

1-17-2023

## The Voting Rights Act of Virginia: Overcoming a History of Voter Discrimination

Senator Jennifer L. McClellan

Follow this and additional works at: <https://scholarship.richmond.edu/pilr>



Part of the [Public Law and Legal Theory Commons](#)

---

### Recommended Citation

Senator Jennifer L. McClellan, *The Voting Rights Act of Virginia: Overcoming a History of Voter Discrimination*, 26 RICH. PUB. INT. L. REV. 111 (2023).

Available at: <https://scholarship.richmond.edu/pilr/vol26/iss1/7>

This Article is brought to you for free and open access by the Law School Journals at UR Scholarship Repository. It has been accepted for inclusion in Richmond Public Interest Law Review by an authorized editor of UR Scholarship Repository. For more information, please contact [scholarshiprepository@richmond.edu](mailto:scholarshiprepository@richmond.edu).

## THE VOTING RIGHTS ACT OF VIRGINIA: OVERCOMING A HISTORY OF VOTER DISCRIMINATION

*Senator Jennifer L. McClellan* \*

---

\* Senator Jennifer L. McClellan was elected to represent the 9th District in the Senate of Virginia in 2017 after eleven years representing the 71st District in the Virginia House of Delegates. She serves as a member of the Agriculture Conservation & Natural Resources, Finance & Appropriations, Judiciary, Privileges & Elections, and Transportation Committees. Senator McClellan serves as Chair of the Virginia Dr. Martin Luther King, Jr. Memorial Commission. In 2021, Senator McClellan patroned SB 1395 creating The Voting Rights Act of Virginia. Senator McClellan earned her J.D. from the University of Virginia in 1997 and Bachelor of Arts from the University of Richmond in 1994. She is the Democratic nominee for Congress in a special election in the 4th Congressional District.

“Democracy is not a state. It is an act, and each generation must do its part to help build what we called the Beloved Community, a nation and world society at peace with itself.”

-- Congressman John Lewis  
*Together, You Can Redeem the Soul of Our Nation*<sup>1</sup>

#### ABSTRACT

*While Virginia is the birthplace of American democracy, it has struggled with ensuring the voting rights of all of its citizens for over 400 years. For most of that history, voting rights only expanded in Virginia in response to federal action in the wake of the Civil War, and contracted in response to federal inaction. This article chronicles the history of voting rights in Virginia, from the birthplace of American democracy in Jamestown and its influence on the United States Constitution, its efforts to expand and restrict voting rights, to becoming a leader in the South with the Voting Rights Act of Virginia.*

#### INTRODUCTION

Virginia is the birthplace of American democracy, but her labor was long and her birthing pains deep. Established on July 30, 1619, Virginia boasts the oldest continuous law-making body in the Western Hemisphere and first elected legislative assembly in the New World: The General Assembly.<sup>2</sup> One month later, Virginia became the birthplace of American slavery, with the arrival of a Dutch privateer and “20 and odd” Africans captured by Portuguese slavers in West Central Africa that were traded for provisions.<sup>3</sup> Three months after that, Virginia took steps towards a permanent colony with the recruitment of English women to Jamestown “to make wives to the inhabitants.”<sup>4</sup> Those women arrived with no right to vote, hold public office, or control their own property.<sup>5</sup>

Virginia is also the birthplace of Thomas Jefferson, who was inspired by the Enlightenment to write in the Declaration of Independence that “all men are created equal, that they are endowed by their Creator with certain

<sup>1</sup> John Lewis, *Together, You Can Redeem the Soul of Our Nation*, N.Y. Times (July 30, 2020), <https://www.nytimes.com/2020/07/30/opinion/john-lewis-civil-rights-america.html>.

<sup>2</sup> *A History of the Virginia House of Delegates*, HOUSE HISTORY, <https://history.house.virginia.gov/home> (last visited Nov. 6, 2022); *1619 Session Information*, HOUSE HISTORY, <https://history.house.virginia.gov/sessions/1> (last visited Nov. 6, 2022).

<sup>3</sup> 3 SUSAN MYRA KINGSBURY, *THE RECORDS OF THE VIRGINIA COMPANY OF LONDON* 243 (1906).

<sup>4</sup> 1 SUSAN MYRA KINGSBURY, *THE RECORDS OF THE VIRGINIA COMPANY OF LONDON* 36 (1906).

<sup>5</sup> Meghan van Joosten, *Women in Early Virginia*, JAMESTOWN-YORKTOWN FOUND. MUSEUMS (July 30, 2018), <https://jyf museums.org/learn/learning-center/women-in-early-virginia/>.

unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”<sup>6</sup> Yet, Jefferson excluded the nearly half a million enslaved men and women—and indeed all women—who resided in the thirteen colonies, including at his beloved Monticello.<sup>7</sup> Nor did the delegates to the Continental Congress voting on that Declaration heed the pleadings of Abigail Adams to her husband, John, and his fellow delegates to “remember the ladies and be more generous and favorable to them than your ancestors.”<sup>8</sup> John responded, “We know better than to repeal our Masculine systems,” believing women’s role was to morally influence their husbands and raise virtuous sons rather than have political power.<sup>9</sup>

Virginia is similarly the birthplace of James Madison, who in 1787, as the architect of the Virginia Plan, laid the foundation for the Constitution of the United States, creating a government by, of, and for, “the people, in order to form a more perfect union.”<sup>10</sup> Madison and his fellow convention delegates also failed to “remember the ladies,” only considered enslaved individuals to be three-fifths of a person for purposes of House of Representatives apportionment and taxation, and excluded indigenous people altogether.<sup>11</sup> The Constitution left it to the states to decide who would have the right to vote.<sup>12</sup>

Since 1789, the American story has been one of each generation attempting to make true for all Americans the promise of American democracy embedded in our founding documents by expanding suffrage beyond white, landowning men. It is a story of cyclical trauma, as the Civil War tore this country apart, Reconstruction sought to bind its wounds, and a violent backlash of white supremacy erased the gains made by formerly enslaved men. It

<sup>6</sup> *Thomas Jefferson*, HISTORY.COM (Mar. 22, 2022), <https://www.history.com/topics/us-presidents/thomas-jefferson> ; *Jefferson and the Enlightenment*, THOMAS JEFFERSON’S MONTICELLO, <https://www.monticello.org/slavery/paradox-of-liberty/thomas-jefferson-liberty-slavery/jefferson-and-the-enlightenment/#:~:text=Jefferson%20and%20other%20members%20of,equality%20were%20natural%20human%20rights> (last visited Nov. 6, 2022); *Declaration of Independence*, HISTORY.COM, <https://www.history.com/topics/american-revolution/declaration-of-independence> (last updated July 2, 2019).

<sup>7</sup> *Thomas Jefferson: Liberty & Slavery*, THOMAS JEFFERSON’S MONTICELLO, <https://www.monticello.org/slavery/paradox-of-liberty/thomas-jefferson-liberty-slavery/> (last visited Nov. 6, 2022); J. David Hacker, *From “20. and Odd” to 10 Million: The Growth of the Slave Population in the United States*, 21 SLAVERY & ABOLITION 840, 843 (2020) (estimating the enslaved population in the United States).

<sup>8</sup> Allison Lange, *Women’s Rights in The Early Republic*, NAT’L WOMEN’S HIST. MUSEUM, <http://www.crusadeforthetvote.org/early-republic> (last visited Nov. 6, 2022); Abigail Adams, *Women’s Rights*, NAT’L PARK SERV. (Feb. 26, 2015), <https://www.nps.gov/wori/learn/historyculture/abigail-adams.htm#:~:text=In.>

<sup>9</sup> Lange, *supra* note 8.

<sup>10</sup> U.S. CONST. pmbi.; *The Life of James Madison*, JAMES MADISON’S MONTPELIER, <https://www.montpelier.org/learn/the-life-of-james-madison> (last visited Nov. 6, 2022).

<sup>11</sup> U.S. CONST. art. I, § 2, cl. 3; The Supreme Court ruled that even former slaves and their descendants were legally considered to be only three-fifths of a person and were not recognized as citizens. *Dred Scott v. Sandford*, 60 U.S. 393, 395 (1856).

<sup>12</sup> U.S. CONST. art. I, § 2, cl. 1.

is a story of the persistence of women creating a seat at democracy's table—or bringing a folding chair. It is the story of a federal government advancing, retreating, advancing again, and subsequently retreating in the battle to protect Black voting rights from states' insistence on disenfranchisement, like the tide rolling on Virginia's shores.

This article chronicles Virginia's role as a leading lady throughout this story, initially dragged kicking and screaming by the federal government to include anyone beyond white men in the democracy she birthed, until she more recently protected the right to vote while her fellow states and the federal government failed to do so. Whether this story ends in triumph or tragedy depends on whether present and future generations heed the words of the late Congressman John Lewis to become “a society at peace with itself.”

## I. SUFFRAGE IN VIRGINIA PRE-1868

### *A. Colonial Voting*

On July 30, 1619, following instructions from the Virginia Company of London, an assembly consisting of Governor George Yeardley, his four councilors, and twenty-two burgesses met “to establish one equall and uniforme kind of Government over all Virginia.”<sup>13</sup> For much of the colonial period, that government alternated between allowing universal suffrage and limiting suffrage to landowners, until eventually granting the vote solely to adult, white, male, Protestant landowners or tenants of a certain sized property who resided in the county in which they wished to vote.<sup>14</sup>

Starting with the election of the first burgesses in 1619, it appears that voting was limited to adult white men who were not working as indentured servants.<sup>15</sup> Over the next hundred years—during the tumult of the English Civil War, the resulting Commonwealth of England, and Reformation of the Crown—the General Assembly changed suffrage laws several times. In 1646, it adopted compulsory voting by requiring all freemen to vote by voice

<sup>13</sup> GEORGE BANCROFT, PROCEEDINGS OF THE FIRST ASSEMBLY OF VIRGINIA 1619, at 341 (1857).

<sup>14</sup> John G. Kolp, *Elections in Colonial Virginia*, ENCYCLOPEDIA VA., <https://encyclopediavirginia.org/entries/elections-in-colonial-virginia/> (last visited Nov. 6, 2022).

<sup>15</sup> See ALBERT EDWARD MCKINLEY, THE SUFFRAGE FRANCHISE IN THE THIRTEEN ENGLISH COLONIES IN AMERICA 21 (1905).

vote in the election for the House of Burgess or face a fine.<sup>16</sup> The law was changed in 1655 to allow only heads of household to vote, limited to one voter per house.<sup>17</sup> The following year, however, “conceiv[ing] it something hard and unagreeable to reason that any persons shall pay equall taxes and yet have no votes in elections,” the General Assembly allowed freemen to vote again, provided that they “fairly give their votes by subscription and not in a tumultuous way.”<sup>18</sup> In 1670, noting that those “[having little interest in the country [more often] make tumults at the election to the disturbance of his majesties peace,” and that the “[laws] of England grant a [vote] only to such as by their [property ownership] have interest enough to [tie] them to the endeavour of the [public] good,” the General Assembly limited suffrage to the landowners and heads of households who paid property taxes.<sup>19</sup> This law was repealed during Bacon’s Rebellion in 1676, allowing freemen to vote once again.<sup>20</sup> Once Bacon’s Rebellion ended, King Charles II instructed Governor Berkeley to limit suffrage only to landowners, “as being more agreeable to the [custom] of England,” and to declare all legislation enacted during the rebellion null and void.<sup>21</sup> The General Assembly repealed the laws passed during Bacon’s Rebellion in 1677,<sup>22</sup> and passed no new suffrage legislation for several years.<sup>23</sup>

When Lord Culpeper became royal governor, he was authorized to extend suffrage to landowners and heads of households; however, the General Assembly passed legislation in 1684 granting landowners and tenants with life-leases “the undoubted right” to vote, saying nothing of those heads of households.<sup>24</sup> In 1699, the General Assembly excluded from suffrage non-landowners, women, children under the age of twenty-one, and Catholics, imposing a fine on anyone seeking to vote who was not eligible.<sup>25</sup> Legislation

<sup>16</sup> 1 HENING’S STATUTES AT LARGE: A COLLECTION OF THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF LEGISLATURE IN THE YEAR 1619, at 333–334 (William Walter Hening ed., 1823); Following the English tradition at the time, voters would assemble at the time and place called for election and orally give their vote to be recorded by the sheriff in what would become a spectator event. See Ed Crews, *Voting in Early America*, COLONIAL WILLIAMSBURG, <https://research.colonialwilliamsburg.org/Foundation/journal/Spring07/elections.cfm> (last visited Nov 6, 2022).

<sup>17</sup> 1 HENING’S STATUTES AT LARGE: A COLLECTION OF THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF LEGISLATURE IN THE YEAR 1619, *supra* note 16, at 411–12.

<sup>18</sup> *Id.* at 403.

<sup>19</sup> 2 HENING’S STATUTES AT LARGE: A COLLECTION OF THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF LEGISLATURE IN THE YEAR 1619, at 280 (William Walter Hening ed., 1823).

<sup>20</sup> *Id.* at 356.

<sup>21</sup> ALBERT EDWARD MCKINLEY, *THE SUFFRAGE FRANCHISE IN THE THIRTEEN ENGLISH COLONIES IN AMERICA* 34 (1905).

<sup>22</sup> See 2 HENING’S STATUTES AT LARGE: A COLLECTION OF THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF LEGISLATURE IN THE YEAR 1619, *supra* note 19, at 380–81.

<sup>23</sup> MCKINLEY, *supra* note 15, at 34.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 36.

passed in 1705 established a fine for failure to vote, detailed election procedures, and the requirement that a voter must reside within the county in which he sought to vote.<sup>26</sup> In 1723, voting was fully limited to white, adult men when the General Assembly declared “no free negro, mulatto, or Indian whatsoever shall hereafter have any vote at the elections of burgesses, or any other election whatsoever.”<sup>27</sup> In 1736, the General Assembly added requirements that a person must own or lease certain amounts of property for a year prior to the election in order to prevent the leasing or subdividing of property to increase the number of voters.<sup>28</sup> This is where the law remained when the Revolutionary War began.

## II. SUFFRAGE AND VIRGINIA’S CONSTITUTIONS

Virginia’s first constitution, adopted on June 29, 1776, maintained the right to vote in General Assembly elections “as exercised at present.”<sup>29</sup> Thus, the franchise was limited to adult, white, male, Protestant landowners or leaseholders of land of a certain size residing in the county in which they wished to vote.

In the first post-Revolutionary War constitutional convention of 1829-1830, proposals were considered to expand suffrage to non-property owners.<sup>30</sup> However, the Constitution of 1830 only granted suffrage to white men twenty-one years and older residing in the Commonwealth subject to detailed property requirements.<sup>31</sup> Expressly excluded from suffrage were (1) persons of “unsound mind,” (2) paupers, (3) non-commissioned officers, soldiers, seamen or marines, in the service of the United States, and (4) persons convicted of any “infamous offence.”<sup>32</sup>

The Constitution of 1851 eliminated property requirements, expanding suffrage to white men twenty-one years and older who had been residents of the state for two years and living in the locality where they voted for twelve

<sup>26</sup> *Id.* at 35-36.

<sup>27</sup> *Id.* at 36-37.

<sup>28</sup> 2 HENING’S STATUTES AT LARGE: A COLLECTION OF THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF LEGISLATURE IN THE YEAR 1619, *supra* note 19, at 476.

<sup>29</sup> VA. CONST. of 1776, art. I, § 6; *The Constitution of Virginia* (1776), ENCYCLOPEDIA VA., <https://encyclopediavirginia.org/entries/the-constitution-of-virginia-1776/#:~:text=The%20Constitution%20of%20Virginia%2C%20adopted,Assembly%20independent%20of%20Great%20Britain> (last visited Nov. 6, 2022).

