

## Voting: The Right to Preserve All Others

People of faith have struggled for democracy since we first questioned the divine right of kings. There would be no John Locke, American Revolution, Abolition, 15th Amendment, 19th Amendment, or Voting Rights Act, but for the historic commitment and work of people of faith.

The institutional members of Texas Impact affirm that every person is created in the image of God, and should have a voice in the ordering of the community through participation in free and fair elections. Free and fair elections mean one person, one vote; fair political representation of all residents; transparent, convenient, and secure electoral processes; and—if noncitizens are to be disenfranchised—then fair and transparent paths to citizenship. In the United States of America, voting and the peaceful transition of power should be a cause for celebration rather than fear.

The ballot is power, and power has never been easily shared. In our nation's history, we have overcome property requirements, poll taxes, race restrictive primaries, gender qualifications, multimember districts, and literacy tests. However, we continue to debate with scant evidence the necessity of felony restrictions; state ID requirements; aggressive poll watchers; complex and outdated ballot by mail systems; armed election judges; convoluted residency requirements; and vague criminal penalties to deter ballot access.



Voting is a matter of faith, citizenship and democracy. It is a kind of prayer and faithful testament to the belief that every citizen bears a responsibility and equal right to determine the future of governance in society.

The Reverend Susan Henry-Crowe



## Early American History

The U.S. Constitution left it to the states to set voting requirements. Each state determined whether religious minorities, non-property owners, free blacks, or women were “qualified.” As the last five states joined the majority of other states and federal government in disestablishing church and state, so too did the last religious qualifications for voting. By 1828, no state had a religious qualification. State by state, non-property owners also fought for the right to vote—often through riot and rebellion such as the Dorr Rebellion in Rhode Island. By 1856, no state had a property qualification.

## The Civil War’s Reconstruction

Amendments have been called “The Second Founding,” and significantly reoriented the federal government’s relationship with the states. The Fourteenth Amendment granted federal and state citizenship to all male persons born or naturalized in the United States, which reversed the U.S. Supreme Court’s decision in Dred Scott and set the stage for future expansion of voting rights. Two years later, the Fifteenth Amendment prohibited states from disenfranchising black men. Both amendments contain clauses explicitly empowering Congress to enforce the amendments through legislation.

However, as soon as it was clear that Congress had lost the will to legislate and that Reconstruction had ended, states began enacting poll taxes, literacy tests, grandfather clauses, and other

nefarious restrictions. Though these laws were challenged in the courts, the U.S. Supreme Court gutted the Reconstruction Amendments. In addition to upholding states’ restrictions, they ruled the 14th and 15th Amendments were inapplicable to women and Native Americans. Additionally, federal legislation was used to disenfranchise and deny citizenship to Chinese-Americans in the Chinese Exclusion Act.

## Texas History

In Texas, Reconstruction ended with an armed standoff at the old Texas Capitol over a contested election in December of 1873. Republican Governor E.J. Davis barricaded himself in the building after the Texas Supreme Court invalidated the election of Democrat Richard Coke. The multi-day standoff was resolved when President Ulysses S. Grant refused to intervene and telegraphed for Davis “to yield to the verdict of the people.”

Federal troops no longer protected African Americans who wished to vote. Black legislators braved routine violence. One of the last black legislators to serve Texas until the 1960s was Rep. Alexander Asbury. When he lost the election of 1896 by 21 votes, a white judge shot him for contesting the case. Rep. Edward Patton was the great grandfather of Barbara Jordan. While running for a second term, the county sheriff shot him.

The 14th and 15th Amendments were increasingly reduced to just ink on paper. By the end of the 1890’s, there would be no more African Americans in the Texas

Legislature until after implementation of the Voting Rights Act of 1965. In addition to intimidation, economic reprisals, and physical violence, the Democratic Party used internal party rules to bar African Americans and Mexican Americans from joining the party and thus voting in the only race that mattered. The state legislature also enacted a poll tax to further disenfranchise African Americans—who were overwhelmingly Republican—and the poor whites that had backed the Populist Party—the most successful third party movement in Texas history.

### The 19th Amendment

The struggle for women’s suffrage is often marked as beginning at Seneca Falls in 1848. Abolition, the Civil War, and the failure of Reconstruction would dominate our national history. The second galvanizing moment for women’s suffrage was the U.S. Supreme Court’s decision in *Minor v. Happersett*, which denied women the right to vote. For the next

45 years, women organized locally to change laws state by state to create the conditions for the 19th Amendment. Ironically, it is also during this period that alien suffrage was restricted in many states and citizenship became a qualification for voting.

