

2022

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### Recommended Citation

Courtney L. Anderson, *Post-Pandemic, but Not Post-Racial*, 15 St. Louis U. J. Health L. & Pol'y (2022).

Available at: <https://scholarship.law.slu.edu/jhlp/vol15/iss2/3>

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## POST-PANDEMIC, BUT NOT POST-RACIAL

COURTNEY LAUREN ANDERSON\*

### ABSTRACT

*The Fair Housing Rights Act and the Voting Rights Act have had measurable success in providing opportunities to address intentional discrimination in housing and voting contexts. Plaintiffs with evidence of direct illegalities have clear frameworks under which justice may be sought, and both Acts provide a path for relief upon violations of housing and voting rights because of one's membership in a protected class. However, the disparate impact theories that are cognizable under both Acts have been scrutinized for lackluster results. Practitioners and academicians have written about and experienced the difficulties plaintiffs face in successfully proving that a particular housing practice or policy is the cause of specific discriminatory outcomes, given the interrelated factors that give rise to segregation. Similarly, the gutting of the preclearance requirements in the Voting Rights Act, coupled with the onslaught of voter suppression legislation in the last few years, create obstacles to satisfy the complicated "totality of the circumstances" test required to evidence disparate impact under the Voting Rights Act. In addition to critiquing the limits of each Act, this Article explains how racial disparities in poverty and health are exacerbated by these limitations. Systems and individuals seeking to exploit people of color through oppressive housing and voting laws rely on the failure of the Fair Housing Act and Voting Rights Act to eradicate segregation, with determinants in each sphere perpetuating the discrimination within the other. The Article sets forth federal action that can be taken to mitigate these inequities.*

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## I. INTRODUCTION

As a result of discrimination in several contexts, neighborhoods in the United States are racially segregated, causing predominantly Black neighborhoods to be under-resourced and resulting in detrimental health outcomes.<sup>1</sup> Individual responsibility for mobility to leave one's current situation is evidenced by aspirational anthems such as "vote with your feet"<sup>2</sup> and "pull yourself up by your bootstraps."<sup>3</sup> However, structural conditions have erected barriers to such upward trajectory for Black people and people with low or no incomes.<sup>4</sup> Disparate impact theories were developed, in part, to provide recourse for obstacles that, while facially neutral, negatively affect people of color at higher rates than white people.<sup>5</sup> However, when there are systems that rely on continued racism in order to perpetuate the goals of the oppressor, the weaknesses of disparate impact become evident.<sup>6</sup>

This is the case with housing and voting. There are correlation versus causation parallels in the disparate impact discussion within these two systems.<sup>7</sup> Although one may bring a disparate impact claim under the Fair Housing Act, the ability of a plaintiff to prevail under the Court's framework is dubious given the limited scope within which culpability lies.<sup>8</sup> The Voting Rights Act of 1965 (VRA) provides relief for people of color who can show their voting rights have been restricted due to racist laws, policies, or practices.<sup>9</sup> Yet, the Supreme Court's ruling in *Shelby County v. Holder* has eradicated the federal oversight

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1. Algernon Austin, *African Americans Are Still Concentrated in Neighborhoods with High Poverty and Still Lack Full Access to Decent Housing*, ECON. POL'Y INST. (July 22, 2013), <https://www.epi.org/publication/african-americans-concentrated-neighborhoods/>.

2. Ilya Somin, *How Foot Voting Enhances Political Freedom*, 56 SAN DIEGO L. REV. 1089, 1090 (2019).

3. Shervin Assari, *Why It's Hard for Blacks to Pull Themselves Up by Bootstraps When It Comes to Health*, INST. FOR HEALTHCARE POL'Y & INNOVATION UNIV. MICH. (Sept. 4, 2018), <https://ihpi.umich.edu/news/why-its-hard-blacks-pull-themselves-bootstraps-when-it-comes-health>.

4. Janae Ladet, *To Equitably Connect Housing and Economic Mobility for Black Americans, Tackle Structural Racism*, HOUS. MATTERS (Feb. 8, 2018), <https://housingmatters.urban.org/articles/equitably-connect-housing-and-economic-mobility-black-americans-tackle-structural-racism>.

5. Michael J. Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PENN. L. REV. 540, 558 (1977).

6. Andre M. Perry, *How Can We Hold Those Who Benefit from Racism Accountable?*, BROOKINGS (Mar. 27, 2018), <https://www.brookings.edu/blog/the-avenue/2018/03/27/how-can-we-hold-those-who-benefit-from-racism-accountable/>.

7. Javier M. Rodriguez et al., *Black Lives Matter: Differential Mortality and the Racial Composition of the U.S. Electorate, 1970–2004*, SOC. SCI & MED., Apr. 2015, at 193, 196.

8. *Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmty. Project Inc.*, No. 13–1371, slip op. at 2 (U.S. June 25, 2015).

9. *Shelby Cnty. Ala. v. Holder*, 570 U.S. 529, 529 (2013).

of initially enacting such procedures.<sup>10</sup> Racism inherent to voting and housing systems creates cyclical, negative reverberations for Black people while providing a pathway that circumvents disparate impact liability.<sup>11</sup> The physical concentration of Black people in a community helps to provide a non-racist justification for the creation of voting districts that reduce the political power of that community.<sup>12</sup> Likewise, the reduction of political power in a community complicates the ability to effectuate the change needed to improve one's surroundings or obtain representation reflective of the community's values.<sup>13</sup> The totality of circumstances and specific causation required to prove disparate impact in voting and housing contexts, respectively, is therefore obscured by each system's reliance on the other's discriminatory patterns.<sup>14</sup> Specific consequences of this regime are the adverse health outcomes suffered by its victims.<sup>15</sup>

Many studies conducted regarding the effects of the pandemic proved that although COVID-19 could affect anyone, the virus and its indirect end products harmed the health and quality of life for Black people at disproportionately high rates.<sup>16</sup> This is attributable, in large part, to systemic racism.<sup>17</sup> As we move towards a post-pandemic society, it is necessary to apply this knowledge to avoid many post-racial assumptions that also lead to poor health, housing, and voting rights for people of color.<sup>18</sup>

In Part II, this Article will discuss poverty inequities and the fallout of residential segregation with respect to health. Part III will describe the Fair Housing Act of 1968 (FHA) and the challenges of succeeding in bringing a disparate impact claim under this Act. Part IV will discuss the purpose of the Voting Rights Act of 1965 and the difficulties faced when asserting a claim under this Act, as well as restrictive voting measures and the relationship

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10. *Id.* at 590–94.

