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PASSIVE VOTER SUPPRESSION: CAMPAIGN MOBILIZATION AND THE EFFECTIVE DISFRANCHISEMENT OF THE POOR

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ABSTRACT—A recent spate of election laws tightened registration rules, reduced convenient voting opportunities, and required voters to show specific types of identification in order to vote. Because these laws make voting more difficult, critics have analogized them to Jim Crow Era voter suppression laws.

We challenge the analogy that current restrictive voting laws are a reincarnation of Jim Crow Era voter suppression. While there are some notable similarities, the analogy obscures a more apt comparison to a different form of voter suppression—one that operates to effectively disfranchise an entire class of people, just as the old form did for African Americans. This form of suppression excludes the poor.

To account for the effective disfranchisement of the poor, we develop a more robust theory of voting than currently exists in the legal literature. Drawing on rational choice and sociological theories of voting, we show how information, affiliation with formal organizations, and integration into social networks of politically active individuals are far more important to the decision to vote than the tangible costs of voting associated with the new voter suppression.

Using this expanded account of voting, we identify the role of political parties and their mobilization activities in the effective disfranchisement of the poor. Relying on the same proprietary data as the Obama campaign in 2008 and 2012 (and hundreds of campaigns since), along with other public sources of data, we show how campaigns employ a "calculus of contact" to decide whom to mobilize. That calculus leads campaigns to disproportionately neglect the poor when canvassing, calling, and sending political mailers to potential voters—mobilization activities that have a sizeable turnout effect. In our view, the most significant voter suppression tactics of the twenty-first century are therefore not what legislatures are doing, but what campaigns are not doing.

We argue that a first step in combating this passive voter suppression should involve changing the information environment of campaigns: the amount and type of information about potential voters that the state makes

available to campaigns. Such a change could force campaigns to adjust their calculus of contact and contact more low-income people during election season. Including the poor as targets of campaign mobilization would be an important first step toward a more egalitarian democracy.

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INTRODUCTION

The past decade has seen the proliferation of election laws designed to suppress the vote.[1] For many critics, the enactment of voter identification (voter ID) laws, the tightening of registration rules, and the reduction or elimination of convenient voting opportunities mark a return to a Jim Crow Era in which literacy tests, poll taxes, and white primaries served to suppress the African American vote.[2] Given this striking analogy to our nation's painful racial history, it is no surprise that voting rights advocates, legal scholars, and social scientists have focused so much attention on these tools as a form of new voter suppression.[3]

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[1] According to the Brennan Center for Justice,

> 25 states have put in place new restrictions since [the 2010 election]—15 states have more restrictive voter ID laws in place (including six states with strict photo ID requirements), 12 have laws making it harder for citizens to register (and stay registered), ten made it more difficult to vote early or absentee, and three took action to make it harder to restore voting rights for people with past criminal convictions.

New Voting Restrictions in America, BRENNAN CTR. FOR JUST., http://www.brennancenter.org/new-voting-restrictions-america [https://perma.cc/T7D4-W77M].

[2] *See, e.g.*, N.C. State Conference of NAACP v. McCrory, 831 F.3d 204, 229 (4th Cir. 2016) (referring to North Carolina's omnibus election reform bill as "the most restrictive voting law North Carolina has seen since the era of Jim Crow"); SPENCER OVERTON, STEALING DEMOCRACY: THE NEW POLITICS OF VOTER SUPPRESSION (2006); TOVA ANDREA WANG, THE POLITICS OF VOTER SUPPRESSION: DEFENDING AND EXPANDING AMERICANS' RIGHT TO VOTE, at xiv (2012) (arguing that voter reforms that suppress voting are rarely legitimate and stem from years of such practices); Keith G. Bentele & Erin E. O'Brien, *Jim Crow 2.0? Why States Consider and Adopt Restrictive Voter Access Policies*, 11 PERSP. ON POL. 1088, 1092 (2013) (noting that comparisons between recent voting restrictions and historical voter suppression "are not difficult to make as voter suppression is viewed by many researchers familiar with the history of American elections as a pervasive and consistent feature of U.S. political practice and institutions."); Atiba R. Ellis, *The Cost of the Vote: Poll Taxes, Voter Identification Laws, and the Price of Democracy*, 86 DENV. U. L. REV. 1023, 1025 (2009) (arguing that voter ID laws requiring photo ID "are similar to other restrictions on the franchise, such as property requirements and poll taxes"); Ryan P. Haygood, *The Past as Prologue: Defending Democracy Against Voter Suppression Tactics on the Eve of the 2012 Elections*, 64 RUTGERS L. REV. 1019, 1021 (2012) ("[T]his current assault on voting rights is consistent with the story of America's contested relationship with democracy . . . ."); Alexander Keyssar, *Voter Suppression Returns: Voting Rights and Partisan Practices*, HARV. MAG., July–Aug. 2012, at 28, 31 ("The recent wave of ID laws (and their cousins) bears a close resemblance to past episodes of voter suppression.").

[3] The following is a representative, though not exhaustive, sample of scholarship. On the effects of voter ID laws on turnout, see Stephen Ansolabehere, *Effects of Identification Requirements on Voting: Evidence from the Experiences of Voters on Election Day*, 42 PS: POL. SCI. & POL. 127 (2009); Matt A. Barreto et al., *The Disproportionate Impact of Voter-ID Requirements on the Electorate—New Evidence from Indiana*, 42 PS: POL. SCI. & POL. 111 (2009).

On the effects of voter ID laws on minority turnout, see Rachael V. Cobb et al., *Can Voter ID Laws Be Administered in a Race-Neutral Manner? Evidence from the City of Boston in 2008*, 7 Q. J. POL. SCI. 1 (2012); Zoltan Hajnal et al., *Voter Identification Laws and the Suppression of Minority Votes*, 79 J. POL. 363 (2017).

Emphasis on the new voter suppression, however, has led voting rights advocates and legal scholars to overlook an entirely different form of voter suppression that operates much like the old. For at least the last fifty years, the turnout of persons in the lowest income quintile (a group we define as "the poor") has been at such a low level that neither major political party has had real incentives to advance their interests in the political process.[4]

Voting rights advocates and scholars have been drawn to the analogy between old and new voter suppression.[5] But the more pressing analogy is between the effective disfranchisement of African Americans in the past and the effective disfranchisement of the poor in the present. Recent studies have shown that the poor—like African Americans in the Jim Crow South—go essentially unrepresented in the political process.[6] This lack of representation appears rooted in the poor's very low rate of voting compared to more affluent groups.[7] The poor's exclusion from politics ultimately contributes to

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For scholarship on the determinants of voter ID laws, see Daniel R. Biggers & Michael J. Hanmer, *Understanding the Adoption of Voter Identification Laws in the American States*, 45 AM. POL. RES. 560 (2017).

On voter registration and cutbacks to early voting, see, for example, MICHAEL J. HANMER, DISCOUNT VOTING: VOTER REGISTRATION REFORMS AND THEIR EFFECTS (2009); FRANCES FOX PIVEN ET AL., KEEPING DOWN THE BLACK VOTE: RACE AND THE DEMOBILIZATION OF AMERICAN VOTERS (2009); Stephen Ansolabehere & David M. Konisky, *The Introduction of Voter Registration and Its Effect on Turnout*, 14 POL. ANALYSIS 83 (2006); Barry C. Burden & Jacob R. Neiheisel, *Election Administration and the Pure Effect of Voter Registration on Turnout*, 66 POL. RES. Q. 77 (2013); Russell Weaver, *The Racial Context of Convenience Voting Cutbacks: Early Voting in Ohio During the 2008 and 2012 U.S. Presidential Elections*, 2015 SAGE OPEN 1.

[4] *See* NOLAN M. MCCARTY ET AL., POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES 119 (2d ed. 2016) (noting that those "who are ineligible to vote are [increasingly] concentrated at the bottom of the income distribution, so politicians feel little pressure to respond to their interests").

For an overview of the literature on the disproportionate voice of the wealthy, see William W. Franko et al., *Class Bias in Voter Turnout, Representation, and Income Inequality*, 14 PERSP. ON POL. 351, 354 (2016).

[5] *See, e.g.*, Bentele & O'Brien, *supra* note 2. Another reason why legal scholars, at least, have ignored the disfranchisement of the poor is due to the Court's refusal to recognize the poor as a class in need of special protection under the Constitution. *See* Harris v. McRae, 448 U.S. 297, 323 (1980) (rejecting a claim for special judicial protection under the Equal Protection Clause brought by low-income individuals seeking Medicaid reimbursement for medically necessary abortions on the basis of the unreasoned conclusion that "poverty, standing alone, is not a suspect classification"). This determination led to a constitutional scholarly exodus away from issues concerning the equal protection rights of the poor that encompass voting rights as well.

[6] *See, e.g.*, LARRY M. BARTELS, UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE 260–65 (2008) (testing the relationship between the ideological views of different income classes and United States senator roll call votes in the late 1980s and early 1990s and finding that "the views of low-income constituents had *no* discernible impact on the voting behavior of their senators"); MARTIN GILENS, AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA 79–81 (2012) (finding that on issues of minimum wage, abortion, and sending troops to Bosnia, "when preferences between the well-off and the poor diverge, government policy bears absolutely no relationship to the degree of support or opposition among the poor").

[7] *See, e.g.*, JAN E. LEIGHLEY & JONATHAN NAGLER, WHO VOTES NOW? DEMOGRAPHICS, ISSUES, INEQUALITY, AND TURNOUT IN THE UNITED STATES 1, 6 (2014) (finding a consistent 30% gap in reported turnout between high- and low-income individuals since the 1970s). According to the U.S. Census, the

the extreme political and economic inequality that characterizes the twenty-first century's new gilded age.[8]

However, the sources of the effective disfranchisement of African Americans in the past and the poor in the present are distinct. Whereas the old voter suppression imposed tangible barriers that led to the disfranchisement of African Americans, such tangible obstacles explain very little of the rich–poor turnout disparity.[9] Other factors are far more influential in the effective disfranchisement of the poor than the cost barriers to voting associated with the new voter suppression.

Our argument is informed by a broader theoretical account of voting than that which appears in the legal academic literature and popular debates. Those discussions tend to focus on the tangible cost of voting as the primary determinant of voting.[10] While we do not dispute the inverse relationship between tangible cost and voting, we highlight other overlooked factors relevant to the voting decision that can explain the effective disfranchisement of the poor.

Rational choice and sociological theories of voting open up a host of additional explanations for the poor's nonvoting. In these theories, factors such as information costs, affiliation with formal organizations, and inclusion within social networks are more important to an individual's turnout decision than the tangible cost of voting.[11]

When we incorporate these factors into the turnout decision, a more complete picture emerges of the poor's low participation in elections. As rational choice theories emphasize, in order to vote, individuals need information about where, when, and how to vote. People also need a reason to vote, which can be derived from information about the candidate's past actions, her policy positions and prescriptions for the future, and how the three relate to the individual's preferences and needs. People who lack information, or find it hard to evaluate due to less education, may not be able to differentiate enough between candidates to see much benefit from voting

average reported turnout among individuals with household incomes under $30,000 is below 50% while the average reported turnout among those with household incomes over $150,000 is more than 80%. U.S. CENSUS BUREAU, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2016: TABLE 7 (2017), https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-580.html [https://perma.cc/JT8F-MUP5].

[8] *See generally* Franko et al., *supra* note 4, at 363 (finding that when political participation is skewed more to the "economic elite," bias is high and the "distributional outcomes shaped by who holds elected office and the policies they enact become more skewed in favor of the rich"); Benjamin I. Page et al., *Democracy and the Policy Preferences of Wealthy Americans*, 11 PERSP. ON POL. 51, 68 (2013) (finding that "the affluent participate disproportionately in politics" and that their policy preferences are consistent with actual policy in multiple areas, which "is, at least, suggestive of significant influence").

[9] *See infra* Section II.A.

[10] *See* Ellis, *supra* note 2, at 1025.

[11] See *infra* Sections II.A–II.B.

and therefore may decide to abstain. The poor tend to be less educated and educational attainment has been consistently shown to be the most important determinant of turnout.[12]

Sociological theories of voting explain that membership in formal groups or integration in social networks that include other voters and people interested in politics can subsidize the information costs to voting, provide solidary benefits for voting, and create a sense of civic duty to vote.[13] Since the 1950s, sociological studies have shown that the poor are less likely to be affiliated with formal organizations and to be integrated into social networks of voters than other socioeconomic classes.[14] This relative social isolation is therefore another critical factor contributing to the effective disfranchisement of the poor.

A broader understanding of the sources of the effective disfranchisement of the poor opens the door to more responsive solutions than simply eliminating new voter suppression barriers. Ideal solutions might include equalizing educational opportunities for the poor and providing the poor with the necessary time and resources to integrate themselves into formal organizations and social networks. But these solutions would require a massive degree of public investment into poor communities, which is hard to imagine in the current political context, when social safety nets are being shredded rather than reinforced.[15]

Alternative, more feasible, solutions involve a critical intervening variable that influences the decision to vote—the mobilization activities of candidates and political parties. Campaigns subsidize the information costs to voting by educating individuals on the logistics of voting—the time, place, and process of voting—and providing individuals with accounts of the candidate's past actions, proposals for the future, and how the two might impact the potential voter's needs and interests. Campaign mobilization activities can also activate formal and informal social networks through what experimental studies describe as a contagion effect. Individuals contacted by campaigns often share political information and embed a sense of duty to

[12] *See, e.g.*, Rachel Milstein Sondheimer & Donald P. Green, *Using Experiments to Estimate the Effects of Education on Voter Turnout*, 54 AM. J. POL. SCI. 174, 174 (2010) ("The powerful relationship between education and voter turnout is arguably the most well-documented and robust finding in American survey research.").

[13] See *infra* Section II.B.

[14] *See* sources cited *infra* note 150.

[15] *See, e.g.*, Bertrall L. Ross II, *Addressing Inequality in the Age of* Citizens United, 93 N.Y.U. L. REV. 1120, 1132–35 (2018) (describing the decline in redistributive policies and protections for lower income and working-class people in the United States over the past forty years).

vote within others in their social networks, thereby increasing the number of voters in the network.[16]

Understanding mobilization activities as key intervening variables that influence turnout sheds light on an important source of the effective disfranchisement of the poor. In deciding whom to mobilize, campaigns utilize what we label a "calculus of contact." Campaigns use a cost–benefit calculation to engage in the most cost-effective mobilization strategies. The primary benefit to campaigns from contacting individuals is a favorable vote, with the campaigns' goal being to produce enough favorable votes to win elections.[17] Not every contact produces an equal probability of a favorable vote. Therefore, campaigns tend to make two probability calculations in their decisions about whom to contact. First, campaigns assess the probability that contact will influence an individual to vote, and to vote favorably for the candidate as a result of the contact. Second, they assess how important it is to contact particular individuals in order to win the election. The costs of contact include the time and resources devoted to a canvassing operation and the data and technology needed to inform the probability calculations on the benefits side.

This calculus of contact has contributed to a consistent socioeconomic class disparity in whom campaigns contact.[18] Campaigns contact the poor less because the poor vote less than other socioeconomic classes.[19] This low turnout is due to the higher costs—information and otherwise—that they incur to vote and their relative lack of integration into formal organizations and informal social networks.[20] The poor's relative lack of voting history contributes to greater uncertainty about their future voting behavior and thus increases the risk to campaigns that these individuals might fail to produce a vote, or that they might even vote for one's opponent in the election.

That contact gap between the poor and members of other socioeconomic classes is of monumental importance in explaining why the poor vote less than other socioeconomic classes. Experimental studies

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[16] Dan Braha & Marcus A. M. de Aguiar, *Voting Contagion: Modeling and Analysis of a Century of U.S. Presidential Elections*, 12 PLOS ONE 1, 1 (2017) ("These results suggest that social contagion effects are becoming more instrumental in shaping large-scale collective political behavior, with implications on democratic electoral processes and policies."); David W. Nickerson, *Is Voting Contagious? Evidence from Two Field Experiments*, 102 AM. POL. SCI. REV. 49, 54 (2008) ("The unavoidable conclusion is that voting is a highly contagious behavior and an important determinant of turnout.").

[17] *See, e.g.*, Gary W. Cox et al., *Mobilization, Social Networks, and Turnout: Evidence from Japan*, 50 WORLD POL. 447, 447 (1998) ("[A] party will target those unlikely to vote if not mobilized, but who would very likely support the party in question if they did get to the polls.").

[18] *See infra* Section II.C.

[19] *See infra* Section II.C.

[20] *See infra* Section II.C.

testing the relationship between voter contact and turnout have shown that campaign contact substantially increases turnout.[21] Other experimental studies have shown that the indirect effect of mobilization, the so-called contagion effect, multiplies the turnout effect from contact.[22]

We argue that campaigns' use of the calculus of contact to disproportionately orient their mobilization activities away from the poor operates as a form of voter suppression. This form of voter suppression is passive in that it arises from campaigns' neglect of a part of the population in their mobilization activities. While distinct in operation, this passive voter suppression shares something in common with the old active voter suppression of the post-Reconstruction redemption period: it has effectively disfranchised an entire class of voters.

What can the law do about passive voter suppression? Since political campaigns, and not the state, are the principal agents of passive voter suppression and since passive voter suppression arises from a decision by a campaign to not do something, a constitutional claim against the practice is dubious, at best. Using the law to respond to passive voter suppression will therefore require shifting from the conventional use of law in the election space as a tool to prohibit conduct, to law as a tool to incentivize conduct.

In this Article, we argue for a legal intervention that could represent a first step in combating passive voter suppression that targets the information that states make available to campaigns for electoral purposes. States vary in terms of what information they make accessible to campaigns. Nearly half of the states give campaigns access to registered voters' partisan affiliation

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[21] DONALD P. GREEN & ALAN S. GERBER, GET OUT THE VOTE: HOW TO INCREASE VOTER TURNOUT 9 (3d ed. 2015**)** ("[T]he more personal the interaction between campaign and potential voter, the more it raises a person's chances of voting."); Kevin Arceneaux & David W. Nickerson, *Who Is Mobilized to Vote? A Re-analysis of 11 Field Experiments*, 53 AM. J POL. SCI. 1, 11–12 (2009) (highlighting the unreported heterogeneous effects in previous experiments by showing that the effects of contact on turnout (between 1.3 to 13.2 percentage points) depends on the premobilization propensity to vote and the competitiveness of the election); Alan S. Gerber & Donald P. Green, *The Effects of Canvassing, Telephone Calls, and Direct Mail on Voter Turnout: A Field Experiment*, 94 AM. POL. SCI. REV. 653, 661 (2000) [hereinafter Gerber & Green, *The Effects of Canvassing*] ("Face-to-face interaction dramatically increases the chance that voters will go to the polls."); Donald P. Green et al., *Getting Out the Vote in Local Elections: Results from Six Door-to-Door Canvassing Experiments*, 65 J. POL. 1083, 1094 (2003) ("Each successful contact with a registered citizen raises that individual's probability of voting by approximately 7 percentage points . . . ."); Melissa R. Michelson, *Getting Out the Latino Vote: How Door-to-Door Canvassing Influences Voter Turnout in Rural Central California*, 25 POL. BEHAV. 247, 256–57 (2003) (finding that canvassing is effective even in low turnout elections in rural areas, increasing an individual's likelihood of voting up to sixteen percentage points among Latino Democrats); David W. Nickerson, *Volunteer Phone Calls Can Increase Turnout: Evidence from Eight Field Experiments*, 34 AM. POL. RES. 271, 271 (2006) [hereinafter, Nickerson, *Volunteer Phone Calls Can Increase Turnout*] ("[P]hone calls are found to boost turnout 3.8 percentage points."); David Niven, *The Mobilization Solution? Face-to-Face Contact and Voter Turnout in a Municipal Election*, 66 J. POL. 868, 868 (2004) ("Controlling for their past voting history, the face-to-face mobilization effort did increase turnout by about five points.").

[22] *See* sources cited *supra* note 16.

and voting history, eight states deny campaigns access to both pieces of information, and the remaining states grant campaigns access to individuals' voting history or partisan affiliation, but not both.[23] All states except Massachusetts collect and make accessible to campaigns information about only registered voters, leaving campaigns completely in the dark about the identity, address, voting history, if any, and partisan affiliation of unregistered persons.[24]

We argue that the current information environments for campaigns in the different states contribute in varying degrees to the socioeconomic biases in contact that lead to passive voter suppression. Campaigns use lists of registered voters to identify targets for contact and they tend to contact individuals with more substantial voting histories and clearer partisan orientations.[25] That leads campaigns to orient their mobilization activities away from the poor because the poor are substantially more likely than other income classes to be unregistered, to lack a voting history, and to have more ambiguous or unknown partisan affiliations.[26]

An important intervention that could reduce these socioeconomic class disparities in campaigns' mobilization activities involves changing the information environments in which campaigns operate. Here we set forth a preliminary proposal as the best means for combating passive voter suppression: for states to provide more information to campaigns regarding eligible voters' partisan preferences through automatic voter registration while withholding individuals' voting histories. Changing the information available to campaigns is an important practical first step, but more reforms would be necessary to effectively enfranchise the poor. In future work, we will focus on other interventions aimed at making elections more competitive as additional steps to creating a more egalitarian democracy.

This Article proceeds in four Parts. In Part I, we engage the analogy between old and new voter suppression. We argue that while the analogy holds when thinking about the use of voter suppression for partisan electoral advantage, it ultimately shifts attention away from a more troubling issue: the passive voter suppression that effectively disfranchises low-income communities. In Part II, we broaden the theoretical lens used in legal scholarship to explain individuals' decisions to vote, introducing social science theories of voting that incorporate information costs, affiliation with formal organizations, and integration into politically active informal social

[23] *See infra* Table 1; *see also infra* notes 261–262 and accompanying text (providing a taxonomy of states on the basis of the information they make available to campaigns).

[24] *See infra* Section IV.B.2.

[25] *See infra* Section IV.A.

[26] *See infra* note 226 and accompanying text.

networks as key variables in turnout decisions. In Part III, we turn our attention to the effect of campaign mobilization activities on voting. Using proprietary data from a campaign data vendor, Catalist, and other public sources of data, we identify a consistent and persistent socioeconomic class-based disparity in campaigns' voter contact over the past fifty years and relate it to the phenomenon we label passive voter suppression. Finally, in Part IV, we suggest an initial legal intervention that could reduce passive voter suppression by shifting campaigns' calculus of contact to incentivize more equal contacts with the poor.

I. THE ANALOGY BETWEEN THE OLD AND NEW VOTER SUPPRESSION

On July 10, 2012, then-Attorney General Eric Holder addressed the annual convention for the National Association for the Advancement of Colored People (NAACP).[27] In the year leading up to the speech, five Republican-controlled state legislatures had moved toward adopting strict photo ID requirements to vote.[28] Republican leaders in those states justified the new ID laws on the basis of mostly unsubstantiated assertions of voter impersonation fraud.[29] The day before Holder's speech, a trial began in federal district court where the State of Texas was seeking a declaratory judgment against the Department of Justice to secure preclearance of its new voter ID law under Section 5 of the Voting Rights Act.[30]

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[27] Eric Holder, U.S. Att'y Gen., Address at the NAACP Annual Convention (July 10, 2012), *available at* https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-naacp-annual-convention [https://perma.cc/7Q4R-6AX2].

[28] *See History of Voter ID*, NAT'L CONF. ST. LEGISLATURES (May 31, 2017), http://www.ncsl.org/research/elections-and-campaigns/voter-id-history [https://perma.cc/77S5-LVU9] (noting that Kansas, Mississippi, Tennessee, Texas, and Wisconsin made moves to adopt strict photo identification requirements for voting in 2011).

[29] *See, e.g.*, Editorial Board, *Voting Laws Must Be Carefully Considered*, GREEN BAY PRESS GAZETTE, Dec. 9, 2010, at A5 (quoting Wisconsin Republican state senator Scott Fitzgerald, "we continue to see these isolated incidents of people trying to vote five, six times a day; people voting based on some sort of fraudulent documentation that's offered"); William D. Hicks et al., *A Principle or a Strategy? Voter Identification Laws and Partisan Competition in the American States*, 68 POL. RES. Q. 18, 20–23 (2015) (describing the overwhelming Republican support for voter ID laws in the state legislatures that have adopted them and the overwhelming Democratic opposition to these laws); Kris Kobach, Opinion, *Voter ID Laws are Good Protection Against Fraud*, WASH. POST (July 13, 2011), https://www.washingtonpost.com/opinions/voter-id-laws-are-good-protection-against-fraud/2011/07/08/gIQAGnURBI_story.html [https://perma.cc/8PEN-5HP5] (op-ed by Kansas Secretary of State and architect of Kansas voter ID law who wrote that "[u]nfortunately, voter fraud has become a well-documented reality in American elections"); *see also infra* note 72.

