

Systemic Racism in U.S. Elections

Disenfranchisement of Black Voters is a persistent problem; and methods to stop it

Prepared For:
Public Policy Leadership, U.S. Election Administrators & Interested Citizens

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Foreword

By **Edward P. Perez**, Global Director of Technology & Standards

These are truly extraordinary times. On top of a global health pandemic and an administration consumed with inflammatory claims of so-called “rigged elections,” a long-festering national wound has been opened again after the death of George Floyd, who died under the knee of former Minneapolis police officer Derek Chauvin. In the aftermath of Floyd’s death, the Black Lives Matter movement has put an urgent spotlight on many forms of injustice and unequal treatment that Black Americans endure year after year.

Because we are an organization devoted to elections and defense of democracy, recent events have turned our attention to a related issue: the disenfranchisement of Black voters in America. With the election looming in just over 130 days as I write this, our research team asked, just how bad is it?

It should come as no surprise that the level of disenfranchisement uncovered in a short research exercise reveals systemic racism permeating U.S. elections throughout our nation’s history. On the one hand, this is deeply disturbing; on the other hand, while the solution is neither fast nor simple, and there is no single remedy, eradicating racism in our elections is an unavoidable moral imperative. And it can be done. It will require enormous political will power. Although I am a student of political science, I cannot see the immediate path forward, though the uneasy national moment is driving us here to reflect on the Institute’s work and its role in developing solutions.

What I can say, as this paper describes, is that the past and present of American voting is in large part the story of tremendous discrimination that Black citizens have faced, both as a direct consequence of the law, as well as errors of commission and omission by those overseeing elections.

We will open our minds and hearts, and use our platforms and talents to do what we can, now and in the years to come, to close the gap in voting access. We also gratefully acknowledge that we are standing on the shoulders of countless Black leaders and everyday citizens who have fought and died for their constitutionally promised equal right to the ballot. All voters cannot matter until Black voters matter; and the goal of trustworthy elections will not be fully achieved until Black voters can trust the vote.

Context

The topic of this research paper may appear to some readers to be a departure from the OSET Institute’s historic focus on election infrastructure and election technology. Why would a non-partisan, non-profit technology research & development organization wade into waters as painful and fraught as the topic of systemic racism? Indeed, some might think that the very topic is “outside our lane,” or that we should not address issues that some regard as inherently “political,” “divisive,” or “partisan.”

We respectfully disagree. Indeed, we are motivated precisely by nonpartisan, patriotic and humanist shared values in defense of democracy. We are listening and taking seriously the words of many Black American citizens who describe, for a host of reasons, the experience of being made to feel like less than full citizens, with insufficient protections of the law and justice that are afforded to others.

Indeed, the nation cannot ignore the fact that the frustration, anger and despair over such unequal conditions has erupted into dramatic, tangible social unrest and understandable protest. An honest and fair examination of these issues in the administration of elections simply cannot be avoided. We must go where the facts lead us, and the facts are that our democracy is currently at risk.

This is not a partisan or ideological issue. If Black Americans experience persistent obstacles to full participation in democratic elections, then we do not have a well-functioning democracy – and that, in and of itself, is a national security issue. And that is why we write, in a nonpartisan spirit.

Although the Fifteenth Amendment of our Constitution guarantees “[that] the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude,”¹ we’ve seen through decades of Jim Crow and its modern manifestations that people of color across the country far too often face disproportionate difficulties while attempting to exercise their right to vote. In the past, systemic efforts to disenfranchise the Black community began with physical intimidation, poll tests, and poll taxes; those were eventually legislatively and constitutionally addressed. In the modern era, attempts to limit Black voters from expressing their constitutional rights are often more subtle, and may even appear ‘colorblind’ on the surface—but in actuality, they can lead to widespread disenfranchisement through unfair rules, regulations, and manipulation of voter data, even to the point of suppressing the Black vote.

The OSET Institute believes that it is impossible to conduct free and fair elections in this country, as prescribed by our Constitution, until they are free and fair *for every single American*. Any conduct to the contrary goes against the foundational pillars of our democracy, and the stability of our social order. In this paper, we examine the different forms of disenfranchisement that Black voters experience, and what can be done, both at the OSET Institute, and in broader American politics, to correct the course.

Let’s consider just one aspect of election administration (arguably the most important): voter registration. Recent news, plus centuries of history, teach us that not everyone trusts the law and election policy to uphold their right to vote without oversight and action. Particularly for minority voters, it may not be enough to be registered to vote, because registrations expire or are subject to being purged. Similarly, registering to vote is no guarantee of success, because registrations must be accepted in order to take effect.

¹ *U.S. Constitution*, Amendment 15, § 1.

Mirroring just about every other aspect of voting in America, Black voters are disproportionately more likely to have their registration fall off the books or never take hold. Whether intentionally or accidentally, millions of voters are incorrectly removed from voter rolls every year, and too many people never receive or take notice of the tiny postcards that provide official notice of their pending disenfranchisement.

To give just one example, in 2018, 53,000 Georgia voter registrants—70 percent of whom were Black, and despite making up only 30 percent of the state’s population—were placed in “pending” status by the Secretary of State because of minor misspellings or missing hyphens in their names on their registration forms. In short, as we examine in this paper, it appears that systemic racism still permeates election administration. And the concern is that until there is significant election reform, Black voters will continue to be disenfranchised, which casts a pall on free and fair elections for everyone.

