

# The “Welfare Queen” Goes to the Polls: Race-Based Fractures in Gender Politics and Opportunities for Intersectional Coalitions

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Having written this Article during the COVID-19 pandemic, Professor Camille Gear Rich dedicates it to the memory of her grandmother Dorothy Darby, who passed due to suspected COVID-19 complications during the writing of this piece. Additionally, Professor Catherine Powell dedicates this to her mother, Adrienne Kennedy Powell, who lives in a senior community—and is thus unable to accept visits with family during the pandemic—but recalls her own mother (born in 1902) did not have the right to vote. These African American women lived their lives at the intersections of various forms of inequality; as a consequence, they generated perspectives that are honored in this piece as a source of future insight and political potential.

The authors also honor *all* of the victims of COVID-19 pandemic, a crisis that has made underlying racial disparities in healthcare, housing, voting rights, education, and employment opportunities more visible for the American public. Since the pandemic has laid bare these racial cleavages, the coalition strategies discussed in this Article must be taken more seriously and engaged in productive fashion. Professor Rich will explore the consequences of how the welfare queen as a discursive construct threatens to shape future U.S. responses to virus in an upcoming piece tentatively entitled *Death by Pandemic: Terminating the Role of the Welfare Queen in American Politics*. Professor Powell will further investigate ideas at the intersections of race, gender, and class stemming from her CNN opinion piece, *Color of COVID: The Racial Justice Paradox of Our New Stay-at-Home Economy* (Apr. 18, 2020, 9:13 AM), <https://www.cnn.com/2020/04/10/opinions/covid-19-people-of-color-labor-market-disparities-powell/index.html> [<https://perma.cc/ZSP8-AP2P>]. This piece highlights the duality of the fact that Blacks and Latinx are more likely to be unemployed, and yet are also more likely to be essential workers who must stay on their jobs, particularly in lower-skill jobs, during the pandemic—“forever color[ing] our understanding of not only the crisis of contagion, but also the ethics of community, care, and concern.” *Id.*

We especially want to honor the many colleagues who have fallen to the virus across the nation, including our dear friend Professor Terry Smith, a ground breaking African American election law scholar whom we consulted while writing this Article. We hope that he will appreciate the use of his work in this piece and believe he would have found great interest in the issues we explore.

Lastly, the authors would also like to acknowledge receiving invaluable feedback on earlier draft at the following gatherings: AALS Annual Meeting, American Democracy 2020: Commemorating the 15th & 19th Amendments amidst the Third Wave of Autocratization panel (Jan. 4, 2020); University of Maryland Constitutional Law Schmooze, Groups and the Constitution (Mar. 7, 2020); and Fordham Law Faculty Retreat (May 2019). Professor Powell is also grateful to her research assistant, Mary Katherine Cunningham.

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## INTRODUCTION

As Americans celebrate the 100-year anniversary of the Nineteenth Amendment's ratification, our celebration would be premature if we failed to reflect on the ways that race has been used to fracture women's efforts at coalition politics and our understanding of women's rights.<sup>1</sup> Indeed, a careful reading of U.S. history and contemporary politics shows that although similar rights claims are made across a diverse community of American women, women's shared interests are often obscured by the divisive manipulation of race. Notably, 2020 is also the 150-year anniversary of the Fifteenth Amendment, which granted the right to vote to Black men.<sup>2</sup> In this Article, we use the coinciding anniversaries of the two amendments as a critical opportunity to direct feminist attention to intersectional questions—to frame this historical moment as a pivot point that explores the mutually constitutive nature of gender and racial subordination<sup>3</sup> in American politics.<sup>4</sup>

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1. See Camille Gear Rich, *Reclaiming the Welfare Queen: Feminist and Critical Race Theory Alternatives to Existing Anti-Poverty Discourse*, 25 S. CAL. INTERDISC. L.J. 257, 264–70 (2016) (discussing how the racialized construct of the welfare queen has been strategically deployed by pundits to alienate Americans from political interests and rights claims that could challenge existing exploitative institutional arrangements in American democracy); Catherine Powell, *Race, Gender, and Nation in an Age of Shifting Borders: The Unstable Prisms of Motherhood and Masculinity*, UCLA J. INT'L L. & FOREIGN AFF. (forthcoming 2020) (on file with authors) (examining how race and ethnicity have been used to justify restrictions on women immigrants—at the intersection of race, ethnicity, and gender—in the context of the Trump Administration's family separation policy); Laura Ho, Catherine Powell & Leti Volpp, *(Dis)Assembling Rights of Women Workers Along the Global Assembly Line: Human Rights and the Garment Industry*, 31 HARV. C.R.-C.L. L. REV. 383, 389–90 (1996) (discussing how race and ethnicity have been used to limit the rights of certain categories of workers in predominantly female sectors); Catherine Powell & Camille Gear Rich, *The New 'Welfare Queen': Donald Meet Ronald, Ronald Meet Donald*, JUST SECURITY (Oct. 23, 2018), <https://www.justsecurity.org/61164/welfare-queen-donald-meet-ronald-ronald-meet-donald/> [<https://perma.cc/L95Y-4N8H>] (discussing how welfare queen discourse and the construct of the anchor baby has been used by the Trump Administration to alienate Americans from the humanitarian interests of refugees at the United States–Mexico border).

2. In this Article, we have chosen to capitalize the terms “Black” and “Brown.” As one of us has noted in other work:

Like Asian American and Latina, Black is a category embracing several groups who may also self-identify according to national origin (for example, Haitian American). Moreover, the term “Black” captures not merely phenotype or skin color, but a category of peoples who share a common history of racial discrimination in the United States. It is an accident of history that “Black” continues to be decapitalized (both in a literal and symbolic sense), while other racial groups are capitalized.

Ho, Powell & Volpp, *supra* note 1, at 384 n.5.

3. By focusing on the intersection of race and gender, this Article honors and builds on the legacy of important scholars whose pathbreaking work has established intersectionality as a methodological framework in law and related disciplines. See generally Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139; Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1993); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 14 WOMEN'S RTS. L. REP. 213 (1992); Celina Romany, *Ain't I a Feminist?*, 4 YALE J.L. & FEMINISM 23 (1991). For significant, related work outside of law (as this Article draws on other disciplines indicated), see, for example, ANGELA Y. DAVIS, *WOMEN, RACE & CLASS* (1981) (feminist

In service of these goals, we use this Article to explore a toxic racial construct often used to distract American women from our shared rights claims—the political trickster known as the “welfare queen.” This construct was born as a result of fiscal conservatives’ attacks on government anti-poverty subsidy programs in the 1980s. It relied on antipathy toward Black women—characterized as “welfare cheats” or frauds—and pathologized women of color to call for aggressive cuts to social-safety-net programs. This Article explores the remobilization of this construct in present-day electoral politics and the ways in which it compromises cross-racial coalitions and obscures the path to reform. We take as our object the 2016 presidential election and its aftermath, for in 2016, then-presidential candidate Donald Trump and his surrogates reanimated the welfare queen construct and alleged that she was stealing American democracy through voter fraud.<sup>5</sup> The

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studies), PAULA GIDDINGS, *WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA* (1984) (history), and Patricia Hill Collins, *Learning from the Outsider Within: The Sociological Significance of Black Feminist Thought*, 33 *SOC. PROBS.* S14 (1986) (sociology).

4. As this Article goes to press, the country is confronted with serious new threats to voting rights—not only due to cynical use of race to divide women (and the American people), but also because the unfolding COVID-19 global health crisis has prompted the postponement of several primary elections. A *Primary Election During a Pandemic*, WNYC STUDIOS (Apr. 3, 2020), <https://www.wnycstudios.org/podcasts/politics-amy-walter/episodes/politics-amy-walter-primary-election-during-pandemic> [https://perma.cc/ED4P-FF4J]. The world faced an analogous pandemic, the Spanish Flu of 1918, a year before the Nineteenth Amendment’s adoption. As Reva Siegel notes, “The combination of World War II and the devastation of the Spanish flu together created imperatives for women to enter the workforce, both to help care for men and to replace men, and these critical interventions in traditional and unconventional roles helped build momentum for ratification.” Reva Siegel, *Public Memory, the Nineteenth Amendment, and the Democratization of the Family*, Keynote Address from the University of Colorado Law School Rothgerber Conference (Apr. 3, 2020) (on file with author).

Although we do not yet know the full impact of the COVID-19 pandemic, preliminary evidence emerging from the 2020 presidential primary suggests that the current pandemic could result in voter suppression, as opposed to the expanded enfranchisement that followed the 1918 Spanish Flu outbreak. *See, e.g.*, Emily Bazelon, *Will Americans Lose Their Right to Vote in the Pandemic?*, *N.Y. TIMES MAG.* (May 25, 2020, 11:41 AM), <https://www.nytimes.com/2020/05/05/magazine/voting-by-mail-2020-covid.html>. In the absence of expanded (and safe) voter access (such as the widespread availability of mail-in, absentee, curbside, and early voting), voting rights in Black and Latinx communities (often in dense urban areas) may be suppressed where voters must choose between voting in person with the risk of COVID-19 transmission or not voting at all. *See, e.g.*, The Joint Ctr. for Political & Econ. Studies, *Joint Center Online Policy Briefing: COVID-19 & Accessible & Safe Voting for Black Communities*, YOUTUBE (Apr. 16, 2020), <https://www.youtube.com/watch?v=7LIsLf8abow&feature=youtu.be> (including remarks by Leadership Conference for Civil and Human Rights President Vanita Gupta, who notes [at minute marker 9:20], “Our nation [] is in a state of an emergency, and our democracy is as well,” and that in the Wisconsin primary, voters stood in long lines six feet apart to avoid COVID-19 transmission, “having to choose between exercising their right to vote and protecting their public health and safety”). Whether for the current election cycle or future ones down the road, the coinciding anniversaries of both the Fifteenth and Nineteenth Amendments in the current election year provide a key window to harvest the benefits of an intersectional perspective—to identify and reject the cynical political manipulation of race that divides us and compromises the broader campaign for women’s equality. Indeed, we have the opportunity to imagine entirely new paths for cross-racial coalition—to imagine new approaches to feminist legal reform that take special insight from issues illuminated by racial difference.

5. *See* Robert Farley, *Trump’s Bogus Voter Fraud Claims*, *FACTCHECK* (Oct. 19, 2016), <https://www.factcheck.org/2016/10/trumps-bogus-voter-fraud-claims/> [https://perma.cc/4VV8-Y9LH] (collecting various fraud claims and election investigation efforts President Trump called for after the 2016

visceral power of this construct allowed this group of Republicans to transform Americans' understanding of voting rights and American democracy. In so doing, their representations simultaneously sidetracked feminist efforts to build strong cross-racial coalitions.<sup>6</sup> This Article explores the various paths out of our current discourse, dispelling the distracting haze generated by the welfare queen construction. In the process, we also hope to advance our conceptual understanding of intersectional identities and their relationship to political change.

To harness this potential, in Part I we explore the welfare queen construct and the way it has been most recently deployed in contemporary American politics.<sup>7</sup> This recent deployment has transformed the welfare queen into what we call here the “voter fraud” trickster—still Brown, female, and poor, but now out to steal American democracy. The welfare queen or (here) “voter–fraudster” serves four critical purposes in the election context. First, the construct cements the view that American democracy is fragile and that the right to vote is a scarce commodity that must be secured from those that would steal this right and upset the proper democratic order.<sup>8</sup> Second, the construct distracts Americans from the very real, large-scale voter fraud occurring at an institutional level (for example, wrongful voter purges from electoral rolls) and focuses them instead on the minor,

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election, as well as claims made by surrogates). Illegal alien voting was often discussed as a threat to the American state. *Id.* References to Blacks were sometimes more coded: “We have people who cheat in elections,” Giuliani said, particularly in ‘inner cities’ controlled largely by Democrats.” *Id.*

6. This was not an entirely new strategy for the GOP. They had visited these themes before. See Rick Perlstein & Livia Gershon, *Stolen Elections, Voting Dogs and Other Fantastic Fables from the GOP Voter Fraud Mythology*, TALKING POINTS MEMO (Aug. 16, 2018, 1:36 PM), <https://talkingpointsmemo.com/feature/stolen-elections-voting-dogs-and-other-fantastic-fables-from-the-gop-voter-fraud-mythology> [<https://perma.cc/YDR8-SV3F>] (offering a historical account showing that the Republicans have “cried ‘voter fraud’ for decades—and used it as justification to target minorities at the polls”).

In this Article, we demonstrate how the Trump campaign (and now his Administration) manipulated similar claims of “voter fraud” to sidetrack women voters, especially white women with less education. Despite the release of the Access Hollywood video (featuring then-candidate Trump’s sexist remarks bragging about how easy it is for him to grab women) only days before the 2016 election, a majority of white women (particularly those with less education) voted for Trump. See Katie Rogers, *White Women Helped Elect Donald Trump*, N.Y. TIMES (Nov. 9, 2016), <https://www.nytimes.com/2016/12/01/us/politics/white-women-helped-elect-donald-trump.html> (discussing exit polls showing that a disproportionate number of white women *without* college degrees (62%) voted for Trump, whereas only a bare majority of college-educated women (51%) voted for Hillary Clinton).

7. See ANGE-MARIE HANCOCK, *THE POLITICS OF DISGUST: THE PUBLIC IDENTITY OF THE WELFARE QUEEN* 56–57 (2004). Hancock provides an astute analysis of the Moynihan Report, a seminal Senate Report produced by Senator Daniel Patrick Moynihan that traces the causes of Black poverty and social marginalization to the “crumbling” of the nuclear family structure in Black urban communities. See OFFICE OF POLICY PLANNING & RESEARCH, U.S. DEP’T OF LABOR, *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION*, at i (1965) [hereinafter *MOYNIHAN REPORT*], <https://web.stanford.edu/~mrosenfe/Moynihan's%20The%20Negro%20Family.pdf> [<https://perma.cc/52TG-LABS>]. Moynihan discussed the emergence of what he called the Black matriarch, or the African American female head-of-household, as a central problem. *Id.* at 30–34. This figure was further pathologized in subsequent policy discussions and emerged as “the welfare queen.” See Ann Cammett, *Deadbeat Dads & Welfare Queens: How Metaphor Shapes Poverty Law*, 34 B.C. J.L. & SOC. JUST. 233, 255–56 (2014).

8. See generally Robert Courtney Smith, “Don’t Let the Illegals Vote!”: *The Myth of Illegal Latino Voters and Voter Fraud in Contested Local Immigrant Integration*, 3 RSF: RUSSELL SAGE FOUND. J. SOC. SCI. 148 (2017).

relatively rare phenomenon of purposeful individual voter wrongdoing. Third, the construct pathologizes the voting-rights claims of immigrants, parolees, and others who have sought to raise questions about restrictions on the right to exercise the franchise. And fourth, voter-fraud-trickster language naturalizes the idea that America should expect to have a large pool of nonvoting, lesser- or near-citizens who occupy a space of liminal legality<sup>9</sup> in American democracy. The consequences of each proposition for our understanding of democracy and coalition politics is explored in detail.

After highlighting the costs of the welfare queen and voter-fraudster constructs for coalition politics following the 2016 presidential election, in Part II we look at historical examples of how an analogous notion of the political trickster was used to alter our idea of democracy and fracture coalitions between white and Black women in earlier periods. Specifically, given the focus of this special-edition issue, we examine the period leading up to the ratification of the Nineteenth Amendment, when Black women (and men) were similarly scapegoated in American politics and charged with voting-related crimes. We explore the potential of organizing true cross-racial coalitions during this preratification period as well as how the political trickster construct ultimately weakened these coalitions. This historical treatment builds off important earlier work that recovers the role of Black women in the preratification period,<sup>10</sup> but adds a new dimension by focusing on how the image of the political trickster fractured important feminist alliances and thereby reveals a deeper understanding of gender and the right to vote. We demonstrate how these earlier voter-trickster narratives (and related narratives of illegitimacy) were used to render marginal populations (Blacks and women) as suspect and unworthy of the franchise. Combined with claims of Black mendacity, waste, and incompetence, the trickster construct branded Black voters in particular as unfit to exercise the franchise. These charges of

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9. For an incisive discussion of the liminal space where rights are qualified—between no rights and full rights—based on impermissible markers of race and ethnicity, see, for example, Jennifer M. Chacón, *Producing Liminal Legality*, 92 DENV. U. L. REV. 709, 753 (2015) (discussing “citizens who are policed more heavily because they bear the visible markers of race or ethnicity that correlate to other forms of liminal legal status”); Jennifer M. Chacón, *Citizenship Matters: Conceptualizing Belonging in an Era of Fragile Inclusions*, 52 U.C. DAVIS L. REV. 1, 64 (2018) (noting that “formal citizenship does not protect people from discriminatory policing”).

10. See, e.g., MARTHA S. JONES, *ALL BOUND UP TOGETHER: THE WOMAN QUESTION IN AFRICAN AMERICAN PUBLIC CULTURE, 1830–1900*, at 10 (2007) (“revis[ing] prevailing views of a well-studied past, including the emergence of Victorian domesticity; the Seneca Falls convention and development of the women’s rights movement; the work of the Civil War; the campaign for women’s suffrage; and the club movement of the woman’s era”); Celeste Montoya, *From Seneca to Shelby*, in *100 YEARS OF THE NINETEENTH AMENDMENT: AN APPRAISAL OF WOMEN’S POLITICAL ACTIVISM* 105, 106 (Holly J. McCammon & Lee Ann Banaszak eds., 2018) (observing that “[i]ntersectional interventions include probing the exclusionary elements of the mainstream movement and better incorporating the contributions and experiences of women from different social locations” because “the importance of interrogating the experiences is crucial to developing a more complete understanding of historical and contemporary voting rights”); ROSALYN TERBORG-PENN, *AFRICAN AMERICAN WOMEN IN THE STRUGGLE FOR THE VOTE, 1850–1920*, at 15, 22–23 (1998) (“A function of the present study is to recover the Black women known to the contemporaries of the movement, but who became lost to later generations of women suffragists and those who wrote about the movement.”).

illegitimacy, in turn, alienated Blacks and women from one another and locked them into states of legal liminality, with no voice in American politics. Although the roots of today's welfare queen construct can be most directly traced to the late twentieth century, the voter-trickster trope of the Nineteenth Amendment's preratification period offers an important historical antecedent. Here, we suggest that once women understand how the political trickster construct has been used as a distraction historically, they will be empowered in multiple ways. For one, this historical understanding could help feminists regroup intersectional coalitions in a thicker rights framework—as Nineteenth Amendment suffragists Frances E.W. Harper and Frederick Douglass did in the nineteenth century.<sup>11</sup> This thicker human rights framework<sup>12</sup> emphasizes (i) intersectional rights and identities (as Black suffragists did nearly a century before the term “intersectionality” was even coined);<sup>13</sup> (ii) the unalienable nature of fundamental rights,<sup>14</sup> such as the right to vote (regardless of the state's formal recognition of such rights); and (iii) a more robust notion of rights that recognizes how rights, like voting, are made particularly meaningful by being embedded in a particular social and collective context.<sup>15</sup>

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11. See *infra* notes 186–90 and accompanying text.

12. Although distinct, this thicker approach complements the one envisioned in Richard L. Hasen & Leah M. Litman, *Thin and Thick Conceptions of the Nineteenth Amendment Right to Vote and Congress's Power to Enforce It*, GEO. L.J. 19TH AMEND. SPECIAL EDITION 27 (2020).

13. For a brilliant overview of how Kimberlé Crenshaw coined the term “intersectionality,” see TED, *The Urgency of Intersectionality / Kimberlé Crenshaw*, YOUTUBE (Dec. 7, 2016), <https://www.youtube.com/watch?v=akOe5-UsQ2o>.

14. We are referring to “unalienable rights” here in the way Thomas Jefferson did in the American Declaration of Independence, which proclaimed, “We hold these truths to be self-evident: that all men are created equal; that they are endowed, by their Creator, with certain unalienable rights . . . .” THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). Although the rights idea today is more secularized (and less natural law-based), the idea of the inalienability of rights continues to undergird U.S. constitutional law—that there are certain prepolitical rights that are retained by the people in a representative (republican) democracy. It is a basic feature of popular sovereignty and representative democracy that government can neither grant nor eliminate fundamental rights—such as life, liberty, equality, and the right to vote. See also U.S. CONST. amend. IX; cf. LOUIS HENKIN, *THE RIGHTS OF MAN TODAY* 5–6, 9–13 (Routledge 2019) (1978) (theorizing about the role of the American and French Revolutions in promoting and secularizing the idea of the inalienability of rights—a notion that was later universalized).

15. The Reconstruction period was especially important in instantiating this thicker idea of rights. As discussed *infra* in Part II, African Americans were keenly aware that the votes they cast as individuals were inherently constitutive of the rights and power of Blacks as a whole. As other scholars have noted, the right to vote is both individual and collective. Each of us as individuals vote in a broader collective context—as part of an electorate or more discrete voting block (such as the “Black vote,” “women’s vote,” “environmental rights vote,” etc.). As such, various aspects of voting rights—such as apportionment, redistricting, and gerrymandering—signal this collective aspect. See generally TERRY SMITH, *WHITELASH: UNMASKING WHITE GRIEVANCE AT THE BALLOT BOX* 16 (2020) (exploring how white identity contributed to the 2016 election of President Trump by analogizing voting to a jury deliberation, in that like the jury, voting is a collective decisionmaking process undertaken on behalf of the democratic body politic, not on behalf of the individual voter).

Importantly, based on these three elements, we embrace the notion of “human rights” *not* to harken to the international space in which human rights is predominantly discussed, but rather to refer to the thicker notion of rights described here. Cf. Catherine Powell & Sarah Cleveland, *Foreword: Human Rights in the United States*, 40 COLUM. HUM. RTS. L. REV. 1 (2008).



In Part III, we return to the present to examine the ways we might think about coalitions between white women and women of color moving forward. We turn our attention to critical-race and feminist-theory tools for conceptualizing cross-racial coalitions or critiquing their operation—to further refine the new intersectional feminist frame articulated in this Article. This new perspective capitalizes on the special vantage point created when we look at so-called reviled figures as an opportunity to surface key value questions that popular culture has encouraged us to disregard by stigmatizing them. As Rich has previously argued, caricatured figures like the welfare queen—boogeymen that are meant to be reviled—are mobilized by political players precisely because they know that by associating certain rights questions and values with reviled figures, they can convince most Americans that these rights claims are entirely beyond the pale.<sup>16</sup> By taking the values associated with these reviled figures seriously, we gain access to new ways of understanding government’s rights obligations. Indeed, we gain fresh insight on possible political perspectives. For example, just as the welfare queen’s demands for social safety nets and reproductive freedom for poor women are cast as a threat to American society,<sup>17</sup> the so-called voter–fraudster’s demand for easy, open, and simple ways to exercise the franchise is transformed into a threat to democratic order rather than seen as a path to full and equal democratic participation.<sup>18</sup> Indeed, both the welfare queen and the voter–trickster figure provide opportunities to rethink the rules of democratic engagement and the opportunities we afford marginalized figures to articulate a legislative agenda and constitutional-rights claims. On the whole, we seek to deepen possibilities for cross-racial coalition politics and law reform, highlighting the role the Internet could play in these coalitions. We conclude with an argument about regrounding our understanding of intersectionality in a human rights frame.

