

Let Every Voice Be Heard: Protecting and Promoting the Right to Vote and American Democracy

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Daniel Kiel

Voting with Conviction: Voting Rights and Voting
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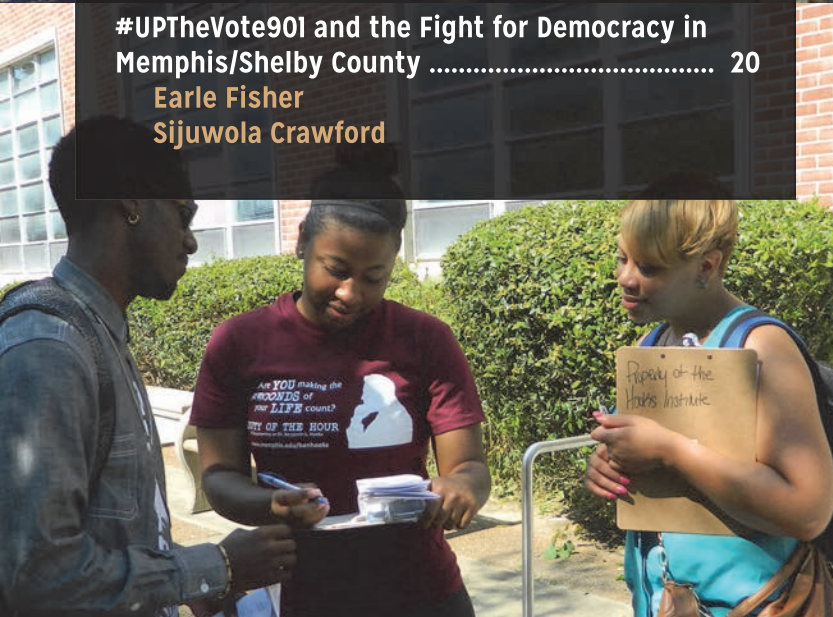
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SEPTEMBER 2020
SIXTH EDITION



The Benjamin L. Hooks
Institute for Social Change

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Daphene McFerren

Executive Director, Benjamin L. Hooks Institute for Social Change
The University of Memphis

Elena Delavega

Programs Research Advisor, Benjamin L. Hooks Institute for Social Change
Associate Professor, Department of Social Work
The University of Memphis

Daniel Kiel

Associate Director, Benjamin L. Hooks Institute for Social Change
FedEx Professor of Law, Cecil C. Humphreys School of Law
The University of Memphis

Voting with Conviction: Voting Rights and Voting Restoration in Tennessee 4

Shanna Singh Hughey

President, Think*Tennessee*

Dawn Schluckebier

Advocacy and Government Relations Director, Think*Tennessee*

**The Criminalization of the Ballot Box: Navigating the Rise of Voter Prosecutions,
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Mitchell Brown

Counsel, Southern Coalition for Social Justice
Equal Justice Works Fellow, Sponsored by the Ottinger Foundation

#UPTheVote901 and the Fight for Democracy in Memphis/Shelby County 20

Rev. Earle Fisher

Senior Pastor, Abyssinian Baptist Church
Founder, #UPTheVote901

Sijuwola Crawford

Chief Operations Officer, #UPTheVote901

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FOREWORD

Perhaps no American better recognized the gap between ideals and practice when it comes to democracy than Congressman John Lewis. Lewis believed so strongly in the power of the vote that he stood facing vicious state troopers at the Edmund Pettus Bridge in Selma, Alabama, in 1965. Lewis, who lived a life of nonviolent protest against injustices of many kinds from his days as a young man leading the Student Nonviolent Coordinating Committee (SNCC) to his three decades in Congress, recognized that voting was a particularly potent tool. Protests might persuade that change was needed, but votes could dictate change. “The vote is precious,” Lewis said. “It’s the most powerful nonviolent tool we have to create a more perfect union.”¹

Because the vote is so powerful, it has also proven an appealing target for those wishing to limit democracy. The troops Lewis faced in Selma represented a highly visible (and armed) impediment to voting, but every inch of progress in expanding American democracy has had to be fought for. The Constitution, which does not mention voting directly, has required multiple amendments to ensure protection of voting rights based on race (Fifteenth Amendment) and sex (Nineteenth Amendment). These amendments required the Civil War and a mass social movement respectively to be included in the nation’s charter.

Suppression of the power of the vote does not always take the form of armed troopers or outright exclusion of women or voters of color. Another constitutional amendment (the Twenty-Third) was required in 1962 to prohibit the use of poll taxes that placed an added barrier on Americans’ ability to vote; that same year, the U.S. Supreme Court decided in *Baker v. Carr* – a case that originated here in Shelby County, Tennessee – that dilution of voting strength represented another unconstitutional form of suppression. But as Lewis knew well, even gains in voting are subject to rollback. In 1965, after the march Lewis led from Selma to Montgomery, Congress passed the landmark Voting Rights Act. The law was reauthorized multiple times over the following decades, including most recently in 2006. But in 2013, the U.S. Supreme Court, in *Shelby County v. Holder*, declared that version of the law outdated and struck down several of its protective portions. Restoring the Voting Rights Act remained Lewis’s quest until his death this past summer.

In 2020, American voters have a constitution that prohibits voting discrimination and professes the principle of “one person, one vote.” Nonetheless, subversion of the power of the vote, particularly those of African Americans and other groups that have historically been disenfranchised, remains prevalent. Largely unrestrained campaign financing enables uneven influence on the election process that undermines the idea of one person, one vote; gerrymandering of legislative districts (a process set to begin anew with the results of the 2020 census) enables lawmakers to choose their constituents rather than the other way around; onerous voter identification laws disproportionately prevent voters in poverty from exercising their constitutional rights. Of particular concern during these extraordinary times, when the fall 2020 elections will take place during the COVID-19 pandemic, some jurisdictions have limited the accessibility of voting by restricting when, where, and how voters may vote.

This issue of the Hooks Institute Policy Papers series examines several ways in which the power of the vote is impacted in our current moment and offers recommendations on how to help provide and protect this foundational right. Each writer confronts a modern mechanism for reducing the power of voting – disenfranchisement through disengagement, formal removal of voting rights, or converting voting into a potential crime – and each piece highlights the impact such practices have primarily on voters of color.

¹ John Lewis, Comments at the Democratic National Convention, Sept. 6, 2012. Transcript available at: <https://www.pbs.org/newshour/show/rep-john-lewis-is-your-vote-is-precious-almost-sacred>.



In “Voting With Conviction: Voting Rights and Voting Restoration in Tennessee,” Shanna Singh Hughey and Dawn Schluckebier explore the history of efforts to secure voting rights and to confront voter suppression before delving deeply into the most significant example of formal voter disenfranchisement – the potentially permanent removal of voting rights after conviction for a felony. Drawing on staggering statistics on the impact of this practice, particularly on communities of color – one in five African American males in Tennessee has had his voting rights taken due to felony conviction – this piece argues for a path to restoration of voting rights and an end to explicit voter exclusion in the twenty-first century United States.

In “The Criminalization of the Ballot Box: Navigating the Rise of Voter Prosecutions, Charting a Path of Resistance,” Mitchell Brown describes the use of voter prosecutions to punish individuals who have “wrongfully voted,” a practice that can intimidate entire communities from exercising their collective power through voting. The piece argues that such prosecutions have the effect of transforming voting from a right into a risky undertaking that could land a voter in prison for years. While remaining mindful of the need to ensure the integrity of elections, Brown offers several recommendations to reduce this “criminalization of the ballot box.” Doing so can increase the integrity of elections by ensuring that the most vulnerable voters are able to fully exercise their rights.

In “#UPTheVote901 and the Fight for Democracy in Memphis/Shelby County,” Earle Fisher and Sijuwola Crawford outline the challenges of increasing voter engagement to overcome a hidden form of voter suppression – voter apathy. The authors recognize through their work that mere registration is not enough to achieve voter empowerment, and they describe concrete steps to deliver “more power” to “more people.” More specifically, the piece lays out a path toward increasing voter engagement through issue-based organizing and provides an important perspective on the challenges of such efforts.

Preserving and promoting the right to vote has been a central element of the Hooks Institute’s mission. In 2008, the Institute helped produce “Freedom’s Front Line,” a documentary exploring the tent city African American families of Fayette County, Tennessee, constructed in 1960 when their attempts to exercise their voting rights beginning in 1959 led to white retaliation. The Tent City story has remained a foundational part of the Institute’s programming for years. In addition, the Institute has spearheaded voter registration efforts on the University of Memphis campus.

This edition of the Hooks Institute’s Policy Papers builds upon that work. In this election year, a year in which the world lost one of its greatest champions of voting in Lewis and during which the centennial of the Nineteenth Amendment has been commemorated, the vote remains as powerful as ever. Yet just as Lewis, the suffragists who demanded votes for women, and the tenters of Fayette County had to fight to obtain and preserve that power, the struggle continues in 2020.²

Daphne McFerren, J.D.

Executive Director, Benjamin L. Hooks Institute for Social Change
The University of Memphis

Elena Delavega, Ph.D.

Programs Research Advisor, Benjamin L. Hooks Institute for Social Change
Associate Professor, Department of Social Work
The University of Memphis

Daniel Kiel, J.D.

Associate Director, Benjamin L. Hooks Institute for Social Change

² The Hooks Institute extends its sincere appreciation to Nathaniel C. Ball, Media and Programs Coordinator (Hooks Institute), for assisting the editors in bringing this edition to fruition.



VOTING WITH CONVICTION: VOTING RIGHTS AND VOTING RESTORATION IN TENNESSEE

Shanna Singh Hughey, J.D., and Dawn Schluckebier, M.P.P.
ThinkTennessee³

Shanna Singh Hughey is the president of ThinkTennessee, a nonpartisan, nonprofit think tank focused on research and advocacy. She works closely with state and local elected officials on both sides of the aisle, as well as advocacy groups from across the ideological spectrum, to promote public policy that empowers voters and increases family economic security. Hughey received bachelor's degrees in political science and psychology with high distinction from the University of Michigan and her JD with honors from The George Washington University Law School.

Dawn Schluckebier is the advocacy and government relations director for ThinkTennessee. Her work focuses on the policies and practice of civic engagement in Tennessee, from the ways we register to vote and cast our ballots to examining why Tennesseans do or do not vote. Schluckebier received her bachelor's degree in American Studies from the University of Maryland, College Park and her MPP from Johns Hopkins University.