11. *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2357 (2021).

12. See Kim Soffen, *How Racial Gerrymandering Deprives Black People of Political Power*, WASH. POST (June 9, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/06/09/how-a-widespread-practice-to-politically-empower-african-americans-might-actually-harm-them/> (explaining how increasing the number of Black people in a district reduces the political power of these communities in neighboring districts.).

13. *Id.*

14. *Brnovich*, 141 S. Ct. at 2359.

15. See Jordyn Imhoff, *Health Inequality Actually Is a “Black and White Issue”*, *Research Says*, MICH. MED. (June 3, 2020, 1:34PM), <https://healthblog.uofmhealth.org/lifestyle/health-in-equality-actually-a-black-and-white-issue-research-says>.

16. Ctrs. for Disease Control & Prevention, *Health Equity Considerations and Racial and Ethnic Minority Groups, COVID-19* (Jan. 25, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html>.

17. Shin Bin Tan et al., *Structural Racism and COVID-19 in the USA: A County-Level Empirical Analysis*, 9 J. RACIAL & ETHNIC HEALTH DISPARITIES 236, 244 (2022).

18. *Id.* at 245.

between voting and health. This Article concludes with an argument for a return to federal oversight of voting rights as an approach to alleviate certain racial disparities that cannot be easily mitigated through currently available channels.

## II. THE INEQUITIES OF SEGREGATION AND POVERTY

In the United States, 37.2 million people live in poverty, approximately 11.4% of the population.<sup>19</sup> Between 2019 and 2020, the poverty rate increased for non-Hispanic whites and Latinos; Black people have the highest poverty rate at 19.5%.<sup>20</sup> Non-Hispanic white people have a poverty rate of 8.2%.<sup>21</sup> In 2019, the median white household earned about thirty-nine percent more than the median Black household.<sup>22</sup> Generally, people of color more often live in both poverty and segregated neighborhoods.<sup>23</sup> This creates an opportunity to leverage physical separateness in ways that maximize Black voter dilution.<sup>24</sup> Segregated living patterns are then perpetuated because it is difficult to prove both intentionally racist behavior and that a certain housing policy is the cause of such segregation.<sup>25</sup> As a result, concentrated poverty prevails, creating unhealthy living environments for communities of color.<sup>26</sup>

*Plessy v. Ferguson* is a United States Supreme Court case that unsuccessfully challenged a Louisiana law that segregated railroad passenger cars and made famous the doctrine of “separate but equal.”<sup>27</sup> Although such explicit segregation is now illegal, and such findings of unconstitutional

19. EMILY A. SHRIDER ET AL., U.S. CENSUS BUREAU, P60-273, INCOME AND POVERTY IN THE UNITED STATES: 2020 14 (2021).

20. *Id.* at 16.

21. *Id.*

22. Valerie Wilson, *Racial Disparities in Income and Poverty Remain Largely Unchanged Amid Strong Income Growth in 2019*, ECON. POL’Y INST. (Sept. 16, 2020, 10:49 AM), <https://www.epi.org/blog/racial-disparities-in-income-and-poverty-remain-largely-unchanged-amid-strong-income-growth-in-2019/>.

23. *Neighborhood Poverty: All Neighborhoods Should Be Communities of Opportunity*, NAT’L EQUITY ATLAS, [https://nationalequityatlas.org/indicators/Neighborhood\\_poverty#/](https://nationalequityatlas.org/indicators/Neighborhood_poverty#/) (last visited Jan. 22, 2022).

24. Elizabeth Oltmans Ananat & Ebonya L. Washington, *Segregation and Black Political Efficacy* 15, 23 (Nat’l Bureau of Econ. Rsch., Working Paper No. 13,606, 2007).

25. Tell Me More, *The Difficulties of Proving Housing Discrimination*, NPR, at 01:55 (Feb. 8, 2013, 12:00PM), <https://www.npr.org/2013/02/08/171478361/the-difficulties-of-proving-housing-discrimination>; Nick Bourland, *When Causation Is Too “Robust”: Disparate Impact in the Crosshairs in De Reyes*, 20 CUNY L. REV. F. 132, 133 (2017).

26. Richard D. Kahlenberg & Kimberly Quick, *Attacking the Black-White Opportunity Gap That Comes from Residential Segregation*, CENTURY FOUND. (June 25, 2019), <https://tcf.org/content/report/attacking-black-white-opportunity-gap-comes-residential-segregation/>; U.S. Dep’t of Hous. & Urb. Dev., *Understanding Neighborhood Effects of Concentrated Poverty*, OFF. POL’Y DEV. & RSCH., <https://www.huduser.gov/portal/periodicals/em/winter11/highlight2.html> (last visited Jan. 22, 2022).

