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# A Short History of the Right to Vote in Tennessee's Constitutions and Court

## Part 1: 1796-1869



By **Cody N. Brandon**

It would be easy to read Tennessee's modern Suffrage Clause — Article IV, § 1 of its Constitution — and mistake it for a uniform clause, consistent with any other you might find across the country. But looks can be deceiving; and the history of the elective franchise in Tennessee's Constitutions and Supreme Court reveals in the text a depth of meaning hidden from the casual observer.

The right to vote in Tennessee today is shaped by — and cannot be understood without — the story of the state moving from its origins as a frontier settlement, through expansion and Civil War, to Tennessee as we know it.

This two-part article examines the history of the elective franchise viewed through two lenses: the Tennessee Constitution and the Tennessee Supreme Court. It follows the history of the state through each of its three Constitutions and related amendments, giving context and depth to each iteration of the Suffrage Clause with contemporary opinions of the court. The focus is on the changing fundamental qual-

ifications for voting, not on Tennesseans' ability to vote having met those qualifications. Accordingly, various laws historically viewed as protecting the "purity of the ballot box" — including registration laws, voter ID requirements, Jim Crow laws and varying systems of administration — are beyond the scope of this article. Nonetheless, those laws played important roles in Tennessee's development as a state, and the true student of Tennessee history ought not neglect any part of the Great State's past — be it glorious or shameful. This article aims to provide a look at an important piece — but only a piece — of the history of the right to vote in Tennessee. In a time

when our usual routines are upended, the future is uncertain, and the administration of elections may require drastic innovation,<sup>1</sup> it can be helpful to look to the past and trace the path that has brought us to where we are.

## THE FIRST CONSTITUTION

Early Tennessee government was rooted in the state's frontier culture. As adventurous settlers and speculators pushed west across the mountains, they established a society and government markedly different from their colonial neighbors, who were dominated by planter cultures.<sup>2</sup> "[F]loods of migrants continuously poured in — poor and wealthy, white and black, enslaved and free — and built frontier communities in the midst of native territory."<sup>3</sup> The election of local militia leaders often provided the most meaningful outlets for ordinary men to participate in politics prior to formal statehood.<sup>4</sup> But before long, these early settlers would adopt the Articles of the Watauga Association — the first written constitution adopted by free men born in America.<sup>5</sup>

It was against this backdrop of entrepreneurialism, adventure and equality — forged by the shared opportunity for profit and struggle for survival — that Tennessee's founders wrote the 1796 Constitution. After a referendum on statehood was put to all free adult males,<sup>6</sup> Tennessee adopted what Thomas Jefferson called "the least imperfect and most republican of the state constitutions."<sup>7</sup> That Constitution provided:

Every freeman of the age of twenty one years and upwards possessing a freehold in the County wherein he may vote and being an inhabitant of this State, and every freeman being an inhabitant of any one County in the State six months immediately preceding the day of election shall be entitled to vote for members of the General Assembly for the County in which he shall reside.<sup>8</sup>

The extension of the franchise not only to freeholders, but also to every free inhabitant meeting the residency requirements, reflected the unique thought that permeated Tennessee's frontier society. When the states had ratified the federal constitution less than a decade earlier, nearly every state required some form of property ownership to qualify to vote.<sup>9</sup> States justified these property qualifications with the purpose of "exclude[ing] such persons as are in so mean a situation that they are esteemed to have no will of their own."<sup>10</sup> But Tennessee eschewed such an approach. The rugged frontier life that rewarded individual effort and achievement — and recognized each man's equal share in the risks posed by the wilderness and its native inhabitants — naturally led Tennesseans to embrace an electorate defined by the same opportunity that drew the state's first settlers. And the 1796 Constitution granted the right to vote to all free men, regardless of race. One commentator observed: "All free men could vote. Poor men, rich men, average men, landless men, and landowning men — they all could vote. This provision also included free black men."<sup>11</sup>

