Voting Rights, Hard Won, Not Done: Honoring the Legacy of the 15th and 19th Amendments

Emily Chafa

Henry Hamilton III

I. Independence through the 15th Amendment

A. Each state generally responsible for establishing the voter qualifications of its citizens.

Individuals who were enslaved were not allowed to vote. Prior to the 15th Amendment, few states allowed free African American males the right to vote. Additionally, males under the age of 21 and women were generally not allowed to vote. There were no federally elected African Americans, and only a few state or local officeholders.

B. State of Iowa

1. Iowa limited the right to vote to white males 21 years and older.

2. Original Iowa Constitution, Article II - Right of Suffrage, provided:

> Section 1. Every white male citizen of the United States, of the age of twenty one years, who shall have been a resident of this State six months next preceding the election, and of the County in which he claims his vote sixty days, shall be entitled to vote at all elections which are now or hereafter may be authorized by law.
>
> . . .
>
> Section 5. No idiot, or insane person, or person convicted of any infamous crime, shall be entitled to the privilege of an elector.

State of Iowa Constitution, Article II, Sections 1and 5 (1857). Source: https://www.legis.iowa.gov/docs/publications/icnst/attachments/Iowa_Constitution_Scanned.pdf.

C. Thirteenth Amendment

> Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted shall exist within the United States, or any place subject to their jurisdiction.

D. Fourteenth Amendment

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privilege or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
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> Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except

for participation in rebellion, or other crime, the basis of representation therein hall be reduced in proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

1. Reconstruction Act of 1867 – In order to be readmitted into the union, among other items, rebel states had to ratify the 14th Amendment and allow black male suffrage.

2. The language "except for participation in rebellion, or other crime" will later be used to support felony disenfranchisement.

E. Fifteenth Amendment

1. Black suffrage leaders

a. Frederick Douglas

Slavery is not abolished until the black man has the ballot. While the legislatures of the South retain the right to pass laws discriminating between black and white, slavery still lives there.

b. Sojourner Truth

I am for keeping the thing going while things are stirring; because if we wait till it is still, it will take a great while to get it going again.

c. Frances Harper

d. Alexander Clark

To the people of Iowa: To every true, honest and liberty-loving citizen of Iowa do the colored men of your proud commonwealth appeal for sympathy and aid in securing these rights and privileges which belong to us as freemen. . . We appeal to the sense of justice of the Legislature and of the people of our own State, for those rights of citizenship without which our sell-earned freedom is but a shadow.

We ask no privilege; we simply ask you to recognize our claim to manhood by giving to us that right without which we have no power to defend ourselves from unjust legislation, and no voice in the government we have endeavored to preserve. . . Deprived of this, we are forced to pay taxes without representation; to submit, without appeal, to laws however offensive, without a single voice in framing them; to bear arms without the right to say whether against friend or foe — against loyalty or disloyalty. . . We ask only that privilege which is now given to every white, native-born or adopted, male citizen of our State - the privilege of the ballot-box.

We ask that the word "white" be stricken from the Constitution of our State; that the organic law of our State shall give to suffrage irrevocable guarantees that shall know of no distinction at the polls on account of color; and in this we simply ask that the "two streams of loyal blood which it took to conquer one, mad with treason," shall not be separated at the ballot-box; that he who can be trusted with an army musket, which makes victory and protects the nation, shall also be trusted with that boon of American

> liberty, the ballot, to express a preference for his rulers and his laws. . .and in spite of all the wrongs which we have long and silently endured in this our native country, we would yet exclaim, with a full heart, "O America! With all thy faults, we love thee still."

Address of the Colored State Convention to the People of Iowa on Behalf of their Enfranchisement, by Alexander Clark, February 13, 1868. Source: State Historical Society of Iowa.

Iowa electors subsequently approve constitutional amendments in 1868, and the word "white" is removed as a qualification for voting.

2. Congressional debates regarding 15th Amendment

Sources: Alexander Keyssar, The Right to Vote: The Contested History of Democracy in the United States (Basic Books, New York 2009); Kurt Lash, The Reconstruction Amendments: Essential Documents (University of Chicago Press, 2019).

a. Representative George Boutwell and Senator William Morris Stewart

> The right of any citizen of the United States to vote shall not be denied or abridged by the United States or any State by reason of the race, color, or previous condition of slavery of any citizen or class of citizens of the United States. The Congress shall have power to enforce by proper legislation the provisions of this article.

b. Senator John Brown Henderson

> No State shall deny or abridge the right of its citizens to vote and hold office on account of race, color, or previous condition. The Congress by appropriate legislation, may enforce the provisions of this article.

c. Representative John Bingham

> i. No State shall make or enforce any law which shall abridge or deny to any male citizen of the United States, of sound mind, and over twenty-one years of age, the equal exercise of the elective franchise at all elections in the State wherein he shall have actually resided for a period of one year next preceding such election, except such of said citizens as shall hereafter engage in rebellion or insurrection, or who may have been or shall be duly convicted of treason or other crime of the grade of felony at common law.
>
> ii. The right of citizens of the United States to vote and hold office shall not be denied or abridged by any State on account of race, color, nativity, property, creed, or previous condition of servitude.

d. Senator Henry Wilson

> No discrimination shall be made in any State among the citizens of the United States in the exercise of the elective franchise or in the right to hold office in any State on account of race, color, nativity, property, education, or creed.

e. Representative Samuel Shellabarger

No State shall make or enforce any law which shall deny or abridge to any male citizen of the United States of the age of twenty-one years or over, and who is of sound mind, an equal vote at all elections in the State in which he shall have such actual residence as shall be prescribed by law, except to such as have engaged or may hereafter engage in insurrection or rebellion against the United States, and to such as shall be duly convicted of treason, felony, or other infamous crime.