<sup>30</sup> VA. CONST. CONVENTION, PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION OF 1829-30, at 25-31 (1830).

<sup>31</sup> VA. CONST. of 1830, art. III, § 14 (Libr. of Va.).

<sup>32</sup> *Id.*

months prior to the election.<sup>33</sup> Individuals convicted of bribery were added to the list of ineligible voters excluded in the 1830 constitution.<sup>34</sup> Votes remained by public voice vote, but persons unable to speak who were entitled to vote could do so by ballot.<sup>35</sup>

In 1864, voters in the localities loyal to, liberated by, or occupied by the Union during the Civil War elected seventeen members to a constitutional convention meeting as Virginia's Restored Government after the creation of West Virginia. The convention adopted a Constitution on April 7, 1864.<sup>36</sup> While the Constitution of 1864 abolished slavery immediately within Virginia, without compensation,<sup>37</sup> it did not extend suffrage to Black men.<sup>38</sup> It cut residency requirements in half, and required voters to pay all taxes assessed upon them.<sup>39</sup> The Constitution required people to take loyalty oaths to be eligible to vote, and delegated to the legislature the process of how voting rights would be restored.<sup>40</sup> The Constitution also disenfranchised office holders in the Confederate government or in any state government in rebellion, persons of "unsound mind," paupers, and those convicted of bribery in an election or of any "infamous offence."<sup>41</sup> For the first time, voting was required by ballot prescribed by the General Assembly rather than by public voice vote.<sup>42</sup>

### III. EXPANDING THE FRANCHISE DURING RECONSTRUCTION

#### *A. Federal Expansion of Voting Rights*

In the wake of the Civil War, Congress expanded suffrage to Black citizens and used federal troops to vigorously defend it in response to a violent backlash across the South.<sup>43</sup> Congress passed three amendments during Reconstruction to provide equal civil and legal rights to formerly enslaved Americans. All three amendments granted Congress the power to enforce its

---

<sup>33</sup> VA. CONST. of 1851, art. III, § 1 (Hathi Trust).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at § 4.

<sup>36</sup> See List and Description of Previous Versions of the Virginia Constitution, LIBR. OF VA, <https://www.lva.virginia.gov/constitutions/discover/#constitution-1864> (last visited Nov. 6, 2022).

<sup>37</sup> VA. CONST. of 1864, art. IV, § 19 (Hathi Trust).

<sup>38</sup> *Id.* at art. III, § 1.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at § 4.

<sup>43</sup> Armand Derfner, *Racial Discrimination and the Right to Vote*, 26 VAND. L. REV. 523, 530-31 (1973).



provisions through legislation.<sup>44</sup> The Thirteenth Amendment abolished slavery in the United States.<sup>45</sup> The Fourteenth Amendment guaranteed citizenship to all persons born or naturalized in the United States, prohibited any state from abridging the privileges or immunities of citizenship, applied due process of laws to the states, and provided equal protection under the law.<sup>46</sup> It also provided for the reduction of representation in the House of Representatives of any state that disenfranchised any male citizens over twenty-one years of age in federal elections, except for participation in rebellion or other crime.<sup>47</sup> Use of the word “male” in this provision sowed the seeds of division in the nascent women’s suffrage movement that blossomed during the debate over the Fifteenth Amendment.<sup>48</sup> The Fifteenth Amendment prohibited the denial or abridgement of the right to vote “on account of race, color, or previous condition of servitude.”<sup>49</sup>

Even with these amendments, southern states resisted expanding suffrage, resorting to organizations like the Ku Klux Klan (“KKK”) to terrorize Black citizens who sought to vote, run for office, or serve on juries, leading Congress to pass three Enforcement Acts in 1870 and 1871 to allow the federal government to intervene when states or individuals infringed upon the rights provided by the Fourteenth and Fifteenth Amendments.<sup>50</sup> The Enforcement Act of 1870 (1) prohibited discrimination on the basis of race, color, or previous condition of servitude in state and federal elections, (2) established penalties for interfering with a person’s right to vote, (3) empowered federal courts to enforce the Act, and (4) authorized the President to use armed forces to enforce federal law and federal marshals to bring charges for election fraud, the bribery or intimidation of voters, and conspiracies to prevent

<sup>44</sup> U.S. CONST. amend. XIII, § 2; U.S. CONST. amend. XIV, § 5; U.S. CONST. amend. XV, § 2.

<sup>45</sup> U.S. CONST. amend. XIII, § 1.

<sup>46</sup> *Id.* at XIV, § 1. The Supreme Court ruled that the Fourteenth Amendment did not apply to indigenous Americans. *See Elk v. Wilkins*, 112 U.S. 94, 94 (1884). Congress later granted indigenous people citizenship with the Indian Citizenship Act of 1924. *See Indian Citizenship Act of 1924*, Pub. L. No. 68-175, 43 Stat. 253 (1924). At the same time, the State Registrar of Vital Statistics Walter Plecker erased indigenous Virginians through his Health Bulletin enforcing the Virginia Racial Integrity Act of 1924. *See W. A. PLECKER, VA. DEP’T. OF HEALTH, THE NEW VIRGINIA LAW TO PRESERVE RACIAL INTEGRITY* 3 (1924).

<sup>47</sup> U.S. CONST. amend. XIV, § 2.

<sup>48</sup> ELLEN CAROL DUBOIS, *FEMINISM AND SUFFRAGE: THE EMERGENCE OF AN INDEPENDENT WOMEN’S MOVEMENT IN AMERICA, 1848-1869*, 60 (1978). *See ANN D. GORDON, THE SELECTED PAPERS OF ELIZABETH CADY STANTON AND SUSAN B. ANTHONY: AGAINST AN ARISTOCRACY OF SEX, 1866-1873, 194-98* (2000); *see generally* Allison Lange, *The 14th and 15th Amendments*, NAT’L. WOMEN’S HIST. MUSEUM, <http://www.crusadeforthevote.org/14-15-amendments> (last visited Nov. 6, 2022).

<sup>49</sup> U.S. CONST. amend. XV, § 1.

<sup>50</sup> Unless otherwise specified, this article refers to these acts collectively as The Enforcement Acts, because the laws passed subsequent to The Enforcement Act of 1870 were amendments to that law. Senate Hist. Off., *The Enforcement Acts of 1870 and 1871*, U. S. SENATE, <https://www.senate.gov/artandhistory/history/common/generic/EnforcementActs.htm#:~:text=In%20its%20first%20effort%20to,intention%20of%20violating%20citizens%20constitutional> (last visited Nov. 6, 2022).

citizens from exercising their constitutional rights.<sup>51</sup> The Act created several new federal crimes, including using or conspiring to use terror, force, bribery, or threats to prevent people from voting because of their race,<sup>52</sup> and violations of state election laws by state or local officials in a federal election.<sup>53</sup> Of importance to future voting rights measures, the Act created several federal offenses related to voter fraud and suppression in federal elections, which were defined as any election at which a federal officer is elected, even if state officers were elected at the same time.<sup>54</sup>

The Enforcement Act of 1871 strengthened penalties for interfering with a person's right to vote, and authorized federal oversight of local and state elections upon the request of any two citizens in a town of over 20,000 inhabitants.<sup>55</sup> The Second Enforcement Act of 1871, also known as the Ku Klux Klan Act, (1) made state officials liable in federal court for depriving anyone of their constitutional rights, (2) created criminal penalties for many of the KKK's activities, and (3) empowered the President to use armed forces to combat those who conspired to deny equal protection of the laws and, if necessary, to suspend habeas corpus to enforce the Act.<sup>56</sup>

#### IV. THE VIRGINIA “UNDERWOOD” CONSTITUTION

On March 2, 1867, Congress passed the Reconstruction Act, dividing the South into five military districts, each assigned a Union general and sufficient military force necessary to protect the personal and property rights of all persons; suppress insurrection, disorder, and violence; and punish disturbers of the peace and criminals.<sup>57</sup> Prior to readmission to the Union, each state had to hold an election for a constitutional convention open to all males twenty-one years and older residing in the state for at least a year, excluding persons disenfranchised for participating in rebellion or convicted of common law felonies; adopt a constitution extending the franchise to those same voters ratified by voters and submitted to Congress for approval; and ratify the

---

<sup>51</sup> Enforcement Act of 1870, ch. 114, § 1-13, 16 Stat. 140, 140-143.

<sup>52</sup> *Id.* at § 4-6, 16 Stat. 141.

<sup>53</sup> *Id.* at § 22, 16 Stat. 145-46.

<sup>54</sup> *Id.* at § 19-21, 16 Stat. 144-145. Challenges to these provisions before the Supreme Court upheld broad federal power over the election of federal officers, even against private conduct. *See e.g.*, *Ex Parte Yarbrough*, 110 U.S. 651, 655 (1884).

<sup>55</sup> Second Enforcement Act of 1871, ch. 99, § 19, 16 Stat. 433, 436-37.

<sup>56</sup> Klu Klux Klan Act, ch. 22, §§ 1-2, 8, 17 Stat. 13-14 (1871).

<sup>57</sup> Reconstruction Act, ch.153, § 3, 14 Stat. 428, 428 (1867). Virginia constituted the first district, under the administration of U.S. General John Schofield. Tennessee was exempt, having been readmitted to the Union after ratifying the Fourteenth Amendment in 1866.

Fourteenth Amendment.<sup>58</sup>

General John Schofield, the Military Governor of Virginia, ordered a referendum to elect delegates to a constitutional convention on October 22, 1867, for which 105,832 freedmen registered to vote and 93,145 voted.<sup>59</sup> Of the 104 delegates, 68—including 24 Black delegates—were Republicans who favored full political and social equality for formerly enslaved Black people and exclusion of ex-Confederates from voting and holding office.<sup>60</sup> On July 6, 1869, Virginia voters ratified the new constitution, rejecting two clauses that disfranchised and barred supporters of the former Confederacy from holding public office.<sup>61</sup>

The new constitution significantly expanded voting rights. It extended suffrage to every male citizen twenty-one years and older residing in Virginia for at least a year and in the locality in which he wished to vote for at least three months, excluding (1) “idiot and lunatics,” (2) persons convicted of bribery in any election, embezzlement of public funds, treason, or felony, and (3) any Virginia citizen who, after adoption of the constitution, fought, sent, or accepted a challenge to fight, knowingly conveyed a challenge, or aided or assisted in any way a duel with a deadly weapon.<sup>62</sup> Proposals to declare voting a natural right and expand suffrage to women, however, failed during the convention.<sup>63</sup> The new constitution guaranteed voting by ballot.<sup>64</sup> Creating an article on local government for the first time, the new constitution established the board of supervisors form of county government and authorized the popular election of a large number of local officials.<sup>65</sup> Renaming the Declaration of Rights as the Bill of Rights in Article I, the new constitution added provisions that renounced the right of secession; recognized the supremacy of the United States Constitution and the laws and treaties enacted thereunder; abolished slavery and involuntary servitude “except as lawful imprisonment may constitute such;” and declared all citizens of the state “to possess

<sup>58</sup> *Id.* at § 5, 14 Stat. 428-429 (1867); Act of Mar. 23, 1867, ch.6, § 1, 15 Stat. 2, 2; Act of July 19, 1867, ch.30, § 6, 15 Stat. 14, 14-15; Act of Mar. 11, 1868, ch. 25, § 6, 15 Stat. 41, 41.

<sup>59</sup> H.J.R 65, 2012 Gen. Assemb., Reg. Sess. (Va. 2012).

<sup>60</sup> Richard L. Hume, *The Membership of the Virginia Constitutional Convention of 1867-1868: A Study of the Beginnings of Congressional Reconstruction in the Upper South*, 86 VA. MAG. OF HIST. AND BIOGRAPHY 461, 476-477 (1978).

<sup>61</sup> J.N. BRENAMAN, A HISTORY OF VIRGINIA CONVENTIONS 78-79 (J.L. Hill Prtg. Co., 1902); DAVID L. PULLIAM, VIRGINIA FROM THE FOUNDATION OF THE COMMONWEALTH TO THE PRESENT TIME, RICHMOND, 130-131 (John T. West, 1901).

<sup>62</sup> VA. CONST. of 1869, art. III, § I. (Libr. of Va.)

<sup>63</sup> W.H. SAMUEL, THE DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF VIRGINIA, ASSEMBLED AT THE CITY OF RICHMOND, TUESDAY, DECEMBER 3, 1867, NEW NATION, RICHMOND 1868, 343-347 (1868).

<sup>64</sup> VA. CONST. of 1869, art. III, § II (Libr. of Va.).

<sup>65</sup> *Id.* at art. VII § 1.

equal civil and political rights and public privileges.”<sup>66</sup>

On January 26, 1870, Virginia was readmitted into the Union and permitted representation in Congress on the condition that: (1) its constitution never be amended to deprive any U.S. citizen or class of citizens of the right to vote except as a punishment for convicted of felonies under state law (provided that amendments could be made regarding the length of time and place of voters’ residences); (2) it never deprive any U.S. citizen, on account of his race, color, or previous condition of servitude, of the right to hold office under state law or require any conditions not required of other citizens, and (3) its constitution never be amended to deprive any U.S. citizen or class of citizens of the school rights and privileges secured by its constitution.<sup>67</sup>

#### V. FORMERLY ENSLAVED BLACK PEOPLE GAIN POLITICAL POWER NATIONALLY AS WOMEN BEGIN ORGANIZING

As a result of expanded suffrage, Black men gained political power across the South.<sup>68</sup> In 1870, Senator Hiram Rhodes Revels of Mississippi and Representative Joseph H. Rainey of South Carolina became the first Black members of Congress; a total of twenty-two Black men served in Congress between 1870 and 1901, including John Mercer Langston of Virginia in 1890.<sup>69</sup> The first Black members of the Virginia General Assembly took their seats in 1870.<sup>70</sup> Nearly 100 served through the remainder of Reconstruction.<sup>71</sup>

During this period, efforts to expand suffrage to women were unsuccessful. In 1848, the first women’s rights convention in Seneca Falls, New York, adopted the Declaration of Sentiments, written by Elizabeth Cady Stanton and modeled after the Declaration of Independence, which stated that “all men and women are created equal,” and included a call for women’s suffrage.<sup>72</sup> In 1865, Stanton and Susan B. Anthony organized a petition for

<sup>66</sup> *Id.* at art. I, §§ II, III, XIX, XX.

<sup>67</sup> Act of Jan. 26, ch. 10, § 16 Stat. 62, 63 (1870).

<sup>68</sup> JOHN A. HANNAH ET AL., U.S. COMM’N ON CIV. RTS., POLITICAL PARTICIPATION: A STUDY OF THE PARTICIPATION BY NEGROES IN THE ELECTORAL AND POLITICAL PROCESSES IN 10 SOUTHERN STATES SINCE PASSAGE OF THE VOTING RIGHTS ACT OF 1965 1-3 (1968), [https://www.crmvet.org/docs/ccr\\_voting\\_south\\_6805.pdf](https://www.crmvet.org/docs/ccr_voting_south_6805.pdf); Eric Foner, *Rights and the Constitution in Black Life During the Civil War and Reconstruction*, 74 AM. HIST. 863, 863 (1987).

<sup>69</sup> AFRICAN AMERICAN MEMBERS OF THE UNITED STATES CONGRESS: 1870-2012 Summary, 13, 36 (2018)

<sup>70</sup> S.J. Res. 78, 2020 Gen. Assemb., Reg. Sess. (Va. 2020).

<sup>71</sup> H.J. Res. 65, 2012 Gen. Assemb., Reg. Sess. (Va. 2012).