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16. See Rich, *supra* note 1, at 262.

[This Essay] is the first step in a larger project I am undertaking, one that examines what stigmatized figures teach us about state norms for citizenship and, by extension, the state’s efforts to pathologize and privatize vulnerability and dependency. Alternatively stated, the welfare queen illustrates what the state regards as the proper reciprocal give-and-take between an individual and the larger political body of which she is a member. The welfare queen construct, therefore, is not just a historically-situated discursive tool used to limit the political appeal and agency of certain populations. Rather, the construct embeds certain ideal citizenship norms that inherently limit conversations about [government] programs. By making these citizenship norms visible, we can begin to systematically find ways for feminist legal theory and critical race theory to move past current discursive blocks in [policy] conversations.

*Id.*

17. See *id.*

18. Although pundits are often vague on what they suspect will be the substance of the voter–tricksters’ political demands, we are encouraged to believe that these voters will try to reinstitute welfare and other government antipoverty programs and relax our immigration restrictions. Yet it is unclear why we should regard these societal shifts as threats at all. These anxieties are discussed further in the sections that follow.

Our aim in this Article is not purely to provide a descriptive recap of the damage the trickster construct worked on American politics; rather, the Article also serves a diagnostic purpose; it can assist in analyzing future divisive political campaigns. Understanding the ways this construct impacted the 2016 presidential campaign helps us understand how President Trump's dog whistles to both race and gender in claiming "voter fraud" as a widespread problem, giving a green light to the proliferation of voter suppression measures. We cannot know where the construct will emerge next.<sup>19</sup> Thus, the goal of this Article is to expose the construct, evaluate its costs, and imagine ways to move beyond it, should it resurface again.

Our general point is quite simple: Because of their position at the margins of American politics, women of color have the opportunity to develop a range of intersectional perspectives that illuminate certain mainstream political claims differently. In order to harness this potential source of insight, stereotypes created to limit the political potential of women of color should be challenged and interrogated. To this end, this Article moves beyond a simple critique of the shortcomings of current strategies for cross-racial alliance-building and instead articulates a new vision of how progressive politics might flourish by mining voices from the margins.<sup>20</sup> Although this Article makes a unique *analytical* contribution to our understanding of gender equality and voting rights, it also offers practical and political insights about what it would mean to truly center the political interests of women of color, a critical project given their role as the most reliable voters for progressive, pro-feminist candidates.<sup>21</sup>

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19. On some occasions, the connection between the welfare costs of immigrants and their role in voting was explicit. Greg Phillips, the commentator whose work largely inspired President Trump's voter-fraud commission, connected the two explicitly. He argued that the "expansion of instant Medicaid and welfare-eligibility verification might make it *easier to register to vote, and harder to verify the identity of voters.*" See Vann R. Newkirk II, *Trump's Favorite Voter-Fraud Activist Hedges His Claims*, ATLANTIC (Jan. 31, 2017) (emphasis added), <https://www.theatlantic.com/politics/archive/2017/01/gregg-phillips-trump-voter-fraud/515046/>.

20. Our understanding of voices at the margins is drawn from seminal work by bell hooks. See generally BELL HOOKS, *FEMINIST THEORY: FROM MARGIN TO CENTER* (1984). Hooks similarly argues for a recentering of women of color's perspectives in the formulation of feminist legal theory and politics. *Id.* Some will argue that hooks's perspectives have been fully integrated by the mainstream feminist movement. Our goal is to show that the idea of fulsome integration, although embraced, is still limited. The ideas regarding the integration of marginalized voices into legal and policy objectives are also influenced by a seminal work by Derrick Bell, one of the fathers of the Critical Race Theory Movement. See generally DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992) (arguing for legal and policy responses informed by persons without race, class, and ethnicity-based social privilege).

21. Data from the U.S. Census Bureau confirms this insight:

In the wake of the general election last year, black women stand out as a demographic group with one of the largest voter turnouts. The U.S. Census Bureau reports that 55% of eligible black women voters cast ballots in November 2018, a full six percentage points above the national turnout.

Melanie Eversley, *Black Women Voters Will Be Central to the 2020 Presidential Election, Experts Predict*, FORTUNE (June 20, 2019, 12:09 PM), <https://fortune.com/2019/06/20/black-women-voters-2020-election/>; see also Montoya, *supra* note 10, at 115–17 (explaining that "women of color are an

In the Conclusion, we provide final thoughts. Despite the challenges of coalition building, we must forge powerful alliances and “refashion both feminism and law to speak to the position of all peoples at the bottom, on the margins, and in the intersections, and not seek only the assimilation of privileged people at the top.”<sup>22</sup> As historian Martha Jones reminds us, by “pivoting the center”—and centering our gaze on women of color—we can bring multiple voices into view and empower linkages between people of color and whites, women, and men.<sup>23</sup>

## I. THE WELFARE QUEEN GOES TO THE POLLS

### A. ORIGINS OF THE WELFARE QUEEN

Many will remember 2016 as the year that marked the political rise of President Donald Trump and the beginnings of a modern Republican Party closely allied to his interests.<sup>24</sup> Yet 2016 was also shaped by the resurrection of another powerful political figure: the welfare queen. For in 2016, the welfare queen re-emerged in American politics and, after a minor makeover, Republicans sent her to the polls. Americans were largely familiar with this caricature as a looming figure in public conversation about Aid to Families with Dependent Children (AFDC) benefits in the 1980s and 1990s. Created by the Republican right, the welfare queen was used to stereotype and villainize Black women on public assistance and using other social welfare programs. Americans were told that the welfare queen was indolent and self-indulgent, that her addiction to government benefits threatened to bankrupt the nation. Americans were told that the welfare queen was irresponsible and sexually aggressive, that her commitment to

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important part of the contemporary gender gap in voter turnout”); DANYELLE SOLOMON & CONNOR MAXWELL, CTR. FOR AM. PROGRESS, *WOMEN OF COLOR: A COLLECTIVE POWERHOUSE IN THE U.S. ELECTORATE 1* (2019), <https://cdn.americanprogress.org/content/uploads/2019/11/18120343/Women-of-Color-in-the-American-Electorate.pdf> [<https://perma.cc/87MR-RSD8>]; Jonathan Capehart, *What Do Black Women Voters Want?*, WASH. POST. (Sept. 10, 2019, 5:08 PM), <https://www.washingtonpost.com/opinions/2019/09/10/what-do-black-women-voters-want/> (citing statistics about Black female voters being essential in various elections and claiming Black women are the “secret weapon” for Democrats to win back the White House in 2020); Christopher Parker & Henry Fernandez, *There’s a Boost in Black Turnout, Especially Among Black Women Voters*, HILL (Aug. 28, 2018, 4:30 PM), <https://thehill.com/opinion/campaign/403977-theres-a-boost-in-black-turnout-especially-among-black-women-voters> [<https://perma.cc/KM49-4FE7>]; *2017 Elections: Alabama Senate*, CNN, <https://www.cnn.com/election/2017/results/alabama-senate> [<https://perma.cc/59B9-QXP3>] (last visited May 1, 2020) (showing how in Doug Jones’s victory for an Alabama Senate seat in a special election on December 12, 2017—with 50.0% of the vote—Black women were a significant proportion of Jones’s overall margin of victory, with 98% of Black women voting for him).

22. Robin West, Remarks as Ruth Bader Ginsburg Lifetime Achievement Award Recipient at the American Association of Law Schools Annual Meeting, Section on Women in Legal Education 13 (Jan. 3, 2020) (on file with authors).

23. JONES, *supra* note 10, at 10 (internal quotation marks omitted).

24. As this Article went to press, Senate Republicans conducted the impeachment hearing trial of President Trump and voted to hear no witnesses and seek no evidence. They rejected all impeachment charges filed in connection with his relations with the President of Ukraine and allegations that he made overtures to the country at odds with congressional directives and in service of his private interests. See Weiyi Cai et al., *Trump Impeachment Results: How Democrats and Republicans Voted*, N.Y. TIMES (Feb. 5, 2020), <https://www.nytimes.com/interactive/2020/02/05/us/politics/impeachment-vote-results.html>.

single motherhood made her and her children a threat to American morals and the nuclear family.

Numerous scholars together have created a rich body of work describing the social significance and origins of the welfare queen construct.<sup>25</sup> Her origins can be traced back to the discussion of the Black matriarch in a document called the Moynihan Report, a Senate document that pathologized Black female heads of households and purported to report on the state of Black families in the United States in the 1970s.<sup>26</sup> In subsequent years, politicians seized upon the idea that Black female heads of households were the primary cause of urban social disorder and that public assistance was one of the reasons these dysfunctional, non-male headed households were flourishing in America. Catherine Albiston and Laura Beth Nielsen describe the stereotype:

The term “welfare mother” [or “welfare queen”] brings to mind several key characteristics, all of which connect to stereotypes of women of color. First, a “welfare mother” is presumed to be black. Second, she is by definition poor. Third, she is presumed to be single and under the age of eighteen. Finally, she is commonly portrayed as the mother of several children, all of whom were conceived out of wedlock because of the availability of generous welfare benefits.<sup>27</sup>

Anne Cammet provides additional dimension, fleshing out the moral condemnation the welfare queen experiences because she is perceived to be at fault for her poverty, a willful conspirator in her own economic marginalization. As Cammett explains, “poor Black single mothers [are] deemed . . . the agents of their own misfortune due to their unmarried status—assumed to indicate loose morals, hypersexuality, and presumed laziness.”<sup>28</sup> State officials worried that public assistance further aggravated these moral defects, as it encouraged these women to look to the state for support, rather than salary from work or financial support from husbands. The welfare fraudster was also morally condemned because she used her intelligence adversarially against the American people. She was savvy in turning state administrative systems to her advantage in an effort to increase and prolong her benefits. The archetype welfare queen was offered to the public by Ronald Reagan. He named Linda Taylor as his prime example: a woman who allegedly financed an exorbitant lifestyle by collecting benefits under several names and in several states.<sup>29</sup> In contrast, the garden-variety welfare mother simply exploited procedural rules using her own name to stay on benefits

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25. See Catherine R. Albiston & Laura Beth Nielsen, *Welfare Queens and Other Fairy Tales: Welfare Reform and Unconstitutional Reproductive Controls*, 38 *HOW. L.J.* 473, 486 (1995).

26. MOYNIHAN REPORT, *supra* note 7.

27. Albiston & Nielsen, *supra* note 25, at 486.

28. Cammett, *supra* note 7, at 237 (citing HANCOCK, *supra* note 7, at 25).

29. As we have noted in an earlier work: “While referred to as ‘an indolent black woman,’ Linda Taylor’s racial identity is not clear and at least some official records reflect that she was, in fact, white (an ambiguity which underscores how racial constructs can be manipulated to achieve a variety of ends).” Powell & Rich, *supra* note 1 (citing Gene Demby, *The Truth Behind the Lies of the Original*

as long as possible. She allegedly birthed multiple children over time merely in order to stay on public assistance. Additionally, she was skilled at acquiring wealth using government funds and hiding the resources she amassed. She had a taste for luxury—often disadvantaging her own children to satisfy her needs.

In short, the devious nature of the welfare queen, as opposed to the simple welfare mother, was an important part of this caricature figure. She was at bottom a low-level criminal mastermind, navigating the rules and procedures set out for support in systematically unfair ways, taking more than her share of benefits.<sup>30</sup>

Importantly, the welfare queen caricature evolved over time to allow conservatives to reshape rights understandings in ways that hurt the life chances of all Americans. She evolved into such a reviled figure that the government was able to make the claim that anyone who attempted to draw on public benefits to support her family was morally problematic. Americans were no longer told that the problem was actual waste or deceit. Rather, the discourse on the welfare queen shifted away from blaming select women who unfairly exploited the system and drew on more than their fair share of benefits. Instead the discourse shifted to allege that *no woman should be reliant on the state for the support of her children*. The new baseline was that no woman has the right to have a child that she cannot afford.<sup>31</sup> The new assumption was that a woman should marry a breadwinner or that a single mother should be at work, financially supporting her children, instead of staying at home. This was a critical pivot in welfare queen discourse. The pivot helps us see how the reviled-figure construct can be used to pathologize general basic-rights claims on issues like family support.<sup>32</sup> Once the welfare queen was mobilized in this way, the stereotype became an effective tool that

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<sup>30</sup> ‘Welfare Queen,’ NPR (Dec. 20, 2013, 5:03 PM), <https://www.npr.org/sections/codeswitch/2013/12/20/255819681/the-truth-behind-the-lies-of-the-original-welfare-queen> [<https://perma.cc/G5T6-RAFN>].

<sup>30</sup> The construct continues to be used to this day, even after welfare programs have been scaled back dramatically. See John DeMaggio, *Your Income Paid for Welfare Fraud from Sea to Shining Sea*, HILL (July 20, 2017, 2:41 PM), <https://perma.cc/RDN7-LQ2K>.

<sup>31</sup> See *Is It Fair to Have Children When You Cannot Afford Them?*, DEBATE.ORG, <https://www.debate.org/opinions/is-it-fair-to-have-children-when-you-cannot-afford-them> [<https://perma.cc/D723-59HN>] (last visited May 1, 2020) (documenting that about 82% of respondents said no to the title-page question and complained about the various ways family members are forced to absorb costs from parents that are insecure financially—very few suggested that government has an obligation to provide support to parents for their children). This understanding of self-sufficiency is so internalized that it shapes people’s basic preferences, regardless of perceived class. The idea of automatic state support for children simply does not enter their frame of reference. Instead, they argue that they cannot have children because they cannot afford them. See Hillary Hoffower, *The US Birthrate Is the Lowest It’s Been in 32 years, and It’s Partly Because Millennials Can’t Afford Having Kids*, BUS. INSIDER (May 24, 2019, 2:39 PM), <https://www.businessinsider.com/us-birthrate-decline-millennials-delay-having-kids-2019-5> [<https://perma.cc/VF5N-RVBA>]; Claire Cain Miller, *Americans Are Having Fewer Babies. They Told Us Why.*, N.Y. TIMES (July 5, 2018), <https://www.nytimes.com/2018/07/05/upshot/americans-are-having-fewer-babies-they-told-us-why.html>. The idea of seeking state support even briefly to facilitate having children is not something that frames people’s life chances, even if they might technically be eligible for assistance.

<sup>32</sup> See Jamelle Bouie, *The Most Discriminatory Law in the Land*, SLATE (June 17, 2014, 11:47 PM), <https://slate.com/news-and-politics/2014/06/the-maximum-family-grant-and-family-caps-a-racist-law-that-punishes-the-poor.html> [<https://perma.cc/4PTD-NHLS>] (arguing that family caps were put in place because of the stereotype of the welfare mother, which depicted Black mothers as unfit and suggested

decreased public empathy for people trapped in poverty, encouraged shame about the poor's need to ask for family assistance, and marginalized the poor from political conversations about the state's role in supporting families.<sup>33</sup> Although the welfare queen remained Brown, the larger conversation she engendered extended to all poor women, casting them as a drain on the public purse that needed to be managed.

Additionally, the welfare queen stereotype was used to reduce empathy on a number of fronts that would later be relevant in a variety of political conflicts. She naturalized the idea that procedural mistakes were actually evidence of malfeasance—missing deadlines to apply for benefits, exceeding one's welfare allotment, or being unable to manage administrative systems could be treated as attempts to circumvent the rules, stupidity, or laziness. She decreased empathy for people facing structural impediments—Americans treated her complaints about long lines at government welfare offices, restricted hours, or procedural hurdles with disinterest. Also, the government argued that it was reasonable to require the surrender of rights and dignity interests in exchange for benefits, characterizing these conditions as fair trades for asking for government help. Indeed, the regime evolved to require women to assist in prosecution of their partners in cases of statutory rape and to allow the state to pursue male partners for outstanding child support to “pay the state back” for expended welfare payments.<sup>34</sup> More generally, Americans were encouraged to see the welfare queen as a thief and a threat, and their enmity toward her allowed the government to roll back a rich array of antipoverty programs that many considered a safety net and a bridge to middle-class life. Many of the strategies used to decrease empathy for the “poor” welfare queen would be redeployed as part of the voter-trickster discourse in the 2016 election, a point that will be explored in the sections that follow.

Even prior to her use at the polls, the welfare queen stereotype was expanding and evolving.<sup>35</sup> Fiscal conservatives began to use this construct in the abstract to

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they had children merely to increase their rights to state benefits). Many states have more recently decided to reconsider these laws, recognizing their flaws; Massachusetts, New Jersey, and California are some of the states that have most recently repealed family caps on welfare benefits. Teresa Wiltz, *Family Welfare Caps Lose Favor in More States*, PEW CHARITABLE TRS. (May 3, 2019), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/05/03/family-welfare-caps-lose-favor-in-more-states> [https://perma.cc/8F8T-54LE]. However, in the 1990s, this policy restriction was hugely popular. *See id.* Almost half the states had family cap rules and therefore refused to increase benefits to families if they had additional children while on public assistance. *Id.*

33. *See* Rich, *supra* note 1, at 269 (“[S]ome space needs to be created for understanding relationships of support between the state and its citizens, without the dependent party feeling villainized for her request for assistance. When we use the welfare queen construct to target and marginalize other constituencies, we further confirm that dependency and vulnerability are properly regarded as private concerns beyond the state’s interest or purview.”).

34. *See* Michelle Oberman, *Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape*, 48 *BUFF. L. REV.* 703, 736–37 (2000) (discussing 1998 California law that required applicants for public assistance to provide information to assist in statutory rape law enforcement against fathers when they failed to marry or pay support to young women impregnated by them).

35. Rich, *supra* note 1, at 269 (“[T]he welfare queen is neither dead nor forgotten [after the death of AFDC]. There is still plenty of work to be done in examining current and past iterations of the welfare queen and the ways in which she disciplines and limits contemporary political conversation.”).

villainize anyone that attempted to draw on government aid programs. Suddenly, anyone that applied for financial assistance from the government—in any form—was liable to be painted with the stereotype.<sup>36</sup> Farmers seeking farm subsidies were welfare queens; corporations seeking corporate bailouts were welfare queens.<sup>37</sup> Both the right and the left began to take an interest in the virulent, deeply indicting caricature and construction built at its core on negative stereotypes about Black women.<sup>38</sup> Though some might suspect frequent invocation of the construct would blunt its force, frequent use only served to strengthen the idea. The welfare queen allowed commentators to cobble together a critique of different social programs, tying them all to the view that it was pathological for government to offer any financial assistance to a party that interfered with the operation of the free market. In short, the welfare queen construct created a kind of dysfunctional shared identity among all parties that sought government assistance to improve their chances, whether in industry or simple daily life. Importantly, just like other cultural, mythical figures, the welfare queen remained specifically raced (in this case as Black), despite the multiple instances and purposes for which she was used.<sup>39</sup> The stigma produced by American anti-Blackness gave the construct additional power. Once a program was metaphorically “tarred” with the allegation that the program supported welfare queens, program supporters knew they would face extraordinary resistance.

Although the welfare queen discourse continued through the turn of the century, it took on a renewed energy and focus with the rise of Trump, because he found that the construct served two of his key areas of interest: immigration

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36. *Id.* (“The deployment of the welfare queen construct by parties across the political spectrum demonstrates that the construct is so powerful, so universally understood, that it can be used as a cultural shorthand to immediately pathologize any relationship of support or exchange between the state and a citizen or corporation.”). For additional examples of articles in which the construct was used, see James W. Harris, *America’s Real Welfare Queens: Fortune 100 Companies*, ADVOCS. FOR SELF-GOV’T (Sept. 3, 2014), <https://www.theadvocates.org/2014/09/americas-real-welfare-queens-fortune-100-companies/> [<https://perma.cc/4GYC-4YPR>] (arguing that major corporations whose franchises secure low-interest loans from the Small Business Association should be regarded as welfare queens); John Stossel, *Sugar Subsidies Are Welfare for the Rich*, REASON (Feb. 27, 2019, 12:01 AM), <https://reason.com/2019/02/27/sugar-subsidies-are-welfare-for-the-rich/> [<https://perma.cc/7RPT-UV9V>] (fiscal conservative arguing that the biggest recipients of “welfare” are “politically connected corporations”). The construct is used by the left as well. See Bernie Sanders & Ro Khanna, *It’s Time to Get Billionaires Off of Welfare*, TIME (Sept. 6, 2018, 12:00 PM), <https://time.com/5388596/billionaires-welfare-bernie-sanders/> [<https://perma.cc/MG7S-6UDK>] (democratic socialist lawmaker and democratic commentator arguing that the biggest recipients of government welfare are billionaires).

37. Rich, *supra* note 1, at 268 (“[M]oderates, libertarians, and even progressives now use the welfare queen construct to vilify powerful financial institutions that receive state support. Investment banks, after the federal bailout, were accused of being ‘welfare queens.’ Mega-farms that receive government farm subsidies are charged with stealing money from the taxpayers . . . .” (footnote omitted)).

38. *Id.* (“[O]ne could argue that the welfare queen construct is far stronger today than it was in the late 1980s and early 1990s, as the welfare queen is now powerful enough to be deployed in multiple directions. She is used by advocates on the Right and the Left to target groups other than poor African American mothers.”).

39. Certain figures in American culture remain raced, even though they are used in different contexts or represented graphically in different ways. For example, Santa, Mother Nature, and fairy godmothers are raced as white, even though they may be used in different cultural projects and settings.

reform and voting-rights challenges. Specifically, the authors have noted elsewhere how Trump reanimated the welfare queen stereotype when he raised public concern about immigrant mothers coming to the United States to have “anchor babies” and draw on public benefits.<sup>40</sup> This repurposing of the welfare queen stereotype was relatively easy—he merely had to propose that granting citizenship or residency rights to Mexican and Central American women would lead to a claim for benefits. Recent arguments by other conservative pundits mirror the same understanding.<sup>41</sup> Trump argued that the federal government should prohibit immigrants from applying for citizenship if they have drawn on public assistance during their time in the United States.<sup>42</sup> The strategy was effective in multiple ways; it sent a symbolic message that immigrants are a drain on the public purse, and it frightened many needy families away from collecting food and economic supports otherwise available under federal and state antipoverty programs.

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40. Rich, *supra* note 1, at 268 (“[T]he Right has used the welfare queen construct to demonize poor and newly immigrated Asian and Latino mothers who allegedly have ‘anchor babies.’ They argue that these ‘anchor babies’ drain state resources by giving mothers a foothold on citizenship or residency status in the United States where these mothers can unfairly draw on state resources. . . . The essential components of the welfare queen appear in these debates, as immigrant mothers are described as overly fertile, overly sexual tricksters who have children in a desperate attempt to access state handouts.” (footnotes omitted)); Powell & Rich, *supra* note 1 (discussing President Trump’s use of anchor-baby rhetoric to justify his Administration’s family separation policy).