I. Suffrage for Whom?

The beginning of 2020 found civic organizations around the state busy planning celebrations to honor the 100th anniversary of Tennessee's vote to ratify the Nineteenth Amendment. Thanks to women-led campaigns a century ago that brought together activists from Memphis to Knoxville, our state's deciding vote granted millions of women across the country access to the ballot box. Commemorations were in order.

And then things got complicated.

A global pandemic raised new questions about how and whether voters can safely cast their ballots this year. And nationwide protests kicked off a tough conversation about who was being heard in our country – and who was being systemically left out.

Suddenly, rather than a star-striped celebration of the Nineteenth Amendment, suffrage's centennial has become an opportunity to reflect on the barriers to civic engagement we have overcome, and those that persist. No such reflection would be complete without acknowledging that, particularly for people of color, suffrage's promises remained largely unfulfilled until the 1965 passage of the Voting Rights Act.⁴ And even today in Tennessee, suffrage for citizens is not yet universal: More than 400,000 voting-age Tennesseans with past felony convictions are barred from the voting box.⁵

³ ThinkTennessee would like to thank law clerk Alexandra Smith for her assistance.

⁴ Jones, M. (2020, August 7). For Black women, the 19th Amendment didn't end their fight to vote. *National Geographic*. <https://www.nationalgeographic.com/history/2020/08/black-women-continued-fighting-for-vote-after-19th-amendment/>.

⁵ The Sentencing Project. (2016). 6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement, 2016. <https://www.sentencingproject.org/wp-content/uploads/2016/10/6-Million-Lost-Voters.pdf>.



The path to full suffrage in the state that, 100 years ago, propelled voting rights into the future includes a rich history, a present marked by relatively low civic participation and work yet to be done.

II. Tennessee's Path to Full Voting Rights

The story of voting in Tennessee starts with suffrage, and with the hot summer a century ago when suffragists and "antis" convened in Nashville for a nail-biting battle over women's right to vote.

It moves forward through 1959, and through the 1960s, when an encampment was set up outside Memphis to house Black sharecroppers who registered to vote in deeply segregated Fayette County. Because they dared to register, they got evicted from their homes and barred from buying groceries and other necessities. The sharecroppers spent years living in a tent city, all because they had the audacity to exercise their constitutional rights. But the consistent national publicity they received helped clarify to the American public that, in parts of the South, Black people were still being denied the right to vote.

The story carries on through 1962, when the U.S. Supreme Court decided *Baker v. Carr*.⁶ This case paved the way for the "one person, one vote" standard of proportional representation. It originated in Shelby County when a small-town mayor brought suit alleging that, because the state had not drawn new legislative districts in sixty years, his constituents' voices were being diluted. Decades later, the principles established in *Baker v. Carr* continue to govern redistricting processes in every state.

The story of voting in Tennessee continues through present day. Although it has some bright spots, from the advent of early voting and online voter registration to the proliferation of nonprofit organizations focused on boosting civic engagement, Tennessee's story is too often one about obstacles enshrined in public policy.

III. Voting in Tennessee Today

Tennessee voters face some potential challenges that voters in most other states do not. Tennessee today is one of just six states in which voters are required to present government-issued photo identification in order to cast their ballot.⁷ It is one of just eight states in which some counties – in Tennessee's case, *most* counties – rely on outdated voting machines that do not produce a separate paper trail that can be used to verify election results.⁸

And two recent actions by the Tennessee General Assembly further set our state apart from others.

Tennessee made national news in 2019, when the state's General Assembly passed, and the governor quickly signed, a law that imposed criminal penalties and steep fines on some organizations conducting voter-registration drives.⁹

The law was written in response to record-setting voter registration efforts across the state, which were led in part by the Tennessee Black Voter Project. Election officials in Memphis and Nashville reported struggling to process the influx of applications, some of which contained errors or omissions and arrived on or just before the voter registra-

6 *Baker v. Carr*, 369 U.S. 186 (1962).

7 National Conference of State Legislators. (2020, July 9). Voter Identification Requirements | Voter ID Laws. NCSL. <https://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx>.

8 Elfrink, T. (2019, May 3). Voter Registration Groups Sue to Block Tennessee Law with Tough Penalties for Signup Mistakes. *The Washington Post*. <https://www.washingtonpost.com/nation/2019/05/03/voter-registration-groups-sue-block-tennessee-law-with-tough-penalties-signup-mistakes/>; see also H.B. 1079, 111th Gen. Assemb., (Tenn. 2019). <http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=HB1079>.

9 Elfrink, T. (2019, May 3). Voter Registration Groups Sue to Block Tennessee Law with Tough Penalties for Signup Mistakes. *The Washington Post*. <https://www.washingtonpost.com/nation/2019/05/03/voter-registration-groups-sue-block-tennessee-law-with-tough-penalties-signup-mistakes/>; see also H.B. 1079, 111th Gen. Assemb., (Tenn. 2019). <http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=HB1079>.



tion deadline.¹⁰ Governor Bill Lee called the law a response to “actual circumstances that were meant to confuse the integrity or to create the lack of integrity in the voting process” and argued it was needed to ensure fairer elections.¹¹ Civil rights organizations disagreed, calling the legislation an attempt “to chill efforts to reach people not yet registered to vote in Tennessee, including African-Americans.”¹²

A federal judge enjoined the law, finding that “there is simply no basis in the record for concluding that the Act will provide much benefit to Tennesseans, and even less reason to think that any benefit will come close to outweighing the harms to Tennesseans (and non-Tennesseans) who merely wish to exercise their core constitutional rights of participating in the political process by encouraging voter registration.”¹³

On March 19, 2020, the Tennessee General Assembly rolled back the law’s most controversial components.¹⁴ The next day, the General Assembly recessed due to COVID-19.¹⁵

The global pandemic presented a novel obstacle to voting in Tennessee. Because Tennessee is one of just sixteen states that typically require voters to list a qualifying excuse before voting by absentee ballot, lawmakers were forced to decide whether to join twelve of those states in temporarily expanding access to absentee voting to all voters during the pandemic.¹⁶ In rejecting a bipartisan proposal to do so, Tennessee joined Texas, Louisiana and Mississippi as the only states not making COVID-19 exceptions to absentee excuse requirements.¹⁷

A state trial court issued an injunction ruling that all Tennessee voters should have the option to vote absentee in the August primaries and the November general election.¹⁸ The Tennessee Supreme Court later narrowed the category of eligible voters to only those with health or medical conditions that make them vulnerable to COVID-19, a ruling that still expands absentee voting to the broadest scope of voters in recent history.¹⁹ Because the courts have yet to rule on the merits of the case, the question of absentee eligibility for the November election is still undecided.

The story of voting in Tennessee today cannot be told without acknowledging that Tennessee’s voter registration and turnout rates are some of the worst in the nation. Our state’s laws may keep some home on Election Day. Others may not vote due to uncertainty about whether they are eligible to cast a ballot at all. More than half of Tennesseans are confused about whether they are legally allowed to vote: 52 percent are unsure whether having

10 Munks, J. (2018, October 8). Shelby County voter registration applications surge, but many deemed invalid. *Memphis Commercial Appeal*. <https://www.commercialappeal.com/story/news/2018/10/09/shelby-county-sees-sharp-rise-voter-registration-form-submissions-but-many-invalid/1534796002/>; Gardner, A. (2019, May 24). How a large-scale effort to register black voters led to a crackdown in Tennessee. *The Washington Post*. https://www.washingtonpost.com/politics/how-a-large-scale-effort-to-register-black-voters-led-to-a-crackdown-in-tennessee/2019/05/24/9f6cee1e-7284-11e9-8be0-ca575670e91c_story.html.

11 Elfrink, T. (2019, May 3). <https://www.washingtonpost.com/nation/2019/05/03/voter-registration-groups-sue-block-tennessee-law-with-tough-penalties-signup-mistakes/>.

12 Elfrink, T. (2019, May 3).

13 *League of Women Voters v. Hargett*, No. 3:19-cv-00385 (M.D. Tenn. 2019). <https://www.courthousenews.com/wp-content/uploads/2019/09/voter-drive-opinion.pdf>.

14 Ebert, J. (2020, March 21). Tennessee Legislature Temporarily Recesses After 14-Hour Day Filled with Rarities Amid Coronavirus Pandemic. *The Tennessean*. <https://www.tennessean.com/story/news/politics/2020/03/19/tennessee-legislature-recesses-2020-session-amid-coronavirus/2880882001/>.

15 Ebert, J. (2020, March 21). Tennessee Legislature Temporarily Recesses After 14-Hour Day Filled with Rarities Amid Coronavirus Pandemic. *The Tennessean*. <https://www.tennessean.com/story/news/politics/2020/03/19/tennessee-legislature-recesses-2020-session-amid-coronavirus/2880882001/>.

