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## The Political (Mis)representation of Immigrants in Voting

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# THE POLITICAL (MIS)REPRESENTATION OF IMMIGRANTS IN VOTING

MING H. CHEN\* AND HUNTER KNAPP+

*Who is a member of the political community? What barriers to inclusion do immigrants face as outsiders to this political community? This Essay describes several barriers facing immigrants and naturalized citizens that impede their political belonging. It critiques these barriers on the basis of immigrants and foreign-born voters having rights of semi-citizenship. By placing naturalization backlogs, voting restrictions, and reapportionment battles in the historical context of voter suppression, it provides a descriptive and normative account of the political misrepresentation of immigrants.*

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## INTRODUCTION

The Nineteenth Amendment was ratified one hundred years ago, in August 1920. It expanded suffrage on a national level by establishing “[t]he 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 sex.”<sup>1</sup> White women moved from being semi-citizens, able to participate in some areas of civic engagement but not in elections, to being citizens with the political rights of their male counterparts. By 1964, the number of female voters exceeded the number of male voters—indeed, that trend has continued in every presidential election since 1994.<sup>2</sup>

Yet the passage of the Nineteenth Amendment did not mean all women could participate in political life. Asian American women who managed to immigrate to the United States were unable to naturalize and vote until the McCarran-Walter Act passed in 1952.<sup>3</sup> Latina citizens were prevented from voting by literacy tests in states like Arizona that “[f]rom the state’s inception . . . [were] enacted specifically to limit the ignorant Mexican vote.”<sup>4</sup> African American women, too, were barred from the ballot box until the passage of the Voting Rights Act of 1965 (VRA) due to institutional barriers such as poll taxes and literacy tests.<sup>5</sup>

It is clear that the Nineteenth Amendment did not achieve universal women’s suffrage because of legal and political barriers that Asian American, Latina, and African American women continued to face long after its passage. If these women had a constitutional right to vote, yet were effectively barred from exercising that right, it raises a question: Who is a member of the political community? One might think that a constitutional right to vote guarantees full membership, yet political scientists and legal scholars describe a “paradox of progress” whereby the tri-

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1. U.S. CONST. amend. XIX.

2. ELIZABETH C. LARSON & KRISTI R. MELTVEDT, CONG. RSCH. SERV., R45805, WOMEN’S SUFFRAGE: FACT SHEET 1 (2019).

3. Nadia E. Brown, *Political Participation of Women of Color: An Intersectional Analysis*, 35 J. WOMEN, POL. & POL’Y 315, 318 (2014).

4. Democratic Nat’l Comm. v. Reagan, 904 F.3d 686, 738 (9th Cir. 2018), *reh’g en banc granted*, 911 F.3d 942 (9th Cir. 2019), *on reh’g en banc sub nom.* Democratic Nat’l Comm. v. Hobbs, 948 F.3d 989 (9th Cir. 2020), *cert. granted sub nom.* Brnovich v. Democratic Nat’l Comm., No. 19-1257, 2020 WL 5847130 (U.S. Oct. 2, 2020) (Thomas, J., dissenting) (internal quotation omitted).

5. Brown, *supra* note 3, at 319.

umphant narrative of universal advances in political participation leaves out the lingering obstacles for racial minority groups.<sup>6</sup>

The inequalities in the participation of Asian and Latino voters in the 2020 presidential election provide a window into their experience as political outsiders. In total, there were 7.2 million immigrants naturalized between 2009 and 2019.<sup>7</sup> These “naturalized voters” or “foreign-born voters” were predominantly Asian American (31 percent and the fastest growing foreign-born group) and Latino voters (33 percent and the largest group of foreign-born voters).<sup>8</sup> While naturalized citizens vote at lower rates than the general population of eligible voters,<sup>9</sup> in part due to unequal outreach from political parties,<sup>10</sup> their registration and voting rates rise with each successive generation and by the second generation exceed that of the general voting population.<sup>11</sup>

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6. Symposium, *Women’s Enfranchisement: Beyond the 19th Amendment*, 92 U. COLO. L. REV. 659 (2021).

7. Abby Budiman et al., *Naturalized Citizens Make Up Record One-in-Ten U.S. Eligible Voters in 2020*, PEW RESEARCH CTR. (Feb. 26, 2020), <https://www.pewresearch.org/hispanic/2020/02/26/naturalized-citizens-make-up-record-one-in-ten-u-s-eligible-voters-in-2020/> [<https://perma.cc/D9P6-UPEN>].

8. Political scientists refer to these groups as “immigrant voters,” without meaning to imply that immigrants ineligible to vote are casting ballots in violation of federal law. There are serious penalties for voter fraud and false claims of citizenship. 18 U.S.C.A. § 611 (West 2020); 8 U.S.C.A. § 1182(a)(10)(d) (West 2013); 8 U.S.C.A. § 1227(a)(6) (West 2008). Empirical studies show that the phenomenon is very rare. See *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUSTICE (Jan. 31, 2017), <https://www.brennancenter.org/our-work/research-reports/debunking-voter-fraud-myth/> [<https://perma.cc/6LEQ-58Y6>]; Justin Levitt, *The Truth About Voter Fraud*, BRENNAN CTR. FOR JUSTICE (Nov. 9, 2007), <https://www.brennancenter.org/our-work/research-reports/truth-about-voter-fraud/> [<https://perma.cc/H65P-282Q>].

9. According to the U.S. Census Bureau, first-generation voters composed approximately 8 percent of the U.S. electorate and second-generation voters composed approximately 9 percent of the U.S. electorate in the 2012 election. U.S. CENSUS BUREAU, CHARACTERISTICS OF THE U.S. POPULATION BY GENERATIONAL STATUS: 2013, at 33–34 (2016).

10. See ZOLTAN HAJNAL & TAEKU LEE, WHY AMERICANS DON’T JOIN THE PARTY: RACE, IMMIGRATION, AND THE FAILURE (OF POLITICAL PARTIES) TO ENGAGE THE ELECTORATE (2011).

11. There is a small increase in participation between first-generation voters and second-generation voters (54 to 57 percent), and a larger share of voters when comparing the third- and later-generation voters (63 percent). U.S. CENSUS BUREAU, CHARACTERISTICS OF THE U.S. POPULATION BY GENERATIONAL STATUS: 2013, at 34 (2016).

Throughout the 2020 election, Latino and Asian American voters sought to persuade politicians that their growing numbers merit increased attention from political candidates and parties. According to pollsters, their growing demographic and emerging voting patterns made them just as influential in 2020 as Black voters have been since the VRA was passed in 1965.<sup>12</sup> Their protests for more attention from candidates went largely unheeded during the primaries. Race was discussed more leading up to the general election in light of rising pressure from Black Lives Matter and protests for racial justice, but attention to specific issues concerning Latinos, Asian Americans, or immigration were addressed only at the margins of the presidential debates.

Nevertheless, Latino and Asian American voters played an important role in 2020 election outcomes. Based on an election-eve poll conducted by Latino Decisions and an exit poll conducted by CNN, Joe Biden received between 65–70 percent of the Latino vote nationally, while Donald Trump received between 27–32 percent.<sup>13</sup> Despite the media narrative that Latinos moved significantly toward the Republican Party during the 2020 election, the overwhelming preference for the Democratic Party in numerous swing states contributed to President Biden's victory in the electoral college.<sup>14</sup>

Biden received similar support from Asian American voters, with 61–68 percent of their vote compared to Donald Trump's 30–34 percent.<sup>15</sup> Survey data suggests that their high voter

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12. Anthony Cilluffo & Richard Fry, *An Early Look at the 2020 Electorate*, PEW RESEARCH. CTR. (Jan. 30, 2019), <https://www.pewsocialtrends.org/essay/an-early-look-at-the-2020-electorate/> [<https://perma.cc/BH3Y-2UPE>] (“[Projecting] that the 2020 election will mark the first time that Hispanics will be the largest racial or ethnic minority group in the electorate, accounting for just over 13 percent of eligible voters—slightly more than Blacks. This change reflects the gradual but continuous growth in the Hispanic share of eligible voters, up from 9 percent in the 2008 presidential election and 7 percent in the 2000 election.”).

13. *Latino Voters in the 2020 Election National Survey Results*, LATINO DECISIONS (Nov. 5, 2020), <https://latinodecisions.com/wp-content/uploads/2020/11/Latino-EE2020-Deck.pdf> [hereinafter *Latino Voters Poll*] [<https://perma.cc/953V-YM5V>]; *Exit Polls*, CNN, <https://www.cnn.com/election/2020/exit-polls/president/national-results/7> (last visited Nov. 11, 2020) [<https://perma.cc/SCF7-D5GA>].

14. See *Latino Voters Poll*, *supra* note 13 (Nevada Latino voters favored Biden by 45 percentage points, Arizona Latino voters by 44 percentage points, Pennsylvania Latino Voters by 43 percentage points, and Georgia Latino voters by 41 percentage points).

15. *Asian American Voters in the 2020 Election*, LATINO DECISIONS (Nov. 4, 2020), <https://latinodecisions.com/wp-content/uploads/2020/11/AAPI-EE2020-Deck.pdf> [hereinafter *Asian American Voters Poll*] [<https://perma.cc/7VEC-GYKD>];

turnout and favorability toward the Democratic candidate turned the tide in favor of President Biden in some states.<sup>16</sup> An extremely high number of first-time Asian American voters in Georgia's Seventh Congressional District also contributed to a rare victory for the Democratic Congressional candidate.<sup>17</sup> While the heterogeneity of Asian Americans' partisan affiliation has historically detracted from their political influence, this heterogeneity appeared to shift in the 2020 election. Changes in Vietnamese and Hmong voting patterns to favor Democrats can partially explain this shift.<sup>18</sup> The 2020 election shows that political participation from Latino and Asian American communities can sway elections.

In contrast to Latino and Asian American voters, "immigrants" are foreign-born individuals who have not gained the legal status of formal citizenship; they are technically noncitizens and have restricted political rights. They lack the right to participate in national elections and to hold elected office. Yet they retain some political rights, such as to be represented in matters that directly affect their community. Once they naturalize, these former immigrants earn, at least in theory, political membership equal to U.S.-born citizens: the right to vote, contribute to campaigns, run for elected office, and serve on juries.<sup>19</sup> When political scientists and pollsters refer to these naturalized citizens as "immigrant voters," they are focusing on their social standing and foreign-born status without making a rights-based distinction about legal standing. They are not referencing immigrants

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*Exit Polls*, *supra* note 13; Kimmy Yam, *Asian Americans Voted for Biden*, NBC NEWS (Nov. 9, 2020), <https://www.nbcnews.com/news/asian-america/asian-americans-voted-biden-63-31-reality-more-complex-n1247171> [<https://perma.cc/4MRF-ZCJ>].

16. Ryan Benk & Lulu Garcia-Navarro, *Asian American and Pacific Islander Turnout Helped Hand Biden Georgia*, NPR (Dec. 4, 2020), <https://www.npr.org/sections/biden-transition-updates/2020/12/04/942271036/asian-american-and-pacific-islander-turnout-helped-hand-biden-georgia> [<https://perma.cc/SC9L-7FPT>].

17. *Asian American Voters Poll*, *supra* note 15, at 21–23. NPR says that Asian American voter turnout in Georgia increased by 91 percent. Benk & Garcia-Navarro, *supra* note 16.

18. *Hmong Voters Could Be Key to Winning Wisconsin*, WIS. PUB. RADIO (Oct. 26, 2020), <https://www.wpr.org/hmong-voters-could-be-key-winning-wisconsin-how-organizers-are-reaching-them> [<https://perma.cc/XZ88-74XY>].

