FELON DISENFRANCHISEMENT — SCOPE OF GOVERNOR'S CLEMENCY POWER — SUPREME COURT OF VIRGINIA HOLDS THAT EXECUTIVE ORDER RESTORING VOTING RIGHTS EN MASSE IS UNCONSTITUTIONAL. — *Howell v. McAuliffe*, 788 S.E.2d 706 (Va. 2016).

In a country that remains anomalous for its pervasive disenfranchisement of convicted felons,[1] Virginia has proven uniquely unforgiving. The Old Dominion was the first state to legally bar convicted felons from voting,[2] and after expanding the law's scope in a transparent effort to target African Americans,[3] it currently stands as one of only four states whose constitution "den[ies] the right to vote to all persons with felony convictions, even after they have completed their sentences."[4] Under article V, section 12 of the Virginia Constitution, however, the Governor has the power "to remove political disabilities consequent upon conviction for offenses committed prior or subsequent to the adoption of this Constitution."[5] Pursuant to this restoration power, Virginia Governor Terry McAuliffe recently issued an executive order to reenfranchise roughly 206,000 Virginians who had previously been convicted of felonies but had since served their full sentences and supervised releases.[6] Just three months later, in *Howell v. McAuliffe*,[7] the Supreme Court of Virginia held that the order was unconstitutional because the restoration power was intended for use solely "on an individualized case-by-case basis."[8] As a textual matter, the Virginia Constitution provides no case-by-case requirement for removing political disabilities. But the court opined that several "competing inferences" undermined the Governor's textual argument.[9] In finding these inferences sufficiently persuasive to obscure the constitution's plain language, the majority gave short shrift to the history behind the restoration power's enactment. Read properly, this history largely rebuts

---

[1] Angela Behrens et al., *Ballot Manipulation and the "Menace of Negro Domination": Racial Threat and Felon Disenfranchisement in the United States, 1850–2002*, 109 AM. J. SOC. 559, 560 (2003).

[2] William Walton Liles, Commentary, *Challenges to Felony Disenfranchisement Laws: Past, Present, and Future*, 58 ALA. L. REV. 615, 617 (2007).

[3] Matt Ford, *The Racist Roots of Virginia's Felon Disenfranchisement*, THE ATLANTIC (Apr. 27, 2016), http://www.theatlantic.com/politics/archive/2016/04/virginia-felon-disenfranchisement/480072 [https://perma.cc/59W5-BXA9].

[4] THE SENTENCING PROJECT, FACT SHEET: FELONY DISENFRANCHISEMENT 1 (2014), http://www.sentencingproject.org/wp-content/uploads/2015/12/Felony-Disenfranchisement-Laws-in-the-US.pdf [https://perma.cc/T4UN-9Q5A].

[5] VA. CONST. art. V, § 12.

[6] Howell v. McAuliffe, 788 S.E.2d 706, 710 (Va. 2016).

[7] 788 S.E.2d 706.

[8] *Id.* at 718.

[9] *Id.* at 720.

the court's presumption that all clemency powers were intended to share the same individualized restraints.

In the wake of Governor McAuliffe's enfranchisement order, two leaders of the Virginia state legislature, William Howell and Thomas Norment, Jr., as well as "four other registered Virginia voters . . . filed a petition seeking writs of mandamus and prohibition."[10] Petitioners argued principally that group clemency orders were unlawful under the Virginia Constitution.[11]

The Supreme Court of Virginia issued the writs of mandamus and granted the petitioners' requested relief. Writing for the majority, Chief Justice Lemons[12] first addressed standing. Under Virginia precedent, citizens have standing if there is "sufficient interest" and "the parties will be actual adversaries."[13] The majority thus granted standing on the grounds that an unconstitutional expansion of the Virginia electorate would sufficiently injure individual registered voters.[14] The court also held that the petitioners had joined all necessary parties.[15]

The bulk of the majority's analysis focused on the constitutionality of Governor McAuliffe's order. Article II, section I of the Virginia Constitution details the criteria for disenfranchisement, stating that "[n]o person who has been convicted of a felony shall be qualified to vote *unless* his civil rights have been restored by the Governor or other appropriate authority."[16] Chief Justice Lemons emphasized that no prior governor had used (or asserted they had the authority to use) their restoration power to restore voting rights en masse.[17] Longstanding executive practice, Chief Justice Lemons declared, "has traditionally played an important role in informing '[the courts'] determination of

---

[10] *Id.* at 711.

