President Truman: “A vote is the best way of getting the kind of country and the kind of world you want.”

THE CONSTITUTION’S TEXT AND INTRODUCTION TO VOTING RIGHTS AND THE CONSTITUTION

Let’s begin—as we always do when interpreting the Constitution—with the Constitution’s text. When it comes to voting rights, it’s worth pausing on a series of provisions. We’ll touch on much of this language during the lesson today, but here’s a quick “voting rights” walking tour through the Constitution.

Beginning with the original Constitution, there are four main provisions addressing voting:

- **Article I, Section 2**: Sets qualification for voters in the U.S. House elections (matches the qualifications for voters for the lower house of each state legislature). For its day, this is a fairly democratic provision—requiring states to elect national representatives with the same rules that apply to the most democratic component of each state government—its lower house.
- **Article I, Section 3**: Leaves the election of U.S. Senators to the state legislatures. (Revised by the 17th Amendment.)
- **Article I, Section 4**: Leaves the time, place, and manner of elections to the state legislatures, but subject to regulation by Congress.
- **Article II, Section I**: Sets up the Electoral College.

**Big Takeaway**
The original Constitution left voting issues largely to the states. It’s a story of federalism/state power.
Turning away from the original Constitution, we see many constitutional amendments touching on elections and voting.

- **12th Amendment**: Alters the Electoral College.
- **14th Amendment**: Section 2 provides a mechanism for penalizing states when they deny African American men over the age of 21 access to the ballot box. Many suffragists were outraged that the 14th Amendment wrote gender explicitly into the amendment (uses the word “male”). The Supreme Court eventually uses the Equal Protection Clause to protect voting in a series of 20th-century cases.
- **15th Amendment**: Bans racial discrimination in voting.
- **17th Amendment**: Provides for the popular election of U.S. Senators.
- **19th Amendment**: Bans gender discrimination in voting.
- **23rd Amendment**: Grants the District of Columbia three electors in the Electoral College—giving D.C. a voice in presidential elections.
- **24th Amendment**: Bans poll taxes in national elections.
- **26th Amendment**: Protects voting rights for those 18 and older. (This was, in part, in response to the Vietnam War. Many young people who were drafted were still unable to vote.)

**Big Takeaways**

- Several amendments extend protections to new groups, including protections based on race (15th Amendment), gender (19th Amendment), and age (26th Amendment).
- While the states still play a central role in elections, various amendments establish an increased role for the national government in some contexts—most notably, through the enforcement clauses of the 15th, 19th, 24th, and 26th Amendments. (This is still a federalism story.)
- And we also see a new role for voters in Senate elections (17th Amendment) and D.C. voters in presidential elections (23rd Amendment).

**Hypothetical Question**

This hypo grows out of constitutional debates over some of the challenges of holding an election in the middle of a pandemic. Here’s the question: A state permits its voters to vote by absentee ballot. For voters 65 and older, they may receive an absentee ballot for any reason. At the same time, voters under 65 may only receive one if they have a valid excuse—for instance, that they’ll be out of town on Election Day or that they have a disability that keeps them from the polls. The nation is in the middle of a pandemic, and many voters fear the health risks involved in voting in person. A political party challenges the state absentee ballot law as violating younger voters’ right to vote. Is this law constitutional or unconstitutional? *(Texas Democratic Party v. Abbott (2020))*
Scholar Exchange: Voting Rights Amendments
Briefing Document

Big Questions

With all of that out of the way, here are today’s big questions—which we should keep in mind throughout today’s session.

- What does the original Constitution say about voting rights?
- How did constitutional amendments transform the Constitution and its relationship to voting?
- What are the relative roles of the national government and the states in this context?

To begin to answer these questions, we must return to early America and walk through the constitutional history of voting rights. From there, we’ll consider what the Supreme Court has said about these issues over time.

FOUNDING STORIES

Founding Generation

To begin, let’s rewind to 1776. After America declares its independence, states begin to write new constitutions—with various states taking different approaches to voting. Most states establish property requirements for voters—limiting voting rights to those who owned property.

However, even in these early years, some states moved to abolish these requirements. (Vermont/1777: no property requirements. PA/1776: abolished property requirements, but required voters to be taxpayers.) Because Vermont also banned slavery, it also gave all freemen (including African Americans) the right to vote. (Justices McClean and Curtis would note this in their Dred Scott dissents.)

