

## Barriers to the Ballot Box in Texas

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In January of 2019, David Whitley, the acting secretary of state of Texas drew national attention with claims that more than ninety-five thousand noncitizens had registered to vote in Texas, and that nearly sixty thousands of these individuals had cast a ballot in at least one election.<sup>1</sup> Within days, Whitley had to walk back his claim— but in that short period his actions had already provided yet another example of racial and ethnic hostility corrupting our electoral process.

Within days of Whitley’s announcement, it became clear that the process that the secretary of state’s office had been using was flawed. Counties immediately began announcing that the lists provided by the states included naturalized citizens.<sup>2</sup> Individuals, who had not been citizens when they last visited the Department of Motor Vehicles, had subsequently become naturalized and then registered to vote as full American citizens. Four days after the initial announcement, officials in five of the largest counties in Texas confirmed that the secretary of state’s office had called them to inform them that many of the flagged individuals had been flagged inaccurately and had already provided proof of citizenship.<sup>3</sup>

Naturalized citizens who had been wrongfully flagged and civil rights organizations sued to stop the voter list review from going forward, and the state eventually agreed to not remove these voters.<sup>4</sup> By focusing on only noncitizens who were registered instead of all voters with invalid registrations, Whitley and the secretary of state office explicitly questioned the right of Latinos to participate in their elections.

Before the walk back and the lawsuits, Texas Attorney General Ken Paxton tweeted a “VOTER FRAUD ALERT” about illegal votes depriving Americans of their voice.<sup>5</sup> Two days later, President Donald Trump also used his Twitter account to argue that these voters identified by Whitley were “just the tip of the iceberg.”<sup>6</sup>

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<sup>1</sup> Caitlin Yilek, “Nearly 60,000 noncitizens may have illegally voted in Texas, officials say,” *Washington Examiner*, January 25, 2019. <https://www.washingtonexaminer.com/news/nearly-60-000-noncitizens-may-have-illegally-voted-in-texas-officials-say>.

<sup>2</sup> Ura, Alexa. “In advisory, Texas implies its list of thousands of voters flagged for citizenship reviews could include naturalized citizens.” *The Texas Tribune*, February 1, 2019. <https://www.texastribune.org/2019/02/01/texas-acknowledges-its-list-thousands-texas-voters-flagged-citizenship/>.

<sup>3</sup> Ura, Alexa. “Texas quietly informs counties that some of the 95,000 voters flagged for citizenship review don’t belong on the list.” *The Texas Tribune*, January 29, 2019. <https://www.texastribune.org/2019/01/29/texas-voter-citizenship-list-problems-state-tells-counties/>

<sup>4</sup> Ura, Alexa. “Texas will end its botched voter citizenship review and rescind its list of flagged voters.” *The Texas Tribune*, April 26, 2019. <https://www.texastribune.org/2019/04/26/texas-voting-rights-groups-win-settlement-secretary-of-state/>.

<sup>5</sup> Ken Paxton (@KenPaxtonTX), Twitter (Jan 25, 2019, 3:37 PM), <https://twitter.com/kenpaxtonTX/status/1088898595653386240?lang=en>

<sup>6</sup> Donald J. Trump (@realDonaldTrump), Twitter (Jan 27, 2019, 8:22 AM), <https://twitter.com/realDonaldTrump/status/1089513936435716096>

Although this episode was particularly egregious, it is not out of line with the trajectory of the battle for civil rights in the Lone Star State and throughout the nation.<sup>7</sup> Individual incidents throw the larger trends into sharper relief. As we move into the next decade, questions about who should get a say in the future of their communities are continually being raised. Texans from all walks of life should be pushing back against rhetoric and policy that cheapens democracy.

### **Voting Rights and Texas: A Fraught – and Fought – History**

The barriers to voting in Texas are nothing new. Texas has a long history of making it difficult for racial minorities—particularly Latinos—to cast their ballots. This history, however, is not limited to discrimination against Latinos. At various times in the state’s history, Texas has moved to make it harder for various minority groups to participate in the democratic process. Nevertheless, given both the size of the Latino population in Texas, as well as the unique challenges that face a minority group that is less likely to speak English, the situation facing Latino Texans is especially complicated.