27. *Plessy v. Ferguson*, 163 U.S. 537, 540, 548 (1896).

segregation exist squarely within the housing context, residential segregation is still prevalent today.<sup>28</sup> The 1950s brought the growth of suburbs, which were characterized by homeowners' associations that created and enforced rules for the residents.<sup>29</sup> Explicit racial discrimination in these developments was successfully mitigated with the case of *Shelley v. Kraemer*, holding that a private homeowners' covenant not to sell to a non-white person was illegal.<sup>30</sup> The Supreme Court found this covenant to be in violation of the Fourteenth Amendment.<sup>31</sup> Since this decision, such associations are prevented from having rules that are racially discriminatory.<sup>32</sup> Many Black, Latino and Asian-American people have since moved from major metropolitan areas to the suburbs.<sup>33</sup> This transition has resulted in a fairly recent phenomenon that is marked by racial segregation in suburban neighborhoods,<sup>34</sup> as many of these neighborhoods have become either predominantly Black, Latino, or Asian-American.<sup>35</sup>

For several years, discrimination against Black people by private individuals and all levels of government has created obstacles to home ownership for Black people.<sup>36</sup> Although racially restrictive covenants, redlining, and other explicit discriminatory policies and practices are illegal, other systems that are inherently discriminatory continue to obstruct equitable access to home ownership.<sup>37</sup> People of color "are more likely than white people to be extremely low-income renters," which is defined as "those with incomes at or below the poverty level or 30% of the area's median income."<sup>38</sup> A disproportionately high number of

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28. Kahlenberg & Quick, *supra* note 26.

29. See EVAN MCKENZIE, *PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT* 57, 128–29 (Marian Ash & John S. Covell eds., Yale Univ. Press 1994) (discussing the growing prevalence of common interest housing developments which often led to racist restrictions on homeownership in these developments.).

30. *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948).

31. *Id.* at 23.

32. See Michael C. Pollack, *Judicial Deference and Institutional Character: Homeowners Associations and the Puzzle of Private Governance*, 81 U. CIN. L. REV. 839, 842–43 (2013); Paul Boudreaux, *Homes, Rights, and Private Communities*, 20 U. FLA. J.L. & PUB. POL'Y 479, 532 (2009).

33. See Kim Parker et al., *Demographic and Economic Trends in Urban, Suburban and Rural Communities*, PEW RSCH. CTR. (May 22, 2018), <https://www.pewsocialtrends.org/2018/05/22/demographic-and-economic-trends-in-urban-suburban-and-rural-communities/> (citing statistics that about fifty-five percent of the U.S. population was suburban as of 2016); see *infra* Part III (for a discussion of black suburbanization).

34. Parker, *supra* note 33; see *infra* Part III (for a discussion of black suburbanization).

35. Parker, *supra* note 33; see *infra* Part III (for a discussion of black suburbanization).

36. Lisa Rice & Deidre Swesnik, *Discriminatory Effects of Credit Scoring*, 46 SUFFOLK U. L. REV. 935, 936 (2013).

37. *Id.* at 936–37.

38. *Racial Disparities Among Extremely Low-Income Renters*, NAT'L LOW INCOME HOUS. COAL. (Apr. 15, 2019), <https://nlihc.org/resource/racial-disparities-among-extremely-low-income-renters>.

people of color live in high poverty neighborhoods.<sup>39</sup> Poverty is correlated with adverse physical and mental health effects, such as obesity and greater incidences of heart disease, as well as being less personally satisfied.<sup>40</sup> Beyond physical and mental health effects, residing in a high poverty neighborhood weakens one's social health as well.<sup>41</sup> These residents have less access to assets, resources, and networks that are crucial for mobility.<sup>42</sup> The aggregated negative effects of these conditions can affect various aspects of one's life and social capital:

The outcomes associated with living in areas of concentrated poverty are well documented and extend to non-poor as well as poor residents of these communities. These include: diminished school quality and academic achievement; diminished health and healthcare quality; pervasive joblessness, employment discrimination and reduced employment networks; increased crime, especially violent crime; declining and poorly maintained housing stock and devaluation of home values; and difficulty building wealth and experiencing economic mobility.<sup>43</sup>

A strong barrier to mobility is the structure for bringing a disparate claim under the Fair Housing Act of 1968 per the United States Supreme Court's opinion in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project*.<sup>44</sup> The next Part discusses this holding to illustrate how the housing system is inherently cyclical with respect to racial oppression.

### III. HOUSING AND DISPARATE IMPACT

Congress enacted the FHA, which, among other things, makes it unlawful to discriminate against a person based on their race in the acquisition or financing of housing.<sup>45</sup> Disparate impact housing claims had been permissible

39. *Neighborhood Poverty*, supra note 23 (“In 2019, 16 percent of people of color lived in high-poverty neighborhoods compared to 4 percent of the white population.”).

40. Anita Arora et al., *Identifying Characteristics of High-Poverty Counties in the United States with High Well-Being: An Observational Cross-Sectional Study*, *BMJ OPEN*, Sept. 17, 2020, at 1.

41. *Id.*

42. U.S. Dep't of Hous. & Urb. Dev., supra note 26.

43. DEP'T OF HEALTH & HUMAN SERVS., OVERVIEW OF COMMUNITY CHARACTERISTICS IN AREAS WITH CONCENTRATED POVERTY (2014).

44. *Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmty. Project Inc.*, 576 U.S. 519, 545 (2015).

45. See 42 U.S.C. § 3604(c) (2018). The “state action” reasoning in *Shelley* is “one of the most controversial and problematical decisions in all of constitutional law.” See GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 1617 (2d ed. 1991). Almost all other housing cases have refused to apply *Shelley's* constitutional reasoning. See, e.g., *Golden Gateway Ctr. v. Golden Gateway Tenants Ass'n*, 29 P.3d 797, 810 (Cal. 2001) (refusing to apply the First Amendment to a condominium association's restrictive rules, concluding that *Shelley* “has largely limited this holding to the facts of those cases” and citing David Cole, *Federal and State “State Action”*: *The Undercritical Embrace of a Hypercriticized Doctrine*, 24 GA. L. REV. 327, 353 (1990)).

by lower courts for decades.<sup>46</sup> In its most recent pronouncement on racial segregation in housing, the U.S. Supreme Court, in its *Inclusive Communities Project* opinion, emphasized the country's "historic commitment to creating an integrated society."<sup>47</sup> In *Inclusive Communities Project*, the Supreme Court considered whether the FHA's prohibition of "discriminat[ion] . . . because of race" encompasses claims of "disparate impact"—claims based on statistical evidence alone—or if intentional discrimination was required.<sup>48</sup>