[11] *Id.* The petition sought to cancel the voter registration permitted under the order, prevent additional registrations pursuant to the order, and disallow similarly categorical orders in the future. *Id.* The Supreme Court of Virginia has original jurisdiction for such writs of mandamus. *Id.* at 710.

[12] Chief Justice Lemons was joined by Justices McClanahan, Kelsey, and McCullough.

[13] *Howell*, 788 S.E.2d at 713 (quoting Cupp v. Bd. of Supervisors, 318 S.E.2d 407, 411 (Va. 1984)).

[14] *Id.* In reaching this conclusion, Chief Justice Lemons relied heavily on the court's prior decision in *Wilkins v. West*, 571 S.E.2d 100 (Va. 2002), which held that district lines drawn to pack specific demographics of voters into particular districts established standing for citizens in those districts "without further proof of personalized injury," *id.* at 107.

[15] Under Virginia precedent a court can proceed without a necessary party if joining that party is "practically impossible" and other parties adequately represent that party's interests. *Howell*, 788 S.E.2d at 716 (quoting Marble Techs., Inc. v. Mallon, 773 S.E.2d 155, 157 (Va. 2015)). Because it was impractical to join all 206,000 felons protected by the Governor's order and the felons were "ably represented by respondents," Chief Justice Lemons found that the case could proceed without them. *Id.*

[16] VA. CONST. art. II, § 1 (emphasis added).

[17] *Howell*, 788 S.E.2d at 716–17.

"what the law is,"'"[18] especially when that longstanding practice is one of restraint.[19] While the majority conceded that this precedent was not controlling, it was nonetheless persuasive given Governor McAuliffe's "unprecedented" action.[20]

Chief Justice Lemons then rejected the argument that a literal reading of the constitution's text permits group clemency orders.[21] He began this analysis by noting that the right to remove political disabilities is one of four clemency powers detailed under article V, section 12 of the Virginia Constitution.[22] Section 12 further stipulates that nearly all clemency orders must be accompanied by a report to the General Assembly communicating the "particulars of every case."[23] The court read this reporting requirement to suggest that the Governor can only issue these grants of clemency in an individualized manner, an inference that is incongruous with a freedom to issue clemency orders en masse.[24] As the court observed, however, section 12 does not impart these reporting requirements to the one clemency power at issue: the power to remove political disabilities.[25] Yet the majority concluded that this textual omission did not denote a broader scope for the restoration power and instead offered alternative explanations for the lawmakers' drafting decisions. First, the court reasoned that the framers might have intended individualized reporting requirements "to apply *in pari materia* to all acts of executive clemency."[26] Second, even without the reporting requirement, the court noted that Governor McAuliffe had failed to demonstrate why the restoration power was "different in its essential character from all the other clemency powers."[27] Thus, because these other acts of clemency "require[] an individualized consideration,"[28] so too should the restoration power.[29]

---

[18] *Id.* at 717 (citations omitted).

[19] *Id.* at 718.

[20] *Id.*

[21] *Id.* at 719.

[22] *Id.* at 720. The other powers include the "power to remit fines and penalties"; to "grant reprieves and pardons"; and to "commute capital punishment." VA. CONST. art. V, § 12.

[23] VA. CONST. art. V, § 12.

[24] *Howell*, 788 S.E.2d at 719.

[25] *Id.*

[26] *Id.* According to the Supreme Court of Virginia, a provision applies *in pari materia* to another "when [it] relate[s] to the same person or thing, the same class of persons or things or to the same subject or to closely connected subjects or objects." Lucy v. County of Albemarle, 516 S.E.2d 480, 485 (Va. 1999) (quoting Prillaman v. Commonwealth, 100 S.E.2d 4, 7 (Va. 1956)). The reporting provision explicitly states its subject matter: all acts of clemency except for the restoration power. VA. CONST. art. V, § 12. However, because of the "shared nature" among clemency powers, and the fact that the reporting requirement was enacted before the restoration power, the framers may have intended the restoration clause to be similarly restricted. *See Howell*, 788 S.E.2d at 719.

[27] *Howell*, 788 S.E.2d at 720.

