

SURVIVAL VOTING AND MINORITY POLITICAL RIGHTS

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ABSTRACT

The health of American democracy has literally been challenged. The global pandemic has powerfully exposed a long-standing truth: electoral policies that are frequently referred to as “convenience voting” are really a mode of “survival voting” for millions of Americans. As our data show, racial minorities are overrepresented among voters whose health is most vulnerable, and politicians have leveraged these health disparities to subordinate the political voice of racial minorities.

To date, data about racial disparities in health has played a very limited role in assessing voting rights. A new health lens on the racial impacts of voting rules would beneficially inform—and perhaps even fundamentally alter—how we address several common voting rights issues. A new focus on the disparate health effects of voting rules, grounded in the kind of solid empirical evidence we provide, could reinvigorate the Voting Rights Act by providing new avenues for assessing voting rights, for litigating and judging voter suppression claims under Section 2, and even informing a new coverage formula in a modified Section 5. This evidence arrives at a critical juncture for the VRA which

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has been stripped of much of its bite by the Supreme Court and is currently being debated in Congress. The clear and compelling story told by our data are a clarion call to legislators, courts, and litigators to reconceptualize and strengthen voting rights by accounting for the barriers that health disparities pose to minority access to the ballot.

CONTENTS

INTRODUCTION	3
I. PUBLIC HEALTH AND THE VOTING RIGHTS ACT	9
A. Section 2: Social and Historical Conditions.....	9
B. Section 5: Spatial Variation in Racism.....	16
II. SYSTEMIC DISPARITIES IN HEALTH.....	18
A. Modeling COVID-19 Risk and Vulnerability.....	19
B. Case Study: Texas Absentee Ballots	22
III. COVID-19 AND THE 2020 ELECTION	30
IV. COVID’S LESSONS FOR THE FUTURE OF VOTING RIGHTS	36
A. Developing Resilient, Data-Driven Approaches to Disaster Voting	38
B. Building Trust in Less Traditional Voting Methods	41
C. Focusing on Protecting Voter Health in Every Election	48
CONCLUSION.....	50

INTRODUCTION

Public health officials have uniformly warned that racial minorities face heightened risks from COVID-19, not only in contracting the virus but also in dire outcomes like hospitalization and death.¹ With this fact in mind, one has to ask whether it was pure coincidence that many of the places with the most egregious histories of undermining the votes of racial minorities opted to provide vote-by-mail options to some groups with heightened risks to the virus—the elderly and those with some underlying health conditions²—while at the same time outright refusing to accommodate racial minorities who also faced heightened risks related to COVID-19.

Candidates in American elections often rhetorically characterize the choice facing voters as one of life or death.³ However, for many voters—including many racial minorities—the life and death stakes were not rhetorical in 2020. Despite pleas and warnings from health officials to avoid social gatherings in light of the COVID-19 pandemic, more than eighty million Americans assembled in polling places and vote centers across the country to cast their ballots,⁴ and many of these voters did so because they were left with no alternative if they wanted to vote. In the

¹ See, e.g., Samantha Artiga et al., *Racial Disparities in COVID-19: Key Findings From Available Data and Analysis*, KAISER FAM. FOUND. (Aug. 17, 2020), <https://www.kff.org/report-section/racial-disparities-in-covid-19-key-findings-from-available-data-and-analysis-issue-brief/>. People living in poverty also remain at higher risk for COVID mortality. See Caitlin Brown & Martin Ravallion, *Poverty, Inequality, and Covid-19 in the U.S.*, VOX (Aug. 10, 2020), <https://voxeu.org/article/poverty-inequality-and-covid-19-us>.

² See, e.g., Yale School of Medicine, *Yale Researchers Develop Model to Estimate COVID-19 Mortality Risk in Veterans*, Dec. 2, 2020, <https://medicine.yale.edu/news-article/28980/> (reporting that “researchers discovered that age is the strongest predictor of mortality, with risk climbing after age 55”); see also *id.* (noting that “another important predictor of COVID-19 mortality is the number of diagnoses a patient has based on the Charlson Comorbidity Index (CCI), a listing of 17 health conditions”).

³ See, e.g., Cory Booker, Email To Supporters (Sept. 19, 2020) (“. . . please make sure that your family, friends, and neighbors understand the importance of getting engaged in this election. This is a life or death election in so many respects. Sitting on the sidelines is unacceptable.”).

⁴ Fifty-four percent of the 155 million people who voted during the 2020 presidential election voted in person. See Pew Research Center, *Sharp Division on Vote Counts, as Biden Gets High Marks for His Post-Election Conduct*, Nov. 20, 2020 <https://www.pewresearch.org/politics/2020/11/20/the-voting-experience-in-2020/>.

weeks following the election, thousands of voters and scores of poll workers tested positive for COVID-19.⁵

All of this occurred as Black Lives Matter protests proliferated across the nation and as white supremacists rallied openly for the incumbent President. It also occurred against the backdrop of a significantly weakened Voting Rights Act (VRA): the crown jewel of the Civil Rights movement that was stripped of much of its power by the Supreme Court⁶ while Congress floundered in restoring strength to the Act's provisions.

Could this diminished VRA provide a solution to politicians capitalizing on the pandemic to suppress minority vote? Even before the judicial assault on the VRA, health considerations—while one of many factors used to gauge racial discrimination—had rarely been more than a footnote in voting rights cases, used only to bolster other valid claims of discrimination. Frequently ignored, health considerations served at best, as garnish.

Yet, in two separate cases in different states, federal courts for the first time took health considerations in voting seriously, striking down election rules under the VRA based solely on the fact that minority communities faced heightened risks related to COVID-19 and that these risks had not been adequately taken into account.⁷ In these two cases, the courts relied on preliminary data from the CDC and general guidelines from other government agencies that highlighted the heightened risk faced by racial minorities. Unfortunately, both cases came so late in the 2020 election cycle that they were later dismissed by appellate courts on practical grounds that changes so close to the election were not feasible.

Even though both courts lacked systematic data to assess the full effects of racial health disparities on ballot access and voter participation, they were onto something far more profound and significant than they could have known at the time.

In this Article, we provide the data the courts lacked, and it is damning. Specifically, applying advanced statistical methods to a trove of public health data we provide an in-depth analysis of minority voting rights during the 2020 election. We find that minorities are not only more likely to contract and die from COVID-19, but also that the proportion of nonwhite citizens is the single leading driver of COVID-related death in

⁵ Kira Lerner & Indrani Basu, *Scores of U.S. Poll Workers Tested Positive for Covid Over Election Period*, THE GUARDIAN (Dec. 7, 2020) at <https://www.theguardian.com/us-news/2020/dec/07/pandemic-covid-coronavirus-election-poll-workers>.

⁶ See discussion accompanying notes 50-59, *infra*.

⁷ See *infra*, Part I.

America's most vulnerable counties—more than old age or any other underlying health condition. Indeed, race is the best predictor of COVID-19 case fatality rates in almost all of America's most vulnerable counties. See Figure 1 (next page).

As shocking as this is—and yet somehow at the same time still unsurprising—the data are worse than that. The data show that many of the counties in the states with a history of racial voter suppression are in states that did the very least to protect racial minorities, even though those same states threw lifelines to other vulnerable populations like older Americans. And perhaps worst of all, we show that this attempt to suppress the vote seems to have worked: voter turnout in those most at-risk counties left without protection did not keep pace with those counties with lower COVID-19 risks. In other words, elected officials who tried to leverage the pandemic to their political advantage seem to have succeeded.

To be sure, this paper provides just one more entry in the long chronicles of voter suppression of racial minorities. When the issue of racial disparities in health and voting comes before the courts, and it inevitably will, anecdotal evidence and postulation must give way to hard data and statistics. We provide some of these statistics here as well as a roadmap for gathering and presenting similar data in the future.

Our findings also provide a compelling reason for Congress to revive and reinvigorate the VRA: the recent history of racial voter suppression is a clarion call that if we leave this problem unaddressed, our future will bring more of the same. And make no mistake about it: the very rules that imperiled minority communities and prevented them from expressing their political voice, if left unchecked, increase the likelihood that they may face similar threats in the future.

Racial disparities in health outcomes are not a new phenomenon, but the COVID-19 pandemic has provided a unique window to assess empirically the connection between racial disparities in health and elections. And this new evidence we present makes other research focused on the ties between race and health all the more salient. Public health scholarship has tracked the social determinants of health for decades and found that a major contributing factor to racial disparities in public health outcomes is the subordination of communities of color.⁸ Similarly, the history of disasters and decades of disaster scholarship make clear that disaster impacts almost always disproportionately burden communities of

⁸ Angela Harris & Aysha Pamukcu, *The Civil Rights of Health: A New Approach to Challenging Structural Inequality*, 67 UCLA L. REV. 758 (2020).

color and the poor,⁹ and that both disasters themselves and government disaster response tend to expose, entrench, and exacerbate existing patterns of racial and class inequity.¹⁰

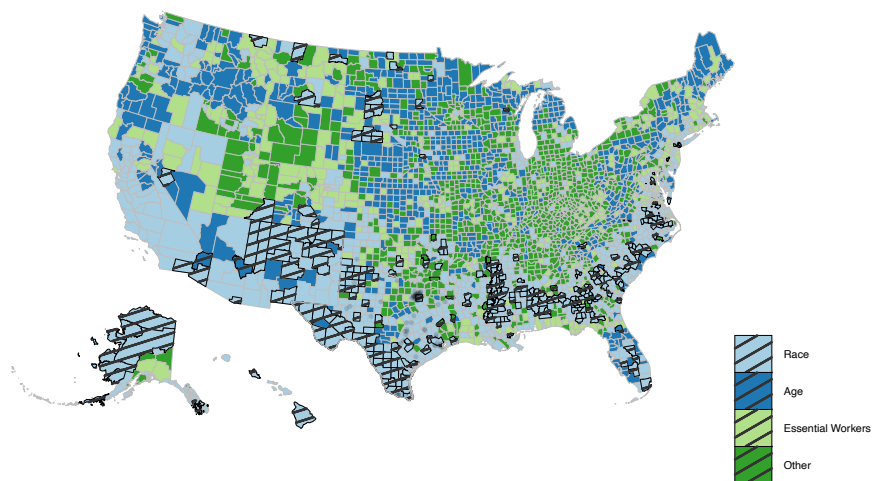


Figure 1. County-level predictors of COVID-19 case fatality (death as a percent of positive diagnosis). Counties are color-coded by the predominant factor that explains COVID-19 vulnerability. Counties in the top 10% of risk for COVID fatalities are identified with crosshatching.

The COVID-19 pandemic has laid bare how racial disparities in health, rooted in social and historical inequities, can suppress the vote in communities of color in all elections, not just during pandemics. The data we present is essential both to litigation before courts and the debates currently in Congress. While health data has historically received short

⁹ See, e.g., SUSAN L. CUTTER, *THE GEOGRAPHY OF SOCIAL VULNERABILITY: RACE CLASS, AND CATASTROPHE* (2009) (noting that while “Disasters are income neutral and color-blind,” disaster “impacts . . . are not.”). Other vulnerable groups also are disproportionately impacted by disasters. See, e.g., DANIEL A. FARBER ET AL., *DISASTER LAW & POLICY* 260 (2015) (“Women, children, the elderly, persons with disabilities, and immigrants (documented and otherwise) all suffer from disaster in ways that other victims do not.”).

¹⁰ See, e.g., Lisa G. Sun et al., *Disaster Vulnerability in Three Dimensions* (forthcoming, on file with author) (marshalling evidence that disasters and disaster aid exacerbate existing inequity and vulnerability); see also FARBER ET AL., *supra* note 9, at 228 (arguing that, although disasters are often discussed “as ‘great social equalizers,’” disasters do “not so much erase as expose social vulnerability”).

shrift in legislative efforts and VRA litigation, we present evidence that politicians can use voting rules to leverage health disparities, rooted in the subordination of racial minorities, to further subordinate and suppress minority voting power.

In Part I we discuss the relevance of public health data for minority voting rights. We trace the legislative history that introduced public health disparities into voting rights law, in particular the 1982 amendments to Section 2 of the VRA and the 2006 reauthorization of Section 5 of the VRA. We explore how health data has been used in VRA enforcement by examining every Section 2 case since 1982 and discover that, while lower courts ubiquitously refer to public health as a relevant metric, actual evidence of health disparities has generally played a relatively minor role in the disposition of cases. COVID-19 may have provided the impetus for a change to this practice. In two cases during the 2020 election cycle, courts struck down limits on absentee voting based *solely* on public health data and the recognition that public health is fundamentally related to voting rights. Because health disparities are one of the few conditions explicitly identified by the Supreme Court as probative of VRA liability, we argue that the secret for reviving the VRA may be hiding in plain sight.

In Part II we describe a novel set of indices of COVID-19 vulnerability in every county in the United States. Our indices differ from other coronavirus models in that we incorporate data on both the underlying health factors related to COVID-19 as well as the structural drivers of COVID-19 risk. Our indices do not predict where a COVID-19 outbreak will happen, but instead identify areas where a COVID-19 outbreak would be especially deadly. We also identify the primary drivers of this fatality risk. We find that race is the predominant driver of COVID-19 case fatality and population mortality rates in nearly every at-risk county (those in the top 10% of COVID-19 risk) in the United States. In other parts of the country age, wealth, underlying health conditions, and/or other factors are the primary drivers. We leverage this variation to show how voting rules interact with public health in ways that perpetuate racial subordination. For example, in Texas absentee ballots are available to individuals over the age of 65, people with a disability, and those physically absent on Election Day. In the run up to the 2020 election, state officials refused to expand the eligibility requirements for absentee ballots to include individuals at risk for COVID-19, despite political pressure and orders

from both state and federal courts.¹¹ (The state appealed the court orders, which were ultimately stayed).¹²

As our models show, the decision not to expand eligibility had important impacts on the 2020 election. In the counties where COVID-19 risk was the highest, turnout in the election was the lowest. Even more, race and ethnicity is the predominant factor of COVID-19 vulnerability in every Democratic county in the state, while a bevy of factors, including age (65+) are the primary driver for COVID-19 vulnerability in Republican counties across the state. Our findings suggest that the failure to accommodate the health risks of racial minority voters sacrificed their health and possibly their lives while diminishing their voice in the 2020 election.

In Part III we step back and evaluate the impact of COVID-19 on election laws in every state during the primaries and the November 2020 election. We find repeated examples of voter accommodations begin made for the elderly and disabled but not for racial minorities. We also find that many of the states that made the fewest accommodations for vulnerable voters in general, and racial minorities in particular, are jurisdictions that were formerly covered by Section 5 of the VRA, before its coverage formula was invalidated in *Shelby County*. This pattern suggests both an ongoing need for the protections that Section 5 once afforded minority voters and the potential for using data about racial health disparities to inform a new coverage formula.