The Court in *Inclusive Communities Project* found disparate impact in violation of the FHA because the Texas Department of Housing and Community Affairs was responsible for situating most Dallas public and affordable housing developments in Black neighborhoods.<sup>49</sup> Though the High Court found disparate impact to be cognizable under the FHA, the Justices emphasized how difficult it would be for a future plaintiff to win a disparate impact case in this context.<sup>50</sup> The Court emphasized the importance of a comprehensive showing of causation between a particular housing policy and the disparate impact and stated that it would be nearly impossible to prove that a single practice or housing decision could be attributed to disparate impact.<sup>51</sup> The inability to rely on statistical anomalies in and of themselves complicates disparate impact under the FHA.<sup>52</sup>

Neighborhood poverty produces physical and mental ailments, disproportionately so with respect to people of color.<sup>53</sup> Residential clusters in these impoverished neighborhoods eases the ability of politicians to engage in racial gerrymandering, despite the illegality of this act.<sup>54</sup> The VRA, like the FHA, allows for a plaintiff to challenge relevant laws which have a disparate impact on people based on their race.<sup>55</sup> Yet, the laws passed and proposed weaken the voting strength of Black people, which undermines the intended impact of the FHA.<sup>56</sup>

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46. *Tex. Dep't of Hous. & Cmty. Affs.*, 576 U.S. at 536.

47. *Id.* at 545 (quoting *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 797 (2007) (Kennedy, J., concurring in part and concurring in judgment)).

48. *Id.* at 545–65 (quoting *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 797 (2007)).

49. *Id.* at 526.

50. *Id.* at 542.

51. *Tex. Dep't of Hous. & Cmty. Affs.*, 576 U.S. at 527, 542–43 (stating "if a statistical discrepancy is caused by factors other than the defendant's policy, a plaintiff cannot establish a prima facie case, and there is no liability.").

52. *Id.* at 542.

53. Shin Bin Tan et al., *supra* note 17, at 237.

54. *Neighborhood Poverty*, *supra* note 23.

55. 52 U.S.C. § 10301 (2014).

56. *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2351 (2021) (Kagan, J., dissenting).

## IV. VOTING AND DISPARATE IMPACT

A central tenet of the VRA is to prohibit racial discrimination so that people of color are able to have meaningful participation in the political process.<sup>57</sup> Section 2 of the VRA prohibits racially discriminatory standards, practices, or procedures with respect to voting,<sup>58</sup> and provides that relief for any such policies may be granted if they are intentionally discriminatory<sup>59</sup> or have a disparate impact on people of color.<sup>60</sup> To prevail on a claim of intentional discrimination, the plaintiff must prove that the law or practice was purposefully enacted to dilute the voting power of communities of color.<sup>61</sup> A showing of disparate impact requires proving that a practice adversely and negatively affects people of color as a result of the totality of the circumstances as set forth by nine factors outlined by the Court in *Thornburg v. Gingles*.<sup>62</sup>

In order for a plaintiff to successfully show voter dilution under Section 2 of the VRA, a prima facie case must be demonstrated, and this requires: (1) the community of color allegedly disenfranchised is “sufficiently large and

57. *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966) (“[W]ealth or fee paying has . . . no relation to voting qualifications; the right to vote is . . . too fundamental to be so burdened or conditioned.”).

58. 52 U.S.C. §§ 10303(f)(2), 10310(c)(3)); *see* U.S. CONST. amend. XXIV § 1 (“The right of citizens of the United States to vote . . . shall not be denied or abridged . . . by reason of failure to pay any poll tax or other tax.”).

59. *See* *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977).

60. *See* *Farrakhan v. Gregoire*, 623 F.3d 990, 993 (9th Cir. 2010) (per curiam) (“[P]laintiffs bringing a section 2 VRA challenge to a felon disenfranchisement law . . . must at least show that the criminal justice system is infected by intentional discrimination or that the felon disenfranchisement law was enacted with such intent.”); *Simmons v. Galvin*, 575 F.3d 24, 41 (1st Cir. 2009) (“Congress has excepted from the reach of the VRA protections from vote denial for claims against a state which disenfranchises incarcerated felons.”); *Hayden v. Pataki*, 449 F.3d 305, 322–23 (2d Cir. 2006) (en banc) (holding that the VRA does “not encompass felon disenfranchisement laws” because of the “wealth of persuasive evidence that Congress . . . never intended to extend the coverage of the [VRA] to felon disenfranchisement provisions.”); *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1233–34 (11th Cir. 2005) (en banc).

61. *Thornburg v. Gingles*, 478 U.S. 30, 32 (1986).

62. *Id.* at 36–37 (The nine factors are: (1) “The extent of any history of official discrimination in the jurisdiction that touched the right of minorities to register, vote, or otherwise participate in the electoral process;” (2) “The extent to which voting in elections is racially polarized;” (3) “The extent to which the jurisdiction has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices that may enhance the opportunity for discrimination;” (4) “Whether minority candidates have been denied access to any candidate slating process;” (5) “The extent to which minorities in the jurisdiction bear the effects of discrimination in education, employment, and health that hinder their ability to participate effectively in the political process;” (6) “Whether political campaigns have been characterized by overt or subtle racial appeals;” (7) “The extent to which minorities have been elected to public office;” (8) “Whether there is a significant lack of responsiveness by elected officials to minorities;” and (9) “Whether the policy behind the use of the voting practice in question is tenuous.”).

geographically compact to constitute a majority in a single-member district;<sup>63</sup> (2) the community is “politically cohesive;”<sup>64</sup> and (3) the white voters vote “as a bloc to enable it . . . usually to defeat the [community of color’s] preferred candidate.”<sup>65</sup> Upon establishing a prima facie case, the plaintiff must then prove voter dilution by a totality of the circumstances using the nine factors outlined in *Gingles*.<sup>66</sup>