[28] *Id.*

[29] *See id.*

With the textual argument dismissed, Chief Justice Lemons determined that Governor McAuliffe's executive order violated article I, section 7 of the Virginia Constitution,[30] which states "[t]hat all power of suspending laws . . . without consent of the representatives of the people . . . ought not to be exercised."[31] In the court's view, the "law" in this matter was disenfranchisement; the Governor's power to restore the right to vote was merely an exception.[32] Accordingly, allowing a broad clemency order would rewrite the law such that the intended exception would become the new rule.[33] If permitted, Chief Justice Lemons contended, such an order would "undermine[] the very basis for the legitimate use of the executive restoration power"[34] and function as a "suspending power that has been forbidden by our Constitution since 1776."[35] The majority thus concluded that Governor McAuliffe's executive order was unconstitutional.[36]

Justice Mims delivered the first of two dissenting opinions.[37] He argued that under Virginia law, the separation of powers doctrine demands an especially "rigorous" injury analysis for mandamus actions.[38] To meet this heightened threshold, the party bringing suit must demonstrate a particularized injury that is both "'separate and distinct' from that of the public at large."[39] Because an expansion of the general electorate harmed every voter in Virginia equally, Justice Mims argued that the plaintiffs failed to distinguish their injury and hence did not clear the heightened standing bar.[40]

In the second dissenting opinion,[41] Justice Powell echoed Justice Mims's position that the petitioners lacked standing, but added that the Governor's executive order was constitutional.[42] Justice Powell contested the majority's interpretation of the restoration power and its reading of the suspension clause. She highlighted the lack of textual evidence for the majority's position that the power to remove political

---

30 *Id.*

31 VA. CONST. art. I, § 7.

32 *Howell*, 788 S.E.2d at 723.

33 *Id.*

34 *Id.*

35 *Id.* at 724.

36 *Id.*

37 *Id.* at 725 (Mims, J., dissenting).

38 *Id.* at 726.

39 *Id.* at 726 (quoting Goldman v. Landsidle, 552 S.E.2d 67, 72 (Va. 2001)).

40 *Id.* at 730. Justice Mims distinguished *Wilkins v. West*, 571 S.E.2d 100 (Va. 2002), which involved accusations of both racial gerrymandering and packing specific districts with particular demographics of voters, *see id.* at 104. As these facts of *Wilkins* did not apply to Governor McAuliffe's order, Justice Mims argued that the cases were inapposite. *Howell*, 788 S.E.2d at 727–29 (Mims, J., dissenting).

41 *Howell*, 788 S.E.2d at 730 (Powell, J., dissenting). Justice Powell was joined by Justice Goodwyn.

42 *See id.* at 731.

disabilities was merely an exception to a more general rule.[43] Such an assertion was not only unsupported, Justice Powell argued, but also granted the judiciary a dangerous amount of textually unbounded discretion[44] to distinguish between "rules" and "exceptions."[45] Moreover, Justice Powell contended that the suspension clause does not bar using a granted power incorrectly, as the majority suggested, but rather prevents the use of power that was not granted by the constitution in the first place.[46] Because the text plainly grants the Governor the power to issue enfranchisement orders, the suspension clause was not relevant in this matter and the order was constitutional.[47]

Rather than cite the Virginia Constitution's plain language as evidence that the power to remove political disabilities is less restricted than other clemency powers, the majority argued that the text is ambiguous enough to impute a case-by-case requirement. But the court's textual analysis relied on presumptions of commonality among clemency powers that flout the unique conditions of the Reconstruction era. A review of this Reconstruction history, particularly the events leading up to and during the 1868 Virginia Constitutional Convention, suggests that lawmakers indeed viewed the restoration power as distinct in nature from other clemency grants, primarily because voting rights had decided effects on prevailing social and political interests. This finding gives credence to the position that the restoration power was intentionally constructed in a liberal manner and cuts against the court's inference that all clemency powers share the same restraints by virtue of their common character.

The power to remove political disabilities was first proposed during the 1868 Virginia Constitutional Convention,[48] which some consider to be "the most remarkable political assembly that ever met in Virginia."[49] In accordance with the post–Civil War Reconstruction Acts,[50] Virginia held an election to determine whether the state would

---

[43] *See id.* at 735. Justice Powell further argued that the disenfranchisement clause did not limit the restoration power. Article I, section 2, she noted, is merely the criteria for voting eligibility and has no bearing on the scope of the Governor's authority to reenfranchise. *See id.* at 739.

[44] *Id.* at 735–36.

[45] *Id.* at 736.

[46] *Id.* at 735.

[47] *See id.* at 733–35. Justice Powell also found support in the history of the restoration power provision. *Id.* at 737 n.5.

[48] JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF VIRGINIA 146 (Richmond, New Nation 1867).