<sup>72</sup> Elizabeth Cady Standton, Declaration of Sentiments at the First Women’s Rights Convention in Seneca Falls (Jul. 1848), [https://www.womenshistory.org/sites/default/files/document/2019-08/Day%203\\_0.pdf](https://www.womenshistory.org/sites/default/files/document/2019-08/Day%203_0.pdf).

universal suffrage.<sup>73</sup> Debate over the Fifteenth Amendment fractured the suffrage movement into two groups: in 1869, Stanton and Anthony formed the National Woman Suffrage Association (“NWSA”), which opposed the Fifteenth Amendment, and pushed for a federal constitutional amendment for women’s suffrage;<sup>74</sup> Lucy Stone, her husband Henry Browne Blackwell, and Julie Stow Howard formed the American Woman Suffrage Association (“AWSA”), which supported the Fifteenth Amendment and pushed for a state-by-state women’s suffrage strategy.<sup>75</sup>

In addition to advocating for legislative action, suffragists attempted to vote under the theory that the Fourteenth and Fifteenth Amendments granted voting rights to women. However, in *Minor v. Happersett*, the Supreme Court upheld state laws barring women from voting, finding that suffrage was not a right of citizenship, and the Fourteenth Amendment did not give women the right to vote.<sup>76</sup>

Women's suffrage efforts in Virginia began in 1870 when Anna Whitehead Bodeker founded the Virginia State Woman Suffrage Association.<sup>77</sup> An avid follower of NWSA, she invited its members to speak in Richmond, submitted a "Defence of Woman Suffrage" to the *Richmond Daily Enquirer*, and unsuccessfully tried to vote in 1871 local Richmond elections, invoking the Fourteenth and Fifteenth Amendments.<sup>78</sup> In 1872, she persuaded Delegate George William Booker to present her petition for women’s suffrage legislation to the General Assembly, which was referred to committee and ignored.<sup>79</sup>

## VI. DISENFRANCHISEMENT POST-RECONSTRUCTION

The political, social, and economic power gained by Black individuals

<sup>73</sup> *Petition for Universal Suffrage which Asks for an Amendment to the Constitution that Shall Prohibit the Several States from Disenfranchising Any of Their Citizens on the Ground of Sex*, NATIONAL ARCHIVES CATALOG, <https://catalog.archives.gov/id/26081744> (last visited Nov. 6, 2022).

<sup>74</sup> Allison Lange, *Suffragists Organize: American Woman Suffrage Association*, NAT’L WOMEN’S HIST. MUSEUM (2015), <http://www.crusadeforthevote.org/awsa-organize>; *Samuel C. Pomeroy: A Featured Biography*, UNITED STATES SENATE, [https://www.senate.gov/senators/FeaturedBios/FeaturedBio\\_Pomeroy.htm](https://www.senate.gov/senators/FeaturedBios/FeaturedBio_Pomeroy.htm) (last visited Nov. 6, 2022); Aaron A. Sargent (R-CA), U.S. SENATE, <https://www.senate.gov/artandhistory/history/common/image/SargentAaronLOC.htm>.

<sup>75</sup> Lange, *supra* note 74; Allison Lange, *Woman Suffrage in the West*, NAT’L WOMEN’S HIST. MUSEUM (2015), <http://www.crusadeforthevote.org/western-suffrage>.

<sup>76</sup> *Minor v. Happersett*, 88 U.S. 162, 177-78 (1874).

<sup>77</sup> Sandra Gioia Treadway, *Anna Whitehead Bodeker Biography*, DICTIONARY OF VA. BIOGRAPHY (2001), [https://www.lva.virginia.gov/public/dvb/bio.php?b=Bodeker\\_Ann\\_Whitehead](https://www.lva.virginia.gov/public/dvb/bio.php?b=Bodeker_Ann_Whitehead).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

across the South during Reconstruction faced a violent backlash as the KKK and other secret and paramilitary organizations began a “reign of terror” across the South that relied extensively on lynchings.<sup>80</sup> At the same time, corruption crept throughout Republican governments in the former Confederacy.<sup>81</sup> As more former Confederates took oaths of allegiance and were granted amnesty, Democrats began regaining control of southern state governments.<sup>82</sup> To resolve the deadlocked presidential election of 1876, the “Compromise of 1877” brought Reconstruction to an end as the federal government removed its troops from the South under Republican President Rutherford B. Hayes.<sup>83</sup> As a result, widespread violence, fraud, corruption, gerrymandering and malapportionment, and legislative intent to disenfranchise Black voters remained unchecked for over fifty years.<sup>84</sup>

#### A. *Erosion of the Enforcement Acts*

In the final year of Reconstruction, the unraveling of federal protection of voting rights began on March 27, 1876, when the United States Supreme Court issued two opinions gutting the Enforcement Acts by declaring some of its criminal provisions unconstitutional. The first case, *United States v. Cruikshank*,<sup>85</sup> arose from the tense aftermath of the 1872 Louisiana gubernatorial election and the Colfax massacre, considered one of the bloodiest racial confrontations of the Reconstruction era.<sup>86</sup> Eight men appealed their convictions under Section 6 of the Enforcement Act for conspiring to hinder citizens in the enjoyment of rights or privileges guaranteed by the federal Constitution or laws, including the rights to lawfully assemble, vote, and bear arms.<sup>87</sup> The Court overturned the convictions, ruling that the First and Second Amendments limited the power of the federal government, but not states or private

<sup>80</sup> *Reconstruction In America: Racial Violence after the Civil War, 1865-1876*, EQUAL JUST. INITIATIVE (2020), <https://eji.org/report/reconstruction-in-america/journey-to-freedom/#emancipation-by-proclamation-then-by-law>.

<sup>81</sup> Radical Reconstruction, ENCYCLOPAEDIA BRITANNICA (Jan. 2022), <https://www.britannica.com/topic/Radical-Reconstruction>.

<sup>82</sup> *Reconstruction In America: Racial Violence after the Civil War 1865-1876*, supra note 80; *Compromise of 1877*, HISTORY.COM (Mar. 2011), <https://www.history.com/topics/us-presidents/compromise-of-1877>.

<sup>83</sup> *Compromise of 1877*, supra note 82.

<sup>84</sup> *Reconstruction In America: Racial Violence after the Civil War, 1865-1876*, supra note 80.

<sup>85</sup> *United States v. Cruikshank et al.*, 92 U.S. 542, 568 (1875); John R. Vile, *United States v. Cruikshank (1876)*, MIDDLE TENN. STATE UNIV. (2009), <https://www.mtsu.edu/first-amendment/article/58/united-states-v-cruikshank>.

<sup>86</sup> See generally David T. Ballantyne, *Remembering the Colfax Massacre: Race, Sex, and the Meanings of Reconstruction Violence*, 87 J. OF S. HIST. 427, 428-29 (2021), doi:10.1353/soh.2021.0086; James Hamilton, *The Colfax Massacre a Forgotten Chapter of Violence*, 5 LIBERATED ARTS: J. FOR UNDERGRADUATE RSCH. 1, 9 (2018), <https://ojs.lib.uwo.ca/index.php/lajur/article/download/7273/5952/13209>.

<sup>87</sup> *Cruikshank et al.*, 92 U.S. 544-46.

citizens.<sup>88</sup> The Court further ruled that the Due Process and Equal Protection clauses of the Fourteenth Amendment limited state governments, not private individuals.<sup>89</sup> Finally, the Court ruled that the only voting rights that Congress had authority to protect were the right to vote in a federal election and the right to vote free of racial discrimination, neither of which was implicated by the convictions.<sup>90</sup>

The second case, *United States v. Reese*,<sup>91</sup> involved the appeal by two Lexington, Kentucky, municipal inspectors of their convictions under Sections 3 and 4 of the Enforcement Act of 1870 for refusing to receive and count the vote of William Garner.<sup>92</sup> The Court ruled that the Fifteenth Amendment “does not confer the right of suffrage upon anyone,” but merely prevents the federal government or states from giving preference to one United States citizen over another “on account of race, color, or previous condition of servitude.”<sup>93</sup> Applying strict construction to the Enforcement Act’s criminal provisions, the Court found that Sections 3 and 4 exceeded the scope of the Fifteenth Amendment because they did not repeat the amendment’s words about race, color, and servitude, and were thus unconstitutional.<sup>94</sup>

These cases crippled the federal government’s ability to respond to increasingly hostile state efforts to disenfranchise Black voters. *Richmond Planet* later outlined the resulting ineffectiveness of the Enforcement Acts in protecting Black suffrage in the South:

It is a conceded fact that the Federal Election Laws were inoperative so far as the South was concerned and almost useless so far as the North and West were concerned inasmuch as in the former section fraud was boldly resorted to and murder put into operation whenever the occasion required in order to roll up the usual majority for the democratic ticket.<sup>95</sup>

Once Democrats regained control and Reconstruction ended, Congress lost interest in federal intervention in state disenfranchisement efforts, and most of the provisions of the Enforcement Acts were repealed in 1894,<sup>96</sup>

---

<sup>88</sup> The Court later incorporated the Bill of Rights into the Due Process Clause of the Fourteenth Amendment, thus applying the Bill of Rights to the states. Specifically, the Court applied the First Amendment’s freedom of assembly to the states in *De Jonge v. Oregon* 299 U.S. 353, 364 (1937), and applied the Second Amendment to the states in *McDonald v. City of Chicago*, 561 U.S. 742, 749 (2010).

<sup>89</sup> *Cruikshank et al.*, 92 U.S. 544.

<sup>90</sup> *Id.* at 554-56.

<sup>91</sup> *United States v. Reese*, 92 U.S. 214, 215 (1875).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 217.

<sup>94</sup> *See id.* at 219-20.

<sup>95</sup> *The Repeal of the Federal Election Laws*, BLACK VA.: RICHMOND PLANET (1894-1909), <https://blackvirginia.richmond.edu/items/show/1613> (last visited Nov. 6, 2022) (originally published in *Richmond Planet* on Feb. 17, 1894)

<sup>96</sup> Act of Feb. 8, 1894, ch. 25, §1, 28 Stat. 36, 36.

signaling clearly to the states the federal government would not protect the rights of Black people to vote:

Let every trace of the reconstruction measures be wiped from the statute books; let the States of this great Union understand that the elections are in their own hands, and if there be fraud, coercion, or force used, they will be the first to feel it. Responding to a universal sentiment throughout the country for greater purity in elections, many of our States have enacted laws to protect the voter and to purify the ballot. These, under the guidance of State officers, have worked efficiently, satisfactorily, and beneficently, and if these Federal statutes are repealed, that sentiment will receive an impetus which, if the cause still exists, will carry such enactments in every State in the Union.<sup>97</sup>

As a result, “the ballot-box stuffers, political thieves, and ward manipulators” in Virginia did not have to fear federal repercussions for their actions.<sup>98</sup>

### *B. Disenfranchisement in Virginia and the Constitution of 1902*

States wasted no time adopting measures that technically applied to all voters but were designed—and enforced—to disenfranchise Black voters.<sup>99</sup> These included poll taxes, literacy tests, grandfather clauses, and more restrictive residency requirements, which were generally permitted by the courts.<sup>100</sup>

Virginia was no exception. An amendment reinstating a poll tax into the Virginia Constitution was ratified by voters on November 7, 1876,<sup>101</sup> and was removed in 1882 after a coalition of Black voters, Republicans, and Democrats known as the Readjusters gained control of the General Assembly.<sup>102</sup> Undeterred, when Democrats regained control of the General Assembly a year later, they passed legislation allowing the Democratic Party to effectively take control of the elections process. In 1884, the General Assembly passed the Anderson-McCormick Act, authorizing the legislature to appoint all members of local electoral boards (which appointed local voter registrars that kept voter registration lists) and three election judges in each precinct or

---

<sup>97</sup> *United States v. Classic*, 313 U.S. 299, 335 (1941) (Douglas, J., dissenting) (quoting H.R. REP. No. 18, at 7 (1893)). There is little doubt that “purify” the vote meant disenfranchising Black voters. The Supreme Court subsequently struck down Section 5 prohibiting bribery or other interference with the right to vote of anyone protected by the Fifteenth Amendment, because the Fifteenth Amendment did not cover the conduct of private individuals. *James v. Bowman*, 190 U.S. 127, 140, 142 (1903).

<sup>98</sup> *The Repeal of the Federal Election Laws*, *supra* note 95; HANNAH ET AL., *supra* note 68.

<sup>99</sup> For an overview of state disenfranchisement methods during this time period, the Court’s response, and their impact, *see generally* Derfner, *supra* note 43.

<sup>100</sup> Grandfather clauses adopted after Reconstruction ended provided that those who had the right to vote prior to the adoption of the Fourteenth or Fifteenth Amendments or their lineal descendants would be exempt from certain requirements for voting such as literacy tests and poll taxes. The U.S. Supreme Court struck down grandfather clauses in *Guinn v. U.S.*, 238 U.S. 347, 364-65 (1915).

<sup>101</sup> 1875-76 Va. Acts 82-87.

<sup>102</sup> 1881-82 Va. Acts 79-80.



ward (who appointed the clerks that compiled election results).<sup>103</sup>

A decade later, the General Assembly passed the Walton Act to reinforce the Anderson-McCormick law by giving electoral boards additional power to ensure the secrecy of the ballot.<sup>104</sup> The Walton Act required printed ballots containing solely the names of all candidates running for an office, with no designation of party or symbols.<sup>105</sup> On election day, no persons were allowed to congregate within 100 feet of any voting places.<sup>106</sup> Voters would be given a ballot by an election judge, enter a voting booth, and have two and one-half minutes to scratch out the names of candidates that they did not want to vote for with a line three-fourths of the length of the name.<sup>107</sup> Failure to exactly follow these directions voided the ballot.<sup>108</sup> No voter could see the ballot until it was provided by the election judge.<sup>109</sup> No ballot could be taken away from the voting booth unless returned to the election judge.<sup>110</sup> Anyone remaining in the voting booth beyond two and one-half minutes had to surrender their ballot and could only receive another ballot at the discretion of the election judge.<sup>111</sup> Each electoral board appointed a special constable for each precinct to enforce the law, with the power to arrest upon verbal orders or warrant of election judges and to assist any voter “physically or educationally” unable to vote by reading the names and offices on the ballot and receiving instructions on the names to strike from the voter, or in the case of a blind voter, prepare a special ballot at the instruction of the voter.<sup>112</sup>

Upon its passage, *Richmond Planet* called the Walton Act “one of the most outrageous measures ever enacted by any state for the disenfranchisement of the colored man.”<sup>113</sup> Noting that all election officials in this process were Democrats, the paper declared: “For extreme partisans, this measure out-Herods Herod, and adds to Virginia’s woes another batch of corrupt election officials. What will the end be?”<sup>114</sup> Predictably, the end was the further

---

<sup>103</sup> 1884 Va. Acts 146-51.

<sup>104</sup> 1893-94 Va. Acts 862-67.

<sup>105</sup> *Id.* at 862-63.

<sup>106</sup> *Id.* at 866-87.

<sup>107</sup> *Id.* at 864-66.

<sup>108</sup> *Id.* at 865.

<sup>109</sup> *See id.* at 863-66 (outlining the extraordinary measures prescribed to keep all but a few election officials from knowing the contents of a ballot until a voter received it, and to prohibit a voter receiving such ballot from disclosing its contents to any other voter).

<sup>110</sup> *Id.* at 865.

<sup>111</sup> *Id.* at 865-66.

<sup>112</sup> *Id.* at 866.

<sup>113</sup> *The Australian Ballot*, BLACK VA.: RICHMOND PLANET (1894-1909), <https://blackvirginia.richmond.edu/items/show/1589> (last visited Nov. 6, 2022) (originally published in *Richmond Planet* on Mar. 17, 1894).

