ALISON MCKEE: Good afternoon. For those of you just joining us this afternoon, my name is Alison McKee. I am the immediate past president of the Virginia Bar Association. Welcome to the t 131s annual meeting, which as you know, we typically have in Williamsburg, but in light of the pandemic circumstances, we are having a completely virtual meeting today. So thank you for being with us this afternoon.

I'd like to introduce this afternoon's Baliles Legacy Presentation Series on the Constitution of Virginia at 50, Looking Back and Looking Ahead, An In-Depth Analysis of the Commonwealth's Governing Document. This program is being chaired by the Committee on Special Issues of National and State Importance, which is chaired by David Landen of the Landen Law Group in Richmond. Unfortunately, David could not be with us here this afternoon.

But I really want him to know how much we appreciate his hard work with the Committee and indeed the work of the entire committee in bringing us quality programs time and time again. So thank you to all of you, especially to David, for your hard work. This program is being sponsored by the Landen Law Group LLC, Charlson, Bredehoft, Cohen, and Brown PC and Dominion Energy. Thank you, sponsors, for sponsoring this very important and exciting program.

I'd now like to introduce our panelists, beginning with my own Con Law Professor from back in the early '80s at UVA Law School, AE Dick Howard. Professor Howard is the Warner Booker Distinguished Professor of Law at the University of Virginia. He served as executive director to the Commission on Constitutional Revision, was counsel to the General Assembly when it reviewed the commission's recommendations and directed the successful referendum campaign for the Constitution's ratification.

Our panelists are Rebecca Green. Rebecca teaches Election Law, Legislative Redistricting, and GIS, ADR, and Privacy Law. She of the election law program, a joint project of William and Mary Law School and the National Center for State Courts, a project that seeks to provide resources for judges deciding election cases.

Our next panelist is Juliet Clark. Juliet Buesing Clark is a student at the University of Virginia, expecting to graduate in May with a JD and master of public policy. After graduation she will clerked for the Honorable Leonie Brinkema in the Eastern District of Virginia for one year before joining McGuire Woods LLP in Richmond. Her note, From Massive Resistance to Quiet Evasion, The Struggle for Educational Equity

and Integration in Virginia, is slated for publication in the *Virginia Law Review* next fall. Juliet holds a Bachelor of Arts from Yale and a Master of Education from the University of Massachusetts in Boston, where she taught English at a title one public high school for five years prior to law school.

And our third panelist is Sai Prakash, Professor Prakash is the James Monroe Professor of Law. His scholarship focuses on separation of powers, particularly executive powers Professor Prakash's most recent book, *The Living Presidency: An Originalist Argument Against Its Ever Expanding Powers* was published by Harvard Belnap Press in 2020.

He also authored Imperial From The Beginning: The Constitution of the Original Executive, Yale University Press, 2015. The former book focuses on the modern presidency, while the latter considers the presidency of the founders. Professor Prakash is a graduate of the Yale Law School and clerked for Judge Laurence H. Silberman of the US Court of Appeals for the District of Columbia Circuit and for Justice Clarence Thomas of the US Supreme Court. He was in private practice for two years before joining the Legal Academy.

Now, Professor Howard will entertain questions through the Q&A box. He will handle those questions at the end of the program. So I'd like to, before we turn it over to Professor Howard, Crystal if you could you share with our participants how they might be able to submit questions to the panel, and also how they may address any technical difficulties they may experience.

CRYSTAL: Sure, no problem. So welcome to all of our attendees. You can download today's presentation materials by clicking the blue hyperlink that's in the chat box. If you have any audio issues and you need to call in using your phone, I put the phone number, meeting ID, and password there as well for you to use. If you have any technical problems, feel free to leave a chat and I'll get back to you.

If you would like to ask a question, use the Q&A box. Because you will unfortunately not have access to your audio or video, but we'll do question and answer at the end of the presentation. Enjoy.

ALISON MCKEE: Thanks very much, Crystal. Professor Howard, we are delighted to have you with us this afternoon and I will turn it over to you right now.

AE DICK HOWARD: Thank you, Alison. I love having a former student introduce me, because I assume enough time has passed and you've forgotten all the slights of the classroom or cold calling or the like and now are in a warm-hearted mood towards your former professor. So thank you for that gracious introduction for all of us. My thank in advance to all three of the panelists. We have a first class, a star studded lineup today, three really good people. So you have a lot to expect this afternoon.

And the task that has been assigned to me as a Legacy Luncheon Speaker, even though we're virtually at lunch, I realize we're not physically together as we would like to be. But my job is to set the stage, as it were, and give you a sense of how we came to where we are so that we can then plunge with the panel into some of the current issues.

Start, if you will, with thinking about the Declaration of Rights that George Mason and his colleagues wrote in May of 1776, which became what is today the Bill of Rights of the Virginia Constitution. That Bill of Rights, that 1776 document highlights the idea of community. It says that government is instituted for the common benefit, the protection and security of the people, nation, or community.

But when the Declaration of Rights of that period turns to the question of who in that community gets to vote, who are the electorate, who gets the franchise, the language is much more qualified. It says that men must have and I quote "sufficient evidence of permanent common interest with or attachment to the community." Well, in George Mason's time of course, that meant property owners. If you didn't own property, you didn't vote.

But the language of permanent common interest and attachment is sufficiently open-ended that over the years since 1776, later generations have been able to debate and enlarge the franchise from the fairly limited number who were able to vote in the beginning. Petition after petition was filed after 1776 trying to move away from simply property owners. And we've had in Virginia, a series of conventions, the federal Constitution, of course, was drafted by the only convention we've ever seen at the local level.

But we've had, depending on how you count them, something like six constitutions

in Virginia. And they have resulted from various conventions. The first one after the Revolution was 1829 and '30, a remarkable collection of some of Virginia's leading voices, including John Marshall himself who was there as a delegate. That convention achieved only modest reforms, enlarging the franchise and the like.

The next convention, 1850, '51, actually brought us to the point of having essentially universal white manhood suffrage. That was the mid 19th century. Well, of course, Civil War and Reconstruction brought yet more change. As a price of readmission to the Union, the former Confederate states had to do two things.

First they had to ratify the 14th Amendment. And secondly, they had to write a progressive Constitution. Well, in Richmond that was the Convention of 1867, '68. They produced what became the 1870 Constitution. And that, in line with the 13th Amendment, the end of slavery, the enfranchisement of African-Americans, Black Virginians were brought to the ballot for the first time.

So the story throughout the 19th century was one of progressive enlargement, of who was entitled to be part of the political community. Well, that progressive trend came to a screeching halt in 1902. There was a convention in 1902, 1902. This is a post-Reconstruction convention. The last federal troops have left the South in 1877. And the Southern states in years after that set out to discard the progressive Reconstruction constitutions and have something much more regressive.

One of the delegates of the 1901, 1902 convention to announce the 1870 Constitution as, I quote, "the blackest page in the history of this state." And it was clear with the delegates in 1901, 1902, who were setting out to do. And they worked to achieve white supremacy. As one delegate put it, he said, I want it distinctly understood that I am here as a white man and I propose to represent white interests. And that is precisely what that convention did.

One of the other delegates was very equally explicit. He said, white supremacy is what I'm setting out to achieve. And he said that is the Anglo-Saxons who claim the right of government, a sense of inherent superiority over peoples of other races. Well, the 1870 Constitution had enfranchised blacks and the delegates in 1902 were determined to reverse that, to eliminate Blacks as much as they could from state politics.

Indeed, there were some delegates at that 1901, 1902 convention who deplored giving the franchise to lower classes of people, including whites, not limited to Blacks. One delegate said he wasn't going to see hordes of ignorant and worthless men marching to the polls. And one of his colleagues said, it's the respectable people in the community who ought to rule. He said, I'm not going to turn my people over to a rabble.

So in this atmosphere, what place did these delegates think that Blacks had in Virginia? Well, they belonged on the land. The only place they thought blacks could be useful was agricultural laborers. As one delegate said, the place they belong is the corn field and the tobacco ground as agricultural laborers. Indeed, there were some delegates who look back with nostalgia on the benign, what they thought was the benign effects of slavery.

One of them said, one of the delegates said that when the restraining hand of the master is taken away from the slave, then the intimate association between slave and master was gone. This was what later became the moonlight and magnolia sort of lost cause era, referring to the period of slavery.

The delegates in Richmond in 1901, 1902 brought history and theology into play in defending their view of white supremacy. One delegate said, ever since the dawn of history, we have seen a Black man in a position of inferiority. Other delegates pointed out it was God's plan for the universe. He said from the very beginning, God had ordained that there'd be a hierarchy of races and the white race would be superior.

It's clear to these delegates that education was wasted on Blacks. They seemed to think that Black men were incapable of cultivation or useful knowledge, as one put it. And one of the delegates said, what will you teach these Black children to read? And for every one who reads the Bible, there will be 10 who will read Jesse James or Billy the Kid or God forbid, Uncle Tom's Cabin.

And of course, higher education was even more inconceivable. One of the delegates said, what is a Black man to do with higher education? Is he going to practice law? Is he going to practice medicine? It was simply beyond belief to the delegates in Richmond that year that Blacks would be able to take advantage of

that kind of education.

Well, of course, the delegates were there not only to make speeches, but they were there to write a constitution. Reconstruction, as I said, had come to an end. And they had models at hand, because Mississippi, in 1890, had led the way and had a constitution. Other Southern states had written new post-Reconstruction constitutions. And they used a number of devices to disenfranchise Blacks, a poll tax, literacy tests, understanding clauses, grandfather clauses, all sorts of other things.

Well, what was the Supreme Court doing all this time? And were they going to stand by and see the Southern states undo the progress that had been achieved in the Reconstruction period? Surely the Supreme Court wouldn't do that. Well, I have to say they did. Because it was a test case out of Mississippi, *Williams versus Mississippi,* decided in 1898 as a challenge to that Mississippi 1890 Constitution.