II. 15th Amendment through the Voting Rights Act of 1965

A. On February 3, 1870, Iowa approved the 15th Amendment to the Constitution, thereby securing its ratification. The amendment required approval by three-fourths of the states, which at the time meant 28 of the then 37 states. Iowa was the 28th state to approve the amendment.

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by and State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

B. Enforcement Acts

After passage of the Reconstruction Amendments there was violent opposition by several groups/mobs, including the Ku Klux Klan. Congress passed three Enforcement Acts to enforce voting rights and counter the violence perpetuated against African Americans.

1. Enforcement Act of 1870

a. Prohibits discrimination in voter registration on the basis of race, color, or previous condition of servitude;

b. Establishes criminal penalties for interfering with a person's right to vote, conspiring to deprive citizens of voting rights, obstructing the enforcement of voting rights, and committing voter fraud;

c. Provides for removal of and criminal penalties for certain individuals wrongfully holding political office; and

d. Provides federal courts the power to enforce the Act and to employ the use of federal marshals and the army to uphold it.

e. Section 2.

And be it further enacted, That if by or under the authority of the constitution or laws of any State, or the laws of any Territory, any act is or shall be required to be done as a prerequisite or qualification for voting, and by such constitution or laws persons or officers are or shall be charged with the performance of duties in furnishing to citizens an opportunity to perform such prerequisite, or to become qualified to vote, it shall be the duty of every such person and officer to give to all citizens of the United

States the same and equal opportunity to perform such prerequisite, and to become qualified to vote without distinction of race, color, or previous condition of servitude; and if any such person or officer shall refuse or knowingly omit to give full effect to this section, he shall, for every such offence, forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered by an action on the case, with full costs, and such allowance for counsel fees as the court shall deem just, and shall also, for every such offence, be deemed guilty of a misdemeanor, and shall, on conviction thereof, be fined not less than five hundred dollars, or be imprisoned not less than one month and not more than one year, or both, at the discretion of the court.

f. Section 4.

And be it further enacted, That if any person, by force, bribery, threats, intimidation, or other unlawful means, shall hinder, delay, prevent, or obstruct, or shall combine and confederate with others to hinder, delay, prevent, or obstruct, any citizen from doing any act required to be done to qualify him to vote or from voting at any election as aforesaid, such person shall for every such offence forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered by an action on the case, with full costs, and such allowance for counsel fees as the court shall deem just, and shall also for every such offence be guilty of a misdemeanor, and shall, on conviction thereof, be fined not less than five hundred dollars, or be imprisoned not less than one month and not more than one year, or both, at the discretion of the court.

2. Enforcement Act of 1871

a. Places all elections in both the North and South under federal control;

b. Authorizes federal district judges to appoint election supervisors who will oversee and be present during every aspect of election – from registering/challenging voters to verifying and counting votes;

c. Authorizes U.S. Marshals to employ deputies to maintain order at polling places to protect election supervisors and maintain peace;

d. Provides criminal penalties for the interfering with an election supervisor in the completion of their duties;

e. Provides criminal penalties for election supervisors and deputy marshals who refuse to perform their duties under the Act; and

f. Requires that votes for representatives in Congress be by written or printed ballots.

3. Ku Klux Klan Act of 1871

a. Provides criminal and civil penalties for conspiring to deprive citizens of their rights, including the right to lawfully hold office, discharge the duties of office, and the right to serve as a juror.

b. Authorizes use of the military to suppress any rebellion or insurrection, and suspends the writ of habeas corpus while suppressing the rebellion; and

c. Prohibits persons who have acted in furtherance of a violation of the Act from serving as a federal juror during the hearing of these matters.

C. Supreme Court strikes down portions of the Enforcement Acts

1. *United States v. Reese,* 92 U.S. 214 (1875) – Supreme Court held the Fifteenth Amendment did not confer the right to vote, but only prohibited exclusions from voting on racial grounds. Congress exceeds it authority under the 15th Amendment when it attempts to enforce a universal right to vote.

2. *United States v. Cruikshank*, 92 U.S. 542 (1876) – Supreme Court held that the due process clause and equal protection clause of the Fourteenth Amendment applied to state governments, but not individuals. Enforcement provision of Fourteenth Amendment did not apply to actions by individual citizens.

3. *United States v. Harris*, 106 U.S. 629 (1883)

> It was never supposed that the section under consideration conferred on Congress the power to enact a law which would punish a private citizen for an invasion of the rights of his fellow-citizen, conferred by the state of which they were both residents on all its citizens alike.

United States v. Harris, 106 U.S. 629, 644 (1883)

4. *James v. Henry Bowman*, 190 U.S. 127 (1903)

> In passing it may be noticed that this indictment charges no wrong done by the state of Kentucky, or by anyone acting under its authority. The matter complained of was purely as individual act of the defendant. . . a statute which purports to punish purely individual action cannot be sustained as an appropriate exercise of the power conferred by the 15th Amendment upon Congress to prevent action by the state through some one or more of its official representatives, and that an indictment which charges no discrimination on account of race, color, or previous condition of servitude is likewise destitute of support by such amendment.