<sup>114</sup> *Id.*

disenfranchisement of Black voters.<sup>115</sup>

In 1900, the General Assembly called for a constitutional convention with the aim of disenfranchising Black Virginians.<sup>116</sup> Candidates for delegates to the convention campaigned on that goal.<sup>117</sup> The architect of the suffrage plan, E. Carter Glass of Lynchburg, clearly articulated the convention's purpose in explaining it to the delegates:

Mr. Glass: ... This plan of popular suffrage will eliminate the darkey as a political factor in this State in less than five years, so that in no single county of the Commonwealth will there be the least concern felt for the complete supremacy of the white race in the affairs of government. And next to this achievement in vital consequence will be the inability of unworthy men of our own race, under altered conditions, to cheat their way into prominence. Our politics will be

<sup>115</sup> See *The New Election Law*, BLACK VA.: RICHMOND PLANET (1894-1909), <https://blackvirginia.richmond.edu/items/show/1499> (last visited Nov. 6, 2022) (originally published in *Richmond Planet* on Aug. 4, 1894) (discussing a report by *Richmond Planet* on the disenfranchisement of “50 illiterates” in the aftermath of the first election held under the Walton Act); see also *An Interesting Discussion*, BLACK VA.: RICHMOND PLANET (1894-1909), <https://blackvirginia.richmond.edu/items/show/1356> (last visited Nov. 6, 2022) (originally published in *Richmond Planet* on Feb. 16, 1895) (providing additional commentary on how the application of the Walton Act disenfranchised and defrauded Black voters); *Justice Vincent's Position*, BLACK VA.: RICHMOND PLANET (1894-1909), <https://blackvirginia.richmond.edu/items/show/1415> (last visited Nov. 6, 2022) (originally published on June 8, 1895) (explaining how a Democrat special constable deceived illiterate voters by marking their ballots himself so they could be made to have voted for Democrat nominees); *Henrico County's Degradation*, BLACK VA.: RICHMOND PLANET (1894-1909), <https://blackvirginia.richmond.edu/items/show/1416> (last visited Nov. 6, 2022) (originally published in *Richmond Planet* on June 8, 1895) (describing further examples of election fraud committed by these special constables through changing Republican ballots in favor of Democrats, or discarding Republican ballots outright); *A Peculiar Appointment*, BLACK VA.: RICHMOND PLANET (1894-1909), <https://blackvirginia.richmond.edu/items/show/1435> (last visited on Nov. 6, 2022) (originally published in *Richmond Planet* on July 27, 1895) (describing how a Democrat judge refused to send a case of fraud similar to those stated above to a grand jury).

<sup>116</sup> See *Not To Disfranchise Us*, BLACK VA.: RICHMOND PLANET (1894-1909), <https://blackvirginia.richmond.edu/items/show/245> (last visited Nov. 6, 2022) (originally published in *Richmond Planet* on Mar. 2, 1901). *Richmond Planet* extensively covered what he called the “unconstitutional ‘Constitutional’ convention. See, e.g. *Virginia's Pledge*, BLACK VA.: RICHMOND PLANET (1894-1909), <https://blackvirginia.richmond.edu/items/show/812> (last visited Nov. 6, 2022) (originally published in *Richmond Planet* on July 20, 1901); *The Negro As A Hobby*, BLACK VA.: RICHMOND PLANET (1894-1909), <https://blackvirginia.richmond.edu/items/show/814> (last visited Nov. 6, 2022), (originally published in *Richmond Planet* on Aug. 3, 1901); *Still Blundering*, BLACK VA.: RICHMOND PLANET (1894-1909), <https://blackvirginia.richmond.edu/items/show/62> (last visited Nov. 6, 2022) (originally published in *Richmond Planet* on Jan. 25, 1902); *President M'Ilwaine's Assertions*, BLACK VA.: RICHMOND PLANET (1894-1909), <https://blackvirginia.richmond.edu/items/show/37> (last visited Nov. 6, 2022) (originally published in *Richmond Planet* on Feb. 8, 1902); *The Convention Discussing*, BLACK VA.: RICHMOND PLANET (1894-1909), <https://blackvirginia.richmond.edu/items/show/42> (last visited Nov. 6, 2022) (originally published on Feb 15, 1902); *The Truth As It Is Spoken*, BLACK VA.: RICHMOND PLANET (1894-1909), <https://blackvirginia.richmond.edu/items/show/268> (last visited Nov. 6, 2022) (originally published in *Richmond Planet* on Mar. 22, 1902); *Hurts White Folks the Most*, BLACK VA.: RICHMOND PLANET (1894-1909), <https://blackvirginia.richmond.edu/items/show/1053> (last visited Nov. 6, 2022) (originally published in *Richmond Planet* on July 5, 1902).

<sup>117</sup> *The New Constitution* (1894-1909), RICHMOND PLANET, <https://blackvirginia.richmond.edu/items/show/250> (last visited Nov. 6, 2022) (originally published in *Richmond Planet* on Mar. 16, 1901) (noting that “[w]ell-nigh all of the candidates for the constitutional convention from this city have declared their position in favor of disfranchising the Negroes, and not disfranchising any white man”).

purified and the public service strengthened ...

But, Mr. President, in the midst of differing contentions and suggested perplexities, there stands out the uncontroverted fact that the article of suffrage which the Convention will to-day adopt does not necessarily deprive a single white man of the ballot, but will inevitably cut from the existing electorate four-fifths of the negro voters. (Applause.) That was the purpose of this Convention; that will be the achievement.

Mr. Pedigo: Will it not be done by fraud and discrimination?

Mr. Glass: By fraud, no; by discrimination, yes. But it will be discrimination within the letter of the law, and not in violation of the law. Discrimination! Why, that is precisely what we propose; that, exactly, is what this convention was elected for -- to discriminate to the very extremity of permissible action under the limitations of the Federal Constitution, with a view to the elimination of every Negro voter who can be gotten rid of, legally, without materially impairing the numerical strength of the white electorate. As has been said, we have accomplished our purpose strictly within the limitations of the Federal Constitution by legislating against the characteristics of the black race, and not against the "race, color or previous condition" of the people themselves. It is a fine discrimination, indeed, that we have practiced in the fabrication of this plan; and now, Mr. President, we ask the Convention to confirm our work and emancipate Virginia. I ask for a vote on the article of suffrage.<sup>118</sup>

The rub for the delegates was how to disenfranchise Black voters consistently with the Fifteenth Amendment without also disenfranchising some white voters. As detailed below, the Democratic Party-dominated convention created a system in which election officials, appointed and controlled by their Party, had the power to decide who could or could not vote, based on their own biases through provisions that facially applied to everyone.

The final 1902 Constitution granted the franchise to registered male citizens twenty-one and older who paid poll taxes, doubled residency requirements from one to two years within the state, and from six months to one year within the locality, and thirty days within the precinct in which they wished to vote.<sup>119</sup> Section 23 excluded from the right to register or vote (1) "[i]diots, insane persons, and paupers;" (2) those disqualified from voting by conviction of a crime prior to adoption of the constitution whose disabilities had not have been removed; (3) those convicted after adoption of the constitution of treason, any felony, bribery, petit larceny, obtaining money or property under false pretenses, embezzlement, forgery, or perjury; and (4) any Virginia citizen who after adoption of the constitution fought, sent or accepted a challenge to fight, knowingly conveyed a challenge, or aided or assisted in any way a

---

<sup>118</sup> 2 VA. GEN. ASSEMB., 101ST GEN. ASSEMB., REPORT OF THE PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF VIRGINIA, at 3076-77 (1906). The Debates are replete with similar sentiments.

<sup>119</sup> VA. CONST. of 1902, art. II, § 18.

duel with a deadly weapon.<sup>120</sup>

As a temporary measure until January 1, 1904, an “understanding clause” was enacted requiring that men seeking to register to vote be able to read any section of the state constitution submitted to him by registration officials and give “a reasonable explanation of the same.”<sup>121</sup> Based on a similar provision in the Mississippi Constitution upheld under the Fourteenth Amendment by the U.S. Supreme Court in *Williams v. Mississippi*, the clause was expected—and indeed intended—to prevent Black men from registering, based on the bias of the registration officials administering it.<sup>122</sup> As Delegate Alfred P. Thom admitted:

[I]t would not be frank in me, Mr. Chairman, if I did not say that I do not expect an understanding clause to be administered with any degree of friendship by the white man to the suffrage of the black man. I expect the examination with which the black man will be confronted, to be inspired by the same spirit that inspires every man upon this floor and in this convention. I would not expect an impartial administration of the clause.<sup>123</sup>

Exceptions to the understanding clause were provided for war veterans (including those who fought for the Confederacy), their sons, and owners of land upon which at least \$1 of state taxes were paid.<sup>124</sup> Men registered during this time did not have to register again, unless they moved out of Virginia or became disqualified to vote under Section 23.<sup>125</sup> Anyone denied registration could appeal.<sup>126</sup>

Starting January 1, 1904, the Constitution established a detailed voter registration process that allowed election officials to reject anyone.<sup>127</sup> With the exception of Civil War veterans, applicants had to pay poll taxes for the three years prior to the election for which they wished to register.<sup>128</sup> Unless physically unable, applicants had to appear before a registration official and

<sup>120</sup> *Id.* at § 23.

<sup>121</sup> *Id.* at § 23, cl. 4.

<sup>122</sup> 2 VA. GEN. ASSEMB., 101ST GEN. ASSEMB., REPORT OF THE PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF VIRGINIA, at 2945–948 (1906).

<sup>123</sup> *Id.* at 2972–973. In the same remarks, Delegate Thom stated, “we do not believe that the negro can stand this examination.” *Id.* at 2872.

<sup>124</sup> VA. CONST. of 1902, art. III, § 19, cl. 1–3.

<sup>125</sup> *Id.* at § 19, cl. 4.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at art. II, §§ 20, 25 (requiring the General Assembly to provide for the annual registration of voters, an appeal for denial, the correction of illegal or fraudulent registration, and the proper transfer of all registered voters. It did not do so.).

<sup>128</sup> *Id.* at art. II, §§ 20, cl. 4, 22 (stating that if a voter became eligible to vote after 1904, he had to personally pay a \$1.50 initial poll tax at registration, preventing any organization from paying the poll tax to facilitate registration); *see also Id.* at art. II, § 38 (stating that at least five months prior to each regular election, local treasurers were required to file with the circuit court separate lists of white and “colored” persons who were three years current on the poll tax at least six months prior to the election, each of which was posted at each polling place and kept for public inspection).

provide in their own handwriting without assistance their name, age, date and place of birth, residence and occupation at the time and for the preceding two years, whether they had previously voted, and, if so, the state, county, and precinct in which they voted last.<sup>129</sup> Finally, applicants had to answer under oath any and all questions affecting their qualifications as an elector submitted to them by the officers of registration, with the questions and answers recorded, certified, and maintained in the official records by the officer.<sup>130</sup>

Once registered, in order to vote, individuals (with the exception of Civil War veterans) had to personally pay at least six months prior to the election all poll taxes assessed for the preceding three years.<sup>131</sup> Anyone registered after January 1, 1904, unless physically unable, had to complete and cast his ballot without assistance on printed ballots prescribed by law; anyone registered prior to 1904 was allowed assistance in preparing the ballot by an election officer of his choosing.<sup>132</sup>

The Constitution enshrined voting by secret ballot on ballots prescribed by the General Assembly without any distinguishing mark or symbol with candidate and office names in clear print, allowing voters to erase any name and insert another.<sup>133</sup> The General Assembly was authorized to provide for the use of voting machines, so long as it did not impair the secrecy of the ballot.<sup>134</sup> The Constitution also established an electoral governing system of local electoral boards appointed by circuit courts, which in turn appointed local election judges, clerks, and registrars.<sup>135</sup> The General Assembly was authorized to prescribe property qualifications of up to \$250 for voting in local elections.<sup>136</sup> The General Assembly was required to enact laws “necessary and proper for the purpose of security regularity and *purity* of general, local and primary elections, and preventing and punishing any corrupt practices in connection therewith,” and granted the power to disqualify persons convicted of such corrupt practices from voting or holding office.<sup>137</sup>

The new constitution succeeded in its intended effect.<sup>138</sup> In 1904, only about 21,000 Black Virginians registered to vote, compared to 147,000 in

<sup>129</sup> VA. CONST. of 1902, art. II, § 20, cl. 2.

<sup>130</sup> *Id.* at cl. 3.

<sup>131</sup> *Id.* at §§ 21–22.

<sup>132</sup> *Id.* at § 21.

<sup>133</sup> *Id.* at §§ 27–28.

<sup>134</sup> *Id.* at § 37.

<sup>135</sup> *Id.* at § 31.

<sup>136</sup> *Id.* at § 30.

<sup>137</sup> *Id.* at § 36.

<sup>138</sup> *See*, J. of the Const. Convention of Va. Held in the City of Richmond, at 539 (June 12, 1901) (To ensure its passage, the convention delegates voted not to send the new constitution to the voters for ratification and adopted the final constitution on June 7, 1902).

1900.<sup>139</sup> In the 1905 gubernatorial election, 88,000 fewer people voted than in 1901.<sup>140</sup> As *Richmond Planet* lamented, “[t]he new unconstitutional Constitution has practically removed the colored citizen out of the equation and the ballot-box stuffers and the tallysheet manipulators have been practically out of a job.”<sup>141</sup>

## VII. THE LONG ROAD TO EXPANDING SUFFRAGE: 1920-1956

As outlined below, in the wake of the ratification of the Nineteenth Amendment to the U.S. Constitution granting women the right to vote in 1920, and two World Wars against fascism, the General Assembly slowly began to relax voting requirements. This, coupled with renewed federal enforcement of remaining federal voting and civil rights legislation opened the door for re-enfranchisement of Black voters in the second quarter of the 20th Century.

### A. Women’s Suffrage

At the turn of the century, the women’s suffrage movement gained steam. In 1890, the NWSA and AWSA merged to form the National American Woman Suffrage Association (“NAWSA”).<sup>142</sup> The Equal Suffrage League of Virginia (“ESLV”) was founded in 1909, joining the NAWSA, and pushed for a state voting rights amendment in the General Assembly before turning towards supporting a federal amendment.<sup>143</sup> Arguing that women were citizens and taxpayers, that they had special interests that were being poorly addressed by male legislators, and that the spheres of home and world overlapped, the ESLV grew to become one of the largest suffrage organizations in the South, reaching 32,000 members by 1919.<sup>144</sup> A Virginia branch of the more radical Congressional Union for Woman Suffrage formed in 1915.<sup>145</sup>

<sup>139</sup> Brent Tarter, *Disfranchisement*, ENCYCLOPEDIA VA., <https://encyclopediavirginia.org/entries/disfranchisement/> (last visited Nov. 6, 2022).

<sup>140</sup> *Voting Rights*, VA. MUSEUM OF HIST. & CULTURE, <https://virginiahistory.org/learn/historical-book/chapter/voting-rights> (last visited Nov. 6, 2022).

<sup>141</sup> *Trouble in the County*, BLACK VA.: RICHMOND PLANET (1894-1909), <https://blackvirginia.richmond.edu/items/show/1093> (last visited on Nov. 6, 2022) (originally published in *Richmond Planet* on Oct. 10, 1903).

<sup>142</sup> Allison Lange, *Suffragists Unite: National American Woman Suffrage Association*, NAT’L WOMEN’S HIST. MUSEUM, <http://www.crusadeforthetvote.org/nawsa-united> (last visited Nov. 6, 2022).

<sup>143</sup> See generally Sara Hunter Graham, *Woman Suffrage in Virginia: The Equal Suffrage League and Pressure-Group Politics 1909–1920*, 101 VA. MAG. OF HIST. & BIOGRAPHY, 229, 240 (1993).

<sup>144</sup> Jennifer Davis McDaid, *Woman Suffrage in Virginia*, ENCYCLOPEDIA VA., <https://encyclopediavirginia.org/entries/woman-suffrage-in-virginia> (last visited Nov. 6, 2022).