NOTE: For purposes of this paper, **systemic racism** is defined as: A combination of biases from within society, ingrained in its historical, social, institutional, and political structures that result in the generation of unequal and racially discriminatory outcomes through the application of policies, laws, regulations, patterns and practices, technology, and other decision-making tools. Systemic racism can produce racially discriminatory outcomes even when policies and practices are ostensibly ‘neutral.’

1. A Historic Pattern of Disenfranchisement

Section 4B and 5 of the Voting Rights Act of 1965 enacted a system of ‘pre-clearance’ in states with historical suppression of Black voters; it prevented states with a history of unequal voting policies from independently administering new election laws, without the approval of a Federal Court or the Justice Department. This was a simple, effective way to ensure that states are doing their due diligence in ensuring new laws don’t disproportionately impact minority voters. Having been renewed by Congress multiple times, the pre-clearance system was the status quo until 2013, when a landmark ruling by the Supreme Court deemed it an unconstitutional and out-of-date burden to these states. There had been a slow creep of new laws budding from these states over the past decades, but the *Shelby v. Holder* Supreme Court case opened the floodgates for states to implement new policies that have disproportionately affected Black voters. According to the Brennan Center’s research on the effects of the *Shelby* decision,

*“The effects of this decision were immediate. Within 24 hours of the ruling, Texas announced that it would instate a strict photo ID law. Two other states, Mississippi and Alabama, also began to enforce photo ID laws that had previously been barred because of federal preclearance.”*²

From 2010 to 2019, there have been over 25 states which have added dozens of new restrictions to voting, including ID requirements, regulations on voter registration, and restrictions on early voting.³ These restrictions go against the very fabric of what a democratic form of government is supposed to represent.

² “The Effects of Shelby County v. Holder | Brennan Center ...” Brennan Center for Justice, August 6, 2018. <https://www.brennancenter.org/our-work/policy-solutions/effects-shelby-county-v-holder>.

³ “New Voting Restrictions in America.” Brennan Center for Justice, October 1, 2019. <https://www.brennancenter.org/our-work/research-reports/new-voting-restrictions-america>.

1.1 Felony Disenfranchisement

The issue of disenfranchisement as it relates to felony convictions illustrates how state legislatures can pass laws that intentionally or unintentionally institutionalize disparate impacts on Black communities. We are currently seeing mass protests around the country and the globe, advocating for police and criminal justice reform; and one of the most pernicious aspects of the status quo in the criminal justice system is the mass incarceration of African American men in this country. The root issues within the criminal justice system involve a number of other causes, including educational, socioeconomic, constitutional, and cultural factors, all of which complicate the equation.⁴ For example, the Thirteenth Amendment to the United States Constitution proved to be a double-edged sword. Section 1 states “*neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted.*” This set up the beginning of the mass incarceration system starting with the Reconstruction Era after the Civil War. And this is what some have called “*slavery by another name.*”⁵

There is enough literature on those topics alone to fill dozens of volumes, so we hone our sights on how mass incarceration has impacted the right of Black Americans to vote. It is estimated, through research by The Sentencing Project, that there are over six million people disenfranchised due to a felony conviction: about one in every 40 adults in the voting age population. To put this number in perspective, the number of disenfranchised felons was slightly over one million in 1976; *it has increased sixfold in under 50 years.*⁶ For the Black population in this country, the rate of disenfranchisement is one in 13 – “[*over*] *four times greater* than that of non-African Americans. Over 7.4 percent of the adult African American population is disenfranchised compared to 1.8 percent of the non-African American population.”⁷ In some states, such as Florida, it is closer to one in every five Black Americans that are disenfranchised. This alarming rate of disenfranchisement is simply a manifestation of the factors that play into the history of mass incarceration in the United States, and their solutions are intertwined as well.

Felony disenfranchisement today is far less of an issue than it was a few decades ago, at the height of the 1990s “war on crime and drugs.” Still, there are 11 states in which felons may lose their right to vote indefinitely, depending on the crime, or require additional waiting periods beyond their sentence, alongside additional action, before their voting rights can be restored. Legal provisions in these 11 states vary in their exact language, but they range from a mandatory waiting period of two years after the completion of probation to permanent disenfranchisement for disqualifying felonies. The other 39 states in the union either never take away the right to vote (e.g., Maine and Vermont), automatically

⁴ Flores, Nayely Esparza. “Contributing Factors to Mass Incarceration and Recidivism.” *Themis: Research Journal of Justice Studies and Forensic Science* 6, no. 4 (2018). <https://scholarworks.sjsu.edu/themis/vol6/iss1/4/>.

⁵ Stevenson, Bryan. “Why American Prisons Owe Their Cruelty to Slavery.” *The New York Times*. The New York Times, August 14, 2019. <https://www.nytimes.com/interactive/2019/08/14/magazine/prison-industrial-complex-slavery-racism.html>.

⁶ Uggen, Christopher, Ryan Larson, and Sarah Shannon. “6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement.” *The Sentencing Project*, October 6, 2016. <https://www.sentencingproject.org/publications/6-million-lost-voters-state-level-estimates-felony-disenfranchisement-2016/>.