In fact, all free, native-born inhabitants of New Hampshire, Massachusetts, New York, New Jersey, and North Carolina could vote—that is, if they met all of the other requirements! And unmarried women landowners in New Jersey could vote in state and local elections from 1776-1807. (The state legislature then restricted voting to “free, white, male citizens.”)

We’ve already taken a look at the key provisions in the original Constitution covering elections and voting. Here’s just a few additional points worth keeping in mind. The original Constitution doesn’t include a constitutional right to vote. Neither does the Bill of Rights. For the founding generation, voting wasn’t considered a natural right. Therefore, the states had the power to decide the voting rights of their citizens. In other words, who could vote—and who couldn’t.

Early 19th Century

Now, let’s skip ahead to the 1820s and 1830s. This is the Age of Jacksonian Democracy. We see massive changes to American democracy during this period. For instance, we see a move towards universal white male suffrage. States abolish property requirements. (Only South Carolina maintains its strict property
Poor white men are now able to vote throughout the county. That wasn’t the case at the founding—but it is the case by the 1830s.

But we still see restrictions for many other groups, including women and African Americans. Restrictions on voting for African Americans and immigrants—in particular—become more prevalent during this period. The New York Constitution of 1820 adds qualifications for African American voters that don’t apply to white voters (e.g., a $250 property requirement). New Jersey limits voting to white male citizens. In fact, all states that entered the Union after 1819 limited voting rights to white males. By 1855, only five states—Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont—had African American voting.

Women’s Suffrage Movement

What about women? In 1848, abolitionists Elizabeth Cady and Lucretia Mott organized a convention to discuss women’s issues in Seneca Falls, New York. The local gathering attracted nearly 300 people.

Stanton prepared a manifesto (The Declaration of Sentiments)—literally, a rewriting of the Declaration of Independence—to draw attention to the inequalities and oppressive laws that women endured. Signed by 68 women and 32 men, the Declaration of Sentiments included a suffrage resolution. However, women’s voting rights was only one demand among many.

The burning issues of the day centered on married women—their right to contract, own property, and sue or be sued. As news of the convention circulated, some voiced their support, while others criticized the reformers for operating outside of their traditional duties as mothers and wives inside the home.

*Declaration of Sentiments:* “We hold these truths to be self-evident; that all men and women are created equal.” Isn’t that great? Stanton used the Declaration of Independence as a model—invoking the natural law principles of the American Revolution to guarantee equal liberty for women. Instead of listing grievances against the British king, she included a list of complaints against men. Her Declaration closed with 12 demands, including equal education, equal pay, property rights, and the “sacred right to the elective franchise.”

Dred Scott Decision

Finally, in the 1857 *Dred Scott* decision, the Supreme Court denied citizenship to African Americans throughout the country. The majority based this decision, in part, on a historical claim: that at the founding, African Americans were not citizens.

Two dissenting opinions disagreed—offering a competing reading of American constitutional history.

- **Justice John McLean:** “Our independence was a great epoch in the history of freedom, and while I admit the Government was not made especially for [African Americans], yet many of them were citizens of the New England States, and exercised, the rights of suffrage when the Constitution was
adopted, and it was not doubted by any intelligent person that its tendencies would greatly ameliorate their condition.”

*McLean:* In 1857, “[s]everal of the States have admitted persons of color to the right of suffrage, and, in this view, have recognized them as citizens, and this has been done in the slave as well as the free States.”

- **Justice Benjamin Curtis:** Changes in New York and New Jersey limiting or ending African American suffrage could “have no other effect upon the present inquiry except to show that, before they were made, no such restrictions existed, and [African American], in common with white, persons, were not only citizens of those States, but entitled to the elective franchise on the same qualifications as white persons, as they now are in New Hampshire and Massachusetts.”

**CONSTITUTIONAL HISTORY OF VOTING RIGHTS IN POST-CIVIL WAR AMERICA**

We ended our story at the *Dred Scott* decision. Let’s fast forward to after the Civil War—to the Reconstruction era that many scholars refer to as America’s “Second Founding.”

Following the Civil War, the Reconstruction generation ratified a series of amendments that transformed the Constitution forever.