Although the 15<sup>th</sup> Amendment in 1870 granted Black men the right to vote, the protections afforded to Black voters were quickly eroded post-Reconstruction. As Jim Crow reared its head in the late nineteenth and early twentieth centuries, poll taxes and literacy tests proliferated throughout the Southern states, limiting minorities’ access to the ballot box. One of the most damaging of these tactics was the so-called White Primary. Although states could not bar racial minorities from voting in *general* elections, the Democratic party—a private organization—could and did bar any nonwhite voters from participating in nomination contests. Because of the Democratic Party’s virtual stranglehold on statewide politics (just one Republican presidential candidate won the state between 1872 and 1948), the White Primary effectively shut nonwhites out from the contests with the most significance.<sup>8</sup>

The White Primary, in concert with other suppressive tactics, was devastatingly effective. According to the Texas Politics Project at the University of Texas, 87 percent of Texas’ eligible voters cast a ballot in 1896.<sup>9</sup> By 1916, turnout had shrunk to 34 percent—barely half the national average.<sup>10</sup> Importantly, the White Primary was not limited to Texas’ hands-off approach to the regulation of private organizations. In 1923 the state formally adopted a law barring African Americans from primary elections. When the law was struck down in 1926 by the U.S. Supreme Court in *Nixon v. Herndon*, the state responded by changing the law to allow executive committees to bar voters from their primaries.<sup>11</sup> When this too was struck down by the Supreme

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<sup>7</sup> The absurdity of the voter fraud charges made in Texas is illustrated in a study of a database of voter fraud convictions at the Heritage Foundation. See: Robert Brischetto, “A Number on Voters,” *San Antonio Express-News*, March 10, 2019, F1-F6.

<sup>8</sup> Texas Secretary of State, “Presidential Election Results,” <https://www.sos.state.tx.us/elections/historical/presidential.shtml>.

<sup>9</sup> Texas Politics Project, <https://texaspolitics.utexas.edu>. As referenced in Jerrold G. Rusk, ed., *A Statistical History of the American Electorate*, (Washington, DC: CQ Press, 2001).

<sup>10</sup> Texas Politics Project, *A Statistical History of the American Electorate*

<sup>11</sup> *Nixon v. Herndon*, 273 U.S. 536 (1927).

Court in *Nixon v. Condon*, the Democratic Party of Texas's annual convention passed a resolution that excluded Black voters.<sup>12</sup> Not until *Smith v. Allwright* was decided by the Supreme Court in 1944 were White Primaries finally deemed illegal, regardless of the state's involvement in their origination.<sup>13</sup>

Texas' problematic stances toward voting rights did not end with the overturning of the white primary, the 24<sup>th</sup> Amendment of 1964 (banning poll taxes), or the Voting Rights Act (VRA) of 1965. Texas was not originally covered by the VRA's preclearance condition found in Section 5 of that Act. In 1975, however, when Congress included new protections for language minorities, the entire state became covered by Section 5. This was due largely to the prevalence of Spanish-dominant communities throughout the state.<sup>14</sup>

Although Texas' relationship with equitable voting rights has improved somewhat since the passage of the 15<sup>th</sup> Amendment, it has hardly done so enthusiastically. Voter protections in Texas have instead hinged on congressional action and Supreme Court decisions for Latino voting rights. Voter purges, electoral resource allocation, restrictions on early voting, and aggressive prosecution of fraud that continue to this day show that the fight for Latino voting rights in Texas is not a history lesson; it is an ongoing struggle that will likely continue into the decades ahead.

### **Increases in Purges in Section 5 States**

In 2013, the Supreme Court dealt the 1965 Voting Rights Act a crippling blow. Prior the decision in *Shelby County v. Holder*, states and counties with a demonstrated history of racially discriminatory voting policies were required to pre-approve any changes with the federal Department of Justice or with a federal court.<sup>15</sup> Texas was one of these covered jurisdictions. *Shelby County v. Holder*, however, invalidated the formula that determined which jurisdictions were covered by this preclearance condition, effectively killing the preclearance condition entirely. As Chapter 5 of this volume relates, Texas Governor Greg Abbott aggressively moved to implement a strict voter ID law in the wake of the Supreme Court's decision. The *Shelby County* decision also had major ramifications for voter list maintenance in jurisdictions throughout the country that were formerly covered under Section 5 of the VRA.