<sup>145</sup> *Id.* (describing further that the Congressional Union for Woman Suffrage later became the National Woman’s Party, which demonstrated in Washington D.C. during World War II for a federal suffrage amendment. Several were arrested in 1917 and sent to federal prison in Lorton, Virginia).

Between 1912 and 1916, three efforts to pass women's suffrage in the General Assembly made it to the floor, only to be defeated.<sup>146</sup>

Fissures in the women's suffrage movement over race, which began during the debate over the Fifteenth Amendment, intensified during this period.<sup>147</sup> While organizations like the National Association of Colored Women ("NACW") and the Virginia State Federation of Colored Women's Clubs advocated for women's suffrage, they were shut out of much of the debate.<sup>148</sup> For example, when the Association sought to march in the 1913 national suffrage parade in Washington, D.C, controversy ensued over whether and where they should march due to fears of offending southerners.<sup>149</sup> Antisuffragists expressly argued that women's suffrage would open the door for Black women to vote, "a menace to society" that would lead to "negro domination" at the polls, prompting the Equal Suffrage League to invoke white supremacy as an argument in favor of women's suffrage.<sup>150</sup>

Finally, Congress passed the Nineteenth Amendment in June 1919, which was ratified the following August. The Virginia General Assembly rejected ratification in 1920.<sup>151</sup> However, in 1928, Virginia's Constitution was amended to extend suffrage to Virginia women and comply with the Nineteenth Amendment.<sup>152</sup> Virginia did not officially ratify the Nineteenth

<sup>146</sup> *Id.*

<sup>147</sup> Allison Lange, *The 14th and 15th Amendments*, NAT'L WOMEN'S HIST. MUSEUM (2015) <http://www.crusadeforthevote.org/14-15-amendments> (explaining there was conflict between prominent American suffragists over the Fifteenth Amendment due to its exclusion of women).

<sup>148</sup> See Allison Lange, *National Association of Colored Women*, NAT'L WOMEN'S HIST. MUSEUM (2015) <http://www.crusadeforthevote.org/nacw> (explaining the general exclusion of black women from NAWSA); see also McDaid, *supra* note 144 (explaining the futility of Black people's efforts to influence the conversation on women's voting rights in the United States); Kathryn Coker, *A Glimpse at Virginia's Organized Woman Suffrage Movement: Part II*, RICH. PUBLIC LIBR. (2020), <https://rvalibrary.org/shelf-respect/law-library/a-glimpse-at-virginias-organized-woman-suffrage-movement-part-ii/> (explaining white suffragists' fears that advocating for black women's suffrage would deter lawmakers from allowing women's suffrage at all).

<sup>149</sup> Editorial, *Colored Women in Suffrage Parade*, RICH. TIMES-DISPATCH (Mar. 2, 1913), [https://chroniclingamerica.loc.gov/data/batches/vi\\_sepia\\_ver01/data/sn85038615/00296020011/1913030201/0362.pdf](https://chroniclingamerica.loc.gov/data/batches/vi_sepia_ver01/data/sn85038615/00296020011/1913030201/0362.pdf).

<sup>150</sup> *Equal Suffrage and the Negro Vote*, EQUAL SUFFRAGE LEAGUE OF VA., <https://encyclopediavirginia.org/10618hpr-fe6e1310e1aa126/> (last visited Nov. 6, 2022) (originally published in 1916).

<sup>151</sup> Brent Tarter, *Virginia's General Assembly and The Nineteenth Amendment*, LIBR. OF VA. (Feb. 12, 2020), <https://uncommonwealth.virginiamemory.com/blog/2020/02/12/virginias-general-assembly-and-the-nineteenth-amendment/>.

<sup>152</sup> VA. CONST. of 1950, art. II, § 18, Publishers Note. The Amendment cut in half the residency requirements, reducing them to one year in the Commonwealth and six months in the locality in which the voter wished to vote, noting that the "chaotic condition which [existed in 1902] in the matter of suffrage" no longer existed, the shortened residency requirements were intended to "stimulate interest in elections on the part of new citizens and invite them to sooner contribute to the solution of the problems of government."

Amendment until 1952.<sup>153</sup>

Shortly after ratification of the Nineteenth Amendment in 1920, the Equal Suffrage League's successor organization, the Virginia League of Women Voters, began sponsoring registration drives, voter education programs, and lobbying efforts at the General Assembly.<sup>154</sup> Excluded from the Virginia League of Women Voters, Ora Brown Stokes organized the Virginia Negro Women's League of Voters in 1921 and began organizing registration drives.<sup>155</sup> In 1923, Sarah Lee Fain and Helen Timmons Henderson became the first two women elected to the Virginia House of Delegates, followed by six more elected between 1924 and 1933, with no additional women elected between 1934-1954.<sup>156</sup>

### B. *The Soldier Vote*

During the Civil War, the ability of soldiers to vote while serving away from home was largely left to the individual states.<sup>157</sup> The Virginia Constitution of 1902's requirements for men to pay their poll taxes and present themselves for examination made it difficult for active-duty servicemen away from home to register and vote. During World War I, Congressional efforts to allow active-duty servicemen to vote absentee failed.<sup>158</sup> Even after the war, the General Assembly rejected proposals to exempt World War I veterans from the poll tax.<sup>159</sup>

During World War II, a debate began brewing over allowing members of the armed services to vote absentee.<sup>160</sup> Unsurprisingly, race and state sovereignty concerns were complicating factors in the debates, as the southern states who adopted measures such as the poll tax to disenfranchise Black voters opposed efforts to exempt service men and women from those measures in federal elections.<sup>161</sup> In 1942, Congress passed the Soldier Voting Act,<sup>162</sup>

<sup>153</sup> *Id.*; *Virginia and the 19th Amendment*, Nat'l Park Serv., <https://www.nps.gov/articles/virginia-women-s-history.htm> (last updated Aug. 23, 2019).

<sup>154</sup> McDaid, *supra* note 144.

<sup>155</sup> *See id.*; Mari Julienne, "Banded Together For Civic Betterment": *The Virginia League Of Women Voters*, THE UNCOMMONWEALTH, VOICES FROM THE LIBRARY OF VIRGINIA, (2020), <https://uncommonwealth.virginiamemory.com/blog/2020/12/16/banded-together-for-civic-betterment-the-virginia-league-of-women-voters-2/>.

<sup>156</sup> McDaid, *supra* note 144.

<sup>157</sup> *See generally* Oscar Osburn Winther, *The Soldier Vote in the Election of 1864*, 25 N.Y. HIST. 440, 440 (1944), <http://www.jstor.org/stable/23148753>; Boyd A. Martin, *The Service Vote in the Elections of 1944*, 39 AM. POL. SCI. REV. 720, 720 (1945).

<sup>158</sup> Martin, *supra* note 157, at 722.

<sup>159</sup> *Id.* at 725.

<sup>160</sup> *See id.* at, 724-25.

<sup>161</sup> *See* Molly Guptill Manning, *Fighting to Lose the Vote: How the Soldier Voting Acts of 1942 and 1944 Disenfranchised America's Armed Forces*, 19 N.Y.U.J. LEGIS. AND PUB. POL'Y, 335, 345 (2016).

<sup>162</sup> Soldier Voting Act of 1942, Pub. L. No. 77-712, 56 Stat. 753.



ensuring that every service man and woman absent from their homes due to service in time of war was entitled to vote in federal elections.<sup>163</sup> The Act also prohibited imposition of a poll tax as a condition of voting in federal elections on anyone in military service in time of war, and allowed absentee ballots for those who resided within the United States.<sup>164</sup> Passing two months before the midterm elections with no provision for those serving overseas, the Act had little effect.<sup>165</sup> However, it was the first expansion of Black voting rights at the federal level since Reconstruction.<sup>166</sup>

Two years later, Congress sought to adopt a universal federal absentee ballot in time for the 1944 election.<sup>167</sup> This time, presidential politics complicated the debate, as Franklin D. Roosevelt ran for an unprecedented fourth term and the soldier vote would likely decide the election.<sup>168</sup> However, as President Roosevelt noted in his January 1944 message to Congress: “The American people are very much concerned over the fact that the vast majority of the 11,000,000 members of the armed forces . . . are going to be deprived of their right to vote in the important national election this fall, unless the Congress promptly enacts adequate legislation.”<sup>169</sup>

After months of bitter, partisan bickering,<sup>170</sup> Congress passed the Soldier Voting Act of 1944 encouraging states to either adopt an “Official Federal War Ballot” or amend their own absentee ballot procedures consistent with the Act to enable soldiers to vote.<sup>171</sup> The Act prohibited any ballot from being declared invalid even if a soldier made a mistake in writing a candidate’s name, provided that “the candidate intended by the voter is plainly identifiable.”<sup>172</sup> However, the Act allowed states to collect poll taxes from soldiers.<sup>173</sup>

In 1944, the Virginia General Assembly passed legislation seeking to make it easier for service members to register and to vote absentee in state and local general elections and primaries.<sup>174</sup> However, based on the state constitution’s requirement to pay poll taxes and register to vote in person, the Virginia Supreme Court declared the absentee registration and poll tax fund

<sup>163</sup> *Id.* at §§ 1-2, 56 Stat. 753.

<sup>164</sup> *Id.* at § 3, 56 Stat. 753.

<sup>165</sup> Of the four million servicemen and tens of thousands of women serving the nation, only one-third of those who applied for an absentee war ballot cast a vote that was counted, with 28,000 absentee war ballots were cast in the 1942 election. Manning, *supra* note 161.

<sup>166</sup> *Id.* at 353.

<sup>167</sup> *Id.* at 354.

<sup>168</sup> *Id.* at 357.

<sup>169</sup> 90 CONG. REC. 706 (1944).

<sup>170</sup> Manning, *supra* note 161, at 360-61.

<sup>171</sup> *Id.* at 368-69.

<sup>172</sup> *Id.* at 369.

<sup>173</sup> *Id.* at 370.

<sup>174</sup> See 1944 Va. Acts 408, 414, 420.

provisions unconstitutional.<sup>175</sup> Wanting service members to vote in the 1945 Democratic primary and general election, but not having enough time to follow the required two-year amendment process, the state convened a limited convention to decide solely the issue of allowing service members to vote.<sup>176</sup> As a result, the convention adopted Article 17 exempting members of the United States Armed Forces during time of war from requirements to register prior to voting in all general and primary elections and pay poll taxes.<sup>177</sup> Efforts to repeal the poll tax for all voters were rejected.<sup>178</sup>

### C. Renewed Federal Enforcement

In 1939, U.S. Attorney General Frank Murphy issued Order of the Attorney General No. 3204, creating the Civil Liberties Unit of the Criminal Division of the Department of Justice to protect individual civil rights, including prosecutions related to interference with the ballot.<sup>179</sup> The first election case of significance the Unit brought was *United States v. Classic*, which upheld federal power to protect the integrity of congressional primaries.<sup>180</sup> The Unit's next significant case was *Smith v. Allwright*, which invalidated all-white primaries as prohibited state action within the meaning of the Fifteenth Amendment.<sup>181</sup> By the mid 1950s, the Justice Department significantly increased prosecuting election law violations.<sup>182</sup> Voting rights became a particular priority in 1956, when the Attorney General instructed U.S. Attorneys throughout the country to post someone on duty on election day until the polls closed, and the Civil Rights Section remained staffed throughout election night fielding complaints and inquiries related to vote buying and intimidation of voters, illegal political expenditures, fraudulent balloting and falsifying of election returns, and the distributing of anonymous political literature.<sup>183</sup>

<sup>175</sup> *Staples v. Gilmer*, 32 S.E.2d 129, 133-34 (Va. 1944).

<sup>176</sup> J. OF THE CONST. CONVENTION OF THE COMMONWEALTH OF VA. TO AMEND THE CONST. OF VA. FOR VOTING BY CERTAIN MEMBERS OF THE ARMED FORCES, at 5 (1945).

<sup>177</sup> *Id.* at 110.

<sup>178</sup> *Id.* at 103-04.

<sup>179</sup> See 1939 ATT'Y GEN. ANN. REP. 2, 59 (in the 1941 Annual Report, the unit is renamed as the Civil Rights Section, and is hereinafter referred to as such).

<sup>180</sup> *United States v. Classic*, 313 U.S. 299, 320 (1941). See also 1941 ATT'Y GEN. ANN. REP. 51-52, 118-19 (identifying *United States v. Classic* as a case of "unusual" and "outstanding" importance).

<sup>181</sup> *Smith v. Allwright*, 321 U.S. 649, 644, 666 (1944) (noted in 1944 ATT'Y GEN. ANN. REP. 33)

<sup>182</sup> See 1955 ATT'Y GEN. ANN. REP. 131.

<sup>183</sup> 957 ATT'Y GEN. ANN. REP. 106-107.

## VIII. A NEW ERA BEGINS

*A. The Civil Rights Acts of 1957, 1960, and 1964*

In 1956, after the longest one-person filibuster in U.S. Senate history by Senator Strom Thurmond, Congress passed the first post-Reconstruction Civil Rights Act.<sup>184</sup> The Act prohibited anyone, whether or not acting under color of law, from interfering or attempting to interfere with any person's right to vote in a federal election through intimidation, threats, or coercion, and empowered the federal government to sue anyone who violated or was about to violate anyone's right to vote.<sup>185</sup> The Act also created a Commission on Civil Rights to investigate allegations of voting rights violations, and turned the Civil Rights Section into a separate division to enforce civil rights through litigation.<sup>186</sup> A provision authorizing the Attorney General to seek preventative relief in civil rights cases, which Senator Bourke Hickenlooper called a "violation of the civil rights of the white race," was stripped from the bill.<sup>187</sup>

While enabling some gains, the 1957 Act proved largely ineffective, leading Congress to pass the Civil Rights Act of 1960.<sup>188</sup> Title III of the Act required the preservation of federal election records related to any application, registration, payment of poll tax, or other acts requisite to voting, creating civil penalties for noncompliance and criminal penalties for intentional alteration, damage, or destruction of such records.<sup>189</sup> Title VI authorized the appointment of federal voting referees upon a finding that discriminatory acts were part of a "pattern or practice" of discrimination, and defined the word "vote" to include registration, casting a ballot, and having that ballot counted.<sup>190</sup> The Civil Rights Act of 1964 used Congressional power over federal elections to alter state qualifications for voters in federal elections. Title I (1) prohibited unequal application of voter registration requirements; (2) prohibited the use of immaterial errors, such as word misspellings, to deny registration; (3) required that any literacy, understanding, or interpretation test be given in writing (authorizing special provisions for visually or otherwise impaired individuals); and (4) provided that a sixth-grade education was rebuttable evidence of literacy in any voting discrimination suit brought by

---

<sup>184</sup> Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634, 634.

<sup>185</sup> *Id.* at § 131, 71 Stat. 637.

<sup>186</sup> *Id.* at § 111, 71 Stat. 637.

<sup>187</sup> ROBERT A. CARO, *MASTER OF THE SENATE: THE YEARS OF LYNDON JOHNSON* 915, 918, 941 (4th ed. 2002).

<sup>188</sup> Civil Rights Act of 1960, Pub. L. No. 86-944, 74 Stat. 86, 86.

<sup>189</sup> *Id.* at § 301, 74 Stat. 88-89.