⁷ *Ibid.*

restore the right to vote immediately after release from incarceration (e.g., 16 states and DC), or automatically restore voting rights after parole/probation (21 states).⁸

As previously mentioned, there are still millions of Americans who do not have the right to vote, and these Americans are disproportionately Black. In 2019 alone, there were six states which expanded felon voting rights,⁹ but many still do not have automatic re-registration after completing the requirements to be reinstated as a voter. The need for former felons to meet additional requirements after they have already legally paid their debt to society adds a particular burden on voters of color, who already suffer disenfranchisement in so many other ways. On top of this, the complicated web of laws regarding reinstatement of voter status often results in de-facto disenfranchisement, due to confusion on the side of election officials.¹⁰ Having multiple layers of applicable policies only compounds the issue of Black voter disenfranchisement, and it is why the solutions to these problems must come in more than one form.

1.2 Voter ID Laws

In recent decades, there has been an ebb and flow in the courts with regard to voter ID laws. We have seen a multitude of court rulings both for and against such laws, which have allowed officials to stay within the bounds of legal precedent (even if their motives for new laws sometimes appear questionable). The stated purpose for many of these voter ID laws is ostensibly to protect election security and integrity, though research on this topic has not turned up any substantial evidence that points toward the existence of widespread voter fraud in the first place, or that these ID laws could solve such problems. A 2019 study by the National Bureau of Economic Research has found that “strict ID requirements have no effect on fraud – actual or perceived.”¹¹ Out of *over one billion* ballots received between 2000 and 2014, an investigation by Justin Levitt of Loyola Law School found *only 31 instances of credible voter impersonation* that occurred in this fourteen year period. Most of these 31 incidents were not even prosecuted.¹² As a result, it appears that some voter ID laws may be a solution in search of a problem – which may suggest questionable motives.

In 2016, the Fourth Circuit Court of Appeals in Virginia struck down a new North Carolina statute that imposed very strict requirements for carrying identification and eliminated many early opportunities to vote. The statute in question was originally passed, unsurprisingly, immediately after the Supreme Court’s decision in *Shelby v. Holder*, as North Carolina no longer needed preclearance for such laws. This law was unanimously struck down for being explicitly discriminatory in nature; one of the Judges presiding over the case, Judge Diana Gribbon Motz, wrote:

⁸ Potyondy, Patrick. “Felon Voting Rights.” National Conference of State Legislatures, October 14, 2019. <https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx>.

⁹ *Ibid.*

¹⁰ Wood, Erika, and Rachel Bloom. “De Facto Disenfranchisement.” Brennan Center for Justice, October 1, 2018. <https://www.brennancenter.org/our-work/research-reports/de-facto-disenfranchisement>.

¹¹ Cantoni, Enrico, and Vincent Pons. “Strict ID Laws Don’t Stop Voters: Evidence from a U.S. Nationwide Panel, 2008–2018,” 2019. <https://doi.org/10.3386/w25522>.

¹² Levitt, Justin. “A Comprehensive Investigation of Voter Impersonation Finds 31 Credible Incidents out of One Billion Ballots Cast.” The Washington Post. WP Company, August 6, 2014. <https://www.washingtonpost.com/news/wonk/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast/>.

*“In what comes as close to a smoking gun as we are likely to see in modern times, the State’s very justification for a challenged statute hinges explicitly on race—specifically its concern that African Americans, who had overwhelmingly voted for Democrats, had too much access to the franchise.”*¹³

While one may be hard pressed to find another modern example of such an explicitly discriminatory voter ID law, there have been other instances where voters of color are predominantly being affected by these laws.

Alabama has some of the strictest voter ID laws in the country, and in 2015, the state was facing a budget crisis. The state made the difficult decision to close 31 DMV offices across the state in an effort to mediate their budget. The caveat is that, without the ability to access a DMV office, it would logically be far more difficult to obtain a driver’s license to show at the voting booth. These closures occurred overwhelmingly in low-income areas, and in communities of color. According to Alabama journalist John Archibald, *“Every single county in which blacks make up more than 75 percent of registered voters will see their driver license office closed.”*¹⁴ After a month of public outrage and national controversy, Governor Bentley announced that these driver’s license offices would remain open; he also pushed back against any notion of a racial motive behind the closings.¹⁵ An analysis by *The Washington Post* determined that, as of 2017, there was minimal correlation between DMV availability and race in Alabama, but rather a correlation between a county’s total population, whether black or white, and DMV availability.¹⁶ Regardless, the story as it relates to voter-ID laws in Alabama caused some to wonder whether voter suppression was a motive; the NAACP’s Legal Defense Fund estimated that approximately *118,000 registered voters* in Alabama would not be able to cast their ballots due to not owning the proper identification needed by their strict statutes.¹⁷

Voter ID laws across our country are tainted by concerns about discriminatory impact, and there are a multitude of court cases in which states have been unable to successfully defend their statutes. Two such cases in Texas: *Texas v. Holder*, as well as *Veasey v. Abbott*, were both lost by the state due to “intentional racial discrimination.”¹⁸ In other words, the conscious or unconscious racism demonstrated in many instances of voter ID-related lawsuits is inseparable from the laws themselves, which are often passed under a veil of election integrity. Such laws, which have yet to demonstrate merit with regard to reducing the already non-existent problem of voter fraud, appear to be misplaced when

¹³ Graham, David A. “North Carolina’s Deliberate Discrimination Against Black Voters.” *The Atlantic*. Atlantic Media Company, July 30, 2016. <https://www.theatlantic.com/politics/archive/2016/07/north-carolina-voting-rights-law/493649/>.