- **The 13th Amendment** abolished slavery.
- **The 14th Amendment** overturned *Dred Scott* and wrote the Declaration of Independence’s promise of freedom and equality into the Constitution.
- And the **15th Amendment** banned racial discrimination in voting.

While Reconstruction leaders discussed voting rights in the debates over the 14th Amendment, the amendment’s primary purpose was to overturn *Dred Scott*, grant citizenship to African Americans, and protect basic civil rights. As discussed at the outset, the 14th Amendment did try to promote African American male voting rights by providing a mechanism for penalizing states when they denied African American men over the age of 21 access to the ballot box. (But Congress never used this mechanism.) Furthermore, the Supreme Court would eventually use the 14th Amendment’s Equal Protection Clause to protect voting in a series of 20th-century cases. But those cases are far on the horizon. Following the 14th Amendment, Reconstruction leaders took a series of actions to promote African American voting rights.

Under the Reconstruction Act of 1867—covering the ex-Confederate South—a large majority of the nation’s African American men secured the right to vote. (In the South, 10 states now protected African American voting rights under Military Reconstruction.)

So, that’s before the 14th and 15th Amendments. And African American votes would play a key role in ratifying both amendments. And even as Southern states drew up new constitutions guaranteeing African American male suffrage, Republicans feared that these provisions could be altered if/when Southern (ex-Confederate) whites retook political power.
**Eric Foner:** “More and more Republicans... now viewed the suffrage (at least for men) as an indispensable element of freedom, a natural right akin to those enumerated in the Declaration of Independence.”

The 1868 Republican platform included a plank extending the right to vote to “all loyal men in the South.” (Democrats attacked this plank with racist arguments, and the *New York Herald* announced that “All men are not equal.”)

By 1868, Republicans began pushing in earnest for (what would become) the 15th Amendment. In December 1868, Congressional Republicans introduced early versions of the amendment.

Republicans wrestled with a range of questions.

- Should the new amendment limit itself to voting—or should it explicitly cover officeholding, as well?
- Should it protect voters against racial discrimination only—or should it cover more than that?

**Abolitionist Wendell Phillips:** “A man with a ballot in his hand is the master of the situation. He defines all his other rights. What is not already given him, he takes...The Ballot is opportunity, education, fair play, right to office, and elbow-room.”

Congress debated a range of options—with significant debates in both the House and the Senate. For instance, Senator Henry Wilson’s draft barred discrimination in voting rights based on race, color, place of birth, property, education, and religious creed. But some Members of Congress attacked it as “too sweeping.” Some Members insisted on a narrower version that was limited to racial discrimination.

Interestingly, each House approved a proposal broader than the final version. The Senate passed Henry Wilson’s draft. But the House rejected it. And the House passed a proposal by Ohio Representative John Bingham, which included explicit protection for officeholding and covered the same things as Wilson’s proposal—except it left out discrimination based on “education.”

The two Houses eventually formed a conference committee to hammer out the final amendment—approving of language limited to a ban on racial discrimination in voting. Of course, even this represented a major constitutional transformation.

However, Radical Republicans knew that this text might not be enough—warning of an “almost fatal defect” in the text. They knew that the amendment could be rendered void by poll taxes, literacy tests, and property qualifications. And so it was by the turn of the century.

Some Republicans—perhaps, most notably, Senator Charles Sumner—even abstained from voting on the 15th Amendment because the amendment didn’t ban literacy tests and poll taxes.
Ratification proved problematic in many Northern and Border states. California and Oregon rejected the amendment because of concerns about enfranchising Chinese residents. Kentucky, Maryland, and Delaware refused due to concerns about expanding the African American vote. And New York ratified and then rescinded approval after Democrats gained a majority there.

Many prominent suffragists also denounced the amendment because they viewed it as a new barrier to women’s rights. This split the longstanding alliance between abolitionists and suffragists.

The leading suffragist group—the American Equal Rights Association—split into two rival organizations: The National Woman Suffrage Association, led by Susan B. Anthony and Elizabeth Cady Stanton, opposed the amendment. And the American Woman Suffrage Association, led by Lucy Stone and Henry Browne Blackwell, supported it.

**Ratification of the 15th Amendment**

In February 1869, Congress approved the new amendment and sent it to the states for ratification.

The 15th Amendment was ratified in February 1870. Many African Americans and abolitionists celebrated it as a “second birth” of the nation, a “greater revolution than that of 1776,” and as the culmination of the anti-slavery crusade.