16 HB 0145, 111th Gen. Assemb., (Tenn. 2019). <http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=SB0193>

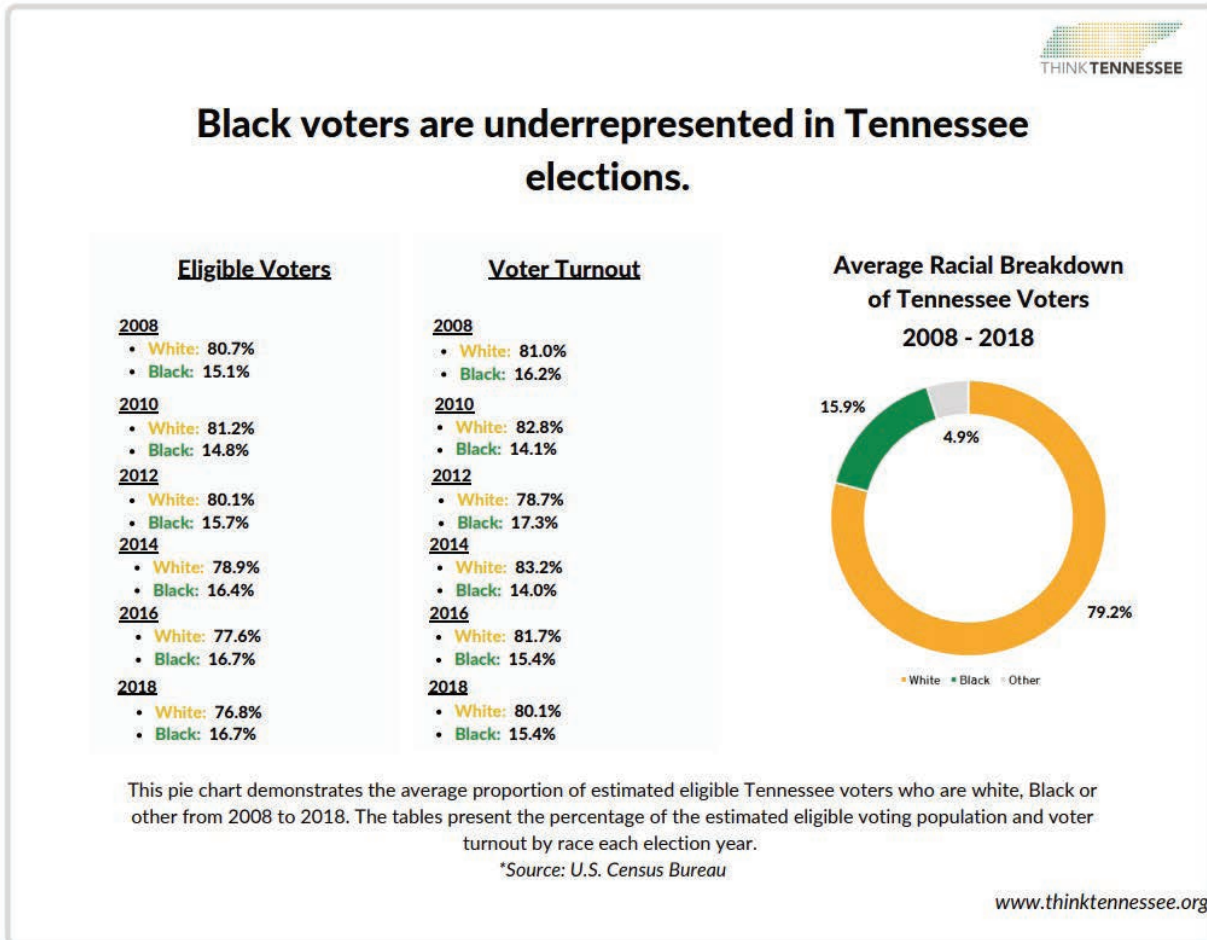
17 HB 0145, 111th Gen. Assemb., (Tenn. 2019). <http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=SB0193>

18 *Fisher v. Hargett*, No. M2020-00831-SC-RDM-CV and *Lay v. Goins*, No. M2020-00832-SC-RDM-CV (Tenn. 2020). https://www.tncourts.gov/sites/default/files/fisher.earlee_and_lay.benjamin.c.opn_.pdf.

19 *Fisher v. Hargett*, No. M2020-00831-SC-RDM-CV and *Lay v. Goins*, No. M2020-00832-SC-RDM-CV (Tenn. 2020). https://www.tncourts.gov/sites/default/files/fisher.earlee_and_lay.benjamin.c.opn_.pdf.



outstanding traffic tickets or utility bills – or a lack of fluency in English – disqualifies them from voting.²⁰ In the 2016 presidential election, Tennessee ranked 45th nationally for voter registration and 49th for turnout; only 51 percent of eligible Tennesseans cast their ballots.²¹ Participation in local elections is even lower: Fewer than 21 percent of voters cast ballots in Nashville’s most recent mayoral election in 2019, and turnout in the 2019 Memphis municipal election was less than 27 percent.²² Moreover, participation rates show a racial disparity: Voter registration and turnout rates among Black and Hispanic voters in Tennessee typically lag those of white voters.²³



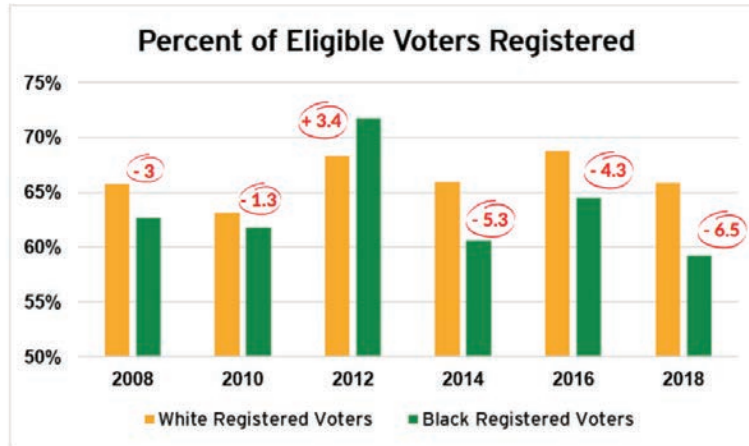
20 See Elections Performance Index. (2016). State Profiles: Tennessee. <https://elections.mit.edu/#/data/map?view=state-profile&state=TN&year=2016>.

21 See Elections Performance Index. (2016). State Profiles: Tennessee. <https://elections.mit.edu/#/data/map?view=state-profile&state=TN&year=2016>.

22 See Davidson County Election Commission. (updated 2020). Election Statistics. <https://www.nashville.gov/Election-Commission/Election>Returns-and-Statistics/Election-Statistics.aspx> (listing turnout for Sept. 12, 2019 Metro General Runoff Election); see also Shelby County Election Commission. (updated 2020). Shelby County Historical Turnout. <https://www.shelbyvote.com/sites/default/files/documents/sccec/vrstatistics/Turnout%20by%20Election%20since%201968%20with%20some%20Primary%20Data%20jan%2030%202020.pdf> (listing turnout for the Oct. 3, 2019 Memphis Municipal Election).

23 U.S. Census Bureau. Citizen Voting Age Population by Race and Ethnicity (2008-2018). <https://www.census.gov/programs-surveys/decennial-census/about/voting-rights/cvap.html>. Tennessee Secretary of State. Election Statistics, Voter Turnout. <https://sos.tn.gov/products/elections/election-statistics>.

Voter registration among Black Tennesseans lags that of white Tennesseans.



This graph compares the rate of voter registration as a percentage of the estimated eligible "Citizen Voting Age Population" (CVAP) of white and Black Tennesseans.
*Source: U.S. Census Bureau

www.thinktennessee.org

Behind these low participation rates and these racial disparities is an important fact: Tennessee bans a higher rate of individuals with felony convictions from voting than forty-seven states.²⁴

IV. The Movement Toward Voting Restoration in Tennessee and Beyond

Tennessee has one of the strictest voting restoration laws in the nation. But in this state and across the nation, advocates and elected officials alike are pushing for laws that streamline the restoration process and lessen the financial barriers that often prevent returning citizens from regaining access to the ballot box. Although the U.S. Supreme Court recently turned down an opportunity to clarify the rules around voting restoration, state-based efforts continue to gain momentum.

a. Tennessee's Strict Voting Restoration Law

Tennessee today is one of just eleven states that permanently disenfranchise people convicted of certain crimes, such as murder, rape, or felony bribery, and one of another eleven states that require those with felony convictions to complete a series of steps beyond serving their sentence in order to have their rights restored.²⁵ Eligibility for restoration varies based on the crime and year of conviction, further complicating the process.²⁶ For example, if two people committed the same crime in different years, one may lose her rights entirely and the other not at all.

24 See ThinkTennessee. (2019). State of Our State: Rights Restoration. https://thinktennessee.org/wp-content/uploads/2019/06/State-of-Our-State-Policy-Brief-Rights-Restoration_FINAL-updated.pdf; see also The Sentencing Project. (2016). 6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement, 2016. <https://www.sentencingproject.org/wp-content/uploads/2016/10/6-Million-Lost-Voters.pdf>.

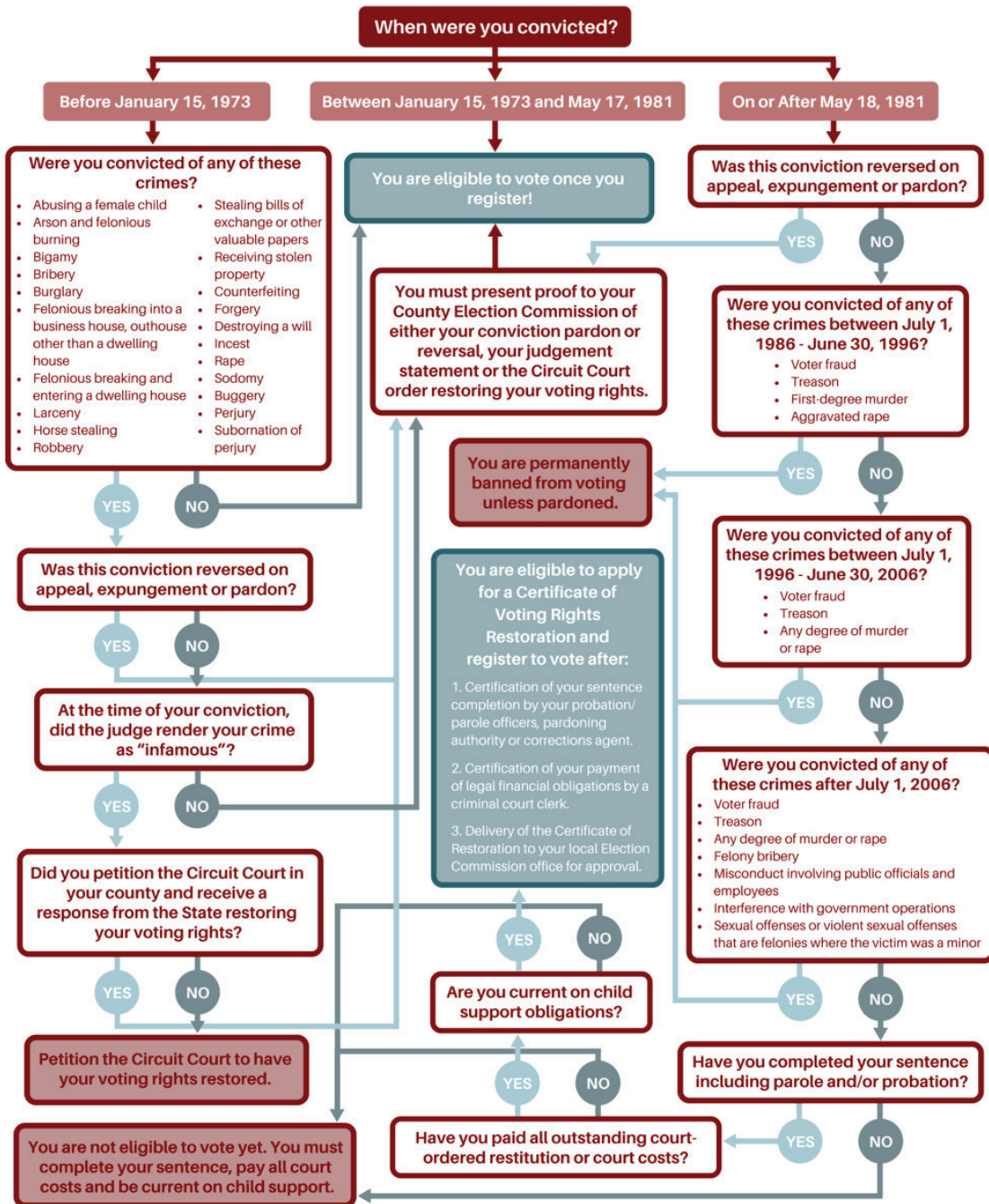
25 See National Conference of State Legislatures. (2019, October 14). Felon Voting Rights. NCSL. <https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx>; see also Brennan Center for Justice. (2019). Disenfranchisement Laws. <https://www.brennancenter.org/issues/ensure-every-american-can-vote/voting-rights-restoration/disenfranchisement-laws>.