James v. Henry Bowman, 190 U.S. 127, 139 (1903).

E. First generation suppression tactics - Violence and intimidation, poll taxes, literacy tests, grandfather clauses, bad character clauses, pauper clauses, understanding clauses, ballot manipulation, etc.

F. Civil rights movement

G. Civil Rights Act of 1957

As Americans, we must also realize and accept the fact that the responsibility of worldwide leadership carries with it a concomitant duty of providing the world with examples of freedom of liberty for all in our daily lives. Any intolerance or discrimination or deprivation of our constitutionally guaranteed rights and privileges resound and reverberate throughout the globe.

House Report accompanying the Civil Rights Act of 1957. Source: Alexander Keyssar, The Right to Vote: The Contested History of Democracy in the United States (Basic Books, New York 2009).

1. Creates Commission on Civil Rights and authorizes it to investigate and hold hearings to determine extent to which citizens are deprived of the right to vote by reason of their color, race, religion or national origin;

2. Establishes the Civil Rights Division in the U.S. Department of Justice, authorizes the U.S. Attorney General to seek court injunctions against deprivation and obstruction of voting rights by state officials, and to prosecute criminal contempt charges; and

3. With a few exceptions, establishes that any citizen of the United States who has attained the age of twenty-one years and who has resided for a period of one year within the judicial district, is competent to serve as a federal grand or petit juror.

4. Shortcomings – Few teeth. . .

   a. There had to be a violation. Elections were completed before the Department of Justice could intervene.

   b. No guarantee of access to voter records before suit. Lengthy litigation.

H. Civil Rights Act of 1960

1. Authorizes appointments of federal voting referees at local polls to oversee elections and ensure African Americans are permitted to vote;

2. Authorizes criminal penalties for anyone who obstructs a citizen's attempt to register to vote or to vote;

3. Authorizes criminal penalties for anyone who obstructs implementation of court orders;

4. Requires retention of voting and registration records related to federal elections, and makes it a crime to destroy or conceal these records;

5. Authorizes the Attorney General to bring pattern and practice lawsuits to enforce provisions of voting rights laws;

6. Extends the Civil Rights Commission for two years.

I. Civil Rights Act of 1964

1. Prohibits the discriminatory application of any standard, practice, or procedure to determine voter qualifications under state law;

2. Prohibits anyone under the color of state law from denying any person a right to vote in any federal election because of an error or omission on any document if such error is not material in determining whether the individual is qualified to vote under State law;

3. Requires that any literacy test used be issued to all individuals and be conducted in writing, and requires that copy of the test and answers be provided upon request within 25 days;

4. Defines "literacy test" as any test of the ability to read, write, understand, or interpret any matter;

5. Establishes a rebuttable presumption that any person who has obtained a 6th grade education possesses sufficient literacy and intellect to vote in federal elections;

6. Clarifies that "Federal Election" means any general, special, or primary election for federal office;

7. Provides an opportunity for voting disputes to be heard by a three-judge district court, with appeal of the final judgment to the Supreme Court;

8. Grants the power to enjoin discriminatory practices; and

9. Extends the Civil Rights Commission for four years.

III. Voting Rights Act of 1965

A. Civil Rights Movement

1. Freedom Summer 1964
    a. James Chaney, Andrew Goodman, and Michael Schwerner
    b. Fannie Lou Hamer
2. Bloody Sunday

B. President Johnson Address to the Nation on need for voting rights legislation:

> Every device of which human ingenuity is capable has been used to deny this right. The Negro citizen may go to register only to be told that the day is wrong, or the hour is late, or the official in charge is absent. And if he persists, and if he manages to present himself to the registrar, he may be disqualified because he did not spell out his middle name or because he abbreviated a word on the application. . . It is wrong--deadly wrong--to deny any of your fellow Americans the right to vote in this country.

President Lyndon Baines Johnson, Address on Voting Rights to Joint Session of Congress, March 15, 1965.

C. Voting Rights Act of 1965

1. Section 2 - No voting qualifications or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.

2. Section 4 – Coverage formula

a. Section 4(b) provides that a jurisdiction is covered if: (1) the Attorney General determines maintained on November 1, 1964, the jurisdiction utilized any test or device, and with respect to which the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964 (dates would be extended by future amendments).

b. Section 4(a) suspends operation of all such tests or devices.

Under Section 4(b), as amended, a State or political subdivision is a so-called "covered jurisdiction" if, on one of the specified coverage dates: (1) it maintained a literacy requirement or other "test or device" as a prerequisite to voting, and (2) fewer than 50% of its voting-age citizens were registered to vote or voted in that year's Presidential election. Section 4(a) suspends the operation of all such "test[s] or device[s]" in covered jurisdictions.

c. "Test or device" is defined 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 members of any other class.

3. Section 5 – Preclearance

a. Section 5 –

> Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, that such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a

> subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court.

Section 5, Voting Right Act of 1965.

b. Section 5 prohibits jurisdictions falling within the Section 4 coverage formula from implementing any change affecting voting without receiving preapproval from the U.S. Attorney General or the U.S. District Court for D.C.

c. *South Carolina v. Katzenbach,* 383 U.S. 301 (1966) - Supreme Court upholds constitutionality of coverage formula and preclearance.