**Frederick Douglass:** “The revolution wrought in our condition by the 15th Amendment . . . is almost startling, even to me. I view it with something like amazement.”

The 15th Amendment represented a hugely important experiment in interracial democracy. However, after a period of success, it ultimately faced a series of setbacks. Despite the amendment’s promise in 1870, it has held less power in our constitutional history than was expected.

Over time, white Southerners regained political power and suppressed African American voting rights—through a mix of violence and Jim Crow laws like poll taxes and literacy tests. (Just as the Radical Republicans predicted.)

As our Interactive Constitution essay on the 15th Amendment (by Rick Pildes and Brad Smith) describes it, “[T]he most significant fact about the 15th Amendment in American history is that it was essentially ignored and circumvented for nearly a century.”

We will pick up the 15th Amendment story again in our final section on the Supreme Court and voting rights.
Additional Amendments

However, before turning to the Supreme Court, it’s worth remembering how additional amendments transformed the Constitution in the 20th century.

- **17th Amendment**: Provides for the popular election of U.S. Senators.
- **19th Amendment**: Bans gender discrimination in voting. (Driven by a growing suffragist movement and by state-by-state efforts—beginning in the West—to extend voting rights to women.)
- **23rd Amendment**: Grants the District of Columbia three electors in the Electoral College—giving D.C. a voice in presidential elections.
- **24th Amendment**: Bans poll taxes in national elections.
- **26th Amendment**: Protects voting rights for those 18 and older.

And finally, there’s Native Americans.

- The Indian Citizenship Act of 1924 granted all Native Americans citizenship. (Congress passed this law, in part, in response to Native American service in World War I.)
- However, Native Americans continued to be denied voting rights by law in several states, including Arizona and Colorado.
- In 1957, Utah became the last state to legalize the vote for Native Americans, but restrictions on voting including residency requirements (claiming Native Americans were not residents of the state if they resided on reservations), language tests, and other tests continued to restrict Native American’s right to vote.

SUPREME COURT AND VOTING RIGHTS

And let’s begin with the Supreme Court’s first important voting rights case—*Minor v. Happersett* (1875). *Minor* was one of the first cases that the Supreme Court decided after the ratification of the 14th Amendment.

As we discussed above, following the Civil War, the American people ratified the 15th Amendment—protecting against racial discrimination in voting. While this new amendment protected African American male voting, it did nothing to protect the voting rights of women. This enraged some members of the women’s suffrage movement.

However, in a movement known as the “New Departure,” suffragists began to argue that the 14th Amendment already protected women’s right to vote.

In *Minor*, Virginia Minor challenged a St. Louis registrar’s decision to block her from registering to vote. A pioneer of the New Departure, Minor argued that women were U.S. citizens and that voting was a “privilege” of national citizenship protected by the 14th Amendment. The Supreme Court rejected Minor’s claim—and with it, one of the New Departure’s core arguments.
In a unanimous decision written by Chief Justice Morrison Waite, the Court agreed that women were U.S. citizens, but concluded that voting was not a right of national citizenship protected by the 14th Amendment. Instead, the Court left the question of women’s suffrage to the states.

**Waite:** “[I]f the courts can consider any question settled, this is one. For nearly ninety years the people have acted upon the idea that the Constitution, when it conferred citizenship, did not necessarily confer the right of suffrage. . . . Our province is to decide what the law is, not to declare what it should be.”

From the 1870s through the early 1900s, the Supreme Court began to cut back on the 15th Amendment in cases like *United States v. Reese* (1876) and *Giles v. Harris* (1903)—breaking the 15th Amendment’s promise of racial equality at the ballot box and green lighting Jim Crow discrimination in the South.

However, the Supreme Court began to reverse course a few decades later. For instance, in a seminal 1944 case—*Smith v. Allwright*—the Supreme Court decided that voters of all races must be allowed to cast a ballot in a primary election. And while the Supreme Court rejected the suffragists’ 14th Amendment argument in *Minor v. Happersett*, the Court did eventually extend the 14th Amendment’s protections to cover voting rights.

The Supreme Court has continuously said that the right to vote is a fundamental right protected under the 14th Amendment. As the Supreme Court explained, the right to vote is “preservative of all rights.”