[30] *See* Texas v. Holder, 888 F. Supp. 2d 113, 114–15 (D.D.C. 2012) (denying Texas's request because evidence showed the law would "likely have a retrogressive effect" in violation of Section 5 of the VRA), *vacated and remanded*, 570 U.S. 928 (2013) (overruled in light of *Shelby County v. Holder*, 570 U.S. 529 (2013), overturning Section 5 as unconstitutional); Devlin Barrett, *U.S. and Texas Battle in Court over Voter I.D.*, WALL ST. J. (July 9, 2012), https://www.wsj.com/articles/SB10001424052702304022004577516953618032404 [https://perma.cc/C534-LUPD].

In his speech, Holder referred to the Justice Department's findings that the Texas voter ID law "would be harmful to minority voters."[31] Holder noted how "[u]nder the proposed law, concealed handgun licenses would be acceptable forms of photo ID—but student IDs would not."[32] And he described how "[m]any of those without IDs would have to travel great distances to get them—and some would struggle to pay for the documents they might need to obtain them."[33] Then, in an unscripted part of the speech, Holder announced, "we call those poll taxes."[34] That was not the first time that someone drew the analogy between voter ID laws and poll taxes—between new voter suppression tools and old.[35] But coming from the chief law enforcement officer of the United States and the closest cabinet member to then-President Barack Obama, the analogy proved particularly noteworthy. Some expressed outrage about the analogy. A Wall Street Journal editorial accused Holder of playing "the race card to drive up black voter turnout" in the coming presidential election.[36] Others applauded the Attorney General and repeated the analogy, describing voter ID laws as modern-day poll taxes and literacy tests.[37]

Thus far no one has interrogated the analogy between the old and new voter suppression in any depth. The remainder of Part I does that. We show that the analogy holds insofar as the focus is on the use of voter suppression tools to advance the goal of partisan electoral advantage. But this interrogation also reveals the limits of the analogy as it ignores a critical distinction between the old and new voter suppression. The old voter suppression of the post-Reconstruction redemption period resulted in the effective disfranchisement of an entire group of voters—African Americans. The new voter suppression of the current era has not had this disfranchising effect on any group of voters—even the poor who are most vulnerable to such laws. Finally, this interrogation exposes the key issue that the analogy between old and new voter suppression ultimately masks: the persistent effective disfranchisement of the poor through passive means.

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[31] *See* Holder, *supra* note 27.

[32] *Id.*

[33] *Id.*

[34] NAACP, *2012 NAACP Convention – Eric Holder*, YOUTUBE 17:05–17:20 (July 10, 2012), https://www.youtube.com/watch?v=Mafc42MM5zs [https://perma.cc/Q3JL-QTMY].

[35] *See, e.g.*, Ellis, *supra* note 2, at 1025–26.

[36] Editorial, *Holder's Jim Crow Politics*, WALL ST. J. (July 10, 2012, 7:22 PM), https://www.wsj.com/articles/SB10001424052702304022004577519202610207274 [https://perma.cc/GAZ2-8U67].

[37] *See, e.g.*, Charles Postel, *Why Voter ID Laws Are like a Poll Tax*, POLITICO (Aug. 7, 2012, 12:26 AM), https://politi.co/2yXQqbK [https://perma.cc/4US5-G93E] ("[T]hese laws function very much like a poll tax."); Al Sharpton, Opinion, *Voting in Jeopardy*, L.A. TIMES, Aug. 7, 2012, at A13 ("These new ID laws take us backward; they truly are nothing more than modern-day poll taxes and literacy tests.").

A. Where the Analogy Holds

The 2016 presidential election surprised many. Very few people, including perhaps the future President himself, expected Donald Trump to win.[38] Even fewer expected Trump to win the state of Wisconsin, a state that Barack Obama won rather decisively in 2008 and 2012, and one that Hillary Clinton did not campaign in out of confidence that the state would remain a pillar in a blue wall of states assuring Democratic victory in the election.[39] But the blue wall crumbled as Trump won the state.[40] The margin was narrow—less than 23,000 votes (a mere 0.77%) separated the two candidates—but that margin guaranteed the winner all ten of the state's electoral college votes.[41]

In 2011, Republican Governor Scott Walker and the Republican-controlled state legislature passed a strict voter ID law.[42] Court challenges would delay the law from going into effect until 2015.[43] Of the closely contested blue wall states that Trump won in the 2016 presidential election, Wisconsin was the only one to have strict photo ID requirements. Some suggested that the ID requirement changed the election outcome in the state.[44]

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[38] Michael Wolff, *Donald Trump Didn't Want to Be President*, N.Y. MAG. (Jan. 8, 2018), http://nymag.com/intelligencer/2018/01/michael-wolff-fire-and-fury-book-donald-trump.html [https://perma.cc/8NLH-9S7C].

[39] HILLARY RODHAM CLINTON, WHAT HAPPENED 394–95 (2017).

[40] Craig Gilbert et al., *How Clinton Lost "Blue Wall" States of Michigan, Pennsylvania, Wisconsin*, DETROIT FREE PRESS (Nov. 9, 2016, 9:03 PM, updated Nov. 10, 2016, 11:31 AM), https://www.freep.com/story/news/politics/2016/11/09/93572020 [https://perma.cc/L9N7-N3VQ].

[41] *Wisconsin Results*, N.Y. TIMES (Aug. 1, 2017, 11:22 AM), https://www.nytimes.com/elections/2016/results/wisconsin [https://perma.cc/25M9-5RT3]; *see also* Jack E. Riggs et al., *Electoral College Winner's Advantage*, 42 PS: POL. SCI. & POL. 353, 353 (2009) ("The winner-take-all methodology of awarding electoral votes, [is] currently used by all states except Maine and Nebraska . . . .").

While close, the election in Wisconsin was not pivotal like Florida famously was in the 2000 presidential election contest between George Bush and Al Gore. *See* Thomas E. Mann, *Reflections on the 2000 U.S. Presidential Election*, BROOKINGS INST. (Jan. 1, 2001), https://brook.gs/2NiaZ64 [https://perma.cc/9KHH-234X]. Although Trump lost the popular vote by nearly three million votes, he won the Electoral College by 77 votes as other parts of the blue wall, Pennsylvania and Michigan, also fell by similarly small margins (0.72% and 0.23% respectively). Philip Bump, *Donald Trump Will Be President Thanks to 80,000 People in Three States*, WASH. POST (Dec. 1, 2016, 2:38 PM), https://www.washingtonpost.com/news/the-fix/wp/2016/12/01/donald-trump-will-be-president-thanks-to-80000-people-in-three-states [https://perma.cc/TVD3-TQDJ]; *Presidential Election Results: Donald J. Trump Wins*, N.Y. TIMES (Aug. 9, 2017, 9:00 AM), https://nyti.ms/2PcFpLz [https://perma.cc/S2FH-U93Q].

[42] *See* WIS. STAT. § 6.79(2)(a); *History of Voter ID*, *supra* note 28.

[43] *See* Shawn Johnson & Laurel White, *As Voting Begins, a Look Back at the Fight over Wisconsin's Voter ID Law*, WIS. PUB. RADIO (Sept. 26, 2016, 5:00 AM), https://www.wpr.org/voting-begins-look-back-fight-over-wisconsins-voter-id-law [https://perma.cc/9ZRF-MXLJ].

[44] *See, e.g.*, KENNETH R. MAYER & MICHAEL G. DECRESCENZO, SUPPORTING INFORMATION: ESTIMATING THE EFFECT OF VOTER ID ON NONVOTERS IN WISCONSIN IN THE 2016 PRESIDENTIAL ELECTION 5 (2017), https://elections.wisc.edu/voter-id-study [https://perma.cc/DG5K-8ZYV] ("We estimate that 11.2% of nonvoting registrants in Dane and Milwaukee counties were 'deterred' in some way from voting by the voter ID law . . . .").

Hillary Clinton seemed to agree. In her election postmortem, *What Happened*, Clinton used Wisconsin as a prime example of the effect of voter suppression on the outcome of the election. One study that Clinton cited found that the Wisconsin voter ID law "helped reduce turnout by 200,000 votes, primarily from low-income and minority areas" that tend to be more Democratic.[45] She then pointed to a 13% decline in turnout in the heavily Democratic and majority low-income and minority city of Milwaukee.[46] Finally, she compared turnout in Wisconsin with that of the neighboring states of Minnesota and Illinois. In Minnesota, where the state legislature did not impose new voter restrictions for the 2016 election, "turnout in heavily African American counties declined much less and overall turnout was essentially flat."[47] In Illinois, where the state legislature actually passed laws designed to make it easier to vote, turnout increased by 5% overall, and African American turnout was 14% higher than in Wisconsin.[48] A Wisconsin Republican state representative predicted that "the new law would help Trump pull off an upset in the state." Clinton concluded, "[i]t turns out he was right."[49]

So many factors go into an election outcome that it is difficult to identify any as decisive.[50] But Clinton's analysis is consistent with empirical studies that suggest voter ID laws can matter in close elections. Empirical studies of the 2014 midterm and 2016 presidential election were mixed in their findings about the effect of voter ID laws on the turnout of groups that tend to vote Democratic—racial minorities, persons with disabilities, the poor, and the young.[51] Some studies focusing on specific jurisdictions found no overall turnout effect while others found that voter ID laws potentially

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[45] CLINTON, *supra* note 39, at 420.

[46] *Id.* As of July 2018, the nonwhite population of Milwaukee is 54.2%. *See Quickfacts, Milwaukee City, Wisconsin*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/milwaukeecitywisconsin [https://perma.cc/RNM4-6U9B].

[47] CLINTON, *supra* note 39, at 420.

[48] *Id.*

[49] *Id.*

[50] It is inherently difficult to determine which of the many factors relevant to an election outcome are ultimately decisive, but Republican lawmakers that are behind the adoption of the voter ID laws seem to think that the effects of these laws could prove decisive in close elections. *See, e.g.*, Hicks, *supra* note 29, at 29 (finding that legislatures with more Republicans in states that are more competitive are significantly more likely to adopt restrictive voter ID laws than other states).

[51] U.S. GOV'T ACCOUNTABILITY OFF., GAO-14-634, ELECTIONS: ISSUES RELATED TO STATE VOTER IDENTIFICATION LAWS 39–43 (2014), https://www.gao.gov/assets/670/665966.pdf [https://perma.cc/R897-6879] (summarizing studies of the effect of voter ID laws on racial minority turnout); Bernard L. Fraga & Michael G. Miller, *Who Does Voter ID Keep from Voting?*, 13, 20–21, 21 tbl.2 (Dec. 14, 2018) (working paper) (on file with authors) (finding 42.3% of the 15,682 individuals who filed a "reasonable impediment declaration" for lack of voter ID and were matched to the Texas voter file in 2016 were nonwhite).

reduced the turnout of Democratic-leaning groups up to 5%.[52] These studies, however, predated the implementation of most of the strict photo ID laws currently in place, including in Wisconsin.

Political scientists Zoltan Hajnal, Nazita Lajevardi, and Lindsay Nielson recently published the first empirical study that measures the effect of strict photo ID laws on turnout nationwide.[53] Using data from the Cooperative Congressional Election Study between 2006 and 2014, the authors compare turnout for different Democratic-leaning groups in states with strict photo ID laws and states without strict photo ID laws, controlling for other factors that could influence turnout.[54] They report that in general election contests, the turnout gap between Latinos and Whites is more than twice as large in strict ID states (13.5%) compared to non-strict ID states (4.9%).[55] The Asian–White turnout gap is 11.5% in strict ID states compared to 6.5% in non-strict ID states, and the gap between White and African American voters is 5.1% in strict ID states compared to 2.9% in non-strict ID states.[56] Such increases in the turnout gap between mostly Republican

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[52] *Compare* Daniel J. Hopkins et al., *Voting but for the Law: Evidence from Virginia on Photo Identification Requirements*, 14 J. EMPIRICAL L. STUD. 79, 88, 96–100 (2017) (finding that 222 ballots, cast provisionally for lack of voter ID, were never counted of nearly 2.19 million votes cast in the 2014 Virginia midterm election (0.0001%); factoring in the potential deterrence effect of voter ID, the authors show that Democratic voters were 5.1% less likely to vote after the implementation of Virginia's strict voter ID law, though turnout among Black voters increase by approximately 2.5%), *and* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 51, at 52 (finding that voter ID laws reduced turnout among African American registrants by 3.7% in Kansas and 1.5% in Tennessee, relative to white registrants) *with* Benjamin Highton, *Voter Identification Laws and Turnout in the United States*, 20 ANN. REV. POL. SCI. 149, 164 (2017) (reviewing the voter ID literature and concluding "[t]o the extent that sound evidence exists, it shows modest turnout effects and only minor differences across politically relevant groups").

[53] Hajnal et al., *supra* note 3, at 364.

[54] *Id.* at 367.

[55] Hajnal et al., *supra* note 3, at 369 (citing *Cooperative Congressional Election Study*, HARV. U., *available at* https://cces.gov.harvard.edu/pages/welcome-cooperative-congressional-election-study [https://perma.cc/U8R4-XKE2]).

[56] *Id.* at 369–71. The effect sizes that the authors find are even larger for primary elections. The turnout gap is more than three times as large in strict ID states for Latinos and Asians, and more than five times as large for African American voters. As the authors note, "[i]n primaries, the effects of voter identification laws are more pronounced and more negative for those on the political left." *Id.* at 371.

The Hajnal et al. findings about the racially disproportionate effect of voter ID laws triggered an intense debate amongst political scientists. In a response to the article, Professors Justin Grimmer, Eitan Hersh, Marc Meredith, Jonathan Mummolo, and Clayton Nall challenged the study's findings. Justin Grimmer et al., *Obstacles to Estimating Voter ID Laws' Effect on Turnout*, 80 J. POL. 1045, 1045–46 (2018). The response criticized Hajnal et al.'s use of survey data, coding decisions, and reliance on cross-sectional regressions that "[do] not adequately account for unobserved baseline differences between states with and without these laws." *Id.* at 1045–46. Using Hajnal et al.'s data, but employing a fixed effects model, Grimmer et al. found that voter ID laws "increased turnout among White, African American, Latino, Asian American, and mixed-race voters by 10.9, 10.4, 6.5, 12.5, and 8.3 percentage points in general elections, respectively." *Id.* at 1049. Furthermore, they found that the large white–minority voting gaps in states that adopted voter ID laws are driven by "increased white turnout . . . not by a drop in minority turnout." *Id.*

In a reply, Hajnal et al. claim that Grimmer et al. "present[] a misleading and flawed picture of the impact of strict ID laws" and reproduce findings supporting the claim in their original article that voter

Whites and mostly Democratic racial minorities could change election outcomes in close races.[57]

Proponents of the new voter suppression laws have claimed that they were intended to guard against fraud, the perception of fraud, and to otherwise protect the integrity of elections.[58] But the history of these new voter suppression laws suggests that lawmakers had partisan electoral advantage as their primary goal.[59] Although there are some scattered statements by lawmakers indicating the partisan (and even racist) motivations driving the adoption of the new voter suppression laws, it is the circumstantial evidence surrounding these laws that is most persuasive.[60] In 2001, fourteen states, including both states with Democratic and Republican majorities, had laws requesting that voters show some form of identification at the polls.[61] These laws allowed voters to present a variety of different

ID laws have a racially disproportionate effect for Latinos in general elections and for Latinos, Blacks, Asian-Americans, and multiracial Americans in primary elections. Zoltan Hajnal et al., *We All Agree: Strict Voter ID Laws Disproportionately Burden Minorities*, 80 J. POL. 1052, 1052–53 (2018).

[57] *See Wide Gender Gap, Growing Educational Divide in Voters' Party Identification*, PEW RES. CTR. 7–8 (Mar. 20, 2018), https://www.people-press.org/wp-content/uploads/sites/4/2018/03/03-20-18-Party-Identification-CORRECTED.pdf [https://perma.cc/27EH-X7UG] (describing the continued racial divisions in partisan identification).

[58] *See, e.g.*, Michael D. Gilbert, *The Problem of Voter Fraud*, 115 COLUM. L. REV. 739, 741, 743–46 (2015) (describing the anti-fraud defense of voter ID laws).

[59] Bentele & O'Brien, *supra* note 2, at 1089 ("[W]e argue that the Republican Party has engaged in strategic demobilization efforts in response to changing demographics, shifting electoral fortunes, and an internal rightward ideological drift among the party faithful."); Daniel R. Biggers & Michael J. Hanmer, *Understanding the Adoption of Voter Identification Laws in the American States*, 45 AM. POL. RES. 560, 580 (2017) ("Using this newly collected data, we determined that the story behind the adoption of a variety of different voter ID laws is primarily a partisan one . . . . These results provide substantial support for our hypotheses: The switch to pivot player status by the Republican Party creates the ability and impetus to modify existing voter ID laws," where "pivot player status" refers to the switch from minority party to control of the legislature and governorship.); Seth C. McKee, *Politics Is Local: State Legislator Voting on Restrictive Voter Identification Legislation*, 2015 RES. & POL. 1, 6 ("Beyond the widely anticipated finding that Republicans are much more supportive of restrictive voter ID legislation . . . among Republican legislators, a higher black district population *increases* legislators' support for voter ID, whereas among Democratic lawmakers, a higher black district population *reduces* legislators' likelihood of voting in favor of restrictive voter ID legislation.").

[60] For examples of lawmakers expressing their motivation for voter ID laws, see Aaron Blake, *Republicans Keep Admitting that Voter ID Helps Them Win, for Some Reason*, WASH. POST: THE FIX (Apr. 7, 2016) https://www.washingtonpost.com/news/the-fix/wp/2016/04/07/republicans-should-really-stop-admitting-that-voter-id-helps-them-win [https://perma.cc/XBM2-WVGK] (quoting Wisconsin Republican representative Glenn Grothman as saying, "I think Hillary Clinton is about the weakest candidate that the Democrats have ever put up and now we have photo ID and I think photo ID is going to make a little bit of a difference as well"; Pennsylvania state House Majority Leader Mike Turzai (R) saying that voter ID "is going to allow Governor Romney to win the state of Pennsylvania"; Pennsylvania GOP Chairman Robert Gleason who pointed to Obama's smaller margin of victory in 2012 compared to 2008 and said, "I think that probably photo ID helped a bit in that"; and Buncombe County, North Carolina Republican precinct chairman Don Yelton who said, "if [voter ID] hurts a bunch of lazy blacks that want the government to give them everything, so be it").

[61] *See* Hicks, *supra* note 29, at 20–21; *History of Voter ID*, *supra* note 28.

forms of identification documents and voters were allowed to cast a regular ballot even when they lacked identification.[62]

In 2002, the Help America Vote Act's (HAVA) response to the election administration and accessibility problems associated with the 2000 election required those who register by mail to provide voter identification when they vote.[63] In 2005, the bipartisan Commission on Federal Election Reform went further and proposed a uniform system of voter identification in which individuals would be required to present photo IDs at the polls, with such IDs being made readily accessible to those who lack it.[64] That Republican-introduced proposal proved controversial, producing three formal dissents.[65] That same year, Republican-controlled legislatures in Georgia and Indiana passed the first two state laws requiring voters to present a photo identification in order to vote.[66] In 2006, the Republican-controlled legislature in Missouri followed suit,[67] but the state's Supreme Court struck down the law as inconsistent with the state constitution.[68] The Court held that the *concern* about voter fraud among state lawmakers was real, but that the *problem* was not, noting a lack of supportive evidence.[69]

In 2008, state lawmakers in Indiana defended the state's voter ID law against a federal constitutional challenge but were unable to present a single prior example of voter impersonation fraud in the State.[70] The only example

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[62] *History of Voter ID*, *supra* note 28.

[63] Help America Vote Act of 2002 § 303(b)(ii) (codified as amended at 52 U.S.C. § 21083(b)(2)(A)); *see also* WANG, *supra* note 2, at 79 (identifying the narrow ID requirement in HAVA as the precursor to "a subsequent flood of more-stringent voter identification requirements enacted at the state level").

[64] COMM'N ON FED. ELECTION REFORM, BUILDING CONFIDENCE IN U.S. ELECTIONS: REPORT OF THE COMMISSION ON FEDERAL ELECTION REFORM, at iv (2005), https://www.eac.gov/assets/1/6/Exhibit%20M.PDF [https://perma.cc/RJ7Y-MZHR] ("[T]o make sure that a person arriving at a polling site is the same one who is named on the list, we propose a uniform system of voter identification based on the 'REAL ID card' or an equivalent for people without a drivers [sic] license. To prevent the ID from being a barrier to voting, we recommend that states use the registration and ID process to enfranchise more voters than ever.").

[65] Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 633 n.4 (2007) (identifying the formal dissenters as himself and another racial-minority-commission member and Democratic U.S. Senator Tom Daschle).

[66] GA. CODE ANN. § 21-2-417 (2006); IND. CODE § 3-10-1-7.2 (2006).

[67] MO. REV. STAT. § 115.427 (2006).

[68] Weinschenk v. State, 203 S.W.3d 201, 204 (Mo. 2006) (en banc) (per curiam).

[69] *Id.* at 218 ("While it is agreed here that the State's concern about the perception of fraud is real, if this Court were to approve the placement of severe restrictions on Missourians' fundamental rights owing to the mere perception of a problem in this instance, then the tactic of shaping public misperception could be used in the future as a mechanism for further burdening the right to vote or other fundamental rights.").

[70] Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 226 (2008) (discounting the state's interest against fraud because "the State has not come across a single instance of in-person voter impersonation fraud in all of Indiana's history. Neither the District Court nor the Indiana General Assembly that passed the Voter ID Law was given any evidence whatsoever of in-person voter impersonation fraud in the State" (internal citations omitted)).

the state presented involved absentee voter fraud that the law did not target.[71] What the Indiana legislatures did have was statistics on who possessed photo IDs, particularly driver's licenses. Those statistics revealed large disparities in White and minority ownership of photo identification, which indicated that the law would impact a larger share of minority, more Democratic voters than White, more Republican voters.[72] The United States Supreme Court nonetheless upheld Indiana's law against a facial challenge. After Republicans gained control of both houses in twenty-six legislatures along with twenty-nine state governorships in 2010, strict voter ID laws proliferated. Such laws passed only in states where Republicans completely controlled the legislature and the Governorship.[73] States continued to justify these laws on the basis of fraud prevention. But like Georgia, Missouri, and Indiana, the new adopters offered scant evidence of the voter impersonation fraud that voter ID laws would prevent while continuing to ignore much stronger evidence of absentee ballot fraud that voter ID laws would not address.[74] This strange policy choice had partisan roots. Absentee voters are mostly Republican-leaning while voters that go to the polls are mostly Democratic-leaning.[75] While the Republican state legislatures lacked

[71] *Id*. at 195–96 (referring to "Indiana's own experience with fraudulent voting in the 2003 Democratic primary for East Chicago Mayor—though perpetrated using absentee ballots and not in-person fraud" (internal footnote omitted)).

[72] Importantly, the district court granted the State of Indiana's summary judgment motion in part because plaintiffs did not introduce "evidence of a single, individual Indiana resident who will be unable to vote as a result of [the voter ID law] or who will have his or her right to vote unduly burdened by its requirements." Indiana Democratic Party v. Rokita, 458 F. Supp. 2d 775, 783 (S.D. Ind. 2006). On this point, the Court of Appeals noted that even though the petitioners had not been able to produce anybody who said they would vote but for lack of ID, their claim was valid inasmuch as the voter ID law "may require the Democratic Party and the other organizational plaintiffs to work harder to get every last one of their supporters to the polls." Crawford v. Marion Cty. Election Bd., 472 F.3d 949, 952 (7th Cir. 2007), *aff'd*, 553 U.S. 181 (2006).

[73] *See History of Voter ID*, *supra* note 28.