And the Supreme Court said, well, it's neutral on its face. And they were not willing to worry about whether it would be administered in a way that was discriminatory or not. So that in effect, the Supreme Court had given a green light to the delegates in Richmond. They knew what they would be able to do. And as one delegate said, we propose to eliminate every Negro of whom we could be rid without running counter to the federal Constitution.

Well, they set out to make it virtually impossible for Black Virginians to register. Those people who had been in the Confederate Army or their sons would automatically be registered. Property owners were automatically registered. And anybody else, which would include most Black Virginians, had to go to the registrar and go through the following tests.

The registrar could open the Virginia Constitution to any section and ask the would be registrant to interpret that section of the Virginia Constitution. Well, there's sections of the Constitution I can't interpret. I mean, and it was clear that any Black registrant was going to confront a white registrar who was not going to be satisfied with that person's interpretation of whatever section he's been asked to read.

And as one of the delegates said, these requirements will simply be too great for the Negro. And of course, if you were a Black laborer, you're not going to give up a

day's pay to register and do something which you're going to be turned away. And so the result was, the grim reaper had gone through the ranks of Black Virginians in effect.

Back in 1867, almost half the voters in Virginia has been Black, about 100,000 voters. After 1902, there were 21,000, which is less than 5% of all registered voters. And indeed a lot of poor whites were cut from the polls as well. So, when you think about George Mason's language of community, and the question of who belongs to the political community, what you're really asking is a question of who belongs and who doesn't and who counts and who does not in this political community.

And the 1902 Constitution made that clear, not only in the voting franchise provisions, but also by such things as making it clear that public schools were to be segregated. That had not been in the Constitution before, but now it was. So we embarked on the era of the first half of the 20th century, some of you will remember that era, the age of the Berg Machine, a genteel machine to be sure.

It didn't necessarily have to crack skulls. But everybody knew who was in control. And the small electorate were largely the top of the Berg machine. And that carried us right into the mid century after World War II and into the 1960s, when change was in the air. And we know, we were there and we've read about the 1960s and what a decade of turmoil it was. The assassinations of John F. Kennedy, Robert F. Kennedy, Martin Luther King, an era of riots and arson in the cities, and anti-Vietnam protest and the like.

It was also of decade of constitutional change and I would say progress. One person, one vote, the Supreme Court had decreed that at state and federal elections. Congress had passed the Voting Rights Act of 1965, which of course, applied to Virginia. The Supreme Court has struck down the poll tax.

So a number of changes came about. And it was about that point, that Governor Mills Godwin appointed a Commission on Constitutional Revision. It was a remarkably talented group of people. Its members included Lewis Powell who later sat on the US Supreme Court, Harvey Dillard, later on the World Court at the Hague, Colgate Darden, the former governor of Virginia, former UVA president, Oliver Hill, who was a leading Civil Rights attorney in Virginia. He was the Thurgood Marshall of

Virginia in those days.

So it was a remarkable group of people who set to work in drafting what is now the Constitution of Virginia. The revisors passed their recommendations along to the General Assembly, who then made further changes. The proposed Constitution went to the ballot in November, 1970. And after a fairly brisk referendum campaign, the Constitution was approved by 72% of the voters. I would say if you were running for office, that would be something of a landslide.

So that brought about the Constitution we have. And quickly to sum up with two or three of the main achievements. Riffing off the idea of the political community of who belongs and doesn't, the new Constitution has, for the first time, an anti-discrimination clause. It prevents governmental discrimination based on race or color, national origin, or sex. The Education Article, Juliet will be talking about that in a few minutes, the Constitution mandates a statewide system of public education for every child of school age.

Of course that was a way of repudiating the legacy of massive resistance and closed schools in places like Prince Edward County. Indeed the Constitution places an enforceable duty on the localities. Once the General Assembly comes up with a funding formula, the counties and cities have to provide their share. And they can be mandamus by the attorney general. I think the revisors understood the direct link between education and civic virtue. Because they placed education on the Bill of Rights, drawing on language from Thomas Jefferson's Bill for the More General Diffusion of Knowledge, education now takes place along more traditional rights such as free exercise of religion or expression.

The Board of Education has promised it in fashioning standards of quality and Juliet will be talking about that. So I think a fair distance was traveled from the Constitution of 1902 to the one that's presently in place. Of course the time has passed. No document is ever unchangeable. Thomas Jefferson famously said that each generation should look at the Constitution and see whether it serves the purposes only of our time and not yesterday.

So there are questions which no doubt we could put on the table to think about. Rebecca will be telling us about voting and reapportionment. The voters of Virginia

have approved as you know, an Amendment to the Constitution that provides for the creation of a bipartisan commission to draw district legislative lines. We shall see how that works out, whether it is up to the task of dealing with partisan gerrymandering and the like.

Restoring the voting rights of felons is an issue I would put on the table, because the Supreme Court of Virginia has been fairly strict in dealing with the governor's power. And Virginia, unfortunately is one of the strictest states in the country. And it is possible to restore voting rights, but it's not an easy process.

Dillon's Rule is an issue we might think about. The Commission on Constitutional Revision had proposed reversing Dillon's Rule, but the General Assembly chose not to do that. So Dillon's Rule is still in place. And then certainly I'll be asking the question is it time to loosen the constitutional restrictions on local government.

So here we are. This year is the 50th anniversary. July the 1st of 2021, it will be exactly six years from the date on which the present Constitution came into being. And I think it invites us to think about, to revert once again to George Mason's Declaration of Rights. One of the aphorisms in that durable document is that it reminds us that, and I'm quoting it, "no free government nor the blessings of liberty can be preserved to any people but by a frequent recurrence to fundamental principles."

Frequent recurrence to fundamental principles. I think that's a very enduring dictum for us. We live in an age, we follow the news. We know what's going on here and abroad. It's an age in which liberal, constitutional democracy seems to be under siege in so many countries. I think of Hungary and Poland for example, any number of countries. And which at times, we've been buffeted here in our own country as well.

So if you think about a state constitution as being a place where the people of that state, here the Commonwealth of Virginia, will write their own hopes and aspirations, I think we could use this anniversary to ask the question of whether we can use the Constitution of Virginia to nurture self-government, free people, in a way which is both just and inclusive. That's sort of homework I would place on the table for my former students and my other friends at the Virginia Bar and beyond.

So with that point of departure, let's turn to the members of the panel. They've been introduced, so I don't have to give you their biographical sketches. We will hear from them in the order first from Rebecca Green on voting rights and partisan gerrymandering. We'll hear from Juliet Clark on education. And finally from Sai on executive powers in Virginia. So, Rebecca, may I turn it over to You

REBECCA GREEN: Yes, you may. Thank you. Thank you so much, Professor Howard. And to the Virginia Bar Association for inviting me to participate. I had the honor of being on a commission to amend Virginia's Constitution to change how we draw district lines with Professor Howard a few years ago. And I'm really grateful for the opportunity I had to get to know him and have tremendous respect for him. So it's an honor to be here.

When Professor Howard reached out last April, to invite me to join this panel, I remember thinking it seemed like a long way off. And I guess I couldn't have known what a long way off it actually was, given what we've been through with this election in the intervening months. But in the conversation today about Virginia's Constitution, as Professor Howard said, I am going to be talking about two election related provisions.

The first has to do with who Virginia welcomes into its political polity through mounting pressure on our Constitution's permanent disenfranchisement of people with felony conviction histories. And the second is a dramatic change to how Virginians draw state legislative and congressional districts. Calls for reforms in these areas come from, on the one hand, recognition of Virginia's long and troubled history of suppressing minority voters and the recognition that Virginia is an outlier in its permanent disenfranchisement of people with felony conviction histories.

And for the other, from a common sense understanding that self-interested legislators drawing their own districts in a back room undermines potentially the interests of voters. So I'll just spend a few minutes talking about each with particular reference to how we got here and what lies ahead. So starting with voting rights of people with felony conviction histories.

Both the permanent exclusion and the governor's power to restore civil rights is contained within executive clemency powers in Article V Section 12 of the Virginia

Constitution. The last three governors have been aggressive in restoring voting rights, starting with Governor McConnell and going into hyperspeed with Governor McAuliffe and continuing apace in Governor Northam's administration.

Over the years, we've seen several attempts to challenge Virginia's constitutional disenfranchisement provisions directly in court, but none have been successful. Challenging felony disenfranchisement provisions in state constitutions is generally an uphill battle, since the practice is recognized and therefore legitimated by explicit text in the 14th Amendment of the federal Constitution. But in one case called *Hunter versus Underwood,* the US Supreme Court did find that although Alabama's voter disenfranchisement provision was facially neutral, the original enactment was motivated by a desire to discriminate against Black Alabamans on account of race.

Generally, the Supreme Court is reluctant to base a determination of discriminatory intent on legislative history. But the Supreme Court overcame its usual reluctance to do so in *Hunter* because of an overwhelming amount of evidence that the Alabama Constitutional Convention was specifically aimed at disenfranchising African-Americans. As the 11th Circuit below characterized it, when the Alabama Constitutional Convention assembled in May of 1901 the question was not whether to disenfranchise African-Americans, but rather how best to do so through constitutional means.

As Professor Howard described, Virginia's history, like Alabama's in *Hunter* is undeniably awash in racism. But unlike in *Hunter* this racism can't be directly linked for legal purposes to the felon disenfranchisement law in Virginia's state Constitution. Like Alabama's, as Professor Howard described, the 1901 convention was fraught with appalling and unabashed racism. Among the many examples just to add to the ones he provided, delegate Walter Watson noted on record that the great underlying principle, this is a quote, "of this convention moment, the one object and cause which assembled this body was the elimination of the Negro from the politics of this state."

Still, the felon disenfranchisement provision itself was not the result of disenfranchisement efforts in 1901. In fact, it was apparently never discussed. This is because the Virginia legislature passed the original Felony Voting Act in 1830 at a

time when Virginia denied African-Americans suffrage outright. And so this history undermines a *Hunter versus Underwood* style attack against the provision.