As a result, the Court has struck down various laws for infringing on the right to vote—most notably, Jim Crow laws discriminating against African Americans.

For instance, in *Harper v. Virginia Board of Elections* (1966), the Court struck down the use of poll taxes in state and local elections as a violation of the 14th Amendment’s Equal Protection Clause. There, Annie Harper couldn’t pay a $1.50 poll tax. She argued that it violated the 14th Amendment’s promise of equality. And she won. The Court concluded that wealth had no rational connection to a person’s eligibility to vote.

In recent years, the Supreme Court has considered a variety of voting rights issues. Let’s walk through a few of the big ones.

**Reapportionment**

One key area of voting rights cases covers the issue of congressional representation and the principle of “one-person, one-vote.” Over time, many state legislatures had not redrawn legislative districts to match changes in population. (This included districts for electing Members of Congress.) During this period, urban areas across a number of states grew in population—leading to electoral district maps that gave more electoral strength to rural areas than to urban areas.

The Warren Court’s reapportionment cases addressed this issue—reshaping political power in legislatures across the country. In 1946, the Supreme Court concluded that it would not address constitutional challenges to legislative maps in *Colegrove v. Green*. 
Justice Felix Frankfurter famously wrote, the challengers “ask of this Court what is beyond its competence to grant. [E]ffective working of our government revealed this issue to be of a peculiarly political nature and therefore not fit for judicial determination.

“[C]ourts ought not to enter this political thicket.”

The Supreme Court reversed course in Baker v. Carr (1962). There, Tennessee citizens brought a challenge to the state’s legislative districts. The Tennessee legislature had established those districts six decades earlier. The challengers argued that the state’s legislative districts ignored population shifts that had occurred in the state over that time.

In a 6-2 opinion authored by Justice William Brennan, the Supreme Court concluded that it could consider these sorts of challenges under the 14th Amendment’s Equal Protection Clause.

Two years later, the Court went further in Reynolds v. Sims (1964). The case involved state legislative districts in Alabama. These districts ranged in size from 15,000 people to 635,000 people. That’s a massive difference! Chief Justice Earl Warren authored the Court’s landmark opinion.

The Court attacked legislative malapportionment and established the “one-person, one-vote” standard—requiring legislative districts to be roughly the same size. The Court argued that malapportionment means vote dilution. And that vote dilution violated the 14th Amendment’s Equal Protection Clause.

Warren: “Legislatures represent people, not trees or acres. Legislatures are elected by voters, not farms or cities or economic interests.”

“As long as ours is a republican form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect representatives in a free and unimpaired fashion is a bedrock of our political system.”

The Court’s reapportionment decisions led to changes in districts across a number of states that had not previously responded to similar population shifts within their borders. Chief Justice Earl Warren called these reapportionment rulings the Court’s most important decisions during his tenure—a tenure that included other landmark decisions like Brown v. Board of Education.

Gerrymandering

Another key area of voting rights cases covers the issue of gerrymandering. Gerrymandering covers efforts by politicians to draw district lines for their state legislatures or for electing Members of Congress to benefit a particular party or a particular group. Racial gerrymandering arises when politicians take race into account to set district lines. And partisan gerrymandering covers districting efforts by politicians to benefit a particular political party. The Supreme Court has played a role in policing racial gerrymandering.
For instance, consider *Shaw v. Reno (1993)*. This was one of the first racial gerrymandering cases to come before the Supreme Court. North Carolina had created a congressional reapportionment plan that created two majority-African American districts. One of them was an unusual shape—designed to track Interstate 85.

Residents challenged this oddly shaped district under the 14th Amendment’s Equal Protection Clause, arguing that North Carolina designed this district to enable the election of an additional African American representative. In a 5-4 ruling, the Court rejected the North Carolina districting decision. The Court concluded that, while North Carolina’s plan was not expressly based on race, the district was so extraordinary in its shape that it constituted an effort to impermissibly draw district lines on the basis of race.

The Court determined that such a suspiciously drawn district would not pass constitutional muster under the Equal Protection Clause unless the state could show that it had a compelling justification for designing the district as it did. The *Shaw* decision helped establish a framework for analyzing the use of race in the legislative districting process—in other words, for evaluating racial gerrymandering claims.

So, the bottom line is that following *Shaw*, you can’t draw districts that look funny without some sort of strong reason. The key point is that the Court doesn’t want states to give race too much weight in the districting process.