<sup>190</sup> *Id.* at § 301, 74 Stat. 90-92.

the Justice Department.<sup>191</sup> Heavily reliant on post-discriminatory litigation, the Civil Rights Acts of 1957, 1960, and 1964 were no match for the creativity states showed in finding new methods of violating the Fifteenth Amendment, and the violent reactions to any efforts to challenge Jim Crow in the early 1960s.<sup>192</sup>

### *B. The Voting Rights Act of 1965*

The tipping point for stronger federal voting rights legislation was the march from Selma to Montgomery, Alabama, organized by civil rights organizations as part of a voter registration campaign. On “Bloody Sunday,”<sup>193</sup> state troopers brutally attacked the unarmed marchers with “billy” clubs and tear gas at Edmund Pettus Bridge as they crossed the county line. Television images of the attack shocked the nation and spurred President Lyndon Johnson to give his “We Shall Overcome” speech to Congress deploring the violence and promising to send a voting rights bill to Congress.<sup>194</sup>

On August 6, 1965, nearly 100 years after passage of the Fifteenth Amendment, Congress passed the most effective piece of legislation to enforce its provisions: the Voting Rights Act (“VRA”).<sup>195</sup> The VRA prohibited states and political subdivisions from imposing or applying voting practices, procedures, qualification, or standards to deny or abridge the right of U.S. citizens to vote on account of race or color,<sup>196</sup> outlawed English proficiency or literacy tests as prerequisites to voting,<sup>197</sup> and invalidated poll taxes as a denial or abridgement of the constitutional right to vote.<sup>198</sup> The Act also prohibited voter intimidation, threats, or coercion.<sup>199</sup>

Sections 3 through 9 of the VRA applied special provisions imposing federal oversight of election processes in states and political subdivisions where racial discrimination in voting had been more prevalent.<sup>200</sup> Section 5 required covered jurisdictions to obtain pre-clearance of any change in voting procedures by the Attorney General or a federal court three-judge panel by proving

<sup>191</sup> *Id.* at § 101(a), (2)(A)-(C), 3(b) 78 Stat. 241, 241.

<sup>192</sup> *See generally* Derfner, *supra* note 43, 552-58.

<sup>193</sup> Christopher Klein, *How Selma’s ‘Bloody Sunday’ Became a Turning Point in the Civil Rights Movement*, HIST. (Mar. 6, 2015), <https://www.history.com/news/selma-bloody-sunday-attack-civil-rights-movement>.

<sup>194</sup> President Lyndon B. Johnson, Special Message to the Congress: The American Promise (Mar. 15, 1965), <https://www.presidency.ucsb.edu/documents/special-message-the-congress-the-american-promise>.

<sup>195</sup> Voting Rights Act of 1965, Pub. L. No. 89-110, § 1, 79 Stat. 437, 437 (1965).

<sup>196</sup> *Id.* at, § 2, 79 Stat. 437.

<sup>197</sup> *Id.* at § 4(c)(1)-(2), 79 Stat. 439.

<sup>198</sup> *Id.* at § 10(a), 79 Stat. 442.

<sup>199</sup> *Id.* at § 11(b), 79 Stat. 443.

<sup>200</sup> *Id.* at § 4(a)(b), 79 Stat. 438.

that the change had neither “the purpose [nor] the effect of denying or abridging the right to vote on account of race or color.”<sup>201</sup> Section 4(b) established a formula identifying covered jurisdictions as those in which (1) any “test or device” was used as a condition of voter registration on the November 1, 1964 election and (2) either fewer than 50% of persons of voting age were registered on that date or fewer than 50% of persons of voting age voted in the election of November 1964.<sup>202</sup> The Act defined such test or device as any requirement that a person, as a prerequisite for voting or registration for voting: (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.<sup>203</sup> Such tests and devices were banned altogether in the covered jurisdictions.<sup>204</sup> A covered jurisdiction could “bail out” of coverage if it had not used a test or device in the preceding five years “for the purpose or with the effect of denying or abridging the right to vote on account of race or color.”<sup>205</sup> Section 3 established a “bail-in” process whereby a federal judge could require a jurisdiction to pre-clear any changes to voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting upon finding that the jurisdiction violated the Fourteenth or Fifteenth Amendment. Sections 6 through 9 authorized the U.S. Attorney General to send federal examiners and poll watchers to covered jurisdictions.

In 1966, the Supreme Court heard its first challenge to the Voting Rights Act when the South Carolina Attorney General filed a complaint directly with the Court seeking an injunction against its enforcement and a declaration that the VRA was an unconstitutional encroachment on states’ rights, a violation of equality between the states, and an illegal bill of attainder.<sup>206</sup> Recognizing the significance of the case, the Court invited all of the states to participate in the proceeding, and a majority responded by submitting or joining in briefs. Virginia joined Alabama, Georgia, Louisiana, and Mississippi in support of South Carolina.<sup>207</sup> Noting that the constitutionality of the VRA “must be judged with reference to the historical experience which it reflects,” the

---

<sup>201</sup> *Allen v. State Bd. of Election*, 393 U.S. 544, 572-73 (1969) (the Supreme Court interpreted Section 5 of the Voting Rights Act of 1965 to cover drawing legislative district maps in addition to the ballot-access rights).

<sup>202</sup> *Shelby Cnty. v. Holder*, 570 U.S. 529, 537 (2013) (the covered jurisdictions in 1965 included Alabama, Georgia, Louisiana, Mississippi, South Carolina, Virginia, 39 counties in North Carolina, and one in Arizona).

<sup>203</sup> Voting Rights Act of 1965 § 4(c), 79 Stat. 437.

<sup>204</sup> *Id.* at § 4(a), 79 Stat. 437.

<sup>205</sup> *Id.*

<sup>206</sup> *South Carolina v. Katzenbach*, 383 U.S. 301, 307 (1966).

<sup>207</sup> *Id.* at 307 n.2.

Court summarized the Act's voluminous legislative history<sup>208</sup> and reached two clear conclusions:

First: Congress felt itself confronted by an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution. Second: Congress concluded that the unsuccessful remedies which it had prescribed in the past would have to be replaced by sterner and more elaborate measures in order to satisfy the clear commands of the Fifteenth Amendment.<sup>209</sup>

The VRA had an immediate impact in expanding voting rights.<sup>210</sup>

### *C. Voting Rights Act Reauthorizations and Amendments*

Congress amended the VRA five times over the next forty years as Sections 4 and 5 neared expiration. Each amendment functioned as a proverbial “whack-a-mole” to address new methods of diluting the Black vote, preventing the election of Black candidates, and engaging in voter discrimination, intimidation, and interference.<sup>211</sup>

#### *i. 1970 Amendments*

In 1970, Congress extended Sections 4 and 5 of the VRA to 1975.<sup>212</sup> Section 4(b) extended covered jurisdictions to include those that maintained a test or device and had less than 50% voter registration or turnout as of 1968.<sup>213</sup> The Section 4(a) bailout provision was amended to require covered jurisdictions to prove that they had not used a test or device in a discriminatory manner in the ten-year period preceding their request.<sup>214</sup> New provisions extended the ban on tests and devices for another five years and applied it nationwide.<sup>215</sup> For presidential elections, the amendments abolished durational residency requirements, established nationwide uniform absentee registration and voting provisions, and directed states to allow voter registration up to thirty days before the election.<sup>216</sup> The amendments also lowered the

<sup>208</sup> *Id.* at 308-315.

<sup>209</sup> *Id.* at 309.

<sup>210</sup> See William Ferguson Reid, LIBR. OF VA., [https://www.lva.virginia.gov/exhibits/political/william\\_reid.htm](https://www.lva.virginia.gov/exhibits/political/william_reid.htm) (last visited Nov. 6, 2022) (providing that Dr. Fergie Reid was the first Black member of the General Assembly since Reconstruction); See generally HANNAH ET AL., *supra* note 68, at 13 (providing that Virginia's percentage of non-white voting age population grew from 38.3% to 55.6%).

<sup>211</sup> For an overview of these new obstacles, see HANNAH ET AL., *supra* note 68, at 19-132. See also Derfner, *supra* note 43, at 530-33.

<sup>212</sup> Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, secs. 3-5, §§ 4(a)-5, 84 Stat. 314, 315.

<sup>213</sup> *Id.* at sec. 4, § 4(b), 84 Stat. 314, 315.

<sup>214</sup> *Id.* at sec. 3 § 4(a), 84 Stat. 314, 315.

<sup>215</sup> *Id.* at § 201, 84 Stat. 315.

<sup>216</sup> *Id.* at § 202, 84 Stat. 315. Judicial relief and penalties were authorized for violations of Sections 201 and 202. *Id.* at § 203-04, 84 Stat. 315.

voting age to eighteen for state, federal, and local elections.<sup>217</sup>

*ii. 1975 Amendments*

In 1975, Congress extended Sections 4 and 5 to 1982 and made permanent the nationwide ban on the use of tests or devices.<sup>218</sup> Covered jurisdictions were extended to include those that maintained a test or device and had less than 50% voter registration or turnout as of 1972.<sup>219</sup> The bailout provision was amended to require covered jurisdictions to prove that they had not used a test or device in a discriminatory manner in the seventeen-year period preceding their request.<sup>220</sup>

Recognizing the prevalence of discrimination against language minorities, Congress prohibited such discrimination and English-only elections, expanding the definition of prohibited “tests” and “devices” to include providing English-only voting materials in places where over 5% of voting-age citizens spoke a single language other than English.<sup>221</sup> Congress required bilingual elections where 5% of voting age citizens in a jurisdiction were from a single language minority and the illiteracy rate was greater than the national illiteracy rate.<sup>222</sup>

The 1975 Amendments strengthened enforcement by allowing “an aggrieved person,” in addition to the Attorney General, to seek imposition of preclearance or federal observer requirements, and authorized the courts to award a prevailing aggrieved person reasonable attorneys fees and costs.<sup>223</sup> Starting in 1974, the Census Bureau was required to conduct surveys in covered jurisdictions after every Congressional election to collect registration and voting statistics by age, race, and national origin, and report the results to Congress; however no person could be compelled to disclose such information in the survey.<sup>224</sup> Finally, the 1975 Amendments established penalties of up to \$10,000 or five years imprisonment for voting more than once in a

<sup>217</sup> Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, § 301(b), 84 Stat. 314, 318.

<sup>218</sup> Voting Rights Act of 1965 secs. 101, 102, §§ 4(a), 201(a), 89 Stat. 400.

<sup>219</sup> *Id.* at sec. 202, § 4(b), 89 Stat. 401. As a result of this provision and expanded definition of test and device, new covered jurisdictions were the states of Alaska, Arizona, and Texas, and several counties in California, Florida, Michigan, New York, North Carolina, and South Dakota.

<sup>220</sup> *Id.* at sec. 101, § 4(a), 89 Stat. 400.

<sup>221</sup> *Id.* at sec. 203, § 4(f)(3), 89 Stat. 401. Language minorities was defined as “persons who are American Indian, Asian American, Alaskan Natives, or of Spanish Heritage.” *Id.* at sec. 207, § 14(c), 89 Stat. 401.

<sup>222</sup> Voting Rights Act of 1965, sec. 301, § 203(b), 89 Stat. 400, 403 (1975). Such jurisdictions could discontinue bilingual elections upon demonstration in federal court that the illiteracy rate of the language minority had dropped below the national illiteracy rate. For purposes of these triggers, literacy was defined as failure to complete fifth grade. Where the language of a particular language minority reaching the required threshold was oral, jurisdictions had to provide oral voting information.

<sup>223</sup> *Id.* at secs. 401-02, §§ 3, 14, 89 Stat. 404.

<sup>224</sup> *Id.* at sec. 403, § 207, 89 Stat. 404.

federal election,<sup>225</sup> and provided for the enforcement of the Twenty-Sixth Amendment, which reduced the voting age to eighteen.<sup>226</sup>

*iii. 1982 and 1992 Amendments*

In 1982, Congress extended Sections 4 and 5 to 2006.<sup>227</sup> It did not change the Section 4(b) coverage formula. Instead, Congress allowed political subdivisions of covered jurisdictions to “bail out” if (1) they proved that they had not used a test or device in a discriminatory manner in the nineteen-year period preceding their request or (2) if after 1984, they demonstrated compliance with all applicable voting rights laws and adopted constructive efforts to expand opportunities for minority group political participation in the ten years preceding the request.<sup>228</sup> In response to the Supreme Court’s ruling in *Mobile v. Bolden* that discriminatory intent was required to find a violation of the Fourteenth or Fifteenth Amendments, Congress amended Section 2 of the VRA to establish a violation when, based on the totality of circumstances, there was a racially discriminatory effect.<sup>229</sup>

Bilingual voting assistance requirements were extended to 1992.<sup>230</sup> In 1992, Congress passed the Voting Rights Language Assistance Act of 1992, extending these requirements to 2007.<sup>231</sup> This law also expanded the scope of coverage for bilingual voting assistance to include jurisdictions where (1) where more than 5% of citizens voting are members of a single language minority and are limited-English proficient; (2) where more than 10,000 members of a language minority have limited English proficiency; or (3) for Indian reservations, where 5% of the American Indian or Alaskan Native citizens of voting age are of a single language minority and are limited-English proficient.<sup>232</sup>

*iv. 2006 Amendments*

In 2006, Congress passed the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act.<sup>233</sup> These amendments to the VRA did not change the Section 4(b) coverage formula, but changed Section 5 to prohibit voting changes that have the purpose

<sup>225</sup> *Id.* at, sec. 409, § 10, 89 Stat. 405 (amended 1975).

<sup>226</sup> *Id.* at sec. 407, § 301(a)-(b), 89 Stat. 405.

<sup>227</sup> Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, sec. 2, § 4, 96 Stat. 131, 131-32.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at sec. 3, § 2, 96 Stat. 134.

<sup>230</sup> *Id.* at sec. 4, § 203(b), 96 Stat. 134.

<sup>231</sup> Voting Rights Language Assistance Act of 1992, Pub. L. No. 102-344, sec. 2, § 203(b), 106 Stat. 921.

<sup>232</sup> *Id.* at 921-22. Limited-English proficiency was defined as being unable to speak or understand English adequately enough to participate in the electoral process. *Id.* at sec. 2, § 203(b), 106 Stat. 921-22.

<sup>233</sup> Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577.



or effect of diminishing the ability of citizens, on account of race, color, or language minority status, "to elect their preferred candidates of choice."<sup>234</sup> Bilingual voting assistance requirements were extended to 2032.<sup>235</sup> The Act also eliminated the Section 8 federal election inspectors to register voters, but authorized the use of election observers under certain circumstances.<sup>236</sup>

#### *D. The Virginia Constitution of 1971*

In his January 1968 annual address to the General Assembly, Governor Mills Godwin noted the effect of the "inexorable passage of time" on the Virginia Constitution and called on the legislature to create a commission to recommend revisions.<sup>237</sup> The resulting constitution was adopted by the General Assembly on February 25, 1971,<sup>238</sup> ratified by the voters on November 3, 1970, and took effect on July 1, 1971.

The new constitution updated the Bill of Rights to prohibit discrimination on the basis of religious conviction, race, color, sex, or national origin.<sup>239</sup> In compliance with federal law, the poll tax and other barriers to voting were eliminated. Article II, Section 1 granted the right to vote to citizens twenty-one and older who had been residents (both domicile and place of abode) of Virginia for at least six months and of the precinct in which they wished to vote for at least thirty days.<sup>240</sup> Convicted felons remained ineligible to vote unless their civil rights were restored by the Governor or other appropriate authority, and persons adjudicated mentally incompetent remained ineligible until competency was reestablished.<sup>241</sup> Persons who would be old enough to vote by the November general election could register in advance and vote in any intervening primary or special election.<sup>242</sup>

In 1972, the voting age was reduced to eighteen in conformance with the Twenty-Sixth Amendment.<sup>243</sup> In 1976, the residency length requirements were removed, and voters who moved from one Virginia precinct to another were allowed to vote at their old precinct until the following November

<sup>234</sup> *Id.* at 580-81.

<sup>235</sup> *Id.* at 581.

<sup>236</sup> *Id.* at 578-79.

<sup>237</sup> A. E. Dick Howard, *Constitutional Revision: Virginia and the Nation*, 9 U. RICH. L. REV. 1, 4 (1974).

<sup>238</sup> 1971 Va. Acts 3.

<sup>239</sup> VA. CONST. art. I, § 11 (clarifying that the mere separation of sexes would not be considered discrimination).