[74] *See e.g.*, Brief for the United States in Opposition, Abbott v. Veasey, 137 S. Ct. 612 (2017) (No. 16-393), 2016 WL 6958563, at *3 (comparing the approximately 20 million votes cast in Texas during the prior decade to the mere "two cases of in-person voter impersonation" that "were identified and prosecuted to conviction"); LORRAINE C. MINNITE, THE MYTH OF VOTER FRAUD 57–76 (2010) (cataloging the low incidence of voter impersonation fraud in select states); Natasha Khan & Corbin Carson, *Data: Voter Impersonation a Rarity*, WASH. POST, Aug. 12, 2012, at A3 (describing "[a] new nationwide analysis of more than 2,000 cases of alleged election fraud over the past dozen years . . . [that] found 10 cases of alleged in-person voter impersonation since 2000" (emphasis omitted)).

[75] *See, e.g.*, Alan Blinder & Michael Wines, *North Carolina Republicans Targeted Voter Fraud. Did They Look at the Wrong Kind?*, N.Y. TIMES (Dec. 5, 2018), https://www.nytimes.com/2018/12/05/us/politics/north-carolina-vote-fraud-absentee.html [https://perma.cc/NY49-PJZH] ("Republicans had generally dominated absentee ballots that were cast through the mail . . . ."); Sarah Childress, *Why Voter ID Laws Aren't Really About Fraud*, PBS FRONTLINE (Oct. 20, 2014), https://www.pbs.org/wgbh/frontline/article/why-voter-id-laws-arent-really-about-fraud [https://perma.cc/N692-UYQA] ("In 2012, nearly half, or 46 percent, of mail-in voters were aged 60 and older, and more than 75 percent were White, according to an analysis by Michael McDonald, a political science professor at the University of Florida who tracks demographic trends in voting. Older White Americans generally are more likely to vote Republican."); Adam Liptak, *Error and Fraud at Issue as Absentee Voting Rises*, N.Y. TIMES, Oct. 7,

evidence of voter impersonation fraud, they certainly had access to data showing racial and class disparities, often large disparities, in photo ID possession.[76] Those circumstantial bits of evidence combined with naked assertions of partisan intent point to partisan electoral advantage as the primary reason for the adoption of voter ID laws.

Voter ID laws were not the only voter suppression tool that Republicans appeared to use for partisan advantage. Voter roll purges by Republican-controlled secretaries of state in Georgia and Ohio;[77] the suspension and reduction of early voting in the Republican-controlled states of Florida, Georgia, Ohio, and Wisconsin;[78] restrictions on registration drives or third party registration in Republican-controlled Florida, Iowa, and Texas;[79] and proof of citizenship voting requirements in Republican-controlled Alabama, Kansas, and Tennessee all targeted groups critical to the Democratic coalition that elected and re-elected President Obama.[80]

Insofar as the new voter suppression aims to achieve partisan electoral advantage, these laws share much in common with the old voter suppression of the past. The Fifteenth Amendment and Reconstruction temporarily introduced a new era of racially inclusive politics in which African Americans under the banner of the Republican Party voted and elected their own to political office in the South.[81] However, the Democratic Party and the slavocracy that powered it would not go quietly. A relatively short period of

2012, at A1 ("Republicans are in fact more likely than Democrats to vote absentee. In the 2008 general election in Florida, 47 percent of absentee voters were Republicans and 36 percent were Democrats.").

[76] Letter from Thomas E. Perez, Assistant Att'y Gen., Civil Rights Div., U.S. Dep't of Justice to C. Havird Jones, Jr., Esq., Assistant Deputy Att'y Gen., S.C., at 2 (Dec. 23, 2011), *available at* http://www.documentcloud.org/documents/279907-doj-south-carolina-voting.html [https://perma.cc/Z66A-5UU5] ("In other words, according to the state's data, which compare the available data in the state's voter registration database with the available data in the state's DMV database, minority registered voters were nearly 20% more likely to lack DMV-issued ID than white registered voters, and thus to be effectively disenfranchised by Act R54's new requirements."); Letter from Thomas E. Perez, Assistant Att'y Gen., Civil Rights Div., U.S. Dep't of Justice to Keith Ingram, Dir. of Elections, Elections Div., Office of the Tex. Sec'y of State, at 3 (Mar. 12, 2012), *available at* https://www.documentcloud.org/documents/324586-justice-departments-decision-on-the-texas-voter.html [https://perma.cc/KRH5-XKHP] ("[A]ccording to the state's own data, a Hispanic registered voter is at least 46.5 percent, and potentially 120.0 percent, more likely than a non-Hispanic registered voter to lack this identification.").

[77] CAROL ANDERSON, ONE PERSON, NO VOTE: HOW VOTER SUPPRESSION IS DESTROYING OUR DEMOCRACY 75–81 (2018).

[78] ARI BERMAN, GIVE US THE BALLOT: THE MODERN STRUGGLE FOR VOTING RIGHTS IN AMERICA 262–63 (2015).

[79] *Id.* at 269; WENDY WEISER & MAX FELDMAN, BRENNAN CTR. FOR JUSTICE, THE STATE OF VOTING 2018, at 7 (2018).

[80] BERMAN, *supra* note 78, at 261.

[81] *See generally* ERIC FONER, FREEDOM'S LAWMAKERS: A DIRECTORY OF BLACK OFFICEHOLDERS DURING RECONSTRUCTION, at xi (Louisiana Paperback ed. 1996) (providing a comprehensive directory of the over 1,500 African Americans who held political office in the South during the Reconstruction Era).

enfranchisement was followed by two stages of voter suppression targeting African Americans and later other poor White voters. Beginning in the 1870s, white violence and intimidation targeted black voters and other supporters of the Republican Party with the goal of deterring them from voting and giving the Democratic Party an advantage in elections.[82] The Democratic Party reinforced this partisan advantage achieved by violence and intimidation by using fraud and manipulation of the ballot box.[83] Both sets of tactics allowed the Democratic Party to regain control of all the state legislatures in the former Confederate states by the mid-1870s.[84]

But even in this era of violence and fraud, African Americans continued to be a political force in the South.[85] An opening remained for partisan rivals of the Democratic Party to create class-based alliances between poor Whites, who had been politically subordinated by Democrats (and other party elites) during and after the slavery era, and African Americans seeking to defend themselves from the reimposition of systemic racial subordination at the heart of the Democratic Party ideology.[86]

The threat of a cross-racial class coalition led to the second stage of voter suppression for partisan advantage in the 1890s. First Independents, then Populists, began to mobilize lower class Whites and African Americans to win elections.[87] The Populist coalition pushed the Democrats out of power temporarily in North Carolina, Virginia, and Tennessee, won legislative seats in most Southern states, and closely contested statewide offices in several of the states.[88] In some states, Democrats were only able to turn back Populist challenges through fraud and manipulation at the ballot box.[89] Under threat of federal intervention to stop Democratic fraud and ballot box

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[82] *See, e.g.*, Laughlin McDonald et al., *Georgia*, *in* QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965–1990, at 67, 68 (Chandler Davidson & Bernard Grofman eds., 1994); Frank R. Parker et al., *Mississippi*, *in* QUIET REVOLUTION IN THE SOUTH, *supra*, at 136, 137; Robert Brischetto et al., *Texas*, *in* QUIET REVOLUTION IN THE SOUTH, *supra*, at 233, 235.

[83] J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880–1910, at 17–18 (1974); McDonald et al., *supra* note 82, at 68.

[84] MICHAEL PERMAN, STRUGGLE FOR MASTERY: DISFRANCHISEMENT IN THE SOUTH, 1888–1908, at 9–10 (2001)

[85] *See* STEVEN F. LAWSON, BLACK BALLOTS: VOTING RIGHTS IN THE SOUTH, 1944–1969, at 7 (1976) (describing how African Americans in the South "continued to exercise the franchise and to hold public office in the 1880s and 1890s").

[86] *See* Armand Derfner, *Racial Discrimination and the Right to Vote*, 26 VAND. L. REV. 523, 535 (1973) (describing the ongoing political threat that African Americans posed to Democratic hegemony in 1890).

[87] KOUSSER, *supra* note 83, at 25–26.

[88] *Id.* at 26; PERMAN, *supra* note 84, at 32.

[89] PERMAN, *supra* note 84, at 32 (describing how massive electoral fraud by Democrats was necessary to prevent the Populist coalition from winning control of the legislature).

manipulation, the African American threat to partisan advantage became even more salient.[90]

States started to look to Mississippi and South Carolina as examples for how to suppress the minority vote without being subject to federal legislative and judicial interventions: through residence requirements for voting, poll taxes, and literacy and understanding tests.[91] Other Democratic-controlled state legislatures followed suit by adopting similar types of voter suppression laws including White-only primary elections and expanded felon disfranchisement laws that targeted crimes for which African Americans were more likely to be accused and convicted.[92] The result was Democratic Party hegemony in the South that would remain essentially unchallenged until the 1960s.[93]

Thus the new and old voter suppression do bear this important similarity: both had partisan electoral advantage as their effect and goal. The old voter suppression helped restore Democratic Party hegemony in the South following Reconstruction. The new voter suppression has not yet had this widespread electoral effect, but it has arguably helped Republican candidates win closely contested elections throughout the nation. But in a critical other respect overlooked by those who rely on the analogy, the strategies diverge. The old voter suppression involved the effective disfranchisement of an entire class of voters that the new voter suppression is nowhere near achieving.

B. Where the Analogy Fails

The ideology of white supremacy was at the core of the post-Civil War Democratic Party. In their virulent opposition to the Fifteenth Amendment, Democratic congressmen repeatedly proclaimed, "[T]his is a white man's

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[90] KOUSSER, *supra* note 83, at 29–30 (describing the failed federal Lodge Bill, which would have required federal "supervision of all phases of registration and voting in national elections, and in effect nullifying certain practices and laws that facilitated fraud and disfranchisement").

[91] *See* Orville Vernon Burton et al., *South Carolina*, *in* QUIET REVOLUTION IN THE SOUTH, *supra* note 82, at 191, 193 (describing the South Carolina Eight Box Law and its racially discriminatory effect on voting); Parker et al., *supra* note 82, at 137 (describing Mississippi's adoption of a cumulative poll tax and literacy requirements for voting during its constitutional convention in 1890).

[92] *See, e.g.*, DARLENE CLARK HINE, BLACK VICTORY: THE RISE AND FALL OF THE WHITE PRIMARY IN TEXAS 69–94 (new ed. 2003) (describing the adoption and use of white primaries throughout the South as a tool to deprive African Americans of all influence in elections); JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 41–68 (2006) (describing the racially discriminatory origins of felon disfranchisement).

[93] KOUSSER, *supra* note 83, at 224–37 (describing the transition from multi-party democracy to single-party oligarchy in the South at the beginning of the twentieth century); Merle Black & Earl Black, *Deep South Politics: The Enduring Racial Division in National Elections*, *in* THE OXFORD HANDBOOK OF SOUTHERN POLITICS 401, 404 (Charles S. Bullock III & Mark J. Rozell eds., 2012) ("From the beginning of the twentieth century until the 1964 elections, *every* member of the U.S. Senate and House of Representatives from the Deep South was a Democrat.").

government."[94] Democrats tried to rally support for their white supremacy vision of government (and opposition to the Fifteenth Amendment) by advancing racist claims about the competency and capability of African Americans to engage in the project of self-government.[95] The Democrats also tried to stoke fear amongst Whites in the South with predictions of retribution from African Americans if they were given the opportunity to rule.[96]

The campaign against the Fifteenth Amendment ultimately failed, but white supremacist ideology remained as a motivating force underlying the old voter suppression. Democrats used white supremacy as a means to bridge the class divides between Whites in the South and to secure white support and involvement in programs of voter suppression, designed not merely to achieve partisan electoral advantage but also the effective disfranchisement of African Americans as a class.[97]

In the two post-Reconstruction stages of disfranchisement, Democrats constructed bogeymen designed to rally unified white support for voter suppression. The first bogeyman, "Negro rule," was constructed in response to the African American enfranchisement and officeholding of the brief Reconstruction period.[98] Feeding into the broad southern white fear of political subordination to African Americans—something southern Whites deemed a realistic prospect given the number of African Americans in the South—Democrats encouraged the violence and intimidation targeting Black voters that was a central feature of the first stage of voter suppression.[99] Democrats proved unable to effectively disfranchise African Americans, but it was not for lack of effort or desire. The resilience of African Americans and southern fear of the return of northern supervision or control over the

[94] This Democratic Party mantra during the debate over the Reconstruction was famously captured in a political cartoon by Thomas Nast in the Harper's Weekly depicting three white men representing the three wings of the Democratic Party with their feet on the back and head of a black man lying face down grasping an American flag, representing his newly granted constitutional rights. Thomas Nast, *This Is a White Man's Government*, HARPER'S WEEKLY, Sept. 5, 1868, at 568, *available at* https://blackhistory.harpweek.com/7Illustrations/Reconstruction/ThisIsAWhiteMansGov.htm [https://perma.cc/9C9F-SM6M].

[95] *See, e.g.*, PERMAN, *supra* note 84, at 22 (quoting Mississippi Senator James Z. George's public statement about the great problem of black suffrage published in the Vicksburg Commercial Herald asserting that African Americans "though possessing many virtues and many excellent qualities, have never yet developed the slightest capacity to create, to operate, or to preserve constitutional institutions"). The Senator's view about "'the great problem' . . . was neither remarkable nor unusual. It was widely shared." *Id.* at 22–23.

[96] *See* ERNEST MCPHERSON LANDER, JR., A HISTORY OF SOUTH CAROLINA, 1865–1960, at 40 (1970) (describing the role of Ben Tillman, Governor and later Senator of South Carolina, in propagating a fear of Negro rule to secure support for voter suppression measures that disfranchised African Americans and poor Whites).

[97] PERMAN, *supra* note 84, at 27.

[98] LAWSON, *supra* note 85, at 10; PERMAN, *supra* note 84, at 22–24.

[99] LAWSON, *supra* note 85, at 11.

South functioned as barriers to effective disfranchisement.[100] But the violence and intimidation combined with fraud and manipulation at the ballot box did reduce the black officeholding that the Democrats associated with "Negro rule."[101]

The Democratic Party and other white supremacists in the South, however, did not give up on the cause of black disfranchisement. When "Negro rule" faded as a plausible description of political reality in the mid-1870s after Democrats gained control over all Southern state legislatures, Democrats constructed a new bogeyman, "Negro domination."[102] According to this account, African Americans posed a domination threat so long as they could vote and be mobilized by rivals to the Democratic Party.[103] Democrats used this fear of "Negro domination" to weaken the cross-class Black–White coalition that underpinned support for the Independents and the Populists in the 1880s and 1890s and to ultimately secure the necessary support for the legal devices used to suppress the vote.[104]

Once the Democrats gained political support for the second stage of voter suppression through law, they set as their goal the complete eradication of the political threat posed by African American voters.[105] The cumulative poll taxes, literacy and understanding tests, white primaries, felon disfranchisement laws, grandfather clauses and other legal vehicles did just that as they reduced black voter registration and voting to a level where Blacks could not exercise any influence over elections or secure any representation in the political process.[106]

The new voter suppression is distinct from the old insofar as it does not disfranchise entire groups. Though racism likely plays a role in these voter suppression efforts, the evidence indicates that partisan electoral advantage

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[100] *See, e.g.*, Peyton McCrary et al., *Alabama*, *in* QUIET REVOLUTION IN THE SOUTH, *supra* note 82, at 38, 42 ("The likelihood of federal intervention [after the passage of the Reconstruction Amendments] prevented the Democrats from simply disfranchising blacks and made it necessary to find alternative methods of assuring white supremacy.").

[101] ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877 (Henry Steele Commager & Richard B. Harris eds., updated ed. 2014).

[102] LAWSON, *supra* note 85, at 10; PERMAN, *supra* note 84, at 22–24.

[103] PERMAN, *supra* note 84, at 24.

[104] *Id.*; *see also* LAWSON, *supra* note 85, at 10 ("[T]he spectre of '[Negro] domination' succeeded [as] [t]he obsession with white supremacy replaced the preoccupation with economic issues . . . .").

[105] *See* BLACK & BLACK, *supra* note 93, at 402 ("To achieve these goals [of Negro subordination and insulation against external interference with local affairs], southern white men in the 1890s and early 1900s combined violence and new requirements for voter registration (primarily poll taxes and/or tests of literacy and 'understanding') to expel virtually all black men from the electorate.")

[106] *See* LAWSON, *supra* note 85, at 14–15 (describing the reduction of the black electorate in states throughout the South after 1900).

is the overriding motivation and the narrower effects of these newer tools.[107] In fact, the new voter suppression tools have not come remotely close to disfranchising an entire class of citizens. The laws have had only a minor effect on turnout when compared to the effect of the old voter suppression tools. Hajnal et al.'s nationwide study, which found the largest negative turnout effect from strict voter ID laws, still only found a statistically significant negative turnout effect from these laws in general elections for *one* of the four racial minority groups: Latinos.[108] Although only a few studies measure the effects of other new voter suppression tools such as voter roll purges, the reduction or suspension of early voting, restrictions on registration drives, or citizenship proof requirements for voting on the turnout of the targeted groups, those studies suggest a negative turnout effect but not nearly at the level of effectively excluding entire groups of voters.[109]

Differences in costs imposed on potential voters can explain the distinctive disfranchising effects of the old and new voter suppression tools. Whereas the old suppression tools imposed impossible-to-surmount costs on African Americans who sought to vote, the new voter suppression tools impose much lower costs that racial minorities and the poor can overcome. A recognition of that reality is not meant to condone voter ID laws or any of the other new voter suppression tools, nor to dismiss their effects as barriers to voting for the many people who cannot afford the costs of a photo ID or are discriminatorily purged from voter rolls. We fully agree that denial of the vote to anyone is a democratic harm that should be unacceptable in any self-governing republic. Instead, our goal is to shine a light on something that the analogy between the old and new voter suppression unintentionally obscures.

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[107] *See, e.g.*, BERMAN, *supra* note 78, at 255 (quoting racist statements from the sponsor of the Texas voter ID law in support of the law); *see also supra* note 3 (identifying direct and circumstantial evidence of the partisan motivation behind state voter ID laws).

[108] *See* Hajnal et al., *supra* note 3, at 368–71 (finding that strict voter ID laws had a statistically negative effect only for Latinos in general elections). The study did, however, find that strict voter ID laws had a statistically significant effect for African Americans, Latinos, and Asian-Americans in primary elections. *Id.* These findings raise the question of whether something other than voter ID laws and the other variables contained in the model is influencing the turnout decision.

[109] *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 51, at 48–49 (finding a 3.7% and 1.5% decline in African American turnout from the 2008 to the 2012 general elections in Kansas and Tennessee, respectively, after the two states imposed citizenship requirements for voting—the highest turnout drop for any racial minority group); Adam J. Berinsky, *The Perverse Consequences of Electoral Reform in the United States*, 33 AM. POL. RES. 471, 480–82 (2005) (finding from a review of scholarship that higher propensity voters took much more advantage of early voting, absentee voting, and internet voting than lower propensity voters, which suggests that the reduction or elimination of convenience voting would not have a large turnout effect on lower propensity voters).

C. What the Analogy Masks

There is an entire class of citizens that has been effectively disfranchised: the poor. In one important respect, the poor are similarly situated to African Americans in the South after the adoption of legal voter suppression tools during the redemption period. The poor's turnout numbers have been reduced to such a low level that the poor do not influence elections. As recent empirical studies have shown, elected actors do not respond to the poor's interests through the political process.[110] That, for us, is the definition of effective disfranchisement, and it undermines our democracy.

In the 2016 presidential election, there was, according to the United States Census, a 30% reported turnout gap between the wealthy and the poor.[111] The gap might lead one to ask whether the new voter suppression laws, like the old, are effectively disfranchising the poor, who are most vulnerable to increases in the tangible costs of voting. But turnout data from elections preceding the recent spate of voter suppression laws suggest otherwise. For example, in the 2004 presidential election, the last presidential election before Indiana and Georgia became the first states to require photo IDs to vote in elections, the reported turnout gap between the rich and poor in the U.S. Census was actually higher than it was in 2016.[112] In fact, a 25% to 35% gap in reported turnout between the highest and lowest income classes categorized in the U.S. Census has persisted since the census started collecting voting data by income in 1964.[113]

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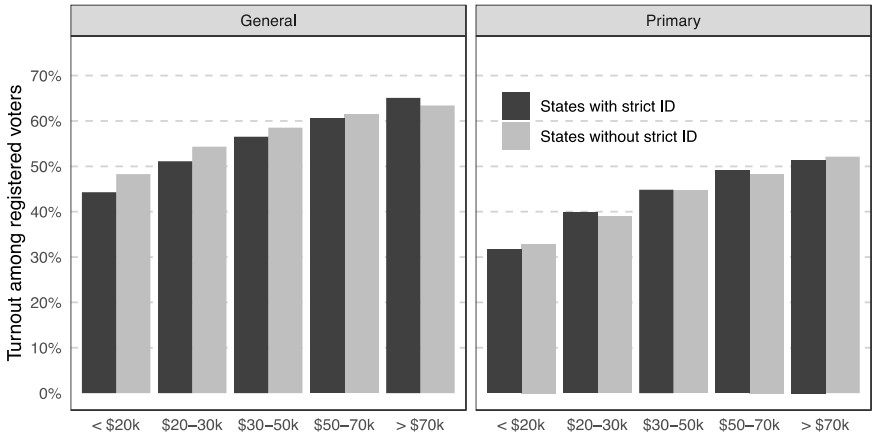
[110] Bertrall L. Ross II & Su Li, *Measuring Political Power: Suspect Class Determinations and the Poor*, 104 CALIF. L. REV. 323, 368–70 (2016) (finding that legislators were less likely to support antipoverty legislation in districts with large poor populations); *see also* Ross, *supra* note 15, at 1132–35 (describing the decline in redistributive policies and protections for lower income and working-class people in the United States over the past forty years); Nicholas O. Stephanopoulos, *Political Powerlessness*, 90 N.Y.U. L. REV. 1527, 1577–79 (2015) (summarizing the empirical literature on policy nonresponsiveness to the poor).

[111] Specifically, 80.3% of citizens who earned more than $150,000 voted in 2016 as compared to 48.5% of citizens who earned less than $30,000. *See* U.S. CENSUS BUREAU, *supra* note 7.

[112] The reported turnout gap between the richest 20% of American citizens and the poorest 20% was 40.3% in 2004 and 33.8% in 2016. *Id.* (2016 data); U.S. CENSUS BUREAU, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2004: TABLE 8 (2004), https://www.census.gov/data/tables/2004/demo/voting-and-registration/p20-556.html [https://perma.cc/3C5N-7TV2] (reporting 2004 data).

[113] *See* KAY LEHMAN SCHLOZMAN ET AL., THE UNHEAVENLY CHORUS: UNEQUAL POLITICAL VOICE AND THE BROKEN PROMISE OF AMERICAN DEMOCRACY 153 (2012) (reporting a similar gap through 2008); Jan E. Leighley & Jonathan Nagler, *Socioeconomic Class Bias in Turnout, 1964–1988: The Voters Remain the Same*, 86 AM. POL. SCI. REV. 725, 728 tbl.1 (1992) (reporting consistent gap between 25%–35% from 1964–1988).

FIGURE 1: AVERAGE FEDERAL ELECTION TURNOUT BY INCOME, 2006–2016[a]



[a] Average turnout in federal elections between 2006 and 2016 by equally sized income quintiles and the status of voter ID laws in the voter's state. *Source:* Cooperative Congressional Election Study (CCES) validated voter file.

To illustrate why we think this gap is one of the most pressing and overlooked voting rights issues of our time, we use the Cooperative Congressional Election Study (CCES) validated voter file to plot the average turnout of individuals in five equally sized income quintiles between 2006 and 2016 (these quintiles do not correspond with the U.S. Census income class categories, which explains the relatively smaller turnout gap between the highest and lowest income quintile in the CCES data). In Figure 1, we plot turnout by status of voter ID laws in the voter's state (strict ID versus no strict ID) and election type (primary versus general).