26 Tennessee Secretary of State. Eligibility to Voter after a Felony Conviction. https://sos-tn-gov-files.tnsosfiles.com/forms/Eligibility%20to%20Vote%20after%20Felony%20Conviction.pdf?VqqFjxmz7DwdD7_jLHbDHXYtLmn2SiPZ.



A Guide to Restoring Your Right to Vote in Tennessee after a Felony Conviction

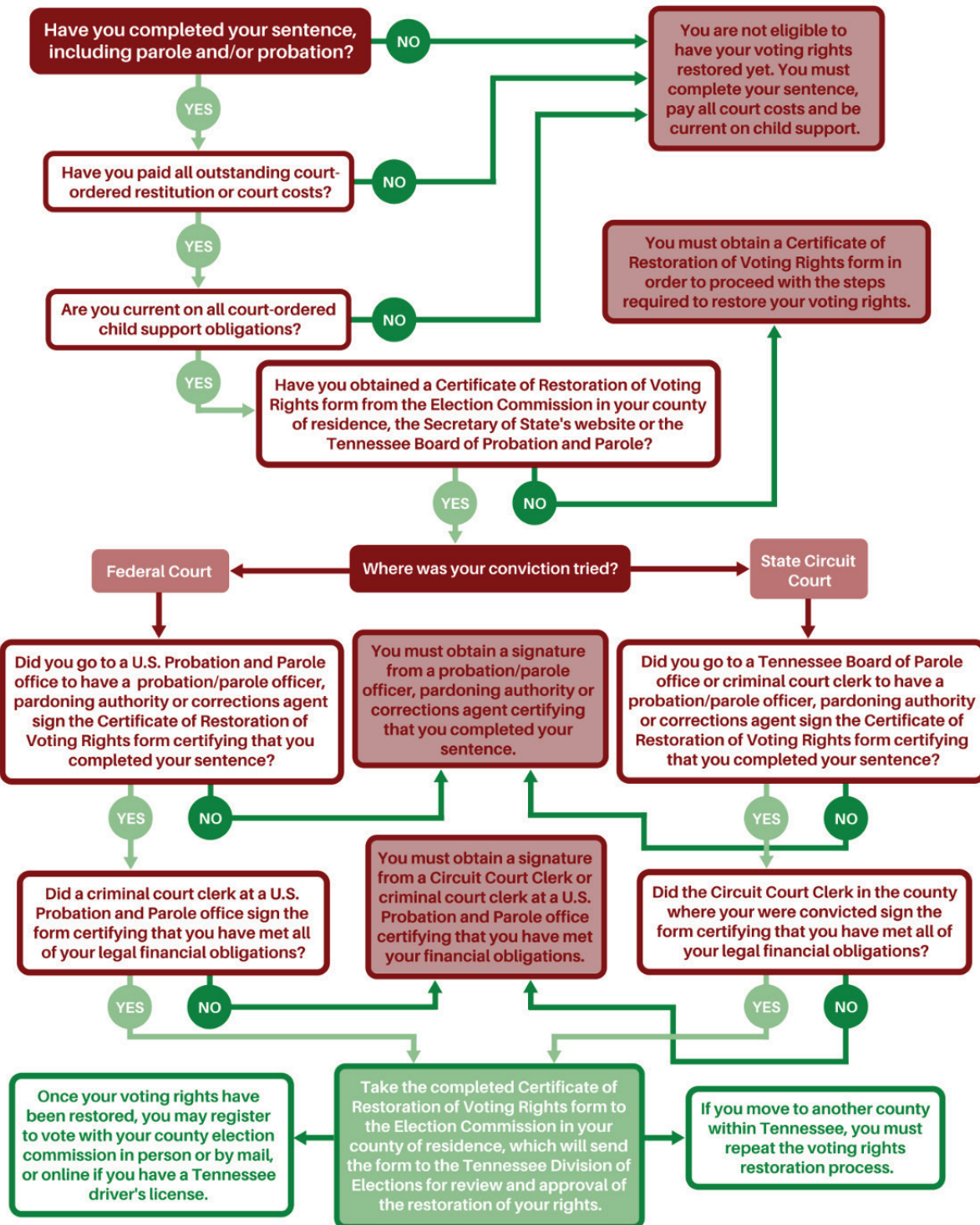
Part I: Do I Have the Right to Vote in Tennessee if I Have a Felony Conviction? It's Complicated.



Sources: Campaign Legal Center. (2019). Restore Your Vote: I have a felony conviction. Can I vote? Retrieved from <https://campaignlegal.org/restoreyourvote/>. Tennessee Secretary of State. (n.d.). Restoration of Voting Rights. Retrieved from <https://sos.tn.gov/products/elections/restoration-voting-rights>.

A Guide to Restoring Your Right to Vote in Tennessee after a Felony Conviction

Part II: Next Step to Restoring Your Voting Rights in Tennessee? Figure Out Where to Go.



Source: Tennessee Secretary of State. (n.d). Restoration of Voting Rights. Retrieved from <https://sos.tn.gov/products/elections/restoration-voting-rights>.



In Tennessee, returning citizens with convictions that qualify for restoration who have completed their sentences, including parole and probation, must be able to demonstrate that they have paid all outstanding legal financial obligations (LFOs), including court fines and fees, as well as restitution, to have their voting rights restored.²⁷ And Tennessee is the only state that also requires them to demonstrate that they are current on all child-support obligations.²⁸

Tennessee's process has not always been this way. Prior to 2006, a returning citizen was required to petition a court for restoration, a process that required the person to demonstrate good moral character and which was subject to objection from prosecutors.²⁹ In 2006, the Tennessee General Assembly created a new section in state law that specifically related to the restoration of voting rights and replaced the subjective petition process with the current one.³⁰

In 2011, the Sixth Circuit in *Johnson v. Bredesen* upheld Tennessee's LFO and child-support requirements.³¹ Applying rational-basis review, that court rejected arguments that those requirements functioned as an illegal poll tax in violation of the Twenty-Fourth Amendment.³²

Because of this law, more than 420,000 voting-age Tennesseans – one in twelve adults – are barred from voting.³³ These already-high numbers show a distinct racial disparity: One in five Black adults in Tennessee cannot vote today because of a past felony conviction.³⁴

b. An Emerging Bipartisan Consensus in Support of Voting Restoration

A national trend toward voting rights restoration has emerged.³⁵ Reflecting a shift away from the “tough on crime” policies of the 1980s and 1990s, voting restoration has found support in conservative and progressive states alike.³⁶ From New York to Kentucky to Louisiana, through both legislation and executive orders, more than 360,000 returning citizens in six states saw their rights restored in 2019 alone.³⁷

27 ThinkTennessee. (2019). State of Our State: Rights Restoration. https://thinktennessee.org/wp-content/uploads/2019/06/State-of-Our-State-Policy-Brief_-Rights-Restoration_FINAL-updated.pdf.

28 Meredith, M. and Morse, M. (2017). Discretionary Disenfranchisement: The Case of Legal Financial Obligations. *The Journal of Legal Studies*, 46(2), 309-338. See also Alliance for a Just Society. (2016, March). Disenfranchised by Debt: Millions Impoverished by Prison, Blocked from Voting. <http://allianceforajustsociety.org/wp-content/uploads/2016/03/Disenfranchised-by-Debt-FINAL-3.8.pdf>.

29 SB 1678, 104th Gen. Assemb., (Tenn. 2006). <http://wapp.capitol.tn.gov/apps/Billinfo/default.aspx?BillNumber=SB1678&ga=104>

30 SB 1678, 104th Gen. Assemb., (Tenn. 2006). <http://wapp.capitol.tn.gov/apps/Billinfo/default.aspx?BillNumber=SB1678&ga=104>.

31 See *Johnson v. Bredesen*, 624 F.3d 742 (6th Cir. 2010), cert. denied.

32 See *Johnson*, 624 F.3d at 751.

33 The Sentencing Project. (2016). 6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement, 2016. <https://www.sentencingproject.org/wp-content/uploads/2016/10/6-Million-Lost-Voters.pdf>. (referencing the Estimates of Disenfranchised Individuals by state on page 15.)

34 The Sentencing Project. (2016). 6 Million Lost Voters. (emphasizing that in Tennessee, 21 percent of African American adults are disenfranchised).

35 See Vasilogambros, M. (2020, January 3). Voting Rights Restoration Gives Felons a Voice in More States. *Pew Research Center*. <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/01/03/voting-rights-restoration-gives-felons-a-voice-in-more-states>.

36 See Vasilogambros, M. (2020, January 3). Voting Rights Restoration Gives Felons a Voice in More States. *Pew Research Center*. <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/01/03/voting-rights-restoration-gives-felons-a-voice-in-more-states>. Key conservative groups, such as the Washington Economics Group, Freedom Partners and Americans for Prosperity helped lead the way in Florida's recent amendment to restore felon voting rights. Bousquet, S. (2018, September 13). Koch-funded group supports voting rights for felons in Florida. *Tampa Bay Times*. <https://www.tampabay.com/florida-politics/buzz/2018/09/13/koch-funded-group-supports-voting-rights-for-felons-in-florida/>. The U.S. Senate recently passed a criminal justice reform bill with bipartisan support and the endorsement of President Donald Trump. Berry, D. (2018, December 18). Senate passes First Step Act with push from criminal justice groups; bill goes to House. *USA Today*. <https://www.hydesmith.senate.gov/senate-passes-first-step-act-push-criminal-justice-groups-bill-goes-house>.