The Equal Protection Clause prohibits states from intentionally discriminating on the basis of race with respect to the creation of voting districts.<sup>67</sup> It is important to understand how redistricting can facilitate racial discrimination through a source of low-income/minority voter suppression known as gerrymandering.<sup>68</sup> Gerrymandering allows the majority party in each state to draw legislative and congressional districts to maximize their number of seats.<sup>69</sup> These districts can cut through neighborhoods and zig-zag through cities, concentrating people of the same race in the same districts.<sup>70</sup> Gerrymandering can ensure that parties with hardly half the popular vote in the entire state can secure nearly all of the congressional seats.<sup>71</sup> This is due to racially polarized voting. Racially polarized voting “increases the vulnerability of racial minorities to discriminatory changes in voting law”<sup>72</sup> because a law that is enacted with the purpose of diminishing the voting strength of Black people will not have its intended discriminatory effect unless racial groups vote as a bloc.<sup>73</sup> Republicans have won at least a plurality of the white vote, and Democrats have won the majority of the Black vote in every presidential election since the VRA was passed.<sup>74</sup> However, racial bloc voting is not limited to federal

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63. *Id.* at 50.

64. *Id.* at 51.

65. *Id.*

66. *Gingles*, 478 U.S. at 36.

67. *See Shaw v. Reno*, 509 U.S. 630, 642 (1993) (deciding that racial gerrymandering and redistricting is subject to strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment).

68. *See* Bloomberg, *Congressional Gerrymandering Is Voter Suppression, Too*, WASH. POST (Sept. 7, 2021, 1:19 PM), [https://www.washingtonpost.com/business/congressional-gerrymandering-is-voter-suppression-too/2021/09/07/f2f0a394-0fff-11ec-baca-86b144fc8a2d\\_story.html](https://www.washingtonpost.com/business/congressional-gerrymandering-is-voter-suppression-too/2021/09/07/f2f0a394-0fff-11ec-baca-86b144fc8a2d_story.html).

69. *Id.*

70. *Id.*

71. *See, e.g., id.* (explaining Republicans in Ohio only earn little more than half of total votes, but consistently win twelve out of fifteen House seats).

72. *Shelby Cnty. Ala. v. Holder*, 570 U.S. 529, 578 (2013) (Ginsburg, J., dissenting); *see also* N.C. State Conf. of the NAACP v. McCrory, 831 F.3d 204, 222 (4th Cir. 2016) (“Racially polarized voting is not, in and of itself, evidence of racial discrimination. But it does provide an incentive for intentional discrimination in the regulation of elections.”).

73. *McCrory*, 831 F.3d at 221.

74. *See* Stephen Ansolabehere et al., *Race, Region, and Vote Choice in the 2008 Election: Implications for the Future of the Voting Rights Act*, 123 HARV. L. REV. 1385, 1401 n.71, 1405 (2010) (examining racial voting patterns in the 1968 through 2008 elections); Alec Tyson & Shiva

elections.<sup>75</sup> It also happens in elections at state and local levels.<sup>76</sup> One study presented findings of racially polarized voting in 105 cases between 1982 and 2006.<sup>77</sup>

The coalescence of segregation and voter suppression manifests in redistricting when the votes of Black people are diluted through “packing” and/or “cracking.”<sup>78</sup> The concentration of Black people in a single district for the purpose of reducing a more broad political influence of that group is “packing.”<sup>79</sup> “Cracking” happens when district boundaries separate people along racial lines, which results in the inability of the community to hold a majority, and thus prevail in an election, in any district.<sup>80</sup> The *Gingles* Court announced three “necessary preconditions” for statutory voter dilution claims, focusing on determining if a racial group is residentially segregated and if there is racially polarized voting.<sup>81</sup> First, the group must be “sufficiently large and geographically compact to constitute a majority in a single-member district.”<sup>82</sup> Second, the group must be “politically cohesive.”<sup>83</sup> And third, white bloc voting must “usually . . . defeat the minority’s preferred candidate.”<sup>84</sup> In *Gingles*, the Court reiterated the strong relationship between geography and representation through elections, where<sup>85</sup> more pronounced residential segregation is more likely to show of sufficient largeness.<sup>86</sup>

The recent Supreme Court case *Brnovich v. Democratic National Committee* illustrates how courts can either easily prioritize the facial neutrality of laws over their discriminatory impact or circumvent the disparate impact entirely in favor of protecting states’ rights against voter fraud, regardless of how non-substantive the fraud claims may be.<sup>87</sup> The complications in prevailing under the VRA are

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Maniam, *Behind Trump’s Victory: Divisions by Race, Gender, Education*, PEW RSCH. CTR. (Nov. 9, 2016), <https://www.pewresearch.org/fact-tank/2016/11/09/behind-trumps-victory-divisions-by-race-gender-education/>.

75. See Ellen Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. MICH. J.L. REFORM 643, 757 tbl.b (2006) (noting 105 lawsuits led to courts reviewing *Gingles* factors to find that racial bloc voting, or racial polarization in voting, occurred).

76. *Id.*

77. *Id.* at 657.

78. See, e.g., *Gill v. Whitford*, 138 S.Ct. 1916, 1923–24, 1930–31 (2018).

79. *Id.* at 1924.

80. *Id.*

81. *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986).

82. *Id.* at 50.

83. *Id.* at 51.

84. *Id.* at 51.