In Part IV we consider the lessons of the COVID-19 pandemic for the future of voting rights. We argue that the pandemic has underscored the need for emergency voting procedures that are data-driven and resilient across a wide range of future potential disasters and voter situations, the importance of states building trust in less traditional voting methods, and, most importantly, the pressing need for legislators, courts, and litigants to reconceptualize voting rights to account for racial health disparities when assessing the impact of voting rules on minority access to the ballot.

In short, COVID-19 has not just complicated the regular fissures of American politics. COVID-19 has exposed a fundamental fault line about the right to vote: its protection is not a rhetorical exercise, its greatest threats are not voter fraud, and barriers to voting—particularly barriers resulting from health disparities rooted in racial subordination—are more than mere inconveniences.

¹¹ See *infra*, Part II.

¹² *Id.*

PART I

PUBLIC HEALTH AND THE VOTING RIGHTS ACT

To appreciate the implications of our findings, it is necessary to understand the role of public health data in VRA litigation. To begin this Part, we examine Section 2 of the VRA, first discussing its legislative history and summarizing the judicial neglect of public health as a probative factor for proving race discrimination in voting. We then highlight two district court cases from 2020 that relied heavily on evidence of racial disparities in COVID-19 exposure, infection, and serious illness, and death to enjoin voting rules that failed to provide adequate accommodations in violation of Section 2.

We then discuss the history of Section 5 of the VRA, including its sunset provision and subsequent evisceration by the Supreme Court in *Shelby County v. Holder*.¹³ The primary purpose for providing this background is to lay a sufficient foundation, once the implications of the data we have laid out are clear, to understand the Article's call for Congress to take health and vulnerability data into account and to revisit and revitalize the VRA.

A. Section 2: Social and Historical Conditions

Section 2 of the Voting Rights Act prohibits discrimination in voting based on race or color. When a plaintiff alleges discrimination, courts ask for evidence that any racially-disparate outcomes in political opportunity “interact with social and historical conditions” in the jurisdiction.¹⁴ In evaluating plaintiffs’ evidence, the Court looks to a list of relevant factors which include, among other things, “the extent to which minority group members bear the effects of discrimination in areas such as education, employment, *and health*, which hinder their ability to participate effectively in the political process.”¹⁵ How did this reference to public health outcomes (and systemic racism more generally) find its way into the voting rights jurisprudence?

¹³ 570 U.S. 529 (2013).

¹⁴ *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986) (“The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.”).

¹⁵ S. Rep. No. 97-417, 97th Cong. 2d Sess., 28-29 (1982)

When the Voting Rights Act was initially passed in 1965, Section 2 provided a cause of action when “any State or political subdivision den[ies] or abridge[s] the right of any citizen of the United States to vote on account of race or color.”¹⁶ In 1970 the state of Texas adopted a reapportionment plan for its state House of Representatives that used a mix of single-member and multi-member districts. The Supreme Court, looking primarily at the negative effect of multi-member districts on the political opportunities for Mexican-Americans, invalidated the districting plan in *White v. Regester*.¹⁷ The Court stopped short of interpreting Section 2 as a guarantee of proportional representation for racial and political minorities and instead (significantly in our minds) pointed to the lower court’s findings, as part of a multi-pronged “totality of the circumstances” analysis, that Mexican-Americans “had long suffered from, and continue[] to suffer from, the results and effects of invidious discrimination and treatment in the fields of education, employment, economics, *health*, politics and others.”¹⁸

In 1980 the Court heard another Section 2 challenge to the at-large voting system for city council in Mobile, Alabama. The Black population in Mobile was approximately thirty-five percent, yet no candidate preferred by Black voters had ever been elected to the three-seat city council.¹⁹ In deciding whether the at-large election system violated Section 2 of the Voting Rights Act, the Court deviated from its approach in *White v. Regester*. In *City of Mobile v. Bolden*, a plurality held that “the language of Section 2 no more than elaborates upon that of the Fifteenth Amendment and the sparse legislative history of Section 2 makes clear that it was intended to have an effect no different from that of the Fifteenth Amendment itself.”²⁰ This particular connection itself did not represent a departure from *White v. Regester*. And the link between Section 2 and the Fifteenth Amendment was quite understandable given their parallel language.²¹ The Court in *Mobile v. Bolden* went further, however, by

¹⁶ Pub. L. 89-110 (1965).

¹⁷ 412 U.S. 755, 779 (1973) (“multi-member district[s], as designed and operated in Bexar County, invidiously exclude Mexican-Americans from effective participation in political life.”).

¹⁸ *Id.* at 768 (internal citations omitted) (referring to the “standards” set forth in *Whitcomb v. Chavis*, 403 U.S. 124 (1971)) (emphasis added).

¹⁹ 446 U.S. 55, 58 (1980) (fn 1).

²⁰ *Id.* at 60-61.

²¹ U.S. CONST. AMEND. XV (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”); VRA § 2 (“No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or

interpreting the Fifteenth Amendment to prohibit discrimination “only if motivated by a discriminatory purpose.”²²

By reading an intent standard into the Fifteenth Amendment and then linking the Fifteenth Amendment to Section 2 of the VRA, the Court announced that its approach in *White v. Regester*—emphasizing the *effects* of a race-neutral law under a “totality of the circumstances” analysis—would not be sufficient going forward. Instead, plaintiffs would need to provide evidence that an electoral system’s discriminatory effects were intended, purposeful, *and* effective.²³ This holding in *Mobile v. Bolden* was at odds with the purposes of the Voting Rights Act, and the Congress immediately set about to amend Section 2 to override the Court.²⁴

The new language that Congress adopted, which has not changed since, prohibits any State or political subdivision from imposing any “voting qualification or prerequisite to voting or standard, practice, or procedure . . . in a manner *which results* in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.”²⁵ This language was adopted with the purpose of reinstating the VRA as interpreted by the Court in *White v. Regester*.

Republicans in Congress initially did not support the amended language of Section 2 for fear that the new “results test” would be used to mandate proportional representation. As a compromise, Republicans agreed to support the amendment so long as it included a disclaimer that “nothing in this section establishes the right to have members of a protected class elected in numbers equal to their proportion in the population.”²⁶ Because the Court was explicit in *White v. Regester* that the VRA did not guarantee proportional representation to racial and political minorities, this compromise was congruent with the underlying motivation for amending Section 2 in the first place. Nevertheless, a group of Senate Republicans were still wary that the “totality of the circumstances” approach in *White v. Regester* (which leaned on a set of

political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.”).

²² *Bolden*, 446 U.S. at 62.

²³ *City of Mobile v. Bolden*, 446 U.S. 55, 67-68 (1980) (“Although dicta may be drawn from a few of the Court’s earlier opinions suggesting that disproportionate effects alone may establish a claim of unconstitutional racial voter dilution, the fact is that such a view is not supported by any decision of this Court.”).

²⁴ See Christopher S. Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes*, 160 U. PA. L. REV. 377 (2012)

²⁵ 52 U.S.C. § 10301 (emphasis added).

²⁶ *Id.*

ill-defined factors discussed in a set of earlier cases²⁷) could be used in the future to implement a raw disparate impact standard for voting rules. These Republicans published a report that identified a set of factors they thought courts should evaluate as part of any totality of the circumstances analysis in future VRA litigation.²⁸ This report implicitly acknowledged the pernicious effects of systemic racism, including the relevance of racial disparities in public health, as well as education and employment, to political power.²⁹ In the first post-1982 Section 2 case to reach the Supreme Court, *Thornburg v. Gingles*, these “Senate Factors” were codified into a formal “totality of the circumstances” inquiry that is required for a finding of liability under Section 2 to this day.³⁰ In formalizing the Senate Factors, the Court in *Gingles* emphasized that racial disparities in voting must “interact[] with social and historical conditions” (which includes health conditions among other factors) in order to give rise to liability.³¹

Since *Gingles*, more than 1,500 Section 2 cases have been filed in federal courts since 1982.³² In each of these cases, plaintiffs were required

²⁷ See, e.g., *Whitcomb v. Chavis*, 403 U.S. 124, 132 (1971) (pointing to racial disparities in “housing conditions, income and educational levels, rates of unemployment, juvenile crime, and welfare assistance” and the state’s “compelling interests in such legislative areas as urban renewal and rehabilitation, health care, employment training and opportunities, welfare, and relief of the poor, law enforcement, quality of education, and anti-discrimination measures.”) and *Burns v. Richardson*, 384 U.S. 73, 87 (1966) (noting that in drawing multimember districts, the state legislature failed to take into account “community of interests, community of problems, socio-economic status, political and racial factors.”).

²⁸ S. Rep. No. 97-417, 97th Cong. 2d Sess. (1982).

²⁹ *Id.* at 28-29. The factors include “the extent of any history of official discrimination” against minority voting rights; “the extent to which” voting in the jurisdiction “is racially polarized”; “the extent to which [the jurisdiction] has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group”; whether minorities have been “denied access” to any “candidate slating process”; “the extent to which” minorities in the jurisdiction “bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process”; “whether political campaigns” have used “overt or subtle racial appeals”; and “the extent to which” minorities “have been elected to public office.” *Id.* [also some “additional factors”]

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

³¹ *Id.* at 47.

³² Authors’ search of Westlaw database for litigation filed under 52 U.S.C. § 10301 and predecessor 42 U.S.C. § 1973. See also Ellen Katz, *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. MICH. J. L. REFORM 643 (2006) (identifying “331 lawsuits, encompassing 763 decision, addressing Section 2 claims [between] 1982 [and 2006].”). Note that Section 2 litigation

to provide evidence that linked their complaints about minority voting rights to social and historical conditions. Of these 1,500 cases, courts considered evidence of public health outcomes in just fifty-six.³³ By and large, health data have played a minimal role in Section 2 litigation, comprising just a handful of sentences in published opinions. When experts introduce, and courts consider, evidence of racial disparities in health care or health outcomes, the data are almost always paired with evidence of racial disparities in education and employment in keeping with the language of the Senate Factors.

A typical example is found in *Veasey v. Perry*, a case challenging Texas’s voter ID law in 2014.³⁴ In that case, the district court judge considered nearly 100 pages of evidence, including evidence of racial disparities in public health outcomes across the state. Citing expert reports, the judge noted:

According to the U.S. Centers for Disease Control, African-Americans and Hispanics in Texas are much more likely to report being in poor or fair health, to lack health insurance, and to have been priced-out of visiting a doctor within the past year. And compared to adult Anglos throughout the state, minorities in Texas experience higher levels of health impairment—particularly those minorities who are low-income.³⁵

The court went on to find that

African-Americans and Latinos are less educated because of discrimination, suffer poorer health because of discrimination, are less successful in employment because of discrimination, and are likewise impoverished in greater numbers because of discrimination . . . This is a predictable effect of discrimination

is just a small slice of all voting rights actions brought under the VRA, whether through official federal court litigation or out-of-court settlements. See J. Morgan Kousser, *Do the Facts of Voting Rights Support Chief Justice Roberts’s Opinion in Shelby County?* TRANSATLANTICA (Jan. 9, 2016), <https://journals.openedition.org/transatlantica/7462> (reporting the total number of voting rights “actions” at 4,173 between 1982-2015).

³³ To be precise, we searched within the citing references of our Westlaw query for any case where the word “health” appeared three or more times. This search yielded 175 cases. We read each of these cases and subset the cases to just those that considered evidence about health care, health outcomes, and/or health risks (as opposed to, say, the “health” of democracy).

³⁴ 71 F.Supp.3d 627 (S.D. Tx. 2014).

³⁵ *Id.* at 666-67 (internal citations omitted).

because health, education, and employment opportunities are all interdependent.³⁶

Much like the record in *Veasey*, public health data are consistently identified as a relevant metric for distinguishing between discriminatory voting rules that serve to subordinate minority communities and accidental, temporary, or otherwise benign disparities in minority political opportunity. But just like in *Veasey*, health data are almost always a small part of the equation. Prior to 2020, Section 2 liability had never been based on evidence of disparities in public health alone.

While hardly a sea change, but potentially an important harbinger of such a change, litigation during the 2020 election cycle provided two exceptions to this trend. Significantly, in Texas and Alabama, federal courts struck down election rules under Section 2 of the VRA not merely due to amorphous health conditions, but rather based *solely* on the fact that minority communities faced heightened risks related to COVID-19. The tie to voting in both of these cases could not have been clearer because the risks posed by the pandemic implicated the rules surrounding elections themselves.

In *Mi Familia Vota v. Abbott*,³⁷ a federal court in the western district of Texas enjoined part of a gubernatorial executive order related to voting. In July 2020, Texas Governor Greg Abbott issued a statewide mask mandate, acknowledging that “health authorities have repeatedly emphasized that wearing face coverings is one of the most important and effective tools for reducing the spread of COVID-19.”³⁸ The Executive Order listed eleven exemptions from the mandate, including “any person who is voting, assisting a voter, serving as a poll watcher, or actively administering an election.”³⁹ Based on the conclusion that Black and Latino communities “experience greater risk of contraction and severity of [COVID-19] and this discriminatory effect can be eliminated, or at least mitigated, if all people wear masks at polling sites,” the court issued a preliminary injunction against the polling place exemption, noting that plaintiffs were likely to succeed on the merits of their Section 2 challenge.⁴⁰

³⁶ *Id.* at 667.

³⁷ --- F.Supp.3d ---, 2020 WL 6304991 (W.D. Tex. 2020), order stayed, 834 Fed.Appx. 860 (5th Cir. 2020).

³⁸ Tx. Exec. Order No. GA-29, (July 2, 2020).

³⁹ *Id.*

⁴⁰ 2020 WL 6304991 at 15.

In *People First of Alabama v. Merrill*,⁴¹ a federal court in the northern district of Alabama struck down a witness requirement related to absentee balloting. In order to cast an absentee ballot, Alabama law required voters to either notarize their ballot or have two witnesses sign the ballot. After an in-depth survey of health statistics, the court held that the witness requirement violated Section 2 of the VRA. The state argued that there could be no violation because “Black and White voters *who are equally at risk* for COVID-19 complications . . . face similar outcomes.”⁴² The court was not convinced, writing that “this argument ignores reality in Alabama—all things are not equal in Alabama in relation to COVID-19. Based on the evidence at trial, Black and White voters are not ‘equally at risk’ for contracting COVID-19. The plaintiffs have also shown that once infected with COVID-19, Black individuals are more likely to have serious complications and die.”⁴³

In both of these cases, the district courts’ orders were ultimately stayed pursuant to the “Purcell principle” that cautions against changing any election rules in the weeks immediately preceding an election.⁴⁴ But in both of these cases the courts recognized public health data as an especially effective window into the underlying social conditions that implicate voting rights. In *Mi Familia Vota* the court noted that “the discriminatory burden that deters Black and Latino voters is at least in part caused by *social conditions of the environment* of the COVID-19 pandemic.”⁴⁵ In *People First of Alabama*, the court wrote that “[t]he higher risk of COVID-19 infection for African Americans is tied to pre-existing and evolving inequities in structural systems and social conditions.”⁴⁶

These observations are especially poignant. In our view, public health data have been underappreciated by courts and Congress and underutilized by plaintiffs in cases challenging voting rules. Not only are public health outcomes directly related to voting (it is difficult or impossible to vote if you are sick or hospitalized), but many of the social drivers of public health are correlated with political power. As we show in Parts III and IV below, the coronavirus pandemic has exposed the political nature of public

⁴¹ 2020 WL 5814455 (N.D. Ala. 2020).