As Figure 1 indicates, income is a much stronger predictor of turnout than presence of strict voter ID laws. Turnout is never more than 2% lower in states with strict voter ID laws compared to states with no strict ID requirements. In fact, for some income groups the turnout in states with strict ID laws was higher than in states with no strict ID laws.[114] On the other hand, there is a 3% to 6% turnout gap between each income quintile, and the difference between turnout in the highest quintile (those who earn approximately $70,000 or more) and the lowest quintile (those who earn less

[114] A recent study of turnout in Rhode Island found differential effects before and after the state's 2014 photo ID law, specifically that turnout *increased* by an estimated 3.7% among high socioeconomic status registered voters in midterm elections. Francesco Maria Esposito et al., *Effects of Photo ID Laws on Registration and Turnout: Evidence from Rhode Island* 30 (Nat'l Bureau of Econ. Research, Working Paper No. 25503) (Jan. 2019), http://www.nber.org/papers/w25503 [https://perma.cc/G9U2-FDDR].

than approximately $20,000) is 19% to 20%.[115] Furthermore, the income gap exists in states with and without strict voter ID laws, suggesting that strict ID laws are not driving the income turnout gap. Thus, the fixation of voting rights advocates and democracy scholars on new voter suppression as the voting rights issue of our time misses a much larger disparity.

In Figure 2 we plot the relative disproportionality of turnout by income quintiles. If turnout is equally distributed across all five income groups, then each group would contribute 20% of the total votes. Instead, as the figure illustrates, those in the poorest quintile contribute nearly five percentage points (or 21%) less than expected to the overall vote, compared to those in the wealthiest quintile who contribute three percentage points (or 15%) more than expected. The large deviation between the highest and lowest income quintile raises serious questions about whether income inequality in the United States undermines the principle of one-person, one-vote.[116] In *Reynolds v. Sims*, the Supreme Court held that "[f]ull and effective participation by all citizens in state government requires . . . that each citizen have an *equally effective* voice in the election of members of his state legislature."[117] In the context of apportionment and districting, the Court has, as a rule of thumb, tolerated deviations between the most populous and least populous state and local districts of up to 10%.[118] Following the Court's logic in the malapportionment cases, the "income quintile deviation" (percentage overrepresentation of the upper quintile minus the percentage underrepresentation of the bottom quintile) is 36%, suggesting that the next battle for the *Reynolds* ideal of an "equally effective voice" might be waged over poverty and turnout.[119] We also note that the "new voter suppression"

[115] Ethan Kaplan, *Election Law and Political Economy*, ECON. FOR INCLUSIVE PROSPERITY 1 (Jan. 2019), https://econfip.org/wp-content/uploads/2019/02/5.Election-Law-and-Political-Economy.pdf [https://perma.cc/GN9Y-J9NT] ("Those earning more than $150,000 per year vote at a 50% higher rate in presidential elections and at a 100% higher rate in midterm elections than those making less than $5,000 per year.").

[116] The Supreme Court interpreted the Equal Protection Clause as a guarantee of the one-person, one-vote standard in apportionment in a series of cases during the 1960s. *See* Avery v. Midland Cty., 390 U.S. 474, 484–85 (1968); Reynolds v. Sims, 377 U.S. 533, 568 (1964); Wesberry v. Sanders, 376 U.S. 1, 17–18 (1964); Gray v. Sanders, 372 U.S. 368, 391 (1963).

[117] 377 U.S. at 565 (emphasis added).

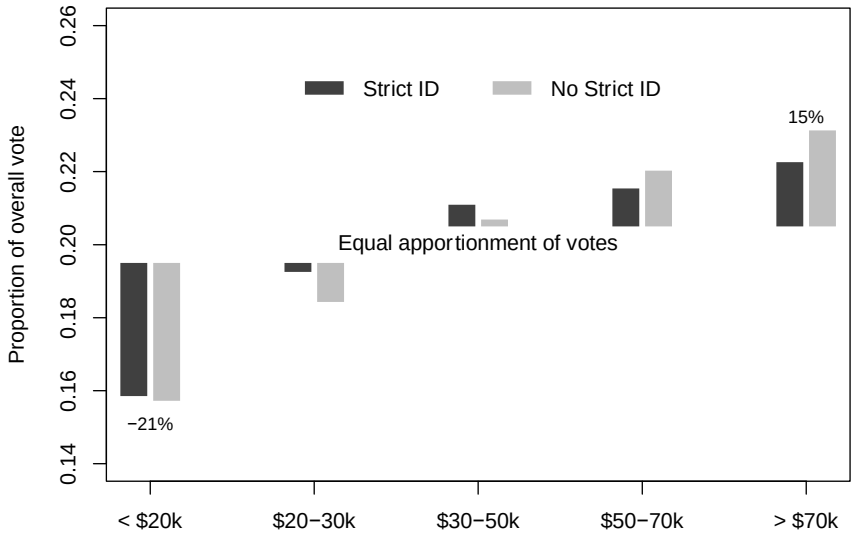
[118] Brown v. Thomson, 462 U.S. 835, 842–43 (1983) ("Our decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within [a] category of minor deviations. A plan with larger disparities in population, however, creates a prima facie case of discrimination and therefore must be justified by the State." (internal citations omitted)). While the Court has required near perfect population equality in congressional districts, it presumptively accepts deviations up to 10% in state and local districts due to their smaller district sizes, geographic constraints, a commitment to compactness, contiguity, and enforcement of the Voting Rights Act. *See id.* at 842.

[119] Note that the 36% "income quintile deviation" is much larger than deviations in turnout by race (15%–16% less turnout among Hispanic, Black, and Asian voters compared to White voters) and gender (7% less turnout among women). *See* Shiro Kuriwaki, *Cumulative CCES Common Content*

does not account for this disparity. In fact, the income quintile deviation is smaller in states with strict voter ID laws than in states with no strict ID laws.

If the new voter suppression only weakly (if at all) accounts for the persistent turnout disparity between the rich and the poor, then what does account for it? To answer this question, we need to move beyond the theoretical approach to voting that is embedded in legal scholarship and advocacy. In the next part, we use social scientists' recent work to broaden our understanding of the factors that drive voting and keep the poor away from the polls.

FIGURE 2: RELATIVE TURNOUT DISPROPORTIONS BY INCOME[b]



[b] Relative disproportionality in turnout by equally sized income quintiles and the status of voter ID laws in the voter's state. *Source*: Cooperative Congressional Election Study (CCES) validated voter file (2006–2016).

II. TOWARD A DEEPER THEORETICAL ACCOUNT OF VOTING

When it comes to voting barriers, a large disjuncture has emerged between what legal experts target and what social scientists conclude matters. A central focal point for legal scholars and lawyers is state-imposed legal barriers to voting and their impact on racial minorities.[120] Yet legal experts have completely ignored the sources, or even the very existence, of the effective disfranchisement of the poor. While social scientists devote

(2006–2018), HARV. DATAVERSE (Apr. 29, 2019), https://doi.org/10.7910/DVN/II2DB6 [https://perma.cc/UTL9-UAYT].

[120] *See supra* note 2 and accompanying text.

considerable energy to examining the effect of legal barriers on racial minority voting,[121] they also study impediments to voting that affect other groups as well, such as the poor.[122] Their broadened focus relies on theories of voting that go beyond tangible obstacles like voter ID laws.

For social scientists informed by rational choice and sociological theories of voting, voting depends on a panoply of factors beyond overt barriers.[123] Voters' ability to access information and their connections to other politically active individuals are much more central determinants of voting than the tangible costs.[124] In this Part, we provide a deeper theoretical account of voting than typically advanced by legal scholars as a foundation for a more nuanced understanding of the sources of disfranchisement. We then relate these theories and their empirical implications to the effective disfranchisement of the poor.

A. Rational Choice Theory

Voting is not a deeply theorized subject in law. When barriers to voting fail to fully explain people's decision not to vote, there is no alternative theoretical account in legal scholarship or advocacy. Instead, legal scholars and advocates cycle from one generation to the next of voting rights challenges—from vote denial (the first generation of barriers) to vote dilution (second generation) to election administration (third generation)—without developing a full theoretical account explaining why people do or do not vote.[125] Understanding the decision to vote, we argue, is key to all three generations of voting rights challenges, which all share the goal of a more inclusive democracy.

Rational choice theory advances our understanding of the determinants of voting beyond tangible costs. Legal scholars are certainly not oblivious to rational choice theory. Anthony Downs, the principal progenitor of the

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[121] *See supra* note 3 and accompanying text.

[122] *See, e.g.*, BARTELS, *supra* note 6, at 260–65; GILENS, *supra* note 6; Kim Quaile Hill et al., *Lower-Class Mobilization and Policy Linkage in the U.S. States*, 39 AM. J. POL. SCI. 75, 83 (1995) (finding a "positive relationship between lower-class mobilization and state welfare policy"); Elizbeth Rigby & Gerald C. Wright, *Political Parties and Representation of the Poor in the American States*, 57 AM. J. POL. SCI. 552, 553 (2013) (examining the responsiveness of state political parties to the preferences of individuals from varied income backgrounds during the initial stages of policymaking).

[123] *See infra* notes 132–136 and accompanying text.

[124] *See infra* note 137.

[125] *See, e.g.*, Gilda R. Daniels, *A Vote Delayed Is a Vote Denied: A Preemptive Approach to Eliminating Election Administration Legislation that Disenfranchises Unwanted Voters*, 47 U. LOUISVILLE L. REV. 57, 66–69 (2008); Brandon Haase, *Guaranteeing the Right to Vote for Twenty-First Century America*, 43 J. LEGIS. 240, 244 (2016); Dale E. Ho, *Building an Umbrella in a Rainstorm: The New Vote Denial Litigation Since* Shelby County, 127 YALE L.J.F. 799, 800–02 (2018); Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the New Voting Rights Act*, 57 S.C. L. REV. 689, 691–92 (2006).

theory, has been much cited and discussed in the legal literature.[126] But when it comes to voting, legal scholars tend to narrowly focus on the paradox of voting that rational choice theorists have thus far failed to resolve within the theory itself—the question of why anyone bothers to vote when the likely impact of any individual vote on election outcomes is essentially nil.[127]

Rational choice posits three factors relevant to an individual's decision to invest, or vote: the benefits from voting, the costs to voting, and the probability that the individual's vote will be decisive in an election.[128] In this "calculus of voting," even relatively trivial costs of voting, such as making a trip to the polls—let alone the much higher information costs—are likely to exceed any benefit from voting multiplied by the probability of casting a decisive vote. It is therefore irrational for anyone to vote. And yet, paradoxically, millions and millions of Americans vote in elections every year.[129]

This paradox, and the lack of clear resolution of this paradox, has contributed to legal scholars' dismissive treatment of rational choice theory.[130] We argue, however, that legal scholars have been too quick to dismiss the theory. Even if rational choice theory is unable to explain why people vote in the first place, it provides important insights into voting determinants on the margin. It may be that the baseline decision to vote is motivated by factors that are inconsistent with the premises of the theory,

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[126] Anthony Downs's seminal work from 1957 that serves as the starting point for rational choice theory, *An Economic Theory of Democracy*, *infra* note 128, has been cited in some 796 law review articles to date according to a Hein Online search.

[127] *See, e.g.*, Stephen Ansolabehere & Nathaniel Persily, *Vote Fraud in the Eye of the Beholder: The Role of Public Opinion in the Challenge to Voter Identification Requirements*, 121 HARV. L. REV. 1737, 1752 & n.38 (2008) (citing Downs but narrowly focusing on the paradox of voting); Richard L. Hasen, *Voting Without Law?*, 144 U. PA. L. REV. 2135, 2138–42 (1996) (engaging in the most expansive analysis of the paradox of voting in the legal literature); Jason Marisam, *Voter Turnout: From Cost to Cooperation*, 21 ST. THOMAS L. REV. 190, 205–06 (2009) (describing the rational choice model and the paradox of voting).

[128] ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 38–45 (1957). In a later article, William Riker and Professor Peter Ordeshook construct a calculus of voting that relates the three factors in the following formula: $R = PB - C$. R is the return to the individual for voting (R) and this return is derived from the probability of casting a decisive vote (P) multiplied by the investment benefit from voting (B) minus the costs to voting (C). William H. Riker & Peter C. Ordeshook, *A Theory of the Calculus of Voting*, 62 AM. POL. SCI. REV. 25, 25 (1968). A paradox arises from the fact that the probability of casting a decisive vote in any large election is infinitesimally small. *See* Andrew Gelman et al., *What Is the Probability Your Vote Will Make a Difference?*, 50 ECON. INQUIRY 321, 323–24 (2012) (estimating that the probability of casting the pivotal vote in a presidential election (accounting for the probability that one lives in a state whose Electoral College vote will be pivotal) is approximately 1 in 60 million, or "at most, 1 in 10 million in a few states near the national median"). As a result, the interaction term (PB) will also be infinitesimally small.

[129] *See* Timothy J. Feddersen, *Rational Choice Theory and the Paradox of Not Voting*, 18 J. ECON. PERSP. 99, 99 (2004).

[130] *See, e.g.*, Hasen, *supra* note 127, at 2146 ("Rational choice theory seems best suited to explaining voting on the margin only, by examining how changes in costs (the *C* term) affect turnout."); Marisam, *supra* note 127, at 205 ("The rational choice model holds limited predictive value for voter turnout.").

such as consumption benefits from voting related to satisfying a sense of civic duty or the desire to maintain a democracy.[131] But rational choice theory can still contribute to our understanding of the sources of variation in turnout that have been mostly overlooked in the legal literature. In particular, rational choice theory identifies two voting determinants—information and formal organizational affiliation—that, we argue later in this Part, are unevenly distributed and help explain the socioeconomic class-based participatory inequality that is the focal point of this Article.

One of the critical insights from rational choice theory is the importance of information to voting.[132] For example, Downs recognized uncertainty as a central feature of the basic logic of voting, which affects all three variables in the calculus of voting.[133] First, uncertainty influences an individual's assessment of the benefits from voting. When looking backward, individuals face uncertainty about what the incumbent, as part of the government, has done or could be doing to increase their well-being.[134] Individuals are also uncertain about the differences between what candidates will do in the future and how those differences might impact their well-being.[135] Individuals unable to differentiate between candidates in terms of their well-being should

[131] *See* DOWNS, *supra* note 128, at 246 (arguing that the paradox of voting can be resolved once we recognize that "rational citizens want democracy to work well so as to gain its benefits"). Riker & Ordeshook, *supra* note 128, at 25, include terms to capture both investment value (utility derived from contributing to the outcome of an election) and consumption value (utility derived from the act of voting itself) in their calculus of voting, but do not develop a strong basis for distinguishing between the two. More recent literature on the ethics of voting has developed a stronger theory about voting as an expression of values and a signal of beliefs. *See, e.g.*, GEOFFREY BRENNAN & LOREN LOMASKY, DEMOCRACY AND DECISION: THE PURE THEORY OF ELECTORAL PREFERENCE 32–53 (1993) (establishing a model of electoral behavior where voting is a primarily expressive act); Loren E. Lomasky & Geoffrey Brennan, *Is There a Duty to Vote?*, 17 SOC. PHIL. & POL'Y 62, 82 (2000) (arguing that "[o]f all the rationales for a duty to vote, we find the expressive account strongest"); Alexander A. Schuessler, *Expressive Voting*, 12 RATIONALITY & SOC. 87, 90 (2000) (explaining how the utility from voting should be conceptualized as "being versus doing").

[132] In addition to Anthony Downs, who focuses extensively on information as a critical determinant of voting, *see* DOWNS, *supra* note 128, at 207–46, an information theory of voting has emerged as a central component in the rational choice account of voting. *See, e.g.*, Timothy J. Feddersen & Wolfgang Pesendorfer, *Abstention in Elections with Asymmetric Information and Diverse Preferences*, 93 AM. POL. SCI. REV. 381, 381 (1999) ("We derive necessary and sufficient conditions for abstention and show how the level of abstention depends upon the information environment."); Timothy J. Feddersen & Wolfgang Pesendorfer, *The Swing Voter's Curse*, 86 AM. ECON. REV. 408, 409 (1996) ("Our contribution here is to demonstrate that informational asymmetries may also influence both participation and vote choice independent of costs to vote and pivot probabilities."); John G. Matsusaka, *Explaining Voter Turnout Patterns: An Information Theory*, 84 PUB. CHOICE 91, 93 (1995) ("The main insight of the model is that even if people believe it is their duty to vote, rational citizens abstain if they feel unable to evaluate the choices."); Joseph McMurray, *The Paradox of Information and Voter Turnout*, 165 PUB. CHOICE 13, 15 (2015) ("[T]he empirical importance of information favors a view of voting somehow as instrumental, rather than as an end in itself.").

[133] DOWNS, *supra* note 128, at 77–82.

[134] *Id.* at 80.

[135] *Id.*

be less likely to vote because there would be no recognizable benefit from voting.

Second, uncertainty also impacts individuals' perceptions about their probability of casting a decisive vote. While it is infinitesimally rare for any individual to cast a decisive vote, studies have shown that individuals' perceptions about the closeness of an election can influence their decisions to vote.[136] Those who do not know the closeness of the election may be less likely to vote. Finally, uncertainty about the logistics of voting can also influence the decision to vote. Individuals who are uncertain about where to vote, how much time it will take to vote, when to vote, and what is required in order to vote are less likely to vote.[137]

Information can reduce or even eliminate uncertainty about the benefits of voting, perceptions about the closeness of elections, and the process of voting. A stream of free (or close to free) and broadly available information can dramatically reduce uncertainty about whether one's vote might be decisive. Television, radio, newspapers, and the Internet provide the public with a broad sense of the anticipated closeness of elections.[138] Such information requires little processing time or background knowledge and is therefore presumably more easily incorporated by individuals across all classes into their calculus of voting.

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[136] For early research showing strong correlations between electoral competitiveness and turnout, see generally ANGUS CAMPBELL ET AL., THE AMERICAN VOTER (1960); THOMAS R. DYE, POLITICS, ECONOMICS, AND THE PUBLIC: POLICY OUTCOMES IN THE AMERICAN STATES (Aaron Wildavsky ed., 1966); WILLIAM H. FLANIGAN, POLITICAL BEHAVIOR OF THE AMERICAN ELECTORATE 34–36 (2d ed. 1972); Lester W. Milbrath, *Individuals and Government*, *in* POLITICS IN THE AMERICAN STATES: A COMPARATIVE ANALYSIS 27 (Herbert Jacob & Kenneth N. Vines eds., 2d ed. 1971).

More recent studies note that the correlation between turnout and competitive elections is strongest in single-member districts, Daniel Stockemer, *When Do Close Elections Matter for Higher Turnout? Gauging the Impact of the Interaction Between Electoral Competitiveness and District Magnitude*, 25 J. ELECTIONS PUB. OPINION & PARTIES 178, 190 (2015), and when voters perceive elections to be close, Leonardo Bursztyn et al., *Polls, the Press, and Political Participation: The Effects of Anticipated Election Closeness on Voter Turnout* 5 (Nat'l Bureau of Econ. Research, Working Paper No. 23490, 2018) ("We find that greater exposure to only the incidental reporting on close polls is associated with greater turnout as well.").

Increased mobilization may also drive turnout in close elections. *See generally* Gary W. Cox & Michael C. Munger, *Closeness, Expenditures, and Turnout in the 1982 U.S. House Elections*, 83 AM. POL. SCI. REV. 217 (1989).

[137] *See* Henry E. Brady & John E. McNulty, *Turning Out to Vote: The Costs of Finding and Getting to the Polling Place*, 105 AM. POL. SCI. REV. 115, 116 (2011) (finding that turnout decreased when polling places were moved, and that "the impact of the search effect is about two and one-half times larger than the transportation effect"); *see also* Jesse Yoder, *How Polling Place Changes Reduce Turnout: Evidence from Administrative Data in North Carolina* 16 (May 30, 2018), https://papers.ssrn.com/a=3178184 [https://perma.cc/DG3E-SF2Z] (finding that turnout decreases when polling places are moved to new locations, and that "the majority of the decline in turnout induced by polling place changes can be attributed to the search costs associated with finding a new polling place rather than travel costs").

[138] *See* John H. Aldrich, *Rational Choice and Turnout*, 37 AM. J. POL. SCI. 246, 260 (1993) (explaining that there is typically "a lot of information about the expected closeness of two-candidate presidential elections, and it is relatively easy to process that information").

When it comes to the costs of voting, the same sources provide mostly free information about when to vote, but not necessarily how, where, and what is required to vote. Parties and nonprofit groups' get-out-the-vote (GOTV) efforts serve as important vehicles for filling this information gap through mailings, phone calls, and door-to-door canvassing.[139] As with information about the closeness of the election, such logistical information necessitates little processing time or background knowledge. As a result, to the extent that individuals receive such information, they are able to build more certainty about the costs of voting into their voting calculus and, in doing so, will often see these costs as quite low.

The biggest informational challenge for individuals comes in assessing the tangible benefits from voting. To do so, they must have a sense of the differences between candidates and parties and how these differences might impact their well-being.[140] In a perfect world with costless information, Downs explains, the potential voter would first need to "examine all phases of government action to find out where the two parties would behave differently."[141] Second, she would need to "discover how each difference would affect h[er] utility income."[142] And third, she would have to "aggregate the differences in utility and arrive at a net figure which shows by how much one party would be better than the other."[143] These are enormous informational requirements for any individual. Because we do not live in a world of costless information, most voters take shortcuts to ascertain party differentials.[144] But even these shortcuts, which might involve comparing

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[139] *See, e.g.*, *Sample Get-Out-the-Vote Email and Phone Scripts*, LEAGUE WOMEN VOTERS, https://www.lwv.org/league-management/elections-tools/sample-get-out-vote-email-and-phone-scripts [https://perma.cc/H93Q-YQNJ] (providing contacted persons with logistical information about voting).

[140] Seven years prior to the publication of DOWNS, *supra* note 128, the American Political Science Association published the findings of a four-year study by the organization's Committee on Political Parties. The Committee argued that the platforms of the Democratic and Republican parties were so similar that voters could not distinguish between them. *See* Committee on Pol. Parties, Am. Pol. Sci. Ass'n, *Toward a More Responsible Two-Party System: A Report of the Committee on Political Parties*, 44 AM. POL. SCI. REV. 1, 3–4 (1950) ("Alternatives between the parties are defined so badly that it is often difficult to determine what the election has decided even in broadest terms."). More recent literature suggests that modern partisan polarization has both increased turnout, *see* Alan I. Abramowitz & Walter J. Stone, *The Bush Effect: Polarization, Turnout, and Activism in the 2004 Presidential Election*, 36 PRES. STUD. Q. 141, 142 (2006) (finding that George W. Bush was "the most polarizing presidential candidate in recent political history and that this was the main reason turnout and activism increased dramatically in 2004"), and increased more informed voting, *see* Douglas R. Pierce & Richard R. Lau, *Polarization and Correct Voting in U.S. Presidential Elections*, 60 ELECTORAL STUD. 1, 9 (2019) (finding that "polarization contributes to our democracy by increasing the likelihood that people vote correctly").

[141] DOWNS, *supra* note 128, at 45.

[142] *Id.* Utility income refers to the benefits of voting, or the satisfaction of choosing one particular candidate/party over another.

[143] *Id.*

[144] *See, e.g.*, Elizabeth Garrett, *Voting with Cues*, 37 U. RICH. L. REV. 1011, 1023–24 (2003) ("Political scientists and cognitive psychologists have worked to identify the shortcuts or heuristics that ordinary citizens can use to vote competently, that is, to vote with limited information as they would if

candidates' policy platforms, public positions, or personal backgrounds, require a nontrivial amount of information, not to mention the time and capacity to process such information.[145]

There is both indirect and direct empirical evidence suggesting the importance of information to voting decisions. The indirect evidence arises from the strong correlation between educational attainment and voting, which makes sense from the perspective of rational choice theory.[146] Education generally enhances the capacity of individuals to process information. And, in some cases, education provides individuals with greater background knowledge about policy and politics which makes it easier to ascertain the candidate or party differentials critical to determining the benefits from voting.[147]

More direct evidence can be found in correlational studies, finding a relationship between information and voting, and in experimental studies,

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they had full information."); Martin Gilens & Naomi Murakawa, *Elite Cues and Political Decision Making*, 6 RES. IN MICROPOLITICS 15, 42 (2002) ("But decision-making heuristics seem to offer a less demanding alternative by which citizens can form meaningful policy preferences."); Michael S. Kang, *Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and "Disclosure Plus,"* 50 UCLA L. Rev. 1141, 1150 (2003) ("Political scientists have shown that when deciding for whom to vote in candidate elections, the typical voter refers to the heuristic cue of party identification to figure out which candidate is most likely to match her values and share her interests.").