85. See Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1689–90 (2001).

86. See Nicholas O. Stephanopoulos, *Race, Place, and Power*, 68 STAN. L. REV. 1323, 1342–43 (2016).

87. *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2343 (2021).

not limited to proving voting laws have an adverse and disparate impact on Black people.<sup>88</sup> A recent Supreme Court decision removed federal oversight in the implementation of new voting laws.<sup>89</sup> The Supreme Court's *Shelby County* decision declared unconstitutional Section 4(b) of the VRA.<sup>90</sup> That section set forth a formula for determining jurisdictions with a history of racial discrimination; the voting laws for offending jurisdictions were then subject to preclearance by the federal government.<sup>91</sup> Section 4(b) provided the formula for determining whether a state had a history of racial discrimination in voting sufficient to require the jurisdiction's voting laws be subject to federal government oversight.<sup>92</sup> Section 5 of the VRA set out the preclearance requirements for enforcement of these state laws.<sup>93</sup>

Since the Court decided Section 4(b) was antiquated and unnecessary given voter history and the diversity of elected officials in jurisdictions historically subject to oversight, a state may now enact laws that adversely impact Black people, and there is no recourse under Section 5 of the VRA.<sup>94</sup> Improvement based on limited metrics for a specific period of time fails to translate into racial equity in the democratic process.<sup>95</sup> In the wake of the *Shelby County* decision, a number of states, such as North Carolina, Montana, Texas, Alabama, Mississippi, and Virginia passed restrictive voting laws.<sup>96</sup> Without the preclearance requirements, jurisdictions have closed polling stations, reduced early voting options, arbitrarily purged voter rolls, and imposed strict voter identification laws.<sup>97</sup> All of these measures have created obstacles to voting for many Black people.<sup>98</sup> Studies of election laws have shown that voter turnout is reliant, in large part, on voter identification and flexible polling locations and voting times.<sup>99</sup>

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88. *See id.* at 2347.

89. *Shelby Cnty. Ala. v. Holder*, 570 U.S. 529, 534–35, 557 (2013).

90. *Id.* at 557.

91. *Id.* at 546.

92. *Id.* at 534–35.

93. *Id.* at 550.

94. *Shelby Cnty. Ala.*, 570 U.S. at 563.

95. *Id.* at 578–79 (Ginsburg, J., dissenting).

96. Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After Shelby County*, 115 COLUM. L. REV. 2143, 2146 (2015); *see also* S.B. 93, 67th Leg., Reg. Sess. (Mont. 2021).

97. Catalina Feder & Michael G. Miller, *Voter Purges After Shelby*, 48 AM. POLS. RSCH. 687, 688 (2020); Thomas L. Brunell & Whitney Ross Manzo, *The Voting Rights Act After Shelby County v. Holder: A Potential Fix to Revive Section 5*, TRANSATLANTICA, 2015, at 1, 2–3; *Voting Laws Roundup: October 2021*, BRENNAN CTR. FOR JUST. (Oct. 4, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-october-2021>.

98. Brunell & Manzo, *supra* note 97, at 3.

99. *See* Quan Li et al., *Cost of Voting in the American States*, 17 ELECTION L.J. 234, 240–41 (2018) (examining thirty-three state election laws to determine the effect of the laws on participation in the electoral process).

It is evident that this overly optimistic depiction of a post-racial America either dismissed or failed to anticipate the onslaught of restrictive voting laws that would follow, culminating in a great number of voter suppression initiatives following the 2020 presidential election.<sup>100</sup> Over the last twenty years, there have been many rules and laws put in place by state and local legislatures that have made it exceedingly difficult for Black people and people living at or below the poverty line to cast their vote at the polls.<sup>101</sup> For instance, legislatures have shortened voting times, passed stricter identification requirements, and put in place registration restrictions.<sup>102</sup> Many of these laws and regulations appear to be neutral on their face but are designed to inhibit access to the polls for low-income and Black individuals.<sup>103</sup> Voter identification laws have made voter registration drives much less effective by requiring registration documents that many people do not carry with them.<sup>104</sup> Some of these voter restriction laws can carry serious penalties; for example, Georgia recently passed a law that makes it a crime to hand out food and water to voters in line at the polls.<sup>105</sup> In addition, voting laws in our country differ so greatly from state-to-state and from region-to-region that it is very difficult to be an educated voter.<sup>106</sup> Moreover, the laws in each state change so regularly that it is nearly impossible to keep up with the current laws.<sup>107</sup>

Most of the recent changes in voting laws claim to increase security in the voting process, but laws that include identification requirements and strict closing times for polls have a disproportionate impact on low-income populations and Black people.<sup>108</sup> The foundation of these laws can be traced back through the history of our country, beginning with the institution of slavery in the American South.<sup>109</sup> After the Civil War, the southern states created “Jim Crow laws” and enacted laws like the poll tax, literacy requirements, and more.<sup>110</sup> These laws were designed to limit the impact of the Black vote and to keep control in the hands of white individuals.<sup>111</sup> The laws that many states have

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100. *Shelby Cnty. Ala.*, 570 U.S. at 563.

101. Valencia Richardson, *Voting While Poor: Reviving the 24<sup>th</sup> Amendment and Eliminating the Modern-Day Poll Tax*, 27 GEO. J. ON POVERTY L. & POL'Y 451, 452 (2020).

102. *Id.*

103. *Id.* at 458.

104. *Id.* at 459.

105. S.B 202, 2021-2022 Reg. Sess. (Ga. 2021).

106. *See* Richardson, *supra* note 101, at 461.

107. *See id.* at 458.

108. *Block the Vote: How Politicians are Trying to Block Voters From the Ballot Box*, AM. C.L. UNION (Aug. 18, 2021), <https://www.aclu.org/news/civil-liberties/block-the-vote-voter-suppression-in-2020/>.

109. Farrell Evans, *How Jim Crow-Era Laws Suppressed the African American Vote for Generations*, HIST. (May 13, 2021), <https://www.history.com/news/jim-crow-laws-black-vote>.