41. See, e.g., Kristin Tate, *Your Taxpayer Dollars Are Footing the Spiraling Costs of Illegal Immigration*, HILL (Apr. 21, 2019, 6:00 PM), <https://thehill.com/opinion/immigration/439930-your-taxpayer-dollars-are-footing-the-spiraling-costs-of-illegal-immigration> [<https://perma.cc/363S-ANX8>] (arguing that the 4.2 million children of migrants, who automatically become American citizens, cost state and federal educational systems \$45 billion in spending annually).

42. See Michael D. Shear & Ron Nixon, *Plan to Punish Immigrants for Using Welfare Could Boost G.O.P. Candidates*, N.Y. TIMES (Aug. 7, 2018), <https://www.nytimes.com/2018/08/07/us/politics/legal-immigrants-welfare-republicans-trump.html?module=inline>; see also Ted Hesson, *Emails Show Stephen Miller Pressed Hard to Limit Green Cards*, POLITICO (Aug. 2, 2019, 4:19 PM), <https://www.politico.com/story/2019/08/02/stephen-miller-green-card-immigration-1630406> [<https://perma.cc/57DF-M3TJ>] (discussing new rule to allow Department of Homeland Security “to bar *legal* immigrants from obtaining green cards if they receive certain government benefits” (emphasis added)). At the time this Article went to press, three federal judges had enjoined the “public charge” rule. See Miriam Jordan, *Judges Strike Several Blows to Trump Immigration Policies*, N.Y. TIMES (Oct. 11, 2019), <https://www.nytimes.com/2019/10/11/us/immigration-public-charge-injunction.html?module=inline>.

Historically, immigration in the United States has been restricted by fears stoked by the “public charge” trope—whether in the context of Chinese exclusion or efforts to limit non-Western European immigration to the United States in the nineteenth and twentieth centuries. See, e.g., Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 676–77 (2005) (discussing federal and state laws aimed at “public charge[s]” in the context of Chinese immigration to the West Coast); Julia G. Young, *Making America 1920 Again? Nativism and US Immigration, Past and Present*, 5 J. ON MIGRATION & HUM. SECURITY 217, 223 (2017) (discussing the public charge trope and immigration from Southern and Eastern Europe in the twentieth century); see also *Yamataya v. Fisher (The Japanese Immigrant Case)*, 189 U.S. 86, 97 (1903) (upholding the amendments to the Immigration Act of 1882, which allowed for the exclusion of “paupers or persons likely to become a public charge” (internal quotation marks omitted)).

Even in regard to *citizens*, President Trump recently signed an executive order extending the welfare-to-work requirements of the 1990s by mandating that any recipient of food assistance, Medicaid, or low-income housing subsidies must join the work force or face losing their benefits. Glenn Thrush, *Trump Signs Order to Require Recipients of Federal Aid Programs to Work*, N.Y. TIMES (Apr. 10, 2018), <https://www.nytimes.com/2018/04/10/us/trump-work-requirements-assistance-programs.html>.



## B. THE WELFARE QUEEN AT THE POLLS

Since 2016, Trump has also explored the power of the welfare queen construct in electoral politics—specifically, raising public anxiety about voter-tricksters at the polls as a basis for his establishing the Presidential Advisory Commission on Election Integrity.<sup>43</sup> As the basis for this Commission, Trump and his allies signaled that the welfare queen was a threat to American democracy itself when she ostensibly illegitimately participated in democratic elections. Republican politicians and media pundits told Americans that they were being overrun by voter-tricksters,<sup>44</sup> a horde<sup>45</sup> of Black and Brown bodies—most vividly represented as Black and Brown women—deceiving officials at polling sites and stealing various elections. According to this view, these women were not legally entitled to vote, but they attempted to trick voting officials into accepting their ballots and in this way diluted the voting power of “real” Americans.<sup>46</sup> In making these claims,

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43. See Michael Tackett & Michael Wines, *Trump Disbands Commission on Voter Fraud*, N.Y. TIMES (Jan. 3, 2018), <https://www.nytimes.com/2018/01/03/us/politics/trump-voter-fraud-commission.html> (describing the failure of Trump’s Presidential Advisory Commission on Election Integrity to find evidence of fraud, though Trump had claimed that widespread voter fraud—such as by noncitizens—had cost him in losing the popular vote to Hillary Clinton in 2016); see also HERITAGE FOUND., A SAMPLING OF ELECTION FRAUD CASES FROM ACROSS THE COUNTRY, [https://www.heritage.org/sites/default/files/voterfraud\\_download/VoterFraudCases\\_5.pdf](https://www.heritage.org/sites/default/files/voterfraud_download/VoterFraudCases_5.pdf) [<https://perma.cc/M5XZ-SHYP>] (last visited May 1, 2020) (defining “Ineligible Voting” as “Illegal registration and voting by individuals who are not U.S. citizens, are convicted felons, or are otherwise not eligible to vote”).

44. *Felon Vote Fraud*, BALLOTEDIA, [https://ballotpedia.org/Felon\\_vote\\_fraud](https://ballotpedia.org/Felon_vote_fraud) [<https://perma.cc/723S-BE54>] (last visited May 1, 2020) (listing cases across the nation involving felons illegally voting).

45. See, e.g., Ford O’Connell, *If You Don’t Think Illegal Immigrants Are Voting for President, Think Again*, HILL (Apr. 23, 2019, 9:15 AM), <https://thehill.com/opinion/immigration/440136-if-you-dont-think-illegal-immigrants-are-voting-for-president-think-again> [<https://perma.cc/SL79-QWZC>]; Media Matters Staff, *Lou Dobbs and Tom Fitton Falsely Claim “a Large Number” of Undocumented Immigrants Are Voting in Elections*, MEDIA MATTERS FOR AM. (June 24, 2019, 8:00 PM), <https://www.mediamatters.org/lou-dobbs/lou-dobbs-and-tom-fitton-falsely-claim-large-number-undocumented-immigrants-are-voting> [<https://perma.cc/D8XU-FXKH>]; Christina Zhao, *Fox News’ Jeanine Pirro Claims Democrats Plotting to ‘Replace American Citizens with Illegals,’* NEWSWEEK (Aug. 29, 2019, 6:57 PM), <https://www.newsweek.com/fox-news-jeanine-pirro-claims-democrats-plotting-replace-american-citizens-illegals-1456889> (quoting Jeanine Pirro on Fox News to represent the view that “[t]heir plan and their plot to remake America is to bring in the illegals, change the way the voting occurs in this country, give them licenses, they get to vote maybe once, maybe twice, maybe three times. . . . You’ve got motor voter registration on the day of the election, we’ve got voter rolls that haven’t been purged of dead people in years, where the Democrats have resisted that”).

46. This quote from Robert Hingdon Jr., one of the prosecutors in voter-fraud cases involving immigrants, is instructive. Hingdon was appointed by President Trump and frequently discussed with members of his office the need to address the President’s agenda. In a sentencing document, Hingdon explains the basis for these voter-trickster prosecutions:

The right to vote is a precious privilege available only to citizens of the United States. When a noncitizen votes in a federal election it serves to dilute and devalue the vote of American citizens and places the decision-making authority of the American electorate in the hands of those who have no right to make those choices.

See Amy Gardner et al., *Trump-Appointed Prosecutor Focused on Allegations of Voting Fraud by Immigrants Amid Warnings About Separate Ballot Scheme*, WASH. POST (Feb. 3, 2019, 6:11 PM), [https://www.washingtonpost.com/politics/trump-appointed-prosecutor-focused-on-allegations-of-voting-fraud-by-immigrants-amid-warnings-about-separate-ballot-scheme/2019/02/03/989851c2-19de-11e9-8813-cb9dec761e73\\_story.html](https://www.washingtonpost.com/politics/trump-appointed-prosecutor-focused-on-allegations-of-voting-fraud-by-immigrants-amid-warnings-about-separate-ballot-scheme/2019/02/03/989851c2-19de-11e9-8813-cb9dec761e73_story.html).

Republicans mobilized many of the same tools and tropes about theft that had previously been used to render women of color on public assistance as beyond redemption, beyond rescue, and beyond concern.

Crystal Mason is one of the women who prosecutors used to prop up the voter-trickster stereotype. As newspapers reported, Mason was a Black mother of three, living in Texas in the months leading to the 2016 election.<sup>47</sup> She was in the final stage of her period of supervised release, after formerly being incarcerated for tax fraud.<sup>48</sup> Unsure of her right to vote but urged by her mother to participate in the election, she agreed to fill out a provisional ballot based on her belief that she was eligible to vote that year.<sup>49</sup> Mason was wrong; in Texas, one must serve all aspects of one's sentence, including supervised release, before the right to vote is restored.<sup>50</sup> Mason's mistake had dramatic consequences—she was charged with and convicted of voter fraud.<sup>51</sup> At her trial, the prosecutor for her case urged the court to “send a message to illegal voters” and to sentence Crystal to a “stern prison sentence.”<sup>52</sup> The judge obliged and sentenced her to a term of five years.<sup>53</sup>

Mason was a perfect foil for the voter-fraud stereotype. On the appeal of her conviction, Mason argued that she did not intend to defraud the state of Texas because she did not know her status on supervised release made voting illegal.<sup>54</sup> Yet she was already tarred with suspicion. Her prior conviction for tax fraud hung as a background indictment. Although her probation officer did not tell her that she was prohibited from voting,<sup>55</sup> the court was not dissuaded. Also, the fact that Mason filled out a provisional ballot that she believed would be discarded if she was ineligible to vote did not establish her good faith in the court's view.

The specter of the cheating, disenfranchised former felon voter proved an attractive target time and time again. Lanisha Bratcher—a North Carolina mother—suffered a similar fate.<sup>56</sup> Police arrived at her door to arrest her the day after she was released from the hospital after suffering a miscarriage.<sup>57</sup> Previously convicted of assault, Bratcher voted in the 2016 election while she was serving the

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47. Taylor Barnes, *Texas Mother Crystal Mason Appeals Five-Year Sentence for Illegal Voting*, CNN (Sept. 11, 2019, 3:07 PM), <https://www.cnn.com/2019/09/10/us/texas-woman-ineligible-voting-appeal/index.html> [<https://perma.cc/6HLE-NLAP>].

48. *Id.*

49. *See id.*

50. *Id.*

51. *Id.*

52. Amrit Cheng, *Crystal Mason Thought She Had the Right to Vote. Texas Sentenced Her to Five Years in Prison for Trying*, ACLU, <https://www.aclu.org/issues/voting-rights/fighting-voter-suppression/crystal-mason-thought-she-had-right-vote-texas> [<https://perma.cc/W8MR-SE36>] (last visited May 1, 2020).

53. *Id.*

54. Barnes, *supra* note 47.

55. Cheng, *supra* note 52.

56. Sam Levine, *A Black Woman Faces Prison Because of a Jim Crow-Era Plan to ‘Protect White Voters,’* GUARDIAN (Dec. 16, 2019, 6:00 AM), <https://www.theguardian.com/us-news/2019/dec/16/north-carolina-felony-vote-law-black-woman> [<https://perma.cc/2ZRR-XNTA>].

57. *Id.*

probation portion of her sentence.<sup>58</sup> She had not been informed that North Carolina law mandates that people convicted of felonies can only vote once they complete their entire criminal sentences, including probation and parole.<sup>59</sup> North Carolina Board of Election officials realized that her mistake was likely accidental and had previously conceded that there were problems in their system of informing parolees of their voting rights.<sup>60</sup> This, however, did nothing to abate the desire of the prosecutor who charged Bratcher with malfeasance and an attempt to improperly take part in the 2016 election. The political register of this felon disenfranchisement rule and its racially disparate effects could not have been more apparent to those familiar with the history of these restrictions.<sup>61</sup> Bratcher was convicted under a Jim Crow Era law that, at the time of passage, was specifically aimed at disenfranchising Blacks.<sup>62</sup> Now that same law has been repurposed to target former felons painted guilty with the voter trickster construct.

The voter-trickster construct had one additional important iteration during this period—the immigrant voter-trickster. The immigrant voter-trickster allows Republican pundits to wrap anxieties on multiple fronts into one core story. Rosa Maria Ortega became a key symbolic figure in this effort, a victim sacrificed to establish this alleged immigrant fraud problem. Ortega at the time was a thirty-nine-year-old mother living in the United States as a legal permanent resident.<sup>63</sup> Ortega had lived in the United States since she was a child, but only possessed a sixth-grade education.<sup>64</sup> Ortega explained that she voted by mistake because she did not fully appreciate the difference between legal permanent resident status and full citizenship under America’s voting standards.<sup>65</sup> Ortega therefore registered to vote in 2002 and cast ballots in multiple elections.<sup>66</sup> On one of these forms, she explained, she checked citizen because the form did not contain a box for legal permanent residents.<sup>67</sup> She tried to register again in 2014 after moving,<sup>68</sup> and officials explained that she should check the box for noncitizen and could not vote.<sup>69</sup> Ortega believed this to be a mistake, and when her voting application was rejected using the noncitizen designation, she changed it to citizen, so that she

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58. *Id.*

59. *Id.*

60. *See id.*

61. *See id.*

62. *See id.*

63. Michael Wines, *Illegal Voting Gets Texas Woman 8 Years in Prison, and Certain Deportation*, N.Y. TIMES (Feb. 10, 2017), <https://www.nytimes.com/2017/02/10/us/illegal-voting-gets-texas-woman-8-years-in-prison-and-certain-deportation.html>; Sam Levine, *This Woman Got 8 Years in Prison for Illegal Voting. Texas Is Showing No Mercy.*, HUFFINGTON POST (Nov. 30, 2018, 7:04 PM), [https://www.huffpost.com/entry/texas-voter-fraud-prison\\_n\\_5c01a9afe4b0a173c02305c1](https://www.huffpost.com/entry/texas-voter-fraud-prison_n_5c01a9afe4b0a173c02305c1).

64. Levine, *supra* note 63.

65. *See id.*

66. *Id.*

67. Wines, *supra* note 63.

68. Levine, *supra* note 63.

69. Wines, *supra* note 63.

could continue casting her ballot.<sup>70</sup> Authorities grew suspicious after seeing the changes on her forms and referred the case for prosecution. They explained that federal law establishes that noncitizens are not permitted to vote, and Ortega should have been aware of this limitation.<sup>71</sup> Ortega's attorney argued that her near-citizen status confused her, given all of the other rights she held as a permanent resident.<sup>72</sup> As he explained, "[s]he can own property; she can serve in the military; she can get a job; she can pay taxes. But she can't vote, and she didn't know that."<sup>73</sup> Ortega appealed and argued that, based on her good-faith attempt to exercise the franchise, she had not intended to willfully violate the law. The Texas appeals court that heard her case refused to reverse her sentence.<sup>74</sup> Ortega's mistake proved doubly fatal: after serving her time, she will be deported back to Mexico.<sup>75</sup>

These three cases together became part of a larger account documenting the rise of a suspect class, hoping to exploit technical rules, illicitly shape American elections, and dilute white votes.

One cannot merely dismiss these cases as evidence of overzealous prosecutors overcharging defendants in cases of negligent wrongdoing. Voting-rights activists compare the harsh treatment Mason, Brown, and Ortega received to other voter-fraud convictions that involve much more intentional, culpable conduct, such as Terri Lynn Rote, an Iowa woman who tried to cast two votes for then-candidate Trump.<sup>76</sup> Rote, who is white, was only sentenced to two years of probation.<sup>77</sup> Prosecutors have shown leniency in other cases involving larger fraud patterns with white defendants. Logically, prosecutorial discretion in cases of

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70. *Id.* (explaining that she has less than a high school education and seemed easily confused by complicated issues); Levine, *supra* note 63.

71. *See* Wines, *supra* note 63.

72. *See id.*

73. *Id.* Noncitizens cannot vote in federal elections. *See Who Can and Can't Vote in U.S. Elections*, USA.GOV, <https://www.usa.gov/who-can-vote> [<https://perma.cc/8RRX-67UY>] (last visited May 1, 2020). However, some localities allow them to vote in local elections. *See, e.g.,* Scott Shafer, *Noncitizens Will Soon Be Able to Vote in San Francisco – For School Board*, NPR (May 3, 2017, 7:55 AM), <https://www.npr.org/2017/05/03/526703128/non-citizens-will-soon-be-able-to-vote-in-san-francisco-for-school-board> [<https://perma.cc/P2W2-TLKD>] (discussing Proposition N initiative that allows noncitizen immigrants with children in local schools to vote for school board). Unfortunately, many noncitizens end up improperly registered, because they are confused by voter registration applications that are automatically generated when they apply for a state driver's license in some jurisdictions. *See* Pam Fessler, *Some Noncitizens Do Wind Up Registered to Vote, But Usually Not on Purpose*, NPR (Feb. 26, 2019, 10:58 AM), <https://www.npr.org/2019/02/26/697848417/some-noncitizens-do-wind-up-registered-to-vote-but-usually-not-on-purpose> [<https://perma.cc/4B5Q-U9BF>].

74. Levine, *supra* note 63.

75. *Id.*; Wines, *supra* note 63. Ken Paxton, the Republican attorney general who brought the fraud charges against Ortega, has lauded Ortega's sentence, explaining that it "shows how serious Texas is about keeping its elections secure." Wines, *supra* note 63. (internal quotation marks omitted).

76. Maya Oppenheim, *Iowa Woman Who Tried to Vote for Donald Trump Twice Gets Two Years Probation and \$750 Fine*, INDEPENDENT (Aug. 18, 2017, 4:20 PM), <https://www.independent.co.uk/news/world/americas/terri-lynn-rote-iowa-vote-donald-trump-twice-two-years-probation-750-fine-a7900886.html> [<https://perma.cc/RW4C-WZ3E>].

77. *Id.*

ineligible voting should focus on the most egregious cases. Specifically, voting charges should be filed against persons who engage in intentional malfeasance. Indeed, prosecutors and judges logically would not seek to impose harsh sentences in cases of accidental voting when there is no credible basis to believe the individual had any criminal intent. But the welfare queen stereotype allows judicial actors and even lay persons to assume malfeasance in these accidental cases and treat technical mistakes as an attack on the democratic process.

The effect of these public, symbolic cases involving women of color is three-fold. Minority voters certainly note the decided lack of empathy for these women-of-color plaintiffs. Stories about the criminal defendants’ status as mothers or victims of miscarriage fail to trigger the kind of public outcry that might follow if the persons targeted by these criminal stings were white. Relatedly, these women did not experience any feminist rally or outcry around their cases. Instead their race, parole status and immigration status were the determinative features of press coverage linking them with discrete separate political movements. Importantly, feminists missed opportunities to form coalitions to rally around voters that fully embody the promise of the Fifteenth and Nineteenth Amendments. They missed the chance to support women voters most likely to champion progressive causes. But the mobilization of the voter-trickster stereotype has implications beyond feminists’ missed opportunities to form coalitions with persons from immigrant communities or the formerly incarcerated. Rather, the mobilization of this construct broadly changed societal views of voters outside of these discrete marginalized populations. These discursive shifts in the framing and understanding of the right to vote are further explored in the next section.

#### C. DISCURSIVE GOALS: THE WELFARE QUEEN AS A THREAT TO AMERICAN DEMOCRACY

The mobilization of the welfare queen stereotype in the voting context has retained many of the features of the original construct into which she was born. Similar to the welfare queen, the voter-fraud trickster is reviled because of her alleged skillful exploitation of technical rules;<sup>78</sup> her laziness and sloth; and because, at bottom, her perspective on American resource distribution and rights is at odds with and threatens the status quo. Much of the effort to thwart the voter-fraud trickster goes beyond vindicating Americans’ fairness concerns or preventing the vote from being “stolen.” Rather, particularly when referring to “illegally” voting immigrants, pundits express concern that illicit voters will force substantive change in American society by hijacking the democratic process.<sup>79</sup>

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78. See John Samples, *On the Motor Voter Act and Voting Fraud*, CATO INST. (Mar. 14, 2001), <https://www.cato.org/publications/congressional-testimony/motor-voter-act-voter-fraud> [https://perma.cc/CFV9-HYSY] (testimony before the S. Comm. on Rules & Admin.) (discussing results of investigation into suspicious names in registration drive targeted to assist African Americans). Samples argues that rampant fraud was found in this initiative for Blacks, including people registering the dead, registering fake voters under dog’s names, and other problems. *Id.* He documents the costs and waste created by expanding access to registration in this manner. *Id.*

79. See, e.g., Zhao, *supra* note 45 (quoting Fox News host Jeanine Pirro: “[I]t is a plot to remake America. To replace American citizens with illegals who will vote for the Democrats”).

Indeed, discourse about the voter-trickster is so deeply entrenched that it is now hegemonic: it affects American voters' views regardless of whether they think this actual threat exists. This becomes clear when we examine how the voter-trickster stereotype has changed how Americans think about voting legislation and the terms on which the constitutional right to vote is offered. In short, whether one believes that there are hordes of illicit voters storming the polls across the country, the voter-trickster discourse has ensured that all Americans have adopted some baseline views about the American voting process. These baseline views should be treated as an effect of discursive power because they frame conversations: they wholly remove certain options for legal reform and place certain kinds of legal relief beyond the cultural imagination. The voter-trickster has had three discrete discursive effects that should concern us. She encouraged Americans to believe that voting rights are a scarce resource that must be rationed; that individual malfeasance is a greater threat to government than institutional fraud efforts; and that America naturally has a large class of nonvoting near citizens that must remain voiceless but effectively managed. Each shift is discussed in further detail below.

### 1. The Right to Vote as a Scarce Resource

The first discursive goal of the voter-trickster is that claims about the threat posed by voter fraud have caused Americans to see the right to vote as a scarce, high-status resource that the government must protect from wrongdoers.<sup>80</sup> Nothing, however, could be further from the truth. In fact, few Americans treat the right to vote with this kind of sacred, heavy weight in their regular lives. In the 2016 presidential election, only 60% of the eligible population turned out to vote on Election Day.<sup>81</sup> Midterm elections typically draw even fewer voters to the polls, usually between 40% and 50% of eligible voters.<sup>82</sup> The genius of the voter-trickster stereotype is that despite the high levels of nonvoting among the American public, Americans are seduced into believing that they value the vote so much that they should support legislation to further constrict the number of people that can meaningfully vote. Here the voter-trickster stereotype encourages Americans to create *more* barriers to voting. Put differently, the actual grave threat America faces is the crisis produced by eligible people *not voting*. Any president or elected official that wins in low-turnout conditions cannot claim the kind of public power and legitimacy earned in a landslide, high-turnout election.

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80. See Samples, *supra* note 78 (arguing that motor voter laws and other quick registration initiatives are rife with fraud and that associated law enforcement problems waste taxpayer dollars).

81. According to the U.S. Elections Project's count, 60.1% of the voting eligible public turned out to vote in the 2016 election. See *2016 November General Election Turnout Rates*, U.S. ELECTIONS PROJECT, <http://www.electproject.org/2016g> [<https://perma.cc/6LLQ-NQK5>] (last updated Sept. 5, 2018).

