Howell v. McAuliffe: Felon Disenfranchisement in Virginia and the "Cautious and Incremental Approach" to Voting Equality

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Introduction

The United States Constitution explicitly permits the States to adopt rules of disenfranchisement—the deprivation of the right to vote—"for participation in rebellion, or other crime."[1] Disenfranchisement policy varies by state, ranging from no loss of rights; loss of franchise while in prison; loss from imprisonment through parole and probation; and even permanent disenfranchisement, where a state indefinitely removes a citizen's right to vote after conviction of any felony.[2] These rules prohibit 6.1 million Americans from exercising the right to vote.[3]

Since 1902, Virginia permanently disenfranchises anyone convicted of a felony, making it one of only four states that maintains this practice.[4] In general, felony disenfranchisement policies disproportionately impact communities of color, with the black community being the greatest affected.[5] In Virginia, more than one in five black adults are disenfranchised.[6]

Since the Civil Rights Movement, Virginia has attempted to loosen the permanence of disenfranchisement through legislation and

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1 U.S. Const. amend. XIV, § 2.

2 *See* Jean Chung, *Felony Disenfranchisement: A Primer*, The Sentencing Project 1 (May 10, 2016), http://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer/.

3 *See id.*

4 *See* Va. Const. art. II, § 1; Christopher Uggen, et. al., *6 Million Lost Voters: States-Level Estimates of Felon Disenfranchisement 2016*, The Sentencing Project 4 (Oct. 6, 2016), http://www.sentencingproject.org/publications/6-million-lost-voters-state-level-estimates-felony-disenfranchisement-2016/.

5 *See* Chung, *supra* note 2, at 2.

6 *See id.*

executive action.[7] Virginia is considered election battleground territory; because minority votes typically favor the Democratic ticket, both parties have an interest in the impact of this constitutionally condoned vote suppression tool.[8] Thus, Democratic attempts at amending Virginia's Disenfranchisement Clause have failed to pass in Virginia's Republican-held House of Representatives.[9] As an alternative to a constitutional amendment, the Clemency Clause of the Constitution of Virginia gives "[t]he Governor . . . [the] power . . . to remove political disabilities consequent upon conviction for offenses committed."[10] In 2016, the governor of Virginia exercised this clemency power.[11]

On April 22, 2016, Virginia Governor Terence R. McAuliffe signed an executive order reinstating the franchise to approximately 206,000 convicted felons in Virginia who had completed their prison sentences and supervised releases.[12] Contending that the Governor overstepped his authority by restoring rights *en masse* rather than individually, Virginia House of Delegates Speaker William J. Howell and other GOP legislative leaders took Governor McAuliffe to court.[13]

By a four-three margin,[14] the Supreme Court of Virginia decided in *Howell v. McAuliffe* "that while the Governor had the ability to grant clemency to felons, including restoring voting rights, he did not

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[7] *See* Howell v. McAuliffe, 788 S.E.2d 706, 717 n.9 (Va. 2016).

[8] *See* Richardson v. Ramirez, 418 U.S. 24, 56 (1974) (ruling that California's felon disenfranchise law did not violate the Equal Protection clause of the Fourteenth Amendment and thus was constitutionally permissible); 270 to Win, *Virginia*, http://www.270towin.com/states/Virginia (last visited Mar. 24, 2018).

[9] *See Howell*, 788 S.E.2d at 717.

[10] *See* VA. CONST. art. V, § 12.

[11] Governor Terence R. McAuliffe, Order for the Restoration of Rights (Apr. 22, 2016), http://governor.virginia.gov/newsroom/proclamations/proclamation/order-for-the-restoration-of-rights/ [https://web.archive.org/web/20160502130218/http://governor.virginia.gov/newsroom/proclamations/proclamation/order-for-the-restoration-of-rights/].

[12] *Id.*; When Governor McAuliffe issued the April 2016 Executive Order, he indicated his intent to issue similar orders at the end of each month. McAuliffe issued such orders May 31, 2016, and again June 24, 2016. [hereinafter "Executive Orders"]; *See Howell*, 788 S.E.2d at 711 n.2.

[13] Laura Vozella, *McAuliffe Restores Voting Rights to 13,000 Felons*, THE WASH. POST, (Aug. 22, 2016), https://www.washingtonpost.com/local/virginia-politics/mcauliffe-restores-voting-rights-to-13000-felons/2016/08/22/2372bb72-6878-11e6-99bf-f0cf3a6449a6_story.html?utm_term=.F7d64adbd2b6.

[14] *See Howell*, 788 S.E.2d at 710, 725. Only two justices said that the governor may not restore rights *en masse*. *See id.* at 710. A third dissenter merely said there was no standing, so the court could not rule on the merits. *Id.* at 725 (Mims, J., dissenting).

have the power to do so *en masse*."[15] Weeks after the ruling, Governor McAuliffe began an individualized restoration effort via autopen—a device used to quickly and repetitiously imprint a signature—ultimately enfranchising approximately 67,000 citizens before the general election on November 8, 2016.[16] Incensed by the Governor's ongoing effort to restore voting rights for felons, Republican leaders filed a motion to hold Governor McAuliffe in contempt.[17] Specifically, Republicans argued that McAuliffe's revised process, though different technologically and procedurally, had the same effect as his *en masse* efforts, and was thus also unconstitutional.[18] In a unanimous vote, the Supreme Court of Virginia rejected the request from state Republicans to find Governor McAuliffe in contempt of court, thereby allowing his mass individualized restoration effort.[19]

This Note evaluates the opinion in *Howell v. McAuliffe*, compares it with analogous cases, and discusses the potential impact of the decision. Part I of this Note describes the historical origins of felon disenfranchisement in Virginia as well as twenty-first-century reform efforts in the Commonwealth. Part II explains the majority opinion and dissents from *Howell v. McAuliffe*. Part III overviews comparable executive orders issued in other states, and judicial responses to their challenges. Finally, Part IV postulates how the holding in *Howell* might affect the Virginia standing doctrine and statutory interpretation moving forward.

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15 David A. Graham, *Terry McAuliffe's Second Try at Restoring Felon Voting Rights*, THE ATLANTIC (Aug. 22, 2016), http://www.theatlantic.com/politics/archive/2016/08/virginia-felon-disenfranchisement-mcauliffe/496898/; *see also Howell*, 788 S.E.2d at 710.

16 *See* Moriah Balingit, *'It's Been Beautiful': With Rights Restored, 79-Year-Old Felon Votes Again After 40 Years*, THE WASH. POST (Nov. 8, 2016), https://www.washingtonpost.com/local/virginia-politics/its-been-beautiful-with-rights-restored-79-year-old-felon-votes-again-after-40-years/2016/11/08/08c31d28-a5f7-11e6-8042-f4d111c862d1_story.html?tid=hybrid_collaborative_1_na&utm_term=.F9225f3be0b6; Luke Rosiak, *Exclusive: Virginia Gov. Pardons 60,000 Felons, Enough to Swing Election*, THE DAILY CALLER (Nov. 6, 2016, 8:30 AM), http://dailycaller.com/2016/11/06/exclusive-virginia-gov-pardons-60000-felons-enough-to-swing-election/.