19. U.S. CITIZENSHIP & IMMIGR. SERV., *THE CITIZEN'S ALMANAC* (2014), <https://www.uscis.gov/sites/default/files/document/guides/M-76.pdf> [<https://perma.cc/JT6N-5BXU>].

ineligible to vote.<sup>20</sup> This Essay refers to foreign-born citizens who have naturalized and are eligible to vote as “naturalized voters.” References to “Asian voters” and “Latino voters” are not meant to imply that all Asian American or Latino voters are foreign-born or recently naturalized: certainly, some are U.S.-born and have lived in the United States for many generations. Instead, it acknowledges that data gathering practices commonly group together foreign- and U.S.-born Asians and Latinos because these racial groups are majority foreign-born and because they represent the fastest growing and largest racial minority groups, respectively.<sup>21</sup>

Part I of the Essay describes the meaning of political membership as including both participation and representation. Voting is a direct form of political participation and serves the function of self-governance in a democracy. Census enumeration is used for reapportioning and redrawing electoral districts and leads to political representation. Both forms of membership are needed for democratic equality across the political community, but this Essay focuses on voting as its primary illustration of the unequal participation of Asian and Latino voters in the political community. Political representation is addressed in a separate essay.<sup>22</sup>

Part II of the Essay describes legal, social, and political barriers to political participation that effectively diminish the membership of naturalized citizens in the political community. The Essay describes state laws governing voter identification, voter purges, and voter challengers as legal barriers to participation. It also describes social and political impediments such as language barriers and naturalization backlogs.

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20. See, e.g., Caroline B. Brettell, *The Political and Civic Engagement of Immigrants: Inclusion and Exclusion: Rates of and Barriers to Participation*, AM. ACAD. ARTS & SCI. (2020), <https://www.amacad.org/publication/political-and-civic-engagement-immigrants/section/2/> [<https://perma.cc/6QUR-N7BA>].

21. See, e.g., Abby Budiman, *Asian Americans Are the Fastest-Growing Racial or Ethnic Group in the U.S. Electorate*, PEW RESEARCH CTR. (May 7, 2020), <https://www.pewresearch.org/fact-tank/2020/05/07/asian-americans-are-the-fastest-growing-racial-or-ethnic-group-in-the-u-s-electorate/> [<https://perma.cc/6MWS-2RNS>]; Luis Noe-Bustamante et al., *U.S. Hispanic Population Surpassed 60 Million in 2019*, PEW RSCH. CTR. (July 7, 2020), <https://www.pewresearch.org/fact-tank/2020/07/07/u-s-hispanic-population-surpassed-60-million-in-2019-but-growth-has-slowed/> [<https://perma.cc/9S3H-64WH>].

22. Ming H. Chen, *The Political (Mis)representation of Immigrants in the Census*, 96 N.Y.U. L. REV. (forthcoming 2021).

The Conclusion suggests that increased democratic equality requires bolstering political participation for immigrants and that doing so will transform electoral outcomes and democratic processes.

## I. THE MEANING OF POLITICAL BELONGING FOR IMMIGRANTS

Determining the membership of Asian, Latino, and naturalized voters requires understanding the meaning of political belonging. The meaning of citizenship has long been held to include political dimensions. J.G.A. Pocock's classic definition of citizenship contrasted Aristotle's ancient Greek notion of direct participation in the polis with a Roman definition based on legal rights alone.<sup>23</sup> The participation-based conception of direct democracy serves the function of self-governance and is most often seen in studies of voting, campaign contributions, and office-holding.<sup>24</sup> Flowing from this conception of political participation is the notion that the political membership of noncitizens is defined by a *lack of political rights*. Women may be considered to have been less than full citizens pre-Nineteenth Amendment. African Americans were less than full citizens since they lacked rights to vote, own property, earn wages, and live free from discrimination in schooling and housing pre-Reconstruction. They continued to confront voting discrimination following the adoption of the Fifteenth Amendment, necessitating the passage of the VRA.

In the present day, immigrants do not have the right to vote or donate to federal elections.<sup>25</sup> They cannot serve jury duty.<sup>26</sup>

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23. J.G.A. Pocock, *The Idea of Citizenship Since Classical Times*, in RONALD S. BEINER, *THEORIZING CITIZENSHIP* 29 (1995); see generally ELIZABETH COHEN, *SEMI-CITIZENSHIP IN DEMOCRATIC POLITICS* (2009); SARAH SONG, *DEMOCRACY AND CITIZENSHIP* (2018).

24. Pocock, *supra* note 23.

25. Jamin Raskin, *Legal Aliens, Local Citizens: Historical, Constitutional, and Theoretical Meanings of Citizen Suffrage*, 141 U. PA. L. REV. 1391 (1993); Virginia Harper-Ho, *Noncitizen Voting Rights: The History, the Law, and Current Prospects for Change*, 21 IMMIGR. & NAT'L L. REV. 477 (2000); Ronald Hayduck, *Democracy for All: Restoring Immigrant Voting Rights in the US*, 26 NEW POL. SCI. 499 (2004); Sarah Song, *Democracy and Noncitizen Voting Rights*, 13 CITIZENSHIP STUD. 607 (2009).

26. See, e.g., Office of Governor Edmund G. Brown Jr., *Veto Message on Assembly Bill 1401 Jury Duty Eligibility* (Oct. 7, 2013), [https://www.ca.gov/archive/gov39/wp-content/uploads/2017/09/AB\\_1401\\_2013\\_Veto\\_Message.pdf](https://www.ca.gov/archive/gov39/wp-content/uploads/2017/09/AB_1401_2013_Veto_Message.pdf) [https://perma.cc/DNN2-DZQW] (where Gov. Jerry Brown vetoed a California bill permitting jury

They cannot run for public office or hold public employment.<sup>27</sup> It is only after they naturalize that they become eligible for these political rights. While some immigrants can claim state citizenship and participate in local elections under the rules where they live, only naturalized citizens can assert their political participation through voting in federal elections.<sup>28</sup> Beyond voting, both immigrants and naturalized citizens can engage in “softer” forms of civic life: engaging in social protests, contacting elected officials, and being included in the U.S. census count of the total population that is used for redistricting.<sup>29</sup>

Legal theorists refer to the various forms of political participation as indicia of political membership. Many highlight inequalities for racial minorities and other groups in political participation as “representational equality.”<sup>30</sup> Political theorist Elizabeth Cohen elaborates on the origins of representational inequality with the concept of “semi-citizens,” whose political statuses fall short of full citizenship and political membership.<sup>31</sup> Explaining why some semi-citizens, including immigrants, deserve political rights despite their lack of full legal status, Cohen contrasts the conventional “delegate” model of representation with a “trusteeship” model.<sup>32</sup> Under the delegate model, elected officials serve a narrow role: they cast votes that mirror the views of their constituents. They may consider immigrants ineligible to vote as less worthy of representation. In contrast, under a trusteeship understanding of representational democracy,

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duty for noncitizens because “jury service, like voting, is quintessentially a prerogative and responsibility of citizenship”).

27. For cases on public function doctrine pertaining to various types of employment, see generally *Sugarman v. Dougall*, 413 U.S. 634 (1973) (civil service); *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982) (police officers); *Ambach v. Norwick*, 441 U.S. 68 (1979) (teachers). Eligibility of immigrants for state bar licensing is still in flux.

28. For a summary of noncitizen voting in the United States, see Kimia Pakdaman, *Noncitizen Voting Rights in the United States*, BERKELEY PUB. POL'Y J., (Mar. 4, 2019), <https://bppj.berkeley.edu/2019/03/04/spring-2019-journal-noncitizen-voting-rights-in-the-united-states/> [<https://perma.cc/K985-549U>]. Other sites for local participation include school boards, participatory budgeting, and government committees.

29. See Chen, *supra* note 22.

30. Janai Nelson, *Counting Change: Ensuring an Inclusive Census for Communities of Color*, 119 COLUM. L. REV. 1399 (2019).

31. See generally ELIZABETH COHEN, SEMI-CITIZENSHIP IN DEMOCRATIC POLITICS (2009).

32. Elizabeth Cohen, *Who Counts? Dilemmas of Representation, Citizenship, and Semi-Citizenship*, 58 ST. LOUIS U. L. REV. 1047 (2014).

elected officials serve a broader role: they cast votes in the service of the public interest, which includes the interests of immigrants. Under Cohen's trusteeship model, immigrants ought to be members of the political community deserving of political representation, even if they cannot vote.<sup>33</sup>

Chen builds on Cohen's notion of semi-citizenship in *Pursuing Citizenship in the Enforcement Era*.<sup>34</sup> If semi-citizenship is incomplete citizenship, there must be ways to place the varieties of semi-citizens on a continuum and to delineate the ways their rights fall short. For example, immigrants awaiting naturalization lack legal rights, such as the right to remain or move freely within a country, and political rights, such as the right to vote or hold elected office.<sup>35</sup> They may also face economic and social constraints insofar as their political and legal statuses intersect with their economic security and social belonging. Naturalized citizens have comparatively more political and legal rights, though their formal rights may not be fully realized. They may also retain social inequities if they are racial minorities and come from countries with different languages, customs, and culture—as is true for the Asian Americans and Latinos who make up the bulk of the naturalized citizenry. While economic, social, political, and legal dimensions of citizenship are all important and interlocking, we focus in this Essay on political participation and, specifically, on voting.

The remainder of this Essay illustrates how the incomplete political membership of immigrants and naturalized citizens emerges from a history of voter suppression for women and racial minorities and how it persists through ongoing formal and functional barriers to political equality.

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33. Sarah Song attributes the need for immigrants to have political rights to their "affected interests" and the "coercion principle" in her essay *Democracy and Noncitizen Voting Rights*, 13 *CITIZENSHIP STUD.* 607 (2009).

34. MING H. CHEN, *PURSUING CITIZENSHIP IN THE ENFORCEMENT ERA* (2020). The categories of civil, social, and political rights were first used by T.H. Marshall in his classic essay *Citizenship and Social Class*. T.H. Marshall, *Citizenship and Social Class*, in *CITIZENSHIP AND SOCIAL CLASS AND OTHER ESSAYS* (Thomas Humphrey Marshall & T.B. Bottomore eds., 1950).

35. See U.S. *CITIZENSHIP & IMMIGR. SERV.*, *supra* note 19.

## II. BARRIERS TO POLITICAL PARTICIPATION FOR ASIAN AND LATINO VOTERS

The history of voting in the United States includes a legacy of political inequality. Formal barriers to voting included disenfranchisement of individuals deemed outside the political community: former slaves, women, the poor, and illiterate people. The Fifteenth Amendment formally granted male African Americans and former slaves the right to vote in 1870.<sup>36</sup> More than one hundred years later, poll taxes and literacy tests continued to impose barriers to voting. The Nineteenth Amendment extended the franchise to women in 1920.<sup>37</sup> But legal and practical barriers continued to impose barriers to voting on Asian and Latina women. The United States gradually expanded the franchise from exclusively white, property-owning men to include all citizens above the age of eighteen.<sup>38</sup> Nevertheless, this narrative of progress omits the forces that undermined the expansion of the franchise to constitutionally eligible voters through formal laws and social resistance—forces that continue to this day.

This Part describes the barriers to voting for naturalized Asian and Latino voters as a *continuation* of the ongoing efforts to suppress political participation of racial minorities and other vulnerable groups. Formal barriers to voting, such as voter identification laws, voter challenger laws, and voter purges, institutionalize voter suppression to prevent Asian and Latino people from exercising their right to vote. These formal obstacles become more difficult to overcome when coupled with functional barriers in the naturalization process, difficulty accessing voting materials in non-English languages, and irregularities in election administration. In the context of voting rights history in the United States, the existence and maintenance of these barriers that disproportionately impact Asian, Latino, and other minority groups should be understood as an ongoing attempt to exclude non-white people from full citizenship. Even after completing the naturalization process, Asians and Latinos face barriers

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36. U.S. CONST. amend. XV.