And whatever arguments might have been marshaled against the 1901 Constitution have even less purchase due to the intervening 1971 Constitution, in which of course, racism was not at all the goal. So this brief foray into the history of the provision suggests that Northam is right, that the only way to do away with this provision is through Constitutional Amendment. And it remains to be seen whether the will is there.

But it is worth noting that doing so would bring Virginia's voting laws in line with the vast majority of other states on this issue. I grew up in Vermont, which is one of two states which allows people to vote in prison. The vast majority of other states automatically restore rights upon completion of sentence.

I thought I would quickly mention my work on this issue with students at William and Mary Law School through a project called Revive My Vote. We started it back in 2013 to help eligible Virginians regain the right to vote. Starting with the McDonnell Administration and even more so today, it's pretty easy today to restore one's voting rights.

The governor is actively looking for people who are eligible and anxious to help them regain the right to vote. That said, Revive My Vote works with a frustratingly large number of applicants who are consistently denied restoration. This is usually due to administrative hurdles. When the Rights Restoration office can't locate required documentation, sometimes this is because the crime occurred out of state. Sometimes it's a federal court and federal courts sometimes refuse to share records citing privacy concerns, which is strange.

Sometimes it's because the offense occurred in the distant past. In one instance, the needed court record was about a crime that occurred in the 1970s. But the courthouse had subsequently burned down and all of the records had been destroyed. Another extraordinary problem is the inability of the governor to locate eligible Virginians, whether it's because of nuptial name changes, frequent moves or otherwise. When the governor's office confirms sentences have been completed and sends out grant orders, many are return to sender, preventing those Virginians

from ever getting word that their rights have been restored.

Because of the efforts of the last three gubernatorial administrations, the numbers of Virginians disenfranchised because of Article 12 are smaller than they would otherwise be. But I think it's worth noting that it doesn't have to be this way, that we don't have to live in a state in which administrative burden prevents otherwise eligible Virginians from having their say at the ballot box.

I won't say quite as much about the redistricting Amendment except to highlight a few of its features that we've already seen in play. By way of background, Virginia recently amended Article II Section 6 of its Constitution to change the way that Virginia draws its legislative lines. Under the new system, a group of eight sitting legislators and eight citizens will draw the lines as states must do following each decennial census.

The Amendment requires a panel of retired judges who have already actually done this. They've selected citizens citizen members of Virginia's new commission and the commissioner has already met. In fact they met for the first time last night, which I watched right here from my kitchen table. The first meeting was organizational. They selected co-chairs and discussed scheduling and timetable questions. And they also talked about how to educate committee members about the legal intricacies of the redistricting process.

But I just wanted to discuss two features of the Constitution and the provisions in the Constitution and what's about to unfold. And that has to do with both transparency and citizen participation. So more than just having citizen members on the commission, I think it's important to stress that all Virginians will be able to take part. We saw glimmers of this in the last round.

Christopher Newport University hosted a redistricting competition that a group of students at William and Mary and other schools around the state participated in. And you know, it was a really exciting way to get involved in the process. I think this year we'll see an explosion in the number of ways that citizens can participate, whether it's drawing maps of their own, whether it's providing direct input to the Commission on their preferred community boundaries, or whether it's using software to assess proposals, software being provided by good government groups

like Plan Score that will allow you to take a proposed map, literally run it through a software program, and learn whether it's competitive, how compact the districts are, and all kinds of other measures.

And I think these innovations will enable citizen oversight like never before. They will combine to powerfully enhance the transparency protections that are now embedded in the Constitution. I think it's worth pointing out that, like many other states, Virginia's process had been shrouded in secrecy in past cycles. Certainly there were public facing elements, but the real decision making has historically happened behind closed doors.

Legislators relied on privilege rules to mask the process largely from the public. No more. The Constitutional Amendment imbeds transparency provisions in the text of Virginia's Constitution. The data being used the proposals being considered and the input the commission receives will all be transparent this time around. And I think that this, combined with technological accountability tools will make for a really promising districting round that I think the Virginia public will be proud of.

It's worth saying that transparency in name only has been a problem in previous rounds. In the 2010 round, Florida had a new Constitutional Amendment in place for the first time. Florida voters by ballot initiative amended their Constitution to prohibit line drawer from taking partisanship into account. And with this provision in place, line drawers did their job and even got high marks for running a transparent process.

The problem is that this process produced unfair maps and in subsequent litigation, plaintiffs unearthed that the transparent process taking place in public was in fact a ruse. Partisans had been using stand-ins to introduce maps at public meetings and orchestrated a secretive process behind the scenes. I tell this story not only as a cautionary tale, but to stress that Virginia's Amendment took a different path than Florida's.

One of the key differences is that, unlike Florida, Virginia put transparency requirements directly into the text of the Constitution. And I think that sets a very different stage. Also as I mentioned, I think technology driven accountability will make the line drawing process far less fun for partisans, who would otherwise try to

manipulate the lines.

And I think the bottom line is that we can have high hopes for this process unfolding in a way that's inclusive, transparent, and produces fair lines. There will never be consensus I think when it comes to map drawing. But I think we're about to see a process that will be a dramatic improvement over what we've seen in the past rounds. That is, assuming that we get census numbers, which of course as you may know, are delayed. So I think I'll stop there.

AE DICK HOWARD: Rebecca, thank you very much. That it opens up a topic to which we I'm sure will return before our session is concluded this afternoon. So do not go away. Hang around. Have a cup of coffee, if you like. But, I'm sure we will-- these are two of the hottest topics to talk about today. So good start to the panel. Let me turn now to Juliet Clark, who will take us into the realm of education. Juliet.

JULIET CLARK: Thank you, Professor. Good afternoon, everybody. My name is Juliet Buesing Clark. I'm a law and policy student at the University of Virginia. I'm in my final year of study. I'm honored to be presenting my research to you. I'd like to thank the organizers of the event, my co-panelists, and especially Professor Howard for letting me join you all today.

Updating language on education was one of the main goals of the 1971 constitutional revisors, as Professor Howard will tell you. And the revisors were optimistic about opening a new chapter in Virginia public education through their work. So I'm going to present on that today. And I'm going to actually share a slide show. Makes Zoom a little more pleasant.

About two years ago, Professor Howard asked me to answer the not at all a simple question about this constitutional revision of the Education Article. How has it worked out? How has education in Virginia changed, grown, improved, or faltered under the 1971 Constitution?

Today I'm going to present a pretty brief summary of my answer to this question. And I'm happy to take more questions later. To begin this story, there's a few historical events that put the change into context. You all are familiar with the *Brown versus Board* case, which declared segregation federally unconstitutional, and probably with Virginia's response, known as massive resistance.

During this time, Virginia's leaders sought to use creative legal mechanisms to maintain school segregation, which was against federal law. Some of the more harmful of these included shutting down public schools rather than integrate them, using public funds to provide money to students to attend private schools, which were segregated, and requiring all local student assignment decision to go through a pro segregation pupil placement board at the state level.

The effect of these decisions on racial integration is fairly obvious. It essentially prevented any integration. But all of these actions actually had another effect. Massive resistance began to weaken Virginia's public school system as a whole. This caused concern to more moderate state and economic leaders who saw Virginia's national reputation and economic promise at risk.

Massive resistance is popularly thought to have ended around 1960, which is when courts forced Virginia to end the statewide school closing ban. But this doesn't actually mean resistance ended. Nor was integration embraced. In fact, several school districts decided to try their own methods, which brings us to our second important historical event, the Virginia Supreme Court's decision in the *Prince Edward County School Board versus Griffin* case.

When the courts had ordered Virginia's state school closing plan to stop, Virginia's Prince Edward County took the unique step on a local level not to allocate any funding for the next five years to its public schools, thus prevented their operation and actually closed them down entirely. Instead the County offered tuition grants to students, but only white students realistically had access to private school options. At the Virginia Supreme Court, the case centered around the constitutional mandate at the time, Section 129 of the 1902 Constitution that Professor Howard mentioned.

This Section read, 'The General Assembly shall establish and maintain an efficient system of free public schools throughout the state." this seems pretty mandatory, but the court decided that the Section was actually completely up to the General Assembly's discretion, and efficient system, the court decided, did not require the operation of any schools, in fact. And localities would get to decide the number and character of schools that they wished to operate, even if that number is zero.

The General Assembly had no obligation to ensure otherwise. The court in other words, rewrote the meaning of Virginia's Education Article in this section in order to support segregation efforts. In 1964, the US Supreme Court required Prince Edward County to reopen and fund it schools. But the damage of the Griffin decision at the state level was done. And it was now baked into Virginia's precedential understanding of the Constitution.

So in some, massive resistance had weakened the state's public education system. And the *Griffin* decision had eviscerated the state Constitution's power, legally, to repair it. When in 1968, the Constitutional Commission got to work on revision, this historical context would shape a number of the changes that they approached.

It's easiest to understand the 1971 changes to the Education Article as related to two main goals. The first is retrospective, to repair the harms done by massive resistance. This essentially comes down to a two part change. First, the revisors needed to symbolically reject segregation and reaffirm a commitment to strong public schools.

The prior Constitution still contained an offensive provision that forbade children of color and white children from being educated together. This had no legal effect after *Brown,* but it represented the ugliness that the revisors wanted to reject. The revisors additionally added education to the Virginia Bill of Rights, enshrining new aspirational language that reaffirmed the Commonwealth's commitment and prioritization of the public schools.

These symbolic rejections of massive resistance were both a statement against segregation and a statement for public schools. In addition to symbolic gestures, the revisors wanted to practically create a legal structure in which massive resistance could never happen again. They wanted to make sure no local school district would have the power to shut down its schools again. And that the General Assembly's mandate to operate public schools was strong and legally unambiguous.