17 Mot. for an Order Requiring Respondents to Show Cause Why They Should Not Be Held in Contempt for Violating the Writ of Mandamus, Howell v. McAuliffe, 788 S.E.2d 706 (Va. 2016) (No. 160784); *see also* Graham Moomaw, *Virginia Supreme Court Denies Republican Effort to Hold McAuliffe in Contempt*, RICHMOND-TIMES DISPATCH (Sep. 15, 2016), http://www.richmond.com/news/virginia/virginia-supreme-court-denies-republican-effort-to-hold-mcauliffe-in/article_397c5a9f-5695-521c-a791-fabae3e17812.html.

18 Moomaw, *supra* note 17.

19 Upon a Pet. for Writs of Mandamus and Prohibition, Howell v. McAuliffe, 778 S.E.2d 706 (2016) (No. 160784); *see also* Moomaw, *supra* note 17].

I. BACKGROUND

Felons in Virginia have been prohibited from voting since the Civil War.[20] After the end of the Civil War, black citizens faced many obstacles to enfranchisement.[21] Specifically, legislatures employed felon disenfranchisement laws, poll taxes, and literacy tests with the express goal of preserving white control over the political process.[22] The Civil Rights Era carved away at a state's ability to prevent certain people from voting.[23] With poll taxes ruled unconstitutional, and literacy tests invalidated by congressional action, Virginia's only current instrument for the continued suppression of black votes is the disenfranchisement of felons.[24] Although the racist aftereffects linger, disenfranchisement reform has progressed.[25]

Gubernatorial action, constitutional amendment, or court decision can reform existing laws governing felony disenfranchisement.[26] In Virginia, although great change has *not* come through the judicial process, legislative reform has had some impact.[27] Interestingly, it is in the Executive Branch where Virginia finds its most active and efficient reformation tool.[28]

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[20] OFFICE OF GOV.: SUMMARY OF THE GOVERNOR'S RESTORATION OF RIGHTS (April 22, 2016), https://commonwealth.virginia.gov/media/5843/restore_rights_summary_4-22.pdf [hereinafter "Restoration of Rights"].

[21] Rebecca Onion, *Take the Impossible "Literacy" Test Louisiana Gave Black Voters in the 1960s*, SLATE (Jun 28, 2013), http://www.slate.com/blogs/the_vault/2013/06/28/voting_rights_and_the_supreme_court_the_impossible_literacy_test_louisiana.html.

[22] Restoration of Rights, *supra* note 20.

[23] *See infra* Part I.B.

[24] *See generally* Richardson v. Ramirez, 418 U.S. 24 (1974) (holding that California's felon disenfranchise law did not violate the Equal Protection Clause of the Fourteenth Amendment, and thus was constitutionally permissible); Harper v. Va. Bd. of Elections, 383 U.S. 663 (1966) (invalidating a Virginia statute that assessed a poll tax in Commonwealth elections); Katzenbach v. Morgan, 384 U.S. 641 (1966) (stating that section five of the Fourteenth Amendment is "a positive grant of legislative power authorizing Congress to exercise its discretion in determining the need for and nature of legislation to secure Fourteenth Amendment guarantees.").

[25] *See* Uggen, *supra* note 4.

[26] *See* Helen A. Gibson, *Felons and the Right to Vote in Virginia: A Historical Overview*, 91 THE VIRGINIA NEWS LETTER 1, 6 (2015).

[27] *See, e.g.*, Howard v. Gilmore, No. 99-2285, 2000 WL 203984 (4th Cir. Feb. 23, 2000) (summarily rejecting a challenge to Virginia's disenfranchisement of felons); Perry v. Beamer, 933 F. Supp. 556 (E.D. Va. 1996) (rejecting a Fourteenth Amendment challenge to Virginia's disenfranchisement law); El-Amin v. McDonnell, No. 3:12–cv–00538–JAG, 2013 WL 1193357 (E.D. Va. Mar. 22, 2013); *see also* Gibson, *supra* note 26, at 6.

[28] *See* Gibson, *supra* note 26, at 6.

Section A of this Part provides an overview of disenfranchisement policy in Virginia, Section B discusses progress during and after the Civil Rights Movement, and Section C explains the current mechanisms through which disenfranchisement policies are changed.

A. *Reaction to the Reconstruction Amendments and the Jim Crow Era*[29]

Following the Civil War, Congress ratified several amendments to the United States Constitution in an attempt to secure the civil and political rights of black people.[30] The Reconstruction Amendments, as they are known, abolished slavery,[31] addressed citizenship rights and equal protection of the laws for all persons,[32] and prohibited states from denying or abridging voting rights "on account of race, color, or previous condition of servitude."[33] While the United States Constitution was undergoing amendment, Virginia delagates convened to draft the state's first post-Civil War constitution.[34] Headed by abolitionist John C. Underwood, Virginia produced a charter that guaranteed the vote to every twenty-one-year-old-male citizen, irrespective of race.[35] Although the "Underwood Constitution," as it became known, passed by a wide margin in 1870, multiracial democracy quickly lost its widespread support during the succeeding two decades.[36]

A political movement was gaining strength in the South, and Redeemer Democrats—those opposing Reconstruction—began to supplant Republican officeholders in the 1880s and 1890s.[37] In office and holding majority control of the Virginia General Assembly, the

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[29] "'Jim Crow[,]' . . . a derisive slang term for a black man[,] . . . came to mean any state law passed in the South that established different rules for blacks and whites. Jim Crow laws were based on the theory of white supremacy and were a reaction to Reconstruction." *See* A Brief History of Jim Crow, CONSTITUTIONAL RIGHTS FOUNDATION (last visited Mar. 24, 2018), http://www.crf-usa.org/black-history-month/a-brief-history-of-jim-crow.

[30] U.S. CONST. amends. XIII, XIV, XV.

[31] U.S. CONST. amend. XIII.

[32] U.S. CONST. amend. XIV.

[33] U.S. CONST. amend. XV.

[34] *See* 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/.

[35] *See id.*

[36] *See id.*

[37] *See id.*

Redeemer Democrats "steadily repealed Reconstruction-era reforms and enacted Jim Crow laws aimed at suppressing black political power."[38] By 1900, the focus narrowed to the express goal of permanently removing the black vote.[39] With the Jim Crow era in full swing, delegates convened for a constitutional convention with the central purpose of black political suppression.[40]

John Goode, the 1902 constitutional convention president, was convinced that one day the Fifteenth Amendment could be repealed.[41] Until such a time that the total disenfranchisement of blacks was once again politically feasible, he implored the delegates at the constitutional convention to find a way to limit the black vote.[42] Acknowledging that the United States Constitution was the supreme law of the land, Goode asked "how is this difficult problem to be solved" and directed his peers' attention to "the provisions on this subject which have been incorporated into the [c]onstitutions recently adopted by some of our sister states of the South."[43]

Frustrated by the presence of the Fifteenth Amendment for the foreseeable future, some states, including Virginia, looked for a loophole to eliminate the black vote—the Fourteenth Amendment provided them an answer.[44] Included in the Fourteenth Amendment is a section giving states the power to revoke the right to vote from any individual "for participation in rebellion, or other crime."[45] Virginia took the "other crime" language and inserted into its constitution the Disenfranchisement Clause.[46] Political leaders championed this disenfranchisement provision as part of a plan to "eliminate the darkey as a political factor in [Virginia] in [fewer] than five years, so that in no single county . . . will there be the least concern felt for the complete supremacy of the white race in the affairs of government."[47] This mentality flourished throughout the twentieth century.