Reports from the Brennan Center for Justice published in 2018 and 2019 demonstrate that prior to the *Shelby County* decision, jurisdictions covered under Section 5 purged their voters at roughly the same rate as those not covered. After 2013, however, purge rates in these formerly covered jurisdictions increased substantially, while purge rates in parts of the country that were not covered by the preclearance condition did not go up. (See Figure 1)

<Figure 1 here>

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<sup>12</sup> *Nixon v. Condon*, 286 U.S. 73 (1932).

<sup>13</sup> Klarman, Michael J. "The White Primary Rulings: A Case Study in the Consequences of Supreme Court Decisionmaking." *SSRN Electronic Journal*, 2001, <https://doi.org/10.2139/ssrn.270086>; *Smith v. Allwright*, 321 U.S. 649 (1944).

<sup>14</sup> United States Department of Justice. <https://www.justice.gov/crt/section-4-voting-rights-act>

<sup>15</sup> *Shelby County v. Holder*, 570 U.S. 2 (2013).

The Brennan Center analyses are based on the biennial Election Administration and Voting Survey (EAVS) administered by the U.S. Election Assistance Commission. Because Texas did not report their purge data to EAVS in 2012 it is excluded from the chart above. The Brennan Center report, however, presents evidence that 14 of the 20 most populous counties in Texas increased their purge rates from 2010—the midterm cycle immediately before the *Shelby County* decision—to 2014, the midterm cycle in which Section 5 of the VRA was invalidated.<sup>16</sup> In 2018, Texas’ purge rate returned to roughly the same level as in 2010—but only after hundreds of thousands of voters were removed from the rolls in the year following the removal of the preclearance condition. And, as the botched attempted purge in 2019 makes clear, targeted purges can be hugely problematic for impacted communities, even if the number of voters affected is not high enough to significantly distort statewide purge rates.

### **Voter Purges Since *Shelby County***

In this post-*Shelby County* environment, more attention is being paid to voter purges than ever before. In 2018, the Supreme Court decided in *Husted v. A. Philip Randolph Institute* that Ohio could purge voters who had not voted for six years and failed to return a postcard, even if the state received no affirmative information indicating that a voter had moved, died, or was otherwise ineligible to vote.<sup>17</sup> At the same time, millions of voters have been purged in recent years in states like Georgia.<sup>18</sup> Because these purges are often based at least in part on how long a registered voter goes without voting, communities with low turnout are especially at risk. As Chapter 5 of this volume, and work by scholars such as Bernard Fraga, makes clear, eligible Latinos are less likely than any other racial or ethnic group to cast a ballot.<sup>19</sup>

Texas itself is no stranger to problematic purges. In 2012, the *Houston Chronicle* reported that thousands of voters across the state were matched with deceased individuals all around the country.<sup>20</sup> State officials had apparently used the Social Security Death Master list to come up with what they called “weak matches”—matches based solely on name and dates of birth. These weak matches unsurprisingly turned up large numbers of false positives, leading to the purge of thousands of voters. The *Houston Chronicle* noted that voters from minority districts in Texas were overrepresented on the list of individuals who had been flagged as deceased in the Social Security database. State officials need not have explicitly targeted voters of color for the purge to have had a racially discriminatory outcome: 16 percent of Latinos and 13 percent of African Americans have one of the ten most common American surnames, while

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<sup>16</sup> Because the EAVS data measures all removals between federal elections, the 2014 data includes all voters removed between 2012 and 2014. The 2014 period therefore includes some time before, and some time after, the *Shelby County* decision.

<sup>17</sup> *Husted v. A. Philip Randolph Institute*, 584 U.S. \_\_ (2018).

