

# Literacy as a Legislative and Judicial Trope

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Literacy itself can be understood only in its social and political context, and that context, once the mythology has been stripped away, can be seen as one of entrenched class structure in which those who have power have a vested interest in keeping it.

—J. Elspeth Stuckey, *The Violence of Literacy*, vii

In his *LiCS* symposium article, “The Legacies of Literacy Studies,” Harvey J. Graff argues that the field of literacy studies “lack[s] adequate critical treatments of the contradictory place literacy holds in popular, school, familiar, and public cultures” (16). Drawing on Graff, this article offers an analysis of the ways in which literacy has held a “contradictory place” in definitions created specifically about literacy testing by the Voting Rights Act (VRA) of 1965 and subsequently by the United States Supreme Court (SCOTUS). This analysis addresses the complex and problematic ways in which literacy and literacy testing has been utilized as a trope for and by the SCOTUS.

When I refer to literacy as a trope, I mean that literacy can serve as a reoccurring theme, example, case, or metaphor. The trope most often used for literacy corresponds to Sylvia Scribner’s metaphor of literacy as power, which she defines as one that “emphasizes a relationship between literacy and group or community advancement” (11). This literacy trope reflects what Graff calls the Literacy Myth—“the assumption that literacy and progress [are] identical” (*Literacy* 5)—or what Catherine Prendergast describes as “the flawed but rhetorically seductive and seemingly deathless argument that literacy will guarantee equality of opportunity, moral growth, and financial security and ensure the democratic participation of all individuals in society, regardless of other facts” (*Literacy* 4). Graff’s and Prendergast’s comments help us see the various ways literacy can be misunderstood and oversimplified.

I first noticed this misunderstanding of literacy when I studied Amish literacy. In *Wisconsin v. Yoder*, the SCOTUS found that requiring Amish children to attend public, non-Amish schools violates their Second Amendment rights. In the dissenting opinion, Justice William O. Douglas wrote about the purposes of literacy and education in ways that focused only on the jobs students may have in the future. Studying this case led me to wonder if this representation was part of a trend in the Supreme Court. To initiate this research, I reviewed Supreme Court case arguments, decisions,

and opinions since 1915 for terms like literacy, reading, and writing. Most cases that referenced or involved literacy were focused on voting rights, literacy tests for voting, and challenges to the 1965 Voting Rights Act, which banned literacy tests as a requirement for voting. This analysis revealed trends: before the Voting Rights Act, literacy was deployed as autonomous and neutral; after the VRA, literacy is characterized in ways that call to mind Scribner's metaphor of "literacy as power," suggesting an ideological understanding of literacy. I turn to this analysis now and conclude with what these legal understandings might mean post-Shelby, following challenges to the Voting Rights Act.

## THE EARLY YEARS: LITERACY TESTS AND THE SUPREME COURT, 1915 and 1959

The first record of literacy tests as a topic of debate in the SCOTUS appears in the 1915 decision on *Guinn v. United States*. The issue at hand in this case was the use of the "Grandfather Clause," a rule employed by many states, in this case Oklahoma, that waived the literacy test requirement for anyone whose grandfather had voted. The Court was asked to consider, first, whether Oklahoma's amendment responsible for creating the Grandfather Clause was valid, and second, whether the Amendment was created in order to deny rights to African Americans who were otherwise qualified to vote. The Court unanimously found this clause to be unconstitutional and ruled against it, even though, as historian J. Morgan Kousser shows, this move was not "particularly progressive" and "had no practical effect" (142). States like Oklahoma were able, Kousser argues, to continue "administrative discrimination without further legal challenge," and most states' Grandfather Clauses had expired by the time of the Court's decision in 1915 (142). Chief Justice Edward D. White, the son of a slaveholding sugar farmer and a former Confederate soldier and prisoner of war from Louisiana, wrote the Court's majority opinion. In the opening paragraph, White writes that

officers of the State of Oklahoma . . . conspired unlawfully, willfully, and fraudulently to deprive certain negro citizens, on account of their race and color, of a right to vote at a general election held in that State in 1910, they being entitled to vote under the state law, and which right was secured to them by the Fifteenth Amendment to the Constitution of the United States.