37. *Id.* amend. XIX.

38. *Id.* amend. XXVI. Some states disenfranchise citizens above the age of eighteen based on mental incapacitation or felony-level criminal history. *Who Can and Can't Vote in U.S. Elections*, USA.GOV, <https://www.usa.gov/who-can-vote> (last updated May 7, 2020) [<https://perma.cc/6DY7-BP54>]; ALEXANDER KEYSSAR, *THE RIGHT TO VOTE* (2000).

to political participation that can prevent them from achieving full political membership and belonging in the United States.

Beneath these barriers is a pernicious belief that immigrants routinely engage in voter fraud. When he first ran for president in 2016, Donald Trump claimed that millions of immigrants who were ineligible to vote cast illegal ballots and lost Trump the popular vote.<sup>39</sup> Though he tried to substantiate his claims by assembling the “Presidential Advisory Commission on Election Integrity,” the commission dissolved without finding any substantial evidence of immigrant voting or voter fraud.<sup>40</sup> Subsequent studies continue to show that noncitizen voting is exceedingly rare.<sup>41</sup> Despite the continuing lack of evidence, Donald Trump renewed his allegations of voter fraud for the 2020 election with a focus on counting legal ballots, without specifically alleging that noncitizens voted.<sup>42</sup> The vague perception of immigrants nevertheless engaging in voter fraud reveals public unease with naturalized voters, if not a mistrust toward immigrants that lingers beyond their acquisition of citizenship. This false perception leads to the construction of barriers to political participation.

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39. Donald Trump (@realDonaldTrump), TWITTER (Nov. 27, 2016, 1:30 PM), <https://twitter.com/realDonaldTrump/status/802972944532209664> [<https://perma.cc/J3A8-8H4D>].

40. Michael Tackett & Michael Wines, *Trump Disbands Commission on Voter Fraud*, N.Y. TIMES (Jan. 3, 2018), <https://www.nytimes.com/2018/01/03/us/politics/trump-voter-fraud-commission.html> [<https://perma.cc/HUV8-2f48>].

41. CHRISTOPHER FAMIGHETTI ET AL., BRENNAN CTR. FOR JUSTICE, NONCITIZEN VOTING: THE MISSING MILLIONS 1 (2017); *The Myth of Voter Fraud*, BRENNAN CTR. FOR JUSTICE, <https://www.brennancenter.org/issues/ensure-every-american-can-vote/vote-suppression/myth-voter-fraud> (last visited Oct. 17, 2020) [<https://perma.cc/77ZT-KYC7>]. The Brennan Center for Justice conducted a systematic survey of 2016 election officials that oversaw 23.5 million votes and found those officials “referred only an estimated 30 incidents of suspected noncitizen voting for further investigation or prosecution (between .0003% and 0.0025% of votes).” See Philip Bump, *There Have Been Just Four Documented Cases of Voter Fraud in the 2016 Elections*, WASH. POST (Dec. 1, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/12/01/0-000002-percent-of-all-the-ballots-cast-in-the-2016-election-were-fraudulent/> [<https://perma.cc/U344-ZVD8>].

42. Donald Trump (@realDonaldTrump), TWITTER (Nov. 11, 2020, 10:34 AM), <https://twitter.com/realDonaldTrump/status/1326186297157963777?s=20> [<https://perma.cc/4SSJ-3ZQF>]. The claim of voter fraud and a stolen election led to an insurrection at the Capitol and a divided vote in Congress over certification of the electoral college result showing that President Joe Biden won for president. *Fact-Checking the Congressional Debate on Ratifying the Election Results*, N.Y. TIMES (Feb 6, 2021), <https://www.nytimes.com/live/2021/01/06/us/fact-check-electoral-certification> [<https://perma.cc/AWH2-TQ6L>].

### A. *Formal Barriers to Political Participation*

Formal barriers keep eligible voters from getting to the polls and thus exclude them from political membership. While the Fifteenth Amendment extended the right to vote to former slaves, it was not until the VRA<sup>43</sup> that the Department of Justice was empowered to enforce voting equality by intensifying review of discriminatory Jim Crow practices.<sup>44</sup> The following Section discusses three formal barriers to political participation that impact Asian and Latino voters: voter challenger laws, voter identification laws, and voter purges.

#### 1. Voter Challenger Laws

Voter challenger laws allow individuals to challenge another voter's eligibility either before or during an election. While these laws are intended to ensure the integrity of elections, they effectively sanction discriminatory practices when overzealous poll watchers initiate challenges based on scant evidence, at best, or racial animus, at worst.

Throughout the history of enfranchisement, voter challenges were invoked by white men to prevent women and African Americans from voting.<sup>45</sup> For instance, during the first election after women won the right to vote in New York, every woman who attempted to cast a ballot was challenged at the polls.<sup>46</sup> During the Jim Crow era, private individuals challenged the eligibility of voters at the polling place using literacy tests and witness requirements.<sup>47</sup>

Modern versions of these laws can be used to intimidate Asian, Latino, and other naturalized citizens by questioning their citizenship and fitness to participate in formal politics.<sup>48</sup> As of this writing, forty-six states allow private citizens to

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43. Voting Rights Act of 1965, 52 U.S.C. § 10101 (1965).

44. *See Shelby County v. Holder*, 570 U.S. 529, 562–66 (2013) (Ginsburg, J., dissenting) (outlining the effectiveness of the VRA, specifically with regard to the use of the preclearance requirement to protect minority voting rights).

45. NICHOLAS RILEY, BRENNAN CTR. FOR JUSTICE, VOTER CHALLENGERS 8–10 (2020); *see* ELAINE WEISS, *THE WOMAN'S HOUR: THE GREAT FIGHT TO WIN THE VOTE* (2018).

46. RILEY, *supra* note 45, at 2.

47. *See id.* at 8 (describing Florida election law in the 1800s).

48. *Id.* at 4.

challenge a prospective voter's eligibility,<sup>49</sup> and a Brennan Center study shows that most challenges are used by anti-immigrant groups to target Latino and Asian voters. The Brennan Center reported:

In May 2011, poll-watchers affiliated with two local tea party groups in Southbridge, Mass., reportedly targeted Latino voters for challenges during a primary election. Local election officials said that dozens of challenges were filed, leaving several voters feeling intimidated. The environment was so tense that some local polling place officials even declined to work at the following election "after feeling stressed by the outside groups during the primary." The dispute ultimately prompted state election officials to issue new regulations governing voter challenges.<sup>50</sup>

As another example, in Atkinson County, Georgia, three residents filed pre-election challenges in 2004 against more than three-quarters of Latino voters in the county, alleging that the registered voters were not citizens.<sup>51</sup> That same year, in Bayou La Batre, Alabama, poll watchers challenged Asian American voters for citizenship and residency at the behest of an incumbent white city council member who was being challenged in the election by a Vietnamese American.<sup>52</sup> The white city council member explained the challenges by noting "we figured if they couldn't speak good English, they possibly weren't American citizens."<sup>53</sup> More challenges to voter eligibility can be anticipated in the 2020 election.

Some challenger laws allow opponents to challenge voter eligibility at the polling place during an election, while others require the challenge be made before Election Day.<sup>54</sup> When

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49. *Id.* at 1. Alabama, Kansas, Oklahoma, and Wyoming do not allow private citizens to challenge a voter's eligibility but do allow government officials to do so, which may be more intimidating. *Id.* at 5; see, e.g., 10 ILL. COMP. STAT. ANN. 5/17-10 (West 2010) (requiring a challenged voter to sign an affidavit affirming their eligibility and prove "proof of residence by producing two forms of identification showing the person's current residence address," or a witness to swear an oath affirming the challenged individual's resident status).

50. RILEY, *supra* note 45, at 12.

51. *Id.*

52. *Id.*

53. *Id.* at 13.

54. *Id.* at 5. Pre-election challenges allow election officials a reasonable amount of time to determine whether a challenger's allegations are valid.

someone initiates a voter challenge on Election Day, an election official asks the voter to demonstrate their qualification and requires them to swear an oath affirming their eligibility.<sup>55</sup> The would-be voters worry about potential challenges, and the ensuing public embarrassment can dissuade them from exercising their franchise.<sup>56</sup> Only fifteen of the thirty-nine states that permit polling place challenges even require challengers to provide documentation to support the claim.<sup>57</sup> As a result, these policies place a disproportionate burden on naturalized citizens who are unfairly suspected of lacking citizenship or some other qualification for voting.

In comparison, laws that require challenges to be made pre-election alleviate some of these concerns. But little evidence is required to substantiate the allegation, and there is no guaranteed opportunity for the challenged voter to contest the challenge before Election Day.<sup>58</sup> Thus, there are few safeguards to ensure that the challenge process is not abused in a manner that impedes the participation of racial minority and naturalized voters.<sup>59</sup>

## 2. Voter Identification Laws

Voter identification laws are another means by which racial minorities and naturalized voters are prevented from full political participation. As this Section will demonstrate, voter identification laws suppress voter participation by making it more difficult to establish voting credentials and deterring voters who feel intimidated by the challenges.

Given that there is no federal identity document in the United States, states may specify their own identification requirements for registering and voting in elections. Some require identity documents or proof of residence to show eligibility for

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55. *Id.*

56. *Id.*; see also MICH. COMP. LAWS ANN. § 168.728 (West 1955) ("If at the time a person proposing to vote is challenged, there are several persons awaiting their turn to vote, said challenged person shall stand to one side until after unchallenged voters have had an opportunity to vote, when his case shall be taken up and disposed of.").

57. RILEY, *supra* note 45, at 16.

58. *Id.* at 20 (internal quotations omitted).

59. See *id.* at 5 n.26 (referencing a town clerk who witnessed over six hundred challenges to the same day registration of college students in New Hampshire).

voting. Whether a state requires photo identification, government-issued identification, proof of citizenship, or proof of residency can differentially impact naturalized citizens, immigrants, and undocumented immigrants who would otherwise be eligible under applicable law to vote. Laws regarding when states require documents, such as when voters register versus when they cast their ballot, can also negatively impact naturalized voters. As a whole, these voter identification laws add to the cost of voting, especially for poor and vulnerable populations whose lives may not be as easy to document or whose residence may not be as stable.<sup>60</sup>

The patterns of adoption of voter identification laws suggest that they are intended to disenfranchise minority and foreign-born voters, particularly naturalized citizens of Asian and Latin descent, and empirical studies show they are effective. For example, studies show that voter identification laws that require a voter to present identification can depress racial minority turnout by roughly five percentage points while exerting a negligible effect on white turnout. The negative effects are even greater for foreign-born voters of any race.<sup>61</sup> In “Voter Identification Laws and the Suppression of Minority Votes,” researchers found that, without controlling for other factors

Hispanic turnout is 7.1 percentage points lower in strict voter ID states than it is in other states in general elections and 5.3 points lower in primary elections . . . . For Asian Americans, the difference is 5.4 points and 6.2 points . . . . The increase for white turnout in strict ID states is 0.2 percentage points in general elections and 0.4 points in primary elections.<sup>62</sup>

When the researchers examined the effects of voter identification laws “after controlling for a range of state-level electoral laws, campaign dynamics, and individual characteristics,” they

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60. Studies assessed in this survey found no evidence that voter identification requirements specifically reduced African American turnout. See, e.g., Zoltan Hajnal et al., *Voter Identification Laws and the Suppression of Minority Votes*, 79 J. POL. 363 (2017); Bertrall Ross & Doug Spencer, *Passive Voter Suppression: Campaign Mobilization and the Effective Disfranchisement of the Poor*, 114 NW. U. L. REV. 663 (2019).