82. Jordan Misra, *Voter Turnout Rates Among All Voting Age and Major Racial and Ethnic Groups Were Higher Than in 2014*, U.S. CENSUS BUREAU (Apr. 23, 2019), <https://www.census.gov/library/stories/2019/04/behind-2018-united-states-midterm-election-turnout.html> [<https://perma.cc/M6N2-U2VZ>] (showing graph plotting turnout rates for midterm elections over the past 40 years).

Yet politicians, stirred by the threat of the voter-trickster construct, or hiding beneath this construct as an excuse, impose tight new restrictions on individuals' ability to register and stay on the voting rolls. These draconian laws create barriers to voting, especially for people of color, by requiring that fees be paid prior to voting, restricting polling locations, and instituting exact-identity-match ID requirements, photo ID, and other forms of qualifications.<sup>83</sup> These restrictions are perhaps the most powerful exercise of the voter-trickster construct's ability to shape our conversations in destructive ways.

## 2. Individual Malfeasance Versus Institutional Wrongdoing

The second aim of the voter-fraud-trickster construct is to focus Americans' attention on the small risk of isolated malfeasance by individual voters and distract them from institutional frauds that deprive hundreds if not thousands of Americans of the right to vote. For example, in Georgia, Governor Brian Kemp oversaw the removal of 560,000 voters from the rolls in a single day for technical reasons. Of that number, 107,000 were removed simply because they had not voted in a prior election.<sup>84</sup> Similar efforts in Ohio and other states likewise deprive parties of their vote by ensuring that their names do not appear in records on election day and that voters are denied the right to exercise the franchise.<sup>85</sup> Additional procedural hurdles have arisen across the nation, including: voter-identification laws, exact-name-identity laws, and voter purges, as well as “slow walking” the registration process. Yet even though there was press coverage of these incidents,<sup>86</sup> they failed to elicit the kind of broad-based coalition politics that one would expect to result in response to voter deprivations, which fundamentally threaten democracy.

By contrast, the data refuting the claims of high rates of individual voter fraud is clear. The Brennan Center's report, *Debunking the Voter Fraud Myth*, provides a survey of studies demonstrating that impersonation fraud by voters is

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83. See Vann R. Newkirk II, *Voter Suppression Is Warping Democracy*, ATLANTIC (July 17, 2018), <https://www.theatlantic.com/politics/archive/2018/07/poll-pri-voter-suppression/565355/>.

84. Angela Caputo, Geoff Hing & Johnny Kauffman, *They Didn't Vote . . . Now They Can't*, APM REP. (Oct. 19, 2018), <https://www.apmreports.org/story/2018/10/19/georgia-voter-purge> [<https://perma.cc/69MP-XJ9W>].

85. See, e.g., Nicholas Casey, *Ohio Was Set to Purge 235,000 Voters. It Was Wrong About 20%*, N.Y. TIMES (Oct. 14, 2019), <https://www.nytimes.com/2019/10/14/us/politics/ohio-voter-purge.html> (discussing an Ohio “use-it-or-lose-it” provision that allows state officials to purge voters' names from the rolls if they have not voted in recent elections). Inquiries made during a recent purge effort revealed that actively voting individuals were also being purged from the rolls. However, the concept of depriving voters of their voting rights for failure to exercise is a practice that should be subject to scrutiny as well. Other states have aggressive voter registry removal provisions as well, including Florida, North Carolina, Georgia, and Texas.

86. For an exhaustive account of various forms of voter suppression across the fifty states, see generally NAACP LEGAL DEF. & EDUC. FUND, *DEMOCRACY DIMINISHED: STATE AND LOCAL THREATS TO VOTING POST-SHELBY COUNTY, ALABAMA V. HOLDER* (2017), <https://www.naacpldf.org/wp-content/uploads/Democracy-Diminished-Redraft-D-10-7-19.pdf> [<https://perma.cc/85J6-B8CC>].

significantly rare.<sup>87</sup> The report cross references other Brennan Center materials, including *The Truth About Voter Fraud*, and explains that

[M]ost reported incidents of voter fraud are actually traceable to other sources, such as clerical errors or bad data-matching practices. [Our] report reviewed elections that had been meticulously studied for voter fraud, and found incident rates between 0.00004 percent and 0.0009 percent. Given this tiny incident rate for voter impersonation fraud, it is more likely, the report noted, that an American “will be struck by lightning than that he will impersonate another voter at the polls.”<sup>88</sup>

[Additionally, a] study published by a Columbia University political scientist tracked incidence rates for voter fraud for two years, and found that the rare fraud that was reported generally could be traced to “false claims by the loser of a close race, mischief and administrative or voter error.”<sup>89</sup>

A comprehensive 2014 study published in *The Washington Post* [also] found 31 credible instances of impersonation fraud from 2000 to 2014, out of more than 1 billion ballots cast. . . .<sup>90</sup>

. . . [Additionally a] 2014 nationwide study found “no evidence of widespread [or systematic voter impersonation]” in the 2012 election.<sup>91</sup>

The Brennan Center also cites a 2012 study that pulled records from every state for all allegations of election fraud and ultimately found the overall fraud rate to be “infinitesimal” and minute—only ten alleged cases of voter impersonation and fifty-six alleged cases of noncitizen voting in twelve years.<sup>92</sup> Yet, in the discursive wars waged in American politics about the voter-trickster, increasingly facts have little role to play.

87. BRENNAN CTR. FOR JUSTICE, *DEBUNKING THE VOTER FRAUD MYTH* 1–2, [https://www.brennancenter.org/sites/default/files/legal-work/Briefing\\_Memo\\_Debunking\\_Voter\\_Fraud\\_Myth.pdf](https://www.brennancenter.org/sites/default/files/legal-work/Briefing_Memo_Debunking_Voter_Fraud_Myth.pdf) [<https://perma.cc/WP42-7U6M>] (asserting that “putting rhetoric aside to look at the facts makes clear that fraud by voters at the polls is vanishingly rare, and does not happen on a scale even close to that necessary to ‘rig’ an election”).

88. *Id.* at 1 (citing and quoting JUSTIN LEVITT, BRENNAN CTR. FOR JUSTICE, *THE TRUTH ABOUT VOTER FRAUD* 4, 6, 7–8 (2007), <https://www.brennancenter.org/sites/default/files/legacy/The%20Truth%20About%20Voter%20Fraud.pdf> [<https://perma.cc/E9SD-P4LM>]).

89. *Id.* (citing and quoting LORRAINE C. MINNITE, *THE POLITICS OF VOTER FRAUD* 3, [http://www.projectvote.org/wp-content/uploads/2007/03/Politics\\_of\\_Voter\\_Fraud\\_Final.pdf](http://www.projectvote.org/wp-content/uploads/2007/03/Politics_of_Voter_Fraud_Final.pdf) [<https://perma.cc/VH5F-3AZP>]).

90. *Id.* (citing Justin Levitt, *A Comprehensive Investigation of Voter Impersonation Finds 31 Credible Incidents out of One Billion Ballots Cast*, *WASH. POST* (Aug. 6, 2014, 6:00 AM), <https://www.washingtonpost.com/news/wonk/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast/>).

91. *Id.* (citing and quoting John S. Ahlquist, Kenneth R. Mayer & Simon Jackman, *Alien Abduction and Voter Impersonation in the 2012 U.S. General Election: Evidence from a Survey List Experiment*, 13 *ELECTION* L.J. 460, 461 (2014)).

92. *Id.* at 2 (citing and quoting Natasha Khan & Corbin Carson, *Comprehensive Database of U.S. Voter Fraud Uncovers No Evidence That Photo ID Is Needed*, *NEWS21* (Aug. 12, 2012, 10:39 AM), <https://votingrights.news21.com/article/election-fraud/> [<https://perma.cc/F7EW-3SGM>]).



### 3. Shadow Populations, Liminal Legalities, and the Pathologization of the Quest to Vote

A third discursive objective of the voter-fraud trickster is the depoliticization and legitimation of so-called neutral rules that disproportionately impact access by women of color to the vote. As the stories of alleged “voter fraud” discussed in the section above indicate, a network of new rules and regulations have emerged that enmesh women in a web of liminal legality in which they are denied the right to vote. Several categories of voters are entirely deprived of the basic rights to the franchise, some on a permanent basis. These categories include voters subject to parole, probation, supervised release, and incarceration.<sup>93</sup> Additionally, immigrants are categorized in multiple ways while living in the United States, with each category subject to its own federally mandated restrictions. These categories include new citizens, legal permanent residents, and temporary residents. Dreamers—individuals in the United States under the Deferred Action for Childhood Arrivals program—and persons with different types of work visas also operate under distinct rules. Most of these categories do not give immigrants the right to vote. Heated debates rage about whether these rules are fair, when the right to vote should be conferred and restored, and on what terms. But by starting the debate at this level of inquiry we have already ceded too much. For we are leaving out of the conversation the ways in which America has now structured itself to manage an increasingly large and visible class of persons governed by American law but with no voice in electing the officials that shape the law’s direction.

The growth of a class of voiceless governed should disturb us in the extreme. As we celebrate the Fifteenth and Nineteenth Amendments’ extension of the franchise to the previously voiceless—women and Blacks—we are watching the emergence of the new voiceless governed. And we know what it means for the evolution of democracy to deny persons with a stake in America’s future a chance to make their views count in the polity. Our history with slavery and making women second-class citizens provides guidance about the exploitation risks and unfairness these arrangements cause. Debates about managing the voter-trickster distract us from the larger questions about the growth of the nonvoting population: those under criminal justice supervision and those persons trapped in the immigration-review process with increasingly small chances of achieving citizenship. The focus on the trickster account encourages attention to the individual fairness of the rules *used to shut people out of the polity*, rather than the overall effect of creating classes of voiceless people in a so-called democracy.

One of the most pernicious effects of the voter-trickster stereotype is that it naturalizes the view that America always has and will continue to have a shadow population of near-citizens that do not deserve the right to vote. It naturalizes the view that we must fight against this shadow class of interlopers that rudely and

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93. See *Felon Voting Rights*, NCSL (Oct. 14, 2019), <https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx> [<https://perma.cc/98S3-E85B>].

presumptively believe that they should shape the conditions under which they live. Some will argue that a polity must draw up some rules for the votes that will define the policies of that polity, and that these restrictions must reflect our values about who has earned the right to speak or has the requisite concrete interest in the polity to merit a stake in determining its future. Indeed, there have always been basic qualification standards for American voters—age restrictions and citizenship requirements among them. However, we also know that our prior decisions defining this class reflected poorly on our views about who deserved to be a part of the American political community. It seems clear at this juncture that when we see new governed-but-voiceless communities emerging, we must take a hard look at the values reflected by these rules.

## II. LESSONS OF THE PAST: HOW THE TRICKSTER NARRATIVE FRACTURED INTERSECTIONAL POLITICS IN THE PRE-NINETEENTH AMENDMENT PERIOD

This Part of the Article illustrates how a racialized trickster narrative was also threaded throughout the pre-Nineteenth Amendment ratification era. However, initially during this period it was Black *men* who were primarily seen as political tricksters—a trope that was eventually transferred to Black women as well. On the one hand, the pre-Nineteenth Amendment period is remarkable for the ways Black and white women (and slavery abolitionists and women’s suffragists more generally) were able to build alliances toward the right to vote. On the other hand, this period is notable because of the ways that the trickster trope emerged and took hold. Specifically, Blacks were accused of “selling their votes,” being vulnerable to manipulation by politicians based on Black illiteracy, and generally being irresponsible voters. Yet, in a more fundamental sense, it was white men who were “dishonest and unprincipled[,] since they either denied or bought the Black man’s vote.”<sup>94</sup>

Section A provides background on the rise and fall of the alliance between Black and white women in the pre-Nineteenth Amendment suffrage movement. Section B examines how the emergence of the political trickster narrative helped fracture this alliance. Section C describes how, even as fissures in this relationship began to emerge, Black and white women jointly turned this trickster narrative on its head. They illicitly exercised the right to vote as a form of civil disobedience, and in some cases were arrested and prosecuted, during what became known as the “New Departure Movement.” As in the current moment, women were prosecuted for a surprising crime: voting. And yet, unlike today, these suffragists—Black and white—knowingly voted “illegally” (or at least knowing their right to vote was not formally authorized), because they understood that the right to vote is a fundamental right. Section D turns to a discussion of how Black abolitionists and suffragists understood that their struggle for voting

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94. TERBORG-PENN, *supra* note 10, at 66–67 (citing the views expressed by Black suffragist, Mary A. McCurdy, *Duty of the State to the Negro*, in *AFRO-AMERICAN ENCYCLOPEDIA* 142, 142–45 (James T. Haley ed., Nashville, Haley & Florida 1895)).

rights and formal recognition as humans—rather than chattel—was a human rights struggle that was necessary to hold the nation accountable to its founding ideals. Section E concludes with reflections on why recovering the role of Black women in articulating this robust vision of right is critical, as well as the relevance of that role for coalition politics and law reform today.

#### A. THE RISE AND FALL OF INTERSECTIONAL POLITICS IN THE SUFFRAGE MOVEMENT

To set the stage, this section examines the emergence and unraveling of a cross-racial alliance leading up to the ratification of the Nineteenth Amendment. Even before the Civil War, Black and white women came together to demand universal suffrage, regardless of gender and race. It is a remarkable story of solidarity, forged in the long, dark shadow of exclusion, slavery, violence, and liminal status.

Women were simply left out of the Constitution—except for, eventually, the Nineteenth Amendment (and over time, the Fourteenth Amendment). To the extent the Framers put *Blacks* in the Constitution *prior to* the Fourteenth Amendment, they did so to preserve slavery and entrench racial inequality.<sup>95</sup> It is therefore no surprise that the movements for race and gender equality intersected in the context of the nineteenth century movements for abolition of slavery and women’s suffrage.

The alliance between abolitionists and suffragists was more than just strategic; it was conceptual as well. Women’s suffragists “invoked the principles and precedent of the American Revolution to attack claims of virtual representation”<sup>96</sup> and support the idea of overthrowing the “tyranny” men had over women in virtually every sphere<sup>97</sup>—and combined this approach with “the radical egalitarianism of the antislavery constitutional tradition.”<sup>98</sup> Several leaders were involved in both movements.

A number of renowned women’s suffrage leaders—such as Susan B. Anthony, Angelina Emily Grimké Weld, Lucretia Mott, and Lucy Stone—had been active in the abolition movement.<sup>99</sup> They joined Black activists—including Sojourner Truth, Sarah Redmond, Margaretta Forten, Harriet Forten Purvis, and Frederick

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95. See, e.g., U.S. CONST. art. I, § 2, cl. 3 (counting Black slaves as three-fifths of a person for apportionment); *id.* art. I, § 9, cl. 1 (prohibiting Congress from banning the importation of slaves through the international law trade before 1808); *id.* art. IV, § 2, cl. 3 (ensuring entitlements to slave holders to the return of runaway slaves).

96. Reva B. Siegel, *The Nineteenth Amendment and the Democratization of the Family*, 129 YALE L. J. F. 450, 459 (2020) [hereinafter Siegel, *The Nineteenth Amendment and the Democratization of the Family*]; see also Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 988 (2002) [hereinafter Siegel, *She the People*] (“Suffragists recalled the relations of colonists and king as they demanded ‘self-government’ and ‘no taxation without representation’ and as they demonstrated how virtual representation provided women no effective representation at all.”).

97. Siegel, *She the People*, *supra* note 96, at 988 n.120 (quoting REPORT OF THE WOMEN’S RIGHTS CONVENTION (Seneca Falls, N.Y., July 19 & 20, 1848)).

98. Siegel, *The Nineteenth Amendment and the Democratization of the Family*, *supra* note 96, at 460.

99. Montoya, *supra* note 10, at 107; TERBORG-PENN, *supra* note 10, at 22–23.

Douglass<sup>100</sup>—to push for “universal suffrage.”<sup>101</sup> Expressing solidarity, Angelina Emily Grimké Weld said, “I want to be identified with the Negro. Until he gets his rights, we shall never get ours.”<sup>102</sup> Frederick Douglass, a former slave, was not only well-known as an abolitionist but also for his reputation as “the first male of any color to advocate publicly for woman suffrage.”<sup>103</sup>

Despite these early signs of unity, racial fissures were apparent from the start of the women’s suffrage movement.<sup>104</sup> Although Frederick Douglass participated in the Seneca Falls convention, *no* Black women were recorded as having attended.<sup>105</sup> Even where Black women were present and active in historic meetings and debates on women’s suffrage, their role was largely invisible in the six-volume *History of Woman Suffrage*, initially edited by Elizabeth Cady Stanton, Susan B. Anthony, and Matilda J. Gage.<sup>106</sup> For example, in the first volume—published in 1881 (and covering the movement’s history from 1848–1860)—“[n]ot one Black woman’s photograph appeared in the volume, not even the celebrated Sojourner Truth.”<sup>107</sup> Reflecting her relative marginalization among not only African American male intellectual circles<sup>108</sup> but also presumably within the

100. TERBERG-PENN, *supra* note 10, at 14–19.

101. *Id.* at 8.

102. Montoya, *supra* note 10, at 107.

103. TERBERG-PENN, *supra* note 10, at 14; *see also* FREDERICK DOUGLASS ON WOMEN’S RIGHTS: CONTRIBUTIONS IN AFRO-AMERICAN AND AFRICAN STUDIES, NUMBER 25 (Philip S. Foner ed., 1976) [hereinafter FREDERICK DOUGLASS ON WOMEN’S RIGHTS].

104. “The movement began officially at Seneca Falls, New York, in 1848 and ended with the ratification of what was called the Susan B. Anthony Amendment in August of 1920.” TERBERG-PENN, *supra* note 10, at 7.

105. Montoya, *supra* note 10, at 108. *But see* TERBERG-PENN, *supra* note 10, at 14 (“No African American women appear to have been present at that meeting if we rely on the records kept by the major players, who were elite white suffragists. I speculate that free Black women who lived in the upstate New York area—perhaps in cities like Rochester—attended the meeting along with the male abolitionists of color, but the chroniclers of the movement made no mention of them.”).

106. TERBERG-PENN, *supra* note 10, at 14–15. *See also* Montoya, *supra* note 10, at 107, critiquing the shortcomings of *History of Woman Suffrage*:

This narrative focuses predominantly on the experiences of white, middle-class educated women in the Northeast; prioritizes the importance of de jure voting rights over de facto; and obscures the experiences of millions of women that remained excluded from the franchise even after the Nineteenth Amendment was ratified.

Montoya also points out that although “critical scholars have worked to challenge and expand traditional and exclusionary narratives of women’s suffrage[.] . . . the ‘Seneca Falls to suffrage’ narrative remains prominent, heavily influenced by [the] six-volume *History of Woman Suffrage*.” *Id.* (quoting Nancy A. Hewitt, *From Seneca Falls to Suffrage? Reimagining a ‘Master’ Narrative in U.S. Women’s History*, in *NO PERMANENT WAVES: RECASTING HISTORIES OF U.S. FEMINISM* 15, 17 (Nancy A. Hewitt ed., 2010)).

107. TERBERG-PENN, *supra* note 10, at 15. “Aside from excerpts from Truth’s speeches, the words of other Black female suffragists were all but absent.” *Id.* Terberg-Penn also notes that not only had Truth been enslaved earlier in her life—and was illiterate, homeless, and “had to provide for her own survival,” but also, “nineteenth-century white women reformers constructed Sojourner Truth in an image of their own making.” *Id.* at 15, 18.

108. *See* JONES, *supra* note 10, at 106–07.

mainstream women’s suffrage movement, Truth gave her celebrated “Ain’t I a Woman” speech at an 1851 women’s convention in Akron, Ohio.<sup>109</sup>

Although universal suffrage continued to be a goal for many women’s suffragists—particularly Black suffragists—a split emerged in the aftermath of the Civil War.<sup>110</sup> Suffragists who were opposed to the inclusion of the word “male” in the Fourteenth Amendment (ratified in 1868) failed in their advocacy to exclude the term.<sup>111</sup> Along similar lines, two years later, many suffragists protested the fact that the Fifteenth Amendment enfranchised only Black men, but not women.<sup>112</sup> The debate that followed then “divided the universal suffrage movement into two camps[:] those who felt that Black men needed the vote even more than women, and those who were unwilling to postpone woman suffrage for the sake of Black males.”<sup>113</sup> The American Equal Rights Association, which had pushed for universal suffrage, disbanded due to this debate.<sup>114</sup> From the divide between the camps, two rival groups emerged.<sup>115</sup>

On the one hand, the National Woman Suffrage Association (NWSA), spearheaded by Stanton and Anthony, represented those who more persistently opposed the Fifteenth Amendment’s exclusion of women.<sup>116</sup> The NWSA’s position was that women should have a right to vote, and it used the Fourteenth Amendment’s Equal Protection Clause to bolster the “New Departure” movement, which was supported by a handful of Black women who, along with white women, tried to vote prior to formal recognition of women’s enfranchisement<sup>117</sup> (and in some cases were prosecuted for “illegally” voting, as discussed below in section B).

On the other hand, the American Woman Suffrage Association (AWSA), spearheaded by Lucy Stone, represented those who supported the Fifteenth Amendment “regardless, seeing it as a step in the right direction” toward universal suffrage.<sup>118</sup> Black women participated on both sides of the split—with Sojourner Truth notably attending meetings for both—though a larger number affiliated with the AWSA.<sup>119</sup>

Disagreements on race remained, even after the NWSA and AWSA merged into the National American Woman Suffrage Association (NAWSA) in 1890;

109. Montoya, *supra* note 10, at 108 (“The speech itself might be seen as an intersectional intervention to address not only the patriarchal stereotypes of female frailty but also to challenge the racism of white feminists who opposed her participation.”).

110. TERBORG-PENN, *supra* note 10, at 8.

111. *Id.*

112. *Id.*

113. *Id.*

114. Montoya, *supra* note 10, at 108.

115. *Id.*

116. *Id.*

117. TERBORG-PENN, *supra* note 10, at 8.

118. Montoya, *supra* note 10, at 108.

119. *See id.*; TERBORG-PENN, *supra* note 10, at 8; Rosalyn Terborg-Penn, *African American Women and the Woman Suffrage Movement*, in *ONE WOMAN, ONE VOTE: REDISCOVERING THE WOMAN SUFFRAGE MOVEMENT* 135, 140 (Marjorie Spruill Wheeler ed., 1995).