In other words, White argues that the literacy test was used as a tool to deny the rightful vote to citizens. In a democratic society, of course, a citizen exercises power through voting. We can understand White's language through Denny Taylor's reminder that "if you have power and privilege in society, literacy can be used to maintain your social status. You can use print to your advantage and to the disadvantage of others" (10). Justice Douglas's words illustrate a point Kate Vieira makes in her *LiCS* symposium article "On the Social Consequences of Literacy" that literacy can be seen as "a navigational technology that opens up some paths and closes off others, that orients and disorients, that routes and often reroutes" (27). Vieira further explains that literacy can serve as an "obstacle"

and often “oppresses, disenfranchises, [and] regulates” (28).

There are three distinctive kinds of literacy tests that were designed to limit voting access: tests that measured knowledge of civics or government, tests of character, and tests designed to be failed.<sup>1</sup> The content of the literacy tests themselves are an important contextual element in understanding the Supreme Court’s treatment of the tests. Most often, literacy tests required for voting were actually tests in civics. A 1965 literacy test given in Alabama and archived by the Civil Rights Movement Veterans (CRMV), for example, asks questions such as: “What body can try impeachments of the president of the United States?” or “Name the attorney general of the United States.”

In many states, including Mississippi, “good moral character”—the second category of voting tests—could exempt a potential voter from the literacy test requirement or was used as a requirement for voting. The three-page application for voting used in the mid 1950s in Mississippi consists of several questions about whether or not the applicant is a church leader; number sixteen asks “Are you a minister of the gospel in charge of an organized church, or the wife of such a minister?” Susan Kates, in her article “Literacy, Voting Rights, and the Citizenship Schools in the South, 1957-70” shows that during this era being “of good moral character” was often used as an exception or alternative for the literacy tests mostly “to ensure that illiterate whites were not disenfranchised” (480). Similarly, there are five different questions about employment. According to voting laws prior to the 1965 VRA, employment is similarly a measurement of “good character” and entitlement to voting, and this philosophy is reflected in Mississippi’s application for registration. This requirement is consistent with Graff’s description of the belief “that education could prevent criminality, if not cure it, and was integral” (*Literacy* 235). This concept of tying literacy to morality reflects what Graff calls “the moral bases of literacy” which is related to what Graff describes as “the moral economy,” or a society in which literacy is considered a resource that a nation needs to “increase its material prosperity” (*Literacy* 25).

The final category of literacy tests is the category designed to be failed. The state of Texas, for example, famously required applicants to answer one question: how many bubbles are in a bar of soap? Similarly, Louisiana’s 1963-1964 test, archived by the CRMV, requires applicants to follow instructions such as “In the space below, write the word “noise” backwards and place a dot over what would be its second letter should it have been written forward” and “Place a cross over the tenth letter in this line, a line under the first space in this sentence, and a circle around the last the in the second line of this sentence.” Again, applicants were expected to complete this test in ten minutes and were not permitted to miss a single question. The confusing nature of the questions plus the strict time limit indicates that the writers of this test did not intend for it to be passed.

The subject of literacy tests appeared again before the Supreme Court 44 years after *Guinn v. United States* in 1959 with *Lassiter v. Northampton County Board of Elections*. In this case, an African American citizen in North Carolina sued to have literacy tests declared unconstitutional. As a result, the SCOTUS was asked to answer two questions: first, can a state apply a literacy test to voters,

and second, does a literacy standard violate the Fifteenth Amendment of the US Constitution? The Court noted that the literacy test was part of a provision of the North Carolina Constitution and found that states' literacy tests were acceptable as long as *every* potential voter was required to take the test. In other words, according to the Court, the test could no longer be required only of African American voters. This decision was consistent with contemporaneous "separate but equal" policies, but of course the tests, used for intimidation and harassment, were not equal.