Thus, the right to vote under Tennessee's first Constitution was shared by a strikingly wide section of the population. But this section, though large in comparison to other early states, still left much of the population disenfranchised. No women or slaves could vote, and the minimum age was set at 21. While free black men could vote, the state government was not free of racist sentiment. The Tennessee Supreme Court made this clear in an early opinion that noted, "The free negroes are a very dangerous and most objectionable population where slaves are numerous" because they were "degraded by their color and condition in life."<sup>12</sup> But while it is easy to frown at a policy that excluded so much of the population compared to our modern conception of a liberal franchise, it is worthwhile to look at the first Constitution as evidence of a newborn state struggling

to define its source of authority and identity. That same opinion characterized the manumission of a slave as the state "adopting into the body politic a new member; a vastly important measure in every community, and especially in ours, where the majority of free men over twenty-one years of age govern the balance of the people, together with themselves; where the free negro's vote at the polls is of as high value as that of any man."<sup>13</sup>

While pronouncements by the court on matters concerning the franchise were rare in these early years,<sup>14</sup> the 1796 Constitution captures a state forging a unique identity shaped by its frontier culture. This new state conceived of itself as subject to the people and embraced that subjugation more eagerly than its contemporaries. The first Constitution even explicitly recognized the natural authority of the people and their "unalienable and indefeasible right" to overthrow the government.<sup>15</sup> While the elective franchise in Tennessee would undergo many more transformations in the years to come, the founding spirit abides in the Constitution and Tennessee's courts, and the 1796 Constitution set the stage for Tennessee's continuing struggle to define the scope of the franchise.

## THE 1834 CONSTITUTION AND CIVIL WAR AMENDMENTS

The state took another stab at defining the franchise in 1834, when it adopted a new constitution. "When the Convention met in 1834 . . . a feeling antagonistic to free negroes had been engendered in the public mind, growing out of sectional feeling. The Constitution adopted, deprived free persons of color of the right of suffrage."<sup>16</sup> The new Constitution read:

Every free white man of the age of twenty-one years, being a citizen of the United States, and a citizen of the county wherein he may offer his vote, six months next preceding the day of

*continued on page 20*





President Ulysses S. Grant sitting at the center of a large table, signing the 15th amendment, granting that the right to vote cannot be denied on basis of race or color.

election, shall be entitled to vote for members of the General Assembly, and other civil officers for the county or district in which he resides.<sup>17</sup>

Thus, mostly with the addition of one word, Tennessee's Constitution now resembled many of its neighbors' and took away from free blacks the right to vote they held under the first Constitution.<sup>18</sup> This change appears to have been accepted without much fanfare from the courts. But the Tennessee Supreme Court did give renewed attention to a provision held over from the 1796 Constitution.

Both the 1796 and 1834 Constitutions incorporated a six-month residency requirement.<sup>19</sup> But the residency requirement became more important in the 1834 Constitution for two reasons. First, the second Constitution had eliminated the freehold option for qualifying to vote, meaning a man attempting to vote could qualify himself through residency only and not through the purchase of land. Second, the second Constitution adopted the term "citizen" in place of the earlier use of "in-

habitant." The alterations led the Supreme Court to conclude that a person residing in a county for six months before an election who had only been naturalized during the six-month period voted illegally.<sup>20</sup> The new approach to the franchise reflected the belief "that no one should be entitled to exercise the privilege of voting, who had not been a member of the body politic, and likewise a permanent resident of the local division or county, for the period of six months, immediately preceding the day of election."<sup>21</sup> The court did not see this as "invidious discrimination" against naturalized citizens, but rather as a general tightening of the franchise to those best suited to participate in elections. "It puts them on exactly equal footing with natural born citizens, immigrating to this state from other states of the Union, and on the same footing, too, with our own citizens, removing from one county to another in this state."<sup>22</sup>

Tennesseans concluded that, in their first attempt, they had perhaps cast the net a little too wide. The Supreme Court gave credence to the widely-held fear that "the

mischievous struggles, in some quarters of the country, on the eve of an election, to manufacture votes for the occasion, no matter how" would reach Tennessee's own elections — "a very serious practical evil" the Constitution checked.<sup>23</sup> As the state expanded into the farmland bordering the Mississippi, moved its capital west to the Middle of the Grand Divisions, and developed more entrenched business and political interests than those existing at the time of the first Constitution, the threat of "outside" or "improper" influence over elections held more sway. The two major changes to the 1834 Constitution — elimination of the black vote and a heightened interest in residency — seemed to promise a more stable government and economy than the more unpredictable electorate of the prior Constitution could secure.