⁴² *Id.* at 68 (emphasis in original).

⁴³ *Id.*

⁴⁴ See *Purcell v. Gonzalez*, 549 U.S. 1 (2006). For a discussion of the impact of *Purcell* on election law litigation in the lower courts, see Richard L. Hasen, *Reining in the Purcell Principle*, 43 FLA. ST. U. L. REV. 427 (2016).

⁴⁵ 2020 WL 6304991 at 15 (emphasis added).

⁴⁶ 2020 WL 5814455 at 6.

health as a tool for voter suppression. This relationship existed before COVID-19 and will persist long after the pandemic finally subsides. We hope that the attention on public health and vulnerability during the 2020 election will spark a renewed focus on health disparities in VRA litigation, and the “structural systems and social conditions” that contribute to these disparities.

B. Section 5: Spatial Variation in Racism

Section 5 of the VRA requires a subset of political jurisdictions in the United States to get permission, or “preclearance,” from the federal government before making changes to their election rules or practices.⁴⁷ When Congress enacted the VRA in 1965, Section 5 was included as a check on certain states and local governments that had a long record of discriminating against racial minority voting rights. Congress instituted a sunset provision for Section 5, which has been extended four times and currently expires in 2031. The formula used to identify which states would be covered under Section 5 focused solely on contemporary state laws and voting behavior.⁴⁸ The formula did not look at employment data, education statistics, or public health data. As time went on, Congress failed to update the formula so that, by the 2010 Census, covered jurisdictions were still identified by their voter registration rates and turnout in the 1970s. Based on Congress’s failure to update the coverage formula over time, the Supreme Court freed all jurisdictions from Section 5 coverage in 2013 in *Shelby County v. Holder*.⁴⁹ Going forward, the Court held that “Congress—if it is to divide the States—must identify those jurisdictions to be singled out on a basis that makes sense in light of *current conditions*.”⁵⁰

What conditions did the Court have in mind? The majority did not say. Presumably the expectation was *not* for Congress to rely on the same conditions as they did in 1965, since, as the majority noted, voter registration and turnout among minority voters currently matched or even exceeded White registration and turnout in most of the covered states by

⁴⁷ Dept. of Justice, *About Section 5 of the Voting Rights Act*, Sept. 11, 2020 , <https://www.justice.gov/crt/about-section-5-voting-rights-act>.

⁴⁸ The formula identified states that used a “test or device” as a prerequisite to vote (e.g., a literacy test or poll tax), or where less than 50% of the voting age population were registered to vote and/or turned out to vote. See Civil Rights Division, *Section 4 of the Voting Rights Act*, DEPT. OF JUSTICE, <https://www.justice.gov/crt/section-4-voting-rights-act> (last accessed Mar. 1, 2021).

⁴⁹ 570 U.S. 529 (2013).

⁵⁰ *Id.* at 553 (emphasis added).

2013.⁵¹ Presumably, then, Congress would need to rely on different metrics to identify where minorities were most likely to suffer discrimination at the hands of state officials.

Ironically, when Congress reauthorized Section 5 in 2006 (extending the sunset provision for another 25 years), it compiled just such a record about voting discrimination from forty-six witnesses over nearly two dozen hearings.⁵² This record focused heavily on the prevalence of racially polarized voting in the covered states, but experts also introduced evidence of racial attitudes, prior liability under Section 2 of the VRA, and racial disparities in public health.⁵³ Congress found that this contemporary evidence, while not directly capturing voters' behavior, was highly correlated with the supposedly outdated coverage formula. In other words, racially polarized voting was far more prevalent, racial attitudes much worse, and racial disparities in public health more pronounced in the covered jurisdictions.

In the face of this evidence, Congress decided to reauthorize the formula as it was instead of engaging in the politically treacherous task of redefining the formula, with the hope that its careful analysis and scrutiny would serve as evidence that the formula continued to capture the current conditions of racial discrimination in voting.⁵⁴ Ultimately, the Supreme Court split five to four on this very issue. Chief Justice Roberts, writing for the majority, lamented that "Congress did not use the record it compiled to shape a coverage formula grounded in current conditions. It instead reenacted a formula based on 40-year-old facts having no logical relation to the present day."⁵⁵ Justice Ginsburg authored the dissent in which she lauded Congress for its careful analysis. "In all, the legislative record Congress compiled filled more than 15,000 pages. The compilation presents countless examples of flagrant racial discrimination since the last

⁵¹ *Id.* at 547-548.

⁵² Senator Specter (PA). "Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006." *Congressional Record* 152:96 (July 20, 2006) p. S7950.

⁵³ See, e.g., Testimony of Wade Henderson (Mar. 8, 2006) (presenting evidence of health disparities in North Carolina and Virginia between 1982-2006); Testimony of Orville Button, Exhibit 6 (Mar. 8, 2006) (discussing health disparities in Texas based on expert report from 2003 congressional redistricting in Texas); Testimony of Eugene Lee, Exhibit 1 (Mar. 8, 2006) (discussing the lack of health insurance among Asian Americans in California).

⁵⁴ For a full accounting of the legislative history of the 2006 reauthorization, see Nathaniel Persily, *The Promises and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174 (2007).

⁵⁵ 570 U.S. 529, 554 (2013).

reauthorization; Congress also brought to light systematic evidence that intentional racial discrimination in voting remains so serious and widespread in covered jurisdictions that section 5 preclearance is still needed.”⁵⁶

The disagreement in *Shelby County* ultimately boiled down to the question whether the coverage formula must be defined in exact terms or whether it can be defined by proxy measures. This was a really a question about how much deference the Supreme Court should afford Congress. Importantly, however, the debate in *Shelby County* was *not* about what kind of evidence Congress can or should rely on when identifying which states should be covered. As the Court has acknowledged in Section 2 cases, racial disparities in public health are strongly correlated with discrimination in voting.⁵⁷

As shown in this Article, racial disparities in public health are geographically concentrated in the formerly-covered states and counties.⁵⁸ Our findings below suggest that public health data may prove especially valuable as Congress contemplates updating the coverage formula in the wake of *Shelby County*.⁵⁹ As our data shows, racism is not dead in the previously covered states and counties. To the contrary, race is the leading indicator of COVID-19 mortality in America’s most vulnerable counties, and many of those most vulnerable counties are in former covered jurisdictions.

PART II

SYSTEMIC DISPARITIES IN HEALTH

In this Part, we describe our indices of COVID-19 vulnerability. Our approach differs from other coronavirus models in that we rely on a rich dataset that captures both the underlying health factors related to COVID-19, as well as the structural drivers of COVID-19 risk. We are the first to systematically explore the relative weight of these intertwined factors on COVID-19 fatality. Our indices do not predict where a COVID-19 outbreak will happen, but they identify areas where a COVID-19 outbreak would be especially deadly, and the primary drivers of this risk.

In Section A we discuss our datasets and how we went about the task of measuring the vulnerability of every county in the United States to

⁵⁶ *Id.* at 565.

⁵⁷ See *supra* notes 45–46 and accompanying text.

⁵⁸ See *supra*, Fig. 1.

⁵⁹ See, e.g., For the People Act of 2021, H.R. 1, 117th Cong. (2021).

COVID-19. In Section B we discuss the results of our analysis. Specifically, the data show that many of the most vulnerable counties are not only those home to many racial minorities, but in the vast majority of the most vulnerable counties the strongest driver of COVID-19 mortality is race. We then provide a case study with damning results. When we apply what we learned about the link between racial identity and COVID-19 to explore the implications of Texas's decision to provide vote-by-mail options to the elderly and those with underlying health conditions, but not to racial minorities, we find that this decision targeted racial minorities with precision, and that voter turnout in the most vulnerable counties was dampened compared to those counties that were less vulnerable. In other words, failure to accommodate the needs of its minority citizens led Texas to suppress their vote.

A. Modeling COVID-19 Risk and Vulnerability

To help visualize the relationship between public health and voting rights, we developed a set of indices related to COVID-19, drawing on public health statistics and data on various socioeconomic factors (more on this below). Although we focus on COVID-19, our methodology can be replicated for any public health concern. Indeed, as the current pandemic recedes, we argue that public health officials and election administrators should be collaborating to address the public health problems that will endure beyond the current crisis, and that likely predated COVID-19.

In short, the indices that we present in this paper detect areas of the United States where individuals are more likely to be exposed to COVID-19, and they also identify places where a COVID-19 outbreak would be especially lethal. Our measures of COVID-19 risk and vulnerability differ from raw case counts, which are the most common metric of COVID-19 exposure. For example, the online COVID-19 case count tracker hosted by Johns Hopkins University⁶⁰ receives more than one billion site visits per day.⁶¹ Case counts are also tracked and reported by the Centers for

⁶⁰ *COVID-19 United States Cases by County*, JOHNS HOPKINS UNIVERSITY, <https://coronavirus.jhu.edu/us-map> (last accessed Mar. 1, 2021).

⁶¹ Jocelyn Kaiser, "Every Day is a New Surprise." *Inside the Effort to Produce the World's Most Popular Coronavirus Tracker*, SCIENCE (Apr. 6, 2020), <https://www.sciencemag.org/news/2020/04/every-day-new-surprise-inside-effort-produce-world-s-most-popular-coronavirus-tracker> (noting that the Johns Hopkins dashboard "gets more than 1 billion hits a day [and] has become the most authoritative source for COVID-19 case data. It is used by news organizations and government agencies around the world.").

Disease Control (CDC),⁶² the World Health Organization (WHO),⁶³ The New York Times,⁶⁴ and other state and local agencies.⁶⁵

Our indices dig deeper than raw case counts by highlighting the latent vulnerability of a community to COVID-19 as opposed to the current prevalence of COVID-19 cases, which can vary significantly over time and has also been shown to be a poor indicator of actual risk.⁶⁶ Latent vulnerability to COVID-19 is more stable over time, and thus a better metric for public policymaking with a longer time horizon.

Our indices—designed and produced by our team of public health, statistics, and legal experts—draw on county-level health, socioeconomic, and other demographic data available in publicly available records.

First, we record the county-level rates of smoking, obesity, diabetes, and deaths due to heart disease (a proxy for hypertension) because these particular conditions have been shown to greatly increase the risk of severe illness or death from COVID-19.⁶⁷ Second, we record socioeconomic factors that are correlated with the risk of COVID exposure: race, the percent living below the poverty line, percent uninsured, and prevalence of those employed as essential workers, including in healthcare support, food service and preparation, manufacturing, production, and transportation, and other occupations where social presence is necessary. Finally, because age plays such an important role in determining vulnerability to COVID-19, we capture the percent of population age 65 or older. Summary statistics are presented in Table 1.

⁶² *COVID Data Tracker*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://covid.cdc.gov/covid-data-tracker/#datatracker-home> (last accessed Mar. 1, 2021).

⁶³ *WHO Coronavirus Disease (COVID-19) Dashboard*, WORLD HEALTH ORG., <https://covid19.who.int/> (last accessed Mar. 1, 2021).

⁶⁴ *Coronavirus in The U.S.: Latest Map and Case Count*, N.Y. TIMES, <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html> (last accessed Mar. 1, 2021).

⁶⁵ See, e.g., *State Emergency Operations Center*, COLORADO DEPT. OF HEALTH & ENV'T., <https://covid19.colorado.gov/> (last accessed Mar. 1, 2021).

⁶⁶ See, e.g., Youyang Gu (@youyanggu), TWITTER (Feb. 17, 2021, 11:39 AM), <https://twitter.com/youyanggu/status/1362109356481933312> (noting that the percent of population infected with COVID-19 through Sept. 1, 2020—an aggregate of case counts—had no predictive power ($R^2 < 0.02$) on the severity of the “third wave” surge of cases just a few months later in the fall of 2020.).

⁶⁷ See *People With Certain Medical Conditions*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> (defining severe illness as “hospitalization, admission to the ICU, intubation or mechanical ventilation, or death.”).

	Top Decile Counties (N=308)	All Counties (N=3142)
Minority Race	52.99 (23.6)	23.50 (20.2)
Uninsured	15.62 (7.0)	10.08 (5.1)
Essential Workers	9.52 (2.6)	11.34 (2.9)
Over 65 Years	17.27 (5.1)	18.37 (4.6)
Current Smokers	19.71 (5.3)	17.87 (3.7)
Obese	35.37 (7.6)	33.43 (5.9)
Diabetes	12.54 (4.7)	10.49 (3.5)
Heart Disease (Deaths/1000)	48.87 (57.0)	34.25 (111.9)
COPD (Deaths/1000)	39.74 (16.1)	38.22 (13.0)
Pop Density (per sq mile)	694.18 (5164.5)	267.54 (1782.4)

Table 1. Model variables for all 3,142 counties and for counties in the top decile according to the COVID-19 Vulnerability Index, Table entries are mean (SD).

We then match up COVID-19 case counts and case-fatality rates across the country with the various risk factors described above using a regression. (A full description of our models is presented in the Appendix). More specifically, we run a zero-inflated negative binomial regression of COVID-19 deaths (at the county level) with all the risk-factor subcategorization variables. We include population density as a control variable and case counts as an offset. We then observe the posterior predictive distribution for each county's mortality rate (COVID-19 deaths as a percent of the overall population) and case fatality rate (the likelihood of dying once contracting COVID-19). We divide these posterior distributions into deciles to address the uncertainty inherent in our modeling approach. Our models lack the precision necessary to confidently compare the 100th worst county from the 101st worst county. However, we have high confidence in our comparisons of the top 10% of counties to the lowest 10% of counties, or the median county, or the average of all counties. And these comparisons reveal important trends. Counties in the top decile for COVID-19 risk are significantly less White (53% nonwhite population compared to overall average of 23.5%), more urban (694 people per square mile versus 268), with higher populations of

uninsured (15.6% versus 10%), and higher death rates due to heart disease (48.9 per 1,000 versus 34.4 per 1,000). See Appendix for more details.

By identifying the counties most at-risk to the pandemic, we are able to observe how voting rules interact with public health to bolster, or in some cases undermine, the literal health of elections. Not every health risk is as visible or as publicized as COVID-19, but focusing on the pandemic highlights just how pervasive health disparities are, and how they directly implicate minority voting rights. We also hope that our models will help state and local election administrators identify where to focus their limited resources to make the most meaningful difference in the face of public health risks in the future.