“the new organization was relentless in its pursuit of the franchise [for women], using exclusionary strategies to court and maintain tenuous alliances with women’s suffragist organizations in the South, many of which did not allow black members.”<sup>120</sup> Although some white women in the North supported a more integrated approach to the movement,<sup>121</sup> others, such as Alice Paul, preferred to keep Black women at a distance. For example, Paul insisted that Black women march separately in a famous 1913 suffrage parade in front of the White House, for “fear of offending ‘certain unnamed southern women’ who had pledged not to march in a racially integrated parade.”<sup>122</sup> Black journalist Ida B. Wells, renowned for her antilynching work, was a strong supporter of women’s suffrage and insisted on marching with the regular Illinois delegation, rebuffing the suggestion that Black women march separately.<sup>123</sup> The chair of the Illinois delegation, Grace Wilbur Trout, had informed Wells-Barnett that the NAWSA “advised them to keep our delegation entirely white” based on pressure from southern white women.<sup>124</sup> Wells-Barnett responded, “I shall not march at all unless I can march under the Illinois banner.”<sup>125</sup> “Either I go with you or not at all,” she said, noting, “I am not taking this stand because I personally wish for recognition. I am doing it for the future benefit of my whole race.”<sup>126</sup>

B. HOW THE POLITICAL TRICKSTER NARRATIVE AIDED IN FRACTURING  
FEMINIST SOLIDARITY

The trickster narrative—and the racial construction motivating it—helped to fracture the alliances between Black and white women in the period leading up to the Nineteenth Amendment’s ratification. In this context—not unlike the stereotype of the welfare queen a century later—the trickster was viewed as irresponsible based on dishonesty. Alternatively, Blacks were viewed as unable to vote responsibly, due to lack of sufficient literacy, ostensibly enabling Blacks to be more easily tricked and manipulated by politicians. As Terborg-Penn notes, “As early as the 1870s, white women had pointed to the irresponsibility of the Black freedman[, and] . . . white suffragists clung to this attitude, and by the 1890s had

120. Montoya, *supra* note 10, at 108; see also MARJORIE SPRUILL WHEELER, *NEW WOMEN OF THE NEW SOUTH: THE LEADERS OF THE WOMAN SUFFRAGE MOVEMENT IN THE SOUTHERN STATES* 100–32 (1993) (describing the relationship of the southern suffragist movement with Black women).

121. TERBORG-PENN, *supra* note 10, at 121–22 (noting that Adella Hunt Logan, Virginia Brooks, and Belle Squire, for example, were among white suffragists who supported the push by Black civil rights leader Ida B. Wells (also known as Ida Wells-Barnett) for an integrated approach). On Virginia Brooks, see Wanda A. Hendricks, *Ida B. Wells-Barnett and the Alpha Suffrage Club of Chicago*, in *ONE WOMAN, ONE VOTE: REDISCOVERING THE WOMAN SUFFRAGE MOVEMENT*, *supra* note 119, at 263, 265, 269.

122. TERBORG-PENN, *supra* note 10, at 121–22.

123. *Id.* at 122. By contrast, Mary Church Terrell marched separately in the area reserved for Black women at the back of the line. *Id.* at 123. However, in subsequent years, she too raised concerns about the marginalization of Black women in the suffrage movement. *Id.*

124. *Id.* at 122 (quoting Hendricks, *supra* note 121, at 268).

125. Hendricks, *supra* note 121, at 269.

126. *Id.*

transferred it to all Blacks, both men and women.”<sup>127</sup> Proposals to disenfranchise Black men, such as poll taxes and literacy tests—designed to systematically strip Black men of the vote—were built on claims that they and Black women lacked the integrity and/or education to exercise responsible voting. This section explores the two dimensions of these claims regarding this pre-Nineteenth Amendment trickster: (1) that Blacks were dishonest, and (2) that due to lack of literacy, Black themselves could be easily tricked and manipulated and could, therefore, not exercise the franchise responsibly.

### 1. The Trickster as Dishonest and Corrupt

At least some white women claimed Black men were selling their votes and should therefore be disenfranchised.<sup>128</sup> From the late nineteenth century, “the idea of Blacks as the source of political corruption was a constant charge that African American women faced and discussed.”<sup>129</sup> Even Black women seemed to acknowledge that in some instances, Black men sold their vote, either out of a sense that voting was futile or based on financial necessity.<sup>130</sup>

On the one hand, some white women complained about presumed corruption “in the South and in immigrant communities in the Northeast” and used this as a basis to argue for disenfranchisement of Black men and limits on extending the franchise to Black women.<sup>131</sup> By contrast, Black suffragists—including Mary Church Terrell, Frances Harper, Frederick Douglass, and Nannie Burroughs—defied such efforts.<sup>132</sup> Although Harper “acknowledged the problem [of political corruption] to be widespread in the South, . . . she did not trust that most white women suffragists would treat Black people any better than had their men,” and in any event she “spread the blame [for political corruption] among both white and Black men.”<sup>133</sup>

For Black suffragists, such as Nannie Burroughs, “The Negro woman . . . needs the ballot to get back, by wise use of it, what the Negro man has lost by the ‘mis-use’ of it.”<sup>134</sup> Whether Black women viewed Black men as dishonest, desperate, or simply deceived in presumably selling their votes, these women understood the broader social and institutional context of voting. Due to the dishonesty and lack of principle of many white men, Black men’s votes were either simply

127. See TERBORG-PENN, *supra* note 10, at 67.

128. *Id.* at 66.

129. *Id.* at 67.

130. *Id.* at 66 (noting Mary Church Terrell reportedly stated that Black men “never sold their votes til they found that it made no difference how they cast them” (internal quotation marks omitted)); *id.* at 67–68 (pointing to Anna J. Cooper commenting that “You do not find the colored woman selling her birthright for a mess of pottage” (internal quotation marks omitted)); *id.* at 68 (quoting Nannie Burroughs’s claim that “unlike Black men who had ‘bartered and sold’ their ballots, Black women knew the value of the vote”).

131. *Id.* at 66.

132. *Id.* at 66–68.

133. *Id.* at 67. Mary Church Terrell also “spread the blame for political corruption among whites and Blacks.” *Id.* Terborg-Penn notes, “Among the Washington suffragists, . . . there was no consensus about who was to blame for political corruption and the buying and selling of Black men’s votes.” *Id.*

134. *Id.* at 68.

denied or sold (in the latter case, out of financial destitution or because their votes would be diluted and meaningless in any event).<sup>135</sup> If Black women could secure the right to vote—even if, in practice this could only be meaningful in the North—they could at least restore the votes stripped from Black men who had been disenfranchised in the South.

## 2. Blacks as Illiterate, Easily Tricked, and Irresponsible

The other dimension of the trickster trope was that Blacks lacked sufficient literacy and were therefore presumably more easily manipulated and fooled by politicians. In fact, some particularly prominent white suffragists promoted the idea of “educated suffrage”—essentially the use of literacy tests (a classic voter suppression tactic then and now)—to restrict the rights of both immigrant and Black voters, who were viewed as not sufficiently educated to exercise the franchise responsibly.<sup>136</sup> These white suffragists in the North were, in part, bowing to the Jim Crow sentiments of southern women and southern segregationists as a matter of political expediency.<sup>137</sup> Thus, these northern white suffragists advocated proposals such as “educated suffrage,” which “would limit the vote to women who could read and write English.”<sup>138</sup>

In particular, Henry Blackwell (Lucy Stone’s husband) and Elizabeth Cady Stanton supported “educated suffrage.” The proposal mirrored the idea of literacy tests, which, along with poll taxes and other restrictions aimed at Black men, would undermine the franchise for women of color (and other less educated women) as well.<sup>139</sup> The NAWSA passed a 1903 resolution noting that “there were more white native-born women who could read and write than all Black and foreign-born voters combined, so that ‘the enfranchisement of such women would settle the vexed question of rule by literacy, whether of home grown or foreign-born production.’”<sup>140</sup> Stanton echoed this perspective, raising concerns about enfranchising illiterate women, whose votes (according to Stanton) could be manipulated by politicians.<sup>141</sup> Nonetheless, and importantly, other white

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135. *Id.* at 67.

136. *Id.* at 68.

137. See WHEELER, *supra* note 120, at 113–23.

138. TERBORG-PENN, *supra* note 10, at 68; see also *id.* at 111 (discussing Susan B. Anthony’s reliance on political expediency in pursuing the support of southern suffragists over the inclusion of Black women).

139. See *id.* at 68–69.

140. *Id.* at 110 (quoting 2 WOMAN’S ERA, Aug. 1985, at 19).

141. *Id.* at 111. Note also that Elizabeth Cady Stanton reportedly called Black men “Sambos” and incipient rapists. Brent Staples, *How the Suffrage Movement Betrayed Black Women*, N.Y. TIMES (July 28, 2018), <https://www.nytimes.com/2018/07/28/opinion/sunday/suffrage-movement-racism-black-women.html>. Stanton claimed that “it’s better to be the slave of an educated white man than of a degraded black one.” Ama Ansah, *Votes for Women Means Votes for Black Women*, NAT’L WOMEN’S HIST. MUSEUM (Aug. 16, 2018), <https://www.womenshistory.org/articles/votes-women-means-votes-black-women> [https://perma.cc/8EAA-F8EC]. Although Susan B. Anthony fought for universal suffrage, if she had to make a choice over which group should be given the right to vote, she indicated that it should be white women—famously stating that she would rather “cut off this right arm of mine



suffragists and abolitionists—including Susan B. Anthony, William Lloyd Garrison, Jr., and Harriet Stanton Batch—opposed the idea of “educated suffrage.”<sup>142</sup>

White southern suffragists, like Laura Clay, were optimistic that literacy and property tests represented a fair, neutral vehicle that would likely be upheld by the courts.<sup>143</sup> However, because many southern whites were themselves illiterate and poor, some white men were reluctant to support these restrictions, which would disqualify women in their own communities from voting.<sup>144</sup> Though enfranchising white women in the South—while placing restrictions on Blacks to vote—would enhance white voting power and dilute Black political power, there were, of course, white men who nonetheless opposed female suffrage. Eager to maintain traditional roles for women, one Mississippian stated that he and his fellow delegates refused to “cower behind petticoats and use lovely women as breast-protectors in the future political battles of the state.”<sup>145</sup>

Even so, the complaints about the illiteracy and presumed unfitnes of Blacks to vote was particularly strong among southern white women suffragists. Laura Clay—who was from Kentucky and played a critical role in the development of the Southern suffrage movement—deplored the “rash prodigality with which the franchise [had] been extended to all classes of men, regardless of their unfitnes for such political trust by illiteracy, foreign birth, or other causes.”<sup>146</sup> Belle Kearny, the daughter of a Confederate officer who had served in the Mississippi state legislature,<sup>147</sup> similarly celebrated property restrictions on the right to vote based on the “‘desperate effort to maintain the political supremacy of Anglo-Saxonism’ after having ‘4,500,000 ex-slaves, illiterate and semi-barbarous’ thrust upon them as voters.”<sup>148</sup>

Indeed, the geography of support for the Nineteenth Amendment sheds light on these racial divisions. In 1918, on the eve of the Nineteenth Amendment’s ratification, the twenty-two (out of forty-eight) states that provided some form of suffrage to women were almost all states in the West and Northeast.<sup>149</sup> The traditional states’ rights views to which white southern segregationists clung laid a foundation for opposition in the South to suffrage, particularly where it would pave the way to Black women joining the franchise as well.<sup>150</sup>

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before I will ever work for or demand the ballot for the negro and not the woman.” *Id.* (internal quotation marks omitted).

142. TERBORG-PENN, *supra* note 10, at 111.

143. See WHEELER, *supra* note 120, at 116.

144. *Id.* at 117 (noting opposition to such voter restrictions on this ground in South Carolina).

145. *Id.* at 117 (internal quotation marks omitted).

146. *Id.* at 116 (internal quotation marks omitted) (alteration in original).

147. *Id.* at 41.

148. *Id.* at 119.

149. TERBORG-PENN, *supra* note 10, at 11 & n.18. The states that offered limited or full suffrage to women in 1918 included: Wyoming, Massachusetts, Colorado, Idaho, Utah, Washington, California, Oregon, Kansas, Arizona, Illinois, Montana, Nevada, North Dakota, Nebraska, Rhode Island, New York, Arkansas, Michigan, Texas, South Dakota, and Oklahoma. *Id.*

150. See generally WHEELER, *supra* note 120, at 100–33 (discussing the relationship between Southern suffragists and the Black suffrage movement).

C. THE “NEW DEPARTURE MOVEMENT”: BLACK AND WHITE WOMEN ALIKE  
APPROPRIATED THE TRICKSTER’S TOOLS WITH ILLICIT VOTING AS A FORM OF  
CIVIL DISOBEDIENCE

Despite these fractures, Black and white women continued to push for suffrage, although in several respects on separate tracks. An example of this parallel but distinct effort was the strategy to seek women’s suffrage under the Reconstruction Amendments prior to the Nineteenth Amendment’s ratification through the “New Departure” movement.

Despite the inclusion of the word “male” in the Fourteenth Amendment, the New Departure effort was built on a strategy to use the new Amendment’s Privileges and Immunities Clause to assert that women should have a right to vote—an approach supported by a handful of Black women who, along with white women, tried unsuccessfully to vote under this and related legal theories.<sup>151</sup> As discussed in further detail in the section immediately above, Black women “combined demands for Black women’s right to vote and civil rights for all Black people,” but in so doing embraced “strategies of the larger woman suffrage movement,” such as calling for suffrage based on the Privileges and Immunities Clause of the Fourteenth Amendment.<sup>152</sup> At the same time, Black women cultivated a strategy designed to address their specific needs.<sup>153</sup>

The New Departure strategy was bold—even radical. We might view it through the lens of civil disobedience, in that by voting, women were breaking laws barring them from the franchise or, at best, voting where the law was ambiguous in authorizing them to vote. Deploying tools of the classic political trickster, these women were bending and even breaking the rules but were vindicating a “higher” law in some sense, such as the American Declaration’s Founding promise that “all men are created equal.”<sup>154</sup> Just as today’s political trickster flouts the norms of “decency,” the women in the New Departure movement often defied the norms of their times, even while frequently constrained by the norms of “respectability,” which may have curbed their radicalism in other respects.<sup>155</sup> In

151. For a more in-depth discussion of the New Departure strategy, see the classic article, Siegel, *She the People*, *supra* note 96, at 971–75. See also Siegel, *The Nineteenth Amendment and the Democratization of the Family*, *supra* note 96, at 461 (describing voting attempts by women beginning in the early 1870s); TERBORG-PENN, *supra* note 10, at 36–41 (same).

152. TERBORG-PENN, *supra* note 10, at 36.

153. *Id.*

154. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); see also Martin Luther King, Jr., Letter from Birmingham Jail 4 (1963) (abridged edition from TeachingAmericanHistory.org), [https://liberalarts.utexas.edu/coretexts/\\_files/resources/texts/1963\\_MLK\\_Letter\\_Abridged.pdf](https://liberalarts.utexas.edu/coretexts/_files/resources/texts/1963_MLK_Letter_Abridged.pdf) [<https://perma.cc/T35G-FV5D>] (justifying using civil disobedience in breaking unjust laws “on the ground that a higher moral law was at stake”).

155. See, e.g., Rabia Belt, Historical Perspectives on Citizenship and the Nineteenth Amendment, Panel at the NYU Law Conference on “That Important Trust”: Suffrage and Citizenship 100 Years After the Nineteenth Amendment (Feb. 5, 2020) (attended by one of the authors) (discussing how notions of “respectability” colored the strategies chosen by the women’s suffragists, including embracing less inclusive strategies for Black women or other women who did not fit the restrictive images of respectability for women that emerged from the Victorian era).

some cases, these women were arrested and prosecuted as law breakers.<sup>156</sup> Although these efforts mostly unfolded on two tracks—with white and Black women risking arrest in separate incidents—important developments linked these efforts.

Prior to launching this formal strategy, suffragists undertook a mock exercise of sorts—dramatizing the desire of women to vote. In 1868, in Vineland, New Jersey, women set up voting tables near the official area where men cast ballots.<sup>157</sup> When women tried unsuccessfully to vote, they protested their disenfranchisement by casting mock ballots.<sup>158</sup> Of the 172 women who cast mock ballots, four were African American.<sup>159</sup> Although this New Jersey feminist mock vote was apparently an isolated case, it was a precursor to the more daring strategy to vote and risk arrest.

From the mainstream women’s movement, Elizabeth Cady Stanton, Victoria Woodhull, Susan B. Anthony, and Virginia Minor paved the way for the New Departure strategy, whereas among Black women, Sojourner Truth and Mary Ann Shadd Cary played leadership roles.<sup>160</sup> Comparing the cases of Anthony and Cary is particularly instructive as a window into the shared experience and alliance between white and Black women, as well as the ways in which the approaches and outcomes significantly diverged.

In 1872, Stanton urged women to register, vote, and, ultimately, where necessary, to risk arrest and incarceration to defend the right to vote.<sup>161</sup> Along with several other women in Rochester, New York, Anthony sought to vote, and she and the others were promptly arrested for “illegally” registering to vote.<sup>162</sup> In the same year, Sojourner Truth unsuccessfully tried to register to vote in Battle Creek, Michigan, along with two white women and another woman referred to only as Mrs. Beatty and described as “colored.”<sup>163</sup>

A year earlier, Black suffragist Mary Ann Shadd Cary had also unsuccessfully sought to register to vote in Washington, D.C.—along with sixty-three other women.<sup>164</sup> Although they could not legally vote, they were at least successful in convincing election officials to allow them to sign affidavits (which documented

156. See TERBORG-PENN, *supra* note 10, at 38, 40 (discussing Susan B. Anthony’s arrest and incarceration); cf. Eduardo Moisés Peñalver & Sonia K. Katyal, *Property Outlaws*, 155 U. PA. L. REV. 1095 (2007) (explaining instances where squatters and others “outlaws” violated private property rights (often in protest of unjust laws), leading to reform of those unjust laws); Eduardo Moisés Peñalver & Sonia K. Katyal, *PROPERTY OUTLAWS: HOW SQUATTERS, PIRATES, AND PROTESTERS IMPROVE THE LAW OF OWNERSHIP* (2010) (same).

157. TERBORG-PENN, *supra* note 10, at 37.

158. *Id.*

159. *Id.*

160. Siegel, *The Nineteenth Amendment and the Democratization of the Family*, *supra* note 96, at 461.

161. TERBORG-PENN, *supra* note 10, at 38.

162. *Id.* at 40.

163. *Id.*

164. *Id.*

that the women had attempted to vote).<sup>165</sup> Significantly, in contrast to Anthony and the Rochester women, Cary and the Washington women “were not arrested for asserting their right to the ballot, and the elections officials gave them the requested affidavits”<sup>166</sup>—despite the Washington women’s same lack of a formal right to vote.

As Rosalyn Terborg-Penn notes, there are likely several grounds to explain the difference in outcomes. First, Anthony was by this time a nationally celebrated individual and had publicized her efforts to vote.<sup>167</sup> Second, because the District of Columbia was able to run its own local elections by 1871, a sizable number of Black men could vote, and several served on the city council, including Frederick Douglass during this period.<sup>168</sup> Therefore, it is possible that elections officials in the District were sympathetic to Black women’s efforts to vote.<sup>169</sup> Moreover, a year prior, Black election officials in certain parts of South Carolina “had encouraged Black women to register to vote,” which may have influenced events in the nation’s capital.<sup>170</sup>

In addition to arguing that the Fourteenth Amendment provided a basis for women’s enfranchisement, certain suffragists also pointed to the Fifteenth Amendment as a hook to secure voting rights—at least for Black women. Although less well-documented by legal historians, the evolution of the Fifteenth Amendment strategy reflects a moment of cross-racial solidarity. A meaningful window into coalition politics on this front is an 1872 letter that white suffragist Mary Olney Brown wrote—amidst the Stanton and Cary cases—to Frederick Douglass, who was by then an editor for *The New National Era*.<sup>171</sup> Brown outlined a legal argument for the enfranchisement of Black women under the *Fifteenth* Amendment, because that Amendment (unlike the Fourteenth Amendment) did not explicitly exclude women.<sup>172</sup> In the letter, which Douglass published, Brown urged Black men to support Black women’s enfranchisement on these grounds.<sup>173</sup> This was significant not only because it provided an alternative legal argument for the enfranchisement of *Black* women, but also it “appears to be the first of many efforts by white suffragists to reestablish the political coalition they had severed with African American men.”<sup>174</sup>

However, the effort to secure women’s right to vote under the Fourteenth (and Fifteenth) Amendment came to an end when the Supreme Court rebuffed these

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165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *See id.*

172. Compare U.S. CONST. amend. XIV (prohibiting the denial of voting rights to “any of the *male inhabitants* of such State” (emphasis added)), with U.S. CONST. amend. XV (prohibiting the denial of “[t]he right of *citizens* of the United States to vote” on the basis of race (emphasis added)).

173. TERBORG-PENN, *supra* note 10, at 40.

174. *Id.* at 40–41.

claims in the landmark case, *Minor v. Happersett*.<sup>175</sup> White suffragists, Virginia Minor and her husband, Francis, sued the registrar in St. Louis, Missouri for denying Virginia the right to vote in 1872.<sup>176</sup> Combining the narrow interpretation of the Fourteenth Amendment’s Privileges and Immunities Clause in the *Slaughter-House Cases*<sup>177</sup> with reasoning based on coverture embraced in *Bradwell v. Illinois*,<sup>178</sup> the Court rejected Virginia Minor’s Fourteenth Amendment claims asserting her right to vote.<sup>179</sup>

Although *Minor v. Happersett* represented a legal defeat in the nation’s highest court, it reset the debate over women’s suffrage in an important way. As Reva Siegel notes, “Only with the Court’s decision in *Minor* did woman suffrage assume settled form, alongside the Reconstruction Amendments, as a ‘Sixteenth Amendment’ question, or as it was known simply, the ‘woman question.’”<sup>180</sup> Although the women’s suffrage amendment did not, of course, end up being adopted as the next amendment after the Fifteenth Amendment enfranchising Black men, it became clear that women’s suffragists would need to set their sights higher—on securing their own national amendment. As one who helped secure the Nineteenth Amendment’s eventual ratification, Carrie Chapman Catt, famously described the road to success: “To get the word male . . . out of the constitution cost the women of the country fifty-two years of pauseless campaign . . . .”<sup>181</sup> Although playing the trickster card of bending and breaking the formal voting rules failed as a short-term strategy for securing the right to vote, it reshaped the conversation and reset the table for coalitional politics and law reform leading up to the Nineteenth Amendment.

#### D. COALITION POLITICS LAID A FOUNDATION FOR A MORE ROBUST APPROACH TO RIGHTS AND CITIZENSHIP

As discussed in section A of this Part above, the alliance between Black and white women was more than merely one of political convenience—it embodied a shared conceptual vision as well. The suffrage movement fused the principles of the American Revolution concerning representation with “the radical egalitarianism” of the abolition movement.<sup>182</sup> As Siegel points out, “As head of household, a [white] male property holder who voted was thought to represent the interests of all who depended upon him—not only his sons and daughters, but also his

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175. 88 U.S. (21 Wall.) 162 (1874).

176. *Id.* at 163–64.

177. 83 U.S. (16 Wall.) 36 (1872).

178. 83 U.S. (16 Wall.) 130 (1872).