110. *Id.*

111. *Id.*

recently enacted are designed to further the same goal, and although they do not appear racial or biased, they have the same effect.<sup>112</sup> In the last year, approximately nineteen states enacted thirty-three laws to impose more stringent identification standards for absentee ballots, limit ballot drop boxes, and shorten runoff elections.<sup>113</sup>

In addition to negatively affecting participation in the political process, restrictive voting both directly and indirectly produces negative health outcomes.<sup>114</sup> Further, these effects are compounded because there is a positive correlation between being uninsured and being affected by restrictive voting barriers.<sup>115</sup> Americans who are from lower income, Black, or Latino backgrounds are less likely to be insured compared to higher income or white individuals,<sup>116</sup> so there are reverberating racial impacts.<sup>117</sup> Lower voter turnout is more prevalent among people who have poor health, as evidenced by hospitalization rates, chronic health conditions,<sup>118</sup> mortality<sup>119</sup> and other health risk behaviors.<sup>120</sup> Racial health disparities are positively associated with lower voter turnout.<sup>121</sup>

A more direct correlation among health, race, and voting is illustrated by a study that found 2.7 million excess Black deaths due to racial inequality from 1970-2004, which led to the loss of one million Black votes in the 2004 election.<sup>122</sup> This study also determined that many close state-level elections in the United States during this time likely would have had different electoral outcomes if not for these deaths attributed to racism.<sup>123</sup>

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112. See *Voting Laws Roundup: October 2021*, *supra* note 97.

113. *Id.*

114. Roman Pabayo et al., *Barriers to Voting and Access to Health Insurance Among US Adults: A Cross-Sectional Study*, LANCET REG'L HEALTH AMS., Oct. 2021, at 1, 1.

115. *Id.*

116. George L. Wehby & Wei Lyu, *The Impact of the ACA Medicaid Expansions on Health Insurance Coverage Through 2015 and Coverage Disparities by Age Race/Ethnicity, and Gender*, 53 HEALTH SERVS. RSCH. 1248, 1250, 1269 (2018); AMY E. CHA & ROBIN A. COHEN, NAT'L CTR. FOR HEALTH STAT., REASONS FOR BEING UNINSURED AMONG ADULTS AGED 18-64 IN THE UNITED STATES, 2019 (2020).

117. Wehby & Lyu, *supra* note 116, at 1248.

118. Parissa J. Ballard et al., *Impacts of Adolescent and Young Adult Civic Engagement on Health and Socioeconomic Status in Adulthood*, 90 CHILD DEV. 1138, 1140 (2019).

119. Chloe L. Brown et al., *Voting, Health and Interventions in Healthcare Settings: A Scoping Review*, PUB. HEALTH REVS., July 2020, at 1, 4.

120. *Id.*

121. Kerry Ard et al., *Two Mechanisms: The Role of Social Capital and Industrial Pollution Exposure in Explaining Racial Disparities in Self-Rated Health*, INT'L J. ENV'T RSCH. & PUB. HEALTH, Oct. 2016, at 1, 9.

122. Rodriguez et al., *supra* note 7, at 196.

123. *Id.* at 196-97.

Removing barriers to voting would increase racial health equity.<sup>124</sup> However, there has been an increase in these barriers in the last year.<sup>125</sup> In 2021, approximately thirty-four laws that restricted voting access were passed in nineteen states, and more than 440 bills were introduced in 2021 legislative sessions.<sup>126</sup> Thirty-five such laws were introduced in 2020.<sup>127</sup> Laws erecting barriers to voting disproportionately impact individuals from low-income households, racial minority groups, and younger United States residents.<sup>128</sup> As Roman Pabayo et al. noted, “[b]arriers to voting take many forms, including laws allowing certain types of IDs to be used in polling stations that make it easier for targeted groups to vote (e.g., gun permits) while restricting others (e.g., those with student ID cards).”<sup>129</sup> Restrictive voting laws weaken the political power of Black and Latino populations<sup>130</sup> and people with low or no incomes.<sup>131</sup>

## V. CONCLUSION

The ongoing conflict between the pursuit of colorblindness and the practical approach of race consciousness continues to infiltrate the political landscape.<sup>132</sup> Despite the constitutional interpretation by the Supreme Court that generally

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124. *See Barriers to Voting in Elections Linked to Increased Odds of Being Uninsured*, COLUM. UNIV. MAILMAN SCH. PUB. HEALTH (Aug. 4, 2021), <https://www.publichealth.columbia.edu/public-health-now/news/barriers-voting-elections-linked-increased-odds-being-uninsured> (explaining that there is an overlap in people who are negatively affected by restrictive voting laws and those who are uninsured, and that increased access to political participation is likely to lead to the election of officials who advocate for the interest of their constituents).

125. *Voting Laws Roundup: October 2021*, *supra* note 97.

126. *Id.*

127. Pabayo et al., *supra* note 114, at 1.

128. *Id.*

129. *Id.*; *see also* Theodore R. Johnson & Max Feldman, *The New Voter Suppression*, BRENNAN CTR. FOR JUST. (Jan. 16, 2020), <https://www.brennancenter.org/our-work/research-reports/new-voter-suppression>.

130. Paru Shah & Robert S. Smith, *Legacies of Segregation and Disenfranchisement: The Road from Plessy to Frank and Voter ID Laws in the United States*, RSF: RUSSELL SAGE FOUND. J. SOC. SCIS., Feb. 2021, at 134, 135.

131. Jeremy Adam Smith & Teja Pattabhiraman, *How Inequality Keeps People from Voting*, GREATER GOOD MAG. (Oct. 29, 2020), [https://greatergood.berkeley.edu/article/item/how\\_inequality\\_keeps\\_people\\_from\\_voting](https://greatergood.berkeley.edu/article/item/how_inequality_keeps_people_from_voting); *see also* U.S. CENSUS BUREAU, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2016 (2017), <https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-580.html> (noting in Table Seven that as income declines, voter registration and voter participation declines); *see generally Voting Laws Roundup: October 2021*, *supra* note 97.