[145] Shortcuts may also be less reliable in state and local elections. *See* Christopher S. Elmendorf & David Schleicher, *Informing Consent: Voter Ignorance, Political Parties, and Election Law*, 2013 U. ILL. L. REV. 363, 367 (arguing that traditional heuristics may be ineffective at the state and local level "not simply because voters pay less attention to these elections. It is also because our system of election law does not provide voters in these elections with on-ballot voting cues of comparable quality to the party labels used in national elections.").

[146] *See, e.g.*, RAYMOND E. WOLFINGER & STEVEN J. ROSENSTONE, WHO VOTES? 34 (1980) (finding in their seminal study that "[c]itizens with a college degree are 38 percent more likely to vote than are people with fewer than five years of schooling").

Subsequent studies have found similarly strong correlations between educational attainment and turnout. *See, e.g.*, Thomas S. Dee, *Are There Civic Returns to Education?*, 88 J. PUB. ECON. 1697, 1704 (2004) (estimating that college entrance increases the probability of voting in the last year by 26%); Karl-Oskar Lindgren et al., *Enhancing Electoral Equality: Can Education Compensate for Family Background Differences in Voting Participation?*, 113 AM. POL. SCI. REV. 108, 120 (2019) (finding after studying Swedish education reforms of the 1990s that increased education has a particularly strong effect on the turnout of students from lower socioeconomic backgrounds); Alexander K. Mayer, *Does Education Increase Political Participation?*, 73 J. POL. 633, 640 (2011) (estimating that postsecondary education advancement increases turnout by 18%); Kevin Milligan et al., *Does Education Improve Citizenship? Evidence from the United States and the United Kingdom*, 88 J. PUB. ECON. 1667, 1678–81 (2004) (finding that U.S. high school graduates are 25.6% more likely to vote after controlling for race, gender, and birth effects and that exogenous increases in (compulsory) education increased turnout).

[147] *See, e.g.*, SIDNEY VERBA ET AL., VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS 514 (1995) ("Educated citizens are much more likely to be informed about politics and tolerant of unpopular opinions."); Ronald La Due Lake & Robert Huckfeldt, *Social Capital, Social Networks, and Political Participation*, 19 POL. PSYCHOL. 567, 568 (1998) ("Well-educated citizens are more likely to possess a knowledge base that makes it easier to unravel the intricacies of the political process, and they are more likely to possess the cognitive skills that make it easier to absorb and process complex political information.").

suggesting a causal effect of information on voting.[148] The findings from these studies are consistent with a general observation that turnout is much higher in higher information elections (such as presidential elections) than in lower information elections (such as city council elections), even though the probability that an individual could cast a decisive vote is much higher in the latter than the former (precisely because turnout is so low).[149] It is difficult to disentangle whether and to what degree information about the costs, perception of electoral closeness, or the benefits from electing a candidate is driving the decision to vote. But it seems clear that information matters quite a bit to the voting calculus. Thus, understanding how information is distributed can provide an important key to understanding turnout variations between groups.

Within rational choice theory, a second source of turnout variation can be derived from the context in which voters operate, including the formal organizations to which people belong.[150] If we understand elections to be contests between formal organizations or groups rather than atomistic individuals, then the rational choice calculus of voting might predict positive

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[148] *See, e.g.*, Valentino Larcinese, *Does Political Knowledge Increase Turnout? Evidence from the 1997 British General Election*, 131 PUB. CHOICE 387, 405 (2007) (finding that information is not only "a good predictor of turnout, but also that it raises voter participation in a clearly causal fashion"); David Dreyer Lassen, *The Effect of Information on Voter Turnout: Evidence from a Natural Experiment*, 49 AM. J. POL. SCI. 103, 113 (2005) (finding a 20% average treatment effect of being informed on the propensity to vote); Thomas R. Palfrey & Keith T. Poole, *The Relationship Between Information, Ideology, and Voting Behavior*, 31 AM. J. POL. SCI. 511, 526 (1987) (finding a positive relationship between the level of information that an individual holds and the probability of voting); Martin P. Wattenberg et al., *How Voting Is like an SAT Test: An Analysis of American Voter Rolloff*, 28 AM. POL. Q. 234, 246–47 (2000) (showing that voters' lack of information in lower ballot races to be the most statistically significant variable predicting "rolloff," or the non-completion of a ballot).

[149] *Compare e.g.*, *Voter Turnout*, U.S. ELECTION PROJ., http://www.electproject.org/home/voter-turnout/voter-turnout-data [https://perma.cc/2TWQ-24TQ] (offering nationwide voter turnout data and finding approximately 60% of the voting eligible population has voted in presidential-year general elections since 2004), *with Official Total of Central and Polling Place Results*, CITY HARTFORD, http://www.hartford.gov/images/registrar/hartford_results_2013.pdf [https://perma.cc/UL5C-DG9K] (reporting less than 5% of Hartford, Connecticut's population voted in the 2013 school board election), *and* Erik Bojnansky, *What If They Held an Election and Nobody Came?*, BISCAYNE TIMES (Dec. 2013), http://www.biscaynetimes.com/index.php?option=com_content&view=article&id=1647 [https://perma.cc/SK5A-GCAA] (reporting turnout was less than 11% in a runoff election for District 5 of the Miami City Council in 2013), *and In Iowa, a Special Election Has Historic Low Turnout*, NPR (Aug. 7, 2017), https://www.npr.org/2017/08/07/541969289/in-iowa-a-special-election-has-historic-low-turnout [https://perma.cc/RZH6-PQ3U] (reporting not a single person voted in the 2017 special election in McIntyre, Iowa to decide the term length of the mayor and city council).

[150] Rebecca B. Morton, *Groups in Rational Turnout Models*, 35 AM. J. POL. SCI. 758 (1991); Carole Jean Uhlaner, *Political Participation, Rational Actors, and Rationality: A New Approach*, 7 POL. PSYCHOL. 551 (1986) [hereinafter Uhlaner, *Political Participation*]; Carole J. Uhlaner, *Rational Turnout: The Neglected Role of Groups*, 33 AM. J. POL. SCI. 390 (1989) [hereinafter Uhlaner, *Rational Turnout*]; Carole Jean Uhlaner, *"Relational Goods" and Participation: Incorporating Sociability into a Theory of Rational Action*, 62 PUB. CHOICE 253 (1989) [hereinafter Uhlaner, *Relational Goods*].

turnout.[151] Since there are many fewer groups than individuals, the probability that a group of individuals will cast a decisive vote is no longer infinitesimal and, depending on the election and how many groups are actively involved, the probability could actually be quite high.

Group leaders further incentivize group members to vote in three ways. First, groups inform their members of the benefits from voting by showing how the candidates differ and how these differences relate to the group's (and therefore its members') utility incomes.[152] Second, group leaders provide their members with selective benefits for voting, such as the satisfaction of sharing an identity with others.[153] And third, group leaders can create a sense that there is a duty as a member of the group to vote.[154] Group leaders can then leverage the potential voting power of the group to secure policy concessions from candidates that will bring their policy platforms closer to the group's preferences.[155]

This group-based variation of rational choice theory thus introduces the possibility that individuals might vary in the intangible benefits they derive from voting, such as satisfying the sense of duty to vote. Prior rational choice scholars had only identified such benefits as an explanation for why people might vote even when the calculus of voting suggested it would be irrational.[156] However, they never assessed whether and why those benefits from voting might be unevenly distributed. If the sense of duty to vote makes a person more likely to vote, then the uneven distribution of that potential benefit will contribute to variations in turnout. Political scientists have argued that these variations might not be random, but rather the product of differences in formal organizational affiliations that are correlated with one's class status.[157]

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[151] *See* Uhlaner, *Political Participation*, *supra* note 150, at 565 ("Although the vote of any one group member could rarely change an election outcome, the votes of many members well might."); Uhlaner, *Rational Turnout*, *supra* note 150, at 419 ("[I]ndividuals do not behave atomistically within the political sphere but rather are joined with others in groups with shared interests.").

[152] *See* Jan Leighley, *Group Membership and the Mobilization of Political Participation*, 58 J. POL. 447, 447 (1996) ("Organizations . . . subsidize the costs of political information for members and may therefore promote broader involvement in the political system.").

[153] Uhlaner, *Political Participation*, *supra* note 150, at 562. Professor Uhlaner refers to goods derived from belonging to a group as relational goods. These goods, which include "'social approval,' solidarity, a 'desire to experience one's history,' friendship and its benefits, the desire to be recognized or accepted by others, the desire to maintain an identity, other aspects of sociability, and some instances of fulfillment of a duty or moral norm," can positively influence an individual's turnout decision. Uhlaner, *Relational Goods*, *supra* note 150, at 255 (internal citations and footnotes omitted).

[154] Uhlaner, *Political Participation*, *supra* note 150, at 562.

[155] *Id.* at 560.

[156] *See* sources cited *supra* note 131.

[157] *See infra* notes 173–175 and accompanying text.

Some empirical evidence supports the group-based rational choice model. For example, those who belong to formal organizations like unions are approximately 8% more likely to vote than nonmembers,[158] and those who attend church are approximately 15% more likely to vote than those who do not.[159] Studies thus far have failed to clearly identify the mechanism driving this variation. The positive relationship between turnout and formal organizational affiliation could be explained by voters' greater ability to obtain information, selective benefits, or an enhanced sense of duty from such groups. Alternatively, it might be explained by other characteristics of the individuals that belong to these organizations that are not accounted for in empirical studies.

In sum, it may be that rational choice theory cannot provide a persuasive explanation for why people vote at all. But it offers potentially helpful clues for why some people might vote more than others by extending its focus beyond the tangible costs of voting that occupy the legal literature. Empirical evidence suggests that variations in the possession and capacity to process information contribute to variations in voting. While the empirical evidence for the group-based rational choice model is not yet as robust, that model introduces variations in the intangible benefits from voting as another plausible account for why some people vote more than others.

B. Sociological Theories of Voting

Legal scholars have only engaged shallowly with rational choice theories; their engagement with sociological theories of voting is even more slight.[160] As with the rational choice theories of voting, the tangible costs of voting that are central to legal voting rights claims are a relatively

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[158] *See* John Thomas Delaney et al., *Unionism and Voter Turnout*, 9 J. LAB. RES. 221, 230 (1988) (reporting turnout is 8.3% higher among union members than nonmembers); Richard B. Freeman, *What Do Unions Do . . . To Voting?*, 3 (Nat'l Bureau of Econ. Research, Working Paper No. 9992, 2003) (finding that turnout is 10 to 13 points higher among union members than nonmembers, though the difference shrinks to about 4% when controlling for demographic characteristics of union members).

[159] Alan S. Gerber et al., *Does Church Attendance Cause People to Vote? Using Blue Laws' Repeal to Estimate the Effect of Religiosity on Voter Turnout*, 46 BRIT. J. POL. SCI. 481, 481 (2016) ("[T]hose who report attending church weekly are between 10 and 15 percentage points more likely to vote."); *see also* STEVEN J. ROSENSTONE & JOHN MARK HANSEN, MOBILIZATION, PARTICIPATION, AND DEMOCRACY IN AMERICA, 273–75 tbl.D-1 (1993) (using ANES data to measure turnout among churchgoers, controlling for various demographic and geographic variables); SIDNEY VERBA ET AL., *supra* note 147 (presenting similar results using both ANES data and responses to the 1990 Citizen Participation Survey).

[160] Professor Richard Hasen is the one scholar we found in the law review literature that gave deep and sustained attention to sociological theories of voting in an article he wrote over twenty years ago. *See generally* Hasen, *supra* note 127. The foundational books for the sociological theory of voting from the mid-twentieth century, *Voting* and *The People's Choice*, have been cited by 123 and 120 law review articles, respectively. BERNARD R. BERELSON ET AL., VOTING: A STUDY OF OPINION FORMATION IN A PRESIDENTIAL CAMPAIGN (1954); PAUL F. LAZARSFELD ET AL., THE PEOPLE'S CHOICE: HOW THE VOTER MAKES UP HIS MIND IN A PRESIDENTIAL CAMPAIGN (3d ed. 1968).

unimportant voting determinant under the sociological theories of voting.[161] But unlike rational choice theories of voting, the sociological theories do not view voting as an individualistic decision.[162] Sociologists instead emphasize the interdependent nature of the decision to vote. The central determinants of voting in the sociological theories are the social networks to which the individual belongs, which are rooted in the social context surrounding the individual.

In the 1940s and 1950s, sociologists from the Columbia School of Sociology initiated two in-depth studies of voting behavior that were among the first to ever be conducted. Both found that voting is a social decision. In *The People's Choice*, the authors of a study of Erie County, Ohio, residents' voting behavior concluded that "voting is essentially a group experience. People who work or live or play together are likely to vote for the same candidates."[163] In *Voting*, a study of voting behavior in Elmira, New York, the sociologists came to a similar conclusion, explaining that "[t]he individual's vote is the product of a number of social conditions or influences."[164] They found that the groups that matter to individuals' vote choices include the family, socioeconomic and ethnic affiliations, personal associations, and formal membership associations.[165] Such social networks influence vote choice through internal communications about politics and their members' reliance on the opinions and vote choices of others, particularly opinion leaders, within the network.[166]

Later sociological work drawing from these early studies theorized that social networks not only influence how one votes, but also the very decision

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[161] Most sociological theories do not incorporate the tangible costs of voting into their models. The one exception is a recent study by Professor Meredith Rolfe, who treated institutional costs as a factor of secondary relevance in her model. MEREDITH ROLFE, VOTER TURNOUT: A SOCIAL THEORY OF POLITICAL PARTICIPATION 101–06 (2012) (advancing a conditional voting decision model in which the individual turnout decision depends on social context and offering a theory of socially interdependent voting behavior).

[162] *See* SEYMOUR MARTIN LIPSET, POLITICAL MAN: THE SOCIAL BASES OF POLITICS 200 (1960) ("Even if people are not aware of a personal stake in the electoral decision, they may still be induced to vote by social pressures and inner feelings of social obligation."); Katherine Haenschen, *Social Pressure on Social Media: Using Facebook Status Updates to Increase Voter Turnout*, 66 J. COMM. 542, 558 (2016) (arguing that personal networks create a "flow of voter action, not just information"); R. Robert Huckfeldt, *Political Participation and the Neighborhood Social Context*, 23 AM. J. POL. SCI. 579 (1979) (discussing the connection between higher social status and greater political participation); David Knoke, *Networks of Political Action: Toward Theory Construction*, 68 SOC. FORCES 1041, 1054 (1990) ("[T]he more often people discuss politics with their intimates, the more they participate in the various electoral activities."); Jan E. Leighley, *Social Interaction and Contextual Influences on Political Participation*, 18 AM. POL. Q. 459, 472 (1990) ("[A]ggregate measures of social context as well as characteristics of individuals' social interaction influence their likelihood of participation.").

[163] LAZARSFELD ET AL., *supra* note 160, at 137.

[164] BERELSON ET AL., *supra* note 160, at 37.

[165] *Id*. at 46–52, 88–98.

[166] *Id*. at 102–08.

to vote.[167] Within social networks, political information that is relevant to the decision to vote is shared.[168] Social networks also construct norms about voting that can be enforced through social sanctions.[169]

Sociologists have found that variations in turnout are related to differences in the composition of social networks. On the one hand, social networks comprising politically interested individuals will share political information with each other and construct group norms that voting is a social obligation or a civic duty.[170] Individuals in these networks seeking to avoid social disapproval, or even ostracization, are thought to engage in imitative behavior, leading to turnout cascades within social networks.[171]

On the other hand, social networks comprising individuals who are indifferent to politics or worse might construct a norm of nonvoting that leads to social disapproval or ostracization for those who *do* vote. The result is abstention cascades in which imitative behavior within the social networks contributes to the widespread abstention of members in the network.[172]

The composition of social networks, and particularly the extent to which they include politically interested people, has been found to be related to the individual's social and neighborhood context.[173] Family, friends, coworkers, neighbors, and comembers of associations like unions or churches are the primary components of networks. These networks tend to be characterized by high degrees of homophily on a broad array of

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[167] *See supra* note 162 and accompanying text.

[168] Scott D. McClurg, *Social Networks and Political Participation: The Role of Social Interaction in Explaining Political Participation*, 56 POL. RES. Q. 449, 450 (2003) (advancing the social network model of participation in which information is shared between members of the social network).

[169] *See e.g.*, Stephen Knack, *Civic Norms, Social Sanctions, and Voter Turnout*, 4 RATIONALITY & SOC'Y 133, 137–38 (1992) ("Social sanctions . . . permit a certain amount of 'substitutability' of feelings of duty, as someone with a low sense of civic obligation may nonetheless vote to avoid displeasing a friend or relative with a stronger sense of [civic] duty.").

[170] *See, e.g.*, La Due Lake & Huckfeldt, *supra* note 147, at 579 (finding a positive relationship between political expertise in a network and the likelihood of political participation and between the frequency of political interaction within the network and the likelihood of participation).

[171] *See* James H. Fowler, *Turnout in a Small World*, *in* THE SOCIAL LOGIC OF POLITICS: PERSONAL NETWORKS AS CONTEXTS FOR POLITICAL BEHAVIOR 269, 270–72 (Alan S. Zuckerman ed., 2005).

[172] *Id.* at 272. Another feature of social networks found to influence turnout decisions is the partisan heterogeneity of the network; the more that persons within the network have differing political views, the less likely that members of the network vote. Diana C. Mutz, *The Consequences of Cross-Cutting Networks for Political Participation*, 46 AM. J. POL. SCI. 838, 844 (2002).

[173] *See* Robert Huckfeldt & John Sprague, *Discussant Effects on Vote Choice: Intimacy, Structure, and Interdependence*, 53 J. POL. 122, 123 (1991) ("[T]he family has been widely recognized as a preeminent agent of social influence with long-lasting political consequences."); Huckfeldt, *supra* note 162, at 589–90 (finding "that the neighborhood social context can influence both (1) the extent of the individual participation and (2) the relationship between participation and individual social status"); Bruce C. Straits, *The Social Context of Voter Turnout*, 54 PUB. OPINION Q. 64, 64 (1990) ("A voter's family, friends, and coworkers serve as bridges to larger networks of social relations which provide access to the information and resources that stimulate political interest and provide an informed basis for making ballot choices." (citation omitted)).

sociodemographic characteristics related to the propensity to vote.[174] That internal similarity, to the extent that it manifests in similar voting patterns among demographically similar communities, in turn leads to substantial turnout gaps between particular communities.[175]

C. Theories of Voting and Socioeconomic Class Turnout Disparities

Rational choice and sociological theories of voting introduce additional determinants of voting that have been mostly overlooked in the legal literature. Once we add information costs, membership in formal organizations, and inclusion within social networks of politically interested individuals as determinants of voting, a more plausible account of the turnout disparity between the rich and poor emerges.

First, the costs of obtaining the information necessary to ascertain the benefits from voting are not evenly distributed across socioeconomic classes. Educational attainment, which tends to enhance the cognitive skills necessary to process and use information relevant to determining the benefits from voting, is positively correlated with income.[176] Higher economic status individuals tend to be better educated and therefore typically better able to ascertain the benefits from voting than lower economic status individuals.[177] The need for, and the cost of, information thus contributes to socioeconomic class disparities in turnout.

Second, class-based differences in formal organizational affiliation are another likely contributor to class-based turnout disparities. Formal organizational affiliation positively influences turnout, and the poor belong to fewer such organizations than other socioeconomic classes.[178] As a result, the poor are less likely than others to receive information from formal organizational group leaders about the benefits from voting, selective economic benefits to voting, or intangible benefits such as a sense of duty to vote that can arise from such affiliations.

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[174] *See* Miller McPherson et al., *Birds of a Feather: Homophily in Social Networks*, 27 ANN. REV. SOC. 415, 431–33 (2001).

[175] *See* McClurg, *supra* note 168, at 451 (attributing the socioeconomic-based participation gap to the differences in the social resources and social networks of low and high status communities).

[176] *See, e.g.*, David Card, *The Causal Effect of Education on Earnings*, *in* 3A HANDBOOK OF LABOR ECONOMICS 1801, 1809 (Orley Ashenfelter & David Card eds., 1999) (reviewing empirical studies and finding a consistent and positive effect of education on earnings).

[177] *See, e.g.*, Lassen, *supra* note 148, at 114 ("[T]he finding that education increases the probability of being informed suggests that education may influence voting indirectly, possibly by lowering the costs of information processing.").

[178] *See* La Due Lake & Huckfeldt, *supra* note 147, at 575 (finding from a regression of organizational membership on demographic characteristics that "[a]s people earn more income, attain higher levels of education, become employed, and get older, they report joining more organizations").

Differences in the composition of social networks are a third contributor to socioeconomic turnout disparities that has been overlooked in law. The poor vote less and, due to the sociodemographic homophily of social networks, they are more likely to be part of social networks with other people who vote less and have little interest in politics.[179] Abstention cascades, rather than turnout cascades, are therefore more likely to be a feature of the poor's social networks.

Empirical findings provide strong suggestive evidence that it is the aggregation of these three determinants of voting—information costs, formal organizational affiliation, and social networks—and not the tangible costs of voting that explain much of the income-class based disparities in voting.[180] The question then arises: What can be done to reduce such disparities? In the next Part, we first acknowledge the likely limits of law in responding to social and class-based sources of disparities. We then turn to another contributing factor, the mobilization activities of political parties. At present, campaigns exacerbate the political exclusion of the poor through what we label passive voter suppression. That offers another potential route for law's interventions: changing campaigns' incentives regarding mobilization.

III. UNDERSTANDING PASSIVE VOTER SUPPRESSION

When tangible cost barriers are the primary source of turnout disparities, law provides a clear solution. Most tangible barriers, such as registration or voting requirements, are state creations and can therefore be eliminated or ameliorated by legislatures or courts. But when the primary sources of turnout disparities are information costs, formal organizational affiliations, and the composition of social networks, then the potential legal interventions are either less readily identifiable or not politically viable, given the massive resources required.

But another dynamic is at work, which can be addressed through law. Candidate and party mobilization activities are centrally important factors contributing to socioeconomic class-based turnout disparities. In this Part, we examine how campaign mobilization activities interact with the three determinants of voting identified in social science theories to increase (and decrease) turnout. We then show how candidates and parties, using a calculus of contact to guide their mobilization activities, ignore the poor and

[179] *Id.* at 576 (finding a relationship between education and belonging to social networks of politically well-informed and interested individuals).

[180] *See, e.g.*, Samuel Abrams et al., *Informal Social Networks and Rational Voting*, 41 BRIT. J. POL. SCI. 229, 237–40, 252–56 (2010) (advancing a social network model explaining various determinants of voting including income, education, student status, and age and providing empirical support for the model).

exacerbate socioeconomic turnout disparities, a phenomenon we label passive voter suppression.

A. Political Mobilization and the Theories of Voting

The political information necessary to reduce uncertainty about the benefits from voting is generally free. But such information differs in its accessibility and tailoring. Examples of broadly accessible free political information include campaign advertisements, television, and radio news.[181] These sources provide information, sometimes detailed information, about the candidates, their backgrounds, and their views on certain issues. The problem is that such sources of information are not usually tailored to a particular audience, which can make it difficult for potential voters to draw connections between the candidates' policies and platforms and their own well-being.

Political information obtained from members of social networks and formal organizations is both free and more tailored to the audience.[182] When family, friends, coworkers, or members of associations discuss politics, they are more likely to discuss candidates, issues, and policies that are of interest to each other.[183] Through these political conversations, members of social networks and formal organizations can obtain more tailored information conducive to differentiating between parties and candidates on matters relevant to the potential voters' well-being. Such tailored information reduces both the cognitive skills and the time necessary for individuals to differentiate between parties and candidates and connect these differences to their own lives.[184]

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[181] Although we note that campaigns are increasingly advertising on internet platforms, such as Facebook, YouTube, and email blasts, this natural migration to online undermines the "free" and "accessible" nature of many campaign advertisements because access to the Internet is stratified by socioeconomic status. *See* Andrew Perrin & Maeve Duggan, Pew Res. Ctr., *Americans' Internet Access: 2000–2015*, PEW RES. CTR. 6 (June 26, 2015), https://www.pewinternet.org/wp-content/uploads/sites/9/2015/06/2015-06-26_internet-usage-across-demographics-discover_FINAL.pdf [https://perma.cc/GJ7G-AL7J] ("Adults living in households with an annual income of at least $75,000 a year are the most likely to use the internet, with 97% of adults in this group currently reporting they are internet users. Those living in households with an annual income under $30,000 a year are less likely to report internet usage, with 74% of adults doing so now . . . [, and] . . . [t]hose with college educations are more likely than those who do not have high school diplomas to use the internet.").