61. Zoltan Hajnal, Nazita Lajevardi & Lindsay Nielson, *Voter Identification Laws and the Suppression of Minority Votes*, 79 J. POL. 363, 368–71 (2017).

62. *Id.* at 368.

concluded, “there are strong signs that strict identification laws decrease turnout for Latinos, [B]lacks, and Asian Americans.”<sup>63</sup>

Voter identification laws can be traced back to a 1950 South Carolina statute that required voters show an identification document at the polls.<sup>64</sup> Hawaii, Texas, Florida, and Alaska implemented similar laws throughout the 1970s, all of which provided mechanisms for voters to cast a regular ballot even without the requested identification.<sup>65</sup> Voter identification laws gained prominence in the wake of September 11 and the polling controversy surrounding the 2000 presidential election.<sup>66</sup> As a result of these controversies, Congress passed the Help America Vote Act of 2002 (HAVA), which required first-time voters who register by mail to show one of various acceptable forms of identification.<sup>67</sup> In 2005, the Commission on Federal Election Reform recommended that states require voter identification at the polls.<sup>68</sup> Both actions purportedly sought to protect election integrity by requiring verified voter documents.

While HAVA did not compel states to adopt voter identification requirements, it led to a surge in state laws. As of January 2020, thirty-four states had voter identification laws on the books, nineteen of which required photo identification.<sup>69</sup> In

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63. *Id.*

64. *History of Voter ID*, NAT'L CONF. STATE LEGISLATURES (May 31, 2017), <http://www.ncsl.org/research/elections-and-campaigns/voter-id-history.aspx> [<https://perma.cc/BJ4L-JC4U>]; see also Charlie B. Tyler & Richard D. Young, *The South Carolina Legislature*, CTR. FOR GOVERNMENTAL SERVS., INST. FOR PUB. SERV. & POLY RESEARCH., UNIV. OF S.C., <http://www.ipspr.sc.edu/grs/SCCEP/Articles/legislature.htm> (last visited Nov. 20, 2020) [<https://perma.cc/SL4T-NENJ>] (describing a political bloc in South Carolina that maintains white majority power through policies that exclude Black people from voting, like poll taxes, literacy tests, and gerrymandering).

65. *History of Voter ID*, *supra* note 64. The number of states increased to fourteen by 2000.

66. The Supreme Court ended a recount dispute and handed the election to then-candidate George W. Bush in the controversial decision *Bush v. Gore*, 531 U.S. 98 (2000).

67. 52 U.S.C.A. §§ 20901–21145 (West 2002).

68. CTR. FOR DEMOCRACY & ELECTION MGMT., AM. UNIV., BUILDING CONFIDENCE IN U.S. ELECTIONS: REPORT OF THE COMMISSION ON FEDERAL ELECTIONS 18 (2005) [hereinafter COMMISSION REPORT]. HAVA only requires first-time voters who register by mail to show one of the various acceptable forms of identification.

69. *Voter Identification Laws by State*, BALLOTPEDIA, [https://ballotpedia.org/Voter\\_identification\\_laws\\_by\\_state](https://ballotpedia.org/Voter_identification_laws_by_state) (last visited Oct. 6, 2019) [<https://perma.cc/EYX7-8PCT>]. Several of these laws were struck down pre-implementation under the VRA because of their negative impact on minority voters. They were all later implemented post-*Shelby County*.

2011, one such law in South Carolina was blocked by the Justice Department because it would have disproportionately suppressed turnout among eligible minority voters, who were “about 20% more likely than white registered voters to lack DMV-issued identification.”<sup>70</sup> Then *Shelby County v. Holder* weakened the provisions of the VRA that for decades required states with a pattern of discrimination to obtain preclearance before changing their voting laws.<sup>71</sup> Since the *Shelby County* decision, many states that were previously monitored under the VRA enacted laws burdening voting rights, such as registration and identification requirements. The formerly blocked South Carolina voter identification law now applies to South Carolina voters. Also, Alabama, Arizona, Mississippi, South Carolina, Texas, and Virginia all implemented new voting restrictions for the 2016 presidential election.<sup>72</sup>

Strict state voter identification laws require voters to present a government-issued photo identification at the polls.<sup>73</sup> If the voter is unable to produce an acceptable form of identification, the voter must submit a “provisional ballot” which is subsequently counted only if the individual brings the required photo identification to a county election official within a specified

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70. U.S. Dep’t of Just., Civ. Rts. Div., Objection Letter to South Carolina Act R54, Section 5 (Dec. 23, 2011) [https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/l\\_111223.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/l_111223.pdf) [<https://perma.cc/A2XH-AM48>], discussed in Charlie Savage, *Justice Dept. Cites Race in Halting Law Over Voter ID*, N.Y. TIMES (Dec. 23, 2011), <https://www.nytimes.com/2011/12/24/us/justice-department-rejects-voter-id-law-in-south-carolina.html> [<https://perma.cc/5DVX-WGXU>].

71. *Shelby County v. Holder*, 570 U.S. 529, 557 (2013). In 2010, Shelby County in Alabama filed suit seeking to declare Section 5 of the Voting Rights Act unconstitutional. Section 5 of the Voting Rights Act required jurisdictions with a history of voting discrimination to submit voting procedures for preclearance to ensure the change would not harm minority voters. The federal district court upheld Section 5 and the U.S. Court of Appeals for the District of Columbia agreed. On appeal, the U.S. Supreme Court ruled that the coverage formula used to determine which jurisdictions are covered by Section 5 is unconstitutional, rendering Section 5 inoperable.

72. *New Voting Restrictions in America*, BRENNAN CTR. FOR JUSTICE (Nov. 19, 2019), <https://www.brennancenter.org/our-work/research-reports/new-voting-restrictions-america> [<https://perma.cc/PYT4-ND93>]. Texas is an especially important case study, with 11 percent of the nation’s total immigrant population. See, e.g., MARK P. JONES ET AL., UNIV. HOUS., *THE TEXAS VOTER ID LAW AND THE 2016 ELECTION: A STUDY OF HARRIS COUNTY AND CONGRESSIONAL DISTRICT 23*, at 17–24 (finding, despite the fact that both Latino and Anglo nonvoters likely possessed valid identification, Latino nonvoters were more likely to attribute that behavior to the belief that they lacked sufficient identification).

73. See, e.g., WIS. STAT. ANN. § 6.79 (West 2019).

time period.<sup>74</sup> Twenty to thirty percent of provisional ballots are never counted.<sup>75</sup> From 2006 to 2016, of the more than ten million provisional ballots issued, over two million were rejected for issues including failure to adequately comply with voter identification requirements.<sup>76</sup>

At the federal level, the Commission on Federal Election Reform also encourages states to issue “REAL ID” compliant identification cards for voting purposes.<sup>77</sup> The REAL ID Act of 2005 passed in the wake of September 11, 2001, when it was revealed that some of the perpetrators were immigrants with counterfeit driver’s licenses and identity cards.<sup>78</sup> Citing national security concerns, the REAL ID Act tightened requirements for identity documents. For example, it required state identification cards to include citizenship status and made a voter’s failure to use a REAL ID compliant identification trigger their state’s provisional-ballot mechanism.<sup>79</sup>

State lawmakers have relied on the recommendations of the Commission on Federal Election Reform to make requirements for driver’s licenses and identity documents more stringent. These laws can make it more difficult to obtain documents that immigrants are legally entitled to, such as a driver’s license. A large number of states issue driver’s licenses to immigrants (including undocumented immigrants) on the basis of a foreign birth certificate, foreign passport, consular card, or evidence of

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74. Marjorie Hershey, *What We Know About Voter-ID Laws, Registration, and Turnout*, 42 PS: POL. SCI. & POLS. 87, 88 (2009).

75. U.S. ELECTION ASSISTANCE COMM’N, ELECTION ADMINISTRATION AND VOTING SURVEY: DEEP DIVE ON PROVISIONAL BALLOTS (2017), <https://www.eac.gov/documents/2018/06/07/eavs-deep-dive-provisional-ballots> [<https://perma.cc/9HM4-B5JQ>].

76. *Id.*

77. COMMISSION REPORT, *supra* note 68, at 19.

78. DEP’T OF HOMELAND SEC., NATIONAL STRATEGY FOR HOMELAND SECURITY (2002). Recognizing the role of states in homeland security, the report outlines major state initiatives, including driver’s licenses. In particular, the report states: “While the issuance of driver’s licenses falls squarely with the powers of the states, the federal government can assist the states in crafting solutions to curtail the future abuse of driver’s licenses by terrorist organizations. Therefore, the federal government, in consultation with state government agencies and nongovernmental organizations, should support state-led efforts to develop minimum standards for driver’s licenses, recognizing that many states should and will exceed these standards.” *Id.* at 49.

79. COMMISSION REPORT, *supra* note 68, at 21.

residency in a state.<sup>80</sup> In order to avoid unnecessarily stigmatizing the driver—citizenship is not a requirement for driving—many do not specify on the card that the holder is a noncitizen. Still, in order to comply with the REAL ID Act, these cards would need to be reissued with markings stating that the holder is not a citizen and that the card cannot be used for federal identification purposes. The resulting barrier can obstruct benign activities such as air travel. It can also infringe on voting for naturalized citizens, as was the case in 2006 when Arizona extended voter identification laws to require proof of citizenship to register and then presentation of REAL ID compliant identification cards on Election Day.<sup>81</sup> Parts of the law that required proof of citizenship were ultimately struck down by the Supreme Court.<sup>82</sup>

Following the 2012 presidential election, in 2013, at least twenty-five states introduced legislation to require voters to show photo identification at the polls or to tighten existing photo identification laws.<sup>83</sup> In 2013, North Dakota passed a voter identification law that was ultimately held unconstitutional for its discrimination against Native Americans.<sup>84</sup> In 2014, no voter

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80. *States Offering Driver's Licenses to Immigrants*, NAT'L CONF. STATE LEGISLATURES (Feb. 6, 2020), <https://www.ncsl.org/research/immigration/states-offering-driver-s-licenses-to-immigrants.aspx> [<https://perma.cc/P29F-4LXX>].

81. *Arizona Taxpayer and Citizen Protection, Proposition 200 (2004)*, BALLOTPEDIA, [https://ballotpedia.org/Arizona\\_Taxpayer\\_and\\_Citizen\\_Protection,\\_Proposition\\_200\\_\(2004\)](https://ballotpedia.org/Arizona_Taxpayer_and_Citizen_Protection,_Proposition_200_(2004)) (last visited Oct. 10, 2019) [<https://perma.cc/5YEP-FRMZ>].

82. *Arizona v. Inter Tribal Council of Arizona Inc.*, 570 U.S. 1, 17 (2013). The Court did so on preemption grounds rather than equal protection grounds. Justice Scalia noted that Arizona's 2005 request to alter the federal form resulted in a divided 2-2 vote by the EAC before suggesting possible strategies for challenging any rejection. Scalia hinted that Arizona should challenge the decision of the EAC under the APA. Kris Kobach, a conservative activist on voter fraud issues and then-Secretary of State of Kansas, sought to challenge the Arizona voter identification law in *Kobach v. U.S. Election Assistance Comm'n*, 772 F.3d 1183, 1187–88 (10th Cir. 2014). He also enacted a similar Kansas law requiring citizenship documentation that was subsequently struck down on equal protection grounds and led to judicial sanction. *Fish v. Schwab*, 957 F.3d 1105 (10th Cir. 2020).

83. *Voting Laws Roundup 2013*, BRENNAN CTR. FOR JUSTICE (Dec. 19, 2013), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2013> [<https://perma.cc/P8YV-C99Z>].