<sup>18</sup> Brater, Jonathan, Kevin Morris, Myrna Perez, and Christopher Deluzio, “Purges: A Growing Threat to the Right to Vote.” *Brennan Center for Justice*, July 20, 2018. [https://www.brennancenter.org/sites/default/files/2019-08/Report\\_Purges\\_Growing\\_Threat.pdf](https://www.brennancenter.org/sites/default/files/2019-08/Report_Purges_Growing_Threat.pdf).

<sup>19</sup> Fraga, Bernard L.. *The Turnout Gap: Race, Ethnicity, and Political Inequality in a Diversifying America*. (Cambridge, United Kingdom: Cambridge University Press, 2018).

<sup>20</sup> Olsen, Lise. “Texas’ voter purge made repeated errors.” *The Houston Chronicle*, November 2, 2012. <https://www.chron.com/news/politics/article/Texas-voter-purge-made-repeated-errors-4001767.php>.

that is true for just 4 percent of white Americans.<sup>21</sup> Because repeated surnames are so much more common among racial minorities, any matching process that uses last names as a primary criterion is likely to return far more false positives for minorities, potentially threatening their ability to cast a ballot.

## **Election Day Experiences**

Over the past few decades, the United States, and Texas in particular, have seen the Latino population increase rapidly. The United States is becoming increasingly nonwhite, and Texas is one of the states leading that change. Even under the best of circumstances, increased racial diversity can pose problems for the fair administration of elections. In the case of Texas and other states in the Southwest and with growing Latino populations, the complications are further exacerbated by the fact that some of these citizens are not fluent in English and therefore find themselves at a disadvantage inside the voting booth. The update to the Voting Rights Act in 1975 sought to address these problems, requiring jurisdictions with large linguistic minority groups to provide election materials in other languages.<sup>22</sup> Because the coverage formula used to determine which jurisdictions are required to provide language assistance is updated only every five years, the federal protections are not flexible enough to deal with fast-changing communities. Voters in a jurisdiction that is just below the coverage threshold in an update year are at risk of receiving inadequate resources for three federal elections.

These inadequate resources translate into real problems for voters of color, and Latinos in particular, on election day. This is demonstrated using survey data that asks voters how long they waited in line to cast their ballot. The Cooperative Congressional Election Survey (or CCES) is administered after each federal election.<sup>23</sup> In addition to their wait times, the CCES asks voters a host of other information about their sociodemographic characteristics and their experience on election day. A number of papers in recent years have demonstrated that racial minorities wait in longer lines all around the country.<sup>24</sup> Unfortunately, the CCES is not weighted to be representative for individual states. Nevertheless, it can help us to understand the experience of racial minorities on election day, and how those experiences are changing over time.

Although Black voters waited in much longer lines across the nation in the early part of the past decade, the wait times for Latinos were just as elevated as those for Black voters in the past few elections—and were substantially above the wait times for White voters.<sup>25</sup> (See Figure 2.)

**<Figure 2 here>**

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<sup>21</sup> Comenetz, Joshua. “Frequently Occurring Surnames in the 2010 Census.” *U.S. Census Bureau*, October 2016. <https://www2.census.gov/topics/genealogy/2010surnames/surnames.pdf>.

<sup>22</sup> See Section 203, 42 U.S. Code 1973aa-1a, ([http://www.usdoj.gov/crt/voting/42usc/subch\\_ib.htm#anchor\\_1973aa-1a](http://www.usdoj.gov/crt/voting/42usc/subch_ib.htm#anchor_1973aa-1a)).

<sup>23</sup> The CCES also includes pre-election waves in even years, and a smaller survey in odd years.

<sup>24</sup> Chen, M. Keith, Kareem Haggag, Devin Pope, and Ryne Rohla. “Racial Disparities in Voting Wait Times: Evidence from Smartphone Data,” 2019. <https://doi.org/10.3386/w26487>; Pettigrew, Stephen. “The Racial Gap in Wait Times: Why Minority Precincts Are Underserved by Local Election Officials.” *Political Science Quarterly* 132, no. 3 (2017): 527–47. <https://doi.org/10.1002/polq.12657>.