132. Adia Harvey Wingfield, *Color Blindness is Counterproductive*, ATL. (Sept. 13, 2015), <https://www.theatlantic.com/politics/archive/2015/09/color-blindness-is-counterproductive/405037/>.

requires states to pursue colorblind policies,<sup>133</sup> it is undeniable that the experience of Black people emphasizes the necessity for race-conscious policies.<sup>134</sup> This tension should be resolved in favor of race consciousness, and restoring federal oversight to voting laws, at least in part, would be helpful in this regard. Many legislative bodies are pursuing election reforms,<sup>135</sup> but there are several potential changes in the U.S. voting laws that are being considered by Congress.<sup>136</sup> Many of these new bills seek to advance racial justice, strengthen American democracy, and limit the new voter suppression laws that many states have enacted.<sup>137</sup>

First, the Freedom to Vote Act, which was introduced to Congress on September 14, 2021, would require states to hold an early voting period at least two weeks prior to Election Day, increase the accessibility to absentee ballots and absentee voting, and make Election Day a public holiday.<sup>138</sup> In addition, the bill attempts to deter deceptive and intimidating practices aimed towards voters and restores formerly incarcerated individuals' voting rights.<sup>139</sup> Finally, the bill includes provisions that would reform redistricting, modernize voter registration, reform campaign financing, and promote election security.<sup>140</sup> Essentially, the Freedom to Vote Act is an effort to ensure that states are complying with the democratic process.<sup>141</sup>

Another potential change in federal voting laws comes in the form of the John R. Lewis Voting Rights Advancement Act of 2021.<sup>142</sup> The John R. Lewis Act seeks to fill the void left by *Shelby County* and strengthen the legislation as a whole.<sup>143</sup>

The For the People Act of 2021 is another federal law designed to protect voter rights.<sup>144</sup> The Act (H.R. 1) passed in the House of Representatives on

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133. *E.g.*, *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 291 (1978) (stating that “[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.”).

134. Ronald Turner, “*The Way to Stop Discrimination on the Basis of Race . . .*”, 11 *STAN. J.C.R. & C.L.* 45, 86–87 (2015).

135. *Voting Laws Roundup: October 2021*, *supra* note 97.

136. *Id.*

137. *Id.*

138. *S.2747 - Freedom to Vote Act*, CONGRESS.GOV, <https://www.congress.gov/bill/117th-congress/senate-bill/2747> (last viewed Jan. 25, 2022); *The Freedom to Vote Act*, BRENNAN CTR. FOR JUST. (Jan. 4, 2022), <https://www.brennancenter.org/our-work/research-reports/freedom-vote-act>.

139. *Id.*

140. *Id.*

141. *Id.*

142. John R. Lewis Voting Rights Advancement Act of 2021, H.R. 4, 117th Cong. (2021).

143. *Voting Laws Roundup: October 2021*, *supra* note 97.

144. For the People Act of 2021, H.R. 1, 117th Cong. (2021).

March 3, 2021, and was introduced to the Senate on March 11, 2021.<sup>145</sup> If passed, H.R. 1 “would make it easier to vote in federal elections, end congressional gerrymandering, overhaul federal campaign finance laws, increase safeguards against foreign interference, strengthen government ethics rules, and more.”<sup>146</sup> Many of the changes would go into effect for the November 2022 elections; however, some may take longer to install.<sup>147</sup>

Suppressing the Black vote is a form of structural racism,<sup>148</sup> which complicates the individual mandates to “vote with your feet”<sup>149</sup> and “pull yourself up by your bootstraps.”<sup>150</sup> The country’s history of racist laws designed to intimidate and dissuade Black votes are well-documented, and such laws have been increasingly promoted under the guise of election integrity.<sup>151</sup> Furthermore, suppressing voting rights reduces the quality of life and actual lives of Black people through reinforcing racial health disparities.<sup>152</sup> The nature of segregation permitting voter dilution, and the fact that disparate impact belies actionable change, require a more present government in order to achieve equity. Repealing and reducing restrictive voter laws increases voter turnout,<sup>153</sup> and the federal government should act to promote a true democracy and truly integrated living patterns.

145. *H.R. 1 – For the People Act of 2021*, CONGRESS.GOV., <https://www.congress.gov/bills/117/congress/house-bill/1> (last visited Jan. 25, 2022).

146. *Annotated Guide to the For the People Act of 2021*, BRENNAN CTR. FOR JUST. (Mar. 18, 2021), <https://www.brennancenter.org/our-work/policy-solutions/annotated-guide-people-act-2021>.

147. *Id.*

148. Danyelle Solomon et al., *Systematic Inequality and American Democracy*, CTR. FOR AM. PROGRESS (Aug. 7, 2019), <https://www.americanprogress.org/article/systematic-inequality-american-democracy/>.

149. Somin, *supra* note 2, at 1090.

150. Assari, *supra* note 3.

151. See Hannah Knowles, *A Texas Bill Drew Ire for Saying It Would Preserve ‘Purity of the Ballot Box.’ Here’s the Phrase’s History*, WASH. POST (May 9, 2021, 3:02 PM), <https://www.washingtonpost.com/history/2021/05/09/texas-purity-ballot-box-black/> (describing the history of the term); see also Joseph Tanfani & Jarrett Renshaw, *Challengers, Observers and Electioneering: The History and Rules of U.S. Poll Watching*, REUTERS (Oct. 7, 2020, 5:11 AM), <https://www.reuters.com/article/us-usa-election-poll-watchers-facts-expl/challengers-observers-and-electioneering-the-history-and-rules-of-u-s-poll-watching-idUSKBN26S1IH>. Perhaps the most infamous example of election observation running amok occurred at the hands of the Republican Party’s National Ballot Security Task Force in New Jersey in 1981. Abuses resulted in a consent decree imposed by a federal court requiring the Republican Party to allow a federal court to review proposed “ballot security” programs. See Consent Order, Democratic Nat’l Comm. v. Republican Nat’l Comm., No. 2:81-cv-03876 (D.N.J. Nov. 1, 1982); see Peter Baker et al., *The Voting Will End Nov. 3. The Legal Battle Probably Won’t.*, N.Y. TIMES (Aug. 17, 2020), <https://www.nytimes.com/2020/08/08/us/politics/voting-nov-3-election.html>.

152. Rodriguez et al., *supra* note 7, at 195.

153. See Zoltan Hajnal et al., *Voter Identification Laws and the Suppression of Minority Votes*, 79 J. POL. 363, 376–77 (2017).