¹⁴ Luzer, Daniel. “Alabama Closing Many DMV Offices in Majority Black Counties.” *Governing*, October 2, 2015. <https://www.governing.com/topics/politics/alabama-demands-voter-id--then-closes-drivers-license-offices-in-clack-counties.html>.

¹⁵ Lyman, Brian. “Alabama Will Reopen Closed DMV Offices in Black Counties.” *Governing*, October 20, 2015. <https://www.governing.com/topics/politics/drivers-license-offices-will-reopen-on-limited-basis.html>.

¹⁶ Ingraham, Christopher. “That Viral Story about Alabama ... - The Washington Post.” *The Washington Post*. WP Company, December 11, 2017. <https://www.washingtonpost.com/news/wonk/wp/2017/12/11/that-viral-story-about-alabama-drivers-license-offices-is-from-2015-and-its-missing-one-key-point/>.

¹⁷ Faulk, Kent. “Group: More than 100k Alabama Voters Can’t Cast Ballots.” *Birmingham Real-Time News*, March 4, 2017. https://www.al.com/news/birmingham/2017/03/naacp_legal_defense_fund_more.html.

¹⁸ Ansolabehere, Stephen, and Eitan D. Hersh. “ADGN: An Algorithm for Record Linkage Using Address, Date of Birth, Gender, and Name.” *Statistics and Public Policy* 4, no. 1 (November 30, 2017): 1–10. <https://doi.org/10.1080/2330443x.2017.1389620>.

we as a country should be striving to extend equal access to voting to as many citizens as possible. After all, the U.S. has some of the lowest voter turnout rates in the developed world.

1.3 Bulk Removal (Purging)

The 2020 primary election in Georgia was, by most metrics, a disaster. Long lines, untrained poll workers, and untested voting machines caused many voters to simply give up, which is arguably disenfranchisement in itself; to be sure Georgia is not unique in experiencing problems of this sort. In Georgia, voters are eligible for two hours of paid leave from their jobs to go and cast their ballots, if certain conditions are met;¹⁹ understandably, many voters who were forced to wait for hours may not have had the ability to stay any longer. This “*complete meltdown*,” in the words of Atlanta Mayor Keisha Bottoms, is only one layer in the breakdown of elections that is so severe as to invite charges of intentional voter suppression from some election observers.

Georgia attracted national attention in 2019 for removing over 300,000 voters from their rolls, labeled routine ‘list maintenance’ by state officials. Those removed from the list were predominantly low-income voters, young people, and people of color—all of whom tend to lean Democratic.²⁰ However, this is not Georgia’s only instance of bulk voter removal (“purging”). In 2017, the Secretary of State’s agency led a historic single-day voter record removal, cutting more than a half million people from the rolls, and an estimated 107,000 of them were removed because they hadn’t voted in prior elections. Before the 2018 midterm elections, as previously mentioned, 53,000 voter registrants in Georgia were placed in a “pending” status.²¹ This was only resolved days before the election; a federal judge issued an injunction against the action, citing “*differential treatment inflicted on a group of individuals who are predominantly minorities*.”²²

Nearly 16 million voters have been removed from the rolls between 2014 and 2016 around the country, and this is not just a problem faced by voters in states which have historically implemented discriminatory policies.²³ For example, prior to the 2016 presidential primary, New York City’s Board of Elections deleted over 200,000 names improperly from the voter rolls in Brooklyn.²⁴ However, there *does* appear to be a strong correlation between classification as a ‘preclearance state,’ and the amount of voters purged from the rolls in comparison to other states. An investigation by the Brennan Center

¹⁹ Crump, Raquel. “Georgia Employers Required to Give Time Off to Vote?” Employment Law Solution, November 7, 2016. <https://www.theemploymentlawsolution.com/wage-hour/georgia-employers-required-to-give-time-off-to-vote/>.

²⁰ Knowles, Hannah, and Reis Thebault. “Georgia Purged 309,000 Voters from Its Rolls. It’s the Second State to Make Cuts in Less than a Week.” The Washington Post. WP Company, December 18, 2019. <https://www.washingtonpost.com/nation/2019/12/17/georgia-purged-voters-its-rolls-its-second-state-make-cuts-less-than-week/>.

²¹ Root, Danielle, and Adam Barclay. “Voter Suppression During the 2018 Midterm Elections.” Center for American Progress, November 20, 2018. <https://www.americanprogress.org/issues/democracy/reports/2018/11/20/461296/voter-suppression-2018-midterm-elections/>.

²² Van Sant, Shannon. “Judge Rules Against Georgia Election Law, Calling It A ‘Severe Burden’ For Voters.” NPR. NPR, November 3, 2018. <https://www.npr.org/2018/11/03/663937578/judge-rules-against-georgia-election-law-calling-it-a-severe-burden-for-voters>.