<sup>25</sup> We use the CCES’ vote-verified post-election weights.

Not only did Latinos face longer wait times on *average* than White voters, they were also far more likely to face the longest lines. In 2014, the bipartisan Presidential Commission on Election Administration said that no voter should wait for more than 30 minutes to cast a ballot.<sup>26</sup> Between 2014 and 2018, however, the CCES indicates that Latinos were 79 percent more likely to wait 30 minutes than White voters. This gap cannot be explained by other sociodemographic characteristics. Figure 3A demonstrates that racial minorities—and Latinos in particular—have been more likely than White voters to report waiting more than 30 minutes since 2014. Figure 3B presents the coefficients from national regression models after controlling for available characteristics.<sup>27</sup> Even after controlling for county population density, county share non-Hispanic white, county share over 64 years old, voter education, voter age, voter party, voter marital status, family income, state, and year, Latinos were 24 percent more likely to wait at least 30 minutes to vote than White voters.<sup>28</sup> (See Figure 3.)

<Figure 3A and 3B here>

To better understand why voters of color might wait in such long lines, the Brennan Center interviewed election administrators from 32 counties around the country and seven counties in Texas for a forthcoming report. These interviews demonstrated that many election administrators may be unprepared to grapple with demographic changes in the coming years. Despite knowing that they would be serving more voters for whom English is not a primary language, these overburdened election administrators explained that they continue to rely on the same poll workers year after year – poll workers that reflect the historic, not contemporaneous or future, demographics of their jurisdictions. Officials in Fort Bend County, for instance, explained that they narrowly avoided being required to provide Vietnamese materials under the language provision of the Voting Rights Act 10 years ago. Despite the large Vietnamese population, the county has not begun providing resources in Vietnamese.<sup>29</sup> Moreover, many election administrators detailed the difficulties they had finding bilingual poll workers. Considering that this forthcoming report shows that counties where the white share of the population has declined the most had the fewest resources per voter in 2018, this is especially troubling.

More troubling still is the fact that the racial/ethnic wait gap in Texas will expand even further in the coming years if the state continues to implement and extend its current voting policies. As related in Chapter 5 of this volume, the Texas legislature enacted a strict voter ID law the very same day that the Supreme Court invalidated the preclearance formula in 2013. Today, the worst effects of the law are being held at bay: voters in Texas who do not have the requisite identification can sign a Reasonable Difficulty form that acknowledges that obtaining

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<sup>26</sup> The Presidential Commission on Election Administration, *The American Voting Experience: Report and Recommendations of the Presidential Commission on Election Administration*, General Services Administration, Jan. 2014, 14, <http://web.mit.edu/supportthevoter/www/files/2014/01/Amer-Voting-Exper-final-draft-01-09-14-508.pdf>.

<sup>27</sup> These are logistic regressions, where the dependent variable takes the value 1 if a voter waited 30 or more minutes and 0 otherwise. To aid in with the interpretation of the coefficients, the coefficients have been exponentiated in the figure. Some of the wait gap can be explained by sociodemographic variables which are included in 3B.

<sup>28</sup> These regressions incorporate individual-level information from the CCES, as well as county-level data from the Census Bureau's 2018 5-year American Community Survey.

<sup>29</sup> Fort Bend County, Texas interview by Brennan Center for Justice, November 12, 2019.

an identification card is a material difficulty for them.<sup>30</sup> The governing powers in Texas would like to see this exception removed. Unsurprisingly, its removal would have a racially disparate impact: Black and Latino voters are more likely to lack the necessary identification than White voters.<sup>31</sup> Not only would the removal of the reasonable difficulty provision disproportionately disenfranchise Latinos in Texas; it could also lead to confusion in the polling places where these voters try to cast a ballot, leading to longer lines even for voters of color who *do* have the requisite identification.

Underlying demographic trends and the legal infrastructure in Texas indicate that Latino voters are at risk of facing major problems at their polling places in the coming years. And just as Latino voters have started using the convenience of other electoral reforms like early voting at comparable rates to White voters, they face additional bureaucratic barriers to voting.