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38 *See id.*

39 *See id.*

40 *See* Restoration of Rights, *supra* note 20; J. N. BRENAMAN, A HISTORY OF VIRGINIA CONVENTIONS, 89 (1902); Ford, *supra* note 34.

41 *See* Brenaman, *supra* note 40, at 87-90; Ford, *supra* note 35.

42 *See* Brenaman, *supra* note 40.

43 *See id.* at 89.

44 *See id.* at 90.

45 U.S. CONST. amend. XIV, § 2.

46 *See* Brenaman, *supra* note 40; Ford, *supra* note 34.

47 Restoration of Rights, *supra* note 20.

B. *The Civil Rights Movement and Virginia Today*

The Civil Rights movement of the 1950s and 1960s brought down many of Jim Crow's malignant provisions.[48] By the late 1960s, Virginia had lost most of its black-vote-suppression tools through court decisions and federal legislation.[49] The Supreme Court found that the grandfather clause exemptions to literacy tests were unconstitutional under the Fifteenth Amendment in 1915, and abolished state and local poll taxes in 1966.[50] In 1965, the Voting Rights Act eliminated literacy tests and required Virginia and other historically biased states to seek federal approval before implementing any changes to election laws.[51] In 1971, Virginia enacted its current constitution, cutting the Jim Crow charter down to half the size.[52] Although most tools devised to suppress the black vote have been banned for decades, Virginia has maintained felon disenfranchisement in its constitution.[53]

As of 2016, the stringent Virginia felon disenfranchisement laws affected hundreds of thousands of Virginians who have served their time.[54] It is estimated that one in five black adults is disenfranchised in Virginia because of this provision.[55] Thus, despite the progress Virginia has made removing the remnants of Jim Crow, this law continues to disenfranchise racial minorities who have paid their debt to society and are otherwise qualified to vote.[56]

Through 2014, Virginia, tied only with Kentucky, had the strictest disenfranchisement laws and the highest disenfranchisement rate.[57] As of 2016, Virginia disenfranchised seven percent of its voting-age

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48 *See* Ford, *supra* note 34.

49 *See id.*

50 *See* Harper v. Va. Bd. of Elections, 383 U.S. 663, 666 (1966); Guinn v. U.S., 238 U.S. 347, 367 (1915); *see also* Ford, *supra* note 34.

51 *See* Ford, *supra* note 34; *but see* Shelby Cty. v. Holder, 570 U.S. 529, 535 (2012) (removing the requirement for Virginia, among other states, "to obtain federal permission before enacting any law related to voting . . . .").

52 *See Virginia Constitution, 1971 and Today*, FOR VIRGINIANS: GOVERNMENT MATTERS, (last visited March 24, 2018), http://vagovernmentmatters.org/primary-sources/521 ("The 1971 constitution incorporated changes mandated by the Civil Rights movement, such as the federal Voting Rights Act and Civil Rights Act. These historic pieces of legislation invalidated many of the segregation and Jim Crow voting requirements present in the 1902 constitution."); *see also* Ford, *supra* note 34.

53 *See* Restoration of Rights, *supra* note 20.

54 *See id.*

55 *See id.*

56 *See id.*

57 *See* Gibson, *supra* note 26, at 1.

population, yet over twenty percent of the voting-age black population could not vote as a result of a felony conviction.[58] This statistic shows that Virginia currently incarcerates black adults at a rate approximately six times greater than its white population.[59] Recognizing this rate as a problem, various Virginia governors have worked over the last several decades to reform laws regarding the reinstatement of voting rights for felons.[60]

C. *Modern Reform*

1. Reform Via the Courts

Section 2 of the Fourteenth Amendment to the United States Constitution explicitly permits the states to adopt rules about disenfranchisement "for participation in rebellion, or other crime."[61] Because of this enumerated state right, the Supreme Court is very hesitant to accept cases challenging states' disenfranchisement laws.[62] However, the few cases to come before the Court have yielded some guidance for reform; specifically, that the motivations behind the state's enactment of its disenfranchisement policy should be considered when determining the constitutionality of the law.[63] In 2013, the United States District Court for the Eastern District of Virginia was prepared to hold a trial to determine whether the Commonwealth of Virginia "adopted its felon disenfranchisement measures with the specific intent to suppress the black vote"; however, prior to trial, Governor Robert F. McDonnell restored the complainant's voting rights, and the court dismissed because of mootness.[64]

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58 Uggen, *supra* note 4; *see* Gibson, *supra* note 26, at 1.

59 Gibson, *supra* note 26, at 1.

60 *See id.* at 6-7.

61 U.S. CONST. amend. XIV, § 2.

62 *See* Gibson, *supra* note 26, at 6.

63 *See* Hunter v. Underwood, 471 U.S. 222, 225 (1985) (holding that *Arlington Heights v. Metropolitan Housing Development Corp.* established the litmus test to determine whether a Disenfranchisement Clause is unconstitutional) (citing 429 U.S. 252, 270 (1977)); Cty. of Mobile v. Bolden, 466 U.S. 55, 66 (1980) (holding there must be 'purposeful discrimination' for a voting disenfranchisement law to be found unconstitutional); Richardson v. Ramirez, 418 U.S. 24, 56 (1974) (holding that California's disenfranchisement law does not violate the Equal Protection clause of the 14th Amendment); Harper v. Va. Bd. of Elections, 383 U.S. 663 (1966) ("[T]he Equal Protection Clause of the Fourteenth Amendment restrains the States from fixing voter qualifications which invidiously discriminate."); *see also* Gibson, *supra* note 26, at 6.

64 *See* El-Amin v. McDonnell, No. 3:12–cv–00538–JAG, 2013 WL 1193357 (E.D. Va. Mar. 22, 2013); Gibson, *supra* note 26, at 6.

2. Legislative Reform

The Virginia General Assembly has had some success reforming felon disenfranchisement laws.[65] Although larger initiatives, such as constitutional amendments, have failed to pass, the Virginia General Assembly has enacted legislation in an attempt to transform a purposefully cloaked and bureaucratic puzzle into a more transparent, streamlined, and workable system for many rehabilitated individuals to apply for enfranchisement.[66] That being said, as of 2010, fewer than three percent of the eligible ex-felon population had their rights restored.[67]

3. Executive Action

Beyond a constitutional amendment or a major court decision, the governor of Virginia is an effective agent of felon disenfranchisement reform.[68] Although recent focus by the Virginia governors of the twenty-first century has been on comprehensive reform of the process by which rights are restored, there are other tools the governor may use to restore an individual's right to vote.[69] In addition to changing the restoration of rights process, the Clemency Clause in the Constitution of Virginia empowers the governor to take direct action.[70]

An early and continuing feature of the Virginia justice system, the gubernatorial pardon was a remedy available to the slave and non-

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65 *See* Gibson, *supra* note 26, at 6.