[49] JOHN DINAN, THE VIRGINIA STATE CONSTITUTION 12 (G. Alan Tarr ed., 2006) (quoting HAMILTON JAMES ECKENRODE, THE POLITICAL HISTORY OF VIRGINIA DURING THE RECONSTRUCTION 87 (Johns Hopkins University Studies in Historical and Political Science, J.M. Vincent et al. eds., Vol. 22, 1904)).

[50] The first congressional Reconstruction Act created military districts in old Confederate states such as Virginia and established criteria for readmittance to the Union. Among these re-

authorize a constitutional convention and, simultaneously, to elect the requisite delegates.[51] Alongside the Reconstruction mandates came the inevitable expansion of black suffrage, a prospect that deeply disheartened Virginian Conservatives.[52] With the Conservative Party weakened by its increasingly apathetic voting base, the Republicans entreated black voters to immediately exercise their political rights or else risk losing them.[53] This tactic proved fruitful, as black voters arrived at the polls at much higher rates than their Conservative counterparts.[54] Consequently, not only was the convention approved, but also an overwhelming majority of elected delegates were Republican.[55]

This Republican domination of the convention produced a body of delegates whose political interests would prove ripe for expanding the Governor's power. Of note, the Republican delegation at the convention was "[d]ominated by their radical wing."[56] This radical faction of the Republican Party was driven by a zealous commitment to black suffrage and an equally motivating distaste for former Confederates.[57] And under the aggressive direction of these radical delegates, the convention adopted several "excessively proscriptive disabling clauses" that threatened to disenfranchise all former Confederates.[58]

Amid these radical pursuits came the proposal for the Governor's restoration power. Edgar Allen was the first to request that a committee file a report on the possibility of granting the Governor the power to restore voting rights "when, in his opinion, the *facts of the case* warrant such a course."[59] The Committee on the Pardoning Power obliged, but their report was generally negative, due primarily to a suspicion that such power could serve as a political gambit to get con-

---

quirements were the creation of a new state constitution and ratification of the Fourteenth Amendment. RONALD L. HEINEMANN ET AL., OLD DOMINION, NEW COMMONWEALTH 247 (2007).

51 *See* RICHARD LOWE, REPUBLICANS AND RECONSTRUCTION IN VIRGINIA, 1856–70, at 122 (1991).

52 *See* WILLIAM ARCHIBALD DUNNING, RECONSTRUCTION, POLITICAL AND ECONOMIC, 1865–1877, at 117 (The American Nation, Albert Bushnell Hart ed., Vol. 22, 1907) ("In the demoralization produced by the reconstruction acts and by the vigorous and aggressive activity of the military commanders, the conservatives failed to make much impression on the elections for constitutional conventions.").

53 LOWE, *supra* note 51, at 124–25.

54 *Id.* at 126–27.

55 *Id.* at 126–28.

56 HEINEMANN ET AL., *supra* note 50, at 248.

57 *See* LOWE, *supra* note 51, at 136–38; *see also* 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. HIST. & BIOGRAPHY 461, 463 (1978).

58 LOWE, *supra* note 51, at 144; *see also* DINAN, *supra* note 49, at 14.

59 *See* 1 THE DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF VIRGINIA 150 (Richmond, New Nation 1868) (emphasis added).

victed felons to the polls.[60] The delegates passed the power into law anyway, and remarkably, no restrictive text was added to the clause following the Committee's report. In fact, the final amendment omits the original language referencing "the facts of the case."[61] This decision, which seemed to broaden rather than restrict the restoration power initially proposed, was sensible in context. Allen, along with many other moderate Republicans, opposed disenfranchising former Confederates, and was "determined to defeat . . . the disabling clauses" by any means necessary.[62] And at a time when some radicals sought to disenfranchise more than 30,000 white Virginians at once,[63] a broad power to reenfranchise gave the Governor a means to effectively counteract those ambitions. The safety measure was passed, but the need to use it in this context never arose, as the Confederate disenfranchisement clauses did not survive congressional referendum.[64]

The radicals' agenda to expand black suffrage likewise provided ample incentive to affirm a new and expansive clemency power, albeit for different reasons. By the early 1800s, free black Virginians were already populating prisons disproportionately. Then-Governor William Giles noted that freed blacks were convicted of crimes at four times the rate of free whites.[65] And in the months following the Reconstruction Acts, black Virginians began to experience many of the targeted policies that would come to define the Jim Crow South.[66] These discriminatory norms meant that Virginia's felon disenfranchisement laws disproportionately threatened free black Virginians. By enacting a generous power to remove political disabilities, radical Republicans seeking to expand the black electorate could counteract this threat and bolster their political standing.[67] In sum, extensive historical evidence supports the interpretation of the restoration power offered by Governor McAuliffe.