### **Mobile Voting Sites / Early Voting**

In years past, Texas has allowed for the use of mobile early voting sites. These sites enabled county election administrators to provide early voting locations for multiple communities throughout their counties. Such mobile early voting sites were particularly helpful for large and lower-income counties; rather than provide early voting locations for a small number of neighborhoods for each day of the early voting period, they could offer early voting – albeit with fewer days – to a far larger set of communities.

In 2019, however, the Texas legislature enacted a ban on the temporary early voting sites.<sup>32</sup> Republican supporters of the bill said that the use of mobile early voting sites allowed for the selective harvesting of the votes of certain communities.<sup>33</sup> Although they were not explicit, these legislators were understood to be using coded language to refer to communities of color and areas with younger voters. Texas Democrats pushed back, calling the legislation an attempt to make it harder for marginalized groups to participate.<sup>34</sup> Under the new law, any early voting location must remain open for the entirety of the early voting period.

Dana DeBeauvoir, the Travis County clerk, explained that the curtailing of mobile early voting will disproportionately impact Spanish speakers, who live in areas where these sites had been deployed with the most success. In the 2018 midterm election, Travis County had 61 mobile early voting centers; as of November 2019, the county was still struggling to decide what they would do as they prepared for massive turnout in the 2020 presidential election.<sup>35</sup>

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<sup>30</sup> Texas Secretary of State. <https://www.sos.state.tx.us/elections/forms/pol-sub/reasonable-impediment-declaration.pdf>

<sup>31</sup> Stewart III, Charles. “Voter ID: Who Has Them? Who Shows Them?” *66 Okla. L. Rev.* 21 (2017), <http://digitalcommons.law.ou.edu/olr/vol166/iss1/2>.

<sup>32</sup> Ura, Alexa. “Texas ended temporary voting locations to curb abuse. Now rural and young voters are losing access.” *The Texas Tribune*, October 10, 2019. <https://www.texastribune.org/2019/10/10/texas-temporary-voting-access-young-rural-voters>.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

<sup>35</sup> Travis County, Texas interview by Brennan Center for Justice, November 11, 2019.

An analysis of voting patterns in Texas makes clear that the new restrictions on early voting come on the heels of major elections in which the share of Latino voters who cast their ballots early rose dramatically. We leveraged Texas' registered voter file to understand who voted on election day, and who voted early. Figure 4 below demonstrates the gap between the early voting rate of White and Latino voters. In 2008, for instance, 65 percent of white voters who participated voted early, while 55 percent of Latino voters voted early. The gap in that year, therefore, was ten percentage points.

<Figure 4 here>

Although white voters were substantially more likely to vote early than Latinos in 2008, that gap has largely narrowed over the past decade. In 2014, the gap was just 3.6 percent, and it was only 6.7 percent in 2016 – a far smaller gap than in the preceding midterm and presidential elections, respectively. It should come as no surprise that, as Latinos have started to use early voting at rates comparable to white voters, restrictions are being put in place. There is a long and documented history of states changing laws once they no longer disproportionately benefit white residents.<sup>36</sup>

### **Increasingly Aggressive Prosecution of Fraud**

Against the backdrop of structural barriers to participation for Latino Americans in Texas is a troubling trend toward more aggressive prosecution against imagined fraud. This can be easily seen in the story with which this chapter opened: Texas Attorney General Ken Paxton rushed to proclaim that his office would bring charges against all non-citizen voters even before he or his office had a chance to examine the evidence and determine whether there were any likely problems. In addition to these statewide investigations into widespread voter fraud, prosecutors in Texas have made examples out of individuals who unknowingly cast a ballot when they were not allowed to do so. Here, we detail the stories of two women who were aggressively prosecuted for accidentally voting when they were not eligible to do so.