Finally, in an important decision just last year, the Supreme Court turned away from policing partisan gerrymandering. The case was *Rucho v. Common Cause (2019)*.

There, the Supreme Court weighed in on whether it had the power to review partisan gerrymandering challenges. Again, these are challenges to district maps for benefiting one political party over another. The Court observed that partisan gerrymandering extends back to early America. (The word “gerrymandering” comes from Elbridge Gerry, a Massachusetts leader from the Founding era.) The original Constitution left issues relating to voting—including districting decisions—largely to the states. And it didn’t grant any explicit role to the courts.

Finally, the Court concluded that there was no manageable standard for reviewing partisan gerrymandering challenges. Justice Elena Kagan authored the dissent—joined by Justices Breyer, Ginsburg, and Sotomayor. Justice Kagan explored possible ways of assessing partisan gerrymandering claims. She also argued that the courts were the only institutions well-suited to step in to stop partisan gerrymandering. (Elected representatives can’t be trusted to police themselves. And they can use gerrymandering to insulate themselves from the electorate.)

**Congressional Regulation**

Another key area of cases covers the powers that the Constitution grants Congress to regulate voting. One of the Civil Rights Movement’s landmark achievements was the Voting Rights Act of 1965 ("VRA"). Congress passed it under its powers granted by the 14th Amendment and the 15th Amendment.
The VRA created mechanisms to enforce the 15th Amendment’s ban on racial discrimination in voting—most notably “preclearance,” a requirement that certain states with poor voting rights histories obtain national permission before altering their voting laws. The VRA included a formula for determining which states and counties needed to get preclearance to change their election practices. So, preclearance didn’t apply everywhere.

Only some states and counties were required to seek approval before changing election policies, based on their history of discrimination in voting. This was strong constitutional medicine—providing the national government with an important role in protecting voting rights and attacking Jim Crow laws discriminating against African Americans.

Shortly after the VRA passed, the Supreme Court considered a challenge to the VRA’s constitutionality brought by South Carolina—South Carolina v. Katzenbach. The Supreme Court—in an opinion authored by Chief Justice Earl Warren—rejected South Carolina’s challenge and upheld the VRA’s preclearance requirement as a valid exercise of Congress’s power to enforce the 15th Amendment.

The Court concluded that the 15th Amendment gave Congress “full remedial powers” to ban racial discrimination in voting. On the Court’s view, the VRA was a “legitimate response” to the “insidious and pervasive evil” of the Jim Crow laws that prevented African Americans from voting since the ratification of the 15th Amendment in 1870.

And when they framed and ratified the 15th Amendment, the Reconstruction generation made Congress “chiefly responsible” for enforcing its promise to ban racial discrimination in voting.

The Supreme Court recently returned to the issue of the VRA’s constitutionality in Shelby County v. Holder. When the VRA was passed in 1965, the preclearance provision was set to expire after five years. But Congress extended its life in 1970, 1975, and 1982, and then for an additional 25 years in 2006.

In Shelby County, the challengers argued that the VRA used an outdated formula for determining which states and localities were covered by the preclearance requirement and that the formula violated the Constitution. In a 5-4 ruling authored by Chief Justice John Roberts, the Supreme Court agreed.

The Court struck down the VRA’s preclearance formula. The Court concluded that this provision exceeded the scope of Congress’s power under the 14th and 15th Amendments. The Court determined that the 2006 extension was unconstitutional because the coverage formula was based on data about racial discrimination from the 1970s and had not been changed since 1982. So, it was based on very old data. The Court observed that the South had changed a great deal since the pre-VRA Jim Crow days.

While the VRA had done its job in its own day—attacking racial discrimination in voting—it remained strong constitutional medicine, in tension with the states’ traditional authority to determine their own voting rules. Under these circumstances, the Court concluded that the selective application of the preclearance requirement ran afoul of what it described as “a fundamental principle of equal sovereignty” among the
States.” As a result, the VRA’s preclearance mechanism can’t be enforced unless Congress passes a new coverage formula.

Justice Ruth Bader Ginsburg dissented—joined by Justices Breyer, Kagan, and Sotomayor. Justice Ginsburg argued that the VRA fell within Congress’s power to protect against racial discrimination in voting under the 14th and 15th Amendments.