Nowhere is the connection between expanding women’s suffrage and restricting the ballot to citizens greater than in Texas. In 1917, William Hobby became governor after Pa Ferguson was impeached. Despite his impeachment, Ferguson ran again in the July 1918 primary against Hobby. Ferguson was an opponent of women’s suffrage and prohibition. A key base of Ferguson’s was the German beer industry, represented by residents in the German belt from Galveston to Fredericksburg. However, America had just entered the First World War, and a telegram from Germany to Mexico had been intercepted, which proposed an alliance in which Germany would help Mexico recapture Texas if Mexico entered the war against the United States. By 1918, anti-German hysteria was at a zenith.



**The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude. The Congress shall have power to enforce this article by appropriate legislation.**

**15th Amendment, U.S. Constitution**



Hobby called a 4th special session in March 1918. In that session, the Legislature would pass HB 15, known as the Loyalty Laws, which prohibited the use of the German language, display of the German culture, and created Loyalty Rangers to monitor Germans in Texas. The Legislature also passed HB 105, allowing women to vote in primary elections, and HB 107, which prohibited non-citizens on the naturalization track—then qualified voters in Texas—from voting in primaries. In the first 17 days after the act passed, 386,000 women registered to vote. In July, Hobby smashed Ferguson with 68% of the vote.

In June 1919, Texas quickly ratified the 19th Amendment. In the 1921 regular session, Texas passed SJR 1, which put women’s suffrage in the Texas Constitution. However, SJR 1 also required that voters be citizens, which disenfranchised the non-citizens on the naturalization track who had the constitutional right to vote under the 1876 Constitution. The voters of Texas approved

that 1921 amendment, 57,622 to 53,910.

## Resurrecting the Reconstruction Amendments

After disenfranchising Germans and Mexicans on the legal path to citizenship, the Texas Legislature codified a long-standing practice of disallowing African Americans from voting in the primary in the 1923 session. However, the resulting court case was one of the first cases that began to restore some of the original intent of the 14th and 15th Amendments. In 1927, the U.S. Supreme Court struck down that law in *Nixon v. Herndon*. Shortly thereafter, Texas responded by passing a new law empowering the executive committee of the political party with the authority to set voter qualifications. In 1932, the Supreme Court struck down the Texas law again using the opportunity to expand the “state action doctrine” once used to limit the Reconstruction Amendments. Texas again responded by passing a new law barring blacks from participating in the party’s nominating conventions instead of the previous two laws, which focused on voter



**The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex. Congress shall have power to enforce this article by appropriate legislation.**

**19th Amendment, U.S. Constitution**



***The vote is the most powerful instrument ever devised by man for breaking down injustice.***

***Lyndon Baines Johnson, August 6, 1965***



qualifications. While initially upholding the law in the 1935 case *Grovey v. Townsend*, the U.S. Supreme Court overturned *Grovey* in the subsequent and final case, *Smith v. Allwright*, in 1944. In *Smith*, the Court ruled that delegation of a state's authority over elections to a private organization was state action that violated the Fourteenth and Fifteenth Amendments.

In the early 1960's, the Warren Court ushered in the era of "one person, one vote." In 1962, in *Baker v. Carr*, the Court ruled that redistricting was a justiciable question under the Equal Protection Clause of the Fourteenth Amendment, which empowered federal courts to hear redistricting cases. In 1964, in *Wesberry v. Sanders*, the Court ruled that the districts of the U.S. House of Representatives must be approximately equal in population. Later that same year, the Court ruled in *Reynolds v. Simms* that state legislatures must have electoral districts roughly equal in population as well.

Also in 1964, the Twenty-Fourth Amendment was ratified, which prohibits poll taxes in

federal elections. Shortly thereafter, the U.S. Supreme Court held that poll taxes are an unconstitutional denial of equal protection for all other elections as well in *Harper v. Virginia State Board of Elections*. The Court wrote, "voter qualifications have no relation to wealth nor to paying or not paying this or any other tax." The state of Texas responded in 1966 by requiring voters to re-register to vote every year. The state of Texas argued it was necessary to keep accurate voter roles. A federal court found that about one million Texans were disenfranchised by the onerous requirement and invalidated the statute in *Beare v. Smith* in 1971.

### **The Voting Rights Act**

The Voting Rights Act of 1965 (VRA) is arguably the pinnacle achievement of the Civil Rights Movement. The VRA enforces the 15th Amendment, which was ratified 95 years prior. The VRA outlawed literacy tests, provided for federal examiners to oversee state and local elections and registered qualified citizens, prohibited changes to



voting laws that had a discriminatory effect — not just purpose — under Section 2, and required certain jurisdictions to “preclear” any changes to their voting laws with the U.S. Attorney General or a three judge federal district court in Washington D.C. under Section 5. The VRA had an immediate impact. By the end of 1966, only four of the 13 southern states had fewer than 50 percent of African Americans registered to vote, and shortly thereafter, African Americans began returning to local, state, and federal offices for the first time since Reconstruction.