> The Voting Rights Act was designed by Congress to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century. Congress felt itself confronted by an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution.

South Carolina v. Katzenbach, 383 U.S. 301, 309 (1966)

d. *Allen v. State Board of Elections*, 393 U.S. 544 (1969) - Private citizens have a right to enforce provisions of Section 5 and to have the dispute determined by a local district court of three judges. "The guarantee of § 5 that no person shall be denied the right to vote for failure to comply with an unapproved new enactment subject to § 5, might well prove an empty promise unless the private citizen were allowed to seek judicial enforcement of the prohibition." *Allen v. State Board of Elections*, 393 U.S. 544, 557 (1969).

e. Section 10 - Attorney General is authorized and directed to bring lawsuits against States or political subdivisions requiring the payment of a poll tax as a precondition to voting, or substitute therefor enacted after November 1, 1964, as will be necessary to implement the declaration of subsection.

f. Section 12 - Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any prohibited act or practice, the Attorney General may institute for the United States, or in the name of the United States, an action for preventive relief, including an application for a temporary or permanent injunction, restraining order, or other order, and including an order directed to the State and State or local election officials to require them to permit persons to vote and to count such votes.

g. Section 14(b)(2) - The term "political subdivision" shall mean any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting.

IV. Amendments to the Voting Rights Act

A. 1970 Amendments

1. Extends temporary provisions of Act for five years;

2. Bars literacy test in all elections national and state for five years;

3. Eliminates durational requirements for elections for President and Vice President and requires that no citizen be denied the right to vote for President and Vice President because the elector is not physically present in a State or political subdivision on election day; and

4. Lowers the minimum age of voters in both state and federal elections from 21 to 18. Congress finds 21-year age requirement denies and abridges the inherent constitutional rights of citizens eighteen years of age but not yet twenty-one years of age to vote—a particularly unfair treatment of such citizens in view of the national defense responsibilities imposed upon such citizens and does not bear a reasonable relationship to any compelling State interest.

B. 1975 Amendments

1. Extends the temporary provisions of the Act for seven years;

2. Permanently bars the use of "test or devices;"

3. Declares that no voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed to restrict the right of any citizen to vote because of membership in a language minority group;

4. Prohibits the use of English-only election materials in certain jurisdictions; and

5. Provides for attorney fees to prevailing party in actions to enforce guarantees of 14th and 15th Amendments.

C. *City of Mobile v. Bolden*, 446 U.S. 55 (1979), and *City of Rome v. United States*, 446 U.S. 156 (1980).

1. Black citizens of Mobile, Alabama, brought action to challenge the constitutionality of the city's at-large method of electing its commissioners. They argued that city commissioners have been unresponsive to the needs of blacks in Mobile; employed relatively few blacks in the higher levels of city service; had been enjoined by federal court order to desegregate its fire and police departments and to open city facilities to allow equal accessibility to blacks; various city committees whose members are appointed by the commission have evidenced a severe underrepresentation of blacks; and the commission had been less responsive to black areas than white ones with respect to providing municipal services.

Court held that at-large or multi-member districts are not a violation per se of voting rights laws. Plaintiffs failed to establish discriminatory intent. Court held plaintiff's in voting rights suits must show discriminatory intent. The 15th Amendment "prohibits only purposefully discriminatory denial or abridgment by government of the freedom to vote on account of race, color, or previous condition of servitude." *City of Mobile v. Bolden*, 446 U.S. 55, 65 (1979).

2. City of Rome filed an action to bailout. Supreme Court held any bailout action to exempt the city must be filed by, and seek to exempt all of, the State of Georgia. *City of Rome v. United States*, 446 U.S. 156, 167 (1980). Political subdivisions of a covered State are "not entitled to bail out in a piecemeal fashion." *Id.,* at 192 (Justice Stevens, concurring opinion).

D. 1982 Amendments

1. Extends most provisions for 25 years (The language assistance requirements were only extended for seven years);

2. Permits political subdivisions of covered States to bail-out independently of the States;

3. Clarifies that the prohibition against voting discrimination includes conduct which has the effect of discrimination;

4. Declares that members of a protected class do not have a right to be proportionately represented, but establishes that a violation is established if it is shown, based on the "totality of circumstances," that the nomination or election processes are not equally open to members of a protected class insofar as its members have less opportunity to participate and elect their own representatives; and

5. Authorizes voting assistance for individuals with certain disabilities.

E. 1992 Amendments – Extends language assistance requirements for 15 years.

F. 2006 Amendments - ``Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006.''

1. Congress found significant progress had been made in eliminating first generation barriers experienced by minority voters, including increased numbers of registered minority voters, minority voter turnout, and minority representation in Congress, State legislatures, and local elected offices; and that this progress was the direct result of the Voting Rights Act of 1965. Nonetheless, vestiges of discrimination in voting continue to exist as demonstrated by second generation barriers constructed to prevent minority voters from fully participating in the electoral process.

a. 15,000 pages of legislative records of racial abuses in voting since the 1982;

b. More DOJ objections between 1982 and 2006 than there were between 1965 and 1982;

c. Between 1982 and 2006 DOJ blocked 700 voting changes due to impact on African American voters;

d. More than 800 voting changes were altered or withdrawn; and

e. Untold number of instances when jurisdictions had informal discussion with the DOJ and decided against pursuing changes.