37 See Love, M. and Schussel, D. (2020, February). Pathways to Reintegration: Criminal Record Reforms in 2019. *Collateral Consequences Resource Center*. https://ccresourcecenter.org/wp-content/uploads/2020/02/Pathways-to-Reintegration_Criminal-Record-Reforms-in-2019.pdf; see also Burness, A. (2019, April 25). Colorado could restore voting rights to 9,000 felons this year. *The Colorado Independent*. <https://www.coloradoindependent.com/2019/04/25/colorado-could-restore-voting-rights-to-9000-felons-this-year/> (noting voting restoration in Colorado to approximately 9,000 indi-



Policymakers and advocates from across the ideological spectrum see an improved reentry process as a way to reduce high recidivism rates and save taxpayer dollars.³⁸ Although “measuring the causal relationship between voting rights and criminal behavior is difficult,” one small study in Minnesota that tracked the relationship between voting and recidivism found “consistent differences between voters and non-voters in rates of subsequent arrest, incarceration and self-reported criminal behavior.”³⁹

Further evidence connecting restoration of voting rights with reduced recidivism comes from Florida, where one study found a 12.8 percent reduction in recidivism “associated with the restoration of voting rights, including civil rights.”⁴⁰ That study concluded that returning citizens with restored civil rights “have a greater ability to become full members of Florida’s society and economy, leading to a reduced rate of recidivism.”⁴¹

c. The Supreme Court’s Missed Opportunity

This summer, the U.S. Supreme Court declined to rule on the constitutionality of laws that couple the payment of fines with the restoration of voting rights.⁴² The case arose in Florida, where the battle over voting restoration has captured the attention of the nation.

In 2018, Florida voters overwhelmingly passed a citizen-initiated constitutional amendment to automatically restore voting rights to individuals convicted of some felonies after they have completed their sentence, including probation and parole.⁴³ Reports estimate approximately 1.4 million individuals would have been newly eligible to register to vote.⁴⁴

The following year, Florida Governor Ron DeSantis signed a law that defined “sentence completion” to include the payment of all court costs, fines and fees included as part of a sentence.⁴⁵ Under the new law, a Floridian with a felony conviction could not restore voting rights until the individual had paid all outstanding LFOs. Voting rights groups challenged the new law, and in May, a U.S. District Court in Florida struck it down, holding that it established a “pay to vote” system that violated the Twenty-Fourth Amendment’s ban on poll taxes.⁴⁶

viduals); Campaign Legal Center. (2019, May 28). Nevada Seeks to Restore Reputation by Becoming One of the Most Inclusive States for Voting with a Conviction. <https://campaignlegal.org/update/nevada-seeks-restore-reputation-becoming-one-most-inclusive-states-voting-conviction> (noting voting restoration in Nevada to approximately 77,000 individuals); Brennan Center for Justice. (2019, December 18). New Jersey Governor Phil Murphy Signs Bill to Restore Voting Rights to People on Probation and Parole. <https://www.brennancenter.org/our-work/analysis-opinion/new-jersey-governor-phil-murphy-signs-bill-restore-voting-rights-people> (noting voting restoration in New Jersey to more than 80,000 individuals); Office of Governor Cuomo. (2018, May 22) Governor Cuomo Issues First Group of Conditional Pardons Restoring the Right to Vote to New Yorkers on Parole. <https://www.governor.ny.gov/news/governor-cuomo-issues-first-group-conditional-pardons-restoring-right-vote-new-yorkers-parole> (noting voting restoration in New York to 24,086 individuals); Westwood, R. (2019, November 15). The battle for voting rights in the age of mass incarceration. *Vox*. <https://www.vox.com/the-highlight/2019/11/8/20953476/louisiana-election-voting-rights-ex-prisoners-felons-florida> (noting voting restoration in Louisiana to approximately 36,000 individuals); Kentucky.gov. (2019, December 12). Gov. Beshear Restores Voting Rights to More Than 140,000 Kentuckians. <https://kentucky.gov/Pages/Activity-stream.aspx?n=GovernorBeshear&prId=4> (noting restoration in Kentucky to more than 140,000 individuals).

38 Wood, E. (2009). Restoring the Right to Vote. *Brennan Center for Justice*. https://www.brennancenter.org/sites/default/files/2019-08/Report_Restoring-the-Right-to-Vote.pdf.

39 Restoring the Right to Vote. https://www.brennancenter.org/sites/default/files/2019-08/Report_Restoring-the-Right-to-Vote.pdf (citing Uggen, C. and Manza J. (2004). Voting and Subsequent Crime and Arrest: Evidence from a Community Sample. *Columbia Human Rights Law Review*, 36 (1), 193-216.)

40 The Washington Economics Group (WEG). Economic Impacts of Restoring the Eligibility to Vote for Floridians with Felony Convictions as a Result of Passage of Amendment 4. <https://drive.google.com/file/d/1sP2BiK-CEmkqJOiKjAgUBAwI75H5UP08/view> (citing results of the study from page 4).

41 WEG. Economic Impacts of Restoring the Eligibility to Vote. <https://drive.google.com/file/d/1sP2BiK-CEmkqJOiKjAgUBAwI75H5UP08/view>.

42 *Raysor v. DeSantis*, No. 19A1071 (U.S. July 16, 2020) (Sotomayor, J. dissenting). https://www.supremecourt.gov/opinions/19pdf/19a1071_4h25.pdf.

43 National Conference of State Legislatures. (2019, October 14). Felon Voting Rights. *NCSL*. <https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx>; Robles, F. (2018, November 7) 1.4 Million Floridians With Felonies Win Long-Denied Right to Vote. *The New York Times*. <https://www.nytimes.com/2018/11/07/us/florida-felon-voting-rights.html>.

44 *Jones v. Governor of Florida*, No. 19-14551 (11th Cir. 2020) (per curiam). <https://www.uscourts.gov/courts/ca11/201914551.pdf>.

45 SB 7066 (Fla. 2019). <https://www.flsenate.gov/Session/Bill/2019/7066/BillText/er/PDF>.

46 *Jones v. DeSantis*, No. 4:19cv300-RH/MJF (N.D. Fla. 2020). <https://www.politico.com/states/fl?id=00000172-48d3-dc3e-aff6-4cdf397b0000>; Fineout, G. (2020, May 24). Federal judge strikes down restrictions on Florida felon voting. *Politico*. <https://www.politico.com/states/florida/story/2020/05/24/>



Upon appeal, the U.S. Court of Appeals for the Eleventh Circuit enjoined the lower court's injunction, after which the U.S. Supreme Court declined to grant certiorari and returned the case to the Eleventh Circuit.⁴⁷ The Eleventh Circuit recently reversed the District Court, finding that fines and fees were part of an individual's sentence that must be discharged before voting rights could be restored.⁴⁸

d. Tennessee Efforts to Expand Voting Restoration

Consistent with the national trend, Tennessee organizations from across the ideological spectrum have joined forces to advocate for voting restoration in Tennessee.⁴⁹ They saw some initial success in 2019, when two Republican lawmakers, with the backing of groups as diverse as the ACLU and Americans for Prosperity, introduced legislation to decouple the payment of LFOs from the restoration of rights and to streamline the restoration process.⁵⁰

The bill was deferred to 2020, when the General Assembly again took it up. One of its sponsors, House Judiciary Committee Chairman Michael Curcio, introduced a provision under which returning citizens would have their voting rights restored only provisionally, subject to revocation if they fell behind on a payment plan designed to ensure they met their LFO and child-support requirements.⁵¹ Curcio had previously sought an opinion from Tennessee Attorney General Herbert Slatery, who found that, under the Sixth Circuit's decision in *Johnson v. Bredesen*, payment plans passed constitutional muster, particularly if they accounted for indigency.⁵²

The amended legislation ultimately passed the Tennessee House of Representatives but was not heard in the Tennessee Senate during the shortened COVID-19 session.⁵³ The bill may return in the 2021 legislative session, and organizations will continue to advocate for a more streamlined restoration process.

V. The Progress Continues

The path to women's suffrage was a long one: 72 years passed between the first women's rights convention at Seneca Falls, New York and the ratification of the Nineteenth Amendment.⁵⁴ Recent reflections on the legacy of Congressman John Lewis and civil rights leader Reverend C.T. Vivian serve as important reminders that, although voting policy does not change overnight, decades of dedication and persistence eventually pay off.

In Tennessee and beyond, advocates have picked up where leaders of the civil rights movement left off. Building on the progress the suffragists made a century ago, they will continue to pave the way toward full civic participation.

federal-judge-strikes-down-restrictions-on-florida-felon-voting-1286097.

47 *Jones v. Governor of Florida*, No. 19-14551 (11th Cir. 2020) (per curiam). <https://www.uscourts.gov/courts/ca11/201914551.pdf>; *Raysor v. DeSantis*, No. 19A1071 (U.S. July 16, 2020) (Sotomayor, J. dissenting). https://www.supremecourt.gov/opinions/19pdf/19a1071_4h25.pdf.

48 Howe, A. (2020, July 16). Justices decline to intervene in Florida voting dispute. *SCOTUS Blog*. <https://www.scotusblog.com/2020/07/justices-decline-to-intervene-in-florida-voting-dispute/>; Pickett, A. (2020, Aug. 18). En Banc Eleventh Circuit Takes Up Voting Rights of Florida Felons. *Courthouse News Service*. <https://www.courthousenews.com/en-banc-11th-circuit-takes-up-voting-rights-of-florida-felons/>; Rozsa, L. (2020, Sept 11). Federal appeals court blocks hundreds of thousands of felons in Florida who still owe fines and fees from registering to vote. *Washington Post*. https://www.washingtonpost.com/politics/florida-felon-voting/2020/09/11/9a6b5d3a-f45e-11ea-bc45-e5d48ab44b9f_story.html

49 See Allison, N. (2019, February 14). Tennessee Republicans, ACLU join forces to help more felons regain right to vote. *The Tennessean*. <https://www.tennessean.com/story/news/politics/2019/02/14/tennessee-republican-bill-voting-rights-felons-aclu/2862118002/>; see, e.g., *ThinkTennessee*. (2019). State of Our State: Rights Restoration. https://thinktennessee.org/wp-content/uploads/2019/06/State-of-Our-State-Policy-Brief_-Rights-Restoration_FINAL-updated.pdf (listing as authors *ThinkTennessee*, Americans for Prosperity and Project Return).

50 See HB 0547, 111th Gen. Assemb., (Tenn. 2020). <http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=HB0547>; Allison, N. (2019, February 14). Tennessee Republicans, ACLU join forces to help more felons regain right to vote. *The Tennessean*. <https://www.tennessean.com/story/news/politics/2019/02/14/tennessee-republican-bill-voting-rights-felons-aclu/2862118002/>.