66 "Applicants had to obtain and submit: the restoration application . . . filled out, signed and notarized; certified copies of all felony sentencing orders; certified proof of payment for any fines, restitution and/or court costs; a letter of petition, signed and date; three letters of reference, completed, signed, and dated by three citizens; a current letter from the applicant's most recent probation or parole officer addressed to the Governor, outlining their period of supervision; a letter to the Governor describing the circumstances of the applicant's offense, community or comparable service, and any additional information they may want the Governor to know when reviewing their petition; if the applicant lived outside the Commonwealth of Virginia, certified copies of their driving record and criminal record from the state in which they resided; a certified copy of the felony sentencing order for each felony conviction; and, if applicable, a [presentence] report." Brief on Behalf of ACLU and ACLU of Virginia as Amici Curiae in Support of Respondents at 35 n.5, Howell v. McAuliffe, 788 S.E.2d 706 (Va. 2016); *see also* Uggen, *supra* note 4.

67 *See* Uggen, *supra* note 4, at 2; Gibson, *supra* note 26, at 7.

68 *See* Gibson, *supra* note 26, at 6.

69 *See id.*

70 VA. CONST. art. V, § 12; *see also* Gibson, *supra* note 26, at 5.

slave residents of the state.[71] In 1870, the Virginia constitutional revisions enumerated the governor's power "to grant reprieves and pardons after conviction" as well as "to remove political disabilities consequent upon conviction for offenses prior or subsequent to the adoption of this constitution."[72] In 1883, the Virginia Supreme Court held that a pardon relieves the "punishment annexed to the offence" and "all penalties and consequences, except political disabilities," thus a separate measure was needed to restore rights.[73] Interestingly, evidence from governors' reports—the constitutionally mandated meeting of the governor with the General Assembly—suggest that the Virginia General Assembly recognized a distinction between pardons granted by the governor and the removal of political disabilities as early as 1906.[74] Although "interpretations have varied over time, the removal of political disabilities today restores one's right to vote, to run for and serve elected office, to serve on juries, and to serve as a public notary."[75]

In 2002, then-Governor Mark Warner "streamline[d] the application process for non-violent offenders, reducing the mandatory post-sentence five-to-seven-year waiting period for non-violent offenders to three years and reducing the number of pages in the application for non-violent offenders from [thirteen to one.]"[76] In May 2013, then-Governor Robert F. McDonnell issued an executive order that lifted the three-year waiting period for convicted non-violent felons—making approximately 350,000 eligible to have their voting rights restored.[77] In April 2014, Governor McAuliffe reduced waiting periods for violent felons to apply to have their voting right restored.[78] Following the completion of their entire sentence and full payment of

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71 *See* Gibson, *supra* note 26, at 5.

72 VA. CONST. of 1870, art. IV, § 5; *see* Gibson, *supra* note 26, at 6.

73 Edwards v. The Commonwealth, 78 Va. 39, 44 (Va. 1883); *see* Gibson, *supra* note 26, at 5.

74 *See* Gibson, *supra* note 26, at 5 ("The revised constitution [mandated] that the governor report to each session of the General Assembly the number of pardons and reprieves granted, in addition to any commuted punishments and the reasons for each action taken."); *see Edwards*, 78 Va. at 44.

75 *See* Gibson, *supra* note 26, at 5.

76 *Id.*

77 *See* Gibson, *supra* note 26, at 5; *see also* Uggen, *supra* note 4, at 3; *Opinion: Past Discrimination in Virginia Remains Root Cause for Denying Felons the Right to Vote*, UVA TODAY (January 20, 2015), https://news.virginia.edu/content/opinion-past-discrimination-virginia-remains-root-cause-denying-felons-right-vote [hereinafter UVA Today].

78 Olympia Meola, *McAuliffe to Speed Rights Restoration*, RICHMOND TIMES-DISPATCH, (Apr. 17, 2014), http://www.virginia-organizing.org/mcauliffe-to-speed-rights-restoration/.

any fees and restitution, ex-felons need only wait three years as opposed to five.[79] Governor McAuliffe also petitioned successfully to have drug offenses downgraded from violent to non-violent felonies.[80] This removal is most significant because in Virginia "60 percent of Virginians in prison, and 72 percent of Virginians incarcerated for drug offenses are [black]."[81]

As of April 2014, in Virginia, non-violent offenders have their rights automatically restored upon completion of their incarceration, and past offenders may apply for restoration without any waiting period.[82] If convicted of a violent crime, the ex-felon's waiting period before he can apply for his voting right to be restored was shortened to three years after his release.[83] However, even with all this progress, many individuals do not make the effort to have their right restored—perhaps either because they are unaware of their eligibility to have their rights restored, or are intimidated by the process.

II. ANALYSIS OF *HOWELL V. MCAULIFFE*

Howell v. McAuliffe involved several members of the Virginia General Assembly challenging Governor McAuliffe's *en masse* restoration of voting rights to disenfranchised citizens.[84] Contending that the Governor's actions violated the Constitution of Virginia, petitioners asked the court to issue writs of mandamus to compel the proper authorities in Virginia to remove from the record of registered voters any felon who registered pursuant to the challenged Executive Order.[85] Respondents filed a response to the petition for writs of mandamus, as well as a motion to dismiss, asserting, *inter alia*, that the petitioners lacked standing.[86] Addressing first the issue of standing, the court ruled that being a qualified voter in an allegedly unconstitu-

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79 *Id.*; *see also* Gibson, *supra* note 26, at 6.

80 *See* Roger Chesley, *Changes to Voting Rights for Felons Need to go Further*, THE VIRGINIAN-PILOT, (Apr. 22, 2014), http://hamptonroads.com/2014/04/changes-voting-rights-felons-need-go-further; Gibson, *supra* note 26, at 2.

81 *See id.*; Gibson, *supra* note 26, at 7; UVA Today, *supra* note 77, at 3.

82 *See* Chung, *supra* note 2, at 8; UVA Today, *supra* note 77, at 2.

83 *See id.*

84 Howell v. McAuliffe, 788 S.E.2d 706, 711 (Va. 2016).

85 *Id.*

86 *Id.* at 711-12.

tional voter pool was enough to satisfy Virginia's standing requirements.[87]

Finding the petitioners had standing, Chief Justice Lemons, writing for the majority, held that Governor McAuliffe unconstitutionally suspended the Disenfranchisement Clause when he restored the voting rights of 206,000 felons.[88] Justices Mims, Powell, and Goodwyn all argued that the court should not have opined on the constitutionality of McAuliffe's order because of the lack of standing.[89] Although Justice Mims limited his dissent to the standing issue, Justices Powell and Goodwyn attacked the majority's interpretation analysis.[90] This Part analyzes each of the opinions given: the majority by Chief Justice Lemons, the dissenting opinion by Justice Mims, and the dissenting opinion filed by Justices Powell and Goodwyn.

A. *Chief Justice Lemons's Majority Opinion*

Writing for the majority, Chief Justice Lemons addressed three issues: (1) whether the petitioners had standing; (2) if all necessary parties were joined to the petition; and (3) whether the Governor's Executive Order violated the Constitution of Virginia.[91] This Section only discusses the holdings for standing and constitutionality.[92]

1. Standing of the Petitioners

In Virginia, "[t]he point of standing is to ensure that the person who asserts a position has a substantial legal right to do so and that his rights will be affected by the disposition of the case."[93] In general, no standing exists "unless [a person] can demonstrate a direct interest, pecuniary or otherwise, in the outcome of the controversy that is sepa-

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87 *Id.* at 713.