This involved adjusting the constitutional language to make certain mandates more enforceable. The other goal was prospective. Based on best theories of the time, the new Constitution embraced a technocratic ideal of state education governance, that is governance by experts, not by politicians, according to scientific best

evidence. This was specifically achieved through the idea of standards and a commitment to high quality.

The Standards of Quality Provision was at the cutting edge of education policy at the time and their revisors should be commended for their foresight. While today you all are used to the idea of high expectations and rigorous standards and the tests that go along with them under No Child Left Behind, 50 years ago, the idea of creating standards that would measure school quality was just being developed. And the Standard of Quality were really cause for great excitement in those first two years.

Here's a slide that looks at the actual language in the new Constitution I bolded some of the more important words. So you can see that the first provision is a newly worded mandate for the General Assembly that's unambiguous and untarnished by the *Griffin* litigation about the old Section 129.

If you look at that very last provision, it's a self-executing requirement that local governments should pay their fair share. It actually-- the attorney general can bring a mandamus suit against them if they don't. In other words, local governments would not be able to close their schools like Prince Edward County had.

In the middle you can see a couple of references to high quality and standards. This commitment to quality, you should note, is not mandatory. It says shall seek to ensure. The revisors had actually recommended shall insure but the General Assembly and Governor were kind of concerned.

There was a lot of litigation starting at the time about school finance. And they wanted to make sure that plaintiffs didn't have extra ammo to bring up against the state. They were wary of those cases. So it ended up being, shall seek to ensure the high quality.

However, the standards of quality, which are created by a board of experts, not politicians, are very much required, and they kind of become essential to this new structure of education governance. So the question for us is, did it work? Did the revisors achieve their goals now that we can look back 50 years later?

From the retrospective angle, rejecting massive resistance. I think the answer is

actually a clear yes. Since 1971, no school district has been shut down in protest of integration. All school districts have received both state and local funding every year. The General Assembly takes seriously its mandate to insure public schools operate throughout the state.

And moreover, de jur segregation is a thing of the past, not just because of federal court orders but because Virginia law now says so too. And most importantly, the public schools are far more stable than they were in the 1950s, even with COVID's new challenges, you can see every day that Virginia is still committed to its public schools and pretty proud of them actually.

That's said, I think it's really important not to make the mistake of thinking the 1971 constitutional revision was intended to make radical full integration or equality an essential component of Virginia's schools. We're not speaking about de facto segregation or the makeup of the demographic composition of schools for a reason. I don't believe it was a goal of the revisors or that it would have been politically possible at the time to pursue actual and complete integration in Virginia schools.

This might seem foreign to modern ears. I think, though, that it's really important to understand the difference in order to understand the legal framework that we have today now, 50 years later. The revisors just weren't very focused on racial equality. Some of them certainly may have supported it personally. But even in the commentary's race is very little mentioned.

Removing Virginia's ugly massive resistance reputation is one thing that would strengthen public schools. Pursuing radical racial equality and justice is entirely another. The revisor's goal was more broad and education focused. They focused on the school system as a whole. They wanted to make quality schools for all children. It was assumed that by doing so, whatever racial inequality left over from history would simply wither and all children would benefit.

The prospective question is a lot more complicated. Did the revisors really create a structure that resulted in high quality schools? As I mentioned, right after the passage of the new Constitution, enthusiasm about the standards of quality could not be overstated.

The board eagerly sent its standards every other year to the General Assembly, who passed them as uncodified acts. The Board took its role as non-political experts very seriously and the standards were early on a testament to the best ideas about education quality at the time. The attorney general wrote multiple opinions on the standards, embracing the General Assembly's obligation to apportion funds, quote, "equitably" between districts and to focus on the quote, "actual costs" of operating schools. This would ensure that there was enough money to keep schools of high quality.

However, this enthusiasm eventually waned. During an economic downturn, the attorney general decided that it was actually OK for the governor to slash funds from the standards, even if it left an unrealistic mandate behind. The General Assembly eventually codified the standards into the Code itself. And the Board, which was an all volunteer body and still it is, somewhat abandoned its role in revising them.

In 2002, JLARC did a review that found that the standards had been barely updated in decades. Today, in fact, the Board is required by law to issue recommendations every two years to the General Assembly. This relegates them to an advisory position that probably was not actually intended by the revisors back in 1971. The current Board however, has tried to take on a more active role.

Some of these problems in actually getting education out of politics and achieving high quality schools for all children, are related to the balance of power left by this constitutional structure. In other states, the primary way to keep a legislature accountable and attentive is by bringing court cases. In about half of states, school finance litigation has successfully forced the state legislature to rework its funding formula or provide better state aid to needy localities.

But Virginia's single school finance case, *Scott v Commonwealth* in the early '90s was unsuccessful for plaintiffs. The Court decided that equality in education was simply not required by Virginia's Constitution. And true to its relatively deferential style, the Court declined to intervene in school budgeting issues.

Unfortunately, political will through the General Assembly for better school funding structure has yet to achieve significant change in Virginia. As a result, Virginia state

budget has persistently underfunded schools and understated the standards that are required for actual quality. This leaves localities lucky enough to have the resources to pick up the slack, able to create their own ideas of quality.

The unlucky ones however, are often left behind. I brought some data along to make this a bit clearer. Here are two notable points. And these are echoed in a lot of various think tanks. These are just two examples.

Virginia state funding of schools ranked in the bottom 10 states in the nation when considering the proportion of funding that comes from the state versus localities. This means that there's probably a lot of inequality between districts since so much is made up for by local funds. Our funding fairness score is equally abysmal.

Getting a D or F rating means that poor students in Virginia end up with significantly less, rather than significantly more, which is what they should have, funding for their education. These points don't bode well for Virginia's less advantaged children or for equity in general in our schools.

So, was the revisor's prospective goal successful? I would say that Virginia schools, on average, are extremely high quality, just as the revisors intended. This is buoyed a lot by our affluent areas, areas like Northern Virginia, where students tend to average out our national scores that helps our state end up within like the top five states in the nation. The state accountability structure that's been built on the 1971 Constitution has created a framework for quality education that works for children in many communities.

But averages do not tell the whole story. The structure does leave the General Assembly relatively unaccountable for its funding choices and Virginia schools have persistently struggled to receive adequate state funding to provide a realistic quality education for all. This has particularly gotten worse since the Great Recession. Without enough state dollars to equalize resources, Virginia schools are highly unequal, with some districts putting twice the amount of money into a single child's education as others.

Thus, despite the revisor's hopes of moving education out of politics and into a board of experts instead of politicians, the General Assembly's continued control of the budget reins has made quality for all on a practical level difficult to achieve.

Lastly, and perhaps most importantly, the revisors hope that a focus on quality for all children would help mitigate racial inequality, has simply not panned out. We may have symbolically rejected segregation and ended the de jur practices of massive resistance, but the legacy of discrimination, oppression, and exclusion is still very much alive and well.

Today, Virginia schools see persistent racial achievement gaps, which worsen between kindergarten and third grade, which means that they're probably based on school quality differences. These gaps persist throughout high school and through college achievement. Sadly, Virginia also has seen rapidly increasing de facto segregation, both within districts and between them. Simply put, our children do not learn together.

These graphs here show how high poverty, highly segregated schools have been increasing across the state, especially in the red communities on this map, nearly doubling in number in the last two decades. This trend has trapped far too many children in unequal classrooms with limited opportunities. And it continues to prevent our children of all races from the benefits of diverse integrated classrooms.

These problems of equity, I would argue, were not solved by the 1971 constitutional revision. Rather issues of socioeconomic, equity, and racial justice have been left for a new generation to solve. I am hopeful that my generation will be able to do so. Thank you so much for your time and I'll turn it back over to Professor Howard.

AE DICK HOWARD: Juliet, thank you very much. It reminds me of the idea that crossed my mind, which I knew would never be adopted by the committee that organized this program. And that was to forget the professors entirely and have nothing but students on the panel. But I think the one model student I thought could represent their generation of law students.

And the fact that she came from UVA, I apologize that she came from my school, but I've known her for a while, and I know she was would do the job she just did. I have to say that the idea of having students talk about the Constitution, I hope that during this 50th anniversary, I think there will be a teacher's institute out of the Library of Congress, I mean, sorry, Library of Virginia.

And I hope that the sort of emerging generation of Virginians will think about the

state Constitution. I have to say that when I was in law school, I don't remember my professors talking about the state Constitution, because they were so blinded by the appeal of the federal Constitution. And I think it sets the picture, Jefferson and Madison used to say the earth belongs always to the living generation.

So I think that if we can get students around Virginia, high school, college, law students, and beyond as part of this general dialogue and discussion, I think will be the better for it. So little editorial comment, as we pass from Juliet's comments on education to Sai's comments on executive powers. Sai, may I turn it over to you?

SAI PRAKASH: Well it's great to be here with the Virginia Bar Association today. And it's hard to follow Juliet. Juliet really does prove Dick right, that the students can really provide us with informative presentations on matters of constitutional law. And of course it was delightful to hear Rebecca's presentation as well.

I should say my specialty is federal executive power, not state executive power. And I should add that my colleague Dick Howard has forgotten more about the Virginia governor than I'll ever know about the Virginia governor. So it's a little odd to be here today, talking to you about the Virginia executive and emergencies. Because I'm assuming that Dick knows more than I do.

But I'm assuming that Dick also wanted to ensure that different voices were heard. And so I'm here to provide a different voice. So I'm going to start off with a sketch of federal executive power, then switch over to the state executive, because I think it's useful to draw a contrast and to see how they influenced each other. And they actually did influence each other, at least early on.

And I think there are similarities in how people perceive federal and state executive power even today. And so as you know, the Constitution, the federal Constitution, was a reflection and in some sense a repudiation of the state constitutions of that era, the constitutions written in 1787 at the Philadelphia convention. The perception on the part of many of the founders is that state legislative power was too rampant, too powerful.