B. Case Study: Texas Absentee Ballots

We evaluate the relationship between our indices of COVID-19 vulnerability and minority voting rights using a geographic information system (GIS) framework. To provide an illustrative example of our spatial analyses, we dissect the dispute about absentee and mail-in ballots in Texas during the 2020 election cycle. As we show below, the failure to expand access to absentee ballots proved quite detrimental to the voting rights of those most at-risk, especially when that risk was correlated with race.

Texas first provided for absentee voting in primary elections in 1917.⁶⁸ To be eligible, a prospective voter had to appear in person with a poll tax certificate in hand and, in the presence of two witnesses, complete a ballot and postmark it to be mailed to the election judge at the voter's polling place. In 1921, the absentee voting process was amended to permit ballots to be sent directly to absentee voters,⁶⁹ and in 1933 the process was expanded to apply to all elections, not just primaries.⁷⁰ The eligibility requirements for absentee ballots slowly expanded over the next fifty years, first to include those with a doctor's certificate that illness or disability would make it impossible for the voter to appear at the polling place (1935),⁷¹ then those who wished to vote absentee for religious reasons (1969),⁷² and finally to non-felons currently in jail and anybody over the age of 65 (1975).⁷³

⁶⁸ Tx. Rev. Civ. Stat. Art. 2954 (1917).

⁶⁹ Act of Mar. 12, 1921, 37th Leg., R.S., ch. 113, § 1, 1921 Tex. Gen. Laws 217, 218.

⁷⁰ Act of Jan. 30, 1933, 43rd Leg., R.S., ch. 4, § 1, 1933 Tex. Gen. Laws 5, 5–6.

⁷¹ Act of May 17, 1935, 44th Leg., R.S., ch. 300, § 1, 1935 Tex. Gen. Laws 700, 700.

⁷² Act of May 24, 1963, 58th Leg., R.S., ch. 424, § 14, 1963 Tex. Gen. Laws 1017, 1034.

⁷³ Act of May 30, 1975, 64th Leg., R.S., ch. 682, § 5, 1975 Tex. Gen. Laws 2080, 2082.

The absentee ballot laws were changed in other ways over time, including adding pregnancy to the list of eligible disabilities (1963), dropping the requirement for a doctor's authentication of disability (1981), and requiring original application forms to be mailed even if a copy was delivered by e-mail or fax (2018), but the eligibility requirements remained the same.

In 2020, a group of voters sued the State for failure to provide absentee ballots for the presidential primary election to anybody fearful of contracting COVID-19 by voting in person. A state judge ruled in favor of the plaintiffs, first by interpreting the word "disability" to encompass voters who are unwilling to vote in person due to COVID-19, and second by pointing to a general provision in the state's election code that any person "who is being harmed or is in danger of being harmed by a violation of threatened violation of [the election] code is entitled to appropriate injunction relief to prevent the violation from continuing or occurring."⁷⁴ The judge provided equitable relief in the form of a temporary injunction against the Travis County clerk forbidding rejection of absentee ballot applications by those who rely on the disability category to cover their fear of contracting COVID-19. The parties were ordered to appear in court after the primary election to reassess the situation with respect to the general election in November.⁷⁵ The temporary injunction was upheld by an appeals court,⁷⁶ but ultimately overturned by the Texas Supreme Court, which determined that the word "disability" referred only to "physical conditions" that did not include lack of COVID-19 immunity or fear of contracting COVID-19.⁷⁷

At the same time these challenges were working their way through the state courts, the same group of plaintiffs filed a challenge in federal court, alleging that the state's absentee ballot laws violated various provisions of the U.S. Constitution and that failure to accommodate the fears of voters who do not want to contract COVID-19 amounted to a conspiracy to interfere with the fundamental right to vote by a protected class in violation of the VRA.⁷⁸ While the district court agreed with the plaintiffs

⁷⁴ Tx. Dem. Party v. DeBeauvoir, No. D-1-GN-20-001610 (Travis Cty. Apr. 17, 2020) (quoting Tex. Elec. Code § 273.081).

⁷⁵ *Id.*

⁷⁶ Tex. v. Tex. Dem. Party, No. 14-20-00358-cv (14th Ct. App. May 14, 2020).

⁷⁷ In re Texas, No. 20-0394 (Tex. S. Ct.), May 27, 2020. The supreme court did acknowledge that state law does not require voters to provide evidence of any disability when they check the disability box on the absentee ballot request form, raising the question how the state intended to enforce its opposition to COVID-motivated requests.

⁷⁸ Tex. Dem. Party vs. Abbott, 461 F.Supp.3d 406, 450-451 (W.D. Tx. 2020).

on each one of their allegations,⁷⁹ the Fifth Circuit vacated the lower court's injunction against state and local election officials.⁸⁰

In its opinion, the Fifth Circuit spent considerable attention on the allegation that the age cutoff for absentee ballot eligibility violates the Twenty-Sixth Amendment, which prohibits discrimination in voting “on account of age.”⁸¹ By contrast, the Fifth Circuit did not evaluate the allegation of race discrimination, or conspiracy to violate the VRA at all. As we show below, the Fifth Circuit's relative emphasis on concerns about race vs. age does not match the facts on the ground.

In the end, Texas expanded the early voting period for both the 2020 primary and general elections,⁸² but did not amend its absentee ballot eligibility requirements or make any other efforts to make mail-in voting more accessible.⁸³ As Texas Attorney General Ken Paxton wrote in response to the first court injunction: “expan[ding] mail-in voting will only serve to undermine the security and integrity of our elections and to facilitate fraud.”⁸⁴

In the eyes of the Fifth Circuit, the absentee ballot policy in Texas raised more red flags with respect to age than to race. In the eyes of Texas's governor, attorney general, and several local elections officials, absentee ballots posed a risk to the integrity of the election itself. No matter that COVID-19 itself was highly racialized and posed its own threat to the integrity and security of the 2020 election. Indeed, as our COVID-19 indices reveal, race was by far the more important factor for consideration, and the partisan alignment of the state's public health

⁷⁹ *Id.* at 420 (“IT IS ORDERED that during the pendency of pandemic circumstances: (1) Any eligible Texas voter who seeks to vote by mail in order to avoid transmission of COVID-19 can apply for, receive, and cast an absentee ballot in upcoming elections during the pendency of pandemic circumstances.”).

⁸⁰ *Abbott v. Tex. Dem. Party*, 978 F.3d 168 (5th Cir. 2020).

⁸¹ U.S. CONST., AMEND. XXVI.

⁸² See Patrick Svitek, *Texas Will Extend Early Voting Period This Fall, Gov. Greg Abbott Says*, TEX. TRIB. (May 28, 2020), <https://www.texastribune.org/2020/05/28/texas-2020-early-voting-greg-abbott-coronavirus/>.

⁸³ On the contrary, Governor Abbott issued an executive order limiting the number of absentee ballot drop boxes to one per county, no matter the county's size or population. See Jolie McCullough, *Texas Counties Will be Allowed Only One Drop-Off Location for Mail-In Ballots, State Supreme Court Rules*, TEX. TRIB. (Oct. 27, 2020), <https://www.texastribune.org/2020/10/27/texas-voting-elections-mail-in-drop-off/>.

⁸⁴ Texas Attorney General, *AG Paxton: Voting by Mail Because of Disability Must be Reserved for Texas Suffering from Actual Illness or Medical Problems*, Apr. 15, 2020, <https://www.texasattorneygeneral.gov/news/releases/ag-paxton-voting-mail-because-disability-must-be-reserved-texans-suffering-actual-illness-or-medical>.

accommodations raise questions about the integrity of Texas's election, far more than the risk posed by an expanded pool of absentee voters.

In Figure 2 (next page), we present a series of maps that illustrate the geographic distribution of COVID-19 risk in Texas, by county. The two maps in the top row (maps A and B) are color-coded by the health or socioeconomic factor that our model identifies as the predominant factor for COVID-19 vulnerability.

As the maps clearly illustrate, *Race*, meaning the proportion of nonwhite population, is the primary driver of COVID-19 vulnerability in 162, or nearly two-thirds (64%) of all counties (shaded turquoise), covering virtually every area of the state except the northern parts of the Prairies and Lakes region. *Age*, the percent of individuals age 65 or older, is the predominant factor of COVID-19 vulnerability in thirty counties (shaded blue), while the percent of *Essential Workers* is the predominant factor in just thirteen counties (shaded lime green). The predominant factor for COVID-19 vulnerability in the remaining forty-nine counties is a mix of the remaining health or socioeconomic variables in our model (shaded dark green).

Layered on top of these factors are crosshatches that signal counties where risk of death from COVID-19 is in the top 10% of all counties across the country. In Map A, death is measured as a percent of the population that has tested positive for COVID-19 (case fatality). In Map B, death is measured as a percent of the overall population (mortality). These two metrics are similar yet capture different elements of risk.

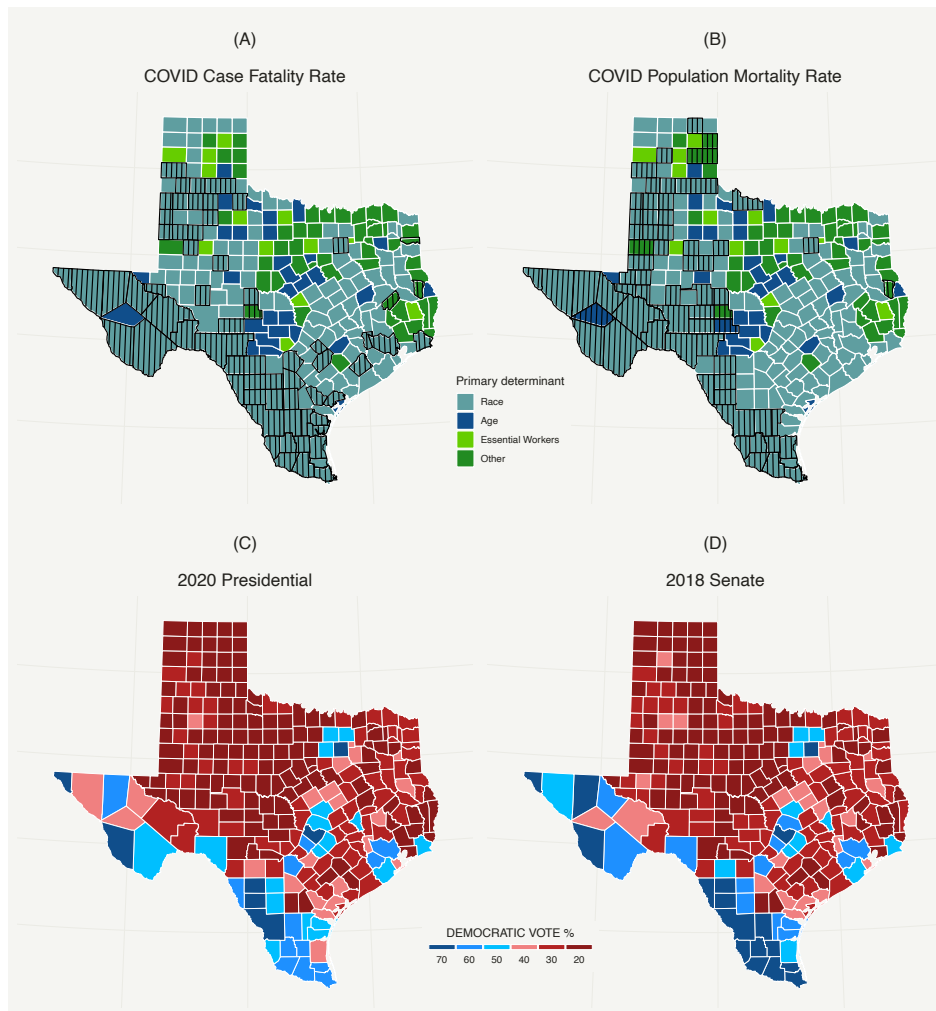


Figure 2. County-level maps of Texas. The top two maps are color-coded based on the single factor that is the largest contributing factor to COVID-19 risk. Map (A) illustrates case fatality rates and Map (B) illustrates overall population mortality rates. The bottom two maps are color-coded based on electoral returns. Map (C) reflects county-level Democratic vote share in the 2020 presidential election between President Trump and Joe Biden. Map (D) reflects the county-level Democratic vote share in the 2018 Senate race between Ted Cruz and Beto O'Rourke.

Whereas the population mortality rate captures underlying vulnerabilities to COVID-19, the case fatality rate reflects different coronavirus testing strategies and capacities, differing quality of and access to healthcare, as well as any underlying vulnerabilities. As Figure 1 illustrates, these two measures identify a very similar set of at-risk counties, suggesting that COVID-19 testing and palliative care is

relatively lacking precisely where COVID-19 vulnerability is high (with the exception of a half dozen counties in the Gulf Coast region where the case fatality rate exceeds the overall mortality rate).

Sixty-seven counties are in the top decile of all counties nationwide for case fatality. Race is the predominant factor of COVID-19 vulnerability in 63 (or 94%) of these counties. A similar relationship exists for population mortality, where race is the primary driver of COVID-19 vulnerability in 61 of the 69 counties. Of the thirty counties where age is the primary predictor of COVID-19 risk, *zero* are in the top decile of case fatality, and just two are in the top decile for population mortality.

The full extent of these findings becomes clear when we overlay a map of political variables on these health dynamics. The two maps in the bottom row of Figure 2 (maps C and D) reflect the Democratic vote share by county in the last two national elections. A familiar pattern emerges in both elections: voters overwhelmingly favor the Republican candidate in the vast majority of counties in the state (224 of 254). The Democratic candidates—Joe Biden in 2020 and Beto O’Rourke in 2016—earned more than 50% of the vote in the state’s three largest metropolitan areas and in border counties along the Rio Grande.

These voting patterns in Texas have been consistent in every presidential and midterm election since 2000.⁸⁵ One striking detail is just how similar the Democratic vote share is to COVID-19 mortality. With the notable exception of a dozen counties in the Panhandle Plains region, the most dangerous places to live in Texas when it comes to COVID-19 are the counties where most of the state’s Democratic voters live. This particular finding is not unique to Texas. A nationwide analysis by Youyang Gu, the data scientist behind a COVID-19 projection website,⁸⁶ found that the statewide Democratic margin of victory in the 2020 election was a stronger predictor of the fall surge in COVID-19 cases than any other variable in his models, including past infection rates, current immunity (due to exposure and vaccines), population density, race, and other geographic factors such as latitude, weather, humidity, etc.⁸⁷

⁸⁵ *Election Information and Turnout Data*, TEX. SEC. STATE, <https://www.sos.state.tx.us/elections/historical/index.shtml> (last accessed Mar. 1, 2021).

⁸⁶ *COVID-19 Projections Using Machine Learning*, <https://covid19-projections.com/> (last accessed Mar. 1, 2021).

⁸⁷ See, e.g., Youyang Gu (@youyanggu), TWITTER (Feb. 17, 2021, 11:39 AM), <https://twitter.com/youyanggu/status/1362109356481933312> (reporting that for every 5% gain in Democratic vote share, the subsequent COVID-19 infection rate increased by 1%).