88 *Id.* at 724.

89 *Id.* at 725.

90 *See* Howell v. McAuliffe, 788 S.E.2d 706, 725-30 (Va. 2016) (Mims, J., dissenting); *id.* at 733-40 (Powell, J., dissenting).

91 *Id.* at 712-25.

92 In their motion to dismiss, respondents also asserted that petitioners failed to join necessary parties. *Id.* at 712. The court answered this fairly quickly; this Note discusses it no further than this footnote. *See id.* ("In this case, it would be 'practically impossible' to join the 206,000 convicted felons whose political disabilities were restored by the Executive Orders.").

93 *Id.* at 731 (Powell, J., dissenting) (citing Cupp v. Fairfax Cty., 318 S.E.2d 407, 411 (Va. 1984)).

rate and distinct from the public at large."[94] Weighing the petitioners' argument that their standing rested on their status as qualified voters whose voting power had been diluted by an unconstitutional addition of ex-felon voters, against respondent's rebuttal that their status as qualified voters gave them a direct interest separate from the public at large, the majority sided in favor of the petitioners.[95]

Because the court had never applied the principle of standing "to a constitutional claim by voters alleging that an executive action diluted their voting strength . . . [,]" the court turned to *Wilkins v. West*[96]—a Supreme Court of Virginia case where the court granted standing to citizens challenging racial gerrymandering based on vote-dilution claims.[97] Decided in 2002, *Wilkins* addressed whether voters had standing to challenge electoral "districts allegedly drawn in violation of the compactness and contiguity requirements" of the Constitution of Virginia.[98] Here, Chief Justice Lemons stated that *Wilkins* stands for the proposition that "an individual's residency in an [unconstitutionally configured] district is sufficient to confer standing to challenge non-compliance with a constitutional provision in 'the voting context' without 'further proof of a personalized injury.'"[99]

Considering the unconstitutional configuration of a voting district analogous to the circumstances in *Howell*, the majority reasoned that a district whose lines were drawn based on racial motivations was akin to the situation here.[100] In vote-dilution cases, Chief Justice Lemons explained, the concept of packing requires a comparison—one voter or class of voters is harmed comparatively rather than absolutely.[101] The relevant comparison here is between a state with a voting population including 206,000 felons, and one without those voters.[102] Thus, Chief Justice Lemons declared the court has the authority to decide the dispute.[103]

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94 *Id.* at 712 (quoting Goldman v. Landsidle, 552 S.E.2d 67, 72 (Va. 2001)).

95 *Id.* at 714-15.

96 571 S.E.2d 100 (Va. 2002).

97 Howell v. McAuliffe, 788 S.E.2d 706, 713 (Va. 2016); *see Wilkins*, 571 S.E.2d at 107.

98 *Id.* (citing *Wilkins*, 571 S.E.2d at 107).

99 *Id.* (quoting *Wilkins*, 571 S.E.2d at 107).

100 *See id.*

101 *Id.* at 714; *see also id.* at 729 (Mims, J., dissenting).

102 *Id.*

103 Howell v. McAuliffe, 788 S.E.2d 706, 715 (Va. 2016).

2. The Constitutionality of Governor McAuliffe's Executive Order

Skipping the text, Chief Justice Lemons began his analysis of the constitutionality of Governor McAuliffe's Executive Orders by reviewing the historical use of the clemency power by all prior Virginia governors.[104] Citing to Virginia legal tradition, Chief Justice Lemons declared that any evaluation of a potential expansion of the executive power requires a "cautious and incremental approach."[105] Taking this "cautious and incremental approach," Chief Justice Lemons considered the following: whether any other governors had acted like this; whether any governors said they could have acted like this; and whether any governors looked into acting like this.[106] An investigation of those points showed Chief Justice Lemons that scores of restoration orders had been issued before, but never *en masse*; no governor of record ever declared that the power existed; and one governor reviewed the possibility of restoring *en masse*, but independently concluded that he could not act in that manner.[107] Looking also to proposals to amend the language of the Disenfranchisement Clause, Chief Justice Lemons coupled what is essentially gubernatorial inaction with the inference that such proposals would be unnecessary if the power to restore *en masse* as exercised by Governor McAuliffe had in fact existed all along.[108]

Although these observations are important, Chief Justice Lemons's "cautious and incremental approach" omits a very crucial element.[109] Absent from Chief Justice Lemons's opinion is any discussion of the legislative intent behind the Disenfranchisement Clause.[110] The historical record is replete with evidence that the Disenfranchisement Clause existed to stifle the black vote.[111] This is important because it creates a strong ability to infer that the inaction is not from the nonexistence of power, but rather that the non-use is

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104 *See id.* at 716

105 *Id.* at 710.

106 *Id.* at 716.

107 *See id.* at 716-17.

108 *See id.* at 717 (H.J. Res. 119 proposed to change: "unless his civil rights have been restored by the Governor or other appropriate authority" to "unless he has served his full sentence and has been released back to civil society.").

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

110 *See id.* at 716-24.

111 *See supra* Part I.

because governors did not desire to secure political and civil rights for black citizens.[112] At a minimum, this could have neutralized Chief Justice Lemons's gubernatorial inaction argument, and forced Chief Justice Lemons to address the text. Furthermore, Chief Justice Lemons's inclusion of the recent legislative failures to amend the Disenfranchisement Clause is misplaced.[113]

Chief Justice Lemons points specifically to the attempt to change the language of the Disenfranchisement Clause from "unless *his civil rights have been restored by the Governor or other appropriate authority*" to "unless *he has served his full sentence and has been released back to civil society*."[114] The effect of this amendment would be to change the condition upon which a felon has his rights restored to "release back to civil society"—automatic—to "restoration by the governor or other appropriate authority"—not automatic.[115] This seems to indicate that Chief Justice Lemons viewed the Executive Orders and the promise from Governor McAuliffe to issue similar orders through the end of his term as something that would be carried out infinitely by all successive Virginia governors.[116] Chief Justice Lemons briefly entertains the notion that a novel executive power may exist, however he quickly dismisses it after echoing Justice Holmes's adage that "a page of history is worth a volume of logic."[117]

This analysis seems neither cautious nor incremental. Choosing so-called common-sense inferences over the practical construction of the text seems more heedless and circumscribed. By choosing to focus his interpretation of the constitution on history rather than text, Chief Justice Lemons seriously errs in failing to consider the likelihood that the inaction of the prior governors, at least in some capacity, could be because those governors did not want to empower black voters. This explanation is just as compelling as his ultimate conclusion that the

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112 *See supra* Part I.

113 *See Howell*, 788 S.E.2d at 717.

114 *Id.* (emphasis added).

115 *See id.*

116 *Press Release*: Governor McAuliffe Restores Voting and Civil Rights to Over 200,000 Virginians, OFFICE OF THE GOVERNOR (Apr. 22, 2016), https://governor.virginia.gov/newsroom/newsarticle?articleId=15008 ("[The Governor] also instructed the Secretary of the Commonwealth to prepare a similar order monthly in order to restore the rights of individuals who complete their sentences in the future.").