2. Authorizes expert fees as part of court costs, and extends bilingual language requirement until 2032.

V. *Northwest Austin Municipal District Number One v. Holder*, 557 U.S. 193 (2009) and *Shelby County v. Holder*, 570 U.S. 529 (2013)

A. *Northwest Austin Municipal District Number One v. Holder*, 557 U.S. 193 (2009)

The State of Texas was subjected to preclearance. A small utility district in Texas sought relief under the Acts bailout provisions. Section 14(c)(2) of the Voting Rights Act provides a narrow statutory definition of political subdivision: "[P]olitical subdivision" shall mean any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting." *42 U.S.C. § 1973 l (c)(2).*

The utility made two arguments: 1) Notwithstanding Section 14(c)(2), it was a political subdivision entitled to bailout under the Act; and 2) Section 5 of the Act could no longer withstand constitutional scrutiny.

The Supreme Court held that "all political subdivisions—not only those described in § 14(c)(2)—are eligible to file a bailout suit." *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 211 (2009).

The Court refused to address the continuing constitutionality of Section 5, because its decision could be made on a lesser ground. "[N]ormally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case." *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 205 (2009). However, the Court did call into the question the continuing relevance of Section 5 of the Voting Rights Act writing "the Act imposes current burdens and must be justified by current needs." *Northwest Austin*, 557 U.S. 193, 203 (2009).

> More than 40 years ago, this Court concluded that 'exceptional conditions' prevailing in certain parts of the country justified extraordinary legislation otherwise unfamiliar to our federal system. Katzenbach, 383 U.S., at 334, 86 S.Ct. 803(citations omitted). . . In part due to the success of [The Voting Rights Act], we are now a very different Nation. Whether conditions continue to justify such legislation is a difficult constitutional question we do not answer today. We conclude instead that the Voting Rights Act permits all political subdivisions, including the district in this case, to seek relief from its preclearance requirements.

Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 211 (2009)

Justice Clarence Thomas indicated he was wholly prepared to find Section 5 of the Voting Rights Act unconstitutional.

B. Shelby County v. Holder, 570 U.S. 529 (2013)

Supreme Court struck down the coverage formula in Section 4 as unconstitutional because conditions have changed. Ruling virtually eliminates Section 5, because without the coverage formula Section 5 is unenforceable.

Shelby County is located within in Alabama, a covered jurisdiction. The County proposed a variety of voting changes which were objected by the Attorney General. In 2010, the county sued the Attorney General in Federal District Court in Washington, D.C., seeking a declaratory judgment that Sections 4(b) and 5 of the Voting Rights Act were unconstitutional. The District Court ruled against the county and

upheld the Act, finding that the evidence before Congress in 2006 was sufficient to justify reauthorizing § 5 and continuing the § 4(b) coverage formula. The Court of Appeals for the D.C. Circuit affirmed, the court found persuasive congressional conclusion that § 2 litigation remained inadequate in the covered jurisdictions to protect the rights of minority voters, and that § 5 was therefore still necessary.

The Supreme Court reversed the Court of Appeals:

> The provisions of § 5 apply only to those jurisdictions singled out by § 4. We now consider whether that coverage formula is constitutional in light of current conditions. . . . As we explained, a statute's "current burdens" must be justified by "current needs," and any "disparate geographic coverage" must be " sufficiently related to the problem that it targets." Northwest, 557 U.S. 193, 203. The coverage formula met that test in 1965, but no longer does so. Coverage today is based on decades-old data and eradicated practices. The formula captures States by reference to literacy tests and low voter registration and turnout in the 1960s and early 1970s. But such tests have been banned nationwide for over 40 years. (citations omitted) And voter registration and turnout numbers in the covered States have risen dramatically in the years since. (citations omitted). Racial disparity in those numbers was compelling evidence justifying the preclearance remedy and the coverage formula. (citations omitted). There is no longer such a disparity. In 1965, the States could be divided into two groups: those with a recent history of voting tests and low voter registration and turnout, and those without those characteristics. Congress based its coverage formula on that distinction. Today the Nation is no longer divided along those lines, yet the Voting Rights Act continues to treat it as if it were.

Shelby County. v. Holder, 570 U.S. 529, 550-551 (2013).

The Supreme Court again came short of declaring Section 5 unconstitutional and appeared to signal that a different coverage formula may pass constitutional muster.

> Congress could have updated the coverage formula. . .but did not do so. Its failure to act leaves us today with no choice but to declare § 4(b) unconstitutional. The formula in that section can no longer be used as a basis for subjecting jurisdictions to preclearance. Our decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in § 2. We issue no holding on § 5 itself, only on the coverage formula. Congress may draft another formula based on current conditions. . . Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.

Shelby County. v. Holder, 570 U.S. 529, 557 (2013).

Justice Clarence Thomas again indicated he would hold Section 5 unconstitutional.

Justice Ruth Bader Ginsburg dissented. "Throwing out preclearance when it has worked and is continuing to work is like throwing away your umbrella in a rainstorm because you are not getting wet." *Shelby County. v. Holder, 570 U.S. 529, 590 (2013)(Justice Ginsburg, dissenting).*

The Section 3 bail-in provisions remain. If a court finds a jurisdiction has engaged in a violation of the 14th or 15th Amendment, it may order as part of the relief that the jurisdiction submit all future changes for preclearance before the changes go into effect.