	# of counties			Top 10%	
	Won the vote	Race is primary driver	Age is primary driver	COVID-19 Case Fatality	COVID-19 Population Mortality
Biden (2020)	20	20	0	17	15
O'Rourke (2018)	30	30	0	26	20

Table 2. Summary of Texas counties that supported Democratic candidates in 2020 and 2018.

Digging deeper, the maps in Figure 2 reveal another important relationship. Joe Biden won twenty counties in the 2020 election, and Beto O'Rourke won thirty counties in the 2018 midterm election. Without exception, race was the primary driver of COVID-19 vulnerability in every single one of these counties. See Table 2.

By way of contrast, race was the primary driver of COVID-19 vulnerability in 58% of Republican counties. While this represents a majority of Republican counties, a significant portion of Republican voters live in areas where COVID-19 risk is primarily due to age (13%), essential workers (5%) or a mix of other factors (22%). Equally notable, less than one quarter of Republican counties are in the top 10% of COVID-19 risk nationwide.

Herein lies the rub. For all of the attention paid to public health during the 2020 election, the debate over absentee ballot eligibility involved a lot of partisan posturing. The legal challenges were filed by the Democratic Party. And the Republican opposition to expanding absentee ballot was based on a political calculation that absentee ballots would be more likely to help Democratic voters. Had the fallout from this debate been limited to politics, the results would have been disappointing as the opportunity to vote was not made equally available to all voters. (see Figure 3).

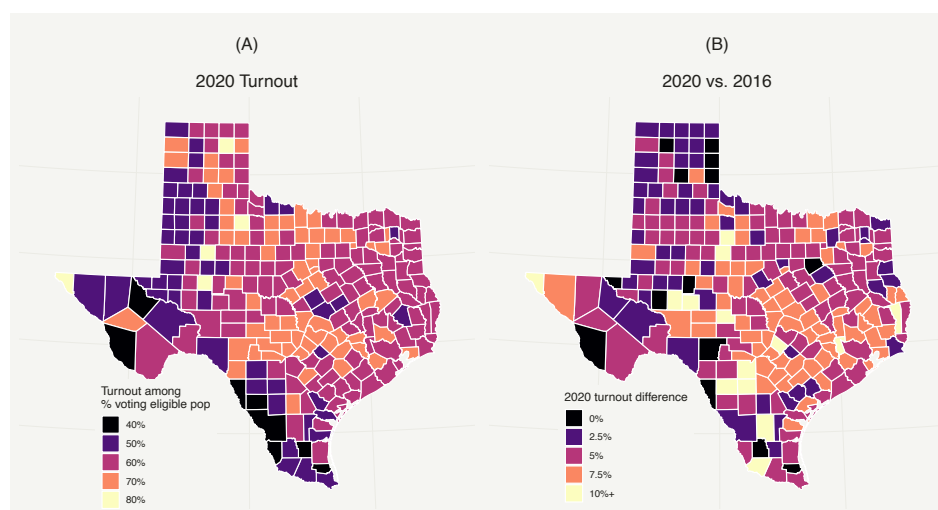


Figure 3. County-level voter turnout. In Map (A) counties are color-coded by the percent of voting eligible population that voted in the 2020 presidential election. In Map (B) counties are color-coded by the change in turnout between 2016 and 2020. Overall, turnout increased by 6.6 percent across the state, with significant variation between individual counties.

But these kinds of effects are the cost of doing business in the competitive world of winner-take-all politics. What makes the Texas story a valuable case study is the impact that these political decisions had on the health and safety of the state's citizens and, in particular, the impact of these decisions on minority communities. Our findings confirm the adage that partisanship is a helluva drug.⁸⁸

Elected officials carry a mandate to represent all of their constituents, even as they run campaigns every few years that appeal to a subset of these constituents. When these interests collide—when the most fundamental task of our leaders (to keep us safe) finds itself in tension with the desire to win the next election—the Texas example teaches us that partisanship trumps governance, at least in 2020.⁸⁹

In the majority-minority counties along the Rio Grande, COVID-19 was a life-threatening reality. In 2020, the health and lives of these minority communities were put at risk for political gain. But the impacts run even deeper, as the very rules that imperiled these communities

⁸⁸ See Justin Levitt, *The Partisanship Spectrum*, 55 WM. & MARY L. REV. 1787 (2014).

⁸⁹ Political scientists have long studied this phenomenon. See, e.g., DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (1974).

prevented them from expressing their political voice, which increases the likelihood that they may face similar threats in the future.

PART III COVID-19 AND THE 2020 ELECTION

Texas was not the only state that grappled with difficult questions about how to conduct elections during the COVID-19 pandemic. The disease was declared a global pandemic in March 11, 2020 by the World Health Organization, and two days later President Trump issued a national emergency declaration.⁹⁰ These declarations were issued smack in the middle of the presidential primary election cycle. State election officials in the twenty-six states that had yet to hold their primary election or caucus scrambled to respond to the emergency. One of the most pressing challenges was to understand exactly what COVID-19 was, who was most vulnerable, and how it spread. Relatively little was publicly known about the virus on March 13, when President Trump declared a national emergency, and while only 1,645 individuals had tested positive for COVID-19 in the U.S., it was clear that the virus was spreading and that large gatherings would likely exacerbate that spread. The nature of the virus and the timing of the primary elections made the public health costs of voting salient from the very beginning of the pandemic.

The risks posed by the pandemic caught the attention of many state lawmakers. While elections are primarily run at the county level,⁹¹ and while states generally do not provide much guidance to local governments on how to respond to election emergencies,⁹² most of the early responses to election administration after the Trump's emergency declaration came from governors and state legislatures.

The 2020 primary elections were the first test of states' ability to adapt their election procedures on the fly to address the immediate risk of voting during a pandemic, in the face of substantial uncertainty and serious time constraints. A number of states acted quickly: within a week of President

⁹⁰ Donald J. Trump, *Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak* (March 13, 2020) at <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/> (declaring an emergency retroactively effective March 1).

⁹¹ HEATHER GERKEN, *THE DEMOCRACY INDEX* (2012) (noting the "hyper-decentralized" nature of American elections).

⁹² Michael T. Morley, *Election Emergencies: Voting in the Wake of Natural Disasters and Terrorist Attacks*, 67 EMORY L.J. 545 (2018).

Trump's March 13 emergency declaration, seven states postponed their primaries⁹³ and the timing and/or mode of voting was ultimately changed in sixteen states.⁹⁴ Nonetheless, states encountered a wide variety of obstacles as they attempted to address these looming health concerns.

In some states, policymakers quickly became embroiled in politics that hindered their ability to alter the election rules. For example, in Wisconsin the Democratic governor's call for postponement was rebuffed by a Republican legislature, with each accusing the other of leveraging the pandemic for political gain. The governor, after acknowledging that he lacked authority to order postponement,⁹⁵ issued an executive order the day before the election postponing in-person voting and extending the absentee ballot deadline for 60 days.⁹⁶ The fight over postponement ended up in the Wisconsin Supreme Court, where a divided court rejected the government's attempt to postpone in a party-line vote by elected judges (one of whom was in a tough reelection fight).⁹⁷

Even states with unified government were sometimes unable to mount a coordinated response, resulting in chaos and uncertainty as scheduled elections loomed. While Ohio was the first state to postpone its primary, just four days after the President's emergency declaration, it was the governor who ordered the postponement, after the legislature rebuffed his call to act, despite the governor's admission that he lacked authority to

⁹³ See Nathaniel Rakich, *5 States Have Postponed Their Primaries Because of the Coronavirus*, FiveThirtyEight, Mar. 17, 2020, <https://fivethirtyeight.com/features/5-states-have-postponed-their-primaries-because-of-the-coronavirus/> (reporting that, as of March 17, 2020, Ohio, Louisiana, Georgia, Kentucky, Maryland had postponed their primaries); Yelena Dzhanova & Jacob Pramuk, *Indiana is the Latest State to Postpone its 2020 Primary*, CNBC, Mar. 20, 2020, <https://www.cnbc.com/2020/03/20/coronavirus-indiana-postpones-2020-primary.html> (adding Indiana and Connecticut to the list of states postponing primaries).

⁹⁴ See Nick Corasaniti & Stephanie Saul, *16 States Have Postponed Primaries During the Pandemic*, N.Y. TIMES (Aug. 10, 2020), <https://www.nytimes.com/article/2020-campaign-primary-calendar-coronavirus.html> (reporting that Alaska, Connecticut, Delaware, Georgia, Hawaii, Indiana, Kentucky, Louisiana, Maryland, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, West Virginia, and Wyoming "either pushed back their presidential primaries or switched to voting by mail with extended deadlines").

⁹⁵ Evers Facebook video: "Folks, I can't move this election or change the rules on my own. My hands are tied," Evers said in the Facebook video. "And that's why I spoke to legislative leaders about this weeks ago. I even publicly called upon them to act. They have made it clear they are unwilling to make changes."

⁹⁶ See Astead W. Herndon & Jim Rutenberg, *Wisconsin Election Fight Heralds a National Battle Over Virus-Era Voting*, N.Y. TIMES (Apr. 6, 2020), <https://www.nytimes.com/2020/04/06/us/politics/wisconsin-primary-voting-coronavirus.html>.

⁹⁷ See *id.*

postpone the election.⁹⁸ Lawsuits⁹⁹ and misinformation and confusion in the media and among local election officials and poll workers ensued,¹⁰⁰ until the Ohio Supreme Court allowed the postponement to proceed, in a ruling issued at 4:00 AM the morning of the scheduled election (just two-and-a-half hours before voting would otherwise have begun).¹⁰¹

In states with robust election emergency laws, leaders were able to navigate the primary season with the most success. For example, in Georgia, the Governor declared a state emergency, which authorized the Georgia Secretary of State, under state law, to postpone the presidential primary. The Secretary of State immediately postponed the primary until late May, and later until June 9, the latest possible date under state law. The extra time permitted the Secretary of State's office to mail absentee ballot applications to all 6.9 million active registered voters in the state. The result was a five-fold increase in votes cast by mail, in addition to a surge in in-person voting. The resulting turnout "shatter[ed] the state's record for turnout set in the presidential primary four years" earlier.¹⁰²

As the crush of primaries passed, it became apparent that COVID-19 wasn't going anywhere and that states would need to evaluate whether their voting laws would adequately protect the public health during the November 2020 presidential election. Some states—Oregon, Washington, Colorado, and Utah¹⁰³—were in relatively good shape because, well

⁹⁸ Amy Acton, *In Re: Closure of Polling Locations in the State of Ohio on Tuesday March 17, 2020*, Director's Order (Mar. 16, 2020), https://content.govdelivery.com/attachments/OHOOD/2020/03/17/file_attachments/1402754/Director%27s%20Order%20Closure%20of%20the%20Polling%20Locations.pdf.

⁹⁹ The judge issued the following statement: "There are too many factors to balance in this uncharted territory to say that we ought to take this away from the legislature and elected statewide officials, and throw it to a Common Pleas court judge in Columbus 12 hours before the election."

¹⁰⁰ At one point, media outlets mistakenly reported that the election had been postponed, and state officials conveyed the same message to county boards of elections who told poll workers not to show up for work the next day. Clarifying phone calls followed, alerting poll workers to show up for the election that was still on (until it wasn't). CITE

¹⁰¹ Rick Rouan & John Fatty, *Coronavirus: Ohio Supreme Court Allows Delay to Primary Election*, COLUMBUS DISPATCH (Mar. 16, 2020), <https://www.dispatch.com/news/20200316/coronavirus-ohio-supreme-court-allows-delay-to-primary-election>

¹⁰² Mark Niesse, *Turnout Broke Records in Georgia Primary Despite Coronavirus Threat*, ATLANTA J. CONST. (July 11, 2020), <https://www.ajc.com/news/state--regional-govt--politics/turnout-broke-records-georgia-primary-despite-coronavirus-threat/G1JnSflr1YMOU06btlnbVJ/>

¹⁰³ Utah authorized its counties to institute universal vote-by-mail in 2012, and by 2018, all Utah counties had adopted that approach. See John Franchi, *Why Vote by Mail Works*

before the pandemic, they had already moved to an election system that could minimize health risks: universal mail in balloting. Hawaii's legislature had also decided pre-pandemic (in 2019) to move to universal vote-by-mail, and its August 2020 primary was the state's first vote-by-mail election.¹⁰⁴

By October 13, three weeks before the election, states had sorted themselves into four basic categories of COVID-19 accommodations. *Universal mail-in voting*: ten states and the District of Columbia implemented universal mail-in voting, meaning ballots were mailed to all registered voters.¹⁰⁵ *Universal absentee voting*: fifteen states sent absentee ballot applications to all registered voters.¹⁰⁶ *No-excuse absentee voting*: twenty states provided an absentee ballot to anybody who requested one, either by moving to a no-excuse system or by specifying that fear of COVID-19 exposure satisfied one of the existing excuses for absentee voting.¹⁰⁷ *Status quo*: five states did very little to address the risks of

in Utah, FOX NEWS, June 10, 2020, <https://www.fox13now.com/news/local-news/why-vote-by-mail-works-in-utah>.

¹⁰⁴ See *The 2020 Elections are Hawaii's First Conducted (Almost) Entirely by Mail*, Hawaii News Now, June 11, 2020, <https://www.hawaiinewsnow.com/2020/06/11/primary-election-is-hawaiis-first-conducted-almost-entirely-by-mail/>.

¹⁰⁵ These states were California, Colorado, Hawaii, Montana, Nevada, New Jersey, Oregon, Utah, Vermont, and Washington. In the case of Montana, authority was granted to each county to make the determination whether to administer universal mail-in voting. All but ten of the counties chose to do so. See Gwen Florio, *46 Montana Counties File Mail Ballot Plans*, MISSOULIAN (Sept. 4, 2020), https://missoulian.com/news/state-and-regional/govt-and-politics/46-montana-counties-file-mail-ballot-plans/article_b14cfead-9bbc-5601-95c3-d69c0a0563f0.html.

¹⁰⁶ These states were Arizona, Connecticut, Delaware, Iowa, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, North Dakota, Ohio, Rhode Island, South Dakota, Wisconsin, and Wyoming. In Arizona, counties sent registered voters an application to join the "Permanent Early Voting List" which would make them eligible to receive an actual ballot in all future elections for which they are eligible to vote. Because North Dakota does not require voters to register, it mailed applications for mail-in-ballots (before its June primary) to "all active voters"—that is, "anyone who cast a ballot in the last two elections." Voters could use that application to request a mail-in-ballot for both the primary and general election. See Michelle Griffith, *North Dakota has Sent Out More than Twice the Number of Mail-in Ballots to Residents than in 2016*, GRAND FORKS HERALD, Oct. 14, 2020.