The *Lassiter* Opinion was written by Justice William O. Douglas who, in defense of the practices surrounding literacy tests, writes that states require many stipulations for voters, including "[r]esidence requirements, age, [and] previous criminal record." He continues,

The ability to read and write likewise has some relation to standards designed to promote intelligent use of the ballot. *Literacy and illiteracy are neutral on race, creed, color, and sex, as reports around the world show. Literacy and intelligence are obviously not synonymous.*

Illiterate people may be intelligent voters. (emphasis mine)

In this opinion, Douglas framed race, creed, color, and sex as irrelevant to this case. All that mattered to the court, in this situation, was whether a voter was literate. As the argument shows, intelligence did not matter—only literacy. This makes sense when we consider that news at the time was disseminated exclusively by newspapers, so a voter who could read the newspaper—regardless of the intelligence of that voter—would be an informed voter. Literacy, in this case, was conceptualized as something that helped a literate person accomplish certain tasks, or as "functional." As Douglas wrote on behalf of the Warren Court, "in our society where newspapers, periodicals, books, and other printed matter canvass and debate campaign issues, a State might conclude that only those who are literate should exercise the franchise." In other words, to protect the literacy standard requirement was, in Douglas's mind, to ensure that voters would be informed on the relevant issues. This school of thought is echoed by Stevens, who shows that, at least theoretically, literacy standards have always been enacted "not because [literacy] was functionally related to intelligent voting but because a great deal of periodical information related to public matters was published at that level (6<sup>th</sup>- or 8<sup>th</sup>- grade) of reading difficulty" (84-5).

Douglas's statement that reading and writing are *neutral* tells us much about his understanding of literacy. In this understanding of literacy, literacy is universally accessible and is autonomous of local contexts. But literacy scholarship has demonstrated that literacy is "neither neutral, ambiguous, nor radically advantageous or liberating" (Graff, *Literacy* 19). Literacy scholarship tells us, to the contrary, that literacy's "value, in fact, depended heavily on other factors, from ascribed social characteristics such as ethnicity, sex, or race, to the institutional, social, economic, and cultural contexts in which it was manifest. The role of literacy in the life of an individual and society is contradictory and complex" (Graff, *Literacy* 19). In other words, context is important, and literacy is neither apolitical nor ahistorical. Douglas's assertion that literacy is neutral ignores the political, historical, and contextual nature of literacy and is consistent with what Brian V. Street calls the autonomous model of literacy—a model that "isolates literacy as an independent variable" (*Literacy*

3).

The Supreme Court never revisited literacy tests as a requirement for voting after *Guinn* and *Lassiter* because six years later, Congress passed the landmark *Voting Rights Act of 1965*, which among other things prohibited the use of literacy tests as a requirement for voter registration. In the next section, I outline and contextualize the VRA and show how literacy is represented in the legislation.

## THE VOTING RIGHTS ACT OF 1965

Literacy is defined indirectly in the VRA through descriptions of literacy tests. Section four explicitly addresses the implementation of literacy tests, stating that “no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State.” “Test or device” is later defined in subsection C as

any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or member of any other class.

In subsection E, the Act states that as long as a potential voter has completed sixth grade in an established school in U.S. territory, even if the instruction in that school was not in English, that voter cannot be subjected to a literacy test.

In both of these subsections of the Act, the phrase used to describe the tests’ intentions, and I argue to define literacy, is “read, write, understand, or interpret.” This definition seems to privilege what is often referred to as “functional literacy” and can be defined, again as Scribner does, as “the level of proficiency necessary for effective performance in a range of settings and customary activities” (9). The writers of the Voting Rights Act seemed to operate under the assumption that if functional literacy can be tested, the test is not one to which a rightful citizen should be subjected.