²³ Morris, Kevin. “Voter Purge Rates Remain High, Analysis Finds.” Brennan Center for Justice, June 12, 2020. <https://www.brennancenter.org/our-work/analysis-opinion/voter-purge-rates-remain-high-analysis-finds>.

²⁴ Morris, Kevin, and Myrna Perez. “Purges: A Growing Threat to the Right to Vote.” Brennan Center for Justice, July 20, 2018. <https://www.brennancenter.org/our-work/research-reports/purges-growing-threat-right-vote>.

found that in states where preclearance was removed due to *Shelby v. Holder*, there were purge rates “significantly higher than jurisdictions that did not have it in 2013.”²⁵ Between 2006-2008, and 2014-2016, there was a 33% increase in the number of voters purged from the rolls, outpacing both voter registration growth, and population growth.²⁶ According to the Brennan Center’s research, “In the past five years, four states have engaged in illegal purges, and another four states have implemented unlawful purge rules [under the standards for purges set by the 1993 National Voter Registration Act].”²⁷ This is a pattern and practice in many parts of the nation, and by allowing these bulk removals or purges to take place, tens of thousands of potential voters are being excluded from the voting process, often without their knowledge.

1.4 Registration and Voting Restrictions

Aside from the societal trauma it undoubtedly imprinted on a generation of Black Americans, the legacy of the Jim Crow era may also have a quantifiable impact on their voter registrations. A 2014 investigation by Nate Cohn of *The New York Times* analyzed voter registration rates of those who became 21 before 1965 (a short amount of time before the 26th Amendment changed the voting age). It found that those who were disenfranchised before the enactment of the voting rights law had a disproportionately lower number of registered voters demographically.²⁸ This gap in voter registration was found too close for voters who registered soon after the passage of the Voting Rights Act (VRA) of 1965, signifying a potential relationship. Voters often cast their ballots as a habit, and without being able to create that habit when one is young, this research shows that it might have long-lasting impacts.

Follow-up research on this hypothesis has yielded mixed results. On the one hand, Census data shows that Southern Black turnout rate in elections after the VRA trailed behind that of Northern Black voters, or white voters.²⁹ However, when looking at a different data set, known as the Catalist voter file,³⁰ researchers found “that older black voters in the Deep South were just as likely as similar voters outside the region to be registered to vote.” It’s important to note that this data set only correctly identified Black voters about 79% of the time, so there is room for error in this analysis as well.³¹

The reality is, if you can manage to register to vote without a single typo, maintain that registration without knowing if you’re being removed, ensure you’re up-to-date on any possible post-incarceration felony responsibilities, and pay for a state identification card to cast a ballot, that still might not be enough to successfully cast a ballot. It is often harder for Black Americans to actually get to a polling place to vote as well. In the months leading up to the 2018 midterms, students at Prairie View A&M

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ Cohn, Nate. “Evidence That the Jim Crow Era Endures for Older Black Voters in the South.” *The New York Times*. *The New York Times*, December 30, 2014. <https://www.nytimes.com/2014/12/30/upshot/evidence-that-the-jim-crow-era-endures-for-older-black-voters-in-the-south-.html>.

²⁹ Cohn, Nate “The Mystery of Lower Voter Registration for Older Black Voters.” *The New York Times*. *The New York Times*, February 13, 2015. <https://www.nytimes.com/2015/02/14/upshot/the-mystery-of-lower-voter-registration-rates-of-older-black-voters.html>.

³⁰ Catalist is a data analytics company that operates a national database of voter intelligence records incorporating extensive voter profiles (e.g., geo-demographics) for research and highly targeted campaign purposes.

³¹ *Ibid*, footnote 29

University sued Waller County, Texas for not providing a site on campus, or in the encompassing town, to vote early. The town of Prairie View is 93.51% black, with 6,428 residents,³² and Prairie View A&M University has a 83.5% black demographic, with 8,524 enrolled students.^{33,34} The nearby city of Waller, which has *two early voting locations*, is 66% white, with a population of 2,326.³⁵ This means that a city with a population of 2,000 people has *two* early voting locations, but a majority African American town and university with nearly 15,000 residents combined did not have a single location to vote early. Upon a public controversy, and following the lawsuit, Waller County gave the students three weeks of early voting at a new polling place on campus.³⁶ It shouldn't take public outrage and a lawsuit in order to guarantee equal rights to vote between different communities; there is no justification for such a practice, and it goes to show how unequally elections are sometimes administered in the U.S.

A similar situation is currently unfolding in Kentucky as of the preparation of this paper. Across the state, there will be a total of around 200 polling places open for their upcoming primary elections, compared to the 3,700 in an average election year.³⁷ Of course, the question is: is this in proportion with a vast increase in absentee voting due to the pandemic? In Jefferson County, the largest county in Kentucky, there is only one polling center in place, serving a voting population of over 600,000, and the state's largest Black population. If the proportion of absentee voters in Kentucky rivals that of Wisconsin's recent primary (approximately 73%),³⁸ there *could* be over 160,000 voters potentially casting their ballots at the county's sole polling place: a potential recipe for disaster. Whether this is an example of bias, intentional suppression of Black voters, or simple mismanagement in the planning of the primary, election administrators should work to ensure that all voters have equal access to the polls, regardless of race or ethnicity.