¹⁰⁷ These states were Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Illinois, Kansas, Kentucky, Maine, Missouri, New Hampshire, New Mexico, New York, North Carolina, Oklahoma, Pennsylvania, South Carolina, Virginia, and West Virginia.

COVID-19, retaining the preexisting rules that limited absentee ballots to a limited set of voters.¹⁰⁸

The impact of these various approaches to the 2020 election is visible in Figure 4, which highlights counties where a COVID-19 outbreak would be the deadliest. A majority of these counties are in the South, but there are high-risk areas across the upper Midwest and in parts of the Southwest as well. Approximately one-third of the highest risk counties are in states that did not permit fear of COVID-19 exposure to be a justification for provide absentee voting.

We examined the impact of the strict absentee ballot policy in Texas above. But Texas was hardly the only state that chose to accommodate elderly voters but not racial minorities. For example, Mississippi's absentee ballot law protects voters who are 65 and older by allowing them to request a mail-in ballot without further justification. Younger voters, on the other hand, may only request an absentee ballot upon proof of a "temporary or permanent physical disability" that makes in-person voting a "substantial hardship."¹⁰⁹

A state lower court interpreted this provision to cover individuals who have an underlying health condition that puts them at high-risk for COVID-19, but the Mississippi Supreme Court rejected this interpretation just six weeks before the November election.¹¹⁰

Twenty-six of Mississippi's eighty-two counties—close to a third—were in the top decile of the country's most vulnerable counties, yet not a single one was on this highest-risk list because of age. The primary driver of vulnerability in twenty-five of these counties was race and, in the final county, it was other socioeconomic factors. Mississippi's absentee ballot law, then, does an incredibly poor job of addressing the primary drivers of COVID-19 risk in its most at-risk counties.

¹⁰⁸ These states were Texas, Louisiana, Mississippi, Tennessee, and Indiana. A court order in Louisiana interpreted the state's eligibility requirements to include those who were actually sick with COVID-19 or caring for somebody who was currently sick with COVID-19.

¹⁰⁹ *Watson v. Oppenheim*, (Miss. S. Ct.) (Sept. 18, 2020), available at <https://courts.ms.gov/Images/Opinions/CO149350.pdf>.

¹¹⁰ *See id.* at 7 ("Having a preexisting condition that puts a voter at a higher risk does not automatically create a temporary disability for absentee-voting purposes."). While some of the predisposing health conditions (such as diabetes) may qualify as disabilities, others likely do not (such as obesity or smoking history).

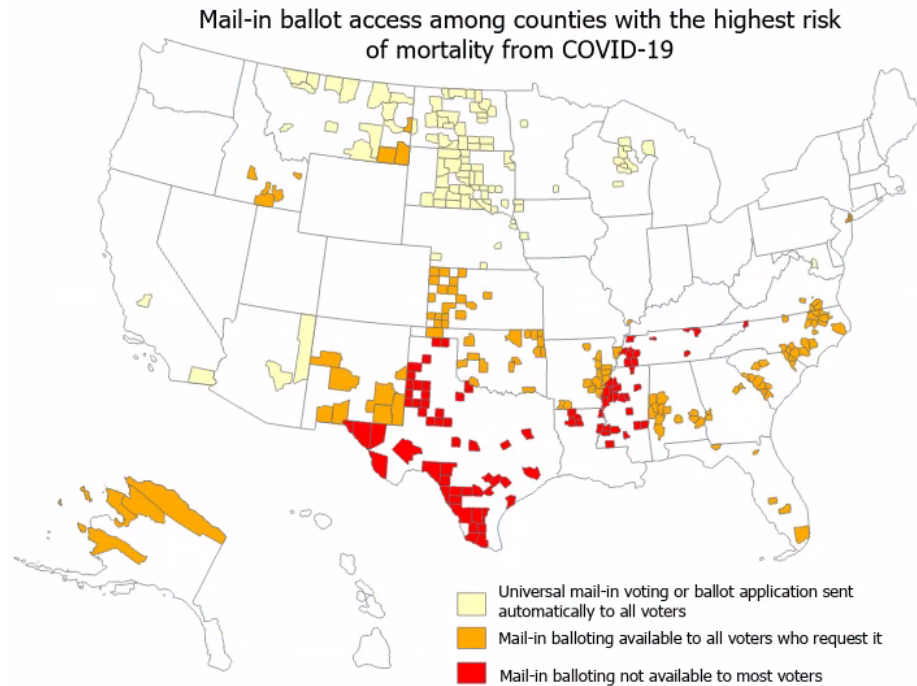


Figure 4. County-level map of mail-in ballot access in the 10% of counties with the highest risk for COVID-19 mortality (i.e., deaths as a percent of the population).

A similar story played out in Louisiana, whose absentee eligibility requirements paralleled Mississippi's until a federal court intervened. Finding that the denial of access to absentee ballots imposed on an undue burden on those individuals' voting rights, the court ordered Louisiana to expand absentee ballot access to those at high risk because of a serious underlying health condition (as well as people in quarantine, with symptoms, or caring for someone with COVID-19).¹¹¹ The expansion still fell well short of a "no excuse" dispensation for absentee ballots that would have protected racial minorities (and all other voters who chose to opt in).

Just like Mississippi and Texas, not a single Louisiana county is in our top-decile of COVID-19 case fatality because of age. In twelve of the

¹¹¹ See *Harding v. Edward*, at 4 n.18, 44 (Sept. 16, 2020), available at <https://bloximages.newyork1.vip.townnews.com/theadvocate.com/content/tncms/assets/v3/editorial/2/a8/2a852452-f845-11ea-9e18-bb48bfdd0c69/5f62512e152b9.pdf.pdf>

fifteen extremely vulnerable (top decile) counties in Louisiana, the primary driver of that vulnerability is race; other socioeconomic factors are at play in the remaining three counties. Yet Louisiana made only the most begrudging accommodations for any vulnerable people other than those over 65, and only then because it was compelled to do so by a court.

These examples highlight a troubling trend of seemingly isolated events. Zooming out, however, systematic and disturbing patterns emerge that suggest a systematic relationship between public health, race, and voting rights that influenced the decisions of leaders in Texas, Mississippi, Louisiana, and beyond. And let there be no mistake, each of these states made these choices despite many warnings and, in some cases, lawsuits aimed at forcing the states to not put voters in such a bind. These policy choices were no coincidence.

Perhaps most troubling, our maps make clear that many of the states that made the fewest accommodations for vulnerable voters in general, and racial minorities in particular, are jurisdictions that were formerly covered by Section 5 of the VRA, before its coverage formula was invalidated in *Shelby County*. This pattern suggests both an ongoing need for the protections that Section 5 once afforded minority voters and the potential for using data about racial health disparities to inform a new coverage formula.

PART IV

COVID’S LESSONS FOR THE FUTURE OF VOTING RIGHTS

As Part III demonstrated, the COVID-19 pandemic precipitated a variety of changes to state voting law. Although many of the most vulnerable counties in the country did not make sufficient accommodations for vulnerable voters to vote safely during the 2020 elections, many states and counties did expand voting options to allow vulnerable individuals to vote with less risk to their health.¹¹²

In states across the country, legislatures are now beginning to debate the pandemic’s lessons for voting laws. Hundreds of bills have been introduced—some proposing to strengthen and expand COVID-19 voter accommodations like vote-by-mail and early voting, while many others

¹¹² Some of these changes are limited to this particular pandemic, either because the changes were written to be COVID-19 specific or because they were time-limited, short-term adjustments, expiring after the November 2020 election. Others, by their terms, will persist beyond the COVID-19 pandemic, unless they are repealed. See Voting Rules Appendix.

would contract and restrict voters' options and access, sometimes proposing much more restrictive rules than were in place even before the pandemic.¹¹³ Some of these bills are incorporating lessons of the pandemic while others are trying engineer election results that will favor one party or candidate or another.

While the specifics of post-COVID voter reform are beyond the scope of this paper, in this Part we consider some high-level lessons that move us beyond the current crisis and that we hope might instruct policymakers who are interested in making their election systems more resilient. First, the pandemic has dramatically illustrated the need for resilient voting procedures—informed by vulnerability data—that can quickly be adapted during future public health emergencies and other kinds of disasters to ensure that all voters—and particularly racial minorities—can safely cast their ballots. Second, the COVID-19 voter experience underscores that the public-health benefits of voting rules like mail-in balloting can only be fully captured if voters—particularly racial minorities with

¹¹³ See, e.g., Nathaniel Rakich & Jasmine Mithani, *What Absentee Voting Looked Like in All Fifty States*, FIFTYTHREE, Feb. 9, 2021, <https://fivethirtyeight.com/features/what-absentee-voting-looked-like-in-all-50-states/>. (“Some states are thinking about making their expansions of vote-by-mail permanent, while other states have shown little interest—still others are even considering bills to restrict absentee voting.”); Brennan Center for Justice, *Voting Laws Roundup: January 2021*, Jan. 26, 2021, <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-january-2021>, last visited Mar. 1, 2021 (observing that “[i]n a backlash to historic voter turnout in the 2020 general election, and grounded in a rash of baseless and racist allegations of voter fraud and election irregularities, legislators have introduced three times the number of bills to restrict voting access as compared to this time last year,” while “other state lawmakers are seizing on an energized electorate and persistent interest in democracy reform” to advance bills expanding voter access); Stephen Fowler, *Georgia House Passes Elections Bill that Would Limit Absentee and Early Voting*, NPR, Mar. 1, 2021, <https://www.npr.org/2021/03/01/972631655/georgia-house-passes-elections-bill-that-would-limit-absentee-and-early-voting> (“Over objections from Democrats, Georgia House Republicans passed a sweeping elections bill that would enact more restrictions on absentee voting and cut back on weekend early voting hours favored by large counties, among other changes.”); Kelly Mena, *More than 100 Bills that Would Restrict Voting are Moving Through State Legislatures*, Feb. 2, 2021, CNN, <https://www.cnn.com/2021/02/02/politics/voting-rights-state-legislation/index.html> (noting that “28 states have introduced, pre-filed or are advancing 106 restrictive [voting] bills for the 2021 legislative session,” the majority of which “look to restrict or put limitations on how and who can vote by mail”); *id.* (reporting that [i]n Arizona—another battleground state—that flipped to Democrats for only the second time in more than seven decades, Republicans have introduced legislation that would repeal the state’s permanent early voting list [in place before the pandemic]—which allows voters to automatically receive their ballots by mail for every election”).

disproportionate health risks—trust the “safer,” healthier voting procedures.

Finally, and perhaps most importantly, the COVID-19 pandemic has laid bare how racial disparities in health, rooted in social and historical inequities, can suppress the vote in communities of color, in all elections, not just during pandemics. Our empirical evidence of this voter suppression can and should inform debates over the future of the VRA, as well as litigation under Section 2 of the current VRA. This kind of health data should play a much more important role in shaping and interpreting voter rights protections in the future.

A. Developing Resilient, Data-Driven Approaches to Disaster Voting

Disaster policy—when it’s not simply reactive to the latest catastrophe—often focuses on fostering the resilience of key systems, like our electoral system. The pandemic has underscored how critical it is to have resilient emergency voting procedures that can ensure that everyone, particularly racial minorities disadvantaged by current and historical inequities, can vote safely and easily.

A resilient voting scheme for emergencies is one that can continue to perform its core, essential functions in the face of stressors that create serious disruption and disturbance.¹¹⁴ It is not enough that the system continue to serve its most basic function—to elect leaders—if other core functions are neglected. The Fifteenth Amendment makes clear that another such core function is inclusion and non-discrimination. Section 2 of VRA adds additional context: to ensure that the “social and historical” subordination of BIPOC people does not continue to perpetuate unequal access to the ballot. Thus, an emergency voting scheme must be resilient in at least two ways: it must continue to function during disasters and must do so in a way that ensures that inequities—like health disparities rooted in the U.S.’s abhorrent history of racial oppression—do not limit racial minorities’ electoral voice.

Because public health crises and other disasters are likely to have an outsized effect on individuals and communities of color, when states fail

¹¹⁴ See, e.g., BRIAN WALKER & DAVID SALT, RESILIENCE PRACTICE: BUILDING CAPACITY TO ABSORB DISTURBANCE AND MAINTAIN FUNCTION xi (2012); ANDREW ZOLLI & ANN MARIE HEALY, RESILIENCE: WHY THINGS BOUNCE BACK 6-7 (2012). Resilience is neither inherently good nor bad—it all depends on whether the resilient system itself is normatively good or bad. Indeed, Section Five of the VRA exists precisely because the racist and exclusionary voting schemes in many states were highly resilient against reform efforts.

to make appropriate accommodations—with a particular eye toward protecting the voting rights of racial minorities—racial minorities will be disproportionately deprived of access to the ballot.

Our assessment of COVID-19 voter accommodations suggests the importance of a data-driven approach to planning for, implementing, and evaluating emergency voting measures. In future pandemics or other disasters that jeopardize safe voting or voting access, vulnerability mapping that incorporates health data directly (rates of different diseases or health conditions that predispose people to sickness or more serious outcomes) or that incorporates the social determinants of health should be used to determine where voting accommodations are the most critical and to determine where to triage limited resources (including polling places and poll workers).

While there may not always be time during a crisis to develop a specific vulnerability index, as we have here for COVID-19, tools like the CDC’s Social Vulnerability Index (SVI) can be useful proxies for advanced planning, with more specific data integrated over time or used after-the-fact to assess what could have been done better. Indeed, while social vulnerability often has broader connotations, the CDC describes the social vulnerability captured by its SVI in terms of external stressors on health.¹¹⁵ The SVI and other similar tools can thus be used to help plan in advance for emergency voting procedures that will best ensure that voters in disadvantaged communities will have equal access to the ballot.

Additionally, the COVID-19 experience, viewed through the lens of resilience scholarship, suggests that disaster voting accommodations are likely to be most effective when they are resilient and robust across various individual voter circumstances and across various disaster scenarios. Many of the COVID-inspired changes to state voting laws may thus promote the electoral system’s resilience by expanding the range of voting methods available to voters—particularly vulnerable voters, as well as the range of voting options available for system administrators to shift between when disaster strikes. Diversity and redundancy are important features of resilient systems,¹¹⁶ and together, these factors suggest that a

¹¹⁵ ATSDR, CDC *Social Vulnerability Index*, <https://www.atsdr.cdc.gov/placeandhealth/svi/index.html>, last visited Mar. 1, 2021. (defining social vulnerability by reference “to the potential negative effects on communities caused by external stresses on human health”).

¹¹⁶ ZOLLI & HEALY, *supra* note 114, at 13.

system is resilient when there it incorporates a variety of different mechanisms or approaches to accomplish essential functions.¹¹⁷

Thus, a voting system that incorporates both mail-in and in-person balloting is presumably more resilient—more able to perform its core functions in a wide range of different disasters scenarios—than one with either method alone, assuming that jurisdictions continue to invest enough in both methods that they remain viable voting mechanisms, hopefully in routine times, but at least in moments of crisis. Those options build flexibility into the existing system, allowing vulnerable voters to choose methods that will best protect their own health and allowing administrators to pivot (at least more) quickly and adapt to various kinds of challenges.