But the hope of stability would not last long. While the first Constitution lasted almost 40 years before being replaced, the 1834 Constitution would last less than 30 years before the government it created essentially disappeared. And within 40 years of the adoption of the second Constitution, the franchise in Tennessee would undergo its most volatile and dramatic transformation in the state's history. In 1861, Tennesseans voted to secede from the Union and join the Confederate effort.<sup>24</sup>

Immediately following the secession and during the ensuing Civil War, the state government dissolved: officials fled with the archives and treasuries of the state, the courts were closed and bandits plundered citizens' homes.<sup>25</sup> As the Supreme Court put it: "[The state] was without protection of law, and there was no security for life or property. Fear had seized upon the hearts of the people. The land was drenched in blood, and anarchy reigned supreme."<sup>26</sup>

Andrew Johnson became military governor and "exercised complete and dictato-

rial control over state government.<sup>27</sup> But when he was nominated to run as Abraham Lincoln's vice president, he instigated a convention call, desiring to obtain the free electoral vote of Tennessee.<sup>28</sup> At the ensuing convention in 1865, members of the Union party passed a resolution purporting to be an amendment to the 1834 Constitution.<sup>29</sup> Its effect was to disenfranchise anyone associated with the Confederate government or army. The purported amendment allowed the General Assembly first convening under the amended Constitution to determine the qualification of voters.<sup>30</sup> That first General Assembly then passed an act limiting the franchise to only those men loyal to the Union cause.<sup>31</sup> Before the start of the Civil War, 145,000 men voted in the election of 1860.<sup>32</sup> In the first general election after the convention, 25,000 men voted — “about the number of Union army troops occupying Tennessee at the time.”<sup>33</sup>

But the restriction of the franchise did not stop with narrowing it to those loyal to the Union. In 1867, the legislature passed an act purporting to revoke the registration of the entire county of Overton and allow the governor to revoke any other county's registration “when it shall be made to appear to the satisfaction of the Governor, that frauds and irregularities have intervened in the registration of voters in such counties.”<sup>34</sup>

Thus, in a state that had originally extended the right to vote to all free men — without respect to race or wealth — the franchise was limited to those loyal to the Union living in counties Gov. William Brownlow deemed loyal. However, the acts had reinstated the franchise of free black men, a population that had grown substantially larger since they lost the right to vote in 1834.<sup>35</sup> Two Tennessee Supreme Court cases help explain the state's understanding of the right to vote in that turbulent time. In the first, a pardoned former Confederate soldier sued after being denied registration.<sup>36</sup> Justice Shackelford, writing for the court, lamented that it was “at this advanced term, amidst the varied

and complicated duties that have been imposed upon us during the session, unable to do more, at present, than to announce the result of [its] decision.”<sup>37</sup> Nonetheless, he felt it important to describe the nature of the right to vote:

The elective franchise is not an inalienable right or privilege, but a political right, conferred, limited, or withheld, at the pleasure of the people, acting in their sovereign capacity. Each State may define it in its own Constitution, or empower its Legislature to do so.<sup>38</sup>

In upholding the denial of the soldier's registration,<sup>39</sup> the court exhibited immense deference to the authority of the convention to determine the scope of the franchise.