51 amend. to HB 547, 111th Gen. Assemb., (Tenn. 2020). <http://www.capitol.tn.gov/Bills/111/Amend/HA0940.pdf>.

52 Restoration of Voting Rights, Office of the Attorney General, Opinion No. 20-02 (February 25, 2020). <https://www.tn.gov/content/dam/tn/attorneygeneral/documents/ops/2020/op20-02.pdf>.

53 HB 547, 111th Gen. Assemb., (Tenn. 2020). <http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=HB0547>.

54 Women's Suffrage Centennial Commission. (2019). Women's Vote Centennial. <https://www.womensvote100.org/learn>.



VI. Policy Recommendations

- **Streamline the Restoration Process.** When a Tennessean becomes eligible to register to vote after a felony conviction, the individual must complete a Certificate of Restoration (COR) demonstrating completion of a sentence, including parole or probation, and verification that all assessed fees have been paid. An agent of the pardoning or incarceration authority or a probation or parole officer must complete the COR and return it to the individual, after which the document must be presented to the local election commission, where election officials verify it.

A system in which the multiple government agencies involved communicate directly with each other, removing the individual as the middle man, would streamline the restoration process and save taxpayer dollars.

- **Decouple Child Support Requirements from Voting Restoration.** Tennessee is the only state that conditions the restoration of voting eligibility on the payment of child-support debt in addition to other LFOs. But this policy has not resulted in higher rates of child support collections. To the contrary, child support payments in Tennessee have decreased in recent years.

Today, Tennessee law treats incarceration as “voluntary unemployment,” which means child support obligations continue to accrue while a parent is in prison. Incarcerated Tennessee parents who are not current on their child support debt owe an average of \$26,266. Paying off that debt could take years or even decades beyond sentence completion.⁵⁵

- **Publish data on the number of Tennesseans granted restoration of rights.** Data on the number of individuals attempting to or successfully restoring voting rights is not publicly available. Analysis of these numbers would help efforts to understand the full impact of rights restoration on recidivism, furthering the broader efforts of criminal justice system reform.

55 National Conference of State Legislators. (2019, March 4). Child Support and Incarceration. *NCSL*. <https://www.ncsl.org/research/human-services/child-support-and-incarceration.aspx>.



THE CRIMINALIZATION OF THE BALLOT BOX: NAVIGATING THE RISE OF VOTER PROSECUTIONS, CHARTING A PATH OF RESISTANCE

Mitchell Brown, J.D.
Counsel, Southern Coalition for Social Justice

Mitchell Brown is currently an Equal Justice Works Fellow at the Southern Coalition for Social Justice (SCSJ), sponsored by the Ottinger Foundation. Mitchell's fellowship concerns the "criminalization of the ballot box" which SCSJ defines as the abuse of public and private power to intimidate (for fear of criminal prosecution) and otherwise deter political activity by minority citizens. Mitchell's fellowship aims to utilize a variety of tools to combat the scourge of voter prosecutions across North Carolina and other states. Mitchell received his J.D. from the New York University School of Law and his B.S. in Business Economics from North Carolina Agricultural and Technical State University.

Crystal Mason and Rosa Maria Ortega were mothers who were arrested, jailed, and separated from their children. Their only crime: Voting while ineligible.

Mason was sentenced to five years in prison for voting with a felony conviction, even though she cast a provisional ballot that was ultimately not counted. Ortega received eight years in prison for illegally voting as a non-citizen. Neither woman intended to defraud the state of Texas. They merely wanted to exercise the opportunity to let their voices be heard and they were punished for it. These prosecutions are a part of what the Southern Coalition for Social Justice (SCSJ) deems the "Criminalization of the Ballot Box."

The criminalization of the ballot box is rooted in racism and discrimination, and seeks to limit the electorate by removing people from the political process. Conservative policy advocate Paul Weyrich once stated that he did not want everyone to vote, because the Republican Party's "leverage in elections quite candidly goes up as the voting populace goes down."⁵⁶ Examples abound today regarding how the electorate is limited – it can be seen in North Carolina's attempted implementation of a voter ID law that targeted African Americans with "surgical precision,"⁵⁷ the disenfranchisement of voters with felony records for extended periods of time,⁵⁸ and now the prosecution of "ineligible" voters which leads to intimidation from nefarious actors.⁵⁹

56 Sam Levine, *Trump Says Republicans Would 'Never' Be Elected Again if It Was Easier to Vote*, THE GUARDIAN, March 30, 2020, <https://www.theguardian.com/us-news/2020/mar/30/trump-republican-party-voting-reform-coronavirus>.

57 *N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016).

58 National Conference of State Legislatures, *Felon Voting Rights*, October 14, 2019, <https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx>.

59 Jack Healy, *Arrested, Jailed and Charged With a Felony. For Voting.*, N.Y. TIMES, Aug. 2, 2018, <https://www.nytimes.com/2018/08/02/us/arrested-voting-north-carolina.html>; Sam Levine, *A Black Woman Faces Prison Because of a Jim Crow-era Plan to 'Protect White Voters'*, THE GUARDIAN, Dec. 16, 2019, <https://www.theguardian.com/us-news/2019/dec/16/north-carolina-felony-vote-law-black-woman>; Lawrence Mower, *Florida Judge Suggests He'll Rule in Favor of Felons in Voting Rights Case*, TAMPA BAY TIMES, May 6, 2020, <https://www.tampabay.com/florida-politics/buzz/2020/05/06/florida-judge-suggests-hell-rule-in-favor-of-felons-in-voting-rights-case/> (updated May 7, 2020).



I. Defining the Criminalization of the Ballot Box

In executing the Criminalization of the Ballot Box Initiative, SCSJ defines the criminalization of the ballot box as “the abuse of public and private power to intimidate minority community members from voting for fear of criminal prosecution and to otherwise deter political activity by minority citizens.” Many people across the nation have been prosecuted in the name of protecting our elections against voter fraud, having mistakenly voted while still on felony probation, voting while a non-citizen, helping a voter to use a voting machine, or a myriad of other non-fraudulent conduct.

With the exception of Maine and Vermont, every state has laws that disenfranchise people with felony records; however, many states also have laws that further criminalize voting by a person who is ineligible because their rights have not been restored after their felony conviction or if they are a non-citizen.⁶⁰ For example, North Carolina has a draconian law that criminalizes voting by a person with a felony record who has not had their civil rights restored.⁶¹ North Carolina’s law is draconian because it is a strict liability law, meaning that there is no intent required for a person to be convicted of this crime, even if the casting of their ballot is based on a mistaken belief that they can vote. These types of laws have been used as a way to intimidate Black voters, whether it is for explicit disenfranchising purposes or protecting against alleged voter fraud.⁶² North Carolina’s voter prosecution statute provides some insight into how these laws not only came into fruition, but also their purpose.

A law calling for the prosecution of North Carolina residents who vote while they are ineligible due to a felony conviction did not exist until the North Carolina General Assembly ratified a “suffrage amendment” to the state constitution in 1900.⁶³ The purpose of the suffrage amendment was to “[s]ave the [s]tate from Negro rule” because “the illiterate Negro was unfit for the ballot.”⁶⁴ The racially discriminatory suffrage amendment led to the creation of a separate crime for voting after conviction of a felony. This new crime did not include an intent requirement.⁶⁵ Since 1901, the North Carolina General Assembly has only made clerical modifications to this law, leaving its racially discriminatory intent intact. The statute now reads that it is a felony “[f]or any person convicted of a crime which excludes the person from the right of suffrage, to vote at any primary or election without having been restored to the right of citizenship in due course and by the method provided by law.”⁶⁶ In 2017, a North Carolina Board of Elections Audit determined that 441 people voted while they were ineligible due to a felony conviction.⁶⁷ But not every case has been prosecuted and some have yet to be fully investigated.

Besides the racially discriminatory intent behind the passage of North Carolina’s voter prosecution statute, there is no requirement of any intent to defraud the state of North Carolina in order for an individual to be charged and convicted. This lack of intent sweeps in innocent conduct because it criminalizes mistaken understandings of a person’s right to vote, without any proof of an intent to defraud the state. Given the impact of mass incarceration

60 National Conference of State Legislatures, *supra* note 3.

61 N.C.G.S § 163-275(5) (2018)

62 Mary Troyan and Bryan Lyman, *Black Belt Voter Fraud Case In Alabama Shaped Sen. Jeff Sessions’ Career*, USA TODAY, Nov. 18, 2016, <https://www.usa-today.com/story/news/politics/2016/11/18/black-belt-voter-fraud-case-alabama-shaped-sen-jeff-sessions-career/94088186/> (updated Nov. 18, 2016) (referring to a case known as the “Marion Three” in 1985); News Service of Florida, *Orlando Felon Says Law Makes Him Afraid to Vote*, ORLANDO SENTINEL, Apr. 30, 2020, <https://www.orlandosentinel.com/politics/os-ne-florida-felon-voting-law-20200430-pbjyz5n2ovghfbandcftqj2ha-story.html>.

63 Ch. 2, § 2, 1900 N.C. Sess. Laws 54-55, codified at N.C. Const. Art. VI, § 2(3)

64 Alexander Mabry, “White Supremacy” and the North Carolina Suffrage Amendment, *THE NORTH CAROLINA HISTORICAL REVIEW* 1, 2, 6 (1936)

65 Ch. 89, § 71, 1901 N.C. Sess. Laws at 265 (“[I]f any person so convicted [of a crime which excludes him from suffrage] shall vote at [an] election, without having been restored to the right of citizenship, he shall be guilty of an infamous crime[.]”).