Disaster voting procedures are also likely to be the most resilient when it comes to protecting vulnerable voters' access to the vote if they are streamlined and easy for voters—particularly those who are most impacted by the disaster—to access and use. The COVID-19 voting experience confirms, for example, that voters were most likely to utilize mail-in-balloting when they didn't have to jump through any hoops to do so: the largest increases in vote-by-mail were in states that proactively moved, for the first time, to universal mail-in-voting or that mailed absentee-ballot applications to every registered voter, not in those states that simply expanded the availability of absentee voting but required voters to initiate absentee-ballot requests themselves.¹¹⁸

Disaster voting accommodations are also likely to be most effective when state law provides clear pathways for authorizing emergency voter procedures (to minimize last-minute litigation over voting procedures)¹¹⁹

¹¹⁷ See *id.* at 6-7, 13. Disaster planning is plagued by a tendency to plan for the last disaster, ensuring that systems will work in a similar disaster but failing to consider how changed system features may function in other kinds of crises. FARBER ET AL., *supra* note 9.

¹¹⁸ Data from the November 2020 general election confirms that “the biggest spikes” in voting by mail “occurred in places that went the furthest to encourage mail voting (i.e., those that automatically sent every registered voter a ballot), especially those with little history of mail voting prior to 2020.” Nathaniel Rakich & Jasmine Mithani, *What Absentee Voting Looked Like in All Fifty States*, FIVETHIRTYEIGHT, Feb. 9, 2021, <https://fivethirtyeight.com/features/what-absentee-voting-looked-like-in-all-50-states/> (noting that the jurisdictions with the biggest vote-by-mail increases “include New Jersey (where only 7 percent of voters voted by mail in 2016, but 86 percent did so in 2020, the District of Columbia (12 percent in 2016 versus 70 percent in 2020) and Vermont (17 percent in 2016 versus 72 percent in 2020)”).

¹¹⁹ Much of the litigation that has plagued COVID-19 voter accommodations in many states has challenged the authority of governors, election officials or courts (rather than state legislatures) to order those changes. See, e.g., Election Integrity Project California,

and when those procedures have been well tested in advance. As Part IV.C. suggests, because many voters experience health barriers to voting even outside of disaster situations and because emergency measures will be easiest to implement if they are not too dissimilar from standard election procedures, there is wisdom in having regular election procedures that meet these same criteria, as well.

B. Building Trust in Less Traditional Voting Methods

Of course, the public (and individual) health benefits of mail-in voting and other less traditional voting methods will not be fully realized—either during disasters or typical elections—if many voters with mail-in balloting options choose not to utilize them. Regardless of the vote-by-mail options available in a county (whether universal, excuse or no-excuse), almost all voters still have the option of voting in person. Every universal mail-in jurisdiction except Oregon¹²⁰ allows voters to elect to vote in person.¹²¹

Inc. v. Padilla, 2:21-cv-32 (C.D. Cal. 2020) (challenging the California governor’s authority to implement voting accommodations for COVID-19).

¹²⁰ Oregon has no in-person voting, but counties do provide “privacy booths” where voters can fill out their ballots. *See, e.g.*, Deschutes County, Voting in Oregon FAQ, <https://www.deschutes.org/clerk/page/voting-oregon-faq>, last visited Feb. 28, 2021.

¹²¹ *See* California Secretary of State, *Election Administration Guidance under COVID-19*, at 2, <https://elections.cdn.sos.ca.gov/ccrov/pdf/2020/july/20154jl.pdf> (setting forth guidelines for in-person voting); Colorado Secretary of State, Election Day FAQs, <https://www.sos.state.co.us/pubs/elections/FAQs/ElectionDay.html>; D.C. Board of Elections, *FAQs Election Day*, <https://www.dcboe.org/FAQs/Election-Day> (advising that voters can still vote in person); Hawaii Office of Elections, *Voting by Mail FAQs*, <https://elections.hawaii.gov/frequently-asked-questions/voting-by-mail/> (“[Y]ou may vote in-person by visiting any voter service center in your county.”); Nevada Secretary of State, Early Voting Information, <https://www.nvsos.gov/sos/elections/voters/early-voting-information>; New Jersey COVID-19 Information Hub, *How Can I Vote This November?*, <https://covid19.nj.gov/faqs/nj-information/reopening-guidance-and-restrictions/how-can-i-vote-this-november-how-have-elections-moved-or-changed-in-new-jersey-because-of-covid-19> (noting that voters can choose to vote in-person by provisional ballot); Utah’s Official Voter Information Pamphlet, General Election 2020, <https://voteinfo.utah.gov/wp-content/uploads/sites/42/2020/09/Utah-VIP-2020-General-FIN.pdf> (voters encouraged, but not required, to surrender mail-in-ballot to aid in efficient ballot processing); Vermont Secretary of State, *2020 General Election FAQs*, <https://sos.vermont.gov/elections/voters/voter-faqs/#q2> (voter can surrender mail-in ballot or sign affidavit affirming she hasn’t already voted); Washington Secretary of State, *Elections*, https://www.sos.wa.gov/elections/faq_vote_by_mail.aspx. Voters are typically asked to bring and surrender their mail-in ballot; those who don’t or can’t, will usually be asked to vote a provisional ballot and/or attest in writing that they won’t also vote by mail. *See, e.g.*, Carly Severn, *What’s Different About Voting in California this Year?*, KQED.org, Sept. 25, 2020 (explaining that in-person voters who don’t surrender their mail in ballot will vote with a provisional ballot); Nevada Secretary of State, *Facts*

Moreover, even voters who affirmatively request a mail-in ballot can, in many jurisdictions, change their mind and vote in person, usually by provisional ballot, which will typically be verified and counted after Election Day.¹²² Preserving the right to vote in-person is important not only because it increases the resiliency of the electoral system but also because some voters will strongly prefer to do so—including voters with disabilities that can best be accommodated by in-person voting, non-English speakers who may best access translation services in person,¹²³ and people of color seeking extra reassurance their vote will be counted.¹²⁴

Yet, to maximize the public-health benefits of mail-in-voting generally and the benefits to BIPOC communities in particular, states need to find ways to help voters feel comfortable using them. This need was particularly acute during the pandemic because many jurisdictions, anticipating large increases in voting-by-mail, consolidated and reduced the number of in-person polling places or voting centers¹²⁵ or allowed

vs. *Myths* 2020 Nevada General Election, <https://www.nvsos.gov/sos/home/showdocument?id=8842> (in-person voters must sign a document attesting that they will not vote their mail-in ballot). In Utah, the legislature eliminated in-person voting during its June primaries, citing COVID-19 risk, but restored it (with additional outdoor voting options) for the November 2020 election. See Sophia Eppolito, *Utah Passes Election Bill Requiring In-Person Voting Options*, AP NEWS, August 20, 2020, <https://apnews.com/article/498e9703035cf43458c1631146bd880b>; Ut S.B. 6007, Amendments to Elections, <https://le.utah.gov/~2020S6/bills/static/SB6007.html>.

¹²² See, e.g., National Conference of State Legislatures, *Provisional Ballots* (Sept. 17, 2020), <https://www.ncsl.org/research/elections-and-campaigns/provisional-ballots.aspx#Why?> (listing states that allow a voter who requested, but did not cast, an absentee ballot to vote an in-person provisional ballot).

¹²³ John Myers, *How California is Preparing for In-Person Voting This Year Due to Coronavirus*, L.A. TIMES (Aug. 7, 2020, 5 AM), <https://www.latimes.com/california/story/2020-08-07/californians-voting-election-coronavirus-rules-for-november> (“The challenges in planning for in-person voting have received little attention, overshadowed by California’s high-profile push to encourage as many voters as possible to cast their ballots from home. But some, particularly those who speak a language other than English and those with physical limitations, are still likely to seek out an in-person voting location.”).

¹²⁴ See, e.g., Russell Berman, *What Really Scares Voting Experts about the Postal Service*, ATLANTIC (August 14, 2020), <https://www.theatlantic.com/politics/archive/2020/08/how-postal-service-preparing-election/615271/>.

¹²⁵ See Nathaniel Rakich & Julia Wolfe, *How To Vote in the 2020 Election*, (updated Sept. 24, 2020, 5:40 PM), <https://projects.fivethirtyeight.com/how-to-vote-2020/> (cataloguing jurisdictions, including the District of Columbia, Maryland, New Jersey, and North Dakota) that have reduced the number of in-person polling locations or vote centers they provide).

some rural counties with fewer residents “to close traditional polling places,” with in-person voting available only at the county election office.¹²⁶ If more voters than anticipated opted to forgo mail-in-voting and vote in person, the reduced number of in-person locations would mean crowded polling places, long lines, and long (public) transit times—all of which would exacerbate COVID-19 transmission risk.

Even outside of the pandemic context, however, adoption of less traditional voting methods to help ease the health costs of voting that disproportionately burden minority voters will be less effective if BIPOC voters don’t trust that votes cast using these methods will be counted. Data from a 2000-person survey we fielded between September 23, 2020 and October 3, 2020 demonstrates that Black and Latino survey respondents were less confident than white respondents that votes in the November election would be accurately counted in their community, with 48.3% of white respondents saying they were “very confident” votes in their area would be accurately counted, but only 27.1% of Latino and 34.3% of Black respondents expressing that same level of confidence. When asked about their confidence that votes would be accurately counted in the United States more generally, 41.8% of White respondents were “very confident,” while only 25.7% and 29.5% of Latino and Black respondents, respectively, shared that confidence.

Those differing confidence levels might partially explain racial differences in plans to vote by mail or absentee ballot: 51.2% of White respondents, but only 41.4% of Hispanic respondents and 43.5% of Black respondents, said that they planned to vote by mail or absentee ballot. It is interesting to note, however, that despite differential trust levels, there was more unmet demand for the opportunity to vote by mail among Black voters than white voters: almost twice as many Black voters (9.8%) as white voters (5.4%) said they would vote by mail if that option were available to them, but it was not. Perhaps in part because minority voters disproportionately reported that the safer vote-by-mail options they wanted were unavailable to them, a higher share of Black and Latino respondents also reported being “very concerned” that “COVID-19’s impact on voter turnout [would] affect the outcome of the November election.”¹²⁷

¹²⁶ *Id.* (citing Nebraska and Minnesota). *See also id.* (noting that, in California, “[c]ounties have the option to consolidate polling places but must maintain a ratio of one precinct per 10,000 voters”).

¹²⁷ 42.5% of Hispanic respondents, 41.5% of Black respondents, and 36.7% of White respondents said they were “very concerned” about this possibility.

The level of concern about votes being accurately counted was undoubtedly heightened during the 2020 election by then President Trump's rhetoric about mail-in-balloting fraud,¹²⁸ his assaults on the mail system,¹²⁹ and related attempts to halt (or pledges not to count) vote by mail.¹³⁰ Nevertheless, concerns voiced during the 2020 election cycle give some sense of the types of concerns voters, and particularly minority voters, may have about voting by mail and other less traditional voting methods.

These voter concerns took several forms: (1) concerns that their ballot would not be received in a timely manner; (2) concerns that their individual ballot would be disqualified and not counted; and (3) concerns that all or some significant subset of mail-in ballots would not be counted because of the rhetoric around fraud.

First, some voters were concerned that the Post Office would not be able to deliver their ballots or do so quickly enough to meet deadlines.¹³¹ These fears were likely fueled by President Trump's comments tying his opposition to Post Office emergency funding to his desire to discourage mail-in ballots,¹³² reports that Post Offices had been ordered to

¹²⁸ See, e.g., Donald J. Trump (@realDonaldTrump), Twitter (May 20, 2020, 7:00 PM), <https://twitter.com/realDonaldTrump/status/1266172570983940101> (asserting that mail-in voting will lead to "massive fraud").

¹²⁹ See, e.g., Russell Berman, *What Really Scares Voting Experts about the Postal Service*, ATLANTIC (August 14, 2020), <https://www.theatlantic.com/politics/archive/2020/08/how-postal-service-preparing-election/615271/>.

¹³⁰ Michael Crowley, *Trump Won't Commit to 'Peaceful' Post-Election Transfer of Power*, N.Y. TIMES (Sept. 23, 2020), <https://www.nytimes.com/2020/09/23/us/politics/trump-power-transfer-2020-election.html> (reporting Trump's statements casting doubt on his willingness to peacefully transfer power, with a specific reference to "get[ting] rid of the ballots"). One Republican Senator from Florida even proposed a bill that ballots not counted within 24-hours of Election Day not be counted at all. Nick Gevas, *Sen. Rick Scott Introduces Bill Requiring Mail-In Ballots Be Counted Within 24 Hours of Election Day*, FoxNews.com (Sept. 28, 2020), <https://www.foxnews.com/politics/florida-gop-senator-introduces-bill-requiring-mail-in-ballots-be-counted-within-24-hours-of-election-day>.

¹³¹ Laws about when ballots must be received to be counted vary from state by state. In some states, the timeliness of the ballot turns on the time it was postmarked, while in others it depends on the time the ballot is received. See, e.g., National Conference of State Legislatures, *Receipt and Postmark Deadlines for Absentee Ballots*, Sept. 29, 2020, <https://www.ncsl.org/research/elections-and-campaigns/vopp-table-11-receipt-and-postmark-deadlines-for-absentee-ballots.aspx>, last visited Feb. 28, 2021.

¹³² See, e.g., Russell Berman, *What Really Scares Voting Experts about the Postal Service*, ATLANTIC (August 14, 2020),

decommission mail sorting machines in many cities¹³³ and to change overtime and mail-pick-up rules,¹³⁴ and letters the Post Office sent to most states warning that their mail-in-balloting deadlines might be cutting things too close for the Post Office to deliver ballots on time.¹³⁵

Even before the current controversy, however, some voters—particularly racial minorities—were skeptical about entrusting their ballots to the Post Office. A 2017 survey of California voters showed that voters who chose to drop off their mail-in-ballots at drop boxes rather than mail them in often did so because they lacked trust that the Post Office would deliver their ballots.¹³⁶ Importantly, racial minorities expressed significantly more distrust in the Post Office: while only 21% of white voters who declined to mail their ballots said they distrusted the Post Office, that number was 29% for Latinos, 32% for African Americans, and 46% for Asian Americans.¹³⁷

Second, some voters were concerned that their individual ballots would be disqualified because of potential voter error in filling out or returning the ballot, so-called “signature mismatch,” when the voter’s signature is judged not to match the reference signature on file, or other issues with the ballot. These concerns are not unreasonable, as mail-in ballots have a higher disqualification rate than other voting methods.¹³⁸ Even more troubling, empirical evidence suggests that voters of color and

<https://www.theatlantic.com/politics/archive/2020/08/how-postal-service-preparing-election/615271/>.