This principle was repeated and expanded in the second case — one stemming from Gov. Brownlow's revocation of the entire registration of Gibson County.<sup>40</sup> In that case, three justices iterated their view of the right to vote in opinions emblematic of Tennessee's continuing struggle to define the franchise. Justice Shackelford — now having occasion for a more robust exploration of the right of suffrage — reiterated that “[t]he right of suffrage is a political right or privilege, and not a natural and inherent right.”<sup>41</sup> He viewed the right to vote as a right, not inalienable, but granted by “the sovereign will of the people,” who had their own “right to control and limit the elective franchise” that “ha[d] never been doubted.”<sup>42</sup> Justice Andrews analogized the right to vote to a property right. Justice Andrews viewed the franchise as a right “conferred upon the citizen” and protected by law, but “having its origin in the will of the body politic.”<sup>43</sup> That right, he thought, was “held by the citizen, in trust, to be exercised for the public welfare,” and “the citizen ha[d] no right to use [it] for his private benefit, in opposition to the public interest.”<sup>44</sup> And Justice Smith, writing for the court, invalidated the governor's revocation on due process grounds,<sup>45</sup> holding the power purportedly granted by the act to the governor stripped the courts of their

constitutionally-invested judicial power.<sup>46</sup>

There was no focus on individual, natural rights. Gone, even, were the meritocratic ideals of the frontier society. The Constitution and Court of Tennessee now yielded to the right and power of the people in convention — whoever those people might be<sup>47</sup> — to confer the franchise on whom they willed.

By the end of Brownlow's tenure as governor, Tennessee's electorate had changed drastically since the adoption of its second Constitution. In 1834, free blacks lost the right to vote, slaves and women had never held the right to vote, and only the free white men meeting the age, residency and citizenship requirements were entitled to cast ballots. By 1869, all men — including newly freed black slaves — could vote, so long as they had been loyal to the Union cause. But women still could not vote, and the minimum age was still 21. <sup>48</sup>

## TO BE CONTINUED

*The second part of this article, to be published in next month's Journal, will follow the franchise from 1870 to the present.*



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**William & Mary and a 2016 graduate of Carson-Newman University. He wishes to express his appreciation to Paige Brandon and Evan X. Tucker for their support and assistance in writing this article. This article represents the opinions of the author and not necessarily those of the Office of the Tennessee Attorney General and Reporter.**

## NOTES

1. During much of the writing, editing, and publishing of this article, the coronavirus pandemic has redefined our sense of normal.

2. Andrew Gold, *The Antebellum Constitutions of Two Southern States Compared and Contrasted: South Carolina and Tennessee*, 23 J. S. Legal Hist.

*continued on page 22*

- 1, 7-8 (2015).
3. *Id.* at 10.
4. Kristofer Ray, *Middle Tennessee: 1775-1825*, 8 (2007).
5. George E. Connor & Christopher W. Hammons, *The Constitutionalism of American States*, 354 (2008); Paul Fink, "Some Phases of the History of the State of Franklin," *Tennessee Historical Quarterly* Vol. XVI, no. 3 (1957), p. 195.
6. Gold, *supra* note 1, at 11.
7. J.G.M. Ramsey, *The Annals of Tennessee to the End of the Eighteenth Century*, 657 (1853).
8. Tenn. Const. art. III, § 1 (1796).
9. Jacob Katz Cogan, *The Look Within: Property, Capacity, and Suffrage in Nineteenth-Century America*, 107 *Yale L. J.* 473, 476 (1997).
10. 1 William Blackstone, *Commentaries* 170.
11. Gold, *supra* note 1, at 14; *State v. Staten*, 46 Tenn. 233, 266 (1869) (Shackelford, J., concurring).
12. *Fisher's Negroes v. Dabbs*, 14 Tenn. 119, 126 (1834).
13. *Id.*
14. See *Brewer v. Weakley*, 2 Tenn. 99 (1807) ("But one case respecting an election is recollecting at present, which is in Lord Raymond's Reports, and that as well as can be recollecting

was a suit brought by a freeholder whose vote was refused. That was with respect to a member of parliament . . .").

15. Tenn. Const. art. XI, § 1 (1796) ("That all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety, and happiness; for the advancement of those ends, they have at all times an unalienable and indefeasible right to alter, reform, or abolish the government in such manner as they may think proper.").