VI. Poll taxes

A. Williams v. Mississippi, 170 U.S. 213 (1898)

Supreme Court sanctions voting practices, including poll taxes and understanding clauses, that are not facially discriminatory, but are developed for discriminatory effect. Williams was convicted of murder by an all-white jury. In order to serve on a jury a citizen had to be a qualified elector. Mississippi law at the time made it virtually impossible for blacks to be an elector because of a variety of "race-neutral" qualifications. Williams alleged his rights were violated by a system which excluded blacks for juries.

Court held scheme did not violate Equal Protection Clause of the 14th Amendment. The statutory schemes "do not on their face discriminate between the races. . .the judgment is confirmed." *Williams v. State of Mississippi,* 170 U.S. 213, 18 S.Ct. 583, 42 L.Ed. 1012 (1898). The Court acknowledged the racial intent of the laws.

B. *Breedlove v. Suttles*, 302 U.S. 277 (1937) – Supreme Court validates poll tax.

The poll tax, with a few exceptions, was required of electors and non-electors alike.

> Exaction of payment before registration undoubtedly serves to aid collection from electors desiring to vote, but that use of the state's power is not prevented by the Federal Constitution. (citation omitted). . . To make payment of poll taxes a prerequisite of voting is not to deny any privilege or immunity protected by the Fourteenth Amendment. Privilege of voting is not derived from the United States, but is conferred by the state and, save as restrained by the Fifteenth and Nineteenth Amendments and other provisions of the Federal Constitution, the state may condition suffrage as it deems appropriate.

Breedlove v. Suttles, 302 U.S. 277, 282-283 (1937).

C. 24th Amendment (1964) – Poll taxes prohibited in federal elections

> Section 1. The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.
>
> Section 2. The Congress shall have power to enforce this article by appropriate legislation.

D. *Harmon v. Forssenius*, 380 U.S. 528 (1965)

Following ratification of the 24th Amendment, the State of Virginia removes the poll tax as an absolute prerequisite to qualification for voting in federal elections, but substitutes a provision whereby voters in federal elections could qualify either by paying the customary poll tax or by filing a certificate of residence six months before the election.

> For federal elections, the poll tax is abolished absolutely as a prerequisite to voting, and no equivalent or milder substitute may be imposed. Any material requirement imposed upon

> the federal voter solely because of his refusal to waive the constitutional immunity subverts the effectiveness of the Twenty-fourth Amendment and must fall under its ban.

Harman v. Forssenius, 380 U.S. 528, 542 (1965).

E. *Harper v. Virginia State Board of Electors*, 383 U.S. 663 (1966)

Supreme Court ruled poll taxes illegal for state elections, as well, overturning Breedlove v. Sutton. Court concludes a "State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard." *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 666 (1966).

> It is argued that a State may exact fees from citizens for many different kinds of licenses; that if it can demand from all an equal fee for a driver's license, it can demand from all an equal poll tax for voting. But we must remember that the interest of the State, when it comes to voting, is limited to the power to fix qualifications. Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process. Lines drawn on the basis of wealth or property, like those of race . . . are traditionally disfavored. (citations omitted). To introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor. The degree of the discrimination is irrelevant. In this context—that is, as a condition of obtaining a ballot—the requirement of fee paying causes an 'invidious' discrimination.

Harper v. Virginia State Board of Elections, 383 U.S. 663, 668-689 (1966).

F. Vernon Dahmer

VII. Disenfranchisement for criminal or immoral conduct

A. Davis v. Beason, 133 U.S. 333 (1890) – An Idaho territorial statute declared "that no polygamist, bigamist, or any person cohabiting with more than one woman, and no woman cohabiting with any of the persons described as aforesaid in this section, in any territory or other place over which the United States have exclusive jurisdiction, shall be entitled to vote at any election held in any such territory or other place." *Davis v. Beason*, 133 U.S. 333, 346-347 (1890).

The Court upheld the statute because it "simply excludes from the privilege of voting, or of holding any office of honor, trust or profit, those who have been convicted of certain offences, and those who advocate a practical resistance to the laws of the Territory and justify and approve the commission of crimes forbidden by it." *Davis v. Beason*, 133 U.S. 333, 347 (1890).

B. Richardson v. Ramirez, 418 U.S. 24 (1974)

California law provided that no person convicted of any infamous crimes would ever be allowed to vote. Respondents were convicted of one or more felonies, served time in jail, and successfully completed their paroles. They complained they were unconstitutionally denied the right to vote.

Supreme Court held that California may consistent with the Fourteenth Amendment, "exclude from the franchise convicted felons who have completed their sentences and paroles." *Richardson v. Ramirez*, 418 U.S. 24, 56 (1974). The Supreme Court reasoned that the language in Section 2 of the Fourteenth Amendment providing exceptions for states refusing the right to vote on the basis "participation in

rebellion, or other crime," was implicit authorization to deny citizens the right to vote due to participation in criminal behavior.

C. Hunter v. Underwood, 471 U.S. 222 (1985)

The Supreme Court held Alabama's criminal disenfranchisement law unconstitutional because it was the product of racial motivations.