#### ***Rosa Ortega***

Rosa Ortega came to the United States from Mexico as a young child; although two of her brothers are American citizens, she never obtained citizenship. She was, however, a legal permanent resident – and, according to her brother, the entire family thought that she was a citizen.<sup>37</sup> According to her lawyers, she did not understand the legal distinction between legal permanent residency and citizenship, and did not know that she was precluded from voting.<sup>38</sup> According to her brother, Ortega indicated on a voter registration form in 2012 that she was a

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<sup>36</sup> See, for instance, Rugh, Jacob S. and Jessica Trounstein, "The Provision of Local Public Goods in Diverse Communities: Analyzing Municipal Bond Elections," *The Journal of Politics* 73, no. 4 (October 2011): 1038-1050. <https://doi.org/10.1017/S0022381611000776>.

<sup>37</sup> Levine, Sam. "This Woman Got 8 Years In Prison For Illegal Voting. Texas Is Showing No Mercy." *The Huffington Post*, November 30, 2018. [https://www.huffpost.com/entry/texas-voter-fraud-prison\\_n\\_5c01a9afe4b0a173c02305c1](https://www.huffpost.com/entry/texas-voter-fraud-prison_n_5c01a9afe4b0a173c02305c1).

<sup>38</sup> Wines, Michael. "Illegal Voting Gets Texas Woman 8 Years in Prison, and Certain Deportation." *The New York Times*, February 10, 2017. <https://www.nytimes.com/2017/02/10/us/illegal-voting-gets-texas-woman-8-years-in-prison-and-certain-deportation.html? r=0>.

citizen because the form lacked an option for legal permanent residents.<sup>39</sup> Upon moving to Tarrant County she attempted to re-register. Her registration was denied after she submitted a form indicating that she was not a citizen. Upon having her registration rejected, she submitted a new form on which she indicated that she was a citizen. This aroused suspicions, and she was eventually prosecuted for illegally voting.<sup>40</sup> Ultimately, Ortega was sentenced to eight years in prison and will almost certainly be deported upon her release.<sup>41</sup>

### *Crystal Mason*

Crystal Mason cast a ballot in the 2016 presidential election while she was on federal supervised release after serving time in prison in Texas.<sup>42</sup> She did not know, however, that Texas law prohibits individuals from casting a ballot until their full sentence has been served. In Texas, this includes any period of supervised release, even though individuals who are under federal supervised release have “completed the entire term of their incarceration.”<sup>43</sup> According to Mason’s attorney, no state agency ever informed her that her eligibility to vote was suspended while she was on supervised release – and yet, despite the state’s failure to notify Mason of her curtailed rights, she was held individually responsible for the ineligible provisional ballot she cast. Although her provisional ballot was not ultimately counted, she was sentenced to five more years in prison for voting.<sup>44</sup>

The prosecution of these individuals stands in sharp contrast to how the criminal justice system has treated other Texans. Just five days after Crystal Mason was sentenced to five more years in prison, Ethan Couch was released from prison. Couch killed four people while driving under the influence. After a psychologist told the court that Couch suffered from psychological distress due to growing up in a rich family—or “affluenza”—he was sentenced to ten years of community supervision.<sup>45</sup> After he and his mother fled to Mexico to avoid potential jail time, he was sent to prison, where he spent just two years.<sup>46</sup> He was prosecuted in Tarrant County, the very same county as Crystal Mason. The Houston Chronicle’s Editorial Board blasted these disparate sentences. “Something’s wrong with the criminal justice system in Fort Worth,” they

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<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

<sup>41</sup> Barajas, Michael. “The Casualties of Texas’ War on Voter Fraud.” *Texas Observer*, September 9, 2019.

<https://www.texasobserver.org/the-casualties-of-texas-war-on-voter-fraud/>.

<sup>42</sup> Barnes, Taylor. “Texas mother Crystal Mason appeals five-year sentence for illegal voting.” *CNN*, September 11, 2019. <https://www.cnn.com/2019/09/10/us/texas-woman-ineligible-voting-appeal/index.html>.

<sup>43</sup> Halpern, Sue. “How Crystal Mason Became the Face of Voter Suppression in America.” *The New Yorker*, December 18, 2019. <https://www.newyorker.com/news/news-desk/how-crystal-mason-became-the-face-of-voter-suppression-in-america>.