[182] *See* ROBERT HUCKFELDT & JOHN SPRAGUE, CITIZENS, POLITICS, AND SOCIAL COMMUNICATION: INFORMATION AND INFLUENCE IN AN ELECTION CAMPAIGN 14 (1995) (noting that socially obtained information is more efficient because it "comes tailor-made").

[183] *See id.* ("If a citizen wants to know about the current status of nuclear arms-reductions talks, he may or may not find relevant information in the newspaper or on the television news, but he can formulate an explicit informational request to an associate who might know.").

[184] *See id.* (explaining that citizens in a social network "can request information from people who, based on their joint history in some common context, are known to have general viewpoints similar to their own").

This tailored, free information is only accessible to members of social networks and formal organizations. Those who either are in social networks with little political activity or who are unaffiliated with politically active formal associations tend to receive less tailored political information.[185] These individuals often must resort to the free information, like the media, that require greater cognitive skills and time to process and use.

Campaigns offer another free source of information that can be tailored to the potential voter. During election season, campaigns reach potential voters by sending mailers, calling, and meeting in person through door-to-door canvassing. Their goal is to mobilize individuals to vote for their candidate and they often do so by providing individuals with information about the candidate and her positions.[186] The most effective campaigns gather information about individuals and seek to tailor information about the candidate and positions in a way that draws a connection between supporting the candidate and improving the contacted individuals' lives.[187] In doing so, campaigns subsidize information costs by reducing the cognitive skills and time necessary to process and use information necessary to differentiate between candidates and otherwise determine the benefits from voting.[188]

Campaigns also indirectly provide tailored information to individuals they do not directly contact. They do so by providing leaders and members of formal organizations and social networks with tailored political information that they can share with other members of those organizations and networks.[189] Sharing such information allows members to make more educated determinations about the differences between the candidates and how these differences might affect them.

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[185] Campaigns are perhaps the important source of tailored information as they tend to focus few mobilization resources on individuals outside of politically relevant social networks and politically active formal associations. *See infra* Section III.D.

[186] *See* Robert Huckfeldt & John Sprague, *Political Parties and Electoral Mobilization: Political Structure, Social Structure, and the Party Canvass*, 86 AM. POL. SCI. REV. 70, 70 (1992) ("When a party worker knocks on a citizen's door, calls a citizen on the telephone, or affronts him with a yard sign, an effort is being made by one individual to provide information that will influence the behavior of another individual.").

[187] *See* Kyle Endres & Kristin J. Kelly, *Does Microtargeting Matter? Campaign Contact Strategies and Young Voters*, 28 J. ELECTIONS PUB. OPINION & PARTIES 1, 4 (2017) ("Campaigns use data about the individual to deliver messages to the segments of the electorate who are thought to be the most receptive to their outreach based on their perceived partisanship and perceived issue positions.").

[188] Kevin Arceneaux, *Do Campaigns Help Voters Learn? A Cross-National Analysis*, 36 BRIT. J. POL. SCI. 159, 160–61 (2006) (arguing that campaign information does not persuade voters to change their minds but helps them make decisions in line with their beliefs).

[189] HUCKFELDT & SPRAGUE, *supra* note 182, at 22 ("[P]artisan organizations heighten and extend the impact of the information they convey by carefully targeting their messages to particular locations within the social structure—locations that are likely to further the diffusion of their messages.").

Beyond information, both the rational choice and sociological theories point to a sense of duty as a determinant of voting.[190] This sense of duty can arise from affiliation with formal organizations and the desire for social rewards or the fear of social sanctions that are associated with individuals' voting decisions.[191] The sense of duty can also emanate from social networks where norms, imitative behavior, and a yearning to belong influence individuals' voting decisions.[192] Through their mobilization activities, campaigns can also convey to individuals, formal organizational leaders, and members of social networks that voting is an important civic responsibility. This sense of duty is often transmitted from organizational leaders to other members, as well as from one member of a social network to another.[193]

Unfortunately, while the political information and sense of duty that campaigns provide directly to individuals and indirectly through formal organizations and social networks is free, it is not broadly accessible. Campaigns do not have the resources or inclination to contact everyone.

Instead, what we label a calculus of contact leads to disparities in the distribution of tailored information. The resulting gaps have socioeconomic class dimensions and drive what we identify as passive voter suppression. In the rest of this Part, we elaborate on these points. But first, we contextualize the rising importance of campaign mobilization activities as a means to inform voters and provide them with a sense of duty to vote.

B. The Rising Importance of Campaign Mobilization Activities

The primary goal of campaigns is to win elections. Campaigns employ multifaceted strategies to secure the votes necessary to win elections. These strategies often involve some combination of encouraging supporters to go to the polls, persuading undecided individuals to vote favorably for the candidate, and discouraging opponents from turning out to vote.[194] In deciding which strategy to pursue and the proper mix of the strategies, campaigns need to consider the costs and effectiveness of each.[195]

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[190] *See* Uhlaner, *Political Participation*, *supra* note 150, at 562 and accompanying text.

[191] *See supra* note 170.

[192] *See supra* notes 154, 170 and accompanying text.

[193] *See* Uhlaner, *Rational Turnout*, *supra* note 150, at 391–92 (describing leaders of formal organizations as intermediaries between politicians and organizational members who can "use the group's communications resources to mobilize members to vote by enhancing their sense of citizen duty by an appeal to group loyalty").

[194] *See* Costas Panagopoulos, *All About That Base: Changing Campaign Strategies in U.S. Presidential Elections*, 22 PARTY POL. 179 (2016) (describing different presidential campaigns strategies over time).

[195] PAUL S. HERRNSON, CONGRESSIONAL ELECTIONS: CAMPAIGNING AT HOME AND IN WASHINGTON 202–26 (7th ed. 2016) (describing the strategic context of congressional campaigns).

Campaigns spend a major share of their budget on advertisements and voter mobilization. Television advertisements have been a central component of campaigns since the 1950s.[196] Such advertisements cost less to reach a broader audience than door-to-door canvassing, which was the dominant way campaigns reached out to potential voters before the advent of television.[197] Advertisements provided potential voters with information about the candidate's background, past support for policies, and future policy proposals.[198] Over time, campaigns increasingly have used attack or negative advertisements to disparage opponents, highlight opponents' past support for policies disfavored by important segments of the electorate, and criticize opponents' future policy proposals.[199]

Campaigns have long viewed advertisements as an effective means of mobilizing supporters, converting the undecided, and discouraging opponents. But doubts emerged in the 1990s about the cost-effectiveness of ads.[200] Although campaigns feared the possible electoral effects of a unilateral shift entirely away from advertisements, they began to experiment with directing more money to mobilization activities.[201]

From the 1950s to the 1990s, mobilization activities remained constant as campaigns focused attention on advertisements. About 20% to 25% of the population reported that somebody from one of the political parties called or visited them during presidential elections from 1956 to 1992.[202] Then two studies during the 1990s provided the impetus for greater campaign investments in mobilization activities.[203] These studies involved the random selection of households to be contacted door-to-door, via phone calls, or through mailers, and then a comparison between the turnout of those

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196 *See* KATHLEEN HALL JAMIESON, PACKAGING THE PRESIDENCY: A HISTORY AND CRITICISM OF PRESIDENTIAL CAMPAIGN ADVERTISING 34 **(**3d ed. 1996).

197 *Id.*

198 *Id.*

199 John G. Geer, *The News Media and the Rise of Negativity in Presidential Campaigns*, 45 PS: POL. SCI. & POL. 422, 422 & fig.1 (2012) (plotting the share of negative ads in presidential campaigns over time and finding that less than 10% of ads were negative in 1960 while more than 60% of ads were negative in 2008); *see also* DARRELL M. WEST, AIR WARS: TELEVISION ADVERTISING AND SOCIAL MEDIA IN ELECTION CAMPAIGNS 1952–2012, at 66 fig.4-2 (6th ed. 2014) (showing increase of negative ads as a percentage of total from 1952–2008).

200 RASMUS KLEIS NIELSEN, GROUND WARS: PERSONALIZED COMMUNICATION IN POLITICAL CAMPAIGNS 18 (2012).

201 *Id.* at 41–44.

202 *Time Series Cumulative Data File, Variable VCF9030 (1948–2016)*, AM. NAT'L ELECTION STUD., https://electionstudies.org/data-center/anes-time-series-cumulative-data-file [https://perma.cc/H3XB-PDGL] [hereinafter ANES].

203 *See* KLEIS NIELSEN, *supra* note 200, at 41–42 (describing the AFL-CIO's experimentation and testing of the effects of mobilization activities on turnout during the 1998 midterm election); Alan S. Gerber & Donald P. Green, *Does Canvassing Increase Voter Turnout? A Field Experiment*, 96 PROC. NAT'L ACAD. SCI. 10939 (1999).

contacted in the households "treated" with different forms of contact and the turnout of members of households not contacted in any of the three ways. The studies found a statistically significant and substantial effect of door-to-door canvassing on turnout, but only a slight effect of mailers on turnout, and virtually no effect of phone calls on turnout.[204] Subsequent studies found that more personalized phone calls that are interactive and responsive to questions and feedback had a more substantial effect on turnout than the more scripted calls used in the initial reported experiment.[205]

Such findings regarding the positive impact of mobilization activities on turnout contrasted with subsequent research finding little to no turnout effect from television advertisements.[206] One explanation for this difference is that mobilization activities are more personal. Whether in the form of a door knock or a phone call, they involve a personal interaction that cannot be replicated through a television advertisement. Campaigns gain two possible advantages from these more personal interactions. First, campaigns can tailor their message to the particular contacted person.[207] Second, the

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[204] *See* KLEIS NIELSEN, *supra* note 200, at 41–44, Gerber & Green, *The Effects of Canvassing*, *supra* note 21, at 661.

[205] *See* Nickerson, *Volunteer Phone Calls Can Increase Turnout*, *supra* note 21, at 271. Robocalls have been independently shown to be ineffective at mobilizing voters. *See, e.g.*, Shang E. Ha & Dean S. Karlan, *Get-Out-the-Vote Phone Calls: Does Quality Matter?*, 37 AM. POL. RES. 353, 363 (2009) ("This finding suggests that although the number of interactions between callers and recipients matter, the message needs to be focused for a GOTV phone call to be effective."); Ricardo Ramírez, *Giving Voice to Latino Voters: A Field Experiment on the Effectiveness of a National Nonpartisan Mobilization Effort*, 601 ANNALS AM. ACAD. SOC. & POL. SCI. 66, 77 (2005) ("In two of the sites, the estimated effect of robo calls is positive, but the estimated effect is negative in the other three sites that employed robo calls. In no sites are the effects positive and statistically significant. Once again, this is not surprising, as other field experiments using automated calls have found them to be ineffective."); Daron R. Shaw et al., *Do Robotic Calls from Credible Sources Influence Voter Turnout or Vote Choice? Evidence from a Randomized Field Experiment*, 11 J. POL. MARKETING 231, 231 (2012) ("Results suggest that the automated calls had weak and statistically insignificant effects on turnout and vote margins."). *But see* Adam Zelizer, *How Many Robocalls Are Too Many? Results from a Large-Scale Field Experiment*, J. POL. MARKETING: ONLINE 1, 6 (2018) ("These results suggest that get-out-the-vote calls can cut through the noise in a busy electoral season, and that increased dosage [seven calls in eight days] may yield increased turnout.").

[206] Joshua L. Kalla & David E. Broockman, *The Minimal Persuasive Effects of Campaign Contact in General Elections: Evidence from 49 Field Experiments*, 112 AM. POL. SCI. REV. 148, 148 (2018) (estimating the effect of TV ads on candidate choice at zero). *But see* Michael M. Franz & Travis N. Ridout, *Does Political Advertising Persuade?*, 29 POL. BEHAVIOR 465, 486 (2007) (finding that the "complete advertising environment" that incorporates multiple exposure to ads during the 2004 general election had small effects on vote choice).

[207] In the past, campaigns were constrained from tailoring messages because of the lack of information they had about individuals prior to contacting them. But since the 2000 presidential election, campaigns have expanded the universe of information they have about potential voters. Data vendors collect and sell to campaigns individuals' demographics, voting history, consumer preferences, and associational activities, among other details. Campaigns then use this information to target specific messages to potential voters that emphasize policy positions or candidate contrasts that are assumed most relevant to the individual based on the data collected about the individual. This message tailoring reduces the information costs of voting for contacted persons.

more personal forms of contact can create a stronger sense of social pressure to vote through an emphasis on voting as a civic duty or obligation to the community.[208]

Campaign strategies shifted dramatically in response to these studies' findings, which could be implemented using new data sources allowing voter contact to be more personalized and effective. The percentage of potential voters contacted by somebody from one of the political parties jumped more than 7% between the 1992 and 1996 election (from just 18.8% to 26%) and another 6% between the 1996 and 2000 election (from 26% to 32%). In the 2004 election, parties contacted 43% of surveyed respondents. Since then, contact levels have remained consistently high from a historical perspective.[209] Between 2006 and 2016, more than 65% of respondents to the Cooperative Congressional Election Study (n=249,627) reported that they had been contacted by a candidate for political office.[210]

Although increased mobilization produces the democratic good of more participation, there is a downside. Over the past forty years, there has been a consistent and large disparity in campaigns' contacts of different socioeconomic classes.[211] Campaigns generally contact the poor much less than other socioeconomic classes.[212] This disparity has continued as campaigns have placed more emphasis on mobilization activities, thereby exacerbating absolute differences between the number of poor people contacted as compared to the number of people from other socioeconomic classes. In the next Section, we identify the source of this contact disparity and show how it leads to the phenomenon of passive voter suppression.

C. Strategic Mobilization and the Calculus of Contact

Political campaigns' new commitment to mobilization has not changed the fundamental reality that campaigns cannot mobilize everyone. Campaigns face a budget constraint that requires them to make choices about who to contact. Since the goal is to win elections, campaigns pursue cost-

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[208] *See, e.g.*, LISA GARCÍA BEDOLLA & MELISSA R. MICHELSON, MOBILIZING INCLUSION: TRANSFORMING THE ELECTORATE THROUGH GET-OUT-THE-VOTE CAMPAIGNS 54 (2012) (arguing that the interpersonal sociocultural interaction associated with face-to-face canvassing leads the contacted person to have a greater "cognitive identification . . . with the political process").

[209] ANES, *supra* note 202.

[210] For a visual representation of these data in Figure 4, see *infra* notes 211–212 and accompanying text.

[211] Between 1978 and 1994, the ANES asked respondents whether they were contacted by a political campaign. The gap in contact between the highest and lowest income quintiles ranged between 8% and 19%, with an average gap of 13.6%. Between 2006 and 2014, the CCES asked respondents whether they were contacted by a political campaign. The gap between the highest and lowest income quintiles ranged between 15% and 28% with an average gap of 22.4%. *See infra* Figure 3.

[212] *See infra* Figure 4 (showing the income class-based disparity in contact since the late 1970s).

effective mobilization strategies that will maximize the number of votes gained per dollar spent.[213] Such cost-effective mobilization requires campaigns to make strategic calculations about the benefits of contacting particular individuals and measure those benefits against the costs of mobilizing voters.

We label this strategic calculation the calculus of contact. The calculus does not lead to a single mobilization method; instead, it identifies factors relevant to the mobilization decision that campaigns weigh and calculate differently. Contacting is rational when the benefits from such contact exceed the cost of such contact. Campaigns using the calculus of contact usually start from the aggregate and assess, on the basis of the electoral context, how many voters they will need to mobilize to win the election. They then use this aggregate assessment to choose between mobilization strategies that involve different probabilities related to securing a favorable vote from the contact.

In the calculus of contact, there are two major costs associated with mobilization. First, campaigns must pay and train staff to contact individuals. Second, campaigns must pay for the data and technology necessary to implement a mobilization strategy. Campaigns use these data to improve their assessments of the probability that contacting an individual will yield benefits for the candidate.

On the benefits side, campaigns seek favorable votes for their candidates by contacting potential voters. To predict benefits from contact, campaigns estimate the probability that an individual will vote in the election and the probability that the person will vote for their candidate.[214] Campaigns also include in their predictions the probability that contacting a particular individual will lead to the indirect mobilization of others in the potential voter's formal organization or social network. Campaigns target formal organizational leaders or social network members who share the campaigns' message, and place social pressure to vote on others in the organization or network whom the campaign does not directly contact.[215]

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[213] *See, e.g.*, GREEN & GERBER, *supra* note 21, at 2 (offering "a guide for campaigns and organizations that seek to formulate cost-effective strategies for mobilizing voters").

[214] *See, e.g.*, Costas Panagopoulos & Peter W. Wielhouwer, *The Ground War 2000–2004: Strategic Targeting in Grassroots Campaigns*, 38 PRES. STUD. Q. 347, 350 (2008) ("Generally, findings confirm the notion that parties contact people predisposed to participate in politics and are members of their respective political coalitions.").

[215] *See* STEVEN J. ROSENSTONE & JOHN MARK HANSEN, MOBILIZATION, PARTICIPATION, AND DEMOCRACY IN AMERICA 27 (1993) ("Political leaders [indirectly] mobilize citizens for political action through social networks."); Scott D. McClurg, *Indirect Mobilization: The Social Consequences of Party Contacts in an Election Campaign*, 32 AM. POL. RES. 406, 418 (2004) (finding through an empirical analysis that "people who are contacted are more likely to engage in interpersonal mobilization").

There is one consistent feature that cuts across virtually all contemporary campaign mobilization strategies: the avoidance of unregistered, infrequent, and nonvoters.[216] As we argue in the next Section, campaigns' avoidance of these individuals introduces socioeconomic biases into mobilization strategies that ultimately result in the passive suppression of poor voters.

D. Passive Voter Suppression

Passive voter suppression is the suppression of votes that arises from parties' and candidates' neglect of, and inattention to, particular potential voters during an election campaign. In this Section, we show how passive voter suppression is related to campaigns' calculus of contact. We theorize about how this calculus of contact has led parties and campaigns to disproportionately ignore the poor in their political outreach. We then relate the rich–poor contact gap to the persistent rich–poor turnout gap.

Campaigns applying the calculus of contact invariably try to avoid contacting two groups of potential voters. The first group includes known supporters of the opposing candidate. Contacting supporters of the opposing candidate is highly unlikely to secure a favorable vote for the candidate. And worse yet, contacting these individuals might contribute to their decision to vote for the opponent. In a relatively competitive election, it is unlikely that these potential voters will be completely ignored as the opposing candidate has strong electoral incentives to contact them.

A second group includes those either not registered to vote or who infrequently or never vote. This group that we label "persistent nonvoters" raises two red flags within campaigns' calculus of contact. First, given the positive relationship between past and future turnout behavior, the probability that contacting nonvoters will result in a vote is likely to be lower than that for more frequent voters.[217]

Even if campaigns' contact of persistent nonvoters resulted in votes, uncertainty about how they might vote creates a second reason for campaigns to avoid them. Without information about nonvoters' partisan affiliation or preferences, which for regular voters might be included in a registration form

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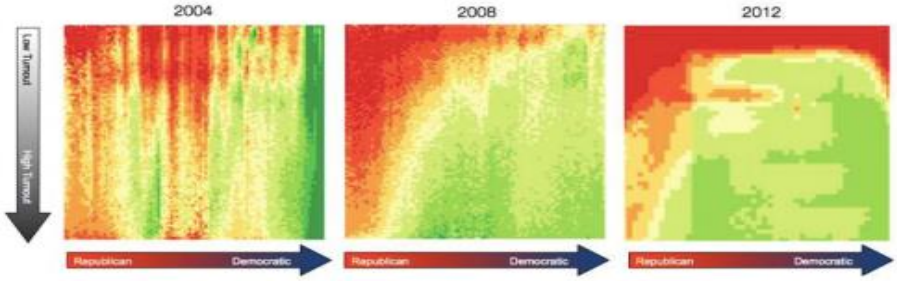
[216] *See* EITAN D. HERSH, HACKING THE ELECTORATE: HOW CAMPAIGNS PERCEIVE VOTERS 146–47 (2015) (describing how contemporary mobilization strategies typically involve campaigns ignoring infrequent voters).

[217] *See, e.g.*, Alexander Coppock & Donald P. Green, *Is Voting Habit Forming? New Evidence from Experiments and Regression Discontinuities*, 60 AM. J. POL. SCI. 1044, 1060 (2016) (finding that "mobilizing 100 compliers today generates 50 more votes over the five federal elections in the decade to come"); Alan S. Gerber et al., *Voting May Be Habit-Forming: Evidence from a Randomized Field Experiment*, 47 AM. J. POL. SCI. 540, 545–46 (2003) (finding evidence through a field experiment that voting may be habit forming in that those who vote in past elections are more likely to vote in future elections).

or voting history indicating participation in one of the parties' primaries, campaigns will not have any bases for predicting how past nonvoters might vote in the future. Mobilizing persistent nonvoters might not only activate a nonvoter who is a latent supporter of the opponent and lead her to vote for the opponent. It might also activate a network of latent supporters of the opponent and lead a group of people to vote for the opponent. That risk, when combined with the relatively low likelihood that the nonvoter would vote if contacted, leads campaigns to mostly ignore nonvoters in their mobilization activities.

Campaigns have employed various mobilization strategies designed, in part, to avoid nonvoters. Prior to the 2000s, campaigns mostly relied on geographic precinct voting data to inform their mobilization strategies.[218] Campaigns used this data to focus their mobilization efforts on precincts with higher aggregate turnout and with favorable voting patterns for the candidate's party.[219] With the advent of better sources of data post-2000, the more well-funded campaigns used "microtargeting" tactics in which they were able to target specific households within precincts (and individuals within households) for mobilization.[220] Microtargeting allowed for a more precise exclusion of nonvoters from the pool of people contacted.

FIGURE 3: DEMOCRATIC PRESIDENTIAL CANDIDATE CONTACT RATES IN OHIO[c]



[c] Contact rates by the John Kerry presidential campaign (2004) and the Barack Obama presidential campaigns (2008 and 2012) in Ohio, by the partisanship and likelihood of voting of each target, as estimated by Catalist LLC. *Source*: Figure originally published in David W. Nickerson & Todd Rogers, *Political Campaigns and Big Data*, 28 J. ECON. PERSP. 51, 63 (2014). Copyright American Economic Association; reproduced with permission of the *Journal of Economic Perspectives*.

David Nickerson and Todd Rogers recently published a heatmap (reprinted in Figure 3 above) of Democratic presidential campaign

[218] *See* KLEIS NIELSEN, *supra* note 200, at 144–45 (describing prior mobilization strategies that relied on precinct-based targeting of potential voters).

[219] HUCKFELDT & SPRAGUE, *supra* note 182, at 236–37 (describing evidence of such geographic based canvassing based on neighborhood or precinct voting data).

[220] *See* HERSH, *supra* note 216.

mobilization patterns in Ohio between 2004 and 2012 that shows how microtargeting has led to increasing disparities in contact between higher and lower propensity voters.[221] In 2004, the presidential campaign of John Kerry relied mostly on a neighborhood precinct strategy that resulted in some disparities in contact between low and high propensity voters.[222] In 2008, the campaign of Barack Obama shifted to a more microtargeted approach to mobilization,[223] although the new approach did not lead to a dramatically different contact pattern as the Obama campaign devoted much more resources to mobilization activities overall, allowing it to extend its reach to more low propensity voters.[224] But by 2012, President Obama's campaign leaned heavily on a microtargeting mobilization strategy, and the result was a much larger disparity in contact between low and high propensity voters.[225]

These low turnout voters that campaigns ignore are disproportionately individuals from lower socioeconomic classes. Data and analytics from vendors like Catalist both drive and reinforce campaigns' tendency to ignore the poor. For campaigns using data vendors and their extensive collection of personal information, the goal is to improve the number of votes per dollar spent from mobilization activities.[226] The figure below reveals how this cost-effectiveness comes at a cost in terms of socioeconomic disparities in contact, showing the positive relationship between Catalist turnout predictions and potential voters' income. Between 2008 and 2014, the predicted likelihood that an individual would turn out to vote increased with her income.[227]

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[221] *See* David W. Nickerson & Todd Rogers, *Political Campaigns and Big Data*, 28 J. ECON. PERSP. 51, 63 & fig.1 (2014).

[222] *Id.* at 63 (describing the lack of reliance on predictive scores for targeting in the 2004 presidential campaign).