117 *See Howell*, 788 S.E.2d at 717.

prior seventy-one governors did not use the power because the power did not exist.[118]

B. *The Dissent by Justice Mims*

The dissent from Justice Mims presents in two parts. First, Justice Mims explained that because the relief sought by petitioners are writs of mandamus, it is particularly important that the petitioners meet the standing requirements, otherwise the court runs the risk of violating the separation of powers. And second, Justice Mims asserted that it is *Goldman v. Landsidle,*[119] not *Wilkins*, that controls the standing analysis here.[120] According to Justice Mims, the remedy of mandamus is an extraordinary one because by issuing a writ, a court is essentially compelling public officials in co-equal branches of government to perform their duties.[121] Describing standing as a safeguard to prevent a court from exceeding its limited role, Justice Mims cautioned the court that the level of interest or importance to the public holds no role in a court's standing inquiry.[122] "Thus, we must be circumspect with how we exercise our power to find standing, lest we create a right of action that tramples upon the constitutional role of the General Assembly to enact statutes that establish standing requirements."[123]

Justice Mims then explained that the majority was wrong to apply *Wilkins* in this instance.[124] Applying *Wilkins* to *Howell* simply because it is a vote-dilution case is misplaced; it is actually *Goldman* that controls here.[125] In *Goldman*, the court clarified the standing inquiry applicable to "citizen" or "taxpayer" suits seeking mandamus relief against the Commonwealth and its officers requires the petitioner to demonstrate a direct interest in the "controversy that is separate and distinct from the interest of the public at large."[126] Disagreeing with the majority's conclusion that the petitioners should receive the benefit of *Wilkins*'s "inference of particularized injury," Justice Mims asserted that neither precedent nor fact supports the

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118 *Id.* at 720.
119 *See generally* 552 S.E.2d 67 (Va. 2001).
120 Howell v. McAuliffe, 788 S.E.2d 706, 727-28, n.2 (Va. 2016) (Mims, J., dissenting).
121 *Id.* at 725-26.
122 *Id.*
123 *Id.* at 727.
124 *Id.* at 727-28.
125 *Id.* at 727 n.2, 728-29.
126 Goldman v. Landsidle, 552 S.E.2d 67, 72 (Va. 2001).

analogy to *Wilkins* here.[127] Like the single taxpayer to whom the court did not grant standing in *Goldman*, petitioners' interest here is shared with several millions of people and is thus "comparatively minute and indeterminable."[128] Furthermore, the presumption that effects of the payments from those funds on the taxpayers interest is "so remote, fluctuating, and uncertain," the petitioners here show no injury beyond the dilution of voting power millions of other Virginia voters *might* experience.[129] Because the court is not prescient, there is no way to predict how or if the felons touched by McAuliffe's Executive Orders will vote; things are "so 'uncertain that no basis is provided for judicial intervention.'"[130] Finally, Justice Mims explained that because the pool of voters before the Executive Orders potentially have their vote diluted equally, the petitioners do not meet the sufficient interest requirement because that interest is not separate and distinct from the public at large.[131]

Justice Mims did note that a particularized injury could be established on a more developed record, but stated that

> [a]t this time, the petitioners as voters have not shown a representational injury. They can only generally allege that they are injured per se by the expanded electorate. This generalized grievance fails to establish an interest that is "separate and distinct" from the public at large.[132]

C. *The Dissent by Justices Powell and Goodwyn*

Justice Powell, with whom Justice Goodwyn joined in dissenting, disagreed with the majority on every major point of law.[133] Like Justice Mims, Justice Powell found that the petitioners lacked standing.[134] Regarding the constitutionality of the Executive Orders, Justice Powell said the majority ignored the plain language of the constitution,

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127 Howell v. McAuliffe, 788 S.E.2d 706, 727-28 (Va. 2016) (Mims, J., dissenting) (quoting Wilkins v. West, 571 S.E.2d 100, 107 (Va. 2002)).

128 *Id.* at 726.

129 *Id.* at 727-29.

130 *Id.* at 729 (quoting *Goldman*, 552 S.E.2d at 71-72).

131 *Id.*

132 *Id.* at 729-30.

133 *See* Howell, 78 S.E.2d at 731 (Powell, J., dissenting).

134 *Id.*

which does not explicitly require case-by-case reviews in granting the governor the ability to restore voting rights.[135]

1. Standing of the Petitioners

According to Justice Powell, the principles of standing "require[ ] the plaintiff to show that he . . . suffered an injury in fact—an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical."[136] *Wilkins* adopted the injury in fact requirement, and absent that element, an "individual 'would be only asserting a generalized grievance against government conduct'" of which he disapproves.[137] Although the majority interprets *Wilkins* here as standing for "the proposition that an individual's residency in an [unconstitutionally configured] district is sufficient to confer standing to challenge the non-compliance with a constitutional provision in the voting context, without further proof of personalized injury," Justice Powell believes this application to be overbroad.[138]

Justice Powell asserted that the court only carved out a narrow exception in *Wilkins* because the insidious nature of racial gerrymandering likely makes it difficult to demonstrate a particular injury.[139] Here, she says, the majority's interpretation of *Wilkins* removes the context of the narrow application.[140] Justice Powell also describes the claim of voter-dilution in this case as vague and hypothetical, claiming it rests on the presumption that an injury is likely to happen in the future.[141] Further, vote-dilution is neither particularized nor personal because every other voter in the Commonwealth is equally affected.[142] Thus, Justice Powell argued, unless the claim is based on racially gerrymandering, residency does not confer standing.[143]

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135 *Id.* at 733.

136 *Id.* at 731. (quoting U.S. v. Hays, 515 U.S. 737, 459 (1995)).

137 *Id.* at 731 (Va. 2016) (Powell, J., dissenting) (quoting Wilkins v. West, 571 S.E.2d 100, 107 (Va. 2002)).

138 *Id.* (internal citations omitted).

139 *See Howell*, 788 S.E.2d at 732 (Powell, J., dissenting).

140 *Id.*

141 *Id.*

142 *Id.*

143 Howell v. McAuliffe, 788 S.E.2d 706, 732 (Va. 2016) (Powell, J., dissenting).

2. Interpretation of the Constitution of Virginia

Justice Powell caveated that even if petitioners could show an injury in fact, she saw "nothing in the Constitution of Virginia [that] renders the manner in which the Governor exercised his authority in th[e] Executive Order . . . unconstitutional."[144] Rather, Justice Powell explained she "believe[s] that the plain language of the Disenfranchisement Clause is unambiguous and places no limitations on the Governor's power to remove political disabilities."[145] Attacking the majority's decision to be highly persuaded by no prior governor previously issuing *en masse* restoration of rights, Justice Powell reminded the court that the proper focus of the analysis is the text.[146]

Justice Powell argued that the majority's opinion places an "inconsistent limitation on the Governor's authority" and "allows a court to pick and choose what parts of the constitution it is going to enforce."[147] By arguing that Governor McAuliffe suspended the constitution's automatic disenfranchisement of felons, Justice Powell wrote, the majority ignored the very next phrase: "unless his rights have been restored by the governor."[148] Justice Powell strongly concluded, "[i]n other words, in holding that the Executive Order suspends the Disenfranchisement Clause, the majority ignores the fact that, to the extent that it is a suspension, the language of the [C]onstitution [of Virginia] expressly allows for such suspension."[149]

III. EXECUTIVE ACTION AND JUDICIAL REPONSES IN OTHER JURISDICTIONS

Virginia is not the only state with a restrictive felony disenfranchisement policy.[150] Virginia is also not the only state whose constitution grants the governor the power to remove political disabilities.[151] Of those states, Kentucky and Iowa fall into both categories.[152] Recently, governors in both states issued *en masse* restora-

144 *Id.* at 740.
145 *Id.*
146 *Id.* at 737.
147 *Id.* at 735.
148 *Id.* at 736 (citing VA. CONST. art. II, § 1).
149 Howell v. McAuliffe, 788 S.E.2d 706, 736 (Va. 2016) (Powell, J., dissenting).
150 *See* Chung, *supra* note 2.
151 *See id.*
152 *See id.*

tion of rights to disenfranchised felons.[153] In both instances, the governors faced legal actions challenging their authority to issue such blanket restorations.[154] This Part briefly describes the governors' actions, the legal challenges, and the judicial responses in Kentucky and Iowa, respectively.