That there needed to be a check on state legislative power. There would be many different checks on the federal Constitution. There would be the check of judicial

review coming from independent judges. But there'd be a check with respect coming from the executive branch as well. Right and they needed to have a strong executive to wield that check. And they looked at the state constitutions and they looked at the state executives and they found them wanting.

They found that the state executives weren't designed to be powerful institutions. As Jefferson put it, when we wrote the state constitutions, we were jealous of executive power. And we were more trusting of legislative power. But as it turns out that trust was at least partly misplaced.

So when they get to the federal convention, they decide to create this unitary executive armed with a remarkable array of powers, authority over law execution of course, because that is what makes an executive an executive. They execute the law. But also authority over foreign affairs, checked by the Senate, and with Congress having significant authority.

Check over the administrative-- sorry, power over the administrative bureaucracy, power to appoint, power to pardon. And all this authority was vested in one person, someone who could run again, and someone who could serve for four years. This is in marked contrast to the state executives of the era. So think of the Virginia Constitution of 1776.

The Virginia Constitution had an executive power, but it was vested in an executive council. There was someone called the governor, but he was just sort of first amongst equals. The executive council had all the executive authority to be exercised by the council, and not by the governor.

And what that meant is that the executive was splintered across several different individuals who had to come together and vote and decide what to do as a plural chief executive. More with the Virginia executive was term limited and can only serve for a limited number of-- a limited period of time, whereas the federal executive was not. The Virginia executive lacked a veto.

It lacked all the strength of an executive of the sort that seems more familiar today, right? I mean every governor today has a veto and has at least some appointment authority. That wasn't as true back in 1787. So the federal Constitution is both learning from the state constitutions and deciding to make a departure from them

to create an executive able to check the more powerful Congress that resulted from the 1787 Constitution.

Because as you know, there was a Congress prior to the Constitution. It was called the Continental Congress. But it didn't have legislative power. They give a bunch of new powers to Congress over taxation, over armies, over spending, over commerce. But they also create this executive check. And they also create a judicial check, that didn't exist before.

This change in conceptions, this new understanding of the need of executive power, interestingly enough, actually affects states in what they do going forward. So constitutions that are rewritten in the 1790s, actually look more like the federal Constitution. That is to say the people who rewrote their constitutions immediately in the wake of the federal Constitution decide to emulate the federal Constitution.

So Pennsylvania, which also has a plural executive moves to a unitary executive model. Now Virginia doesn't do this. Virginia doesn't revise its Constitution until 1820. And it doesn't really establish anything like a unitary executive. It keeps a Council of State that checks the governor in the exercise of executive power.

It's not until 1851 that we have a Constitution, at least the executive part of the Constitution, that looks like the Constitution that we have today, the modern Virginia Constitution. And so as in many things, Virginia sticks to old ways far more than perhaps some of the other states do. But eventually, that notion that we needed to have a strong executive also influenced Virginia as well.

So what about emergency authority under the federal Constitution? Did the president have emergency authority to spend money, to jail people, suspend habeas corpus, to impose quarantines, and the like? And I have written in a paper called "The Imbecilic Executive" that the answer is no, that the federal Constitution did not grant the presidency a host of emergency authorities.

And why do I come to that conclusion? Well, it's basically an historical analysis of the text. And the claim is that the executive power, that phrase, by the 18th century, did not include emergency authority. And how do I know this? Because we can see this from English practices but also from American practices prior to 1787.

So what is the English practice? Well, there were emergencies in England and there were claims of authority to act in emergencies and to act contrary to standing law on the part of the Crown and the officers of the Crown that parliament fundamentally rejected. So parliament had allowed people to export grains to other countries within Europe.

But there was a famine in England and the Crown decided, we need to impose an embargo on the exportation of grains because people in Great Britain are starving. There's a policy rationale for behind this, right? We want to preserve this grain for us. And so the crown barred the exportation of grain contrary to law.

And the Crown before parliament said, this is totally illegal because the Crown has authority and emergencies to act to mitigate those emergencies. And the parliament did something interesting. The parliament retroactively blessed or sanctioned what the Crown had done. But it pointedly denied that the Crown had any authority to act contrary to law, that the Crown had any authority to Act, in emergencies contrary to law.

Under existing British law, you could export grain. And the parliament said, the Crown has no authority to suspend that law. And this goes back to the Declaration of Rights in the early part of the 18th century. The Crown lacks the authority to suspend the execution of statutes. And that's true even in the face of an emergency. So the parliament, almost on the eve of the Revolution had denied that the Crown had the prerogative power that John Locke had spoken of in his two treatises of government, right?

Locke is talking, in the late part of the 17th century, and there's been a lot of changes by the end or by the midpoint of the 18th century. But it's not just English practice. It's also American practice. We had an emergency in America in 1776. It was called the Revolution. And this was a war fought here.

It was a domestic war. This was not a war fought overseas like most of our famous wars, right? There was active fighting in both North and South. And there was a need for emergency action on the part of the executive, or more specifically on the part of the government. And what I found in the course of my research is that in every case, whenever there was need for emergency action, the legislature took it.

That is to say, the legislature granted authority to the executive to spend money for future appropriations to jail people without trial, to conduct trials outside of the ordinary civil process, to use military tribunals. And this was true both at the federal level and at the state level. Many states authorized state executives to suspend habeas corpus, to expend money, to seize private property for use by the military, and to try people in military courts, try ordinary civilians and otherwise in military courts.

And these statutes tended to be temporary and they tended to be geographically limited. They tended to be temporary, because they didn't want to give the authority indefinitely and they tended to be geographically limited around the area where Americans had their armies or around where fighting was taking place.

And the same thing is true at the federal level. We have a commander in chief called George Washington. And Congress regularly granted him authority to suspend habeas corpus, conduct military trials, seize private property upon payment, and do other sorts of things that would be needful in time of an emergency. And so what I basically found is that the states and the Continental Congress, the legislatures, chose to convey authority, and whatever that authority lapsed, the governors and the federal commander in chief denied that they had emergency authority.

This is relevant because it tells us what it means to be a commander in chief. It doesn't include authority to do this or that or whatever you think is needful in an hour of desperation. But it also tells us about executive power. Because most, almost all the governors or state executives had grants of quote executive power, and despite that grant they didn't perceive themselves as having a reservoir of undefined emergency authorities.

And so I argue that the federal Constitution ought to be read the same way. And then I looked at Washington's administration. And there were emergencies during the Washington administration as well, right? There was a rebellion, the Whiskey Rebellion, and how did Washington respond to that? Well, it turns out he responded to it by invoking statutory authority, never invoking any constitutional authority.

Congress provided that he could call forth the militia to help execute the laws. It was

proving impossible to enforce the excise laws in Western Pennsylvania, so he summoned the militias of Pennsylvania and Virginia to suppress that rebellion. He followed the letter of the law, did not invoke any constitutional authority.

There was another emergency. There were invasions of American-- there was invasions of American States in the South by Indian tribes. Again, President Washington looked to Congress for authority to wage those wars. And then finally and most tellingly, there was a pandemic in early America. There was a yellow fever that struck parts of the country that killed thousands of people. It sort of evokes the modern problems we're having today.

And there was a question. Congress was set to return to Philadelphia. Philadelphia was in the throes of a pandemic. Could Washington summon Congress elsewhere to avoid the specter of members of Congress contracting this deadly fever? And as you know, under the Constitution, the president can summon Congress on extraordinary occasions. And the question is, can he summon them elsewhere?

And Washington received a bunch of advice from his cabinet, but also from Madison and the Speaker of the House, from a number of people. They weren't all his departmental associates. And he and they basically concluded that the power to summon Congress early on an extraordinary occasion wasn't a power to summon them elsewhere.

None of the opinions he received spoke of the president having a generic emergency power to do what was needful to handle the pandemic to safeguard Americans, much less safeguard Congress. And so he hit upon a clever expedient. He basically didn't think he had legal authority to do anything.

He hit upon the clever expedient of writing to Congress and saying, writing to members and saying, A, there's a pandemic. B, I'm going to meet in Germantown, Pennsylvania. C. Why don't you meet me there? And that was a way of telling them about the pandemic, but not ordering them to meet somewhere else. And of course that's entirely permissible.

Because that's not a legal command. They could have still gone to Philadelphia had they wanted to. Of course, why would they, given the pandemic? But my point is that Washington himself did not believe he had some sort of emergency power to

do what was needful to protect Americans, much less protect Congress. Now, that's a limited conception of executive power, one that was challenged by Lincoln in various ways during the Civil War and one that remains contested today.

I'm going to leave federal power there and segue to the Virginia Constitution of today. The Virginia Constitution of today says, the president has the chief executive power, and of course that he has to take care that the laws are faithfully executed, a phrase that mimics the Take Care Clause in the federal Constitution. And the Virginia Constitution is somewhat more detailed with respect to executive responsibilities of various sorts.

But there is no clause that specifically conveys a host of emergency powers. If the Virginia governor has emergency powers, of course, they come from two sources. One would be of the state Constitution itself and another would be state statutes. With respect to the question of the state Constitution, again, I wouldn't read the 19-- the revisions to the Virginia Constitution as granting emergency authority.

I think to really answer that question you'd have to go back to the era in which it was written and ask the question, does this phrase executive power, whatever it meant 200 years ago now mean something different? Chief executive power, such that it includes executive emergency powers of various sorts, an if so, what would they be?

I will say that the attorney general during World War II, wrote an opinion, the Virginia attorney general wrote an opinion, saying that the Virginia governor had a general reservoir of power to deal with emergencies. And that Dick Howard and his book on the Virginia Constitution has cited that attorney general opinion, suggesting that Dick perhaps believes that that's true for the Virginia Constitution.

And then I'll further tell you, that our colleague Toby Heytens, who I think is the Solicitor General of Virginia, has cited Dick Howard's book in defending the governor's orders. And so an attorney general wrote something that Dick Howard then cited, that is now being cited by the solicitor general, all in a bid to defend the idea that the governor has a quote, reservoir of powers to handle emergencies.