[223] *Id.* at 63–64 (explaining the shift to greater reliance on predictive scores for targeting in the 2008 presidential campaign).

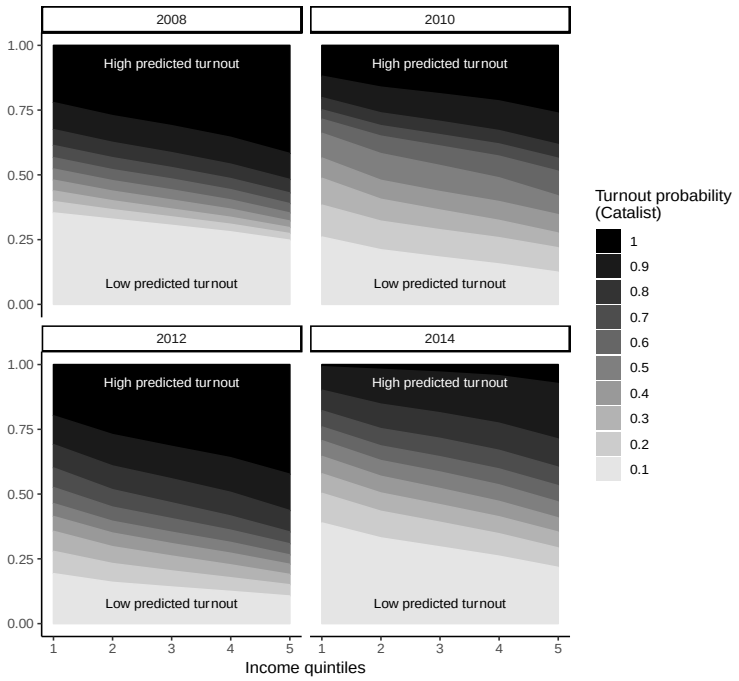
[224] *Id.* (finding that "[t]he highest concentrations of direct contacts were observed among citizens who were predicted to support Democratic candidates but who had low likelihoods of voting").

[225] *Id.* at 64 (suggesting that presidential campaigns in 2012 "avoided communicating with citizens with the lowest turnout probabilities").

[226] *See* HERSH, *supra* note 216, at 15–21 (describing the data vendors and the information that these data vendors sell to campaigns).

[227] Our data are from a one percent sample of Catalist's national voter file (n=1,556,196).

FIGURE 4: ESTIMATED TURNOUT PROBABILITIES BY INCOME QUINTILE[d]



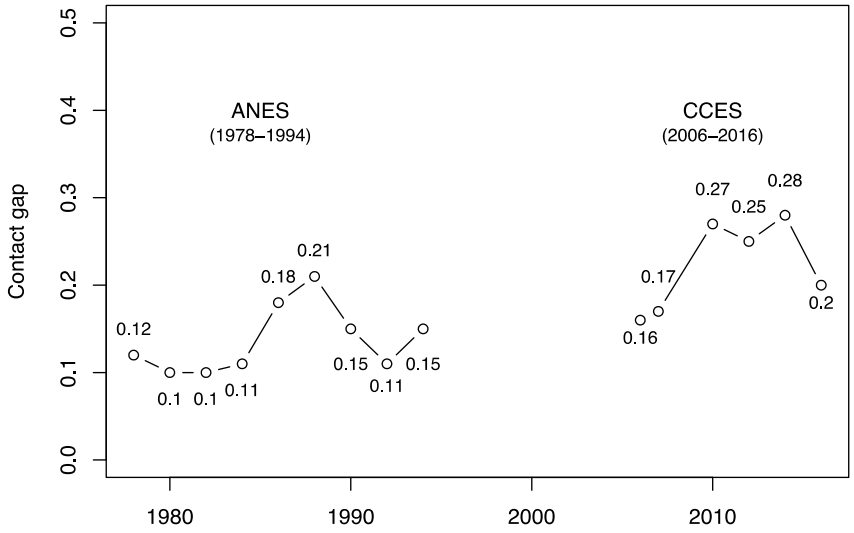
[d] Distribution of the estimated probability that a registered voter will vote by five equally sized income quintiles. *Source*: Random sample of registered voters (n=1.5 million) in the national file maintained by Catalist LLC.

Such predictions ultimately contribute to socioeconomic class biases in campaign contact. Data from the American National Election Studies (ANES) and the Cooperative Congressional Election Study help reveal the disparities in campaign contact of potential voters in the top and bottom income quintiles. The ANES data show a persistently large 7% to 17% rich–poor contact gap between 1978 and 1994.[228] According to the more recent CCES data, this gap has grown. Between 2006 and 2016, the rich–poor contact gap has ranged from 16% to 28%.[229]

[228] ANES, *supra* note 202. Our measure of the proportion of individuals contacted each year reflects any respondent to the ANES who answered "yes" to one of several questions about campaign contact. These questions are reflected in variables VCF0946a (contacted by incumbent), VCF0947a (contacted by challenger), VCF0948a (contacted by Democrat), VCF0949a (contacted by Republican) of the cumulative data file. The sample size is 18,069 spanning the election years 1978 to 1994.

[229] The CCES is a two-wave internet survey of a stratified national sample of 30,000 to 60,000 individuals. The CCES has been administered during each election year since 2006 by the firm YouGov. A one-panel survey is also administered during non-election years. CCES respondents were asked whether a candidate or political campaign had contacted them during an election year on the 2006 (v4065), 2007 (CC06_V4065), 2010 (CC425a), 2012 (CC425a), 2014 (CC425a), and 2016 (CC16_425a) surveys.

FIGURE 5: SELF-REPORTED CONTACT STRATIFIED BY INCOME[e]



[e] Self-reported contact by candidates and/or political campaigns, stratified by income. Actual earnings are not coded uniformly across surveys. Income quintiles represent five equally sized groups of survey respondents in each year. *Source*: ANES Time Series Cumulative Data File (1978–1994) and the CCES Common Content (2006–2016).

Particularly troubling is the fact that the rich–poor contact gap in 2010 and 2014 represented the largest gap in any presidential or midterm election since the ANES started surveying people in 1978. This growing contact gap corresponds with campaigns' increasing use of data and microtargeting mobilization strategies over the past decade.[230]

Campaigns' decisions to disproportionately ignore the poor in their mobilization activities appear to drive at least a part of the persistent rich–poor turnout gap. According to experimental studies testing the causal effect of door-to-door canvassing on turnout, a campaign's decision to contact an individual through door-to-door mobilization is predicted to increase their likelihood of voting by as much as 7% to 10%.[231] Studies also estimate that campaigns' more tailored phone call contact with potential voters increases

The total sample size for these years is 249,627. Shiro Kuriwaki, *Cumulative CCES Common Content (2006–2018)*, HARV. DATAVERSE, https://cces.gov.harvard.edu [https://perma.cc/5FU2-KZSG]. For information about the survey's design and methodology, see Lynn Vavreck & Douglas Rivers, *The 2006 Cooperative Congressional Election Study*, 18 J. ELECTIONS PUB. OPINION & PARTIES 355 (2008).

[230] *See* HERSH, *supra* note 216, at 147–50 (describing the increase use of microtargeting strategies by well-funded campaigns).

[231] Gerber & Green, *The Effects of Canvassing*, *supra* note 21, at 658 n.8; Green et al., *Getting Out the Vote in Local Elections*, *supra* note 21, at 1094.

turnout by 3% to 5%.[232] Thus, when we multiply the socioeconomic class contact gap by the causal effect of canvassing and phone calls on turnout, we see that campaigns' disproportionate orientation of mobilization activities away from the poor could account for approximately 10% of the approximately 30% turnout gap between the rich and poor.[233] That effect accounts for far more of the turnout gap than the new voter suppression laws do.[234]

The explanatory value of the socioeconomic bias in campaign contacts is greater when we incorporate the indirect mobilization effects from campaign contacts. Social scientists have found that voter contacts have a contagion effect on turnout among others in the network of the individual contacted.[235] Another study by David Nickerson assesses the contagion effect of mobilization on turnout in two cities found that those who received a door-to-door canvassing appeal to vote were 8.6% to 10.9% more likely to vote than the control groups.[236] Beyond this direct mobilization effect, the study found that "[t]he treated person passed on 64% and 59% of the increased propensity to vote" onto the other person in the household in the two studied cities, respectively.

This means that "a person who might be 25% likely to vote in the primary would become 85% likely to vote as a direct result of a cohabitant deciding to vote." That is a huge effect, with the increase in likelihood of voting from contagion exceeding the socioeconomic turnout gap that existed at the time of the study in 2008 between persons with advanced degrees and persons with eighth grade educations, and between persons in households with less than $10,000 in income and persons in households earning more than $60,000. The study demonstrates that within households, at least,

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[232] Melissa R. Michelson et al., *Heeding the Call: The Effect of Targeted Two-Round Phone Banks on Voter Turnout*, 71 J. POL. 1549, 1559 (2009) (finding that multiple phone calls to targeted likely voters increases turnout up to 10.3%); David W. Nickerson, *Quality Is Job One: Professional and Volunteer Voter Mobilization Calls*, 51 AM. J. POL. SCI. 269, 275 (2007) (finding that higher quality, more conversational phone calls to potential voters by professionals increased turnout by 3% at the national level and 5% at the local level); David W. Nickerson, *Volunteer Phone Calls Can Increase Turnout: Evidence from Eight Field Experiments*, 34 AM. POL. RES. 271, 283 (2006) (finding that volunteer phone banks increased turnout by 3.8%).

[233] In 2016, there was a 20% rich–poor contact gap. The cumulative effect of the two forms of mobilization on turnout (face-to-face and phone contact) is 15%. If we assume that the mobilization effect is cumulative and consistent across voters, the elimination of the rich–poor contact gap through a 20% increase in campaigns' contact of the poor should increase poor turnout by 3% (0.15×0.20) and reduce the turnout gap from 30% to 27%.

[234] *See supra* Figure 1 (showing the relatively minor effect of voter ID laws on the rich–poor turnout gap); *supra* notes 114–115 and accompanying text (describing the relatively minor effect of voter ID laws as compared to income on the rich–poor turnout gap).

[235] *See supra* note 16 and accompanying text.

[236] Nickerson, *supra* note 16, at 54. The following discussion of this study is sourced from pages 53–55 and Table 2.

"voting is a highly contagious behavior." The contagion effect is likely to diminish somewhat moving from cohabitants to friends, neighbors, coworkers, and associates. But experimental research indicates that the contagion effect of mobilization persists within social networks.[237]

Although it is difficult to quantify precisely, when we include the indirect mobilization effect on turnout, a conservative estimate of the effect of eliminating passive voter suppression is a further 2% to 3% reduction in the turnout gap. Thus, combining the direct and indirect mobilization effect of campaign contacts might reduce the rich–poor turnout gap by about 15%.[238]

In subsequent elections, there would be a persistent additive or even multiplier effect of the elimination of the socioeconomic contact gap on the rich–poor turnout gap. Studies show that voting is habit-forming over time and consistent engagement with nonvoters across elections can turn them into occasional or even frequent voters.[239] A cycle could therefore emerge in which the continuous reach of campaigns into new communities of nonvoters continues to chip away at the turnout gap.

Furthermore, every person that transitions from a nonvoter to a voter is a part of a social network. These new voters receive tailored information about the election and increase the number of politically active individuals in a network. Such new voters can enhance political communication within the network and embed in other members a sense of duty to vote, thereby improving turnout in previously politically marginalized communities.

A virtuous cycle of political inclusion and concomitant reductions in the rich–poor turnout gap will not result from eliminating voter ID laws, prohibitions on voter purges, or making voting more convenient through early voting or Election Day holidays. Even automatic voter registration (which we discuss below) is no panacea. Voter registration is a serious barrier for many individuals, and the burden of registering to vote falls disproportionately on the poor. However, even among those who are registered to vote, turnout varies significantly by income. As illustrated in Figure 6, the gap in registration rates between the wealthiest quintile (earning approximately $70,000 or more per year) and the poorest quintile (earning approximately less than $20,000 per year) is 27%. Even among these individuals, who have exhibited the requisite interest in politics and effort to

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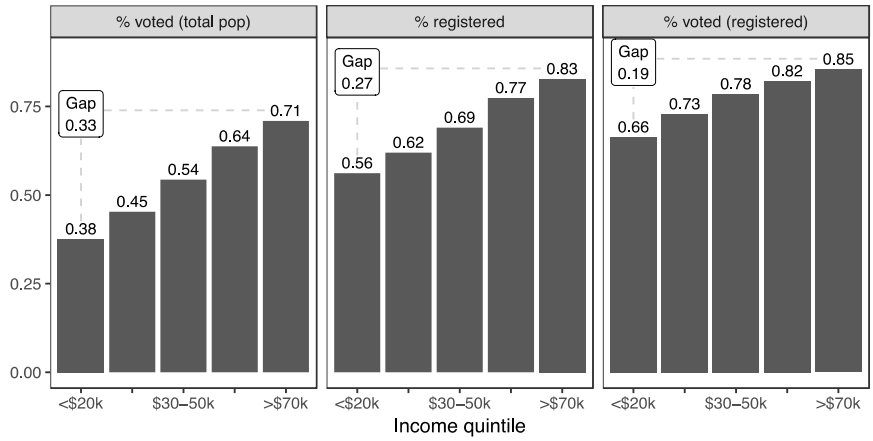
[237] *See* Robert M. Bond et al., *A 61-Million-Person Experiment in Social Influence and Political Mobilization*, 487 NATURE 295, 297–98 (2012) (showing the indirect mobilization effect of online social pressure to vote between close friends through a randomized controlled trial of all Facebook users on the day of the 2010 congressional elections).

[238] *See supra* note 233.

[239] *See supra* note 217 and accompanying text.

register to vote, we observe an income gap in voter turnout. The turnout gap between the wealthiest and poorest quintiles is 19%, which is much smaller than the gap in turnout as a percentage of the total voting age population but is still larger than the gap between White and Black voters (approximately 15%). Thus, even automatic voter registration will likely not eliminate the rich–poor turnout gap. But we might be able to shrink this gap through efforts to combat campaigns' passive voter suppression. In the next Part, we turn to the question of how to address passive voter suppression. We argue that doing so will require a fundamental shift in how election lawyers use law as a tool to address participatory inequality.

FIGURE 6: VOTING AND REGISTRATION RATES BY INCOME[f]



[f] Rate of voter registration and voter turnout by equally sized income quintiles. Even among those who are registered to vote we observe a gap of nearly 20% in turnout between the highest and lowest quintiles. *Source: Current Population Survey Voting and Registration Supplement, 2004–2016.*

IV. COMBATING PASSIVE VOTER SUPPRESSION

There is no silver bullet to the problem of passive voter suppression. The conventional response to active forms of voter suppression used throughout American history, which involved the passage of prohibitory laws directed at state actors or judicial invalidations of suppressive laws as unconstitutional, is not suitable to combat passive voter suppression.[240] Political parties in their mobilization activities are not likely to be considered state actors for purposes of applying constitutional rights prohibitions.[241] And

[240] *See, e.g.*, Voting Rights Act of 1965, Pub. L. No. 89-110, § 4, 79 Stat. 437, 438–39 (codified as amended at 42 U.S.C. § 10501 (2012)) (suspending and then ultimately banning literacy tests); Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 686 (1966) (declaring state poll taxes unconstitutional).

[241] *See* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 620 (1991) ("[T]he conduct of private parties lies beyond the Constitution's scope in most instances [except when] governmental authority may

even if parties were considered state actors, constitutional freedom of speech and association prevent the state from forcing political parties to contact certain people or institutions as part of their mobilization campaigns.[242]

Given this reality, we argue that combating passive voter suppression requires a multipronged strategy that deviates from the conventional legal responses to active voter suppression. Central to campaigns' calculus of contact are two probability determinations and a budget constraint. First, campaigns assess the change in the probability that an individual will vote on the basis of the contact.[243] Second, campaigns assess the change in the probability that an individual will vote favorably for the candidate as a result of the contact.[244] Finally, campaigns must consider how many people they can contact given their budget constraint, which is set by the amount of contributions that campaigns receive from donors.[245]

In this Part, we focus on how law could be used to manipulate the probability assessments in the calculus of contact. Similar to the calculus of voting, we argue that information is a key factor that can influence campaigns' calculus of contact in a way that could lessen their bias against mobilizing the poor.

Campaigns rely on two critical pieces of information in assessing the impact of contact on individuals' likelihood of voting. First, campaigns rely on registration information.[246] Individuals who are not registered are typically harder to mobilize to vote because they still have to overcome registration barriers in order to vote. Second, campaigns rely on information

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dominate an activity to such an extent that its participants must be deemed to act with the authority of the government . . . ."); *see also* Nathaniel Persily & Bruce E. Cain, *The Legal Status of Political Parties: A Reassessment of Competing Paradigms*, 100 COLUM. L. REV. 775, 777 (2000) (describing "[t]he crux of the problem political parties pose for lawyers and judges" as being whether parties are "state actors and therefore subject to constitutional restraints imposed by the Bill of Rights and the Fourteenth Amendment or . . . private associations . . . that can use the Constitution as a shield against state power").

[242] *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000) ("The forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints."); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (declaring compelled speech to be a violation of the First Amendment freedom of speech).

[243] *See* Panagopoulos & Wielhouwer, *supra* note 214, at 350.

[244] *See id.*

[245] The size of a campaign's budget is driven by some factors that are less subject to legal manipulation, such as the candidate's wealth, public reputation, and embeddedness within networks of people with larger capacities to contribute to campaigns. But it is also driven by a factor that, in some cases, can be manipulated legally—the competitiveness of electoral jurisdiction. Holding all other factors constant, more competitive races draw more donations to campaigns from individuals and parties. ROLFE, *supra* note 161, at 99–100 (reviewing the literature finding that "in higher-stakes races, candidates and other actors will have more resources to spend on mobilizing the electorate, leading to higher rates of voter turnout").

[246] *See* HERSH, *supra* note 216, at 29 ("Most strategic campaigns do not focus on transmitting appeals . . . to citizens not registered to vote.").

about individuals' voting history, specifically the elections in which the individual has voted in the recent past (information about how individuals voted is not publicly available in any state).[247] Campaigns generally consider people with more scant voting histories to be harder (and therefore less cost-effective) to mobilize than people with more robust voting histories.[248]

Campaigns' assessments about the change in the probability that an individual will vote favorably for the candidate as a result of contact is derived primarily from information about individuals' partisan affiliations, but also from other evidence collected by data vendors.[249] The choice of campaign strategy—base mobilization or voter persuasion—will dictate which individuals along the partisan spectrum campaigns will contact.[250] But consistent with both strategies is campaigns' reluctance to contact individuals for whom they have little to no information about partisan preferences.[251]

Law cannot change how campaigns make these probability assessments, but it can change what information is available to campaigns to make these probability assessments. Below, we first describe the current information environment that states and data vendors have constructed for political campaigns, which we argue has contributed to the problem of passive voter suppression. To do this, we describe the results of our fifty-state survey of state election laws to identify what information is available to campaigns to make the probability assessments that are central to the calculus of contact.[252]

We then advance three alternative information environments that could change how campaigns apply the calculus of contact and identify the strengths and weaknesses of each alternative. The three alternative information environments we identify are: (1) a no-information environment; (2) a full-information environment; and (3) a partial-information environment. As a preliminary matter, we conclude that a partial

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[247] *See id.* at 147 (identifying vote history as critical data that campaigns use "to isolate segments of the electorate to whom they will direct their attention"); *see also Access to and Use of Voter Registration Lists*, NAT'L CONF. ST. LEGISLATURES (Aug. 5, 2019) http://www.ncsl.org/research/elections-and-campaigns/access-to-and-use-of-voter-registration-lists.aspx [https://perma.cc/JRZ9-QVNP] (summarizing each state's laws on access to voter lists).

[248] *See* HERSH, *supra* note 216, at 146 ("In a general election campaign, [campaigns often] ignor[e] citizens who are not registered or have voted very infrequently in the past.").

[249] *See, e.g.*, Catalist One Percent Codebook (on file with authors) (showing the different sources of the Catalist data, the partisanship model, and partisanship scores for all persons in its database).

[250] *See* HERSH, *supra* note 216, at 142 (describing the campaign contacting patterns for the two mobilization strategies).

[251] *See* KLEIS NIELSEN, *supra* note 200, at 155–59 (identifying data on people's partisan leanings as one of the most important pieces of information that campaign targeting consultants use in constructing a mobilization strategy).

[252] *See infra* Table 1.

information environment might be best to combat passive voter suppression, but we encourage future empirical work on the effect of different information environments on campaigns' mobilization efforts.

A. The Current Information Environment for Campaigns

The administration of elections is primarily a state affair.[253] States set voting qualifications, subject to limitations established in the Constitution, run elections, and collect and distribute voter information related to elections. States have historically delegated responsibilities for keeping and distributing voter information to localities.[254] In the past, voter registration lists were the most important piece of information that local election officials kept. In 1993, however, the federal National Voter Registration Act (NVRA) provided states with financial incentives to better maintain their bloated voter registration rolls, which included individuals who had left the state, died, or otherwise became ineligible to vote.[255] Then in 2002, Congress adopted the Help America Vote Act (HAVA) as a response to the failures in election administration during the 2000 presidential election.[256] HAVA provided states with financial incentives to create a computerized statewide voter registration list.[257]

In just over a decade, voter registration list maintenance was transferred from over 13,000 counties, cities, and towns to fifty states and the District of Columbia.[258] The newly centralized voter registration lists were a boon for campaigns seeking to engage in mobilization activities.[259] Rather than needing to cobble together registration lists from multiple localities throughout a district or state, campaigns could engage in one-stop shopping at the state level. In the 2008 presidential election campaign, President Obama took advantage of the centralized voter registration lists to put

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253 U.S. CONST. art. I, § 4, cl. 1.

254 *See* HERSH, *supra* note 216, at 62–63 (describing how towns and counties controlled registration prior to the National Voter Registration Act and the Help America Vote Act).

255 National Voter Registration Act, 52 U.S.C. § 20507 (2012); *see also* HERSH, *supra* note 216, at 63 (describing the background and intent underlying the NVRA).

256 Rabia Belt, *Contemporary Voting Rights Controversies Through the Lens of Disability*, 68 STAN. L. REV. 1491, 1503 (2016).

257 Help America Vote Act, 52 U.S.C. §§ 21083, 21041 (2012); *see also* SASHA ISSENBERG, THE VICTORY LAB: THE SECRET SCIENCE OF WINNING CAMPAIGNS 245 (2012) (describing how HAVA "encouraged states to centralize their electoral data and organize their voter files in standard formats that for the first time made it easy to manipulate records across state lines").

258 *See* NAT'L COMM'N ON FED. ELECTION REFORM, TO ASSURE PRIDE AND CONFIDENCE IN THE ELECTORAL PROCESS 29 (Jimmy Carter et al. eds., 2002) (describing the pre-HAVA registration system where registration data was "usually recorded and maintained in the separate files of the nearly 13,000 local election jurisdictions of the United States").

259 ISSENBERG, *supra* note 257, at 245.

together the most comprehensive and sophisticated mobilization operation in history.[260]

Registration lists contain information about voters that is critical to campaigns. First, the lists themselves only include the names and addresses of individuals who are registered to vote in the state.[261] Campaigns can therefore easily avoid unregistered persons. Second, at least 35 states make information about individuals' voting histories available to parties and candidates (see Table 1 below). Some states provide specific information about the elections in which individuals have voted in the past. Other states distribute lists of inactive voters to candidates and parties (lists of individuals who have either moved, not voted in elections over the past two years, or both) that the NVRA requires states to keep and maintain.

In 34 states, registration lists available to candidates and campaigns include information about individuals' partisan affiliation or party preferences. In the 36 states with primaries limited to persons with a particular partisan affiliation or nonaffiliation, the collection about individuals' partisan affiliations, and its distribution to parties, is necessary for the operation of the primary system.[262]

Given the high percentage of voters that identify as independents in the United States (39% as of January 2019),[263] the more well-funded campaigns purchase information about individuals' partisan tendencies from private data vendors to assess the probability that individuals will vote favorably for the candidate as a result of contact. For example, Catalist, a private data vendor that the Obama campaign purchased information from, assigns partisan scores to individuals on the basis of information about individuals' characteristics and behaviors collected from sources such as the United States Census, the Federal Reserve, public records, media outlets, and infoUSA.[264] Most campaigns cannot afford the cost of information from data

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[260] *See, e.g.*, Sasha Issenberg, *How Obama's Team Used Big Data to Rally Voters*, MIT TECH. REV. (Dec. 19, 2012), https://www.technologyreview.com/s/509026/how-obamas-team-used-big-data-to-rally-voters [https://perma.cc/5TJE-L7MS] (describing how the Obama campaign used publicly available data and data vendors to fuel its mobilization operation).