Prior to 1901, Alabama law denied persons convicted of treason, embezzlement of public funds, malfeasance in office, larceny, bribery, or other crimes punishable by imprisonment in the penitentiary the right to register to vote, vote or hold public office. Most of the listed offenses were felonies. In 1901, the legislature added numerous other offenses and included catch-all clauses such as "crimes against nature" and "crime involving moral turpitude." The new list contained many misdemeanors, and omitted many more serious crimes. Furthermore, the Court of Appeals found that the crimes selected for inclusion were believed by legislators to be crimes more frequently committed by people of color.

> Without again considering the implicit authorization of § 2 [of the Fourteenth Amendment] to deny the vote to citizens "for participation in rebellion, or other crime," see *Richardson v. Ramirez*, 418 U.S. 24, 94 S.Ct. 2655, 41 L.Ed.2d 551 (1974), we are confident that § 2 was not designed to permit the purposeful racial discrimination attending the enactment and operation of [the Alabama law] which otherwise violates § 1 of the Fourteenth Amendment. Nothing in our opinion in Richardson v. Ramirez, suggests the contrary.

Hunter v. Underwood, 471 U.S. 222, 233 (1985).

D. Raysor v. DeSantis, July 16, 2020 – Florida Disenfranchisement case

On November 6, 2018, Florida voters approved Amendment 4, a state constitutional amendment that automatically restored voting rights to ex-felons who had completed all of the terms of their sentences.

Amendment 4 provided that a felon's "voting rights shall be restored upon completion of all terms of sentence including parole or probation."

The Florida legislature passed Senate Bill 7066, which implemented the Amendment and interpreted its language to require payment of all fines, fees and restitution imposed as part of the sentence (collectively, "legal financial obligations" or "LFOs").

The Governor requested an advisory opinion from the Florida Supreme Court whether Amendment 4's language mandating completion of "all terms of sentence" itself requires payment of LFOs. The Florida Supreme Court agreed with the legislature's interpretation of the Amendment—during the pendency of this appeal, it held that the plain text of Amendment 4 requires payment of all LFOs as a precondition of re-enfranchisement.

Seventeen plaintiffs brought suit, challenging the constitutionality of the LFO requirement. Each plaintiff is a felon who has alleged that he or she would be eligible for re-enfranchisement under Amendment 4 but for non-payment of outstanding LFOs.

Each plaintiff has also alleged that he or she is indigent and, therefore, genuinely unable to pay those obligations.

The United States District Court for the Northern District of Florida issued a preliminary injunction requiring the State to allow the named plaintiffs to register and vote if they are able to show that they are genuinely unable to pay their LFOs and would otherwise be eligible to vote under Amendment 4.

The State appealed to the 11th Circuit. The 11th Circuit affirmed the preliminary injunction.

> Because the LFO requirement punishes those who cannot pay more harshly than those who can—and does so by continuing to deny them access to the ballot box—Supreme Court precedent leads us to apply heightened scrutiny in asking whether the requirement violates the Equal Protection Clause of the Fourteenth Amendment as applied to these plaintiffs. When measured against this standard, we hold that it does and affirm the preliminary injunction entered by the district court.

Jones v. Governor of Fla., 950 F.3d 795 (11th Cir. 2020)

A bench trial was subsequently held before the District Court. The District Court found the LFO requirement violated Equal Protection Clause, due process, and the 24th Amendment. District Court issued a permanent injunction enjoining the LFO requirement.

On July 1, 2020, 11th Circuit stayed the permanent injunction without providing a reason. Supreme Court denied the application to vacate the stay without providing a reason.

Justice Ruth Bader Ginsburg dissented, "This Court's order prevents thousands of otherwise eligible voters from participating in Florida primary election simply because they are poor. . .This Court's inaction continues a trend of condoning disenfranchisement [referencing RNC v. DNC]. *Raysor v. Desantis* (2020)(Justice Ginsburg, dissenting).

On Friday, September 11, 2020, the 11th Circuit Court of Appeals reversed the lower court ruling. *Jones v. Governor of Fla.* (11th Cir. 2020).

E. Iowa and felony disenfranchisement

1. Iowa Constitution provides:

   a. Article. II, Section 5. A person adjudged mentally incompetent to vote or a person convicted of any infamous crime, shall not be entitled to the privilege of an elector.

   b. Article IV, Section 16. The governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses except treason and cases of impeachment, subject to such regulations as may be provided by law. Upon conviction for treason, he shall have power to suspend the execution of the sentence until the case shall be reported to the general assembly at its next meeting, when the general assembly shall either grant a pardon, commute the sentence, direct the execution of the sentence, or grant a further reprieve. He shall have power to remit fines and forfeitures, under such regulations as may be prescribed by law; and shall

report to the general assembly, at its next meeting, each case of reprieve, commutation, or pardon granted, and the reasons therefore; and also all persons in whose favor remission of fines and forfeitures shall have been made, and the several amounts remitted.

2. Iowa Code provides:

"The power of the governor under the constitution to grant a reprieve, pardon, commutation of sentence, remission of fines and forfeitures, or restoration of the rights of citizenship shall not be impaired." *Iowa Code § 914.1 (2005)*.

3. Meaning of "infamous crime"

a. *Blodgett v. Clarke*, 159 N.W. 243 (Iowa 1916) – Forgery is an infamous crime. Any crime punishable by imprisonment in the penitentiary is an infamous crime. Blodgett v. Clarke, 159 N.W. 243, 244 (Iowa 1916), citing, *Flannagan v. Jepson*, 158 N. W. 641 (Iowa 1916).

b. Iowa Code Section 39.3 - The Iowa legislature attempts to define "infamous crime" as used in the Iowa Constitution as "an offense classified as a felony under federal law." *Iowa Code 39.8(3).*

c. *Chiodo v. Section 43.24 Panel*, 846 N.W.2d 845 (Iowa 2014) - The crime of OWI, second offense, is not an infamous crime under article II, section 5 of the Iowa Constitution.