A. *Kentucky*

In 2005, Kentucky Governor Ernie Fletcher issued an executive order pardoning "nine individuals indicted by a grand jury as well as 'any and all persons who have committed, or may be accused of committing, any offense up to and including the date hereof, relating in any way to the current . . . investigation.'"[155] Paralleling the language in the Constitution of Virginia's, the Kentucky constitution states, "[the Governor] shall have power to . . . grant reprieves and pardons, except in case of impeachment, and he shall file with each application therefor a statement of the reasons for his decision thereon, which application and statement shall always be open to public inspection."[156]

In evaluating the validity of the Governor's order, "the Supreme Court of Kentucky held that '[n]othing in the language of [this provision] infers that general pardons are prohibited, nor is there an indication that a governor may not pardon a class of persons.'"[157] Taking the practical construction of the text, the court explained that "[i]f the framers sought to prohibit general pardons, they would have so stated in the language of the provision."[158]

Not ten years later, then-Kentucky Governor Steven L. Beshear restored political disabilities to "all offenders convicted of crimes under Kentucky state law and who have satisfied the terms of their probation, parole, or service of sentence" *en masse* via an executive order.[159] Included in those political disabilities restored was the right

153 Brief on Behalf of Law Professors as Amici Curiae in Support of Respondents at 30, 32 Howell v. McAuliffe, 788 S.E.2d 706 (Va. 2016) [hereinafter Brief].

154 *Id.* at 30.

155 Executive Order 2005-924, Ky. Exec. Order No. 2005-924 (August 29, 2005); *see also* Brief, *supra* note 153, at 30.

156 KY. CONST. § 77; *see also* Brief, *supra* note 153, at 30.

157 Fletcher v. Graham, 192 S.W.3d 350, 358 (Ky. 2006); *see also* Brief, *supra* note 153, at 31.

158 *See Fletcher*, 192 S.W.3d at 358-59; *see also* Brief, *supra* note 153, at 31.

159 *See* Ky. Exec. Order No. 2015-871 (Nov. 24, 2015); *see also* Brief, *supra* note 153, at 31.

to vote with "both [a] prospection and retroactive application."[160] After the conclusion of Beshear's term, his successor, Governor Matthew G. Bevin, reversed course and suspended further restorations; however, he did not undo the restoration of rights that had already occurred.[161]

B. *Iowa*

In 2005, Iowa Governor Tom Vilsack issued an executive order restoring rights to offenders who had completed their sentences but had not applied to have their rights restored.[162] Iowa's constitution states that, "the governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offences except treason and cases of impeachment, subject to such regulations as may be provided by law."[163] "Governor Vilsack's executive order [ ] restored the voting rights of 'all offenders that [were] completely discharged from criminal sentence, including any accompanying term of probation, parole or supervised release, as of [the date of the order], but [had] not [personally applied for the restoration of rights pursuant to the established application process].'"[164]

An attorney in Iowa challenged the governor's power to restore rights, arguing that the governor could not restore citizenship rights *en masse* "in light of the application process under Iowa Code Chapter 914." Unpersuaded by that argument, the Iowa District Court held that "the governor's power to restore voting rights is 'subject to such regulations as may be provided by law.'"[165] Thus, the court concluded that the ability of a felon to apply for his rights to be restored does not suggest that the governor may only restore the rights in such circumstances, and that on his own motion the governor may "grant[ ] clemency to any one person or to a thousand as has been done by

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160 *See* Ky. Exec. Order No. 2015-871 (Nov. 24, 2015); *see also* Brief, *supra* note 153, at 31, n.8.

161 *See* Ky. Exec. Order No. 2015-052 (Dec. 22, 2015); *see also* Brief, *supra* note 153, at 31-32.

162 Ruling on Motions for Summary Judgment at 1, Allison v. Vilsack, No. EQCV016165 (Iowa Dist. Ct. Oct. 27, 2005) [hereinafter Ruling]; *see also* Brief, *supra* note 153, at 32.

163 IOWA CONST. art. IV, § 16; *see also* Brief, *supra* note 153, at 32.

164 Iowa Exec. Order No. 42 (July 4, 2005), *available at* https://goo.gl/pmMNgZ; *see also* Brief, *supra* note 153, at 32.

165 *See* Ruling, *supra* note 162, at 4; *see also* Brief, *supra* note 153, at 33.

Executive Order 42."[166] In 2011, a subsequent governor rescinded the executive order, but like Kentucky, the Governor did not remove the rights that had been restored via Executive Order 42.[167]

C. *Comparison to* Howell v. McAuliffe

The situations in Kentucky and Iowa make compelling comparisons for a few reasons. First, in *Howell*, Chief Justice Lemons interpreted the *en masse* restoration order as suspending the Disenfranchisement Clause. Specifically, Chief Justice Lemons perceived the Executive Orders as permanently inverting the Disenfranchisement Clause. The actions by the governors in Kentucky and Iowa evidence an understanding that, without the existence in the state constitution of a specific limitation, clemency powers may be exercised *en masse*.[168] To the extent courts have reviewed challenges to such *en masse* restorations, those restorations have been unanimously upheld.[169] And second, Chief Justice Lemons's belief of this inversion rests on the presumption that all governors in the future will continue this practice. Also, as Kentucky and Iowa demonstrate, succeeding governors can choose to either continue issuing *en masse* restoration orders or halt the practice if they so choose.

IV. VULNERABILITIES CREATED BY THE HOLDING IN *HOWELL*

In Virginia, courts are careful not to interpret a law such that an absurd result would follow. However, Chief Justice Lemons's interpretation in *Howell* did just that.[170] Moreover, Chief Justice Lemons's analysis of the interpretation of the Constitution of Virginia chooses to ignore the plain reading of the text, and instead relies heavily on government inaction, altogether ignoring legislative intent.[171] Lastly, the application of *Wilkins* in *Howell* broadens standing in vote-dilution cases, abandoning the requirement of racial gerrymandering allegations as the one standing situation where the court will infer a particularized injury.[172] This Part first critiques the absurd result and

166 *See* Ruling, *supra* note 162, at 4; *see also* Brief, *supra* note 153, at 33.
167 *See* Iowa Exec. Order No. 70 (Jan. 14, 2011); *see also* Brief, *supra* note 153, at 33.
168 *See supra* Part III.A-B; *see also* Brief, *supra* note 153, at 30.
169 *See supra* Part III.A-B; *see also* Brief, *supra* note 153, at 30.
170 *See* Howell v. McAuliffe, 788 S.E.2d 706, 716-24 (Va. 2016); *see also supra* Part II.A.
171 *See id.*
172 *See Howell*, 788 S.E.2d at 736.

then postulates how these consequences of *Howell* might affect Virginia jurisprudence moving forward.