[261] The Alaska state law on the preparation of registration lists is a typical state registration law in that it includes "the names and addresses of all persons whose names appear on the master register." ALASKA STAT. § 15.07.127 (2018).

[262] *See State Primary Election Types*, NAT'L CONF. ST. LEGISLATURES (June 26, 2018), http://www.ncsl.org/research/elections-and-campaigns/primary-types [https://perma.cc/AR53-SDZF] (describing the state primary election types in the various states).

[263] *Party Affiliation*, GALLUP, https://news.gallup.com/poll/15370/paMinnesotarty-affiliation.aspx [https://perma.cc/HJ4B-4GAJ] (reporting trends monthly since 2004 in answering, "[i]n politics, as of today, do you consider yourself a Republican, a Democrat or an Independent?").

[264] *See* Catalist One Percent Codebook, *supra* note 249.

vendors and therefore rely on the cheaper and sometimes free state sources of information.[265]

In Table 1, we present a taxonomy of state voter information distribution regimes focusing on the two pieces of information critical to the calculus of contact—voting history and partisan affiliation. More than half of the states distribute both individuals' voter history information in some form and individuals' partisan affiliation, providing campaigns with access to the information critical to making the necessary probability assessments in the calculus of contact. This information environment has likely helped produce the large rich–poor disparities in contact over the past three presidential elections that we associate with passive voter suppression. What are possible alternative information environments and how might they impact passive voter suppression? In the next Section, we identify those alternatives and offer tentative predictions about likely changes to passive voter suppressions in each of the information environments.

[265] *See* Nickerson & Rogers, *supra* note 221, at 66 ("[S]maller campaigns will benefit most from targeting based on predictive scores, but they are also the campaigns that are least able to afford hiring campaign data analysts and voter databases.").

TABLE 1: FIFTY STATE SURVEY OF VOTER INFORMATION DISCLOSURE[g]

		Discloses Voter History	
		No	**Yes**
Discloses Partisan Affiliation	**No**	Arkansas Georgia Hawaii Indiana Montana South Carolina Texas Vermont	Alabama Michigan Mississippi Missouri North Dakota Tennessee Virginia Wisconsin
	Yes	Alaska Idaho Illinois Kentucky Louisiana New Mexico Oregon Wyoming	Arizona California Colorado Delaware D.C. Florida Maine Maryland Minnesota Nebraska Nevada New Hampshire New Jersey North Carolina Ohio Pennsylvania South Dakota Utah

Discloses list of inactive voters with partisan affiliation: Connecticut, Iowa, Kansas, Massachusetts, New York, Oklahoma, Rhode Island, West Virginia

[g] Taxonomy of states by disclosure of voter history and voter partisanship to political campaigns and the public. *Source*: Authors' coding of state statutes, as of 2019.

B. Alternative Information Environments to Combat Voter Suppression

1. The No-Information Environment

One alternative information environment is one in which states deny to parties and campaigns the voter information critical to the calculus of voting—registration status, voter history, and partisan affiliation. States in this no-information environment would not only deny this information to

parties and campaigns but also to the public and the data vendors who could distribute or sell the information to campaigns.

No states currently deny campaigns all three pieces of information. The eight states that deny information about individuals' voting history and partisan affiliation to parties still provide them with registration lists that identify the registration status of persons within the state. The one state, North Dakota, that does not keep registration lists because it does not require registration in order to vote, still provides parties and campaigns with voter lists, which identify individuals who have voted in past elections and includes four years of their voting history.[266] To the extent that a substantial portion of the electorate is concerned about electoral integrity and registration systems are seen as important vehicles for preserving such integrity, registration requirements are not going anywhere.[267] But just because a state maintains a registration system does not mean that it has to make registration lists and accompanying information about individuals' voting history and partisan affiliation accessible to parties.

Denying this information to campaigns could reduce passive voter suppression through the complete disruption of the calculus of contact. Without this voter information, it would be much harder for campaigns to make either of the probability assessments that guide their decisions about whom to contact. And through this disruption, campaigns' contact patterns might become less biased against the poor.

There are, however, two problems with this response to passive voter suppression. First, campaigns would not be completely in the dark about individuals' voter behavior and partisan preferences. Aggregate voting information would continue to be collected at the precinct level and broadly available to the public as a part of the public vote counting exercise that is a part of every election. From the precinct data, campaigns can identify differences in turnout levels and partisan voting patterns and make decisions about which neighborhoods to canvass.[268] Campaigns would likely use this precinct-level data from prior elections to inform their much cruder probability assessments.

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[266] See N.D. CENT. CODE § 16.1-02-12 (2019) (identifying the information contained and maintained in the central voter file); *id.* § 16.1-02-15 (making available voter lists and reports for election-related purposes).

[267] *See, e.g.*, Dayna L. Cunningham, *Who Are to Be Electors? A Reflection on the History of Voter Registration in the United States*, 9 YALE L. & POL'Y REV. 370, 373 (1991) (identifying fraud prevention as the principal justification for registration systems in the modern context).

[268] *See, e.g.*, *Harvard Election Data Archive*, HARV. DATAVERSE, https://projects.iq.harvard.edu/eda/data [https://perma.cc/EZ7J-MMFP] (collecting precinct-level voting data and linking it to geographic boundary files).

The loss of information would thus reduce campaigns' capacity to microtarget individuals for contact, but rational campaigns will still target particular neighborhoods with greater numbers of voters and, depending on the mobilization strategy, with particular partisan compositions.[269] The neighborhood-level mobilization targeting caused by the loss of information would be less efficient for campaigns and would likely lead to some improvement in socioeconomic equity in campaign contact. But given the degree of socioeconomic segregation in the United States and the correlation between income, educational attainment, and voting, campaigns would likely avoid entire low-income neighborhoods.[270] Alternatively, campaigns may look for proxies that predict income relatively well and are easy (i.e., less costly) to observe. One such proxy may be race. Similar to "ban the box" policies that prohibit employers from asking about applicants' criminal histories on job applications (but have resulted in fewer callbacks for black job applicants), the attempt to help a disadvantaged group may backfire by driving campaigns to less reliable signals and stereotypes.[271]

Second, a no-information environment may not be possible. Data vendors would still collect other publicly available information and use it to make predictions about partisan preferences. More importantly, the closed and semi-closed primary systems that exist in many states require the distribution of information about registered voters' partisan affiliation so that the parties can properly run their primaries. Parties in these states will therefore acquire access to information about individuals' partisan preferences and their voter registration statuses. These two bits of information would create opportunities for campaigns to more precisely target individuals for contact using the calculus of contact.

2. The Full-Information Environment

On the other extreme is a full-information environment. A full-information environment would be one in which states collected information about all eligible voters' registration status, voter history, and partisan affiliation and make this information accessible to parties and campaigns. As seen in Table 1, seventeen states and the District of Columbia currently collect and share information about registered persons' voting history and

[269] *See* HERSH, *supra* note 216, at 57 ("A chief alternative to individual-level targeting based on registration records was, and still is, geographic-level targeting based on past election returns.").

[270] *See, e.g.*, Sean F. Reardon & Kendra Bischoff, *Income Inequality and Income Segregation*, 116 AM. J. SOC. 1092, 1115–25 (2011) (describing the trends in residential income segregation since 1970); *see also supra* note 146 and accompanying text.

[271] *See, e.g.*, Amanda Agan & Sonja Starr, *Ban the Box, Criminal Records, and Racial Discrimination: A Field Experiment*, 133 Q. J. ECON. 191 (2017) (finding that the Black–White gap in callbacks for hypothetical candidates for job interviews increased when employers were unable to ask about the criminal history).

partisan affiliation. Another eight states maintain and share active and inactive voter lists that provide some information about registered persons' voting history and their partisan affiliation.

Although these states provide more information about individuals than any other, they still come up short in providing full information about persons eligible to vote within their jurisdictions. States generally do not collect or share any information about unregistered persons. In fact, every state except Massachusetts collects and shares only information about registered voters.[272] Parties and campaigns that rely on information from the state therefore do not know who unregistered persons are, where they live, what their voting history is (for those who may have been registered and voted in another state), or what their partisan affiliation is.

A completely full-information environment is probably unrealistic given that not even the relatively well-funded United States Census is able to collect information about everyone in the country.[273] But there are two potential pathways to a fuller information environment. The first is to follow the example of Massachusetts. In addition to collecting information about registered voters, towns in Massachusetts prepare and maintain "street lists," making it the only state that provides parties and campaigns with information about unregistered persons.[274] These street lists include the identity, address, date of birth, occupation, and nationality of all persons in the state who are seventeen years of age and older and an asterisk next to the name of persons who are registered to vote.[275] But these street lists do not include information about voting history, and partisan affiliation is not consistently included.[276] States could replicate Massachusetts's "street list" approach and add survey questions about individuals' voting histories and partisan affiliations, then share all of the resulting data with parties.

A fuller information environment might reduce the rich–poor contact gap because campaigns with information about the partisan preferences of unregistered persons might be more inclined to contact them. But campaigns

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[272] *See infra* note 274 and accompanying text.

[273] *See* U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY: RESPONSE RATES, https://www.census.gov/acs/www/methodology/sample-size-and-data-quality/response-rates [https://perma.cc/SYT7-R73C] (identifying a response rate ranging from 90% to 98% depending on the year from 2000 to 2017).

[274] MASS. GEN. LAWS ch. 51, § 4.

[275] *Id*.

[276] Towns in Massachusetts annually compile street lists by mailing forms that include all the information about voter eligible persons in the household to all addresses in the town. Adults in the household are required to return the forms to the town clerk, and if they fail to do so, they are designated as inactive voters on the street list. *See, e.g.*, *Question and Answers About the Annual Street List Form*, TOWN OF WALES, https://www.townofwales.net/sites/walesma/files/uploads/faqs_about_the_annual_street_list_form.pdf [https://perma.cc/Q9P5-CXM7].

might still be reluctant to contact these individuals because they are unregistered and presumably lack much of a voting history. It is difficult to know how much the addition of partisan preference information on unregistered persons would change the campaigns' contact calculus, but it is likely that a different approach which provides fuller information about potential voters would have some effect on reducing the contact gap.

In this second pathway, states obtain fuller information about eligible voters through an automatic voter registration (AVR) system. In 2015, Oregon became the first state to adopt AVR.[277] Eleven more states adopted AVR between 2016 and 2018 and at least twenty-four other states are expected to adopt AVR in 2019.[278] The AVR systems are enhancements on the federal National Voter Registration Act's (NVRA) method for registering voters. The NVRA conditioned federal funding to states on the adoption of a voter registration system that would allow individuals to register to vote when they apply for a driver's license at a state motor vehicle agency or for public assistance at a state public assistance agency.[279]

The NVRA made voter registration more broadly accessible, but because it operated according to an opt-in model, in which persons would need to come into contact with one of the state agencies and would need to *decide to* register to vote, many remained unregistered. The opt-in NVRA model has produced only minor gains in the percentage of persons who report being registered to vote. According to the United States Census Bureau Voting and Registration Supplement, 68.2% of U.S. citizens aged 18 years and older reported being registered to vote in 1992, the last presidential election year before the adoption of the NVRA.[280] In the most recent presidential election in 2016, 70.3% of citizens aged 18 years and older reported being registered to vote.[281]

In contrast to the NVRA, AVR systems employ an opt-out voter registration model. In the AVR opt-out registration model, a person who comes into contact with agencies designated by the state are conditionally

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[277] *History of AVR & Implementation Dates*, BRENNAN CTR. FOR JUSTICE (June 19, 2019), http://www.brennancenter.org/analysis/history-avr-implementation-dates [https://perma.cc/49FF-6PFR] (reporting that the state has seen registration rates quadruple since the implementation of AVR).

[278] *Automatic Voter Registration Bills, 2015–Present*, BRENNAN CTR. FOR JUSTICE (July 10, 2019) https://www.brennancenter.org/analysis/automatic-voter-registration-bills-2015-present [https://perma.cc/BNM4-VYN6] (listing all AVR bills introduced by states since 2015).

[279] 52 U.S.C. § 20503 (2012); *id.* § 20506.

[280] JERRY T. JENNINGS, U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, P20-466, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 1992, at vi tbl.B (1993).

[281] U.S. CENSUS BUREAU, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2016: TABLE 4C (2017), https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-580.html [https://perma.cc/J732-VA78].

registered to vote.[282] In one model (e.g., California), the conditionally registered voters are given the chance to opt out while at the agency or, if they do not opt out, are given an opportunity to declare their partisan affiliation. In another model (e.g., Oregon), conditionally registered voters are sent a registration notification card in the mail in which they can opt to decline to be registered or can choose their party affiliation.[283] Conditionally registered voters who take no action are registered as unaffiliated voters.[284] Proponents argue that by shifting the default to being registered, it will increase the number of persons registered to vote.[285] It is too early to tell, but the proponents' arguments are consistent with findings from behavioral economics that opt-out regimes secure more participation than opt-in regimes.[286]

From the perspective of creating a full-information environment that can combat passive voter suppression, more registered voters as a result of AVR means more complete registration lists with accompanying voting history and partisan affiliation. In this fuller information environment, campaigns should have stronger incentives to contact registered persons that would have remained unregistered under the NVRA's opt-in approach. But there are two factors that might reduce the effect of the full-information environment on passive voter suppression. First, campaigns will likely still rely on information about individuals' voting histories in deciding who to contact. That will play to the disadvantage of lower income voters who tend to have a less substantial voting history.

Second, many people might not return the voting registration card in the opt-out regime. The decision to not return the voter registration card will, of course, mean that the person becomes a permanently registered voter by default. But it will also mean that the person assumes an unaffiliated voter status. The AVR opt-out regime is therefore likely to increase the number of unaffiliated voters. Worse yet, the AVR opt-out regime might actually increase campaign's uncertainty regarding unaffiliated individuals' partisan preferences.[287]

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[282] *See, e.g.*, BRENNAN CTR. FOR JUSTICE, THE CASE FOR AUTOMATIC VOTER REGISTRATION 6–7 (2016), https://www.brennancenter.org/sites/default/files/publications/Case_for_Automatic_Voter_Registration.pdf [https://perma.cc/89C6-UGG2] (describing how automatic voter registration works).

[283] *Automatic Voter Registration*, NAT'L CONF. ST. LEGISLATURES (Apr. 22, 2019), http://www.ncsl.org/research/elections-and-campaigns/automatic-voter-registration.aspx [https://perma.cc/57LA-MJJ2].

[284] *Id.*

[285] *Id.*

[286] *See, e.g.*, Brigitte C. Madrian, *Applying Insights from Behavioral Economics to Policy Design*, 6 ANN. REV. ECON. 663, 668 (2014) (describing the increased participation rates associated with opt-out automatic enrollment in retirement savings plans).

[287] Kevin Morris & Peter Dunphy, Brennan Ctr. for Justice, *AVR Impact on State Voter Registration*, BRENNAN CTR. FOR JUSTICE 4 (Apr. 11, 2019), https://www.brennancenter.org/sites/default/files/2019-

In an opt-in regime, registered voters consciously choose to be unaffiliated, which is an indication that the registered voter does not strongly support either party. But in an opt-out regime, where unaffiliated status is the default, the campaign has no way of knowing whether the registered voter is unaffiliated because she does not strongly support either party or simply because she failed to send the notification card back. The latter type of unaffiliated registered voter might clearly support one party or the other, but the campaign would have no way of knowing. The increased uncertainty about the meaning of unaffiliated voter status might lead campaigns to increasingly employ mobilization strategies that target declared party affiliates. To the extent AVR results in registered poor voters being disproportionately unaffiliated with either party, campaigns might continue to bias their mobilization activities away from the poor.

States could get around this problem by being more proactive in seeking out the partisan affiliation status of voters. For example, states could follow the lead of Michigan, which authorizes township, city, and village clerks to "conduct . . . house-to-house canvass[es] or use such other means of checking the correctness of registration records as may seem expedient."[288] But such a process would be expensive. Alternatively, states could subsidize campaigns' purchase of information from private voter data vendors and campaigns could use data vendors' partisan propensity scores to assess the meaning of unaffiliated status in a way that will inform their calculus of contact. That would also be costly but, depending on the number of campaigns, it will likely be less costly than house-to-house canvassing and would likely yield better information than a partisan affiliation survey.

3. The Partial-Information Environment

A third option is for states to increase the amount of information campaigns can access along dimensions likely to reduce socioeconomic bias in contact, while decreasing the amount of information along dimensions likely to expand socioeconomic bias in contact. The categories into which each of the three critical pieces of information—registration status, voting history, and partisan preferences—fall into cannot be determined with any degree of certainty without empirical testing that is beyond the scope of this Article. But three viable hypotheses can be derived from the calculus of contact itself.

First, the effect of information about registration status on campaigns' mobilization patterns will be contingent on the percentage of the population

08/Report_AVR_Impact_State_Voter_Registration.pdf [https://perma.cc/37NZ-S7RP] ("[C]lose to 85 percent of new voters registered through AVR were automatically marked as nonaffiliated . . . .").

[288] MICH. COMP. LAWS § 168.515 (1954).

that is registered to vote. In states where nearly all people are registered to vote, as may come to pass in states that implement AVR, information about registration status will likely decrease the socioeconomic contact gap for the reasons described above. In states where only a substantial majority of the people are registered to vote, as is the case in most states today, information about registration status is probably an important source of the socioeconomic contact gap. Given that states are unlikely to abandon registration systems anytime soon and parties and campaigns will continue to have access to registration lists, particularly in states that have closed or semi-closed primaries, the best path forward to reducing the socioeconomic contact gap is to push for AVR alongside the continued distribution of registration information.

Our second hypothesis is that information about voting history tends to expand socioeconomic bias in contact. Campaigns tend to contact people with higher propensities to vote based on their voting history and the poor tend to have a less substantial voting history. In states where voting history is available, it is easier for campaigns to avoid low propensity voters than in states where voting history is not. Therefore, if the goal is to reduce socioeconomic bias in contact, states could deny campaigns access to voting history information.

Unlike voter registration and partisan identification information that is needed for parties to properly run a closed or semi-closed primary, there is no obvious systemic reason for campaigns to have access to voter history information. States might need to collect such information as part of their efforts to maintain cleaner voter rolls that exclude persons who have moved out of the state, died, or otherwise become ineligible to vote.[289] But there is no evident reason why this information needs to be shared with campaigns.

There might, however, be voter turnout costs associated with denying to the public access to individuals' voting history that are important to recognize. In an influential experimental study, Professors Alan Gerber, Donald Green, and Christopher Larimer found that social pressure in the form of a mailer listing the recent voting record of people in the household and the recent voting records of those living nearby had a substantial turnout effect.[290] While the control group that did not receive any mailer had a turnout rate of 29.7%, the treatment group that received a mailer listing the voting record of people in the household and their neighbors voted at a 37.8% clip.[291]

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[289] *See* 52 U.S.C. § 20507 (2012) (establishing federal requirements for the administration of voting rolls).

[290] Alan S. Gerber et al., *Social Pressure and Voter Turnout: Evidence from a Large-Scale Field Experiment*, 102 AM. POL. SCI. REV. 33, 34 (2008).

[291] *Id*. at 38.

This represented "a remarkable 8.1 percentage-point treatment effect" that far exceeded the small treatment effect of political mailers on turnout in other experiments.[292]

If the state denied public access to voter history information, any turnout gains arising from social pressure through the use of such information would be lost. But any turnout gains from such social pressure are likely to only exacerbate the socioeconomic turnout gap as the poor are less likely to be in social networks where they will receive pressure to vote.[293] It may be better to sacrifice some turnout gains from the use of voting history for more equitable campaign contact and turnout that may result from making such information publicly inaccessible.

Our third hypothesis is that the effect of information about partisan identification on the socioeconomic contact gap is likely to be contingent on the presumed validity of the information. For reasons having to do with the nature of primary systems in states that we describe above, we could not completely deny to campaigns access to registered persons' partisan identification information. But we may want to make information about individuals' partisan preferences more, not less, available. To the extent that campaigns have more information about the partisan preferences of the poor, the calculus of contact suggests that campaigns will often have greater incentives to contact the poor because they will be able to better assess the probability that the person contacted will vote favorably for the candidate. The key is providing reliable information about the poor's partisan preferences. And this can be done through the combination of AVR and active outreach by states to individuals to seek out their partisan preferences, or via campaigns' acquisition of vendor data about the probable partisan leaning of individuals, which the state could subsidize.

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[292] *Id.*; *see also* Gerber & Green, *The Effects of Canvassing*, *supra* note 21, at 660 (finding through an experiment that "direct mail raises turnout by .6 percentage points for each mailing").

The findings from this study informed the development of two new political apps, VoteWithMe and OutVote, in time for the 2018 midterm elections. *About*, VOTEWITHME, https://votewithme.us/about.html [https://perma.cc/S2ZF-KWK7]; *Organizing for Everyone*, OUTVOTE, https://www.outvote.io [https://perma.cc/KX2X-RDHY].

The apps match people's smartphone contacts with state voter files and then display information about their contacts' voting history. Natasha Singer, *Did You Vote? Now Your Friends May Know (and Nag You)*, N.Y. TIMES (Nov. 4, 2018), https://nyti.ms/2D0Xq81 [https://perma.cc/47H4-C46T]. The app then produces an automated message that the owner of the app can send to encourage their contact to vote in the election. *Id.*

The motivating force behind the app is social pressure as contacted persons who receive messages through the app know that their friends know their past voting history and will know whether they voted in the election in which they are being nudged to vote. It is not yet clear whether such social pressure through the app will work to increase the turnout of the nudge recipients, but the findings from the Gerber et al. study suggests that it might. *See* Gerber et al., *supra* note 290, at 38.

[293] *See supra* note 179 and accompanying text.

In sum, a partial-information environment that could effectively reduce the socioeconomic bias in contact would include fuller registration through AVR, no publicly accessible information about individuals' voting history, and more accessible and reliable information about individuals' partisan preferences. That partial-information environment does have some drawbacks and may not be easy to implement. Ultimately, further empirical testing is necessary to assess which, if any, of the information environments reduces passive suppression, but the partial-information environment might be the best of the three.

CONCLUSION

We may never return to the Jim Crow Era of complete disenfranchisement of an entire community of eligible voters, but the active voter suppression threat remains real. In fact, the coming years will likely see more efforts to actively suppress the vote. Voter ID laws will probably be enacted in more states, voter roll purges could emerge as a common election year practice, early voting might continue to be reduced or eliminated altogether, and registration rules may be tightened further. These new voter suppression tools could further enhance partisan advantage and give candidates victories that they would not have had in the absence of these laws. To ensure the fairness of elections and the opportunity for everyone to vote, voting rights advocates should continue their fights against these laws and in favor of laws that make voting easier.

But if the goal is an inclusive democracy, then voting rights advocates will need to target something more than the new voter suppression. State decisions to increase barriers to voting are not the primary source of the large disparities in participation between different classes of voters, disparities that not only exist between the rich and the poor but also between the old and young and Latinos and other racial and ethnic groups. Removing all tangible cost barriers to voting will not lead to participatory equality between these groups.

To achieve the goal of an inclusive democracy, we also need to look at campaign mobilization practices. Through their door-to-door canvasses, calls, and mailers to potential voters, campaigns reduce the most important cost barriers to voting: the cost of the information necessary to give people a reason to vote. Through these contacts, campaigns also increase individuals' sense of duty to vote, a critical intangible benefit from voting. But campaigns focused on winning elections contact some and ignore others in ways that are biased along class lines. This uneven distribution of contacts, which we label passive voter suppression, has undercut the goal of democratic inclusion.

Voting rights advocates therefore need to develop strategies to combat passive voter suppression. We offer one here that focuses on changing the amount and type of information about potential voters that is available to campaigns. An information environment that provides campaigns with information about all voters' partisan orientations (through automatic voter registration) and denies to campaigns information about individuals' voting histories may have the strongest effect on reducing passive voter suppression. But this legal intervention represents only a first step that will need to be followed up with other legal responses designed to increase the incentives for campaigns to reach out to the politically marginalized.