Most Americans alive today have lived in a time of relative stability for voting rights in the United States. Few remember having to fight for their franchise thanks to the Voting Rights Act. Conflict over who gets the franchise dominates most of American history. However, 1982 to 2013 was an era of relative consensus on expanding the franchise. At the national level, the Voting Rights Act was reauthorized in 1982. In 1986, the Uniformed and Overseas Citizens Absentee Voting Act was passed. In 1993, the National Voter Registration Act was enacted. In 2002, the Help America Vote Act was enacted, and in 2006, the Voting

Rights Act was again reauthorized. At the state level, Texas restored the voting rights of former felons that completed their sentences. Texas also pioneered early voting, which became a model for other states that followed the in-person “retail voting” model as opposed to many less densely populated western states which chose to expand mail-in voting instead.

## 2013 to the Present

Like the Court at the end of Reconstruction, today’s U.S. Supreme Court is gutting the hard won gains protected by the Voting Rights Act. In 2013, the U.S. Supreme Court said in *Shelby County v. Holder* that the formula that determined which states fell under Section 5 “preclearance” was outdated and Congress must update it. However, a political majority has not existed in Congress since 2013 to update it, and localities and states like Texas can now change their voting laws without oversight, forcing costly litigation on voting rights proponents. Also in 2013, Texas passed its Voter ID legislation. After *Shelby County*, that law went into effect without the need for federal preclearance.



**“I believe there are more instances of the abridgement of the freedom of the people by gradual and silent encroachments of those in power than by violent and sudden usurpations.”**

**James Madison**



**Democracy is based upon the conviction there are extraordinary possibilities in ordinary people.**

**Harry Emerson Fosdick**



In 2021, the U.S. Supreme Court significantly narrowed Section 2 of the Voting Rights Act, which prohibits changes to voting laws that have a discriminatory effect. Section 2 is critical because the U.S. Supreme Court has held that to violate equal protection, a law must have a discriminatory purpose as opposed to a discriminatory effect. It is quite difficult to prove what's in the hearts of a legislative body, especially when that purpose goes unspoken. In *Brnovich*, the U.S. Supreme Court narrowed what a discriminatory effect can be by creating a bunch of factors courts must consider, such as whether or not a state provides more opportunities to vote now than the state did when section 2 of the Voting Rights Act was last amended in 1982.

In 2023, two cases with major implications for voting rights are pending at the U.S. Supreme Court. *Merrill v. Milligan* is an appeal from Alabama in which the state gerrymandered its congressional districts by dividing up the state's heavily African American counties, known as the Black Belt. Due to the legal issues in the case, the U.S. Supreme Court could further limit Section 2 of the Voting Rights Act. The second case is *Moore v. Harper*, which advances a novel argument called the "independent state legislature theory." The Republican controlled legislature of North Carolina is arguing that it is "independent" from the checks and balances of the North Carolina Supreme

Court. In other words, the North Carolina Legislature wants the U.S. Supreme Court to declare that the North Carolina Supreme Court does not have the power to review the election laws passed by the North Carolina legislature in redistricting. A Supreme Court ruling for the North Carolina Legislature would ensure even more partisan districts, especially in states where the statewide elected officials are of the other party.

The parties in power in state legislatures are paying attention to the changing case law coming from the U.S. Supreme Court. Those in power struggle to resist the temptation to use that power to change the laws so they can remain in power. Throughout our history, "preventing fraud" is the often-unsubstantiated refrain that justifies those changes. In 2021, Texas passed SB 1, a sweeping elections bill that empowers partisan poll watchers to intimidate, harass, and disrupt; dramatically increases ballot rejections for mail-in ballot voters; and creates legal ambiguities for election judges, voter assistants, and volunteer deputy registrars. Many parts of SB 1 are now law and are being challenged in federal court where the case law is rapidly shifting. State legislatures will not take us back to the days of political inequality in one piece of legislation, but they will continue to push the boundaries of what courts—and voters—will allow.

# THE WAY FORWARD FOR TEXAS

- ★ Enact measures that increase voter participation, such as online voter registration; longer early voting periods; county-wide polling locations; and modernizing vote-by-mail
- ★ Reject proposals to impose new restrictions or onerous administrative processes on county election administrators
- ★ Provide additional resources to counties for year-round election administration activities
- ★ Reject any new requirements or restrictions for individual voters

## STAY IN TOUCH

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