<sup>240</sup> *Id.* at § 1 (amended 1999). A person qualified to vote except for having moved his or her residence from one precinct to another fewer than thirty days prior to an election could vote in the precinct from which he or she moved. In presidential elections, the General Assembly was authorized to impose shorter Virginia residency requirements and alternatives to registration for new residents of the Commonwealth.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> 1972 Va. Acts 1602-03.

election.<sup>244</sup> Residency requirements were again changed in 1996 to merely require voters to reside in Virginia and the precinct in which they voted. This permitted the General Assembly to delineate how long voters could continue to vote in a former precinct once they moved to another and to provide for alternative registration for new Virginia residents in presidential elections.<sup>245</sup> In 1998, the General Assembly was authorized to provide for absentee voting for persons employed overseas, their spouses, and dependents residing with them who were otherwise qualified to vote.<sup>246</sup>

Article II, Section 2 authorized the General Assembly to establish voter registration procedures and prohibited closing the registration period prior to thirty days before an election. Section 2 also prescribed standard registration application forms to be signed under oath to include information specified therein to be completed in person before the registrar and by or at the direction of the applicant and signed by the applicant, unless physically disabled.<sup>247</sup> Application fees were prohibited.<sup>248</sup> As a requisite to voting, however, the General Assembly was authorized to require the applicant to read and complete the application in his or her own handwriting.<sup>249</sup>

#### *E. Impact of the VRA and Amendments*

Over the forty years between its adoption and the 2006 amendments, the VRA had a tremendous impact.<sup>250</sup> Almost immediately, non-white voter registration dramatically increased; in some southern states, it more than doubled.<sup>251</sup> In Virginia, the number of non-white registered voters increased over 68% from 1964 to 1966, and the non-white percentage of the population registered increased from 38.3 to 55.6%.<sup>252</sup> By 2004, Black voter registration rates in Virginia reached 57.4%.<sup>253</sup> Likewise, the number of non-white

<sup>244</sup> 1976 Va. Acts 1453-54.

<sup>245</sup> 1996 Va. Acts ch. 907

<sup>246</sup> 1998 Va. Acts ch. 768.

<sup>247</sup> VA. CONST. art. II, § 2 (amended 2021).

<sup>248</sup> *Id.* Amendments adopted in 1976, 1982, and 1994 reduced the specific information required, until 1996 Amendments limited the information to full name, date of birth, residence address, social security number, if any, whether the applicant was a U.S. citizen, and such additional information as may be required by law. *See* 1974 Va. Acts ch. 782; 1982 Va. Acts ch. 685; 1994 Va. Acts ch. 816; 1996 Va. Acts ch. 907.

<sup>249</sup> VA. CONST. art. II, § 2 (amended 2021).

<sup>250</sup> *See generally* S. REP. NO. 109-295 (2006); H.R. REP. NO. 109-478 (2006) (explaining the purpose of this Act is to ensure the right of all citizens to vote).

<sup>251</sup> *See An Assessment of Minority Voting Rights Access in the United States: 2018 Statutory Report*, U.S. COMM'N ON CIV. RTS. 24-26 (Sept. 12, 2018), [https://www.usccr.gov/files/pubs/2018/Minority\\_Voting\\_Access\\_2018.pdf](https://www.usccr.gov/files/pubs/2018/Minority_Voting_Access_2018.pdf).

<sup>252</sup> *Id.* at 25 (highlighted in Table 1).

<sup>253</sup> S. REP. NO. 109-295, at 11 (2006).

elected officials increased significantly.<sup>254</sup> Yet, this success would ultimately lead to the next wave of federal enforcement retreat through the courts.

### IX. A NEW ERA OF FEDERAL RETREAT

Shortly after the 2006 reauthorization of the VRA, a Texas utility district filed suit seeking to bail out from the coverage, alternatively arguing Section 5's preclearance requirement was unconstitutional.<sup>255</sup> Finding that the utility district was eligible under the VRA to seek a bailout, the Court declined to rule on the constitutionality of the 2006 extension.<sup>256</sup> However, the Court raised serious concerns about the special provision's continued constitutionality, noting that "federal intrusion into sensitive areas of state and local policymaking, imposes substantial 'federalism costs.'" The Court warned:

Past success alone, however, is not adequate justification to retain the preclearance requirements. It may be that these improvements are insufficient and that conditions continue to warrant preclearance under the Act. But the Act imposes current burdens and must be justified by current needs....

[A] departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets.<sup>257</sup>

The Court questioned whether the problems Section 5 meant to address were still "concentrated in the jurisdictions singled out for preclearance."<sup>258</sup>

#### A. *Shelby v. Holder*

On June 25, 2013, the Supreme Court gutted the VRA by ruling Section 4 unconstitutional.<sup>259</sup> In a 5-4 opinion, Chief Justice John Roberts wrote that the Section 4(a) coverage jurisdictions formula adopted in 1982 failed to reflect improvements in Black voter participation, and that, as a result, "the conditions that originally justified [Section 5 preclearance] no longer

---

<sup>254</sup> In 1964, there were only three Black members of Congress and approximately 300 Black elected officials. Black elected officials increased significantly from 1,469 in 1970 to over 9,000 in 2000. In the original six covered jurisdictions, the number of Black elected officials increased by approximately 1000% since 1965, increasing from 345 to 3700. In 2004, there were forty-three Black members of Congress (forty-two in the House and one in the Senate) and twenty-seven Latino members of Congress; over 480 Black state legislators and thousands of Black local public officials; over 263 state and local Latino public officials; and 346 Asian American elected officials (including six at the federal level and 260 at the local level) compared to 120 in 1978. As of 2000, over 5,200 Latinos had been elected to office, including twenty-five to the House of Representatives and two to the United States Senate. *See id.* at 11-12 (2006); H.R. REP. NO. 109-478, at 18-20 (2006).

<sup>255</sup> *Northwest Austin Mun. Util. Dist. Number One v. Holder*, 557 U.S. 193, 197 (2009).

<sup>256</sup> *Id.*

<sup>257</sup> *Id.* at 202-203.

<sup>258</sup> *Id.* at 203.

<sup>259</sup> *Holder*, 570 U.S. 557.

characterize voting in covered jurisdictions.”<sup>260</sup> Citing *Northwest*, the Court found that the VRA “imposes current burdens and must be justified by current needs.” Highlighting the VRA’s success at redressing racial discrimination in voting, the Court concluded that Congress could no longer use data from the past to determine which jurisdictions must seek preclearance to change their voting laws. Rather, Congress must draft another formula based on current conditions.<sup>261</sup> The Court did not rule on the constitutionality of the Section 5 preclearance requirement, but left it effectively meaningless with no triggering coverage formula.<sup>262</sup> In her dissent, Justice Ruth Bader Ginsberg noted that “[t]hrowing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you do not get wet.”<sup>263</sup>

### B. The States’ Response to *Shelby v. Holder*

In the wake of the *Shelby* ruling, states began restricting access to voting, invoking the menace of voter fraud—without evidence of its existence—in order to suppress minority votes, reminiscent of the Virginia constitutional convention producing the 1902 Constitution.<sup>264</sup> Within hours of the decision’s release, Texas announced it would immediately implement a 2011 voter ID law that previously had been rejected under Section 5 and found by a federal court panel to impose “strict, unforgiving burdens on the poor.”<sup>265</sup> Texas also implemented redistricting maps that were blocked in 2011 by a separate court panel after the DOJ “provided more evidence of discriminatory intent than we have space, or need, to address.”<sup>266</sup>

The next day, North Carolina amended pending legislation, ultimately passed as the omnibus Voter Information Verification Act (“NC VIVA”), adopting a restrictive photo ID law, eliminating same-day registration during

<sup>260</sup> *Id.* at 535.

<sup>261</sup> *Id.* at 557. To date, Congress has failed to do so.

<sup>262</sup> *Id.*

<sup>263</sup> *Id.* at 590 (Ginsburg, R., dissenting).

<sup>264</sup> *The Effects of Shelby County v. Holder*, BRENNAN CTR. (Aug. 6, 2018), <https://www.brennancenter.org/our-work/policy-solutions/effects-shelby-county-v-holder>.

<sup>265</sup> Ryan J. Reilly, *Harsh Texas Voter ID Law ‘Immediately’ Takes Effect After Voting Rights Act Ruling*, HUFFINGTON POST, [http://www.huffingtonpost.com/2013/06/25/texas-voter-id-law\\_n\\_3497724.html](http://www.huffingtonpost.com/2013/06/25/texas-voter-id-law_n_3497724.html) (last updated Apr. 7, 2014). The Texas legislature enacted the nation’s strictest voter photo ID law (SB14) requiring voters to provide one of six limited types of voter ID in order to cast an in-person ballot. Proponents claimed the requirement would prevent in-person voter fraud and increase voter confidence and turnout. SB 14 was initially blocked under the VRA Section 5, and hours after the *Shelby* decision, Texas implemented the law. After several years of litigation, the 5th Circuit ruled in 2016 that SB 14 had an unlawful disparate impact on African American and Hispanic voters in violation of Section 2 of the VRA. *Veasey v. Abbott*, 830 F.3d 216, 250 (5th Cir. 2016) (en banc), cert. denied, 137 S. Ct. 612 (2017). For further details on the legislative and litigation history of SB 14, see *An Assessment of Minority Voting Rights Access in the United States: 2018 Statutory Enforcement Report*, supra note 251, at 74–82.

<sup>266</sup> Reilly, supra note 265.

early voting, reducing the early voting window from seventeen to ten days, and limiting pre-registration of sixteen and seventeen-year-old voters to those who would turn eighteen by election day.<sup>267</sup> A number of states enacted measures disproportionately impacting access to the ballot for minority voters through strict voter ID laws, more restrictions on voter registration procedures, decreases in early voting, limited voter access to polling places, less language access, and limited access for persons with disabilities.<sup>268</sup> The resulting impact on minority voter registration and turnout was predictable: minority citizens were more likely than white citizens to say that their reason for not registering to vote was registration requirements or difficulties, as opposed to disinterest in the political process.<sup>269</sup>

## X. VIRGINIA BUCKS THE TREND

Unlike with past setbacks in federal voting rights protection, and contrary to its fellow southern states, Virginia largely resisted efforts to significantly restrict access to voting post-*Shelby*.<sup>270</sup> Between 2014 and 2016, the General

---

<sup>267</sup> H.R. 589, 2013 Gen. Assemb., Reg. Sess. (N.C. 2013). For an analysis of VIVA's disparate impact on Black voters in North Carolina, see Michael D. Herron & Daniel A. Smith, *Race, Shelby County, and the Voter Information Verification Act in North Carolina*, 43 FLA. ST. U. L. REV. 465, 465 (2017). This law was likewise struck down as a violation of the Fourteenth Amendment and VRA § 2 because it was intentionally racially discriminatory. *North Carolina NAACP v. McCrory*, 831 F. 3d 204 (4th Cir. 2016), cert. denied, 137 S. Ct. 1339 (2017). *An Assessment of Minority Voting Rights Access in the United States: 2018 Statutory Enforcement Report*, supra note 251, at. 63-74.

<sup>268</sup> See generally *An Assessment of Minority Voting Rights Access in the United States: 2018 Statutory Enforcement Report*, supra note 251, at 83-119.

<sup>269</sup> See *id.* at 10, 199-217.

<sup>270</sup> In 2012, the General Assembly passed SB 1, amending Virginia's voter ID requirements to eliminate a provision allowing a voter without an ID to sign an affidavit affirming their identity and cast a ballot; instead, the voter had to vote provisionally and be given an opportunity to present an ID by noon of the third day after the election for his ballot to count. The bill also expanded acceptable forms of ID to include some non-photo IDs. 2012 Va. Acts 839. The following year, the General Assembly passed SB 1256 requiring a photo ID, including one that had expired within the previous year, for all voters, but requiring the State Board of Elections to provide a free voter ID without requiring the voter to provide documentation. 2013 Va. Acts 725. The Court issued the *Shelby* decision after SB 1256's enactment, but before its implementation, nullifying the need for preclearance. The 4th Circuit upheld the law in *Lee v. Virginia State Board of Elections*, 843 F. 3d 592, 595 (4th Cir. 2016).

Assembly made incremental progress in reducing barriers to voting.<sup>271</sup> Even so, a report found Virginia the second hardest state in which to vote in 2016.<sup>272</sup> In the six years since, Virginia has made significant strides expanding access to the vote, culminating with the landmark Voting Rights Act of Virginia.

*A. Changes to Registration and Voting Laws: 2017-2021*

Between 2017 and 2020, the Virginia General Assembly adopted changes to its voting laws that caused it to jump to the twelfth easiest state in which to vote in 2020.<sup>273</sup> These changes began incrementally. For example, in 2017, HB 1912 added persons granted a protective order to the list of voters allowed to cast an absentee ballot.<sup>274</sup> A year later, HB 397 removed the requirement that persons applying for an absentee ballot provide the last four digits of their Social Security number.<sup>275</sup> In 2019, HB 1790 permitted in-person absentee voters in line when the polling location closed to still cast his or her ballot.<sup>276</sup> Starting with the November 2020 general election, HB 2790 and SB 1026 provided for in-person absentee voting starting forty-five days prior to the election and ending on the second Saturday before the election, and allowed no-excuse in-person absentee voting with no application on the second Saturday immediately preceding the election.<sup>277</sup>

During the 2020 General Assembly Session, the new Democratic majority adopted several measures to make it easier to register, vote absentee, and cast a vote.<sup>278</sup> These included measures to:

- Implement automatic voter registration for individuals accessing services at a

<sup>271</sup> See, e.g., 2014 Va. Acts 1027 (allowing a voter who returns an unused or defaced ballot before election day to vote by regular ballot on election day); 2015 Va. Acts 276 (providing that a voter is qualified to vote if his or her name as found on the pollbook matches or is substantially similar to the name listed on the photo ID presented and the name stated by the voter); 2015 Va. Acts 1245 (adding student ID cards issued at Virginia private schools as a valid form of photo ID for voting); 2015 Va. Acts 622-23 (removing the requirement that a person applying to vote absentee because of a religious obligation provide information regarding the nature of such obligation); 2016 Va. Acts 704 (allowing a voter to give his or her full name and current residence address orally or in writing to an officer of election when voting); 2016 Va. Acts 1274 (removing the requirement that a person registering to vote who states he or she was previously adjudicated incapacitated or convicted of a felony and has been restored provide information regarding the circumstances under which his or her rights have been restored).

<sup>272</sup> Quan Li et al., *Cost of Voting in the American States*, 17 ELECTION L. J.: RULES, POL., AND POL'Y 234, 240 (2018).

<sup>273</sup> Scot Schraufnagel et al., *Cost of Voting in the American States: 2020*, 19 ELECTION L. J.: RULES, POL., AND POL'Y 503, 508 (2020).

<sup>274</sup> 2017 Va. Acts 1080-81.

<sup>275</sup> 2018 Va. Acts 921.

<sup>276</sup> 2019 Va. Acts 523.

<sup>277</sup> *Id.* at 1207.

<sup>278</sup> For a complete list of changes to Virginia's election laws in 2020, see 2020 Changes to Virginia's Election Laws, VA. DEP'T OF ELECTIONS (2020), <https://www.elections.virginia.gov/media/election-administration/electionlaw/2020-Changes-to-Virginia-Election-Laws.pdf> (last visited Nov. 6, 2022).