66 N.C. G.S., *supra* note 6.

67 Post-Election Audit Report, NORTH CAROLINA STATE BOARD OF ELECTIONS, April 21, 2017, available at https://s3.amazonaws.com/dl.ncsbe.gov/sboe/Post-Election%20Audit%20Report_2016%20General%20Election/Post-Election_Audit_Report.pdf.



on Black communities in North Carolina, Black voters are more at risk of running afoul of this statute as Blacks were incarcerated at a rate of 4.3 times their White counterparts as of 2014.⁶⁸

i. Criminalizing the Ballot Box Leads to Intimidation of Eligible Voters for Fear of Potential Prosecution

Looking over the panoply of different voter prosecutions—historical and those that are more recent—one common thread is present: they make people scared to vote. In the past, Black voters and those who would attempt to help them would be intimidated with violence or even death, and that intimidation remains today. Some voters are fearful of voting and are passing this fear down to their children. One former SCSJ client stated that after he was prosecuted for voting while he was ineligible, “he would never vote again and would tell his four children not to vote.”⁶⁹ In Florida, people with felony records are scared to vote because the law is convoluted and the applicability of a new constitutional amendment enfranchising some voters with felony records is in dispute.⁷⁰ In Texas, Crystal Mason stated that “[t]he people who pay the price are folks such as me who believed they were doing the right thing. It’s a life-altering price — a message our elected officials are trying to send to scare us away from the voting booth with harsh sentencing laws.”⁷¹

There are many voters who are eligible to vote, despite having a felony criminal record. Yet, they are aware of criminal voter prosecutions and because of their previous contact with the criminal legal system, they are afraid of further contact with the criminal legal system and turn away from the voting booth. As Josie Duffy Rice stated “. . . it’s essential to remember that consequences of prosecutions like [Crystal Mason’s] radiate far beyond the defendant, making entire communities question whether it’s worth the risk to engage in one of the most sacred rights in a democratic society.”⁷²

These prosecutions seem to be selective and not truly aimed at stopping voter fraud or election fraud. Voter fraud is “a crime committed by one voter who intentionally tries to cast a ballot in an election he or she is not legally permitted to vote in,” whereas election fraud is rigging the electoral process to gain an electoral advantage.⁷³ Two examples provide evidence that prosecutors are selectively prosecuting voter and election fraud. The first example regards a Morganton, NC woman who voted for Donald Trump in 2016 using her mother’s identity, because it was her mother’s dying wish to vote for Donald Trump. In this instance, the district attorney decided not to prosecute this woman who clearly committed voter fraud because “[the district attorney’s office] exercise[s] . . . discretion when evaluating whether a case should be prosecuted. This is done on a case-by-case basis. This office consistently demonstrates compassion in dealing with first-time, non-violent offenders.”⁷⁴ A second example of selective prosecution occurred in Tarrant County, Texas, the same county where Crystal Mason and Rosa Maria Ortega received five-year and eight-year prison terms, respectively, for voting while they were ineligible. In 2018, a Texas judge (Russ Casey) pleaded guilty to falsifying signatures in a bid for re-election but instead of receiving any jail time, he received five years of probation and had to resign from his position.⁷⁵

68 *Criminal Justice Facts: State-by-State (North Carolina)*, THE SENTENCING PROJECT (2018), <https://www.sentencingproject.org/the-facts/#map>.

69 Lynn Bonner, *Felony Charges of Illegal Voting Dismissed for Five NC Residents*, THE NEWS & OBSERVER, Aug. 13, 2018, <https://www.newsobserver.com/news/politics-government/article216584335.html> (updated Aug. 14, 2018).

70 News Service of Florida, *supra note 7*.

71 Crystal Mason, Op-Ed, *I Was Arrested for Voting, But I Won’t Let the Government Intimidate Me*, WASH. POST, Sept. 30, 2019, https://www.washingtonpost.com/opinions/i-was-arrested-for-voting-but-i-wont-let-the-government-intimidate-me/2019/09/30/7b6261b8-dfbf-11e9-8dc8-498eabc129a0_story.html

72 Josie Duffy Rice, *How to Punish Voters*, N.Y. TIMES, Oct. 31, 2018, available at <https://www.nytimes.com/2018/10/31/opinion/election-voting-rights-fraud-prosecutions.html>.

73 Adam Peck, *Election Fraud is not the Same Thing as Voter Fraud. Republicans Never Really Cared Either Way*, THINKPROGRESS, Dec. 5, 2018, available at <https://archive.thinkprogress.org/election-fraud-not-voter-fraud-north-carolina-9-congressional-district-4e2a27b6b307/>.

74 *DA Cites ‘Compassion’ for Not Prosecuting Voter Fraud*, THE NEWS HERALD, Apr. 26, 2017, https://www.morganton.com/news/da-cites-compassion-for-not-prosecuting-voter-fraud-case/article_766b15cc-2ad8-11e7-abfa-8f9665252d92.html.

75 Gillian Edevane, *Judge Gets Probation for Voter Fraud in Same County Where Woman Got Five-Year Prison Term for Voting Illegally*, NEWSWEEK (Apr. 24, 2018), available at <https://www.newsweek.com/judge-gets-probation-election-fraud-county-woman-got-five-years-prison-texas-899147>.



Russ Casey is able to still be a part of his community, while Crystal Mason is subject to serving five years in state prison and Rosa Maria Ortega awaits deportation to Mexico, a country that she has not been in for more than 30 years, after being paroled.⁷⁶ This type of selective prosecution sends the message to Black and Brown voters that they will be prosecuted to the fullest extent of the law, whereas others will receive little, if any, punishment.

ii. Lack of Notice from the State About the Rights of Voters Leads to Voter Prosecutions

Many people who are charged with voting while ineligible say they were never informed that they could not vote and that they voted by mistake. The state has a burden to give people notice about their ability to vote, and when the state fails to carry their burden, voters should not be punished for the mistaken belief that they can vote. For many people with felony records, confusion stems from how the state defines “completion of sentence.” In some states, completion of sentence means as soon as an individual leaves prison, while in other states it means having completed probation and parole, including having paid all fines and fees.⁷⁷

The state’s lack of adequate notice and community education is an issue and serves to further distance some people from the ballot box. For example, after a 2017 audit, North Carolina revised its inadequate notices about the restoration of voting rights for people with felony records when they leave prison or are placed on probation, yet it was too late for the many people who were found to have voted while ineligible in that 2017 audit. If state actors were more diligent in giving people notice about their right, then maybe these people would not have been prosecuted and their lives would not have been upended.

II. Effect of Criminalization of the Ballot Box

The right to vote is an equalizing force in our society, allowing citizens of all backgrounds to have an equal say in how they are governed. However, laws disenfranchising people with felony records and laws criminalizing a person’s vote without any showing of intent to defraud act to silence and intimidate many members of our communities. These community members are disproportionately Black, Brown, and/or poor, and their voices should be heard the loudest because most laws and policies that are passed impact them disproportionately, whether it is in the criminal legal context, educational equity context, or even in the tax policy context. Through the silencing of their voices, they are deprived of equality in our democratic society and forced to accept a status quo that does not truly represent their interests.

The chilling effect on the Black voting population seems eerily familiar to the historical chilling effect of the past. Thousands of potential voters are legally silenced because of the collateral consequences of their felony conviction. Sadly, even if many are later eligible, they may not vote because they are scared. Though more research is required to determine the full impact that voter prosecutions have on voters, as a first step, states must re-evaluate how they seek to achieve the goal of rooting out voter fraud, because intentionally or unintentionally, it intimidates voters. It cannot be denied that there are nefarious actors who seek to defraud the electoral system in order to gain a competitive advantage, but responsive laws seeking to curb fraud can be over-inclusive, sweeping in innocent conduct. A state’s methods to protect against voter fraud should be narrowly tailored to root out actual voter fraud in a non-discriminatory way.

III. Recommendations

- a. **Understand the Scope of the Issue, Tailor Methods Appropriately:** States should work to develop an understanding of the scope of the issue of voter fraud within their jurisdictions so that the methods used to combat it will be proportional to the scope of the problem. In addition, these

76 Gus Garcia-Roberts, *Texas Woman Sentenced to Eight Years for Illegal Voting Paroled, Facing Deportation*, USA TODAY, Feb. 21, 2020, <https://www.usa-today.com/story/news/2020/02/21/rosa-maria-ortega-texas-woman-sentenced-8-years-illegal-voting-paroled-and-faces-deportation/4798922002/>.

77 Nat’l Conference of State Legislatures, *supra* note 3; Mower, *supra* note 4.



investigations should determine whether current methods for combating voter fraud disproportionately affect Black voters – and if so, any such methods should be re-evaluated.

- b. Require Intent for Prosecution:** Statutes punishing voter fraud should require intent to be proven before individuals can be convicted and have their lives thrown into chaos. Innocent conduct should not be the impetus for a criminal prosecution, especially when community members have done all they can to separate themselves from their past, only to be drawn right back into the criminal legal system. In addition, in making prosecution decisions under voter fraud statutes, district attorneys should use their discretion in a fair and equitable manner, and if they do not use their discretion in a fair and equitable manner, they should be subject to malicious prosecution liability.
- c. Clarify Post-Sentence Eligibility:** In order to allow greater focus on actual fraudulent conduct, states should establish greater clarity for individuals' voting rights once they leave prison in order to reduce the potential for individuals to "wrongfully" vote due to misunderstandings regarding ineligibility. This includes giving better notice to people when they are sentenced to probation or when they enter probation/parole after serving a term of incarceration. If the state fails to provide adequate notice of a person's right to vote, then they are violating that person's due process rights. Further, states should consider amending their laws to allow individuals who are no longer incarcerated to have their voting rights (and other civil rights) automatically restored. Moreover, individuals should not be disenfranchised because they cannot afford their fines and fees stemming from a conviction, nor should being on probation or parole be a determinative factor as to eligibility to vote for individuals after leaving prison.



#UPTHEVOTE901 AND THE FIGHT FOR DEMOCRACY IN MEMPHIS/SHELBY COUNTY

Earle Fisher, Ph.D., and Sijuwola Crawford
#UPTheVote901

Rev. Earle J. Fisher, Ph.D. is the senior pastor of Abyssinian Baptist Church (Whitehaven) and founder of #UPTheVote901. Dr. Fisher holds a Ph.D. in Communication from the University of Memphis and is currently the Research Fellow in the Political Science Department at the University of Memphis studying Political Theology and Radical Black Politics.

Mr. Sijuwola “Keith” Crawford is a native Memphian, musician, independent scholar, and Chief Operations Officer of #UPTheVote901. Siju has been recruited across the country as a labor organizer and has been instrumental in political organizing in Dallas, Philadelphia and New Mexico.

For far too long, democracy has been on life support in Memphis and Shelby County. To be sure, this is true of the state of the country at large. But there seems to be something peculiar about how this dire situation manifests in this moment.

Anyone with any political lens or affiliation should recognize our federal political apparatus as being particularly polarized and dysfunctional surrounding the past two presidencies. How else might we explain a transition from President Barack Obama, the first Black president, to President Donald Trump, the resurrection of a white nationalist president?

Metrics show our democracy under a deleterious assault. If democracy is the rule of the majority through equitable access to the ballot box, then Memphis’s low voter turnout⁷⁸ and laws passed by the state to make voting more difficult are two concrete examples of the attack. Even those who don’t follow politics closely articulate “apathy” to describe the swath of people less inclined to participate in the voting process.