16. *Staten*, 46 Tenn. at 266 (Shackelford, J., concurring).

17. Tenn. Const. art. IV, § 1 (1834).

18. Gold, *supra* note 1, at 18.

19. *Compare* Tenn. Const. art. III, § 1 (1796) ("every freeman being an inhabitant of any one County in the State six months immediately preceding the day of election") with Tenn. Const. art. IV, § 1 (1834) ("a citizen of the county wherein he may offer his vote, six months next preceding the day of election").

20. *State v. Cloksey*, 37 Tenn. 482, 487 (1858).

21. *Id.* at 486.

22. *Id.* at 486-87.

23. *Id.* at 487.

24. *Ridley v. Sherbrook*, 43 Tenn. 569, 573

(1866).

25. *Id.* at 573-74.

26. *Id.* at 574.

27. *Gaskin v. Collins*, 661 S.W.2d 865, 867 (Tenn. 1983).

28. *Id.*

29. *Id.*; *Ridley*, 43 Tenn. at 574-75.

30. *Ridley*, 43 Tenn. at 575.

31. See *Staten*, 46 Tenn. at 274-75 (reproducing act limiting suffrage to those "publicly known to have entertained unconditional Union sentiments," Union soldiers, and others of categories that would exclude Confederates and their sympathizers); *id.* at 241 (noting 1867 act deleted the word "white" and extended the franchise to "persons of color"); *id.* at 275-77 (collecting various other acts disenfranchising Confederates and requiring both past and future loyalty to the Union, specifically to Governor Brownlow).

32. *Gaskin*, 661 S.W.2d at 867.

33. *Id.*

34. *Staten*, 46 Tenn. at 280 (Shackelford, J., concurring).

35. *Id.* at 241.

36. *Ridley*, 43 Tenn. 569.

37. *Id.* at 575-76.

38. *Id.* at 576.

39. *Id.* at 578.

40. *Staten*, 46 Tenn. at 235.

41. *Id.* at 269 (Shackelford, J., concurring).

42. *Id.* at 268 (Shackelford, J., concurring).

43. *Id.* at 255 (Andrews, J., concurring).

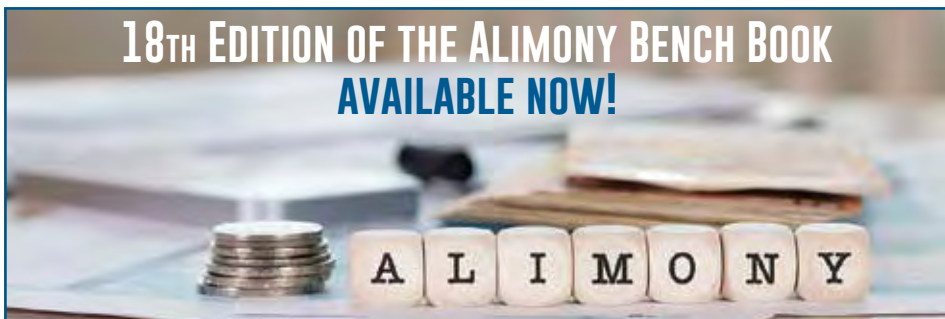
44. *Id.*

45. *Id.* at 250 ("The power bestowed upon the Governor, to annul the registration, is, in most essential particulars, devoid of the quality of 'due process of law.'").

46. *Id.* at 254 ("The statute which empowers the Governor, practically and effectually to divest out of any and every qualified voter, his right to vote, not only once, but from time to time, and without end, is repugnant to those provisions of the organic law which are ordained to invest the Courts with judicial power, and to exclude the executive head of the government from the exercise of such power.").

47. In the case of the post-Civil War amendments, "the people" in convention were members of the Union party. *Gaskin*, 661 S.W.2d at 867. As one commentator notes, "The membership of the convention was suspect," coming largely from a handful of counties with which members had only a tenuous connection. Sam D. Elliott, "You Cannot Get Back ... without Some Irregularity," 53- DEC Tenn. B. J. 27, 30 (2017).

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