Which I think is a way of saying that the executive branch has some residual implied authority to deal with emergencies that may not be expressed. Having said that,

there is an opinion of the Virginia attorney general from several years ago saying, while it may be true that the governor has a reservoir of powers, what the governor can't do is spend money without an appropriation. And so if the Virginia legislature fails to pass annual appropriations, the Virginia governor just can't spend money on grounds that there's an emergency.

So on the one hand, the attorney general says there's a reservoir of powers to deal with an emergency. On the other hand, the Virginia attorney general says, but it doesn't extend so far as to permit the governor to expend funds without an appropriation. So whether the Constitution grants emergency powers, I think is contested in various ways.

We don't know what the answer is, in part because we don't know what the courts have said about this. But as I mentioned earlier, Virginia governors have the benefit of statutory grants of authority as well. And as many of you are aware, the Virginia legislature has granted tremendous authorities to the Virginia governor to deal with emergencies of various sorts.

The governor can declare a state of emergency and spend money in various ways. But he can also, in cases of an emergency issued quarantines and other sorts of orders. And using that authority, Governor Northam has imposed various rules to handle the COVID-19 outbreak. And he's issued about I think 15 or more executive orders in the past nine or 10 months. I'm sure he will issue others as well.

And as you also know, they regulate what we can do in public. They regulate what businesses can do. They regulate what we can do in private, namely gatherings of various sorts and the number of people that can be in those gatherings. And having read most of them, but not all of them, the governor seems to be relying upon his statutory authority and not any constitutional authority.

And I think he's doing that because he believes, or his lawyers believe, that the statutes of Virginia convey sufficient authority to him that he doesn't need to rely upon any claims or nebulous claims of constitutional authority, that the statutes to do the trick and so you might as well rely upon them. And the reason why there have been 15 is because these orders typically have a temporary nature to them. They last for 30 or 60 or 90 days.

And I think they last that long because we've all hoped that the need for them would expire after some period of time. And so, the governor has put time limits on them. And then felt the need to modify them or extend them in various ways. And that's why there's been 15 of them or so. And there will surely be more as this pandemic ensues and continues. It shows no signs of abating, unfortunately.

Now, the Virginia legislature has not been sitting on its hands. It's actually amended the emergency statute in minor ways. What it hasn't done, I think, is actually sanctioned the precise measures or codified the precise measures that the governor has taken pursuant to his statutory authority. It probably hasn't done that because it either thinks that the governor has properly exercised its authority.

It may not want to take responsibility for what the governor has done. And then finally, it may not wish to codify in some of semi-permanent way these rules, given that it's a fast changing situation where you don't want to have a permanent set of rules. Having said that, if you look at the Emergency Act, the Virginia legislature has created slightly different sets of rules for different periods of time.

So one set of rules expires at the end of March. Another set of rules takes over from that point on and lasts for two years. And then a third set continues on from 2023. So they've shown some nimbleness and some willingness to create different emergency, slightly different emergency regimes, and done so prospectively, which is interesting. But they haven't done anything, to my mind, as far as I can tell, that sanctions particular actions of the governor.

And again I think it's because they're trying to leave the flexibility with the governor but probably also trying to avoid possible unhappiness with the regime that the governor has imposed. And of course, it's also possible, I don't know the politics within the legislature, it's also possible that maybe some of these gubernatorial initiatives, these executive orders wouldn't pass through the legislature in which case, there wouldn't be a majority to enact them, nor would there be a majority to repeal them in both chambers.

And so we're stuck with whatever the governor has done without any prospect of significant modification or legislative imprimatur. As you also know, there have been lots of challenges in the state courts. And from what I can tell, from the

crackerjack assistance of our librarians, our incredible librarians here at the University of Virginia, it looks like the government has won every single one of these challenges.

The attorney general has successfully defended the governor each time. And the government has prevailed under a number of theories. Sometimes the courts don't get to the merits. They deny that anyone has standing to challenge the governor's executive orders or that the particular people coming to court have standing. And other times, they get to the merits and then rule that the governor acted legally because he used statutory authority properly.

Will there be a successful challenge? I don't know. Your guess is as good as mine. One supposes that as these challenges continue, and as the restrictions continue, maybe whatever deference the courts are giving to the executive branch in the face of a truly unprecedented modern times public calamity, that deference might wither or diminish over time.

Of course, the extent of the deference that the courts are according to the executive branch is in part a function of the claims that are being brought. And as we've seen elsewhere, if you are able to tie your rights claim to the federal Constitution, say the Free Exercise Clause or some other part of the federal Constitution or state Constitution for that matter, you might have greater success, right? It's one thing to say you're acting ultra vires because you don't have statutory authority. It's another thing to say, you're violating my right to assembly or petition the government or free exercise of religion.

And of course, the Supreme Court itself has shown some willingness to strike down state restrictions on the grounds that it violates the Free Exercise Clause of the federal Constitution. And so that may well be the case or that may well happen yet in Virginia. So I think I'll end with this thought about broad delegations in times of emergencies.

There is a move at the federal level to rein in delegations to the federal executive and to the administrative bureaucracy. There's an interest in reviving the nondelegation doctrine on the part of some of the justices, the more conservative justices, because they believe that the federal Constitution doesn't permit Congress

to just delegate its legislative powers elsewhere. And of course, the Virginia Constitution says that the executive can't exercise legislative and judicial power.

So the Virginia Constitution makes express what some think is implicit in the federal Constitution. But having said all that, I think there is a long tradition of delegating sweeping authority to the executive in times of crisis. This dates back to the Roman era, where Rome would delegate authority to dictators in order to thwart invaders.

And these dictators weren't viewed as tyrants. They were viewed as virtuous citizens, in part because they would use their authority and then voluntarily give it up. That's the legend of Cincinnatus. Washington was called Cincinnatus because he had control of the army and he voluntarily gave it up. And so there was this tradition of dictatorship that was viewed as benign, that was going to last as long as the emergency lasted, and then go back to the status quo ante.

And that was true in America as well. Several governors or several executives were viewed as dictators during the Revolution, because it was thought necessary to give them extraordinary powers. This was said of the Virginia governor. It was also said of the South Carolina governor. It was even said of Washington, given that he could hold people indefinitely and given that he could conduct military trials of civilians where Congress had provided that authority.

And I think that same thing is playing out in the courts today. That is to say, the courts, if there's ever going to be a revision of the nondelegation doctrine, it's not going to happen with respect to pandemic legislation or emergency legislation that deals with true emergencies. Because the courts are going to be reluctant to second guess what the executive is doing.

So with that, I will welcome any questions you might have. And once again, I want to express my profound appreciation for being part of this wonderful day of VBA talks.

AE DICK HOWARD: Thank you, Sai. That's a wonderful walk through English, American, and Virginia history only in a few minutes. It's almost like this is your classroom. So maybe I should qualify my notion that we should have all student panel. Because if I had done that, you wouldn't have been here and we'd have been the poorer for it.

We have a few questions coming in. I'll remind the audience if they do have

questions they'd like to put to any of us, there is a Q&A feature. I have several questions. And what I'll do is, I'll take those questions first. And then I have questions I'd like to put to the panel. But let me take some of the questions that have come in from members of our virtual audience today from around the Commonwealth.

And first let me, I'll sort of rearrange them a little bit. I'll start with questions to Rebecca, if I may. And here's a historical question from Stephen Price. And he asked the following question. He says, under English Common Law, didn't convicted felons lose their right to vote?

REBECCA GREEN: Yes, so the answer is yes, that is true. And there is-- other countries know historically have used this practice. And in fact, that's probably a big reason why it's included or assumed in the 14th Amendment, in the explicit text of the 14th Amendment. But I'm not sure that history provides a rationale here, especially given that only white men, as Professor Howard mentioned at the outset, you know, could historically vote in American history.

So I think the expansion of the franchise over the course of US history could be seen to include decisions that states make about who to accept into their political communities. So I guess I would just answer it that way.

AE DICK HOWARD: Rebecca, if I can stay with you for a moment, I have a question from Robert Spelling. And I'm going to read off the question. This just from the question of felons voting to the question of redistricting. And he says the following. Can you talk about the impact, if any, of the delay in the president transmitting the census report to the Congress on the timeline of the new Virginia redistricting commission drawing districts ahead of the 2022 midterm election.

And he goes on to say, also will the commission redraw its House and Senate district boundaries using the same census data and on the same schedule?

REBECCA GREEN: Yeah. So this is a great question. And there's been a lot of hand-wringing about this. People are concerned because of course, there is a census delay, due not only to the pandemic, but also to some litigation involving who to count. And I think the latest-- so this was discussed actually at the commission's first meeting last night.

And the thinking is that, first of all, Virginia is one of two states in the country that

has off year elections. New Jersey and Virginia are the two. And so there's been historical practice of the US Census kind of hurrying up to get those two states their census data early to accommodate their off year elections. So we do assume that even-- and the federal government knows that we need our numbers quickly.

And so there is sort of like a sense of when would be the drop dead date to receive the census numbers in order to run those elections in the fall. And so it's not clear whether the numbers will come out. But one of the things that people discussed last night at the commission's meeting was that there is quite a bit of work that can get done even absent the official numbers.

There are numbers that can be used that while not official, will allow the commission to get underway. Although it won't be able to obviously finalize until those numbers are released. So it remains to be seen. You know I've heard late May. I've heard someone throughout March at one point. And then, I think I was a little bit alarmed when someone mentioned something about August. So if it is delayed that far, there's going to have to be some kind of legislative response, because obviously that would not be in time to run the elections.

On your second question, I think the question was, does the House and Senate use the same numbers and run on the same timeline? And my understanding is that the answer there is yes. I think the timeline starts tolling for both when the census figures are released. I think it's a 45 day window to draw maps using that data. So that's my understanding of how the statutory requirement unfolds.