2. What Can Be Done?

There is no single or holistic solution to this challenge. Discriminatory dynamics that stem from the nation's racist past and present have been institutionalized due to many factors, from the legacy of Jim Crow to more recent, but no less troubling, politically-driven efforts to impose unequal election administration policies. Solving this challenge will take cooperation at every level: states' legislatures,

³² "Prairie View, Texas." Wikipedia. Wikimedia Foundation, April 12, 2020. https://en.wikipedia.org/wiki/Prairie_View,_Texas.

³³ "How Does Prairie View A&M University Rank Among America's Best Colleges?" U.S. News & World Report. Accessed June 13, 2020. <https://www.usnews.com/best-colleges/prairie-view-am-university-3630>.

³⁴ "Undergraduate Ethnic Diversity at Prairie View A & M University." College Factual, April 30, 2020. <https://www.collegefactual.com/colleges/prairie-view-a-and-m-university/student-life/diversity/chart-ethnic-diversity.html>.

³⁵ "Waller, Texas." Wikipedia. Wikimedia Foundation. Accessed June 13, 2020. https://en.wikipedia.org/wiki/Waller,_Texas.

³⁶ Root, Danielle, and Adam Barclay. "Voter Suppression During the 2018 Midterm Elections." Center for American Progress, November 20, 2018. <https://www.americanprogress.org/issues/democracy/reports/2018/11/20/461296/voter-suppression-2018-midterm-elections/>.

³⁷ Lee, Michelle. "Kentucky Braces for Possible Voting Problems in Tuesday's Primary amid Signs of High Turnout." The Washington Post. WP Company, June 19, 2020. https://www.washingtonpost.com/politics/kentucky-braces-for-possible-voting-problems-in-tuesdays-primary-amid-signs-of-high-turnout/2020/06/19/b7b960ce-b199-11ea-8f56-63f38c990077_story.html.

³⁸ Bush, Daniel. "Record Absentee Ballots Sustain Turnout in Wisconsin Primary." PBS. Public Broadcasting Service, April 14, 2020. <https://www.pbs.org/newshour/politics/record-absentee-ballots-sustain-turnout-in-wisconsin-primary>.

Secretaries of State, local elections administrators, good government groups, and nonprofits must all address the biases which are present in election administration, whether implicit or explicit, and work to address them head-on.

2.1 Policy & Legislation

There are a number of legislative solutions which could alleviate some of the obstacles that limit Black voter participation in the United States. One could argue that the policy of preclearance for certain states with a history of voter disenfranchisement could be a starting point. We have seen in the aftermath of the *Shelby v. Holder* case that there are still disproportionately large amounts of disenfranchisement stemming from states that have had a prior history of discrimination, and which previously required preclearance as a result. With new quantitative evidence to support this wave of disenfranchisement, there is a chance that the Supreme Court may someday realize that their decision to remove those key sections of the VRA may have been premature.

To address felony disenfranchisement, states should work to provide automatic voter registration for individuals who have fully paid their debt to society, and allow them the constitutional right to full participation in civic life. After all, the right to vote is universal and fundamental in our nation. Though some may argue that felons have broken the social contract, and thus do not deserve a say,³⁹ the ability of elected officials to wield the power of felony disenfranchisement in order to disproportionately take away the voting rights of Black people around the country should not be acceptable either. The topics of mass incarceration and felony disenfranchisement are intertwined. One cannot be addressed without the other, and as a result, racial concerns will play a large part in the issue of felony disenfranchisement as it currently exists.

Until there is solid evidence that points to the effectiveness of voter ID laws to prevent fraud, while simultaneously maintaining diverse voter turnout, the extension of such laws should be viewed with concern, if not outright skepticism. While they ostensibly appear to be colorblind in their implementation, these laws disproportionately affect Black voters, and there have been thousands of registered voters unable to cast a ballot due to not having an acceptable form of identification, as defined by the state.

In terms of difficulties obtaining a voting registration, or difficulties actually exercising one's right to vote, the answer is less linear than other issues. In the case of Prairie View A&M University, in Waller County, Texas, the unequal distribution of early voting locations could be due to a variety of factors, and it need not have been an instance of deliberate suppression to be just as damaging; instead, unconscious bias could have influenced the placement of these early polling centers. College students, when running clubs at universities, must often undergo implicit bias training before they're allowed to be a club president, or treasurer, for example; and perhaps the administrators of our elections should undergo similar trainings. According to Arusha Gordon and Ezra Rosenberg of the Michigan Law School, implicit bias might be endemic in elections and their administration. Election administrators, much like any other Americans, are surprisingly likely to have some level of implicit bias, edging on 70%,⁴⁰ and they can take these biases into the workplace. For example, poll workers that are trained by

³⁹ Levine, Eli L. "Does the Social Contract Justify Felony Disenfranchisement?" 1 Wash. U. Jur. Rev. 193. 2009. https://openscholarship.wustl.edu/law_jurisprudence/vol1/iss1/5 p. 203

⁴⁰ Mason, Betsy. "Curbing Implicit Bias: What Works and What Doesn't." Discover Magazine. Discover Magazine, June 5, 2020. <https://www.discovermagazine.com/mind/curbing-implicit-bias-what-works-and-what-doesnt>.

election administrators may be playing a part in racial disenfranchisement without their explicit knowledge:

*“Studies demonstrating that minorities frequently receive less assistance than Whites suggest that poll workers might unintentionally offer less assistance to minority voters than to White voters... If a poll worker unintentionally provides less assistance to traditionally marginalized voters as compared to others because of the poll worker’s implicit biases, there will be a disproportionate impact on minorities’ votes being counted.”*⁴¹

Elections officials have discretion over almost every aspect of the voting process, and with this discretion comes the risk of implicit bias.⁴² Due to the wide surface area of potential impact, there are a number of different policy and legislative avenues that Rosenberg and Gordon suggested, beginning with more research into the specific effects that this bias has. The solutions proposed range from creating a new legal framework around implicit bias,⁴³ and blindly reviewing voter applications, to implementing further training for poll workers and other election officials.⁴⁴ Election administrators must acknowledge their impact on the way we conduct elections and how implicit bias may play a part, before we can address the issue head-on.

2.2 Technology

In addition to potential solutions to institutionalized racism such as court decisions, legislation, and new training, there are things that we can do *right now*, in our current environment, that will have an impact for the better. This is where technology can come into play, and where we hope to help.

So far, the technology companies that have developed a majority of voting systems used in the U.S., and the state authorities that approved of their use today, have underserved the American people.⁴⁵ What is even more disheartening to the Black community is the fact that public officials continue to approve and use machines that utilize weak software, hardware, and firmware that are susceptible to cyber-attack, and tallies that are vulnerable to tampering.⁴⁶ Some of these machines end up on eBay for sale, or stored in open warehouses for anyone to reverse-engineer or modify the software.⁴⁷ These vulnerabilities create new avenues for bad actors to attempt the creation of unequal outcomes, or simply to reduce trust in systems and institutions due to different forms of unconscious bias. In other words, taken as a whole, insecure election technology that affects the entire nation can be especially harmful to those portions of the voting population that are most vulnerable. And, for the same reason,

⁴¹ Gordon, Arusha & Rosenberg, Ezra D. “Barriers to the Ballot Box: Implicit Bias and Voting Rights in the 21st Century”, 21 MICH. J. RACE & L. 23. 2015. <https://repository.law.umich.edu/mjrl/vol21/iss1/2> p.37

⁴² *Ibid* at p.28

⁴³ In the past, there have been instances where the Supreme Court dismissed testimony on the effects of implicit bias, as well as how the bias might impact a jury. *Ibid* at p.42-43

⁴⁴ *Ibid* at p.51-53

⁴⁵ Wilkie, Jordan. “‘They Think They Are above the Law’: the Firms That Own America’s Voting System.” The Guardian. Guardian News and Media, April 23, 2019. <https://www.theguardian.com/us-news/2019/apr/22/us-voting-machine-private-companies-voter-registration>.

⁴⁶ Abdollah, Tami. “Outdated Software Could Make New Voting Systems Vulnerable to Hackers.” Los Angeles Times. Los Angeles Times, July 14, 2019. <https://www.latimes.com/nation/la-na-election-machine-hacks-20190714-story.html>.

⁴⁷ Varner, Brian. “I Bought Used Voting Machines on eBay for \$100 Apiece. What I Found Was Alarming.” Wired. Conde Nast, October 25, 2018. <https://www.wired.com/story/i-bought-used-voting-machines-on-ebay/>.

some have recently noted that technology companies must do more in the future to listen to diverse voices about how technology is used and accessed:

“Understanding the cultural nuances of technology use and access is integral to building policies and technical solutions that secure systems and serve people. As countries around the world explore online and mobile voting, efficacy and adoption will differ across cultures, communities, and socioeconomic status.”⁴⁸

Without a proper understanding of these issues, we are in danger of not only building systems that are inadequate to ensure the full trust and participation of the Black American community, but the whole election process may also be diminished for all Americans. In other words, our fully-inclusive democracy itself is at risk.

To cite just one example of how new election technologies can assist in bringing greater equity to elections, imagine a no-cost service that helps voters update and maintain their registrations through convenient text or email messaging. With millions of voters being removed from the rolls, and with many of these removals occurring without warning, the responsibility of proactively maintaining one’s registration has been left to individual voters. Because this burden is disproportionately shifted onto voters of color (who are more likely to be removed),⁴⁹ helping these voters maintain their registrations can limit one common avenue of disenfranchisement. If the first time you hear that you aren’t on the voter rolls anymore is when you show up to vote, it can sometimes be too late, and this is where technology can make a difference. Implementing a free service for voters, which syncs and monitors one’s voter registration, and notifies voters if their status has been changed, is just one failsafe to prevent people from being disenfranchised without their knowledge. While not an exhaustive solution to removal or other problems, a service like this could greatly increase the convenience of maintaining one’s voter registration, and would likely increase turnout as a whole, as more voters would be in a “registered and active” status.

The best long-term way to improve the conditions faced by communities of color is to promote enhanced accountability in election administration. Far too often, the public learns about disenfranchisement only after it has already occurred, and in some instances, when it is too late to make a difference before an election. To many people, the election process is confusing and muddled, without a clear line of decision making and policies. While there are technically provisions to allow for public viewing of vote tabulation and certification of results, among other things, these don’t serve to stop disenfranchisement before it happens. With greater transparency, from the registration phase to the certification phase, the public could have a direct view of the process and thereby increase trust in election-related institutions and policies. Greater transparency also provides more opportunities to effectively identify and unroot any systemic biases that adversely impact the Black community. Only by addressing these systemic problems can a resurgence of public trust in elections occur among communities that have historically been discriminated against. In short, the goal of trustworthy elections will not be fully achieved until Black voters can trust the vote.