179. *Minor*, 88 U.S. at 170, 178. For an excellent and more detailed discussion of the Supreme Court’s treatment of the legal claims in Virginia Minor’s case, see Siegel, *She the People*, *supra* note 96, at 971–75, and Siegel, *The Nineteenth Amendment and the Democratization of the Family*, *supra* note 96, at 461.

180. Siegel, *She the People*, *supra* note 96, at 975.

181. *Id.* (alteration in original) (quoting CARRIE CHAPMAN CATT & NETTIE ROGERS SHULER, WOMAN SUFFRAGE AND POLITICS 107 (1923)).

182. Siegel, *The Nineteenth Amendment and the Democratization of the Family*, *supra* note 96, at 459–60.

wife, servants, and slaves.”<sup>183</sup> Although differently situated, the abolition and suffrage movements embraced a shared conception of rights—which Black women were central in articulating and embodying. This conception of rights was more robust than rights recognized by the status quo at the time and, indeed, had to be more robust to move beyond the existing conception of rights that limited the right to vote to white men. This vision of rights was a *human* rights vision—broader than the prevailing civil and political rights framework of the pre-Nineteenth Amendment period. This *human* rights approach had to be capacious enough to cover those inhabiting the liminal space between subject and citizen and inclusive enough to cover even those cast aside as fraudsters or otherwise ostensibly undeserving of the rights of citizenship.<sup>184</sup> In short, through the movement for universal suffrage (including all Blacks and all women) suffragists crafted a more capacious campaign for human rights. This had had the potential of providing credibility to “shadow populations”—then, women and Blacks—who had been stigmatized by the broader society, and even to each other as too incompetent or too untrustworthy to exercise the franchise.

The human rights vision the coalition formed was honed at the intersection of abolition and suffrage. It became the basis for building strong bridges between Black voters of both genders and white women. The approach had three central elements, which continue to define this broader notion of rights: (1) that rights and identities are intersectional, (2) that fundamental rights (such as the right to vote) are inalienable, regardless of the state’s formal recognition of such rights, and (3) that certain rights (again, such as the right to vote) are exercised and made particularly meaningful in a social and collective context (as opposed to solely viewed from an individualistic rights perspective).

As other scholars have noted, the anti-slavery movement was one of the earliest international human rights movements.<sup>185</sup> This Article fills a gap in the literature by examining not only the *domestic* dimensions of this human rights framing, but also the critical role of Black women in articulating this vision of rights at the intersection of the abolition and suffrage movements.

### 1. Intersectional Rights and Identities

The first element of this human rights vision—intersectional rights and identities—was framed by both the Black suffragist, Francis Ellen Watkins Harper, and the abolitionist and suffragist, Frederick Douglass. These key leaders

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183. *Id.* at 458 (emphasis added).

184. *See, e.g.*, *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 454 (1857) (holding that even a former slave who had lived in a non-slave state did not have the rights of citizenship to seek redress in court); *Minor*, 88 U.S. at 178 (denying women’s right to vote under the Privileges and Immunities Clause of the Fourteenth Amendment, in effect denying to recognize women as equal citizens).

185. Jenny S. Martinez, *Anti-Slavery Courts and the Dawn of International Human Rights Law*, 117 *YALE L.J.* 550, 554 (2008); *see generally* JENNY S. MARTINEZ, *THE SLAVE TRADE AND THE ORIGINS OF INTERNATIONAL HUMAN RIGHTS LAW* (2012) (noting that although many observers point to the post-World War II era as the foundational moment for the emergence of the human rights idea, the movement to abolish slavery and the slave trade was, in fact, the first successful international human rights campaign).

played a striking role in advancing the idea of intersectionality as a core component of a more robust vision of rights. In recognizing the potential for coalition building, Watkins Harper eloquently and forcefully outlined the crucial significance of an intersectional approach during Reconstruction, stating that “[w]e are all bound up together in one great bundle of humanity, and society cannot trample on the weakest and feeblest of its members without receiving the curse in its own soul.”<sup>186</sup> Appealing to the ways that support for Black women at the intersection of gender and race could benefit both white women (in securing suffrage) and Black men (in maintaining their voting rights) alike, a “coalition-building strategy was at work here, for African American women hoped that all three groups—Black women, Black men, and white women—could see the need to pull together in order to accomplish similar goals.”<sup>187</sup> In the end, the ratification of the Nineteenth Amendment left Black women disenfranchised, because they still faced literacy tests, poll taxes, grandfather clauses, and other sweeping measures adopted as backlash against Reconstruction.<sup>188</sup> And yet the coalitional politics leading up to its ratification signaled moments of alliance and critical insights into both the potential and limitations of building coalitions for legal reform.

Frederick Douglass also embraced a human rights vision grounded in the idea of intersectionality, even more explicitly invoking the terminology of “human rights.” For example, in his own autobiography, Douglass reflected on “a bold denunciation of slavery, and a powerful vindication of human rights.”<sup>189</sup> In the context of woman’s suffrage, Douglass spoke to both the interdependence of rights and the notion that those most directly affected—including those at various intersections of identity—should be placed at the center and heard in coalitional

186. Francis Ellen Watkins Harper, Speech at the Eleventh National Woman’s Rights Convention (May 10, 1866); see also JONES, *supra* note 10, at 2 (citing Harper as the inspiration for the book’s title: ALL BOUND UP TOGETHER).

187. TERBORG-PENN, *supra* note 10, at 9–10.

188. See Jennifer K. Brown, Note, *The Nineteenth Amendment and Women’s Equality*, 102 YALE L.J. 2175, 2181 n.34 (1993); Katharine Q. Seelye, *Rosalyn Terborg-Penn, 77, Dies; Historian Recognized Black Suffragists*, N.Y. TIMES (Jan. 4, 2019), <https://www.nytimes.com/2019/01/04/obituaries/rosalyn-terborg-penn-dead.html> (“Blacks of both sexes, especially in the South, were effectively barred from voting by poll taxes, literacy tests and other forms of intimidation, including lynching, until the Voting Rights Act of 1965.”); Brent Staples, *When the Suffrage Movement Sold Out to White Supremacy*, N.Y. TIMES (Feb. 2, 2019), <https://www.nytimes.com/2019/02/02/opinion/sunday/women-voting-19th-amendment-white-supremacy.html>.

189. ANGELA Y. DAVIS, NARRATIVE OF THE LIFE OF FREDRICK DOUGLASS, AN AMERICAN SLAVE, WRITTEN BY HIMSELF: A NEW CRITICAL EDITION 150–51 (2010). He also spoke of being “awakened . . . on the subject of human rights.” FREDERICK DOUGLASS, MY BONDAGE AND MY FREEDOM 274 (Miller, Orton & Mulligan 1855). Finally, during the Reconstruction period, Douglass embraced a natural rights notion underpinning the human rights idea in the Reconstruction era, writing:

While there remains such an idea as the right of each State to control its own local affairs . . . no general assertion of human rights can be of any practical value. To change the character of the government at this point is neither possible nor desirable. All that is necessary to be done is to make the government consistent with itself, and render the rights of the States compatible with the sacred rights of human nature.

Frederick Douglass, *Reconstruction*, 18 ATLANTIC MONTHLY 761, 761–62 (1866).

politics. For example, in one speech, Douglass elegantly articulated and embraced a full-throated theory of intersectionality, declaring:

No man, however eloquent, can speak for woman as woman can for herself.

Nevertheless, I hold that this cause is not altogether and exclusively woman's cause. It is the cause of human brotherhood as well as the cause of human sisterhood, and both must rise and fall together. Woman cannot be elevated without elevating man, and man cannot be depressed without depressing woman also.<sup>190</sup>

## 2. The Inalienability of Rights

A second element of the human rights conception that was fused through the alliance between abolitionists and suffragists was the inalienability of rights. This notion of the inalienability of rights was articulated by Thomas Jefferson in the American Declaration of Independence. Although a slaveholder himself, Jefferson was influenced by enlightenment thinkers—such as John Locke—who paved the way for the idea that all humans have certain basic rights. In other words, simply by virtue of our shared humanity, certain rights are universal. In proclaiming that that “all men are created equal,” Jefferson, of course, went on to state that all men “are endowed, by their Creator, with certain unalienable rights.”<sup>191</sup> The U.S. Constitution provides this rights idea today on a secular, social contract theory basis (rather than on the natural law basis implied in Jefferson's formulation). But the idea of the inalienability of rights continues to undergird U.S. constitutional law, based on the notion that there are certain pre-political rights that are retained by the people in a representative democracy.<sup>192</sup> A basic feature of popular sovereignty and social contract theory (incorporated into the U.S. Constitution by our own Framers) is that government can neither grant nor eliminate fundamental rights such as life, liberty, equality, and the right to vote.<sup>193</sup>

## 3. Suffrage as Both Individual Right and Collective Responsibility

The Reconstruction period was especially important in instantiating a thicker idea of rights that recognizes that even as we exercise rights as individuals, many rights have associative dimensions. Although U.S. constitutional law is traditionally theorized as based on the idea of individual rights and rugged individualism, scholars of the Reconstruction period note ways the Emancipation and its

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190. FREDERICK DOUGLASS ON WOMEN'S RIGHTS, *supra* note 103, at v (citing “Frederick Douglass in an undated speech to a Woman Suffrage Convention”).

191. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

192. See U.S. CONST. amend. IX; *cf.* HENKIN, *supra* note 14, at 7–8 (noting that the American Declaration and U.S. Constitution are based on the notion of prepolitical rights that are retained by The People).

193. THOMAS PAINE, RIGHTS OF MAN 49 (1791).



aftermath invited a broader view.<sup>194</sup> During this period, Blacks were keenly aware that the votes they cast as individuals were inherently constitutive of the rights and power of Blacks as a whole.<sup>195</sup> This is precisely why some white suffragists sought to cabin the enfranchisement of African American women (in light of the connection between Black women’s voting rights and Black power). Given the construct of the political trickster as a lever for rolling back the enfranchisement of Black men, even while women were still struggling for the right to vote themselves, Black women often sought support for their own enfranchisement in community-empowerment terms, not merely in terms of their own individual rights.

For example, the famous Black suffragist and civil rights advocate Mary Church Terrell explained how the “double burden” of Blackness and womanhood led African American women to approach the suffrage movement with different goals than white women.<sup>196</sup> As one historian notes, “Painfully aware of the restrictions on Black male voting in the south and the social, political, and economic challenges facing their communities, Black women saw their enfranchisement as an opportunity for *community* uplift as well as personal recognition of citizenship.”<sup>197</sup> As Elsa Barkley Brown notes, Black women—many newly freed from slavery—viewed suffrage as a “*collective*, not an individual possession.”<sup>198</sup> Thus, not surprisingly, during this period, the NAACP supported the effort to ensure that *no* women be excluded from the Nineteenth Amendment.<sup>199</sup>

In light of the distinct goals and strategies of Black women, Martha Jones documents how we might view the history as one of essentially two separate women’s suffrage movements—with Black women organizing separately, both out of necessity (in light of segregation) and out of a sense that their goals were different, though overlapping, with the goals of white women.<sup>200</sup> Through Black churches and Black women’s clubs, for example, Black women fought to support women’s suffrage generally, even while countering the rollback of voting rights for Black men.<sup>201</sup> In fact, the popularity of the Black women’s club movement—starting in the 1890s—“revealed the members’ belief that votes for Black women

194. Akhil Reed Amar, *Forty Acres and a Mule: A Republic Theory of Minimal Entitlements*, 13 HARV. J.L. & PUB. POL’Y 37 (1990).

195. As Terry Smith notes, each of us as individuals vote in a broader collective context—as part of an electorate. See SMITH, *supra* note 15, at 16.

196. Ansah, *supra* note 141 (internal quotation marks omitted).

197. *Id.* (emphasis added); see also Seelye, *supra* note 188 (noting historian Rosalyn Terborg-Penn’s book on this topic, *AFRICAN AMERICAN WOMEN IN THE STRUGGLE FOR THE VOTE*, *supra* note 10). Seelye notes that: “White women wanted parity with white men, while black women, only just emerging from slavery, wanted to use the ballot box to fight the racial oppression that was engulfing the South.”

198. Elsa Barkley Brown, *Negotiating and Transforming the Public Sphere: African American Political Life in the Transition from Slavery to Freedom*, 7 PUB. CULTURE 107, 124 (1994) (emphasis added).

199. TERBORG-PENN, *supra* note 10, at 10.

200. See JONES, *supra* note 10, at 10.

201. *Id.* at 8, 10.

would mean regaining votes stolen from Black men who had been disfranchised throughout the southern states.”<sup>202</sup>

E. MAKING VISIBLE THE ROLE OF BLACK WOMEN IN ARTICULATING A ROBUST, INTERSECTIONAL VISION OF RIGHTS

Recovering the historical role of Black women in building the coalition between abolitionists and suffragists and articulating this robust vision of human rights is essential for building durable coalitions and law reform today. This point was recently driven home in the debate over the proposed statue of prominent suffragists in Central Park to commemorate the centennial of the Nineteenth Amendment.<sup>203</sup> Although Central Park has twenty-three statues commemorating men who have made important contributions, not a single one honors women.<sup>204</sup> This oversight is now being addressed, as the organization Monumental Women won approval from the New York City Department of Parks and Recreation to erect a statue featuring women suffragists Sojourner Truth, Susan B. Anthony, and Elizabeth Cady Stanton.<sup>205</sup> Sojourner Truth was added “only after criticism about the lack of a Black suffragist in the design.”<sup>206</sup> The sculptor, Meredith Bergmann, a white woman, issued a powerful statement underscoring the importance of recovering a more inclusive history for the movement today:

We need to be true to our new understanding of the historical record which does not shrink from calling out injustice and oppression, or minimize the contributions of people of color or the harms done to people of color. We need to correct the injustice done to women of all races and their invisibility in public spaces. . . . None of the women depicted on the monument lived to see the ratification of the 19th Amendment, let alone the Voting Rights Act of 1965, whose work is still incomplete. But as we struggle towards greater justice, we need and deserve a monument commemorating some of the important work that has come before us.<sup>207</sup>

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202. TERBORG-PENN, *supra* note 10, at 9.

203. See Ginia Bellafante, *Is a Planned Monument to Women's Rights Racist?*, N.Y. TIMES (Jan. 17, 2019), <https://www.nytimes.com/2019/01/17/nyregion/is-a-planned-monument-to-womens-rights-racist.html>.

204. See *Central Park Will Finally Feature Its First Statue Honoring Women*, NBC N.Y. (Oct. 22, 2019, 6:14 AM), <https://www.nbcnewyork.com/news/local/central-park-will-finally-feature-its-first-statue-honoring-women/1992740/> [<https://perma.cc/NAW9-FDEU>].

205. *Statue Approved!*, MONUMENTAL WOMEN, <https://monumentalwomen.org/> [<https://perma.cc/9HE4-RTWN>] (last visited May 1, 2020).

206. N. Jamiyla Chisholm, *Sojourner Truth, Susan B. Anthony and Elizabeth Cady Stanton Statue Coming to Central Park*, COLORLINES (Oct. 22, 2019, 3:48 PM), [https://www.colorlines.com/articles/sojourner-truth-susan-b-anthony-and-elizabeth-cady-stanton-statue-coming-central-park?fbclid=IwAR3NdLAv76uj\\_AUkwZXPq5ISIA5j1GGnFvYZYSYBSY1wjAn0-fduP59Gkw](https://www.colorlines.com/articles/sojourner-truth-susan-b-anthony-and-elizabeth-cady-stanton-statue-coming-central-park?fbclid=IwAR3NdLAv76uj_AUkwZXPq5ISIA5j1GGnFvYZYSYBSY1wjAn0-fduP59Gkw) [<https://perma.cc/Q52S-LE5R>]; see also Staples, *supra* note 188; Staples, *supra* note 141.

207. *The Design of Our Women's Rights Pioneers Monument Featuring Sojourner Truth, Susan B. Anthony, and Elizabeth Cady Stanton: Artist's Statement from Meredith Bergmann*, MONUMENTAL WOMEN, <https://monumentalwomen.org/sculptors-page/> [<https://perma.cc/X695-DDHS>] (last visited May 1, 2020).

Of course, those who tell history wield a form of power. Recovering and preserving a more inclusive historiography is important not only for erecting statues commemorating this history, but also so that we can recreate a stronger foundation to advance women’s shared political interest and power.

### III. THE ROAD AHEAD

History’s lessons are hard-earned, but unfortunately sometimes they are ignored. In 2016, long-standing fractures along race and gender in the American electorate were again ripe for exploitation. As discussed in Part II, based on Trump’s repeated claims that widespread voter fraud explained why Hillary Clinton won the popular vote—even though he won the Electoral College—Trump established his voter-fraud commission.<sup>208</sup> As discussed above, Republican pundits capitalized on this opportunity and sent the welfare queen construct to the polls.<sup>209</sup> In addition to relying on base racial stereotyping, the Republican voter-trickster account also opened up a deep discursive rift that transformed our fundamental understanding of Americans’ right to vote and the terms on which it is to be offered. To be clear, our analysis does not posit that all Americans believed Republican pundit claims that a horde of shadowy tricksters had descended on the nation’s polling stations during the presidential election and must be punished.<sup>210</sup> Rather, we posit that the Republican rhetoric still succeeded despite progressives’ skepticism, because Republican arguments achieved hegemony: their voter-trickster claims transformed Americans’ conversations about the right to vote, regardless of whether one agreed with these Republican pundits’ ultimate conclusions of fraud. This transformation of voting understandings fundamentally compromised feminists’ potential to build cross-racial gender coalitions in the voting arena. Part III focuses on recognizing the discursive effects of the voter-trickster discourse and identifying ways we can recapture and contain this voter-trickster account. It also investigates how we create diverse coalitions using the insights we have learned as a result of the deployment of the welfare queen rhetoric.

#### A. THE VOTER-TRICKSTER AND THE THREAT TO CROSS-RACIAL COALITIONS

##### 1. Procedural Obstacles, Morality Tests, and Deservingness

One of the key ways in which the voter-trickster compromises coalition politics is that she depoliticizes the imposition of so-called neutral administrative rules that serve as obstacles to accessing state benefits. Indeed, voter ID laws,

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208. For background, see Michael Tackett & Michael Wines, *supra* note 43 (discussing the rise and fall of Trump’s Presidential Advisory Commission on Election Integrity, which was disbanded after it failed to find evidence of fraud).

209. See *supra* notes 44–46 and accompanying text.

210. Although not everyone believed these voter-fraud allegations, President Trump’s key constituents did. “[A]s of last summer [2017], 68 percent of Republicans thought millions of illegal immigrants had voted in 2016, and almost three quarters said voter fraud happens ‘somewhat’ or ‘very often.’ The same survey found that nearly half of Republicans believed President Trump had won the popular vote.” Perlstein & Gershon, *supra* note 6.

requirements of home-precinct voting, restrictive polling-site hours, and barriers to mail-in or absentee voting function as a corollary to the other, more substantive bases we have described (felon status, immigration issues) that deprive citizens of the right to vote. Currently there is litigation challenging some of these individual, discrete rules for voting that appear burdensome, unfair, and discriminatory.<sup>211</sup> However, the voter-trickster discourse has rendered invisible the ways in which this entire regime of restrictions naturalizes the idea that it is acceptable to deny the vote on an individual level because of a failure to satisfy ever-tightening rules about how to exercise the franchise.

How do the voter-trickster and welfare queen affect this change? The public-assistance benefits at issue in earlier debates about the welfare queen were actually special monetary benefits provided by the state, only accessed by means testing and other qualifying rules. Although it might be recharacterized in another era, monetary living assistance is not regarded as an automatic fundamental guarantee in American society. There is no right to subsistence or support by the state. The “right to vote,” however, is automatically guaranteed for American citizens that meet minimum age and citizenship qualifications. Increasingly, however, this right is being recast in the language used for government benefits—as a right subject to rules, restrictions, qualification standards, and eligibility testing. This conceptual shift seems natural and inevitable to many Americans because we have become accustomed to the range of disenfranchisement strategies used against vulnerable classes—namely, persons connected to the criminal justice system and immigrants. Now, in order to access the right to vote, all Americans, regardless of class, are subject to a procedural gauntlet that is a challenge for many.

Currently, initiatives challenge individual, discrete voting rules, but some attention must be paid to the global effect of the establishment of these restrictive voting regimes. Although they might superficially be justified in terms of cost-containment or limiting economic burdens on particular voting locations, the costs of enforcing these restrictions is substantial, because personnel must actually be hired to turn countless confused voters away from the polls and explain the basis for these restrictions. It is entirely unclear whether these costs have been considered.

The next section more closely considers the ways in which challenges to these rules are sometimes framed as the problems of Black and Brown people, people complaining about the disparate racial effects of a so-called neutral procedure<sup>212</sup>—indeed, this approach faces challenges of its own. However, in

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211. See *infra* notes 252–58 and accompanying text (for the case brought by the Southern Poverty Law Center, challenging ongoing restrictions on former felons, which disproportionately impacts women of color).

212. For example, disenfranchisement in connection with criminal activity has previously been ruled constitutional. In *Reynolds v. Sims*, the Supreme Court held that the right to vote is a fundamental right, establishing a strict scrutiny test. See 377 U.S. 533, 561–62 (1964). But though the Fourteenth Amendment guarantees “equal protection of the laws” to all persons, *id.* at 540, Section 2 of this Amendment allows states to deprive persons of the right to vote if they have participated in any “rebellion or other crime.” *Id.* at 593–94 (Harlan, J., dissenting). This provision has been interpreted to

pursuing this racially disparate impact argument, we should not forget that at bottom these challenges bring our attention to the slow, gradual chipping away at core rights, using administrative procedures to undercut a fundamental constitutional guarantee.

## 2. Coalition Threats: Technical Mistakes Converted into Moral Failings

Another related way the voter-trickster stereotype compromises coalition efforts is that it allows officials to convert average Americans’ technical defaults and misunderstandings of voting rules into evidence of un-deservingness and moral failing.<sup>213</sup> This is a critical issue. Voters today are routinely felled by a variety of procedural mechanisms set up by state officials, offered ostensibly in service of the state’s need for administrative convenience. Complaints about the new gauntlet of restrictions are met with disdain; officials even challenge that the only people who resist these administrative requirements are people interested in committing fraud.<sup>214</sup> However, these restrictions inherently burden the right to vote in ways far beyond the qualification limits originally proposed as basic requirements of voting eligibility. These new restrictions include limited poll hours and locations, requirements that one vote in one’s own district or precinct, restrictions on absentee ballots, and rules that require home-state voting.<sup>215</sup> The person who fails to observe these restrictions is now painted with the same brush as the earlier voting tricksters we described: the ex-felon voter and the immigrant voter.<sup>216</sup> Specifically, noncompliance is regarded as the result of laziness or sloth, or worse, attributed to purposeful malfeasance.

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allow the disenfranchisement of the incarcerated and paroled former felons. The Civic Participation and Rehabilitation Act, allowing persons paroled after felony convictions to vote, has been introduced at various points but has never been debated by the full Congress. *See Civic Participation and Rehabilitation Act of 2005, H.R. 1300, 109th Cong. § 3.* Aside from this principle, the minor administrative hurdles that deprive non-felons of the vote have no basis and should be scrutinized more carefully.