84. Sarah Childress, *North Dakota's Voter ID Law Is Latest to Be Overturned*, PBS (Aug. 2, 2016), <https://www.pbs.org/wgbh/frontline/article/north-dakotas-voter-id-law-is-latest-to-be-overturned/> [<https://perma.cc/53YZ-62FL>].

identification laws were passed, although nineteen states introduced laws to that effect.<sup>85</sup> In 2015, Texas passed a “strict photo identification” law that was held by federal courts to discriminate against minorities.<sup>86</sup> The trend toward decreasing passage of voter identification laws veiled the impact of the preceding years of implementation. In the 2016 election, the following states had photo identification requirements in place for the first time: Alabama, Kansas, Mississippi, New Hampshire, South Carolina, Tennessee, Texas, Virginia, and Wisconsin.<sup>87</sup> These requirements could have contributed to Donald Trump carrying many of these states.

In the years since the 2016 election, strict voter identification requirements have not been enacted as frequently as other laws restricting voting rights. However, new laws arise in the same spirit. In 2017, Arkansas enacted a photo identification requirement that remained in effect for the 2018 midterm election, during which a ballot measure passed that amended the Arkansas Constitution to require photo identification to vote in the state.<sup>88</sup> That same year, Iowa passed a sweeping “electoral integrity” bill that implemented photo identification requirements.<sup>89</sup> North Dakota passed a law requiring qualifying voter

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85. *Voting Laws Roundup 2014*, BRENNAN CTR. FOR JUSTICE (Dec. 18, 2014), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2014> [<https://perma.cc/AJ9V-UD8W>].

86. *Veasey v. Abbott*, 796 F.3d 487 (5th Cir. 2015). For an analysis of this case, see *analyzed in Recent Cases—Election Law—Voting Rights Act—Fifth Circuit Strikes Down Voter ID Law Based in Disparate Impact—Veasey v. Abbott*, 796 F.3d 487 (5th Cir. 2015), 129 HARV. L. REV. 1128 (2016), <https://harvardlawreview.org/wp-content/uploads/2016/02/1128-1135-Online.pdf> [<https://perma.cc/9RC6-PLQ6>].

87. *New Voting Restrictions in Place for 2016 Presidential Election*, BRENNAN CTR. FOR JUSTICE (Nov. 2, 2016), [https://www.brennancenter.org/sites/default/files/analysis/New\\_Restrictions\\_2016.pdf](https://www.brennancenter.org/sites/default/files/analysis/New_Restrictions_2016.pdf) [<https://perma.cc/3SUQ-6HKJ>] (including exceptions for voters who have a reasonable impediment to obtaining identification in the following states: Alabama, Kansas, Mississippi, New Hampshire, South Carolina, Tennessee, and Texas).

88. *Voting Laws Roundup 2017*, BRENNAN CTR. FOR JUSTICE (May 10, 2017), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2017> [<https://perma.cc/D7B6-Q6G9>]; ASSOCIATED PRESS, *Arkansas Voter ID Ballot Measure Approved*, ARK. DEMOCRAT GAZETTE (Nov. 6, 2018), <https://www.arkansasonline.com/news/2018/nov/06/arkansas-voter-id-ballot-measure-approved/> [<https://perma.cc/4C26-89XA>].

89. Brianne Pfannenstiel, *Branstad Signs Controversial Voter ID Bill into Law*, DES MOINES REG. (May 5, 2017, 1:15 PM), <https://www.desmoinesregister.com/story/news/politics/2017/05/05/branstad-signs-controversial-voter-id-bill-into-law/311568001/> [<https://perma.cc/4GDA-YUS7>]. Special voter cards were theoretically issued to the eighty-five thousand registered Iowa voters without valid identifica-

identification that resembled the 2013 North Dakota law that was previously held unconstitutional for its disenfranchisement of Native American voters.<sup>90</sup> This law withstood a constitutional challenge in the Eighth Circuit in 2019 that found that statistical disenfranchisement of more than two thousand Native Americans was insufficient to justify enjoining the law.<sup>91</sup> In 2018, North Carolina voters approved a constitutional amendment requiring photo identification for voting purposes, and implementing legislation was subsequently passed over a gubernatorial veto.<sup>92</sup> In 2019, Arizona enacted a law that extends voter identification requirements to early voting, arguably in response to the contentious 2018 Senate election.<sup>93</sup>

These voter identification laws join a slew of other voting restrictions implemented to disenfranchise naturalized citizens, often presumed to vote for the Democratic party.

### 3. Voter Purges

Voter purges present a third formal barrier to political participation for naturalized voters, especially those of Asian American and Latino descent. This is because voters whose names are removed may not understand that they have been removed from the voter registry and that restoring their names requires additional steps that make voting burdensome.

The HAVA directs that states “shall perform list maintenance with respect to [a] computerized list of registered voters on a regular basis,” in compliance with the National Voter Registration Act of 1993 (NVRA).<sup>94</sup> The NVRA permits states to enact laws removing voters for change of residence, death, felony

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90. Max Feldman, *How North Dakota Voter ID Law Will Disenfranchise Native Americans*, BRENNAN CTR. FOR JUSTICE (Oct. 18, 2018), <https://www.brennan-center.org/our-work/analysis-opinion/how-north-dakotas-voter-id-law-will-disenfranchise-native-americans> [<https://perma.cc/95UY-FWVH>].

91. Levi Lass, *Eighth Circuit Upholds North Dakota Voter ID Law*, COURTHOUSE NEWS SERV. (July 31, 2019), <https://www.courthousenews.com/eighth-circuit-upholds-north-dakota-voter-id-law/> [<https://perma.cc/U9CW-G782>]. The Supreme Court denied a petition for a stay of the Eighth Circuit’s decision.

92. Lynn Bonner, *Voter ID Becomes Law in North Carolina as House Overrides Veto*, NEWS & OBSERVER (Dec. 19, 2018, 3:59 PM), <https://www.newsobserver.com/news/politics-government/article223310620.html> [<https://perma.cc/XT6Y-QR7V>].

93. Jeremy Duda, *Ugenti-Rita Seeks Sew Limits on Early Voting*, ARIZ. MIRROR (Jan. 17, 2019), <https://www.azmirror.com/2019/01/17/ugenti-rita-seeks-new-limits-on-early-voting/> [<https://perma.cc/YX33-CZE9>].

94. 52 U.S.C.A. § 21083 (West 2002).

conviction, or mental incapacitation.<sup>95</sup> Thus, the NVRA creates the “regulatory floor for state maintenance of voter registration roll” and includes a prohibition on removal of voters for the act of not voting.<sup>96</sup>

Some states enact laws to maintain the voter rolls in ways that amount to a voter purge. Federal law prohibits systematic voter roll purges within ninety days of a federal election.<sup>97</sup> However, this baseline protection can be undermined by state officials issuing batch challenges to large numbers of voters challenging their eligibility to vote.<sup>98</sup> Regardless of whether an official initiates a voter purge through the state challenge process or federal law, the actions overestimate the number of ineligible voters because some rely on outdated driver’s license information that does not account for changes in citizenship status.<sup>99</sup> These laws consequently disenfranchise naturalized citizens disproportionately and erroneously.<sup>100</sup> They should, therefore, be blocked by courts.<sup>101</sup>

The threat to naturalized citizens from voter purges grows more severe as the political climate becomes more polarized and anti-immigrant sentiment increases. Georgia’s contested 2018 gubernatorial election provides several examples. A Georgia state law passed in 2017 included an “exact match” program, which required that citizens’ names on their government-issued identification like social security cards or driver’s licenses precisely match their names as listed on voter rolls.<sup>102</sup> The law subjected fifty-three thousand names to holds for mismatches.<sup>103</sup> Civil rights groups argued that the measure disproportionately impacted African American, Asian American, and Latino voters,

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95. *Voter List Accuracy*, NAT’L CONF. STATE LEGISLATURES (Mar. 20, 2020), <https://www.ncsl.org/research/elections-and-campaigns/voter-list-accuracy.aspx> [<https://perma.cc/5MSC-23RU>].

96. *Id.*

97. 52 U.S.C.A. § 20507(c)(2)(A) (West 2002).

98. JONATHAN BRATER, BRENNAN CTR. FOR JUSTICE, *VOTER PURGES: THE RISKS IN 2018*, at 2–3 (2018).

99. *Id.*

100. *Id.* at 9.

101. *See id.* at 2–6.

102. Susan Ferriss, *Georgia Hotbed for Voter Suppression Tactics*, CTR. FOR PUB. INTEGRITY (Oct. 19, 2020) (citing GA. CODE ANN. § 21-2-417), <https://publicintegrity.org/politics/elections/us-polling-places/georgia-hotbed-for-voter-suppression-tactics/> [<https://perma.cc/JY57-HBDC>].

103. *Id.*

who were turned away because their surnames appeared differently according to local naming practices and the translation of foreign words into English, and that their participation was chilled by confusion about their eligibility to vote.<sup>104</sup> The state's 2017 implementation of a "use it or lose it" law, which purged voters from the voter roll who did not to vote in recent elections and neglected to respond to mailed notices, exacerbated the problem.<sup>105</sup> More than half a million people were removed from the voter rolls and 107,000 were purged.<sup>106</sup> Stacey Abrams, the 2018 Democratic gubernatorial candidate who lost to Republican Brian Kemp, has since taken efforts to surmount voter suppression through her organization Fair Fight,<sup>107</sup> and the "use it or lose it" law was abandoned in 2019.<sup>108</sup> The efforts to eliminate voter purges increased the number of registered voters in the run-up to the 2020 election, with the surprising results of a Democratic victory in the electoral college vote for President and two run-off elections for positions in the U.S. Senate.<sup>109</sup> Voter purges also occurred in Texas and Virginia—places that previously required preclearance of changes in voting laws from the Department of Justice due to their history of voter discrimination—

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104. Ga. Coal. for People's Agenda, Inc. v. Kemp, 347 F. Supp. 3d 1251 (N.D. Ga. 2018).

105. Paul M. Smith, "Use It or Lose It": *The Problem of Purges from the Registration Rolls of Voters Who Don't Vote Regularly*, 45 HUM. RTS. MAG. (Feb. 10, 2020) (citing GA. CODE ANN. § 21-2-234), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/voting-rights/-use-it-or-lose-it—the-problem-of-purges-from-the-registration0/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/voting-rights/-use-it-or-lose-it—the-problem-of-purges-from-the-registration0/) [<https://perma.cc/LZ2B-W7CD>].

106. These numbers were found in an investigation jointly conducted by WABE in Atlanta, KCUR in Kansas City, and Reveal from the Center for Investigative Reporting and reported in APM Reports. *They Didn't Vote... Now They Can't*, APM REPS. (Oct. 19, 2018), <https://www.apmreports.org/story/2018/10/19/georgia-voter-purge> [<https://perma.cc/2V8R-RVW4>].

107. Stacey Abrams's Fair Fight brought suit for multiple election problems in the Georgia gubernatorial election, including voter registration purges, absentee ballot cancellations, and precinct closures. *Fair Fight Action et al. v. Raffensperger et al.*, 413 F. Supp. 3d 1251 (N.D. Ga. 2019). For more information, see Stacey Abrams, Opinion, *We Cannot Resign Ourselves to Dismay and Disenfranchisement*, N.Y. TIMES (May 15, 2019), <https://www.nytimes.com/2019/05/15/opinion/stacey-abrams-voting.html> [<https://perma.cc/5CBE-R5PU>], and FAIR FIGHT, <https://fairfight.com/> (last visited Oct. 18, 2020) [<https://perma.cc/776Q-VSY3>].

108. Stanley Augustin, *Georgia Largely Abandons Its Broken "Exact Match" Voter Registration Process*, LAWS' COMM. ON CIV. RTS. UNDER LAW (Apr. 5, 2019), <https://lawyerscommittee.org/georgia-largely-abandons-its-broken-exact-match-voter-registration-process/> [<https://perma.cc/HS8Y-6CV8>].