⁴⁸ “Systemic Racism Is a Cybersecurity Threat.” Council on Foreign Relations. Council on Foreign Relations, June 16, 2020. <https://www.cfr.org/blog/systemic-racism-cybersecurity-threat>.

⁴⁹ Morris, Kevin, and Myrna Perez. “Purges: A Growing Threat to the Right to Vote.” Brennan Center for Justice, July 20, 2018. <https://www.brennancenter.org/our-work/research-reports/purges-growing-threat-right-vote> at p. 7.

3. Summary

In our research, we have found that Black voters across this country are being disproportionately disenfranchised; the effects of systemic racism pervade many aspects of voting and election administration. Within the realm of felony disenfranchisement alone, approximately one in every five Black Americans do not have the right to vote due to a disqualifying conviction. Voter ID laws, as we have seen in recent years and court decisions, have sometimes targeted Black voters in their efforts to strategically and systematically suppress their votes. The Black vote is also suppressed through voter roll purges that disproportionately impact African Americans, and through efforts (whether unconscious or intentional) by policymakers to make casting a ballot itself even more difficult for communities of color.

Solutions to such a myriad of issues are not linear, and every option to tackle this systemic problem should be on the table. These options must range from a full and honest national dialogue on our common humanity; to acknowledging the historical and contemporary achievements that the Black community has accomplished on behalf of the United States; to a recognition of how the implementation of technology on an electoral system that is deeply imbued with historic racism can actually contribute to the persistence of injustice and inequity. For our part, we will remain optimistic and devote our commitment to new forms of technology that can instead help to ensure equal access and free and fair conduct of elections.

Greater enfranchisement of communities of color strengthens the vote of all, and ensuring every citizen has a fair chance to fulfill his or her duties as a citizen is instrumental to the advancement of democratic values across the world. The American people cannot expect to be a beacon of equality, democracy, and freedom to the rest of humanity when we struggle to guarantee to our very own people those same rights. Our nation's leaders are obligated to address the systematic disenfranchisement of Black voters over our nation's history, and to acknowledge that the electoral system requires significant reforms in policy and technology. Anything less would be a crisis of leadership, and an abdication of true American principles.

Technology has the potential to help our country administer elections that are fair, verifiable, accurate, secure and transparent. The OSET Institute is proposing and developing new publicly owned technology that will bring breakthrough innovations to election administration in the U.S., with application to democracies worldwide. More immediate to the challenge of voter registration status in 2020, the Institute's [TrustTheVote Project](https://trustthevote.org) is working on a specific solution: [VoteReady](https://trustthevote.org/voteready/), which can be explored at <https://trustthevote.org/voteready/>.

In conclusion, as we move together as a nation towards greater racial equality, the fair and equal representation of all people must be the first step to addressing the broader systemic racism that still lingers within the United States. The Black vote *is* the American vote, and when Black citizens are disproportionately denied full participation in civic life, our democracy is at risk. In this way, the assurance of free and fair elections, devoid of racism and inequality, is tantamount to a matter of national security.

We believe that with increased access to the ballot comes the ability to elect those representatives who best understand and serve the interests of precisely those Americans who have historically been denied a voice — and that can bring us one step closer to true equality.

About the Authors



Jonathan Lancelot is a principal policy analyst for the OSET Institute focused on election cybersecurity as a matter of national security. Jonathan graduated from Norwich University with a Master's in Diplomacy with a focus on cyber-diplomacy, and published the widely shared paper "Russia Today, Cyberterrorists Tomorrow: U.S. Failure to Prepare Democracy for Cyberspace," which is published in the Embry-Riddle Aeronautical University's *Journal of Digital Forensic, Security and Law*, and he is a contributor at *Small Wars Journal*. Mr. Lancelot is currently researching implicit race bias in digital technology design and engineering with a particular focus on systemic racism in election administration technology. Jonathan is also a certified Apple computer administrator and has worked in the U.S. Senate and for the Department of Defense.



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About the OSET Institute

The Open Source Election Technology ("OSET") Institute is a 501(c)(3) tax-exempt nonpartisan, nonprofit election technology research corporation chartered with research, development, and education in election technology innovation in order to increase confidence in elections and their outcomes in defense of democracies, as a matter of national security.

The Institute's flagship effort, the [TrustTheVote Project](#) is a democracy software foundry that is building **ElectOS**, a next generation higher integrity, lower cost, easier to use election administration and voting technology framework freely available for any election jurisdiction to adopt, and have professionally adapted and deployed. ElectOS and all open source election technology is being designed and engineered per the requirements and specifications of election officials, administrators, and operators through a Request For Comment (RFC) process.

As part of our research, development and education mission, from time to time, the Institute produces technology policy research briefings and other related policy content to inform stakeholders, supporters, and the public about issues of election technology innovation and integrity, as well as innovations in election administration process.

Threats to free and fair elections anywhere are inherently threats to our democracy everywhere

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