The definition of literacy as the ability to “read, write, understand, or interpret” does not have an object—in other words, it is unclear *what* such a test would measure one’s ability to “read, write, understand, and interpret.” Text? Oral expression? Context and cultural influences are missing from the legislation’s definition, which are important elements to consider since, as Scribner shows, “grasping what literacy ‘is’ inevitably involves social analysis” (8). Street’s work is useful in analyzing the VRA in two ways: first, the fact that the VRA exists at all is a reflection of the ideological model, which he says “enables us to focus on the ways in which the apparent neutrality of literacy practices disguises their significance for the distribution of power in society” (431). Second, Street’s autonomous model helps us understand the VRA’s language, which treats literacy as “independent of social context, an autonomous variable whose consequences for society and cognition can be derived from its intrinsic character” (432). In other words, the definition of literacy in the VRA ignores the

social context of literacy, which is important for defining and understanding what literacy is. The contradictory nature of the existence of the act and the language used in the act illustrates how complicated it is to legislate issues of literacy. This contradiction, it seems, can be seen in how the SCOTUS interpreted literacy in the cases that followed the VRA.

Prior to the passing of the VRA, the Supreme Court could not or would not rule against literacy tests and treated literacy as, to borrow the court's term, "neutral." Once the VRA passed, literacy tests came to serve as a trope for discrimination disguised as bureaucracy in Court documents. After the VRA, literacy tests functioned as a trope in ways that resonate with Street's ideological model, J. Elspeth Stuckey's descriptions of literacy as violence, or Taylor's descriptions of "toxic" literacy. For example, language used in the 1980 case *Fullilove v. Klutznick*, which held that Congress could use its spending power to remedy past discrimination, reflects a belief that literacy tests were, to borrow Taylor's term, "toxic." Literacy tests were described by Drew S. Days, the Chief Lawyer for the Respondent, as something from which "discrimination flow[ed]." In 1982, E. Freeman Leverett, the attorney arguing on behalf of the appellants in *Rogers v. Lodge*, claimed that "in Burke County [Georgia] the evidence is that in the memory of no witness has any black person ever been unable to pass the literacy test." One justice (unidentified in the transcripts) challenged this claim, asking how many "negroes" had been elected to office in Burke County, to which Leverett had to admit "zero." Clearly, the justices in 1982 were unwilling to accept the idea that literacy tests were fair and enforced a conception of the tests as bureaucratic injustice, what we might call "literacy violence."

Legal cases have continued to invoke the injustices of literacy testing. In *Thornburg v. Gingles*, a 1986 case concerning voting and racial justice, attorney for the plaintiff Julius Chambers used the word "problems" to describe a situation in which literacy tests were used illegally in districts to intimidate potential African American voters despite the passing of the VRA. In the 1996 case *Morse v. Republican Party of Virginia*, the issue in question included the practice of holding a convention that required a \$45 fee instead of a primary election. Justice Stephen Breyer compared this practice to literacy tests, asserting that in both cases, "only the white people can vote." In other words, the fee would serve as a deterrent for poor or minority registrants. In the 2000 age-discrimination case *Kimel v. Florida Board of Regents*, Barbara Underwood, the attorney who argued on behalf of the federal government, asserted that "as to the fact that this Court has not found an age discrimination unconstitutional, I'd like to point out that this is no different from what happened with literacy tests and voting." Similar parallels were drawn between literacy testing and discrimination based on disability by attorney for the petitioners Jeffrey S. Sutton in the 2001 case *Board of Trustees of the University of Alabama v. Garrett*. Sutton explicitly says "Let's draw an analogy to the race cases" and describes literacy tests as "problem[atic] and discriminat[ory]."