One may question the weight of this historical evidence given that no governor has attempted to construe the restoration power this lib-

---

[60] *See id.* at 483.

[61] VA. CONST. art. V, § 12.

[62] LOWE, *supra* note 51, at 167.

[63] *Id.* at 136–37.

[64] Thanks in large part to the influential "Committee of Nine," the federal government was convinced to have the disenfranchisement provisions voted on separately from the Virginia Constitution. The constitution was ratified; the disenfranchisement provisions were not. J.N. BRENAMAN, A HISTORY OF VIRGINIA CONVENTIONS 78–79 (1902).

[65] PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION OF 1829–1830 app. 1 at 911 (Richmond, Samuel Shepherd & Co. 1830).

[66] These measures included curfews, mandatory passes, and punishment for insulting whites, among others. LOWE, *supra* note 51, at 106.

[67] *See* HEINEMANN ET AL., *supra* note 50, at 248 (remarking that several provisions fashioned at the 1868 Constitutional Convention were "clearly designed to institute the rule of radical Republicans and blacks").

erally until quite recently. This concern is quelled by several countervailing considerations. First, prior executive practice can be explained, at least partially, by a failure of the radical Republicans to hold the governor's office after the restoration clause was adopted.[68] On the day Virginia approved the new constitution, Gilbert Walker — a True Republican candidate who did not share the radicals' politics — replaced the radically aligned sitting governor, Henry Wells.[69] And after Walker, the Republicans would not control the governor's office for nearly a century.[70] Second, legal scholarship and Virginia case law stress that drafting history is at least equally compelling in interpreting text as executive practice, if not considerably more persuasive.[71] Thus, for the court to completely disregard this history, notwithstanding prior executive practice, constitutes a significant misuse of the rules of interpretation.

In *Howell*, the majority's textual analysis ignored a Reconstruction history that seems impossible for anyone who knows about Reconstruction to ignore. This oversight is significant, not because such history reveals an unequivocal intent to allow for group-based orders, but because it satisfies the court's demand for unique characteristics of the restoration power and further demonstrates that the framers likely viewed the restoration power as distinct from other acts of clemency. Considering its interpretive value, the majority would have been well served to engage in such historical inquiry for this matter.

---

[68] Moderate Republicans similarly lost political incentive to use the restoration power en masse because the Confederate disenfranchisement clauses were not ratified.

[69] *See* HEINEMANN ET AL., *supra* note 50, at 249–50. Scholars differ slightly on Walker's specific politics. *Compare* PETER WALLENSTEIN, CRADLE OF AMERICA 231 (2d ed., rev. 2014) (classifying Walker as a moderate), *with* BRENAMAN, *supra* note 64, at 79 (classifying Walker as a conservative). Regardless, Walker was certainly not a radical Republican.

[70] *See Virginia: Past Governors Bios*, NAT'L GOVERNORS ASS'N, https://www.nga.org/cms/home/governors/past-governors-bios/page_virginia.html [https://perma.cc/2VFL-KJ3Z]. Although the Readjuster Party — which was sympathetic to black interests and received biracial support — rose to power briefly in the early 1880s, it was nevertheless a faction of the Democratic Party. *See* William Doolittle, Note, *Virginia's Readjuster Coup and* Thornburg v. Gingles' *Majority-Minority District Requirement*, 25 J.L. & POL. 211, 211–12 (2009).

[71] *See* Marsh v. City of Richmond, 360 S.E.2d 163, 167 (Va. 1987) (holding that the intent of the legislature, not the intent of the city council, is relevant in interpreting ambiguous statutory language); Funkhouser v. Spahr, 46 S.E. 378, 380 (Va. 1904) ("[T]he only proper way to construe a legislative act is from the language used in the act, and, upon occasion, by a resort to the history of the times when it was passed." (quoting United States v. Trans-Mo. Freight Ass'n, 166 U.S. 290, 318–19 (1897))); *cf.* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 686 (1990) ("[C]ourts should consider legislative history when there are two or more plausible meanings of the provision being interpreted . . . ."). Perhaps recognizing its interpretive value, the majority in *Howell* chose to analyze the framers' intent for the suspension clause, *Howell*, 788 S.E.2d at 720–22, but, curiously, did not do so for the restoration power, *id.* at 719–20.