¹³³ See, e.g., Luke Broadwater, Hailey Fuchs & Nick Corasaniti, *Postal Service Warns States It May Not Meet Mail-in Ballot Deadlines*, N.Y. TIMES (Aug. 31, 2020), <https://www.nytimes.com/2020/08/14/us/politics/usps-vote-mail.html>.

¹³⁴ See, e.g., Berman, *supra* note 132.

¹³⁵ See, e.g., Broadwater, *supra* note 133.

¹³⁶ UC Davis Center for Regional Change, *The California Voter Experience Survey*, Sept. 2017, <https://regionalchange.ucdavis.edu/sites/g/files/dgvnsk986/files/inline-files/UCDavisCCEPIssueBrief3VoteCenterStatewideSurveyBrief.pdf>.

¹³⁷ See *id.*

¹³⁸ Jeffrey Toobin, *The Legal Fight Awaiting Us After the Election*, NEW YORKER (Sept. 21, 2020), <https://www.newyorker.com/magazine/2020/09/28/the-legal-fight-awaiting-us-after-the-election>; Pam Fessler & Elena Moore, *More than 550,000 Primary Absentee Ballots Rejected in 2020, Far Outpacing 2016*, NPR, (Aug. 22, 2020, 5:00AM), <https://www.npr.org/2020/08/22/904693468/more-than-550-000-primary-absentee-ballots-rejected-in-2020-far-outpacing-2016> (noting that because voting machines prevent errors like voting for too many candidates and because poll workers can help catch other mistakes before a ballot is cast in-person, “only about one-hundredth of a percent of in-person ballots are rejected compared with about 1% of mail in ballots”).

new voters are more likely to have their ballots disqualified.¹³⁹ Unfortunately, that means that many of the voters who most need mail-in balloting options to protect their health are most (and most justifiably) concerned about their mail in ballots not being counted.

Finally, some voters were concerned, because of Trump's attacks on mail-in-balloting in the run up to the November 2020 general election, that all, or some subset of, mail-in ballots would not be counted.¹⁴⁰ Hopefully, the fact that mail-in ballots cast in the November election were, in fact, counted helps assuage some of these latter fears. Voters should also be reassured by initial statistics that suggest that mail-in ballots in the 2020 general election were rejected at a much lower rate than in past elections.¹⁴¹

Nonetheless, all jurisdictions need to consider mechanisms that provide voters assurances that their votes have been received, verified, and properly counted. States that lack robust tracking systems for mail-in ballots should adopt them and opportunities to "cure" defective ballots (that would otherwise be rejected) should be expanded.¹⁴²

Additionally, simplifying ballot design and promoting voter education campaigns (in multiple languages) can help voters understand and be confident in filling out their ballots.¹⁴³ Jurisdictions should also establish clear rules in advance about how ballots that are filled out incorrectly but manifest a clear intent to vote for a certain candidate (by, say, circling the

¹³⁹ Pam Fessler & Elena Moore, *More than 550,000 Primary Absentee Ballots Rejected in 2020, Far Outpacing 2016*, NPR, (Aug. 22, 2020, 5:00AM), <https://www.npr.org/2020/08/22/904693468/more-than-550-000-primary-absentee-ballots-rejected-in-2020-far-outpacing-2016>; Sophia Chou, ProPublica & Tyler Dukes, *In North Carolina, Black Voters' Mail-in Ballots Much more Likely to be Rejected Than Those From Any Other Race*, PROPUBLICA.ORG (Sept. 23, 2020, 2:30PM), <https://www.propublica.org/article/in-north-carolina-black-voters-mail-in-ballots-much-more-likely-to-be-rejected-than-those-from-any-other-race>.

¹⁴⁰ See sources in note 130, *supra*.

¹⁴¹ See, e.g., Pam Fessler, *A 2020 Surprise: Fewer Absentee Ballot Rejections than Expected*, NPR, Dec. 31, 2020, <https://www.npr.org/2020/12/31/951249068/a-2020-surprise-fewer-absentee-ballots-rejections-than-expected>.

¹⁴² Jocelyn Grzeszczak, *These Are the States Where You Can Track Your Mail-in Vote*, NEWSWEEK, (Aug. 18, 2020), <https://www.newsweek.com/these-are-states-where-you-can-track-your-mail-vote-1525920>.

¹⁴³ States should be proactively eliminating any identified pitfalls or traps—such as rejection of so called "naked ballots," mailed without their secrecy covers. that could lead to large numbers of ballot disqualifications. See, e.g., Jane C. Timm, *'Naked Ballots' Explained*, NBC NEWS, (Sept. 27, 2020), <https://www.nbcnews.com/politics/2020-election/naked-ballots-explained-pennsylvania-new-court-ruling-complicates-mail-voting-n1241017>.

candidate's name rather than filling in the bubble) should be treated, before partisan wrangling over particular ballots begins.¹⁴⁴

It may be more difficult to establish clear rules in advance about how to judge whether signatures are a “close enough” match, but jurisdictions should establish clear, transparent appeals procedures that give voters adequate notice and time to respond to signature-mismatch disqualifications. In order to facilitate a timely ballot-verification process (with opportunities for voters to appeal disqualification of their votes), states should also change their election rules to allow processing (if not counting) of mail-in ballots on receipt or at least many days before Election Day. Moreover, jurisdictions should adopt, in advance, rules that help mitigate the risk that signatures will be disqualified for partisan reasons, including having bipartisan representation on judging committees and ensuring that signature judges cannot access a voter's party affiliation.

Jurisdictions can also ameliorate concerns about mail-in ballot receipt by providing alternative methods for returning mail-in ballots, including depositing ballots in secure drop boxes¹⁴⁵ and returning mail-in ballots to polling places (particularly during early voting).¹⁴⁶

¹⁴⁴ Of course, partisan influence on these rules cannot be entirely eliminated, even if rules are established in advance, because if Democrats remain more likely to vote by mail than Republicans, *see* Pew Research Center, Election 2020: Voters are Highly Engaged, but Nearly Half Expect to Have Difficulties Voting, at 5 (Aug. 13, 2020), <https://www.pewresearch.org/politics/2020/08/13/election-2020-voters-are-highly-engaged-but-nearly-half-expect-to-have-difficulties-voting/> (reporting results of a survey showing that 80% of registered voters who support or lean toward Trump prefer to vote in-person “either on Election Day (60%) or earlier (20%)” with only 17% preferring to vote by mail, whereas 58% of Biden (or Biden-leaning) voters prefer to vote-by-mail, with only 40% preferring in-person voting on Election Day (23%) or during early voting (17%)), Republicans will be incentivized to adopt stricter rules that disqualify more ballots.

¹⁴⁵ California Secretary of State, *Election Administration Guidance under COVID-19*, at 24, <https://elections.cdn.sos.ca.gov/ccrov/pdf/2020/july/20154jl.pdf> (noting that “[v]oters distrustful of mail service or late in completing their mail ballot can still be nudged to avoid in-person voting locations by providing a convenient, non-mail alternative for returning their ballot,” such as a “drive through drop-off site” equipped with a “secure drop box”). Providing these alternatives also provides a way for voters to return mail-in ballots without paying postage (in those jurisdictions that don't send prepaid response envelopes).

¹⁴⁶ Raúl Macías, *Voters Should be Able to Return Absentee Ballots to Polling Places*, BrennanCenter.org (Sept. 10, 2020). At this late date, it may be more practical for counties to pursue (and publicize) this latter option, as drop boxes can be expensive and take considerable time to source. *See* Nathaniel Persily & Charles Stewart III, *With Six Weeks to the Election, Six Ways to Protect It*, N.Y. TIMES (Sept. 20, 2020). Returning mail-in ballots to a polling place in person does involve some COVID-19 exposure risk,

Unfortunately, rather than adopting measures that would give vulnerable voters added assurances that their ballots have been received and counted, many states are considering legislation that would do the opposite: toughening signature requirements, eliminating secure-ballot boxes as a mechanism for ballot receipt, and otherwise making it harder for mail-in-ballots to count.¹⁴⁷

Many of these proposed measures are likely to disproportionately deter racial minorities from protecting their health by voting by mail. Legislators, courts, and litigants should thus view these measures—both during the pandemic and after—through the lens of their impacts on health-cost-of-voting for racial minorities and other vulnerable voters. The next section takes up this question more fully.

C. Focusing on Protecting Voter Health in Every Election

The most important lessons of the COVID-19 voter experience aren't merely lessons for future disasters, but for how we think about and protect the voting rights of racial minorities in every election. As is often the case with devastating disasters, the COVID-19 experience has exposed preexisting patterns of vulnerability and racial inequity that have not been adequately accounted for in existing laws and scholarship. In particular, the COVID-19 voter experience has brought into sharp focus the underappreciated ways that racial health disparities, rooted in the subordination of BIPOC people, limit minority access to the ballot, not just during pandemics, but in every election. Going forward, these racial disparities in health, confirmed by our empirical data, should be a critical part of any legislative reinvigoration of the VRA and—lacking that—a critical component of litigation to enforce Section 2 of the current VRA.

By highlighting how health considerations impact and alter individual costs of voting, COVID-19 has illuminated the risks that in-person Election Day voting in early November always poses for those whose health predisposes them to contagious illness of various kinds, those whose inflexible jobs or lack of health insurance mean they cannot afford to get sick, or those whose health circumstances make voting at a traditional polling place difficult or even impossible. While COVID-19 is, despite former President Trumps' frequent protests to the contrary, not the

but the process could presumably be streamlined so that voter time at the polling location would be brief. See Macías, *supra*.

¹⁴⁷ See, e.g., Brennan Center for Justice, *supra* note 113.

same as annual influenza,¹⁴⁸ influenza does pose serious risks to some voters and prior research has demonstrated that influenza outbreaks correlate with lower voter turnout.¹⁴⁹ Evidence also suggests that people who vote are healthier than those who do not and that these voter-participation gaps can have significant effects on healthcare policy.¹⁵⁰

These health vulnerabilities, exposed and exacerbated by the COVID-19 pandemic, suggest that, for the most at-risk voters, “convenience voting” should be reconceptualized as “survival voting” in circumstances that extend well beyond the current crisis. These methods of voting—like easy access to vote-by-mail—provide important protection for voters with certain disabilities and those with other health conditions that make voting in-person at crowded polling places on Election Day in early November difficult, dangerous, and sometimes deadly. And because, as Part III demonstrated, racial minorities are likely to be overrepresented among voters whose health is most vulnerable, failure to account for the differential health costs of voting when designing voting procedures will disproportionately limit racial minorities access to the vote and to electoral power.

The pandemic has thus made clear that health considerations—and racial health disparities, in particular—should play a much more important role in reinvigorating the VRA for a new century, in designing voting procedures for every election, and in Section 2 litigation (under the current VRA) challenging procedures that are likely to limit minority ballot access. Data about regional variations in racial health disparities, and how different jurisdictions accommodated (or not) those disparities during the pandemic, could also play an important role in developing a new coverage formula for Section 5 of the VRA.

A new health lens on the racial impacts of voting rules would beneficially inform—and perhaps even fundamentally alter—how we address some common voting rights issues. For example, while we often consider long polling place wait times as a potential barrier to voters who have rigid work schedules and who lose hourly wages for any time they must take off work to vote, we often overlook how long lines can also be

¹⁴⁸ Megan McArdle, *COVID-19 Isn't the Flu. Trump's Comparison is Reckless*, WASH. POST (Oct. 6, 2020), <https://www.washingtonpost.com/opinions/2020/10/06/covid-19-isnt-flu-trumps-comparison-is-reckless/>.

¹⁴⁹ Robert Urbatsch, *Influenza and Voter Turnout*, SCANDINAVIAN POL. STUD. (March 2007) (finding influenza outbreaks correlated with lower voter turnout in both the U.S. and Finland).

¹⁵⁰ Sean McElwee, *Health Care Policy is Undermined by Voting Barriers* (May 9, 2018), <https://tcf.org/content/report/health-care-policy-undermined-voting-barriers/>.

a barrier to those in poor health or with certain kinds of disabilities. Long wait times increase the risk of disease exposure (not only to COVID-19 but to other illnesses like seasonal flu), tax voters with limited energy or limited ability to stand for long periods, and pose difficulties for those with frequent medical needs (to take medication, use the bathroom, etc.) or with limited tolerance for heat or cold.

This focus on the health costs of voting makes clear that well-documented, disproportionately long wait-times in minority neighborhoods¹⁵¹ inflict a double whammy on minority voters: both the economic and health costs are substantial and may simply be too high a cost for some potential voters to pay. The same is also true of other voting “inconveniences” that are more commonly encountered by BIPOC voters, such as having to travel longer distances to polling stations. The health lens reminds us that the costs of “inconvenient voting” aren’t merely economic, and the cumulative health and economic costs may disproportionately deter BIPOC voters from casting their ballots.

In sum, a new focus on racial health disparities—and the empirical evidence we present of how those disparities can be used as a tool for voter suppression—should change how lawmakers, courts, and litigants conceptualize barriers to racial minorities exercise of the franchise.

CONCLUSION

While data about racial disparities in health has traditionally played only a very limited role in assessing how voting rules affect the voting rights of racial minorities, the COVID-19 voter experience has powerfully exposed how those disparities undermine minority voice and voting power not just during pandemics, but in every election. Empirical evidence generated by our COVID-19 Vulnerability Index demonstrates that politicians leveraged health disparities, rooted in the subordination of racial minorities, to suppress the vote of racial minorities in the 2020 general election and to further entrench racial inequity in voting.

¹⁵¹ See, e.g., Stephen Pettigrew, *The Racial Gap in Wait Times: Why Minority Precincts are Underserved By Local Election Officials*, 132 POL. SCI. Q. 527, 528 (2017) (finding that “a voter in a predominantly minority precinct experiences a line that is twice as long, on average, than a voter in a predominantly white precinct,” that “minorities are three times as likely to wait longer than 30 minutes and six times as likely to wait more than 60 minutes,” and that “for two neighborhoods in the same county or town, the neighborhood that is less white is likely to have a longer line”).

This evidence arrives at a critical juncture for the Voting Rights Act, which has been stripped of much of its bite by the Supreme Court and is currently being debated by Congress. A new focus on the disparate health effects of voting rules, grounded in the kind of solid empirical evidence we provide, could reinvigorate the VRA—providing new avenues for assessing voting rights, for litigating and judging voter suppression claims under Section 2, and even for informing a new coverage formula to resurrect Section 5. The clear and compelling story told by our data are a clarion call to legislators, courts, and litigators to reconceptualize and strengthen voting rights by recognizing and accounting for the barriers that health disparities pose to minority access to the ballot. The data provided in this Article shows that racist barriers to the franchise are not dead, even if they are not as obvious as literacy tests or a lynching mob. To the contrary, in 2020 voter suppression took the form of scaring off voters who proved unwilling to risk their lives to vote. And, given the way the virus has ravished populations of racial minorities, a number of those who showed up to vote were made to pay with their lives.