Department of Motor Vehicles office or website;<sup>279</sup>

- Repeal the requirement to show a photo ID in order to vote;<sup>280</sup>
- Make election day a state holiday;<sup>281</sup>
- Eliminate the requirement to provide an excuse for voting absentee, thereby allowing any qualified voter to vote in-person or by mail up to forty-five days before election day and maintain the requirement passed in 2019 allowing in-person absentee voting on the last two Saturdays before the election;<sup>282</sup>
- Extend the deadline for absentee ballots postmarked on or before election day to be counted if returned to the general registrar before noon on the third day after the election;<sup>283</sup>
- Make the “annual absentee list” permanent, allowing voters to apply to be added to the list and receive absentee ballots for all elections in which they are eligible to participate, removing voters from the list only if (1) the voter requests in writing to be removed, (2) their registration is canceled or placed on inactive status, (3) a ballot is sent to them and returned as undeliverable; or (4) the voter moved to a new address in a different locality;<sup>284</sup> and
- Starting with the 2022 general election, implement same-day voter registration.<sup>285</sup>

In the midst of the COVID-19 pandemic, budget language passed during a Special Session required local registrars to establish ballot drop-off locations for the 2020 general election at each registrar office and satellite voting locations for absentee voting, and at every polling place on election day.<sup>286</sup> These provisions were codified in 2021.<sup>287</sup> Absentee voting was made even easier by 2021 legislation eliminating the requirement for voters to have a witness signature on absentee ballots for any election during a declared state of emergency related to a communicable disease or public health threat.<sup>288</sup> A process was created to allow voters to be notified of and offered the ability to cure procedural errors on absentee envelopes.<sup>289</sup> Other absentee voting measures adopted in 2021 included providing pre-paid postage for all absentee ballot return envelopes and making the permanent absentee voting list an opt-out, rather than opt-in list, and authorizing in-person absentee voting on

<sup>279</sup> 2020 Va. Acts 1639, 1642.

<sup>280</sup> *Id.* at 2016-33.

<sup>281</sup> *Id.* at 622-24.

<sup>282</sup> *Id.* at 2333-341, 2342-350.

<sup>283</sup> *Id.* at 444, 1703-704.

<sup>284</sup> *Id.* at 2612.

<sup>285</sup> *Id.* at 2351.

<sup>286</sup> Gregory S. Schneider, *Virginia General Assembly Votes to Expand Access to Absentee Voting, Create Ballot Drop Boxes*, WASH. POST (Aug. 28, 2020), [https://www.washingtonpost.com/local/virginia-politics/virginia-voting-ballot-drop-boxes/2020/08/28/2a50f55a-e7cf-11ea-97e0-94d2e46e759b\\_story.html](https://www.washingtonpost.com/local/virginia-politics/virginia-voting-ballot-drop-boxes/2020/08/28/2a50f55a-e7cf-11ea-97e0-94d2e46e759b_story.html).

<sup>287</sup> 2021 Va. Acts 1614.

<sup>288</sup> *Id.* at 565.

<sup>289</sup> *Id.* at 1615.

Sundays during the early voting period.<sup>290</sup>

### *B. The Voting Rights Act of Virginia*

In the 2021 Special Session, the General Assembly passed the landmark Voting Rights Act of Virginia (“VRA-VA”).<sup>291</sup> Modeled after the VRA, the Act was designed to protect Virginians from voter discrimination, intimidation, and suppression. As other states moved to restrict the vote,<sup>292</sup> Virginia became the first in the South to pass its own voting rights legislation.<sup>293</sup>

#### *i. Rights of Voters*

The VRA-VA enacted a new chapter in the Code of Virginia outlining the rights of Virginia voters.<sup>294</sup> The VRA-VA prohibits the Commonwealth or any locality from imposing or applying any voting qualification, prerequisite to voting, standard, practice, or procedure that results in a denial or abridgement of the right of any U.S. citizen to vote based on race, color, or membership in a language minority group, based on the totality of circumstances.<sup>295</sup> The VRA-VA adopts state bilingual voting assistance requirements similar to those contained in the VRA for localities meeting language-minority

<sup>290</sup> *Id.* at 1378, 1383-384. For a complete list of changes to Virginia’s election laws in 2021, *See 2021 Changes to Virginia’s Election Laws*, VA. DEP’T OF ELECTIONS, [https://www.elections.virginia.gov/media/electionadministration/electionlaw/2021-Changes-to-Virginia-Election-Laws\\_FINAL.updated.pdf](https://www.elections.virginia.gov/media/electionadministration/electionlaw/2021-Changes-to-Virginia-Election-Laws_FINAL.updated.pdf) (last visited Nov. 6, 2022). The legislature passed a constitutional amendment establishing that every U.S. citizen eighteen years or older meeting the residency requirements and registered to vote pursuant to Article II of the Virginia Constitution has a fundamental right to vote that shall not be abridged by law, except for convicted felons during the period of incarceration (with rights restored upon release) and persons adjudicated by a court to lack the capacity to understand the act of voting during such period of incapacity. 2021 Va. Acts 1604. This provision did not pass the requisite second time during the 2022 General Assembly Session when the restored Republican majority left it in committee. *HB 416 Constitutional Amendment: Qualifications of Voters and the Right to Vote (Voter Referendum)*, VA.’S LEGIS. INFO. SYS., <https://lis.virginia.gov/cgi-bin/legp604.exe?221+sum+HB416> (last visited Nov. 6, 2022).

<sup>291</sup> 2021 Va. Acts 82-88, 168-175 (this author was the patron of Chapter 528).

<sup>292</sup> *Voting Laws Roundup: December 2021*, BRENNAN CTR., <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-december-2021> (last updated Jan. 12, 2022) (showing that over 440 bills with provisions that restrict voting access were introduced in forty-nine states in the 2021 legislative sessions, and nineteen states passed thirty-four laws restricting access to voting, more than one-third of all restrictive voting laws enacted since the Brennan Center for Justice began tracking legislation in 2011).

<sup>293</sup> Graham Moomaw, *Virginia is Set to Become the First Southern State with Its Own Voting Rights Act. Here’s What It Does* (Mar. 12, 2021), VA. MERCURY, <https://www.virginiamercury.com/2021/03/12/virginia-is-set-to-become-the-first-southern-state-with-its-own-voting-rights-act-heres-what-it-does/>.

<sup>294</sup> VA. CODE §§ 24.2-125–31 (2022).

<sup>295</sup> *Id.* at § 24.2-126(a)-(c) (2021) (stating that the extent to which members of a protected class have been elected to office in the state or locality is one circumstance that may be considered, but the VRA-VA does not establish a right to have members of a protected class elected in numbers equal to their proportion in the population); *Id.* at § 24.2-125 (defining a “protected class” of voters a “group of citizens protected from discrimination based on race or color or membership in a language minority group”).



thresholds.<sup>296</sup>

*ii. Notice or “Preclearance” of Local Election Changes*

To mitigate the loss of the VRA Section 5 preclearance process, the VRA-VA prescribes a review process for changes to covered election practices, defined as:

- Any change to the method of election of members of a governing body or an elected school board by adding seats elected at large or by converting one or more seats elected from a single-member district to one or more at-large seats or seats from a multi-member district;
- Any change, or series of changes, within a 12-month period, to the boundaries of the locality that reduces by more than five percentage points the proportion of the locality's voting age population that is composed of members of a single racial or language minority group, as determined by the most recent American Community Survey data;
- Any change to the boundaries of election districts or wards in the locality, including changes made pursuant to a decennial redistricting measure;
- Any change that restricts the ability of any person to provide interpreter services to voters in any language other than English or that limits or impairs the creation or distribution of voting or election materials in any language other than English; or
- Any change that reduces the number of, or consolidates or relocates, polling places in the locality, except where permitted by law in the event of an emergency.<sup>297</sup>

Prior to adopting or administering any covered practice, the governing body of the locality must publish the proposed covered practice and a general notice of opportunity for public comment, allow for at least thirty days of public comment, and conduct at least one public hearing during this period to receive public comment on the proposed covered practice.<sup>298</sup> If the governing body makes changes to the proposed covered practice in response to public comment received, the revised covered practice must also be published and an opportunity for public comment provided for at least fifteen days.<sup>299</sup> The governing body must publish the final covered practice through a plain English description of the practice and the text of an ordinance giving effect to the practice, maps of proposed boundary changes, or other relevant materials, and notice that the covered practice will take effect in thirty days.<sup>300</sup> During this thirty-day waiting period, any person who will be subject to or affected by the covered practice may challenge it in the circuit court of

<sup>296</sup> Compare VA. CODE § 24.2-128 (2022) (adopting state bilingual voting assistance requirements), with Voting Rights Language Assistance Act of 1992, § 2, 106 Stat. 921 (setting language assistance requirements for localities meeting minority-language thresholds).

<sup>297</sup> VA. CODE § 24.2-129(A) (2022).

<sup>298</sup> *Id.* at § 24.2-129(B).

<sup>299</sup> *Id.*

<sup>300</sup> *Id.* at § 24.2-129(C).

the locality where the covered practice is to be implemented. Those seeking to challenge must allege the covered practice would:

have the purpose or effect of denying or abridging the right to vote on the basis of race or color or membership in a language minority group, or result in the retrogression in the position of members of a racial or ethnic group with respect to their effective exercise of the electoral franchise.<sup>301</sup>

The court may award a prevailing private plaintiff reasonable attorney fees and costs.<sup>302</sup>

As an alternative to the public comment and hearing process, the governing body of a locality seeking to administer or implement a covered practice can submit the proposed covered practice to the Office of the Attorney General for issuance of a certification of no objection.<sup>303</sup> The certification of no objection will be granted when the Attorney General finds that the covered practice neither has the purpose or effect of denying or abridging the right to vote based on race, color, or membership in a language minority group, nor will result in the retrogression in the position of members of a racial or ethnic group with respect to their effective exercise of the electoral franchise.<sup>304</sup> A certification of no objection shall be deemed to have been issued if the Attorney General does not object to the covered practice within sixty days of the governing body's submission or if, upon good cause shown and to facilitate an expedited approval within sixty days of the governing body's submission, the Attorney General affirmatively indicates that no such objection will be made.<sup>305</sup> An affirmative indication by the Attorney General that no objection will be made or the absence of an objection to the covered practice by the Attorney General does not bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure.<sup>306</sup>

### *iii. Limits on At-Large Elections*

The VRA-VA places limitations on at-large methods of election by prohibiting such methods from impairing the ability of members of a protected class to elect candidates of their choice.<sup>307</sup> It also protects against these methods influencing the outcome of an election as a result of the dilution or the abridgement of the rights of voters who are members of a protected class.<sup>308</sup> Such a violation is established if it is shown that racially polarized voting

---

<sup>301</sup> *Id.*

<sup>302</sup> *Id.*

<sup>303</sup> *Id.* at § 24.2-129(D).

<sup>304</sup> *Id.* at § 24.2-129(A).

<sup>305</sup> *Id.* at § 24.2-129(D).

<sup>306</sup> *Id.*

<sup>307</sup> *Id.* at § 24.2-130(A).

<sup>308</sup> *Id.*

occurs in local elections and that this, in combination with the method of election, dilutes the voting strength of members of a protected class.<sup>309</sup> The VRA-VA provides a private right of action to any voter who is a member of a protected class that resides in the locality where a violation is alleged in the circuit court of that locality, and the court may award a prevailing plaintiff reasonable attorney fee and costs.<sup>310</sup> The court may also implement appropriate remedies that are tailored to remedy the violation.<sup>311</sup>

*iv. Attorney General Enforcement and Voter Education and Outreach Fund*

The VRA-VA authorized the Attorney General to initiate a civil action when there is reasonable cause to believe that a violation of an election law has occurred affecting the rights of any voter or group of voters.<sup>312</sup> In such action, the court may assess civil penalties, including awarding the prevailing plaintiff injunctive relief, compensatory and punitive damages, and reasonable attorney fees and costs.<sup>313</sup> Any civil penalties levied in such an action are to be deposited in the Voter Outreach and Education Fund to be used solely for educating voters on their rights under state and federal law.<sup>314</sup>

*v. Other Provisions*

The VRA-VA strengthened Virginia's voter intimidation laws by adding to the list of prohibited offenses the use of threats and coercion to willfully hinder or prevent, or attempt to hinder or prevent, election officers from holding an election, and expanded the location of such actions to any polling place, voter satellite office, or other election location, and provided a private cause of action for any voter so intimidated, threatened, or coerced.<sup>315</sup> Additionally, the VRA-VA extended voter misinformation laws to cover misinformation regarding voter satellite locations and the registrar's office and provided a private cause of action.<sup>316</sup> The Act imposes a civil penalty on

<sup>309</sup> *Id.* at § 24.2-130(B). "Racially polarized voting" refers to the extent to which the candidate preferences of members of the protected class and other voters in the jurisdiction have differed in recent elections for the office at issue and other offices in which the voters have been presented with a choice between candidates who are members of the protected class and candidates who are not members of the protected class. A finding of racially polarized voting or of a prohibited at-large method of election shall not be precluded by the fact that members of a protected class are not geographically compact or concentrated in a locality. Proof of an intent on the part of voters or elected officials to discriminate against members of a protected class is not required to prove a violation of subsection 24.3-130(A). *Id.* at § 24.2-130(B).

<sup>310</sup> VA. CODE § 24.2-130 (C) (2022).

<sup>311</sup> *Id.* at § 24.2-130(D).

<sup>312</sup> *Id.* at § 24.2-104.1(A).

<sup>313</sup> *Id.* at §§ 24.2-104.1(B)-(C).

<sup>314</sup> *Id.* at § 24.2-131.

<sup>315</sup> *Id.* at § 24.2-1000; *Id.* at § 24.2-1005. Prior law covered the use of bribery or intimidation at any precinct.

<sup>316</sup> VA. CODE ANN. § 24.2-1005.1 (2022).

anyone acting under the color of law who interferes with the vote in violation of an official policy or procedure.<sup>317</sup> Finally, the Act makes it a Class 1 misdemeanor for a person to intentionally provide a ballot to someone he knows cannot understand the language in which the ballot is printed and misinforms him as to the content of the ballot with an intent to deceive him and induce him to vote contrary to his desire, or to change the ballot of a person to prevent the person from voting as he desires.<sup>318</sup>

### CONCLUSION

Reporting on the VRA-VA, the *New York Times* noted:

As states across the South race to establish new voting restrictions, Virginia is bolting in the opposite direction....

Alone among the states of the former Confederacy, Virginia has become a voting rights bastion, increasingly encouraging its citizens—especially people of color—to exercise their democratic rights.<sup>319</sup>

As this article demonstrates, that has not always been the case. For most of her 403 years of representative democracy, Virginia limited the fundamental right to vote to landowning, white men. Only through vigorous federal intervention did she expand that right. Yet, as federal enforcement of voting rights has retreated in the past decade, Virginia—the birthplace of American democracy—has emerged as a fierce protector of voting rights.

However, it is unclear whether Virginia will continue to champion voting rights. During the 2021 campaign season and 2022 legislative session and midterm, echoes of the past have emerged in calls for “election integrity” and unsubstantiated claims of voter fraud to support measures eerily similar to those passed in other states that have disproportionately impacted people of color, language minorities, and the poor.<sup>320</sup> Vigilance will be required to protect the right to vote and ability for all people to participate in the great American experiment of a government by, of, and for *all* the people.

<sup>317</sup> *Id.* at § 24.2-1005.2(A).

<sup>318</sup> *Id.*

<sup>319</sup> Reid J. Epstein & Nick Corasaniti, *Virginia, the Old Confederacy's Heart, Becomes a Voting Rights Bastion*, N.Y. TIMES (Apr. 2, 2021), <https://www.nytimes.com/2021/04/02/us/politics/virginia-voting-rights-northam.html>.

<sup>320</sup> *See, e.g.*, Graham Moomaw, “Virginia AG Announces 20-person ‘Election Integrity Unit’,” VA. MERCURY, (Sept. 9, 2022) <https://www.virginiamercury.com/2022/09/09/virginia-ag-announces-20-person-election-integrity-unit/>.

*This page intentionally left blank.*