109. Maya King, *How Stacey Abrams and Her Band of Believers Turned Georgia Blue*, POLITICO (Nov. 8, 2020), <https://www.politico.com/news/2020/11/08/stacey-abrams-believers-georgia-blue-434985> [<https://perma.cc/39ET-8PUA>].

which were not addressed as forcefully and may have impacted participation.<sup>110</sup>

Collectively, state laws requiring stringent voter identification, broad voter challenges, and aggressive voter purges threatened the votes of Asian American and Latino voters and diluted their influence in the 2020 election.

### *B. Social and Political Barriers to Political Participation*

Even if formal barriers keeping people from getting to the polls could be removed, newly naturalized immigrants would face functional barriers that impede their effective exercise of the vote. Three examples include social and political impediments such as naturalization backlogs that preempt voting and language barriers that hamper voting. These functional barriers were exacerbated by the COVID-19 restrictions that made voting more difficult.

#### 1. Naturalization Barriers

Immigrants can be stymied from participating in politics even before they reach the polls. This is because the naturalization process that makes them eligible to vote is frequently beset by backlogs. Since 2005, the backlog has been growing and under the Trump Administration it skyrocketed. A 2019 report found that the U.S. Citizenship and Immigration Service's (USCIS) national backlog included 738,148 naturalization applications and the national average wait times ranged from ten months to nearly three years.<sup>111</sup> The closure of the USCIS due to COVID-19 will worsen the backlogs,<sup>112</sup> with the agency struggling for funding and oath ceremonies complicated

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110. JONATHAN BRATER ET AL., BRENNAN CTR. FOR JUSTICE, PURGES: A GROWING THREAT TO THE RIGHT TO VOTE 3 (2018). Before the Supreme Court weakened the Voting Rights Act "preclearance" requirement in *Shelby County*, monitored and nonmonitored jurisdictions exhibited similar voter roll removal rates.

111. COLO. STATE ADVISORY COMM. TO THE U.S. COMM'N ON CIV. RTS., CITIZENSHIP DELAYED: CIVIL RIGHTS AND VOTING RIGHTS IMPLICATIONS OF THE BACKLOG IN CITIZENSHIP AND NATURALIZATION APPLICATIONS 5 (2019) [hereinafter CITIZENSHIP DELAYED].

112. Notice, 85 Fed. Reg. 41227 (July 9, 2020) (the Colorado State Advisory Committee issued a Statement of Concern); see also MIGR. POL'Y INST., A ROCKIER ROAD TO CITIZENSHIP? FINDINGS OF A SURVEY ON CHANGING NATURALIZATION PROCEDURES (2020).

by social distancing requirements.<sup>113</sup> These practical barriers cast doubt on the efficacy of the institutions responsible for ensuring newly naturalized citizens and would-be citizens can exercise their right to vote.

The naturalization backlog at the USCIS disenfranchised would-be voters.<sup>114</sup> If the USCIS had consistently met the six-month timetable established by Congress, these future Americans would have been able to complete the naturalization process, register, and vote in the 2020 election cycle.<sup>115</sup> However, delays in the adjudication of naturalization applications made nearly all future citizens wait longer than six months.<sup>116</sup> In some places, eligible voters could have swayed elections.<sup>117</sup> For instance, the National Partnership for New Americans, a nonprofit organization that coordinates voter registration and naturalization nationwide, reported that the margin of victory was 112,911 ballots in Florida during the 2016 presidential election.<sup>118</sup> The number of naturalized voters in Florida who became citizens between 2014 and 2018 was almost triple that margin, at 415,468, suggesting that new voters could make a difference in this delegate-rich state in future elections.<sup>119</sup> The number of newly naturalized voters in swing states such as Michigan, Pennsylvania, and Nevada also exceeded Donald Trump's margin of victory in 2016.<sup>120</sup> Naturalized voters

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113. On March 18, 2020, the USCIS suspended routine in-person services, including naturalization interviews, until at least April 1. *USCIS Response to COVID-19*, USCIS (Oct. 7, 2020), <https://www.uscis.gov/about-us/uscis-response-coronavirus-disease-2019-covid-19> [<https://perma.cc/LAH9-SVCU>]; Colo. State Advisory Comm. to the U.S. Comm'n on Civ. Rts., *Statement Urging USCIS to Address Naturalization Backlog by Modifying Oath and Allegiance Ceremonies During COVID-19 Crisis* (July 22, 2020), <https://www.usccr.gov/files/2020-07-22-CO-SAC-Statement-on-Naturalization-Backlog-and-COVID.pdf> [<https://perma.cc/NYD4-KEKL>]; Ming Hsu Chen, *Citizenship Delays Imperil Voting for Hundreds of Thousands of Immigrants in the 2020 Election*, CONVERSATION (Sept. 3, 2020), <https://theconversation.com/citizenship-delays-imperil-voting-for-hundreds-of-thousands-of-immigrants-in-the-2020-election-141939> [<https://perma.cc/Z2XB-FUTP>].

114. CITIZENSHIP DELAYED, *supra* note 111.

115. 8 U.S.C.A. § 1572(1) (West 2000) (“The term ‘backlog’ means, with respect to an immigration benefit application, the period of time in excess of 180 days that such application has been pending before the Immigration and Naturalization Service.”).

116. CITIZENSHIP DELAYED, *supra* note 111.

117. Chen, *supra* note 113.

118. DIEGO IÑIGUEZ-LOPEZ, NAT'L P'SHIP FOR NEW AM., *THE POWER OF NEWLY NATURALIZED CITIZENS IN THE 2020 ELECTIONS* 12 (2020).

119. *Id.*

120. *Id.* at 3–4, 10–12.

also played a role in Senate races in Arizona, Virginia, and North Carolina.<sup>121</sup> Even in places where these potential voters do not compose a significant part of the electorate, voting rights infringements do not only violate the law if they sway elections. They violate the individual rights of the potential voter.

## 2. Voter Discrimination and Language Barriers

Once they become eligible to vote, naturalized immigrants sometimes face language barriers to voting. While English is not the national language of the United States, the vast majority of election activity occurs in English. Section 203 of the VRA requires that states or political subdivisions therein facilitate non-English language access if more than ten thousand, or more than 5 percent, of the citizens of voting age in that political subdivision are members of a single-language minority; are limited-English proficient; and if “the illiteracy rate of the citizens in the language minority as a group is higher than the national illiteracy rate.”<sup>122</sup> For this measure, only individuals “who cannot read English well enough to use English-language election materials are counted.”<sup>123</sup> The language access provisions of the VRA apply to registration and voting in any type of election, whether that be primary, general, or special election.<sup>124</sup>

However, implementation of Section 203 can be problematic in jurisdictions with a large number of immigrants. The fixed requirement based on ten thousand affected individuals in a jurisdiction creates substantial burdens for states with large populations that do not speak English as their primary language. This includes the entirety of California, Florida, and Texas, along with smaller political subdivisions of twenty-six other states.<sup>125</sup> Many are populous states with significant electoral weight and a large number of Spanish-speaking

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121. *Id.* at 3–4, *add.* at 12 tbl.8.

122. 52 U.S.C.A. § 10503(b)(2)(A) (West 2006) (subsection (2)(A)(i)(III) makes special provision for Native American reservations that make up all or part of a given political subdivision).

123. GARRINE P. LANEY, CONG. RESEARCH SERV., *THE VOTING RIGHTS ACT OF 1965, AS AMENDED: ITS HISTORY AND CURRENT ISSUES* 36 (2008).

124. 28 C.F.R. § 55.10 (2020).

125. Notice of Determination, 81 Fed. Reg. 87532, 87533 (Dec. 5, 2016).

voters.<sup>126</sup> Problems are more complicated in jurisdictions like California with significant language diversity.<sup>127</sup> California must provide Spanish language voting materials statewide and also contains covered jurisdictions requiring voting materials based on large populations of Chinese, Filipino, Vietnamese, Cambodian, Korean, and American Indian people.<sup>128</sup>

Additionally, language barriers often prevent immigrants from naturalizing. City of Denver Commissioner Jamie Torres testified at a public hearing for the U.S. Commission on Civil Rights that language is a barrier to naturalization, which then impacts eligibility to vote.<sup>129</sup> Acquiring citizenship requires an applicant to demonstrate their “ability to read, write, and speak words in ordinary usage in the English language,” subject to certain age, disability, and residence history-based exceptions.<sup>130</sup> Though the standard of proficiency is less than what may be required to vote, USCIS officials have a significant amount of discretion in determining whether language proficiency is demonstrated. Recent studies show that this discretion is raising the language bar.<sup>131</sup>

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126. Renee Stepler & Mark Hugo Lopez, *Ranking the Latino Population in the States*, PEW RESEARCH CTR. (Sept. 8, 2016), <https://www.pewresearch.org/hispanic/2016/09/08/4-ranking-the-latino-population-in-the-states/> [<https://perma.cc/R3JB-SANP>].

127. *Language Spoken at Home by Ability to Speak English for the Population 5 Years and Over*, U.S. CENSUS BUREAU, <https://data.census.gov/cedsci/table?q=B16001&tid=ACSDT1Y2016.B16001> (last visited Oct. 12, 2020) [<https://perma.cc/6Ezd-VS8A>] (Table B16001) (2010–2018).

128. Notice of Determination, 81 Fed. Reg. at 87533 (Dec. 5, 2016).

129. Public hearing for the Colorado Advisory Committee to the U.S. Commission on Civil Rights (Feb. 20, 2019) (on file with editors).

130. See Immigration and Nationality Act (INA) § 312, 8 U.S.C. § 1423 (requiring that immigrants seeking naturalized citizenship demonstrate “an understanding of the English language, including an ability to read, write, and speak words in ordinary usage in the English language: *Provided*, That the requirements of this paragraph relating to ability to read and write shall be met if the applicant can read or write simple words and phrases to the end that a reasonable test of his literacy shall be made and that no extraordinary or unreasonable condition shall be imposed upon the applicant”); see also 12 USCIS, POL’Y MANUAL pt. E, ch. 22, available at <https://www.uscis.gov/policy-manual/volume-12-part-e-chapter-2> (last updated Mar. 19, 2020) [<https://perma.cc/MM2J-4P7N>] (detailing the Trump Administration’s approach to the English language requirement).

131. CITIZENSHIP DELAYED, *supra* note 111.

### 3. 2020 Election Obstacles to Accessing the Ballot: COVID-19, Absentee Voting, and Poll Closures

The added challenge of the 2020 global pandemic further exacerbated the problems that newly naturalized citizens face in voting because national emergencies change the way states administer elections. State voting policies have previously had to accommodate for shifting world and national upheavals. For instance, states adopted absentee voting during the Civil War when states recognized the need for soldiers to vote even though they were far from home.<sup>132</sup> This practice of providing soldiers with ballots was expanded during World War I and World War II.<sup>133</sup>

Pandemics, like war, offer unique challenges. In 1918, when the United States faced both the Spanish Influenza and the end of World War I, government officials circulated public service announcements to remind the American public that “[c]oughs and sneezes spread diseases, as dangerous as poison gas shells.”<sup>134</sup> Still, states had voters cast ballots at crowded polling centers.<sup>135</sup> The result—turnout was significantly lower because of the pandemic.<sup>136</sup>

During the COVID-19 pandemic, state election officials had to make numerous decisions on how to expand access to polling places. They had to decide whether to consolidate polling places given the limited number of poll workers available and the countervailing need to keep wait times manageable for voters.<sup>137</sup> The Brennan Center found in a 2019 report that in past elections African American and Latino voters have experienced significantly

132. See CONSTANCE E. SMITH, *VOTING AND ELECTION LAWS: LAWS FOR VOTERS* (1960).

133. James Alcorn, *Recent Developments in Absentee Voting*, 12 RICH. J.L. & PUB. INT. 283 (2009); Pamela S. Karlan, *Bullets and Ballots: The Exceptional History of the Right to Vote*, 71 U. CIN. L. REV. 1345 (2003) (tracing the expanding right to vote to wartime rhetoric and opportunities).