The 15th Amendment’s text and history show a commitment to attacking racial discrimination at the ballot box.

The Court’s previous decisions—including Katzenbach—confirmed Congress’s broad powers to enforce the 15th Amendment’s commands. The VRA has worked—defeating Jim Crow, transforming voting (especially in the South), and increasing African American voter participation. And Congress was careful when it decided to reauthorize the VRA in an overwhelming, bipartisan vote in 2006.

Ginsburg: “Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.”

Voter ID Laws

Finally, one of the biggest debates over voting rights today involves the constitutionality of state voter ID laws. The Supreme Court addressed this issue a little over a decade ago in Crawford v. Marion County Election Board (2008). There, the Supreme Court reviewed a constitutional challenge to a 2005 Indiana law requiring voters to show photo identification before casting their ballots.

The challengers—including the local Democratic Party and groups representing minority and elderly citizens—argued that the Indiana law was an unconstitutional burden on the right to vote. In a 6-3 ruling, the Supreme Court upheld the Indiana law, but the Court divided over the reasoning (3-3-3). (So, there was no majority opinion.)

Three justices—John Paul Stevens (author), John Roberts, and Anthony Kennedy—voted to uphold the law. They concluded that Indiana had a legitimate interest in preventing fraud, modernizing its elections, and safeguarding voter confidence—and that the law promoted those interests. And they thought that the ID law’s burden wasn’t great—falling on only a small part of the population.

The Court referred to these burdens as “neutral and nondiscriminatory.” Three other justices—Antonin Scalia (author), Samuel Alito, and Clarence Thomas—also voted to uphold the law, but on different grounds. They argued that laws like these fell within the traditional powers of the states and that the Court should simply defer to state and local officials.

Finally, three justices dissented. Justice David Souter—joined by Ruth Bader Ginsburg—concluded that the state had shown no evidence of fraud and that there was a real burden on certain populations, including the
elderly and the poor. And Justice Breyer argued that while some voter ID laws might be constitutional, the facts in this case forced him to conclude that the Indiana law was unconstitutional.

Voter ID laws remain a topic of constitutional debate today. But this is only the tip of the iceberg. Americans continue to debate a range of constitutional issues that touch on voting rights.

**REAL WORLD HYPOTHETICAL QUESTION**

Again, this hypothetical grows out of constitutional debates over some of the challenges of holding an election in the middle of a pandemic.

As a reminder, here’s the question:

A state permits its voters to vote by absentee ballot. For voters 65 and older, they may receive an absentee ballot for any reason. At the same time, voters under 65 may only receive one if they have a valid excuse—for instance, that they’ll be out of town on Election Day or that they have a disability that keeps them from the polls. The nation is in the middle of a pandemic, and many voters fear the health risks involved in voting in person. A political party challenges the state absentee ballot law as violating younger voters’ right to vote. Is this law constitutional or unconstitutional? (*Texas Democratic Party v. Abbott* (2020))

This hypo grows out of a real case in Texas. It pits the constitutional right to vote (including the rights enshrined in the 26th Amendment) against federalism (a state’s traditional powers to define its voting rules) and the Supreme Court’s reluctance to change voting rules right before an election (what the Court calls the “Purcell principle”).

Most states allow their voters to vote for mail for any reason, but 14th states—including Texas—require their voters to provide a valid excuse. The federal district court blocked the Texas absentee ballot law, concluding that it violated the 26th Amendment.

As a reminder, here’s the text of the 26th Amendment: “The right of the citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.”

The district court’s argument was basically that the Texas absentee ballot law discriminated against voters based on their age—and this, in turn, violated the 26th Amendment. The federal appeals court reversed the district court—allowing the Texas law to remain in place. And the Supreme Court—in a 9-0 vote—rejected an emergency application by the challengers trying to block the law. So, the Texas absentee ballot law remains in place.

Interestingly, Justice Sonia Sotomayor wrote a separate statement, noting that the case raised “weighty but seemingly novel questions regarding the Twenty-Sixth Amendment.” However, she agreed that the Court
shouldn’t take them up in the context of emergency application. Of course, the Texas case is just one of many constitutional challenges addressing the challenges of holding an election in the middle of a pandemic.

*Research provided by Nicholas Mosvick, senior fellow for constitutional content, and Thomas Donnelly, senior fellow for constitutional studies, at the National Constitution Center.*