<sup>44</sup> *Ibid.*

<sup>45</sup> Fernandez, Manny, Richard Pérez-Peña, and Azam Ahmed. “Ethan Couch, ‘Affluenza’ Teenager, Had Last Party Before Fleeing, Officials Say.” *The New York Times*, December 29, 2015.

<https://www.nytimes.com/2015/12/30/us/affluenza-ethan-couch-mexico.html>.

<sup>46</sup> Victor, Daniel. “Ethan Couch, ‘Affluenza Teen’ Who Killed 4 While Driving Drunk, Is Freed.” *The New York Times*, April 2, 2018. <https://www.nytimes.com/2018/04/02/us/ethan-couch-affluenza-jail.html>.

said flatly.<sup>47</sup> Indeed, that a white man should spend less time in prison for killing four people than two women of color who thought they were allowed to vote is hard to explain.

This aggressive prosecution is meant to, and does, have chilling effects on marginalized voters across the state. Formerly disenfranchised individuals, for instance, are often confused about their eligibility to cast a ballot.<sup>48</sup> It is entirely possible that individuals whose rights *have* been restored but were formerly disenfranchised due to a felony conviction will be scared away from participation by such high-profile prosecution. This could be true even for individuals who are almost positive that they are eligible. When the cost of being wrong is so high, and the state makes its intention to prosecute clear, some would-be voters will inevitably determine that the risks are too high. Mason herself makes clear the chilling effect of these prosecutions. “I don’t think I’ll ever vote again,” she told the Fort Worth Star-Telegram. “That’s being honest. I’ll never vote again.”<sup>49</sup>

## Conclusion

As this book has demonstrated, Latinos in Texas are all too used to having to fight to secure their civil rights. This has been true in housing, employment, healthcare, and voting. The gains from the past 50 years should be celebrated – but the work is far from over. Despite a period of increased federal oversight of American elections, minority voting rights are in many ways at greater risk now than they have been since the landmark civil rights cases of the 1960s. As the Latino population in Texas and around the country grows, we expect others to try and thwart efforts to translate those numbers into political power.

## Recommendations

There are many policies that Texas can and should adopt to ensure equitable access to the ballot box for Latino American voters. Nevertheless, the following policies are among those that would provide the strongest protections and get the ball rolling:

- **Enact automatic voter registration (AVR).** AVR would ensure that Latinos and others are re-registered to vote if they are accidentally purged. It would allow for automatic updates when voters move, and when they become citizens.
- **Make early voting easier, not harder.** Early voting allows workers with inflexible schedules to participate easily in elections. In particular, early voting in Texas should

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<sup>47</sup> Editorial Board. “Blatant injustice for mistaken voters in Fort Worth.” *The Houston Chronicle*, April 5, 2018. <https://www.houstonchronicle.com/opinion/editorials/article/Blatant-injustice-for-mistaken-voters-in-Fort-12806216.php>.

<sup>48</sup> See, for instance, Drucker, Ernest, and Ricardo Barreras. 2005. “Studies of Voting Behavior and Felony Disenfranchisement Among Individuals in the Criminal Justice System in New York, Connecticut, and Ohio.” Research report. Sentencing Project. [https://www.prisonpolicy.org/scans/sp/fd\\_studiesvotingbehavior.pdf](https://www.prisonpolicy.org/scans/sp/fd_studiesvotingbehavior.pdf); Uggem, Christopher, and Jeff Manza. 2004. “Lost Voices: The Civic and Political Views of Disfranchised Felons.” In *Imprisoning America: The Social Effects of Mass Incarceration*, edited by Mary Patillo, David Weiman, and Bruce Western, 165–204. New York: Russell Sage Foundation.

<sup>49</sup> Tinsley, Anna M. and Deanna Boyd. “Convicted felon indicted on illegal voting charge in Tarrant County.” *Fort Worth Star-Telegram*, March 1, 2017. <https://www.star-telegram.com/news/politics-government/election/article135748503.html>.

allow for mobile early voting sites that can serve multiple communities without requiring huge financial and resource investments.

- **Recruit multilingual poll workers.** Election administrators in counties with many dominant languages should ensure that poll workers are able to assist them on election day.