AE DICK HOWARD: Thank you, Rebecca. Sai, let me turn to you. So there are a pair of questions. And I'll read them one after the other. To you from Clyde Christofferson. And the first question he asks is as follows. Might it be practical for the executive to exceed what was lawful, but reasonable under the circumstances, for example, the British Crown embargo of grain during a famine and then expressly seek ratification?

So as he poses that question, then he subsequently goes on in another transmission here to say the following. Might such a strategy be more palatable if coupled with a strategy implemented jointly by the executive and Congress of restoring the policy authority of the legislature that has been eroded for practical reasons over the years? So that's the question from Mr. Christofferson.

SAI PRAKASH: I think Mr, Christofferson has just hit the nail on the head. And it's very-- he's got a very Jeffersonian approach. This was exactly Jefferson's view of what an executive should do in time of an emergency. The executive ought to, of course, look to see if the Constitution or statutes authorize the action.

But if the executive concluded there was no authority, the executive ought to act illegally and then explain himself to the legislature and ask for an indemnification of the act, rather than claiming that the Constitution always authorized whatever needed to be done in time of emergency. And there are many examples of both Congress, certainly Congress, and also the Virginia legislature, indemnifying the executive.

So in that article I mentioned earlier, "The Imbecilic Executive," I have a footnote where I describe Virginia's legislature during the Revolutionary War passing a bill that retroactively sanctioned what the Virginia executive had done. And there are many private bills passed by Congress after the Constitution that basically say, this executive did this or that and it was wrong in various ways or not authorized. But we're going to sanction it.

And of course this is precisely what happened in the Civil War. Lincoln took a bunch of emergency actions. And he says, I didn't do anything that Congress couldn't do, which I think was an artful way of admitting that he did things that he didn't have legal authority to do, but that Congress did have legal authority to do. And then he went on to say, maybe Congress ought to enact legislation.

And that's precisely what they did. They enacted legislation in the early days of the Civil War that retroactively sanctioned some of Lincoln's emergency measures. And so, Mr. . Christofferson is exactly right. The regime, I think of the founding was, the president and governors have certain limited emergency authorities from the Constitution and statutes. And they can use those things.

If they don't have authority to do a certain thing, they sometimes will have to do it anyway. And then they'll have to go to the legislature and beg forgiveness. And then they're basically putting themselves at risk. But he says, that's what a good executive ought to do.

And if they're right, that there was an emergency, of course the legislature will

sanction what they did. And that's of course what parliament did in the wake of this famine in England, right? They said you don't have authority to do what you did. Don't pretend that you do. But we're going to sanction it anyway.

Clyde's, Mr. Christofferson's second question, I think is reflective of a concern that legislatures have kind of delegated authority too often to the executive. And that's a sense that's widely held in some quarters in America. And it's held with respect to Congress, but perhaps it's also held with respect to the state legislatures throughout the country.

And I can't speak to how other states deal with delegations. What I can say is, there's a way to deal with these extraordinary delegations. And the way to deal with them is to say, you know, that the governor can take extraordinary measures that last for 60 days, after the next session of the legislature. And what that means is, if the legislature is meeting in two weeks, then the governor's measures last for two weeks plus two months.

If the legislature is meeting in six months, they last for six months plus two months, eight months. But the point is there's a deadline to them. And the legislature has to weigh in rather than just giving a blank check to the executive to handle this pandemic. I mean, the governor could be-- I'm not weighing in on the policy rationale of this.

But if this pandemic lasts for five years, the governor could rule by decree for five years with respect to what we can or can't do. And you might think, maybe that's a good idea. But maybe the legislature ought to be sanctioning this rather than just passing a rule, a statute that delegates power to the executive to impose an indefinite state of emergency, when the legislature is fully capable of responding to the crisis.

This isn't a situation where the legislature can't meet because there's an invasion. Or the legislature can't meet because they're all dead from a pandemic. . They're meeting they're doing things. Yet we're still being subject to these decrees without any-- you might think, I'm not saying this, but you might think without any meaningful legislative review or certainly not any meaningful legislative blessing or sanctioning of these orders, because they're trying to avoid responsibility.

That's true of Congress and maybe it's true our esteemed legislature. But thank you for that wonderful question, Mr. Christofferson.

AE DICK HOWARD: Thank you, Sai. Let me take the chair's prerogative to put a question to Juliet. Once she graduates, then she's free. I can't ask her any questions I please. But up to this point I can. So I'll take that prerogative. And I'm curious to know, the following sort of scenario.

We're in the course of the pandemic, which has drastically affected American life in so many respects, but above all in the schools. I mean, schools have had to navigate this virtual learning space. Public officials have had to come to terms with the functions that schools play in society. And they go beyond simply the transmission of knowledge in the classroom.

There are things like school lunches, the socialization of students to deal with each other and the world beyond. I mean, there are so many ways in which some of the functions are simply lost when schools are closed. And I'm wondering if especially as this pandemic stretches out, might it be that the pandemic will bring us to do some rethinking about how schooling is done and what do you think? What might we see, including any implications there might be for constitutional revision. Juliet, would you take a shot at that?

JULIET CLARK: Yeah. This is a really interesting question that a lot of people are talking about right now, in Virginia as well as across the country. On the one hand, COVID has been shown and will continue to exacerbate these problems of equity that I highlighted in the presentation. We're seeing huge racial and socioeconomic learning loss gaps.

The pandemic is bad for all kids, but it's really hurting the more disadvantaged kids specifically at more disadvantaged schools. We're seeing a huge variety in what schools are providing. I know that Virginia's state leaders actually have taken some steps to think about how virtual learning might be a part of schooling in the future by creating these standards that are related to it, by setting up the infrastructure for internet.

So that's one side of things. I think that's the more obvious side. I think the more interesting question is, if the pandemic is going to create a political will around

rethinking schooling in general. So what we're going to see is kids that are sitting in the same classroom, same age but are performing at vastly different grade levels. Which is something teachers have always dealt with. But most of the public kind of ignores.

And so now it's going to be pretty obvious. We're going to have kids at all different levels in the classroom. So this might change how we want to think about assessment. Do we want to be looking at assessment outside of grade level and thinking about how kids are growing. Do we want to be looking at a curriculum that really focus on basically teaching content deeply, but maybe at multiple different levels, which is kind of it's based on the inclusion model of instruction.

So this might reshape what we actually see in classrooms. Because it will become a lot more socially acceptable and normal to know that kids are at different levels in the same classroom. I also think we're probably going to see differences in talking about year round schooling and talking about when we are in school. It seems like the pandemic is going to wrap up right before summer break. And I think a lot of districts, and even the state is talking about what are we going to do this summer.

I think that could start a longer question like, should we really have this old fashioned agricultural model of a really long summer break. It causes learning loss. It causes equity gaps. All these things. And it's kind of complicated for working parents. Which brings me to the last point, which is I think schools closing has really highlighted, for a very powerful political bloc.

We're talking about like suburban parents, like this is really hard not having child care for my kids during the day. And admitting that, yes, schooling does provide this child care function. We've seen a lot of preschools actually end up staying open during the pandemic because it's so essential to have that for working families. When public schools are closed, these parents are struggling.

Even parents that are of very good means are really struggling to kind of balance having kids at home and having jobs that they need to work. So I think we're going to see a lot of questions about what a school is. And a school is kind of a community hub. It's a place for child care.

And the fact that schools get out at 2:00 every day is, it speaks to this old idea that

there's always a mom home who can pick them up in the middle of the day. But that's just not true anymore. Most families have working parents. So I think what we're going to start to see is this question of, should school really be an all day thing maybe.

Should there be after school programs universally? Should we have universal pre-K, and these questions. And I do think some of these have constitutional implications. I've talked a lot about racial equity, which is more of a problem that persists from the past. But I think we're going to face new problems as well coming up.

I think pre-K is kind of the big frontier here. We're already seeing some states adjust their constitutions to change the age downward that public education is provided or that the state education structure accounts for. So I think we'll probably see additional movement in that area of what are we going to provide for kids from zero to five, for that brain development, for family stability, for helping with child care.

How is the state really going to support that because it has huge investment implications down the road. And I think the pandemic just highlights how important that is. So those are some ideas. I'm sure that people are coming up with many more still. Thanks, Professor.

AE DICK HOWARD: Thank you, Juliet. Rebecca Green, may I circle back to you with a question about restoring the voting rights of felons. I've been intrigued with that problem and it's a pressing problem. And I think it probably matters, I mean, you were quite right in tracing the origin of the ban on voting by felons back to the early 19th century.

It precedes the age of 1902 Constitution. So it does in effect bifurcate the question of, what do you think of restoring the voting rights of felons in general and the question but does the disenfranchisement fall, even if it wasn't originally intended to fall, on Blacks and Hispanics. Does it fall more heavily on persons of color or other minorities? Governor Northam in his State of the Commonwealth address has proposed automatic reinfranchisment for former felons.

Assuming that proposition carries forward, I'm guessing that you've been asked to sort of be involved in the process of drafting a constitutional amendment. I'm wondering, how do you go about-- what do you put in an amendment like that? So a

couple of questions occurred to me, one, what can we learn from other states who have moved in this direction?

And in particular, what can we learn from what happened in Florida, where the people of Florida overwhelmingly voted to amend the Florida Constitution to reenfranchise former felons. But the Florida legislature basically gutted that vote in piling on all sorts of provisions which are basically unachievable. So what the people asked for, the legislature is essentially it's come back to. The drafting process may not be easy and if anybody can deal with it, you can. So I'm just curious what you might tell us about drafting something

REBECCA GREEN: You know, I haven't been asked to help draft this Amendment. But I would love to be part of the process. And I do think that you're right to point to Florida as a real cautionary tale about putting something through that has huge public support and yet not doing a careful drafting job and finding that that's undercut.

And so for people who aren't familiar with that situation, Florida voters passed, by a very wide margin, an Amendment to the Florida Constitution that did away with their felon disenfranchisement law. But the legislature subsequently decided, in interpreting the language of that Amendment, that didn't kick in until Floridians had finished paying their fines and fees, which one could argue is maybe a straightforward requirement. But the problem is one of recordkeeping.