What these cases illustrate is that even in instances when literacy was not the subject of inquiry, the literacy test stands as a symbol that is rhetorically persuasive enough to use in the important arguments made in the SCOTUS, and this shift was a result of the VRA. Following the passing of the VRA, representatives of the court began to characterize literacy tests in ways that call

to mind Scribner's metaphor of "literacy as power"—those with power using literacy to prohibit others from gaining power. The justices' use of this new trope of literacy tests as discriminatory suggest they understood that literacy was used as a kind of violence—a way to prohibit citizens from exercising their right to vote—or as Kate Vieira puts it, as an "obstacle." This trope constructs literacy as ideological.

Forty-eight years after the VRA outlawed literacy tests for voting, these tests continue to be relevant following the SCOTUS's historic *Shelby County v. Holder* decision that struck down Section Five of the 1965 Voting Rights Act (VRA) in June 2013. Despite the fact that Congress passed four bipartisan expansions of the VRA over the last 43 years, including as recently as 2006, the SCOTUS voted 5-4 to find Section 4(b) unconstitutional. At the center of the arguments made before the Supreme Court on February 27, 2013 was the relevance and significance of the historic use of literacy tests to determine which voting districts required preclearance before making changes to voting districts, locations, and laws. Burt W. Rein, the attorney representing Shelby County, Alabama, argued that literacy tests could not be used to determine which districts were required to seek preclearance because the literacy test was outlawed by the Voting Rights Act. Justice Stephen G. Breyer tried to reframe this issue by comparing discriminatory voting practices to a plant disease. In his comparison, literacy tests were simply a symptom of the disease and he argues, "the disease is still there in the State." Although Attorney Rein attempted to push back, arguing that the needs do not justify the current burden of preclearance on specified districts, Breyer argued that "by and large (this statute) has worked" to create fairness in voting laws. Literacy tests were used to identify districts for preclearance status, but since literacy tests were outlawed by the VRA, opponents of preclearance argue that historic uses of literacy tests is no longer a relevant mechanism to determine singled-out districts.

Justice Breyer's characterization of literacy testing is consistent with that used in the SCOTUS in the years following the VRA. Breyer and the three justices who voted with him seem to characterize the literacy test as shorthand for discrimination. However, Breyer was in the minority. The other five justices see the VRA, as Justice Antonin Scalia referred to it, as a "racial entitlement" and violation of states' rights. This historic decision—and what Congress will do in response—serves as a culmination of the way in which literacy has been constructed and used as trope in judicial debates about voting rights.

It may be that the VRA's contradictory characterization of literacy, blending Street's autonomous and ideological models, contributed to the recent shift in the court's characterization of literacy tests and the VRA. More broadly, I suspect we are in the midst of a shift in our cultural attitudes regarding literacy in the United States. Graff reminds us of "the pervasive power of the literacy myth in American culture and politics," and this myth seems to be as powerful as ever ("Legacies" 16). Given that the United States, which functions under what Graff refers to as a "knowledge economy," is still emerging from The Great Recession, is it a coincidence that attitudes toward literacy, literacy tests, and access are shifting? After all, as Graff maintains, "[t]he ... needs of a 'knowledge economy,' we easily forget,

do not bring employment and rewards to all those in search of fair work and pay, *regardless* of their ability to read and write across different media and different languages” (“Legacies” 16). When it comes to employment, access, education, and voting rights in the United States, investments are deep. This sense of exigence contributes to the further politicization of literacy, already highly politicized through the literacy myth. We must consider this history of literacy’s conceptualization and use as a trope throughout modern American history so that we fully realize what is at stake when Congress responds to the SCOTUS *Shelby County* decision. And what is at stake? Access, equality, fairness, and the further perpetuation of the literacy myth to maintain power for those who are already successful in the knowledge economy.



## NOTES

<sup>1</sup> The Civil Rights Movement Veterans website archives all the tests that are available on the Internet, including the 1965 Alabama Voter Literacy Test and Application Form, the 1963-64 Louisiana Voter Literacy Test, the South Carolina Voter Application (date unknown), and the mid-1950s Mississippi Voter Application and Literacy Test.

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