213. *See Zachary Roth, Study: North Carolina Polling Site Changes Hurt Blacks*, NBC (Nov. 23, 2015, 12:22 PM), <https://www.nbcnews.com/news/nbcblk/study-north-carolina-polling-site-changes-hurt-blacks-n468251> [<https://perma.cc/RW79-WDKM>].

214. *Republicans and Voter Fraud*, REPUBLICAN VIEWS (July 30, 2015), <https://www.republicanviews.org/republicans-and-voter-fraud/> [<https://perma.cc/9TBA-9C79>] (recognizing that some Republicans take more measured stances than others on voting restrictions). Some, however, accuse those attempting to open the franchise as interested in facilitating fraud. For example,

[w]hen faced with Clinton’s push for universal voter registration at the age of 18, [then-Governor of New Jersey Chris] Christie stated, ‘She doesn’t know what she’s talking about. You know, in New Jersey, we have early voting that [is] available to people. I don’t want to expand it and increase the opportunities for fraud. Maybe that’s what Mrs. Clinton wants to do. I don’t know.’

*Id.*

215. *See, e.g., The New Poll Tax? Long Lines, Closed Polling Stations Hurt Black, Latinx & Student Voters in TX, CA*, DEMOCRACY NOW (March 5, 2020), [https://www.democracynow.org/2020/3/5/air\\_berman\\_voting\\_delays\\_super\\_Tuesday](https://www.democracynow.org/2020/3/5/air_berman_voting_delays_super_Tuesday) [<https://perma.cc/6SA2-YW3X>].

216. Although some Americans may have been concerned about the immigrant-trickster and the “former-felon” trickster, prevailing narratives about wrongdoers and the need to protect the American voting process largely made sense to them. Indeed, the news stories above about these women detail the women’s prior crimes, effectively inviting Americans to consider these women’s prior bad acts as evidence to explain why they were subject to the horrible experience of losing their votes. *See supra* Section I.B.

### 3. Coalition Threats: Disparate Impact and Other People's Problems

Another way the voter-trickster discourse compromises the coalition-building process is that it allows the government to reframe the voting access challenges of marginalized groups in terms that suggest they are about marginal, unsympathetic figures complaining about “racially disparate impact” of unfair rules. To be clear, there is a way in which equal protection law has hit a wall. Similar to the position taken in Fourteenth Amendment equal protection cases, disparate impact without evidence of intentional bias is not considered evidence of real racism for many Americans. Consequently, when individuals complain that neutral rules are burdening racial minorities, there is the suspicion that these rules essentially are fair but that minorities have grown too bold, too disruptive in demanding changes to institutional conditions that are really not intended to harm anyone. This is a fundamental reason why America has had a relatively muted reaction to current arguments challenging voting restrictions that highlight their unequal racial consequences.

Indeed, the emphasis on the racially disparate impact of these neutral policies often hides the ways in which they prime sites for coalition building. For example, issues such as voter purges, instead of being represented as a threat to democracy, are understood as a discrete issue that only affects minority voters. Indeed, one study showed that “in six of every 10 counties across Georgia, black voters were canceled at a higher rate than their white peers for inactivity. And in more than a quarter of those counties black voters were removed at a rate 1.25 times their white peers.”<sup>217</sup> Although the policy is represented as bearing down harder on African American communities, it presents a broader threat as an operational matter. In an era of increasing housing precarity, people change addresses far more frequently. This may also lead to inconsistent voting patterns and attempts at out-of-precinct voting.

Similarly, the name-identity requirements imposed by certain jurisdictions certainly burden communities of color, as they are more likely to have names that are culturally specific and feature arguably unusual spellings. However, the identical-name requirements also affect women more generally, as women are more likely to experience partial name changes as a consequence of marriages or divorce. State officials may not hyphenate or space names consistently or may delete or include portions of a name simply because they run out of space on a form. The name requirements also impose burdens on trans persons of both genders, as they may go through periods where they use a different name in certain contexts as a part of gender transition. Yet when government officials talk about name-identity rules, they tend to promote the voter-trickster narrative—that makes this seem primarily a concern of poor and minority communities. As one Republican commentator put it, the only reason to resist name-verification requirements and ID requirements “is that you plan to cheat” and vote

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217. Caputo, Hing & Kauffman, *supra* note 84.

improperly.<sup>218</sup> This approach flattens out the complexity of lived experience and the process of acquiring and establishing one’s name.

Additionally, much of the emphasis on long lines and broken voting machines has highlighted how these problems seem to plague Black and Brown communities more than white ones.<sup>219</sup> However, this false dividing line based on race hides the way the strategy also plays out in other geographically bounded, time-constrained or transportation-limited groups that are threatened by conditions where there is no guaranteed limit on wait time or timely access to a properly operating machine. For example, women of all races are more likely to have onerous and specific scheduling obligations, because they are picking up children from school or caring for elderly relatives. They are threatened by these conditions as well. Additionally, college students have faced some of the same problems where they are provided with too few machines or too many malfunctioning ones.<sup>220</sup> Disabled voters, rural voters, and a variety of others are burdened by poll-site closures, but the focus on race tends to elide these realities.<sup>221</sup>

## B. CHARTING A WAY FORWARD

### 1. Miner’s Canary Analysis and Contemporary Politics

Can we imagine future conversations that are not compromised by racial fractures produced by the voter trickster construct? What would true solidarity mean? One approach would be to employ a classic miner’s canary analysis and use the concept of “political race” that Lani Guinier and Gerald Torres argued could

218. Philip Schuyler (@FiveRights), TWITTER (June 9, 2019, 12:22 PM), <https://twitter.com/FiveRights/status/1137756767260172288> [<https://perma.cc/T2N6-3VQ7>].

219. *The New Poll Tax?*, *supra* note 215 (describing “Hervis Rogers, an African-American voter who waited nearly seven hours to cast his vote at a polling site at Texas Southern University in Houston, one of the nation’s largest historically black colleges”). Other voters in Texas reported waiting approximately three hours to vote. *Id.* These long lines result from the disproportionate closing of polling stations in Black and Brown communities. See Igor Derysh, “Voter Suppression, Plain and Simple”: Texas Closed Hundreds of Polling Sites in Black, Latino Areas, SALON (Mar. 3, 2020, 10:00 AM), <https://www.salon.com/2020/03/03/voter-suppression-plain-and-simple-texas-closed-hundreds-of-polling-sites-in-black-latino-areas/> [<https://perma.cc/JT9H-EPG9>] (finding that counties in Texas “with largest minority population growth saw 2.5M new residents and 542 closures. Whiter areas had just 34”). These problems can be found all over the country. See Reid Wilson, *Study: Voters in Black Neighborhoods Face Longer Wait Times*, HILL (Sept. 11, 2019, 3:35 PM), <https://thehill.com/homenews/campaign/460965-study-voters-in-black-neighborhoods-face-longer-wait-times> [<https://perma.cc/LJW2-3XR7>] (discussing research showing Black voters were more likely to wait longer at polls than white Americans). For example, Senator Bernie Sanders’ campaign sued in California to keep polls open an extra two hours after reporters in that state reported extremely long wait times. *The New Poll Tax?*, *supra* note 215.

220. See, e.g., Jeff Martin & Kate Brumback, *Broken Voting Machines, Long Lines under Scrutiny in Georgia*, ASSOCIATED PRESS (Nov. 7, 2018), <https://apnews.com/a2b641d6f03f41f28b2645a20200951f>.

221. See Derysh, *supra* note 219 (“Closing polling places has a cascading effect, leading to long lines at other polling places, transportation hurdles, denial of language assistance and other forms of in-person help, and mass confusion about where eligible voters may cast their ballot,” the Leadership Conference Education Fund report said. “For many people, and particularly for voters of color, older voters, rural voters, and voters with disabilities, these burdens make it harder—and sometimes impossible—to vote.”).

usher in a new era of progressive cross racial politics.<sup>222</sup> Miner's canary analysis and the associated concept of 'political race' require parties to examine the legal and social problems faced by minorities to identify broader social problems that threaten Americans generally.<sup>223</sup> Guinier and Torres explain.

[The] goal is to explore how racialized identities may be put to service to achieve social change through democratic renewal. . . . Toward these ends, we link the metaphor of the canary with a conceptual project we call *political race* . . . . [T]he canary is diagnostic, signaling the need for more systemic critique. Political race, on the other hand, is not only diagnostic; it is also aspirational and activist, signaling the need to rebuild a movement for social change informed by the canary's critique . . . . The political dimension of the political race project seeks to reconnect individual experiences to democratic faith, to social critique, and to meaningful action that improves the lives of the canary and the miners by ameliorating the air quality in the mines.<sup>224</sup>

Many scholars quickly recognized the brilliance of the miner's canary approach. Guinier and Torres identified a strategy for making persons with racial privilege attentive to and motivated to address minority pain. The importance of the political innovation they offered cannot be overstated; political organizers have sometimes been forced to recognize that white paternalism or benevolence are simply insufficient motivational drivers and will not galvanize white Americans to work for racial equality goals. Guinier and Torres's miner's canary analysis overcomes this resistance to social change by harnessing white Americans' rational self-interest. They position minorities in an instrumentalist analysis as potential protectors or warning indicators for larger American interests. Of course, even great innovations have their costs and limitations. Years after Guinier and Torres proposed this approach, we can now question whether a miner's canary's instrumentalist approach to Black and Brown people's concerns can truly help America build the bonds of connection and community between racial groups as equals, as the authors hoped. For if minorities are mere indicators, there is always a chance that white America will dismiss some of the issues minorities raise as *de minimis* or specific to a minority group. If minority pain is only acknowledged and addressed on the way to focusing on whites' interests, the justice and dignitary interests of minority Americans may be given short shrift. Moreover, the strategy formulated may be limited and fail to address nuances of the problems targeted.<sup>225</sup>

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222. See LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* 10 (3d prtg. 2003).

223. See *id.* at 11–12. As Guinier and Torres remind us, “those who are racially marginalized are like the miner's canary: their distress is the first sign of a danger that threatens us all.” *Id.* at 11.

224. *Id.* at 11–12.

225. See Candice Norwood & Matt Vasilogambros, *Polling Places in Black Communities Continue to Close Ahead of November Elections*, *GOVERNING: THE FUTURE OF STATES AND LOCALITIES* (Sept. 5, 2018), <https://www.governing.com/topics/politics/sl-polling-place-close-ahead-of-november-elections-black-voters.html> [<https://perma.cc/N27X-4Y2R>] (discussing closing of polling sites, increasing



*a. Name-Match Requirements in Voter ID Laws.*

Despite these limitations, miner’s canary analysis can offer assistance in forging today’s deeply necessary intersectional movement on voters’ rights. A few examples help illustrate this point. Specifically, Black voters have raised concerns that states like Texas that have exact-name-match requirements pose a hazard to minority voters. These states require that the voter present a valid ID card with her name spelled and spaced in the exact same fashion as it appears on the state’s voter registration rolls. Many Blacks face challenges in meeting this requirement because their names may be spelled in a unique fashion or their names simply are not familiar to white administrative workers and end up being misspelled, hyphenated, or cut off when they are recorded in official documents. Black voters may have ignored these discrepancies in the past as a mere inconvenience, because prior to the state of Texas’s exact-name-match requirement, the discrepancies did not cause them any material or political harm. Miner’s canary analysis teaches us that this exact-name-match requirement will likely threaten a larger swath of Americans and that an intersectional politics can be built by identifying other groups similarly threatened by this rule.

The significance of this shared problem, this key issue, cannot be overstated; however, the opportunities for coalition politics have not yet been fully realized. Indeed, media accounts tend to focus on the problems name-match restrictions cause for Blacks or immigrant families. However, exact-name-match requirements do threaten other, potentially overlapping or disconnected groups. For example, women of all races are more likely to have problems complying with exact-name requirements because their names are more likely to be changed and to be recorded differently across various forms of ID. Marriage, divorce, and remarriage may cause a woman’s name to change or be hyphenated or spelled inconsistently. Similarly, transgender persons may not have exact-name matches across various forms of identification, because different state law restrictions may or may not allow them to record the name associated with their chosen gender. To be clear, there may be legal restrictions that exist in some states preventing transgender persons from getting a state identification that exactly matches the name on the voter rolls. Political organizers, by emphasizing this more general gender-based dimension of the exact-name requirement, would find more parties motivated to address Black voters’ complaints.

A miner’s canary approach could also shape the litigation approaches impact litigation groups use to challenge state name-match requirements. Instead of focusing solely on the racially discriminatory impact of the name-match requirements, lawsuits attentive to intersectionality could stress these gendered aspects as well. This gendered focus will highlight for litigators that claims can be

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distance of sites from Black communities, and locating sites in non-Black, potentially hostile white communities as strategies to decrease Black voter turnout). Importantly, this last consideration, concerning the location of polls in racially hostile areas, is likely to not be one of the items prioritized under a miner’s canary analysis—because there is no broader generalizable interest that concerns all parties that might be interested in this problem.

brought under the Nineteenth Amendment's Enforcement Clause as well as other race-based measures. The Southern Poverty Law Center is already engaged with some of these issues, challenging these laws for their disproportionate impact on women, particularly women of color.<sup>226</sup>

*b. Miner's Canary Analysis and Poll Site Closures.*

A second example demonstrates the value of miner's canary analysis even further. Black voters have noted that Texas is systematically closing polling sites in Black communities, and as a consequence Blacks face long travel times and long wait times at the polls. With good reason, Black activists have charged that the legislative initiative to eliminate many polling sites targets Black communities and is a conscious attempt to suppress minority electoral participation.<sup>227</sup> In the 2016 election, after Texas closed multiple polling locations, there were three- to four-hour waits at some polling sites in Black areas.<sup>228</sup> One student at a historically Black college reported a wait time of seven hours.<sup>229</sup> A miner's canary analysis would seek to interest a broader coalition in challenging poll closures by describing the broader consequences of a voting regime that does not include a reasonable wait time as part of the fundamental right to vote. For example, working-class voters of all races could be prevented from getting a meaningful opportunity to exercise the franchise if forced to allocate multiple hours to vote. Women and men of all races with childcare obligations also would face challenges unless a reasonable wait time is assured at a polling site. A miner's canary analysis similarly could more generally challenge strategic poll closures with an eye toward determining whether state officials were trying to suppress or burden the participation of particular interest groups. Indeed, a recent article explored the way state officials in Texas closed poll sites on college campuses under certain administrative rules to create obstacles to student voting.<sup>230</sup> In short, when a miner's canary analysis is used, there are many more constituents that would be interested in challenging the gauntlet of technical rules that have now been thrown up as obstacles to voting.<sup>231</sup>

*c. Recognizing Limits of the Miner's Canary Frame.*

Although the benefits of a miner's canary frame are clear, this strategy for coalition building does have limits. Sometimes challenges are distinct to a minority group and are not easily transferrable to raise concerns about a more general domain. For example, one of the challenges brought by Black voters to state

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226. See *infra* notes 252–58 and accompanying text.

227. See, e.g., Norwood & Vasilogambros, *supra* note 225.

228. *The New Poll Tax?*, *supra* note 215.

229. *Id.*

230. Michael Wines, *The Student Vote Is Surging, So Are Efforts to Suppress It.*, N.Y. TIMES (Oct. 24, 2019) <https://www.nytimes.com/2019/10/24/us/voting-college-suppression.html>.

231. These obstacles include strict restrictions on the kinds of valid ID a registrar will accept, limits on advance voting, mail-in voting, and out-of-precinct voting.

officials that changed many poll sites noted that polls were being established in white areas that sometimes reflected racial hostility towards Blacks.<sup>232</sup> This issue of voter intimidation based on race is less generalizable and thus less likely to be taken up by persons thinking through the miner’s canary lens. Similarly, immigrants and African Americans would have problems with Georgia’s voter-challenge laws, which allow one’s neighbors to file grievances challenging a person’s right to vote.<sup>233</sup> Here again, issues of residential segregation and specific antipathy toward immigrants and Blacks play a major role in understanding why this particular piece of legislation raises discrimination concerns. It is not, then, a strong candidate for coalition-building under the miner’s canary analysis.

## 2. Interest-Convergence Approaches

Another course for coalition building is to pursue a strategy informed by Derrick Bell’s interest-convergence model.<sup>234</sup> Importantly, when Bell introduced the concept of interest convergence, he was not attempting to build an affirmative model for political action or a guide for people trying to build cross-racial coalitions for legislative and policy initiatives. Instead, Bell offered the interest-convergence model to illuminate why cross-racial coalitions for racial justice are fragile.<sup>235</sup> Specifically, Bell posited that African American gains in civil rights would only occur where they coincided with whites’ interests and were relatively cost-free or caused little inconvenience.<sup>236</sup> Bell illustrated this dynamic in the context of the civil rights battles of the 1960s. He argued that America’s desire to appear positively in the eyes of the international community, and to provide a meaningful contrast to Soviet Communism, required the United States government to take symbolic action to show its commitment to the equality of all citizens.<sup>237</sup> When this symbolic victory was achieved, white Americans largely defected from real support of civil rights initiatives.<sup>238</sup> This dynamic, he suggests,

232. See Norwood & Vasilogambros, *supra* note 225.

233. Asma Khalid, *Election Laws May Discourage Some From Voting, Even If They Are Allowed*, NPR (Sept. 13, 2018, 5:00 AM), <https://www.npr.org/2018/09/13/646314446/election-laws-may-discourage-some-from-voting-even-if-they-are-allowed> [<https://perma.cc/AN9U-QWXB>]. Your neighbor can challenge your right to vote in Georgia. Georgia, however, is not an outlier. Every state in the nation has the right under federal election law to have citizen monitors present during an election. However, these monitors may do things that intimate voters based on race. See Jocelyn Benson, *When Poll-Watching Crosses the Line*, POLITICO MAG. (Aug. 25, 2016) <https://www.politico.com/magazine/story/2016/08/poll-election-monitor-challengers-vote-laws-watchers-214189> [<https://perma.cc/TW5X-TP9N>]. Benson explains, Sometimes, this takes the form of challenging a voter’s legitimacy based on their race or ethnicity. During a local election in Michigan in 1999, Arab-American voters were singled out and challenged by election monitors who questioned their citizenship when they arrived at the polls. Similarly, challengers in Washington state accused hundreds of citizens of being illegal immigrants and ineligible voters because they had Hispanic or Arabic-sounding surnames. Benson, *supra*.

234. See generally Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

235. Derrick Bell’s theory of interest convergence posits that “[t]he interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.” *Id.* at 523.

236. *Id.*

237. *Id.* at 524–25.

238. See *id.*

is one of the reasons why the goal of racial integration has not been fully achieved.<sup>239</sup> Since then, scholars have used interest-convergence theory to explain the limited progress we have achieved in a variety of legislative, policy, and litigation initiatives related to race, gender, and religious equality.<sup>240</sup>

The broader interpretive frame for Bell's work offered here potentially has even more explanatory power. Viewed in more general terms, Bell's theory showed that when various constituencies are motivated to achieve an equality goal for entirely different reasons, their commitment to that goal will *vary based on the values the equality goal serves* and will be *displayed at different levels of intensity*.<sup>241</sup> For example, one group may defect from a cross-racial coalition when the goal has only been achieved at a very superficial, symbolic level, because their political interest in the goal has been satisfied. This leaves the remaining groups in the cross-racial coalition that have a deeper commitment to a particular method of implementation or interest in substantive gains feeling betrayed or even used. Viewed through this lens, Bell's argument allows us to identify contemporary challenges that threaten efforts to build cross-racial and gender coalitions supportive of voting reforms. Specifically, have white feminist groups championed the voting rights of communities of color because of a thin commitment to diversity, to ensure that their movement appears inclusive and accommodating to outsiders that might question their equality commitments? Have they done so because women of color, in particular Black women, are consistent and reliable Democratic voters in support of feminist causes? If their commitment to this group is purely instrumental, in service of white feminist groups' preexisting goals, they may not lobby for minority voting rights with the same degree of commitment or intensity required to challenge restrictions.

Interest convergence also allows us to diagnose future issues like weak bonds of affiliation or disaffection expressed by women of color. For example, women of color may be somewhat lukewarm about cross-racial coalitions with white feminists or Democratic politicians (despite voting for them), because these two groups' substantive equality vision does not include the more specific goals or particular value commitments of organizations shaped by women of color. To be clear, if white feminists are only interested in women of color's votes as a means to achieve gains framed by white feminist organizations or more conservative elements of the Democratic party, they should expect these coalitions to be fragile indeed. Women of color may offer lukewarm support, but they do not have any deep motivation to rally for causes that do not truly resonate with them.

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239. *Id.*

240. Cynthia Lee, *Cultural Convergence: Interest Convergence Theory Meets the Cultural Defense*, 49 ARIZ. L. REV. 911, 924–31 (2007) (comparing and contrasting articles applying interest convergence in a variety of domains).

241. See, e.g., Michael deHaven Newsom, *Some Kind of Religious Freedom: National Prohibition and the Volstead Act's Exemption for the Religious Use of Wine*, 70 BROOK. L. REV. 739, 796 (2005) (positing that interest convergence is responsible for the benefits to minority religious groups of the Volstead Act's exemption for the religious use of wine).

*a. Interest Convergence and Felon Disenfranchisement Laws.*

An example from the voting-rights context helps to more concretely illustrate this phenomenon. Minority-led advocacy groups have been some of the strongest advocates for the elimination of felon-disenfranchisement laws, because they tend to deprive large numbers of minority men and women of the right to vote. Studies show that the War on Drugs led to disproportionate punishment of minorities; additionally, the recent legalization of marijuana in many states makes the earlier imposed felony drug convictions for marijuana possession and distribution seem fundamentally unfair.<sup>242</sup> Democrats more broadly saw felon disenfranchisement as a ripe topic for cross-racial coalition building, but for largely instrumental reasons: people of color tend to vote in larger numbers for Democratic candidates and have the ability to shape close elections.<sup>243</sup> Indeed, felon disenfranchisement steadily increased in importance for Democratic organizers after the year 2000 in the excruciatingly close Bush–Gore presidential election. In that election, Republican George W. Bush won Florida by 537 votes; however, 31% of Black Floridian men were denied the vote due to disenfranchisement.<sup>244</sup> It seemed reasonable to believe that the inclusion of ex-felon voters in the electorate could have decisively changed the election.

*b. Instrumentalizing Insights from Interest Convergence—Challenges.*

The fragile nature of the Democrats’ cross-racial coalition challenging felon disenfranchisement was revealed during the 2020 Democratic primary. Interest-convergence analysis revealed the reasons for these fractures but did not offer immediate solutions for addressing emerging splits and cleavages. Several of the primary candidates were either heavily involved in enforcement of War on Drugs policies, defending government in police brutality cases, or were part of law-and-order-focused administrations that were blamed for causing high rates of incarceration in minority communities. Debate raged about whether it was fair or

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242. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 56 (rev. ed. 2012); ALVARO PIAGGIO & PRACHI VIDWANS, HUMAN RIGHTS FOUNDATION, *THE COST AND CONSEQUENCES OF THE WAR ON DRUGS: REPORT 49–54* (2019), [https://hrf.org/wp-content/uploads/2019/05/WoD\\_Online-version-FINAL.pdf](https://hrf.org/wp-content/uploads/2019/05/WoD_Online-version-FINAL.pdf) [<https://perma.cc/3RTT-JKLR>].