Because it turns out that Florida records are just not up to the task of helping people easily figure out how much they owe. So there are plenty of people who were terrified of registering to vote, thinking that they had paid off their fines and fees, but they weren't able to confirm that because of the poor recordkeeping system in the 67 counties in Virginia. So it just turned into a huge mess. Where you had thousands of people disenfranchised, because either they couldn't confirm that they paid their fines and fees. They couldn't afford to pay their fines or fees or they were just frightened without surety about whether or not they would be in trouble for registering.

So I do think that that suggests that a much more careful job should be done in Virginia as we approach this question of exactly what the word should be of the constitutional Amendment. And I think looking to other constitutions is one place to

start. But of course, I think part of the issue is that in other states lack this provision to begin with. So it may not be as easy as just looking at other states.

It may take some original drafting. But I do think we're a step ahead of the game in terms of knowing how bad they can turn out by looking to Florida. So, it's going to be important to be careful in terms of how it's drafted.

AE DICK HOWARD: Rebecca, thank you very much. Sai, let me come back to you for a moment and run a scenario by you. And it's a question of state constitutional interpretation, but I think you're clearly nimble, and you were modest in saying that you didn't know that much about the governor of Virginia and his powers but that is excessively modest. At any rate, you've mentioned the question of the governor's power to spend when there's no budget.

That's a question of what can the executive do when there's no legislative authority. And the question I want to run by you actually goes a step beyond that. Because there is in the first place, a general question, which you've been addressing, I thought, very thoughtfully, of, is there any reservoir of executive power when Article V of the Virginia Constitution says that the executive power shall be vested in the governor, what is it that's vested?

Is there something residual there that doesn't require legislative approval or the like? Specifically, can he act in emergencies? Well, the incident you referred to, the question, the ongoing question you referred to has an additional dimension to it. And that is, if someone argues that the governor may spend state money after July 1, let's assume no budget has been agreed to.

And we have, on a couple of occasions, come very dangerously close to that, where it looked like a budget might not be in place. So the question is not purely academic. I think it could be very practical. And the additional dimension of it, this makes it a real test case, is that the Constitution of Virginia says, in no uncertain terms that no money shall spent save in pursuance of appropriation.

So that in clear language, it says, if you don't have a legislative appropriation, you can't spend the money. Well, if you are a textualist and you say, that's all we need to know, and that's the end of the matter, the governor can't spend, then the question is then that I've been asked to consider over the years, going back really back to

Governor Warner's administration in some sense of that, is, well, what happens when July 1 comes, and you look at this provision of the Constitution that says you can't spend money unless there's a legislative appropriation and there's not a budget. So it's July 2, July 1, do you close down the state hospitals? Do you close down the state police? Do you close down the state courts? Do you open the state prisons? Just real, genuine, critical problems here.

So my thoughts, I mean, I had no answer to this, because there are no court cases. We just don't know the answer to that. As a citizen, I hope we never discover the answer. I don't want to know. As a citizen of Virginia, I do not want to find out what the answer to that is. As an academic, obviously, I'm curious to know what would be the answer to it if the time came.

And it seems to me that a governor might, whatever a court might say, the governor is not going to let-- the money keeps coming in, the revenues are still there. The state money is available. But it seems to me the governor is bound-- he might decide to close down discretionary things. Virginia Museum of Fine Arts, for example, might be closed.

But he's not going to send home the state troopers or close the hospitals or the like. You know that in the real world the governor will spend money. Is there sort of a realpolitik, sort of a thing that we know will happen, no matter what the Constitution says, or are there constitutional limitations which are going to apply in a case like that. So I'm just curious to know, if a governor were to ask you what do I do? If I was in court, what do you tell them?

SAI PRAKASH: That's a great question, Dick. And I think there's a legal answer and there is a practical answer. But there's also a federal answer. So let me give to the federal answer first. This actually happens all the time at the federal level, where Congress fails to pass an appropriation and the prior year appropriations have expired.

So there's no authority to go to the Treasury and withdraw funds. But of course, the government has all these programs that rely upon funds. Sometimes Congress actually passes a permanent appropriation that allows funding to continue. That's true for lots of entitlements. But it doesn't have permanent appropriations for the

army and for most of the federal budget.

Large portions of the federal budget are done through annual appropriations, and not permanent appropriations. And so, this question has come up multiple times at the federal level. And the lawyers, the executive branch lawyers, claim that the president has legal authority to spend money, to shut down things, which kind of makes sense, that you don't just literally leave the door open because you don't have money to pay someone to lock the door.

But they also claim to have authority to spend money on anything that's needed to protect the lives of Americans, which I think includes things like the military and things like the air traffic controllers and stuff. And so, the way to think about it is they're basically saying the president can spend money on anything that's necessary to protect the lives of Americans and to protect federal property. But nothing beyond that. And so there are limits to what to the principle they're annunciating.

I actually think that they're wrong in saying that because I think the federal Constitution has the same provision that the Virginia Constitution does with respect to saying that you can't withdraw money from the Treasury unless there's an appropriation made by law. And everyone understands that to mean Congress because the president can't make law. But I think the executive branch has hit upon an expedience of saying, well, certain things have to be funded, will be funded and the executive will go to the Treasury and withdraw funds without regard to an appropriation.

And I think there's two ways of handling that reality, right? The one way is to claim that there is legal authority, which I disagree with. And the other way is to say, look, there is no legal authority but I'm going to continue doing this. And I'm doing something illegal and hopefully you'll see the wisdom of what I'm doing and you'll retroactively sanction what I'm doing.

Now, in most of these cases, there's never going to be a court case because no one has standing. Tomorrow, Joe Biden can send a check to you or me and no one will have standing to challenge it because they're not harmed in a particular way by the fact that you or I got a check from Joe Biden. And that's true with respect to

appropriations.

That is to say for the most part individuals won't have standing just because the governor is spending money where there's no appropriation or the president is spending money with no appropriation. So there's not going to be a court case. So I think the governor or the president can spend money as a practical matter because they control the Treasury.

I think it's illegal. I think they should do that where they think it's necessary. And then I think they should do what Mr. Christofferson said earlier, which is to basically say publicly, I took this measure because I thought it was absolutely necessary. I don't claim that it's legal. In fact it's illegal. I don't want to foster a tradition or practice of spending money without an appropriation.

And it's up to the legislature now to sanction what I did or to impeach me for doing this, for taking these measures. It's up to them. And you know, it's possible that there'll be some of uncertainty about what the legislature is doing. Because they're not going to want to take responsibility sometimes for either sanctioning what the governor did or refusing to sanction it. But I think you hit your nail upon a real world problem, that if Virginia hasn't faced, the federal government faces every two or three years.

This has just happened repeatedly for decades, where Congress is unable to reach agreement on an appropriation. Typically, they pass something called a continuing resolution that funds the government at previous levels. But sometimes they're not able to do that. And that's when these Office of Legal Counsel opinions kick where the president on the advice of lawyers says I can fund things that are necessary to protect the lives of Americans and to protect the national defense, which means that some things get funded and some things don't.

AE DICK HOWARD: Thank you. We're coming close to the conclusion of our discussion. We have one other question that was a general question put to me by David Shufflebarger. And he asked, looking back, do you have any regrets about what else might have been addressed in the 1970 Constitution? If so, what ought to be a priority for the next version?

Well, of course with the passage of time, you can say absolutely, there were some

regrets at the time, but there are even more regrets now. Take one quick example. The commission added to the 1971 Constitution the requirement that legislative districts be compact and contiguous. Now, that's not a self-defining phrase. It requires some interpretation.

But it's meant to be a mandate to the legislature. The Virginia Supreme Court, in several cases over the years has been, in my judgment, unduly deferential to the legislature. I think they see what Felix Frankfurter once called a political thicket. They just don't want to really get involved in telling the legislature what to do in drawing district lines. So that's why the pending, the new commission that Rebecca has described is important.

So it's issues like that. Similarly with felons, it seems to me that the governor has the authority to issue wholesale pardons, sorry, restoration of voting rights, as opposed to individuals one at a time. There is a number of cases where, once a constitution is in place and the courts interpret it, whatever the framers thought they were doing, whatever a law professor like me thinks it ought to mean, the judges still have the final words. So we have to look carefully to those various decisions in time to see what's on the table.

I return to my original theme, but in looking at the present Constitution, we ought to be above all, emphasizing those things which help nurture racial justice, economic justice, political inclusiveness, a fair Commonwealth. I mean the things we care about can be enshrined in one way or another in the state Constitution. They don't finally provide answers. But they help. So I think I'll have to leave it there an that point with passage of time.

Alison, do you want to pick it up at this point? And may I thank the panel for wonderful remarks. I'm just excited to have had all of you on. Thank you for your time and your insights. They've been wonderful. Alison, back to you.

ALISON MCKEE: Thank you so much indeed. I want to thank you, Professor Howard, Professor Green, Professor Prakash, and Juliet as well for your sharing your expertise on these important issues of Virginia constitutional law, which we as Virginia lawyers, need to consider further. So this really got us thinking about a lot of these issues on these important topics and we thank you for being here this afternoon.

I want to give an extra shout out to Juliet. We are delighted to see that you will be staying in Virginia, and we wish you well in your clerkship. And as you embark on your career with McGuire Woods. And we really hope that you will stay in close touch with the Virginia Bar Association and become a member if you're not already and do great things for us.

There was talk at one point in time about establishing an Education Law Section and you just might be the person to do that. So, we do wish you well. And as I said, delighted that you will be in Virginia. With that, we'll conclude this program.

We have a scheduled break right now and will resume in 15 minutes with our ethics program. That's scheduled to begin at 3:45. So again, thank you to Professor Howard and our other panelists. Have a great afternoon. And I'll see most of you in just a few minutes as we begin our ethics program. Thank you.