> [A]n infamous crime first must be a crime classified as a felony. As a misdemeanor crime, OWI, second offense, is not an "infamous crime" under article II, section 5. It will be prudent for us to develop a more precise test that distinguishes between felony crimes and infamous crimes within the regulatory purposes of article II, section 5 when the facts of the case provide us with the ability and perspective to better understand the needed contours of the test. This case does not.

Chiodo v. Section 43.24 Panel, 846 N.W.2d 845, 857 (Iowa 2014).

d. *Griffin v. Pate*, 884 N.W.2d 182 (Iowa 2016) - Delivery of a controlled substance is an infamous crime. Infamous crime under the constitution means felony crime

> In this case, the legislative judgment was clearly expressed, and there is no scientific evidence or facts to undermine that judgment. In truth, the clamor of debate has largely passed over the issue of disqualifying voters in Iowa for a conviction of an infamous crime, and courts are unable to move issues forward on their own perceptions of infamy in today's society. In this case, there is insufficient evidence to overcome the 1994 legislative judgment, and we must accept it today as the standard for infamous crime. It will be up to our future democracy to give the necessary voice to the issue and engage in the debate that advances democracy.
>
> In the end, we are constrained to conclude that all objective indicia of today's standard of infamy supports the conclusion that an infamous crime has evolved to be defined as a felony. This is the community standard expressed by our legislature

> and is consistent with the basic standard we have used over the years. It is also consistent with the constitutional history, text, and purpose of the provision.

Griffin v. Pate, 884 N.W.2d 182, 205 (Iowa 2016).

4. Governor's restoration of voting rights

a. Governor Thomas Vilsack Executive Order No. 42 (2005)

> The rights of citizenship, including that of voting and qualifications to hold public office, which were forfeited by reason of conviction shall be restored for all offenders that are completely discharged from criminal sentence, including any accompanying term of probation, parole, or supervised release, as of July 4, 2005.

b. *Allison v. Vilsack*, EQCV0161165 (Iowa District Court, Muscatine County)(2005)

After Governor Vilsack issued Executive Order No. 42, the Muscatine County Attorney sought a writ of mandamus contesting the Governor's right to issue an Executive Order restoring the rights to citizenship and thereby bypass the State's general reprieve and commutations statute (Iowa Code 914). The court dismissed the claim on summary judgement concluding, among other findings, that nothing in Iowa Code 914 impaired the Governor's authority to grant a reprieve, pardon, commutation of sentence, remission of fines and forfeitures, or restoration of the rights of citizenship.

c. Governor Terry Branstad Executive Order No. 70 (2011)

"Executive Order Number 42, dated July 4,2005, issued by Governor Thomas J. Vilsack, shall be rescinded."

d. Governor Kim Reynolds Executive Order No. 7 (2020)

> I, Kim Reynolds, Governor of the State of Iowa, do hereby restore rights of citizenship, including that of voting and qualification to hold public office, to any person who forfeited those rights by conviction of an infamous crime, except for a violation of chapter 707 [homicide and related crimes] of the Iowa Code, and who has discharged his or her sentence on or before August 5, 2020. I further order the following:
>
> 1. Discharge of sentence. For purposes of this Executive Order, a person has discharged his or her sentence upon completion of any term of confinement, parole, probation, or other supervised release for all felony convictions and completion of any special sentence imposed pursuant to Chapter 903B [sex offender special sentencing].

VIII. New Threats

A. Discriminatory State Action

The Fourth Circuit Court of Appeals opined that North Carolina's "new provisions target[ed] African Americans with almost surgical precision." *N.C. State Conference of the NAACP v. McCrory,* 831 F.3d 204, 214 (4th Cir. 2016).

B. Disinformation and Voter Suppression

Congressional findings on Russian interference in 2016 election.

1. The Committee found that no single group of Americans was targeted more by the Russian-based Internet Research Agency's (IRA) information operatives more than African-Americans.

2. More that 66 percent of IRA's Facebook advertisement content contained a term related to race and targeting was principally aimed at African Americans in key metropolitan areas.

3. 96 percent of the IRA's YouTube content was targeted at racial issues and police brutality.

4. IRA's videos featured expressly voter suppressive content intended to dissuade African-American voters from participating in the 2016 presidential election

Source: Report of the U.S. Senate Select Committee on Intelligence, On Russian Active Measures, Campaigns, and Interference in the 2016 U.S. Election, Volume 5: Counterintelligence Threats and Vulnerabilities.

C. Long lines

A 2019 study by researchers from UCLA, Carnegie Mellon University and the University of Chicago found "substantial and significant evidence of racial disparities in voter wait times." The same study cited evidence indicating that approximately 3% of voters will leave polling locations without voting when experiencing lengthy voting lines.

The Leadership Conference on Civil and Human rights reported that between 2014 and 2018 jurisdictions relieved from preclearance by the ruling in *Shelby County v. Holder* utilized 1,173 fewer polling locations, despite overall increased voter turnout.

IX. Reforms