Something must to be done. Voter suppression can result when voters are not informed and engaged, or do not believe in their power. Through issue-based organizing that engages the citizenry more broadly, disenfranchised voters can reclaim that power.

The Memphis and Shelby County Voter Collaborative

“Lesser of two evils” is a common sentiment that frames the dialogue around the two major political parties and nearly any two candidates nowadays. This is the political milieu that birthed the idea we originally called the Memphis and Shelby County Voter Collaborative in 2017.

We were tired of seeing anemic turnout determine the personalities and policies that govern the masses. Low engagement elections lead to officials who simply didn’t represent the will of the majority of people in the city, county and state.

⁷⁸ Shelby County Election Commission, “Shelby County Historical Election Turnout,” (2019), available at: <https://www.shelbyvote.com/sites/default/files/documents/sccec/vrststatistics/Turnout%20by%20Election%20since%201968%20with%20some%20Primary%20Data%20jan%2030%202020.pdf>



During the first year or so, our major aim was to increase voter engagement and turnout. We accomplished this in the first few elections in 2018, largely through voter education and voter registration drives. We hosted voter empowerment symposiums and town halls. Voter empowerment symposiums were events where we would educate attendees on the role and function of the offices that were up for election. We also provided an overview (via voter guides) of many of the aspiring and incumbent politicians. It quickly became clear that many people felt intimidated by politics. They did not feel adequately equipped to understand the role of governing officials and the power they wield. Many attendees and partners communicated that this deficiency was (at least partially) a result of what National Education Association writer Amanda Litvinov refers to as the “forgotten purpose” of “civics in public schools.” Litvinov describes how after the 1960s, “civics offerings were slashed as the curriculum narrowed over the ensuing decades, and lost further ground to “core subjects” under the NCLB-era (No Child Left Behind) standardized testing regime.”⁷⁹

We sought to offset that decline, locally, with voter registration and voter education initiatives. Voter registration was the role of every partner, and our goals were to look for public gatherings and events in addition to typical canvassing and approaching personal networks.

#UPTheVote901

As our organization gained more footing and bearing, a core team of three people, the two of us (serving as founder and director of operations respectively), as well as Shahidah Jones (serving as media strategist and director of communications) formed the core leadership team of what Memphians now refer to as #UPTheVote901.

The vision of #UPTheVote901 was confirmed as giving “more power, information, and representation to more people.” The mission at hand was to increase civic engagement through issue-based organizing. The vision serves as an evolving paradigmatic, philosophical framework that informs the how and why to our operations.

#UPTheVote901 began to challenge Memphians to name the things they would change if they could do it with the blink of an eye. Through one-on-one conversations and a survey, over 2,200 people responded to identify issues that are now centered in what we call “The Memphis People’s Agenda.” The agenda is aspirational and meant to be the world as we imagine it could be if people were invigorated by the potential for social change. As such, while it has a local flair, it hints at what folks want from all levels of government.

Listening to people was our first step in engaging them and sharing a vision that resonated, even when there was reticence and fear.

Our Vision: Three Components

There are three components to our vision: power, information, and representation. They are all important because, together, they establish the matrix of political empowerment. It is not enough to simply register voters who don’t feel adequately empowered or informed. That makes them reluctant to stay civically engaged long enough to ensure they have adequate representation through (and beyond) electoral politics.

Here are ways we encountered these components playing out in our communities:

Power

Power is the capacity to get something done. Of our three components, power seems to evoke the most fear. It is easier to speak of proper representation because a particular elected official can be a hero for us or a villain who absolves us of responsibility and obligation beyond helping to elect them. Information also seems neutral enough as we listen to “leaders” elaborate on public issues and their roles. Both “representation” and “information” point

79 Amanda Litvinov, “Forgotten Purpose: Civics Education in Public Schools,” *neaToday*, March 16, 2017, available at: <http://neatoday.org/2017/03/16/civics-education-public-schools/>



to public officials as political saviors or saboteurs, making those public officials (and not the people ourselves) the ones responsible for whether or not our political will is realized. In contrast, talking about “power” literally took training and practice both for organizers and for the general community we were able to engage.

That power is the ability to change an environment and is measured by how much change one can accomplish is an easy concept to grasp. Similarly, it has not been too hard to imagine that in political strategy, money and mainstream media are not the things which provide the greatest chance for political leverage. Our greatest potential is ensconced in the organizing people.

People power is not just rhetorical pontification. Numerically, money and media tools have historically sought to only persuade a small number of registered or potential voters to turn out, gambling the rest of the population will not participate. Too often that has been a winning bet.

We understood that if and when we can activate a fraction of the people left out in the normative political universe, we would begin to see some results and hope for more power and bigger change over time. This thinking led us to craft the goal of a voting base that supports the Memphis People’s Agenda because their issues helped to inform it or they were approached by others who affirmed the agenda.

The goal here is straight forward. We are committed to work for a base large enough to turn the tide of local elections and foster a popular movement that would give birth to candidates who support the agenda or support candidates who align with our aspirations.

In time, this will allow us to do what few Americans do – play a direct role in the crafting of public policy. To this end, we knew that we needed to get out and talk to as many people as possible. Canvassing, phone banking, and various events were held and attended so that we could engage Memphians around their issues and invite them to be a part of this movement.

Information

Information is about having access to the necessary material and insights that adequately inform our social and political maneuvers. Information is a close second to power. We’ve found that people tend to feel disempowered by what we don’t know – our ignorance, if you will. If we consider how the few too often rule the many, we can argue that the few only do so by keeping the many ignorant and fearful.

It bears mentioning that many of the people engaged by #UPTheVote901 have felt politics and politicians tend to operate under a nontransparent cloak. What they imagine behind the cloak is an array of privileged people protecting their individual opulence and cementing the advantages of corporations who fund their campaigns via quid pro quo.

This is not how democracy is intended to function. This is more aligned with a plutocracy or oligarchy.

Representation

Representation is the concrete assurance that the person in political office shares (at least a substantial amount of) your convictions – especially on the issues most important to you. Beyond the conspicuous three tiers and three branches of government, we began to shift our aims to a narrower focus of local elections. This meant that the offices in question could be demonstrated to have more direct impact on the things that elicited concern from Memphians. Obfuscation fled as everyday people become conversant with the notion of the mayor submitting a budget that would be approved by the city council and that the imagination for what was in this budget need not be limited to past iterations. Why could the city not contribute any money to improve a public transportation system that fails by nearly any standard other than existence? Why could the city not provide money for other initiatives like K-12 public education and other social services that are lacking? Understanding the connection to these offices and the changes sought provided context for why Memphis has districts and super districts that seem to posture directly along lines in the sand drawn by Jim Crow.



This knowledge, coupled with the election commission's obsession with an unverifiable voter fraud rampage, reads like a classic chapter in the book of voter suppression.

All these elements (and more) demanded that we organize an effort to fight for the soul of our democracy. We were compelled to orchestrate rides to the polls, mass media blitzes, and the 2019 Memphis People's Convention. We have many more rivers to cross. But we have already seen the needle move. Each election since 2017, lest one (October 2019), has seen a modest increase in turnout and the viability of progressive candidates since those often left out of the voting process or who have had their votes suppressed tend to align with more progressive candidates. The Shelby County 2018 primary election saw a 14.9 percent turnout, up from 10 percent in 2014⁸⁰. This is not anything to run a victory lap about. However, it did signal an open opportunity to build more momentum and engage more citizens.

Nevertheless, we know that these efforts are often met with resistance by the political infrastructure.⁸¹ And we are not naïve enough to think that simply increasing turnout at the ballot box would automatically yield a more just society. We aim to restructure the political apparatus and make the quest for democracy more plausible. We understand that this is not the time to aim low or settle for symbolic and sentimental changes. Our commitment is to ensure that structural and systemic changes are enacted so the will of the majority of the people is honored and actualized. That's what it means to live in a democracy.

Our Recommendations

If we are to see democracy reclaimed and stabilized at the local, state and national levels in our lifetime, there are at least two things we believe every reasonable citizen should support:

- **Automated voter registration statewide.** One of the ways to shift our attention from massive voter registration projects into voter education initiatives and to remove one of the major barriers of voter suppression is to automate registration. This could also relieve the Tennessee Secretary of State of the burden of processing incomplete registration forms. It also responds to the lack of up-to-date information that our election commissions have on residents who may be transient or less engaged. Instead of purging rolls we should ensure that only those who "opt-out" are left out. It's a win-win for all those who sincerely want more people to participate in the electoral process.
- **Massive voter education initiatives.** It should not take someone with a social science degree to be able to access the necessary information they need to empower them to participate in the political process in the way they see fit. Nor should we have to sift through inordinate amounts of partisan propaganda. (Re)Enfranchisement is about much more than simple access. It is about access with adequate information. We want to encourage those groups who are passionate about seeing democracy thrive in our communities to commit to moving beyond the initial step of voter registration and produce (and partner with organizations that produce) more town hall meetings, candidate forums, publication of non-partisan voter guides, and other projects that ensure more voices are heard and more values are honored.

These are not magic wands or blissful wishes. These are concrete and tangible steps that can be made that will (with time) lead to increased engagement, better representation and more power for more people. Only those who are enemies of democracy would not want to see that become a reality.

80 Bill Dries, "Verdict Still Out on Tale of Increased Voter Turnout in Primaries," *The Memphis Daily News*, May 7, 2018, available at: <https://www.memphis-dailynews.com/news/2018/may/7/verdict-still-out-on-tale-of-increased-voter-turnout-in-primaries/>

81 Sam Stockard, "Memphis' Fisher Rejects Idea of Voter Fraud in 2018 Registration Filings," *Daily Memphian*, Sept. 15, 2019, available at: <https://dailymemphian.com/article/7443/Memphis-Fisher-rejects-idea-of-voter-fraud-in-2018-registration-filings>



NOTES

Cover Photographs

Top Left: Hooks Institute voter registration campaign Sept. 2018.

Top Right: Black Lives Matter protest, Memphis, TN ©David Mason.

Bottom Right: Hooks Institute voter registration campaign Oct. 2012.

Bottom Left: African American demonstrators outside the White House, with signs “We demand the right to vote, everywhere” and signs protesting police brutality against civil rights demonstrators in Selma, Alabama. Mar.16, 1965. Prints and Photographs Division, The Library of Congress.






THE BENJAMIN L. HOOKS INSTITUTE FOR SOCIAL CHANGE

memphis.edu/benhooks

bhi@memphis.edu | 901.678.3974

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