243. Theodore R Johnson, *Democratic Primary: Why 2020 Could Be The Year of the Black Voter*, *GUARDIAN* (Mar. 7, 2020, 1:00 PM), <https://www.theguardian.com/us-news/2020/mar/07/joe-biden-democratic-primary-2020-black-voter-bernie-sanders> [<https://perma.cc/2T3A-6YMV>]. Johnson explains:

For more than five decades, an average of about 90% of black voters have supported the Democratic candidate. Those voters are concentrated in the South, where most of the states vote Republican. However, in a few battleground states, – Michigan, Wisconsin, Pennsylvania, and Florida in particular – the number of black voters is sizable enough to be the deciding bloc. So a Democratic candidate who demonstrates the strongest black support in the primary can make the case that he or she is better positioned to win the presidential election.

*Id.*

244. See Julian Borger, *US Inquiry into Claims Black Voters Were Stripped of Rights*, *GUARDIAN* (Dec. 4, 2000, 3:44 PM), <https://www.theguardian.com/world/2000/dec/04/uselections2000.usa1> [<https://perma.cc/2GGQ-A7ZU>].

appropriate to advance these candidates for presidential office based on their other accomplishments or whether it was fundamentally unfair to ask African Americans to vote for them given their law-enforcement histories.<sup>245</sup> Political strategies and campaign organizers with an understanding of interest-convergence patterns could have easily predicted these problems. Indeed, ironically, Democratic operatives were seeking to restore the voting rights of formerly incarcerated ex-felons (disproportionately African American) while offering them presidential candidates that had played key roles in creating the conditions that led to their incarceration.<sup>246</sup> When a large swath of Black voters revealed that they might not support law-and-order Democrats, the fragile nature of the coalition politics became clear.<sup>247</sup> In short, the perception that formerly incarcerated persons would vote Democratic made these potential voters attractive to Democrats more broadly, including those specifically supporting feminist causes. However, upon learning that the formerly incarcerated might have substantive views that would disqualify the preferred presidential candidates of more mainstream Democrats, some sectors of the Democratic party grew frustrated and disillusioned.<sup>248</sup> What would it mean to recognize the power and the values perspective offered by currently disenfranchised voters who are in prison, on parole, or on probation? An interest-convergence analysis suggests that our failure

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245. Peter Beinart, *Progressives Have Short Memories*, ATLANTIC (Dec. 4, 2019), <https://www.theatlantic.com/ideas/archive/2019/12/kamala-harris-was-impossible-bind/602971/> (questioning whether it was reasonable for today's white progressives and African American voters to be critical of Harris's past punitive policies that led to the incarceration of Black and Latinx men given pressure on women-of-color candidates twenty years ago to show they were tough on crime); Charles D. Ellison, *How Hitting Bloomberg on Stop and Frisk Could Backfire with Black Voters*, FORWARD (Feb. 20, 2020) (faulting media for highlighting disastrous unconstitutional stop and frisk policies under the Bloomberg administration because it could disillusion Black voters from a politician that favored their positions on multiple other issues); Nicole Goodkind, *Pete Buttigieg Is Struggling to Win Over Voters Despite 2020 Surge*, NEWSWEEK (Apr. 23, 2019), <https://www.newsweek.com/pete-buttigieg-diversity-black-vote-bernie-sanders-2020-1403980> (discussing candidate's struggle to win over Black voters in part because his attitudes towards felon disenfranchisement are alienating).

246. See Jelani Cobb, *How Did the Democrats End Up Here?*, NEW YORKER (Feb. 23, 2020), <https://www.newyorker.com/magazine/2020/03/02/how-did-the-democrats-end-up-here>.

247. Indeed, even African Americans with no contacts with the criminal justice system had reservations about these candidates' connections to discriminatory criminal justice regimes. See Michael Finnegan, *California's Tough-on-Crime Past Haunts Kamala Harris*, L.A. TIMES, (Oct. 24, 2019, 5:00 AM), <https://www.latimes.com/politics/story/2019-10-24/kamala-harris-california-crime> (noting that Harris's over twenty-year history as a prosecutor in a jurisdiction that disproportionately prosecuted African Americans haunted her attempts to gain traction with Black voters); Joel Rose, *Mike Bloomberg Can't Shake the Legacy of Stop and Frisk*, NPR (Feb. 25, 2020, 4:18 PM), <https://www.npr.org/2020/02/25/809368292/the-legacy-of-stop-and-frisk-policing-in-michael-bloombergs-new-york> [<https://perma.cc/7WF9-V6BT>] (discussing challenges Bloomberg faces in recruiting Black voters given racially discriminatory policies under his administration).

248. See David A. Graham, *A Voting-Rights Debate Reveals Why Democrats Keep Losing*, ATLANTIC (Apr. 25, 2019), <https://www.theatlantic.com/ideas/archive/2019/04/democrats-republicans-felon-voting-florida/588010/>. How will they vote for candidates that don't even believe they have the right to vote? Senator Sanders agrees felons should be able to vote while in prison. *Id.* Mayor Buttigieg is against having the incarcerated vote. *Id.* Beto O'Rourke and Julián Castro would only grant voting rights to nonviolent-felon prisoners. *Id.* "Senator Warren was cautious, saying, 'I'm not there yet.' Senator Kamala Harris was more cautious still, calling for a 'conversation.'" *Id.*

to dive into these questions risks creating coalitions that show no deep or true motivation to achieve common goals.

### 3. Intersolidarity Politics—A New Vision

#### *a. Substantive Values Reassessment.*

What would a more fulsome version of intersectional solidarity politics produce? It could proceed along a number of different lines. First, it would mean looking past these more classic miner’s canary accounts of shared interest questions and challenging voting restrictions that disproportionately fall on minorities. It would mean that feminist groups would focus on these issues regardless of whether their implications primarily benefit Brown and Black women and men. Perhaps a silver lining of Trump Republican efforts to send the welfare queen construct to the polls is that this effort has (unintentionally) opened up a more fulsome conversation about latent antagonism or, at least, resistance to the broader, more meaningful enfranchisement of Black and Brown persons and women, despite the protections afforded by the Fifteenth and Nineteenth Amendments.

This is an ironic point, one worthy of further investigation. Some political analysts have worried that working-class Americans primarily vote based on their economic hopes and aspirations rather than for candidates that attend to the working class’s current economic interests. The women painted as potential welfare queens do not suffer from these illusions and instead vote from a perspective of intergenerational poverty and a full understanding of structural inequality. Although Republicans paint women of color with the stereotype of the welfare queen, actually these voters are rational economic actors of the purest form. To wit, in the last presidential election, Black women, a group that is disproportionately represented among the poor, voted over 90% percent Democratic,<sup>249</sup> in favor of more generous support of public healthcare, public schools, and other public services.

For an action plan on the ground, this new intersectional politics requires that we treat the insertion of the voter-trickster stereotype into this debate as a sign that broader reforms and broader skepticism is required about how we think about the right to vote. Although this is a conversation that affects all Americans, feminists can lead the charge in building the necessary coalitions. For example, the emergence of restrictive voter-identification laws may affect all women, but we must ask what larger purpose they serve in a broader network of restrictions. According to a Brennan Center report:

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

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249. Vanessa Williams, *Black Women – Hillary Clinton’s Most Reliable Voting Bloc – Look Beyond Defeat*, WASH. POST (Nov. 12, 2016), [https://www.washingtonpost.com/politics/black-women-hillary-clintons-most-reliable-voting-bloc-look-beyond-defeat/2016/11/12/86d9182a-a845-11e6-ba59-a7d93165c6d4\\_story.html](https://www.washingtonpost.com/politics/black-women-hillary-clintons-most-reliable-voting-bloc-look-beyond-defeat/2016/11/12/86d9182a-a845-11e6-ba59-a7d93165c6d4_story.html).

absentee, and three took action to make it harder to restore voting rights for people with past criminal convictions.<sup>250</sup>

Not all of these restrictions affect women generally, but they are part of a larger network of marginalization and control that should raise concerns.

*b. Intersectional Perspectives and Coalition Politics.*

Intersectional perspectives of women of color tend to bring the multifaceted, threatening nature of neutral policies to the fore, if coalition organizers are able to see them beyond simply their race or gender and as a conduit to potentially universal interests. For example, to return to the name-correlation or identical-name requirements, a Black woman with a name like “Shaniqua Jones Henderson” could talk expansively about the ways that such requirements threaten different communities. She can show that her identification prior to marriage (Shaniqua Jones) makes it harder to meet the requirements now that she is Shaniqua Jones Henderson. She can show identification where her name is improperly hyphenated causing yet another set of identity-match problems. Additionally, she could show how “unfamiliar” or culturally specific names—like Shaniqua—may be spelled any number of ways by careless clerks (Shaenequa, Shaniqua, Shanniqqa) and the burden should not be on her to correct clerk misspellings, particularly if they cause her to be denied voting access. The key universal issue at stake is recognizing the life circumstances and challenges that affect whether one is consistently recognized by a single name. This intersectional voter might also be able to speak to issues around region or class, noting that the preference for certain kinds of identification (for example, driver’s licenses or non-driver’s identification) makes little sense in jurisdictions with fewer drivers and less available DMV services. White women would benefit from reforms on this front as well.<sup>251</sup>

Another example of how intersectional politics can pave the way for broader law reform is illustrated by a lawsuit filed in 2019 by the Southern Poverty Law Center (SPLC) against Florida’s Governor, challenging Florida’s new voter suppression law, Senate Bill 7066, as being neutral on its face but intended to

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250. BRENNAN CTR., *NEW VOTING RESTRICTIONS IN AMERICA 1* (2019), <https://www.brennancenter.org/sites/default/files/2019-11/New%20Voting%20Restrictions.pdf> [<https://perma.cc/G92J-3Y5T>].

251. In fact, two relatively well-known white women in Texas—District Judge Sandra Watts and state senator and gubernatorial candidate Wendy Davis—faced such challenges in light of a new, restrictive voting law in their state. Both encountered problems at the polls due to discrepancies between how their name appeared on the official voting rolls and on their driver’s licenses—a common problem related to marital name changes—underscoring a “potential gender impact of current trends in voter restrictions.” See Montoya, *supra* note 10, at 105. Montoya notes:

Ultimately, both [of the Texas women] were able to avoid casting a provisional ballot, many of which are never properly certified and counted, by exercising an amendment that allowed them to sign an affidavit swearing to their identity. . . . [However,] [c]hanges in women’s names may put them at higher risk of being excluded from voting.



disenfranchise particular groups.<sup>252</sup> In 2018, Florida voted overwhelmingly for the Voting Restoration Amendment (Amendment 4), “which granted anyone sentenced for a felony offense, except for those convicted of murder or a felony sexual offense, the automatic right to vote upon completion of sentence, including parole and probation.”<sup>253</sup> Immediately in the aftermath of Amendment 4’s adoption, Senate Bill 7066 was enacted, intending to undermine the state’s new Amendment 4 protections reenfranchising former felons. According to SPLC’s complaint, “Within six months of Amendment 4’s passage and effective date, the Florida legislature passed Senate Bill 7066, a measure specifically designed to confuse, complicate and reduce the number of people eligible to vote under Amendment 4.”<sup>254</sup> The new law undercuts Amendment 4’s protections by requiring former felons to pay off legal financial obligations associated with their incarceration “as a precondition to getting their voting rights restored.”<sup>255</sup> Thus, it “is in direct contravention of the clear and unambiguous language in Amendment 4 which mandates the automatic restoration of voting rights to those who have completed the term of their sentence.”<sup>256</sup>

Because women—and particularly women of color—often have fewer resources due to labor-market segregation and pay inequality, they are more likely to be unable to pay these fees. Calling this new law a “poll tax,”<sup>257</sup> SPLC’s complaint is based on both Fourteenth and Nineteenth Amendment claims and highlights the women-of-color plaintiffs, whose experiences demonstrate the intersection of race and gender. Since Black women in particular are the fastest growing segment of the prison population and are among the poorest of all groups, they are especially disproportionately affected. At the same time, the new voter-suppression law adversely affects anyone in Florida whose limited resources disable them from paying off the fees (and compounded interest) associated with their incarceration.<sup>258</sup>

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252. *See generally* First Amended Complaint for Declaratory & Injunctive Relief, McCoy v. DeSantis, No. 4:19-cv-304-RH/MJF (N.D. Fla. Oct. 28, 2019).

253. *Id.* ¶ 3. Amendment 4 “enjoyed bi-partisan support among the voters and passed with almost 65% of votes cast in the election.” *Id.*

254. *Id.* ¶ 6.

255. *Id.*

256. *Id.*

257. *Id.* ¶ 53 (“Senate Bill 7066 constitutes a poll tax because it requires the payment of a fee as a precondition to exercising the right to vote, and failure to pay this fee can serve as the sole basis for rejecting a person’s voter registration application or removing them from the voter rolls.”).

258. Most states prohibit the incarcerated from voting, but the rules can be complex. The restrictions run the gamut from extremely generous to highly restrictive. For example, Maine and Vermont allow felons to vote while in prison. *See* SENTENCING PROJECT, FELONY DISENFRANCHISEMENT: A PRIMER 1 (2019), <https://www.sentencingproject.org/wp-content/uploads/2015/08/Felony-Disenfranchisement-Primer.pdf> [<https://perma.cc/746Y-9VBL>]. At the other end of the continuum, states like Kentucky continue to impose a lifelong denial of the right to vote to all citizens with a felony record, in the absence of a restoration of civil rights by the Governor or, where allowed, state legislature. *See id.* Other states disenfranchise felons for various lengths of time following the completion of their probation or parole. *See id.* Additionally, the severity of each state’s disenfranchisement rule varies. The problem has seismic consequences for America generally and minority communities in particular. One in thirteen

In short, a politics that focuses on intersectional perspectives gives us an opportunity to more self-consciously think about how policies play out across groups and examine the constituent members of our coalitions for missing members. Rather than merely trying to recruit a more diverse constituency to support an agenda already determined by a homogenous core leadership group of whites, we can consider how our coalitions would change if we gave more space to policies that intersectional perspectives raise as threats to us all. Additionally, we should explore ways in which these perspectives may pave entirely different paths forward than the track progressives are accustomed to following. For example, we could gain insights if we more forthrightly talked about the ways Black women's voting patterns more closely hew to their actual economic interests, as opposed to the voting patterns of white women, who more frequently vote in alignment with their family's economic aspirations. Importantly, although Black women have economic aspirations for their families as well, there is something about America that makes Blacks less willing to gamble that they will be part of the wealth class that enjoys these rules. Exploring why this gap exists and how to make concrete economic realities more a part of political decisionmaking would help us to frame the policies we need to mitigate wealthy inequality.

*c. Reassessing Leadership.*

An intersectional feminist perspective focused on cross-race coalitions among women also has the possibility of expanding our definition of and expectations of a leader.<sup>259</sup> Thankfully Americans now have a range of female leaders that continually allow Americans to reassess their default perspectives. Senators (and former presidential candidates) such as Elizabeth Warren and Kamala Harris and congresswomen such as Ayanna Pressley, Alexandria Ocasio-Cortez, Ilhan Omar, and Rashida Tlaib allow us to reconsider what we think fortitude or bravery looks like, as well as the kinds of communication styles and arguments we find persuasive. With this broad range of female political leaders, we can appreciate each of them for their distinct style of politics and consider what we expect public conversation and debate to look like. Importantly, this group at present shares a commitment to forthrightly championing the perspectives of what Derrick Bell called the "faces at the bottom of the well,"<sup>260</sup> elevating new values and rights and developing new institutions. Whether one agrees with them, these women offer new ways of relating to the American voter and new insights from the perspective of intersectional politics. Outsider or marginal voices tend to buck conventional wisdom about what can be done, because they can more easily

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Black adults were disenfranchised nationally as of 2016, and in some states one in five Black adults were disenfranchised. *See id.* at 2, 6.

259. Stability and strength values, which often function as stereotyped proxies for a certain kind of masculinity, must be recast in feminine form. Importantly, some of the candidates (for example, candidates like Harris) have views that evolved over time and may previously have been seen as less sympathetic to marginalized groups. However, even this evolution provides interesting insights into how to frame marginalized groups' interests.

260. *See generally* BELL, *supra* note 20 (explaining how racism is entrenched in American society).

imagine a different future. Moreover, this new leadership will work with the understanding that we embrace marginal voters not merely because it is the right thing to do but because they have new ideas about how to frame legal policies to address racial inequality, environmental threats, and wealth disparities.

*d. Web-Based and Virtual Spaces for Intersectional Strategies and Moving Beyond the Trickster Construct.*

Social media and other web-based tools present an additional strategy for circumventing the use of race in fracturing possibilities for coalition-building among women. To some extent, online spaces can help us overcome segregation in housing, the workplace, and other aspects of the physical world that not only elevate and ossify the significance of racial difference in society but make organizing across difference challenging. Today’s digital landscape provides a platform to recreate race, place, and space. On the one hand, the online space raises the possibility of building stronger, more diverse movements around voting rights that could enhance feminist alliances across race, class, and geography (as the #MeToo movement potentially demonstrates).<sup>261</sup> On the other hand, our digital spaces are not colorblind, nor are they ideal sites for Platonic forms of civil republican deliberation.<sup>262</sup> As critical digital studies scholar Charlton McIlwain notes, just as “geography formed the foundation for persistent racial problems: segregation . . . redlining . . . bussing . . . gentrification . . . gerrymandering . . . and the like,” the political economy of web traffic demonstrates racial “sites” and racial-spatial relationships within the geography of the Internet.<sup>263</sup> Additional problems such as racial impersonation online, as well as foreign actors creating dummy websites to aggravate potential racial fractures, further underscore that more attention must be devoted to building positive opportunities for cross-racial coalition in online spaces.<sup>264</sup> We must take steps to mitigate these threats.

*e. A Renewed Focus on Human Rights to Move Beyond the Trickster Construct.*

As discussed in Part II of this Article, in the period leading up to the Nineteenth Amendment’s ratification, abolitionists and suffragists embraced a more robust vision of rights than the one reflected in the original Constitution, which failed to recognize the citizenship and equality of women and people of color. We have called this vision a human rights vision, because it was based on

261. See, e.g., Catherine Powell, *How #MeToo Has Spread Like Wildfire Around the World*, NEWSWEEK (Dec. 15, 2017, 8:00 AM), <https://www.newsweek.com/how-metoo-has-spread-wildfire-around-world-749171>.

262. See Olivier Sylvain, *Recovering Tech’s Humanity*, 119 COLUM. L. REV. F. 252, 273 (2019); see also Catherine Powell, *Race and Rights in the Digital Age*, 112 AJIL UNBOUND 339, 339 (2018) (discussing “how, despite the liberatory potential of technology, racial bias pervades the digital space”).

263. See Charlton McIlwain, *Racial Formation, Inequality and the Political Economy of Web Traffic*, 20 INFO., COMM. & SOC’Y 1073, 1076–77 (2017).

264. See William J. Aceves, *Virtual Hatred: How Russia Tried to Start a Race War in the United States*, 24 MICH. J. RACE & L. 177 (2019). William J. Aceves, *Suing Russia: How Americans Can Fight Back Against Russian Intervention in American Politics*, 43 FORDHAM INT’L L.J. 1 (2019).

the indivisibility of rights, the inalienability of rights, and the collective nature of voting rights (as individual, yet collectively exercised as part of an electorate or, more discretely, as part of a voting bloc). This human rights vision did not depend on recognition from the state—even while it sought such recognition—and was thus broad enough to cover even those inhabiting the liminal space between subject and citizen, including tricksters, outcasts, and near-citizens.

In recognizing that “[w]e are all bound up together in one great bundle of humanity,”<sup>265</sup> Black suffragist Frances Harper advanced this idea. Frederick Douglass also spoke about the interdependence of rights and embraced the notion that those most directly affected—including those at various intersections of identity—should be centered and encouraged to speak for themselves in coalitional politics.<sup>266</sup>

Similarly, today a broad human-rights-based strategy will allow us to reclaim a vision of rights that is more intersectional and inclusive. Besides recognizing the indivisible and inalienable nature of rights, this strategy should recognize that the right to vote is not merely an *individual entitlement*, but part of a *social process* that constitutes community and belonging. None of us vote in isolation from the polity. Although the franchise gave women more independence from husbands, the right to vote is inevitably bound up with considerations of geography, community, and identity.

#### CONCLUSION

The year 2020 is an opportunity to celebrate the 100-year anniversary of the ratification of the Nineteenth Amendment and the 150-year anniversary of the ratification of the Fifteenth Amendment. However, Americans must also bear in mind that there still are many forces that threaten the ability of Black and Brown persons to vote and all women’s right to vote. Moreover, the institutional practices that threaten the ability of these vulnerable groups to vote will ultimately threaten all Americans’ voting rights and interests. Our ability to name and upend the social and institutional forces that erode Americans’ voting rights depends on two critical moves. First, we must resist the allure of the welfare queen and voter-trickster stereotypes, because it alienates us from key allies and encourages us to minimize the rights and pain of Brown and female voters. Second, we must be willing to look to the values perspectives of women caricatured as welfare queens, because these women give America the opportunity to radically question and reconstruct our notion of what we owe government and what government owes us. If we take these two steps, we can recraft the American dream in a manner that is inclusive and empowering for all Americans.

Technology can play a key role in this process. Recent campaigns, such as the #MeToo movement and the Equal Rights Amendment (ERA) campaign, have

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265. Harper, *supra* note 186; *see also* JONES, *supra* note 10, at 1 (quoting Harper as the inspiration for the book’s title: *All Bound Up Together*).

266. *See supra* note 190 and accompanying text.

shown us that Internet- and coalition-based strategies will allow us to cut across physical and spatial geographic borders, as well as conceptual borders of difference such as race and gender. Women of color are at the center of today’s campaigns for ratification of the ERA<sup>267</sup> and challenging voting restrictions on former felons<sup>268</sup>—demonstrating the importance of a more robust human rights perspective grounded in intersectional politics.

The path to coalition politics is brighter than ever. With the right coalitions we can build a world in which women currently demonized as welfare queens find it safe to go to the polls. Equally importantly, these women will see their interests more fairly represented on the ballots they cast in service of democracy.

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267. JULIE C. SUK, *WE THE WOMEN: THE UNSTOPPABLE MOTHERS OF THE EQUAL RIGHTS AMENDMENT* (forthcoming 2020) (manuscript chs. 10–12) (on file with the authors).

268. *See, e.g.*, First Amended Complaint for Declaratory & Injunctive Relief, *supra* note 252.