134. Dionne Searcey, *The Lessons of the Elections of 1918*, N.Y. TIMES (Mar. 21, 2020), <https://www.nytimes.com/2020/03/21/us/politics/1918-flu-pandemic-elections.html> [<https://perma.cc/Q5TJ-TDC2>].

135. *Id.*

136. Jason Marisam, *Judging the 1918 Election*, 6 ELECTION L.J. 141, 145 (2010), <https://www.liebertpub.com/doi/pdf/10.1089/elj.2009.0052> [<https://perma.cc/X69W-VBBK>].

137. *America in Line: Voters Across the US Are Waiting in Long Lines to Cast Their Ballots*, WASH. POST (Oct. 22, 2020), <https://www.washingtonpost.com/graphics/2020/elections/voting-lines-2020-election/> [<https://perma.cc/LA5C-QKPV>].

longer wait times than white voters because of closed polling places.<sup>138</sup> Election officials also had to decide how to count a record number of absentee ballots cast by voters seeking to avoid exposure to the coronavirus. These decisions were especially consequential for racial minority voters because Asian American and Latino voters used absentee ballots in unprecedentedly high numbers in 2020.<sup>139</sup> Asian Americans face distinctive language barriers and an unusually high proportion of rejected ballots when voting absentee.<sup>140</sup>

States tried to improve on failures in the primaries, when many states and localities moved or closed polling places. For instance, Milwaukee, Wisconsin, needed fourteen hundred poll workers to run its primary but a week before the election had fewer than four hundred poll workers and only five polls operational on Election Day.<sup>141</sup> The city of Milwaukee is Wisconsin's

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138. Hannah Klain et al., *Waiting to Vote: Racial Disparities in Election Day Experiences*, BRENNAN CTR. FOR JUSTICE (June 3, 2020), [https://www.brennan-center.org/sites/default/files/2020-06/6\\_02\\_WaitingtoVote\\_FINAL.pdf](https://www.brennan-center.org/sites/default/files/2020-06/6_02_WaitingtoVote_FINAL.pdf) [<https://perma.cc/QY8A-9JJ6>]; Keith Chen et al., *Racial Disparities in Voting Wait Times: Evidence from Smartphone Data* (Nat'l Bureau of Econ. Rsch., Working Paper No. 26487, 2019); Robert M. Stein et al., *Waiting to Vote in the 2016 Presidential Election: Evidence from a Multi-county Study*, 73 POL. RES. Q. 439 (2019).

139. Claire Wang, *Asian American Swing State Early and Absentee Voting Increased 300%, More Than Any Other Group*, NBC NEWS (Nov. 20, 2020), <https://www.nbcnews.com/news/asian-america/asian-american-swing-state-early-absentee-voting-increased-300-more-n1248454> [<https://perma.cc/2HD7-D7JG>] (reporting data from Catalist and TargetSmart); Greg Korte et al., *U.S. Latino Vote Matters Like Never Before: Latinos Are Participating in Early and Absentee Voting at Rates 2.5 Times Their Participation in 2016*, BLOOMBERG (Oct. 24, 2020) <https://www.bloomberg.com/news/features/2020-10-24/2020-election-latino-absentee-early-voting-up-biden-leads-trump-in-polls>.

140. Asian American voters who are foreign-born face language barriers similar to Latino foreign-born voters, though language translation is less prevalent than for Spanish speakers given linguistic diversity within the Asian American population. Some experience rejection of ballots due to invalid signatures that stem from unfamiliarity signing a Romanized name when their original names are written in characters. Anna Purna Kambhampaty, *Asian Americans Are the Fastest-Growing Racial Group in the Electorate – But Many Face Additional Obstacles to Voting by Mail*, TIME (Oct. 20, 2020), <https://time.com/5901094/asian-americans-vote-by-mail> [<https://perma.cc/4HHM-85AC>] (reporting on findings from polls by Public Policy Institute of California and Asian Americans Advancing Justice).

141. Patrick Marley & Craig Gilbert, *Wisconsin Polling Places Are Closing Because There's Not Enough People to Work the April 7 Election*, MILWAUKEE J. SENTINEL (Mar. 31, 2020), <https://www.jsonline.com/story/news/politics/elections/2020/03/31/wisconsin-voting-sites-closing-due-coronavirus-poll-worker-shortage/5090003002/> [<https://perma.cc/WVE7-5972>].

most diverse city.<sup>142</sup> On Election Day, the much smaller city of Madison, Wisconsin, had only sixty-six of its normal ninety-two polling sites open.<sup>143</sup> Georgia also experienced significant poll closures as a result of COVID-19.<sup>144</sup> In the weeks leading up to its June Primary “more than 10% of Georgia’s polling places ha[d] relocated because of COVID-19 concerns[;] in metro Atlanta more than 80 polling places were closed and consolidated ahead of Election Day.”<sup>145</sup> Research shows that moving polling stations has a negative impact on voter turnout.<sup>146</sup> In the general election, the Democratic Party achieved narrow victories in states like Wisconsin and Georgia that will shape the electoral college map going forward. However, Democratic losses in many moderate House districts may be attributable to the unique polling place dynamics of the 2020 election.<sup>147</sup>

Absentee voting provided another avenue for improvement. Going into the general election, forty-six states permitted absentee ballots.<sup>148</sup> Only some of these states send all voters

142. *QuickFacts Milwaukee, Wisconsin*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/milwaukeecitywisconsin> (last updated July 1, 2019) [<https://perma.cc/9LGW-RLJZ>].

143. Brianan Reilly, *Madison Has 66 Polling Sites on Election Day, Milwaukee Has Five. What’s the Deal?*, CAP. TIMES (Apr. 7, 2020), [https://madison.com/ct/news/local/govt-and-politics/madison-has-66-polling-sites-on-election-day-milwaukee-has-five-whats-the-deal/article\\_8868bacf-6697-5cf4-aa4f-d85fb37cf846.html](https://madison.com/ct/news/local/govt-and-politics/madison-has-66-polling-sites-on-election-day-milwaukee-has-five-whats-the-deal/article_8868bacf-6697-5cf4-aa4f-d85fb37cf846.html) [<https://perma.cc/FA2Q-YGNP>].

144. Mark Niesse, *Voting Machines and Coronavirus Force Long Lines on Georgia Voters*, ATLANTA J.-CONST. (June 9, 2020), <https://www.ajc.com/news/state-regional-govt-politics/voting-machines-and-coronavirus-force-long-lines-georgia-voters/VajM2D3aSHALhCz7KwDrpJ/> [<https://perma.cc/UJ3Z-S83B>].

145. *‘It Was Very Chaotic:’ Long Lines, Voting Machine Issues Plague Georgia Primary*, NPR (June 9, 2020), <https://www.npr.org/2020/06/09/873054620/long-lines-voting-machine-issues-plague-georgia-primary> [<https://perma.cc/95K2-UG4K>].

146. Jesse Yoder, *How Polling Place Changes Reduce Turnout: Evidence from Administrative Data in North Carolina* (May 30, 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3178184](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3178184) [<https://perma.cc/V9CQ-PEJ3>].

147. Simone Pathe et al., *Some House Democrats Fall While the Party Fails to Flip Some Key Suburban Districts*, CNN (Nov. 5, 2020), <https://www.cnn.com/2020/11/04/politics/house-race-results-2020/index.html> [<https://perma.cc/R934-EKJU>].

148. *Voting Outside the Polling Place: Absentee, All-Mail, and Other Voting at Home Options*, NAT’L CONF. STATE LEGISLATURES (Aug. 28, 2020), <https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx> [<https://perma.cc/7H7G-RA4F>]. Most of these states require that voters request an absentee ballot, and places like Texas required an explanation beyond the coronavirus. In contrast, Connecticut expanded the list of acceptable excuses for using absentee ballots to include fear of the coronavirus. Alexander Ross Perry & Christopher Meyer, *Mail Voting Litigation in 2020, Part V: Efforts to Halt Vote-By-Mail*

absentee ballots without request or justification, though by the time of the general election, California, Nevada, New Jersey, and Vermont announced plans to send mail-in ballots to all registered voters.<sup>149</sup> Other states sought to expand access after the 2020 primary elections, including New York.<sup>150</sup> At the federal level, Senators Amy Klobuchar (D-Minnesota) and Ron Wyden (D-Oregon) introduced legislation that would ensure Americans are still able to vote by expanding early in-person voting and no-excuse absentee vote-by-mail to all states, and allowing voters who did not receive an absentee ballot to use a printable ballot currently only provided for military and overseas voters.<sup>151</sup>

But absentee voting became a partisan issue, and the candidates' campaign choices may have influenced voters' willingness to use them. President Trump claimed that voter fraud would be rampant, tweeting, "There is NO WAY (ZERO!) that Mail-In Ballots will be anything less than substantially fraudulent. Mail boxes will be robbed, ballots will be forged & even illegally printed out & fraudulently signed."<sup>152</sup> Twitter flagged the tweet as an untrue statement and numerous fact checks have shown it to be false, but President Trump persisted in impugning mail-in ballots during the presidential debates and following the election.<sup>153</sup>

Absentee voting skirmishes matured into pre- and post-election legal battles as well. For example, the pre-election rules in Texas only made absentee ballots available for those (1) over the age of sixty-five; (2) disabled; (3) out of the country on election or

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*Expansion*, LAWFARE (Oct. 29, 2020), <https://www.lawfareblog.com/mail-voting-litigation-2020-part-v-efforts-halt-vote-mail-expansion> [<https://perma.cc/HCQ2-KU9D>] (part of five-part series cataloguing litigation related to mail voting conducted by Lawfare and Stanford-MIT Elections Project).

149. Perry & Meyer, *supra* note 148.

150. *Id.*

151. The Natural Disaster and Emergency Ballot Act of 2020, S. 3529, 116th Cong. (2020).

152. Donald Trump (@realDonaldTrump), TWITTER (May 26, 2020, 6:17 AM), <https://twitter.com/realDonaldTrump/status/1265255835124539392?s=20> [[perma.cc/XG9B-PFHU](https://perma.cc/XG9B-PFHU)].

153. *Trump Makes Unsubstantiated Claim That Mail-In Ballots Will Lead to Voter Fraud*, TWITTER: POLS. (May 26, 2020), <https://twitter.com/i/events/1265330601034256384?lang=en> [<https://perma.cc/Y48T-7JDW>]; Nick Corasaniti et al., *The Times Called Officials in Every State: No Evidence of Voter Fraud*, N.Y. TIMES (Nov. 10, 2020), <https://www.nytimes.com/2020/11/10/us/politics/voting-fraud.html?action=click&module=Spotlight&pgtype=Homepage> [<https://perma.cc/WTR8-7MQS>]. See also *supra* note 42.

during the period of early voting; or (4) confined in jail but otherwise eligible.<sup>154</sup> The limitations gave rise to litigation in both federal and state court, but the courts were unwilling to strike down efforts to expand the accessibility of absentee ballots for those at high risk of contracting COVID-19, including working class voters and racial minorities.<sup>155</sup> Decisions about how to count ballots received by the election date led to yet more litigation in Pennsylvania, Michigan, Georgia, Arizona, Nevada, and Wisconsin.<sup>156</sup>

The partisan patina on absentee voting likely influenced election results as well. Prior to the election, there was scant evidence that absentee ballots lead to fraud, and studies showed that absentee ballots do not measurably change electoral outcomes. Researchers at Stanford's Institute for Economic Policy Research looked at election results from California, Utah, and Washington from 1996 to 2018 and concluded: "(1) vote-by-mail does not appear to affect either party's share of turnout; (2) vote-by-mail does not appear to increase either party's vote share; and (3) vote-by-mail modestly increases overall average turnout rates."<sup>157</sup> The researchers offered a caveat to this conclusion,

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154. *Application for a Ballot by Mail*, TEX. SEC'Y OF STATE, <https://www.sos.texas.gov/elections/voter/reqabbbm.shtml> (last visited Nov. 20, 2020) [<https://perma.cc/WC7V-AEYX>].