A. *The Absurd Result: McAuliffe's Post-Decision Actions and the Motion for Contempt*

Justice Powell made a point to warn the court that "the plain, obvious, and rational meaning of a statute is to be preferred over any curious, narrow, or strained construction, and a statute should never be construed in a way that leads to absurd results."[173] In *Howell*, the court ignored the practical construction and interpreted the constitution as limiting the governor's ability to restore political rights to an individual basis.[174] Thus, Governor McAuliffe may not restore the rights of 2, 200, or 206,000 felons in a single order—rights may only be restored one at a time.[175]

Unfazed by the judicial setback, Governor McAuliffe initiated a process whereby he individually restored the rights using an autopen.[176] Incensed by what the petitioners in *Howell* viewed as a defiance of the court's decision, the petitioners filed a motion to hold Governor McAuliffe in contempt.[177] In a unanimous vote, the Supreme Court of Virginia rejected the request, thereby permitting Governor McAuliffe's mass individualized restoration effort.[178] Retrospectively, it makes it look like the court was not answering the question of "whether the Governor has done something he has no [power] to do, but rather whether he has done what he has the [power] to do in an unconstitutional manner."[179] Although no court is required to tailor the law around what is or is not efficient, what is absurd here, is that the two processes have the same effect yet the efficiency of the constitutional process pales in comparison to the unconstitutional one.

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173 *Id.* at 728 (Powell, J., dissenting) (citing Ricks v. Commonwealth, 778 S.E.2d 332, 335 (Va. 2015) (citation, alteration and internal quotation marks omitted)).

174 *Id.* at 716-24.

175 *Id.* at 723-24.

176 *See* Balingit, *supra* note 16; Rosiak, *supra* note 16.

177 Mot. for an Order Requiring Respondents to Show Cause Why They Should Not Be Held in Contempt for Violating the Writ of Mandamus, Howell v. McAuliffe, 788 S.E.2d 706 (Va. 2016) (No. 160784).

178 Upon a Petition for Writs of Mandamus and Prohibition, Howell v. McAuliffe, 788 S.E.2d 706 (2016) (No. 160784); *see also* Moomaw, *supra* note 17.

179 *See* Howell v. McAuliffe, 788 S.E.2d 706, 733 (Va. 2016) (Powell, J., Dissenting).

B. *Implications from the Misapplication of* Wilkins

The decision in *Wilkins v. West* was a narrow one.[180] In *Wilkins*, the court "considered the standing requirements necessary to maintain a challenge to redistricting legislation in two contexts [only]: (1) claims that electoral districts were racially gerrymandered, and (2) claims that electoral districts violated the compactness and contiguity requirements" of the Constitution of Virginia.[181]

In *Howell*, relying on *Wilkins*, the court essentially took a narrowly tailored application—a vote-dilution case where the court was willing to infer the particularized injury required for standing because of the particularly egregious nature of racial gerrymandering—and applied it to a case with a claim of generalized vote-dilution.[182] The comparison of the Virginia voting population with and without the felon voters is not analogous to voters within and without a racially gerrymandered district, specifically because there is no racial gerrymandering.[183] By doing this, the court jettisoned the extremely limited application of this inference, thereby allowing for the argument that particularized injury should be inferred in any case involving a vote-dilution claim.

The application of *Wilkins* here creates the ability to argue that the pre-law population can be appropriately compared to the post-law population. For example, imagine Virginia passes a law lowering the voting age to seventeen from eighteen. Applying *Howell* to this scenario, any individual who, at the time the law was passed, was eighteen or older would have standing to challenge this law under this vote-dilution theory. The purpose of the judiciary—in Virginia and in the nation at-large—is to address individual controversies with actual specific injury, not to challenge general laws or policies with which the litigants disagree.[184] This contrivance of distinct populations before the law and after the law is tenuous—at best—and leaves the notion of separate and distinct from the public at-large near meaningless.

An alternate situation where this broad application of *Wilkins* may have implications for future legal proceedings is regarding taxpayer standing. In Virginia, an individual taxpayer generally has

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180 *Id.* at 728-29, 732.

181 *Id.* at 728 (citing Wilkins v. West, 571 S.E.2d 100, 106-07 (Va. 2002)).

182 *Id.* at 727-28.

183 *See Howell*, 788 S.E.2d at 732 (Powell, J., dissenting).

184 *Id.* at 725-26 (Mims, J., dissenting).

standing to challenge an act of a city or county where he lives, but does not have general standing to challenge state expenditures.[185] If the logical leap Chief Justice Lemons takes applying *Wilkins* to *Howell* holds, then it can be imagined that a reasonable comparison in the taxpayer scenario is applicable from local expenditures to those at a state level.

C. *Implications for Constitutional Interpretation*

Chief Justice Lemons ignores the plain reading of unambiguous text in favor of a creative interpretation based heavily on if or how the prior seventy-one governors of Virginia restored political rights to felons.[186] This is especially peculiar because he invokes the longstanding history of the government yet chooses not to acknowledge the legislative intent behind the Disenfranchisement Clause.[187] Had Chief Justice Lemons done so, he would have at least considered that the reason for most of the inaction could have been the same reason the clause was inserted. In other words, the lack of any prior *en masse* restoration is not because such power did not exist, but rather because many Virginia governors did not want to empower the black vote.[188] Perhaps this theory is not accurate; however, at a minimum, this point could have neutralized the gubernatorial inaction argument, and forced Chief Justice Lemons to address the text.

The observation of the omission of the legislative intent is noteworthy for two reasons. One, the majority's interpretation of the text is wrong, and Chief Justice Lemons buttresses it with this spurious executive-history argument. If he had given even slight attention to legislative history—i.e. the racist roots of this law—this might have enlightened why executive inaction was not particularly noteworthy. And two, because the legislative intent here is so clear, yet ignored, parties before the court in future cases can point to *Howell* as a reason why legislative history deleterious to their argument can be totally disregarded.

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185 *See* Gordon v. Bd. of Supervisors, 153 S.E.2d 270, 271 (Va. 1967) (holding that taxpayers have standing to challenge an expenditure of public funds by a locality).

186 *See* Howell v. McAuliffe, 788 S.E.2d 706, 716-724 (Va. 2016).

187 *Id.*

188 *See supra* Part I.

CONCLUSION

Although the full impact of *Howell* may not be immediately known, there are two areas susceptible to exploitation based on its holding. First, the court misapplied *Wilkins*, opening the court's docket to a slew of cases traditionally viewed as political. Second, the court's evaluation of legal text by invoking legal history without considering the impetus of the text creates a compelling vehicle for manipulation of constitutional arguments moving forward. Specifically, the argument that legislative intent holds no role in statutory interpretation.