155. See *Tex. Democratic Party v. Abbott*, 961 F.3d 389 (5th Cir. 2020); *In re State*, 602 S.W.3d 549 (Tex. 2020); Nicholas Stephanopolous, *Conservative Groups Sue to Make Pandemic Voting Even Harder*, SLATE (July 6, 2010), <https://slate.com/news-and-politics/2020/07/conservative-groups-sue-to-make-pandemic-voting-even-harder.html> [<https://perma.cc/L2XZ-5P46>]; *John Roberts' Unwavering, Limited View of Voting Access Seen in Supreme Court's Wisconsin Ruling*, CNN (Apr. 7, 2020), <https://www.cnn.com/2020/04/07/politics/voting-wisconsin-supreme-court-john-roberts/index.html> [<https://perma.cc/UXL9-WH6P>]; see also Richard L. Hasen, *Three Pathologies of American Voting Rights Illuminated by the COVID-19 Pandemic and How to Treat and Cure Them*, ELECTION L.J. (2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3604668](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3604668) [<https://perma.cc/FFV7-ABZ7>].

156. Perry & Meyer, *supra* note 148 (part of five-part series cataloguing litigation related to mail-in voting conducted by Lawfare and Stanford-MIT Elections Project); David A. Fahrenthold et al., *Here Are the GOP and Trump Campaign's Allegations of Election Irregularities. So Far, None Has Been Proved*, WASH. POST (Nov. 10, 2020), [https://www.washingtonpost.com/politics/trump-election-irregularities-claims/2020/11/08/8f704e6c-2141-11eb-ba21-f2f001f0554b\\_story.html](https://www.washingtonpost.com/politics/trump-election-irregularities-claims/2020/11/08/8f704e6c-2141-11eb-ba21-f2f001f0554b_story.html) [<https://perma.cc/EBD4-8B3S>].

157. Daniel M. Thompson et al., *The Neutral Partisan Effects of Vote-By-Mail: Evidence from County-Level Rollouts* abstract, preceding p. 1 (Stan. Inst. for Econ. Pol'y Rsch., Working Paper No. 20-015, 2020), <https://siepr.stanford.edu/research/publications/neutral-partisan-effects-vote-mail-evidence-county-level-roll-outs> [<https://perma.cc/QMP8-948V>].

noting “[t]he effect of vote-by-mail relative to the counterfactual of an in-person election during COVID-19 might be quite different, and the effect would depend on whether we believe COVID-19 disproportionately deters Democrats or Republicans from voting.”<sup>158</sup> Reports from the 2020 election matched the caveat: the Democratic campaign’s stress on early and absentee voting and the Republican campaign’s discouragement of mail-in ballots meant that mail-in ballots favored Joe Biden over Donald Trump.<sup>159</sup>

The persistence of social and political barriers to voting in the past and in the present—especially during unexpected events like COVID-19—shows that they can reinforce political inequalities even when formal barriers to voting are cleared.

## CONCLUSION

This Symposium issue is about going beyond the Nineteenth Amendment to expand equality for women and other marginalized groups: politically, economically, and socially. This Essay focuses on political inequality of immigrants and Asian and Latino naturalized voters by looking at legal status as a precondition for political participation. Women, racial minorities, and naturalized citizens confront shared challenges to political participation with formal barriers such as voter identification, voter challenger laws, and voter purges. There have also been a variety of social and political barriers that are distinct to each group but that similarly function to impede political participation.

Our prediction is that overcoming these barriers would improve on both the process and substantive outcomes of democracy. As Professor Ross commented in his remarks for this Symposium, women participated at higher rates than men once they gained the right to vote, and they voted for more social programs

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158. *Id.* at 3.

159. Discussions of the “red mirage” and “blue shift” preceded the election and appear to be borne out. Mark Niquette & Laurence Arnold, *What Is the ‘Big Blue Shift’ Scenario in U.S. Vote Counting?*, WASH. POST (Nov. 3, 2020), [https://www.washingtonpost.com/business/what-is-the-big-blue-shift-scenario-in-us-vote-counting/2020/10/30/17614e78-1ab4-11eb-8bda-814ca56e138b\\_story.html](https://www.washingtonpost.com/business/what-is-the-big-blue-shift-scenario-in-us-vote-counting/2020/10/30/17614e78-1ab4-11eb-8bda-814ca56e138b_story.html) [https://perma.cc/7WCA-95KS].

after the Nineteenth Amendment.<sup>160</sup> As Professor Ellis described in his contribution, African Americans also participated at higher rates and used that voting to usher in more civil rights during Reconstruction and in the civil rights era that brought down Jim Crow.<sup>161</sup>

Naturalized voters would likely do the same if barriers to their participation were cleared. As a share of the electorate, naturalized voters are growing and concentrated in important jurisdictions.<sup>162</sup> Their emerging policy agenda is one that emphasizes immigration reform, workers' rights, and health care.<sup>163</sup> More specifically, the Pew Hispanic Research Center shows that some of the priority issues for Latinos include a path to legal status for undocumented persons; border security and the government response to Central American asylum seekers; and deportation of immigrants.<sup>164</sup> Asian-American voters are historically neither strongly party-affiliated nor single-issue voters, but they have become more politically cohesive and increasingly Democratic since 2008; the majority now list immigration among their top issues.<sup>165</sup> Latinos and Asian

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160. Bertrall Ross, Chancellor's Professor of Law, Univ. Cal., Berkeley, Sch. of Law, Campaign Finance and Female Officeholding: An Empirical Assessment of the Year of the Woman (Apr. 3, 2020).

161. Atiba Ellis, Professor of Law, Marquette Univ. Law Sch., The Voting Rights Paradox: Ideology and the Incompleteness of American Democratic Practice (Apr. 3, 2020).

162. The Pew Research Center estimates that roughly ten percent of eligible voters in the 2020 election will be first generation population. Anthony Culliffo & Richard Fry, *An Early Look at the 2020 Electorate*, PEW RESEARCH CTR. (Jan. 30, 2019), <https://www.pewsocialtrends.org/essay/an-early-look-at-the-2020-electorate/> [<https://perma.cc/4E5B-7ESX>]. Since 2000, the number of foreign-born eligible voters increased more than 90 percent, compared to 18 percent growth among the U.S.-born voter population. Abby Budiman, Luis Noe-Bustamante & Mark Hugo Lopez, *Naturalized Citizens Make Up Record One-in-Ten U.S. Eligible Voters in 2020*, PEW RESEARCH CTR. (Feb. 26, 2020), <https://www.pewresearch.org/hispanic/2020/02/26/naturalized-citizens-make-up-record-one-in-ten-u-s-eligible-voters-in-2020/> [<https://perma.cc/Y89S-9LT6>].

163. Ana Gonzalez-Barrera et al., *Path to Legal Status for the Unauthorized Is Top Immigration Policy Goal for Hispanics in U.S.*, PEW RESEARCH CTR. (Feb. 11, 2020), <https://www.pewresearch.org/fact-tank/2020/02/11/path-to-legal-status-for-the-unauthorized-is-top-immigration-policy-goal-for-hispanics-in-u-s/> [<https://perma.cc/RX3D-G7TJ>].

164. *Id.*

165. *The Wall Street Journal* and *Washington Post* reported that Asian American voters should not be overlooked in the 2020 election. *Asian-American Voters to Play Big Role on Super Tuesday*, WALL ST. J. (Feb. 28, 2020), <https://www.wsj.com/articles/asian-american-voters-to-play-big-role-on-super-tuesday-11582894805> [<https://perma.cc/TK23-9XWD>]; *Politicians Often Overlook Asian-American Voters. They Shouldn't, Especially in 2020*, WASH. POST (July 10, 2019),

Americans joined together in multiracial coalitions to restore the Deferred Action for Childhood Arrivals program that provided legal protections from deportation of DREAMers.<sup>166</sup> They worked together to oppose the exclusion of undocumented immigrants from the 2020 census.<sup>167</sup> They lobbied for legislation to expand voting rights for minorities and to improve electoral processes after the passing of Rep. John Lewis and the protracted disputes over the 2020 presidential and senatorial elections.<sup>168</sup> They are gaining support from other voters for many of these issues.<sup>169</sup>

Making voting more accessible for Asian and Latino naturalized citizens by overcoming barriers to their political participation could enhance representational equality. It would expand

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<https://www.washingtonpost.com/opinions/2019/07/10/politicians-often-overlook-asian-american-voters-they-shouldnt-especially/> [<https://perma.cc/AB2M-37KM>].

166. The Trump Administration's rescission of the DACA program was ruled arbitrary and capricious in *Dep't of Homeland Sec. v. Regents of the U. Cal.*, 140 S. Ct. 1891 (2020). President Joe Biden restored the program in January 2021. Executive Order on Preserving and Fortifying Deferred Action for Childhood Arrivals (Jan. 20, 2021).

167. Following the *Dep't of Com. v. New York*, 139 S. Ct. 2551 (2019) litigation, President Donald Trump issued a presidential memorandum ordering the Census Bureau to omit undocumented immigrants from the census count. Memorandum from President Donald J. Trump on Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census to the Sec'y of Com. (July 21, 2020). A legal challenge to this memorandum was under review in the Supreme Court, when President Joe Biden revoked it. Exec. Order No. 13986, 3 C.F.R. § 6 (2021).

168. John Lewis Voting Rights Advancement Act, H.R. 4, 116th Cong. (2020); S. 4263, 116th Cong. (2020) (the bill passed in the House but was not voted on in the Senate). In January 2021, Democrats in the 117th Congress re-introduced the bill as part of the For the People Act of 2021 to continue the effort to improve election processes and prevent voter suppression. For the People Act of 2021, H.R. 1, 117th Cong. (2021); S. 1, 117th Cong. (2021) (the bill passed the House and is being considered in the Senate, as of this printing).

169. Cady Lang, *The Asian American Response to Black Lives Matter Is Part of a Long, Complicated History*, TIME (June 26, 2020), <https://time.com/5851792/asian-americans-black-solidarity-history/> [<https://perma.cc/Q65N-ESXA>]; Leila Miller, *Latino Activists Push for Solidarity with Black Community as They Confront Racism*, L.A. TIMES (July 14, 2020), <https://www.latimes.com/california/story/2020-07-14/la-me-latino-support-george-floyd-protests> [<https://perma.cc/D9HF-KE8D>]; *New Poll Shows Strong Support for Protecting Essential Workers and Including Mixed-Status Families in COVID-19 Assistance*, CTR. FOR AM. PROGRESS ACTION FUND (July 2020), <https://www.americanprogressaction.org/issues/immigration/news/2020/07/22/178160/new-poll-shows-strong-support-protecting-essential-workers-including-mixed-status-families-covid-19-assistance/> [<https://perma.cc/UK4C-795P>]; Nicholas Kristof, *We Interrupt This Gloom to Offer . . . Hope*, N.Y. TIMES (July 19, 2020), <https://www.nytimes.com/2020/07/16/opinion/sunday/coronavirus-blm-america-hope.html> [<https://perma.cc/R6HA-9CRS>].

political participation and make elections fairer and more representative of the national political community. These procedural improvements would advance democratic ideals and traditions. In this way, expanding the franchise benefits all Americans, whether U.S. born or naturalized citizens and whether members of a majority or minority race.