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**NOT YOUR MULE? DISRUPTING THE
POLITICAL POWERLESSNESS OF BLACK
WOMEN VOTERS**

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On the one hundredth anniversary of the Nineteenth Amendment, this Article reflects on the legacy of Black women voters. The Article hypothesizes that even though suffrage was hard fought, it has not been a vehicle for Black women to meaningfully advance their political concerns. Instead, an inverse relationship exists between Black women’s political participation and their relative level of socioeconomic and political well-being. Taking recent national elections as a case study, the Article identifies two sources of Black women’s political powerlessness: “caretaker voting” and the “trapped constituency problem.” The Article concludes that Black women’s strong voter turnout coupled with their reliable support of the Democratic Party has had the perverse outcome of cementing their irrelevance in the electoral system. To disrupt this trend, the Article proposes a new path forward.

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INTRODUCTION

2020 marked the one hundredth anniversary of the Nineteenth Amendment to the U.S. Constitution which granted women the right to vote.¹ Ratified on August 18, 1920, the Nineteenth Amendment was the product of a decades-long battle waged by women’s suffragists across various ethnic backgrounds and was initially celebrated as a triumph for all women.² One day after ratification, the New York Times declared that the Nineteenth Amendment brought an end to “the long struggle for woman suffrage in this country.”³ Part of the excitement that attended ratification of the Amendment was the belief that voting would provide women a valuable mechanism to advance their political concerns.⁴ Yet in the case of Black women, both of these assumptions have proven false.

As white women confidently marched to the polls in the wake of the Nineteenth Amendment, the right to vote remained largely theoretical for Black women voters for half a century longer. As Black women struggled to obtain meaningful access to the franchise, their natural allies in the feminist movement and the Republican Party remained conspicuously absent.⁵ While Black women’s political participation today rivals that of all other demographic groups, voting has still not become a vehicle for Black women to meaningfully advance their political concerns. Instead, as this Article contends, Black women’s strong participation in national elections, coupled with their reliable support of the Democratic Party, has had the perverse outcome of making them a “trapped constituency”: a group whose

1. U.S. Const. amend. XIX.

2. See Jennifer K. Brown, *The Nineteenth Amendment and Women’s Equality*, 102 YALE L.J. 2175, 2177–81 (1993) (summarizing the history of the Nineteenth Amendment, from the 1848 Woman’s Rights Convention in Seneca Falls to its ratification in 1920).

3. *Another Amendment Ratified*, N.Y. TIMES, Aug. 19, 1920, at 8.

4. *Id.*

5. See *infra* Section I.B.

votes are relied upon by the political establishment but whose political preferences are largely irrelevant.⁶

The problem facing Black women voters is not abstract. Rather, as Black women's political participation grows, their political power is shrinking, as is their share of American prosperity by all available metrics.⁷ Even before the global coronavirus pandemic unleashed an unprecedented recession, Black women were clinging to the bottom of the U.S. social strata in terms of income, life expectancies, and health outcomes.⁸ Black women are also disproportionately impacted by criminalization and mass incarceration and locked out of educational opportunities.⁹ Adding insult to injury, the Democratic Party rarely prioritizes Black women despite their dependable support; instead, the Party devotes its time and attention to appeasing white, moderate, suburban voters who have come to represent a coveted swing vote.¹⁰ The ways that Black women voters are taken for granted and sidelined by the Democratic Party ultimately beg the question: *Why should Black women vote at all?*

Although most commentators are reluctant to question the utility of voting—particularly in an election year where Black women voters were essential in removing Donald Trump—this Article contends that many of the common justifications for voting in national elections are mere myths where Black women are concerned. Primary among these myths are the ideas that voting enhances Black women's experiences of lived equality, that voting ensures that the Supreme Court acts as a guardian of civil and constitutional rights, and that voting guarantees that issues of racial justice are prioritized within the Democratic Party.¹¹

By examining the relationship between Black women's voting and political outcomes, this Article concludes that Black women are “trapped constituents” within the Democratic Party—a group whose votes are taken for granted because their political alternatives are limited.¹² The Article asserts that unless Black women voters are content to continue playing a

6. Kamala Harris's historic selection as the nation's first female vice president can be understood as a response to these historical trends. See discussion *infra* Part V.

7. See *infra* Parts II, III, and IV, for an in-depth exploration of these arguments.

8. See *infra* Section III.A.

9. See *infra* Section III.A.

10. See *infra* Section III.B and Part IV.

11. See *infra* Part III.

12. See *infra* Part IV.

caretaker role for American Democracy, important shifts are necessary. Specifically, this Article proposes that Black women pursue strategies—including strategic non-voting—that put them on par with swing voters, allow them to reclaim political power, and assert “I am not your mule” once and for all.

I. THE NINETEENTH AMENDMENT AND BLACK WOMEN’S CENTURY-LONG STRUGGLE TO SECURE THE VOTE AFTER EMANCIPATION

To understand the electoral force that Black women have become, it is helpful to start with the fifty-year fight that activists waged to secure Black women meaningful access to voting following the ratification of the Nineteenth Amendment.

A. *Black Women’s Ephemeral Right to Vote*

In the months following ratification of the Nineteenth Amendment on August 18, 1920, thousands of Black women across the United States flocked to the polls in states such as Georgia and Alabama, aided by Colored Women’s Voter Leagues that formed to support aspiring first-time voters.¹³ However, Black women’s voting rights remained largely ephemeral for another 50 years due to the color line that shaped American life following emancipation.

In many jurisdictions, Black women attempting to vote were systematically rebuffed using voter suppression tactics that expanded and perfected disenfranchisement tactics first deployed against Black men following the ratification of the Fifteenth Amendment. One oft-used measure was the poll tax, which conditioned voting on an individual’s ability to pay a fee ahead of primaries—fees which accumulated if they went unpaid.¹⁴ Literacy tests were another tactic used in both the North and the South to effectively penalize Black voters for the long period—during enslavement and thereafter—where they were denied access to quality education.¹⁵ Literacy tests were also notable for

13. See Liette Gidlow, *More than Double: African American Women and the Rise of a “Women’s Vote”*, 32 J. WOMEN’S HIST. 52, 53 (2020).

14. See John E. Filer et al., *Voting Laws, Educational Policies, and Minority Turnout*, 34 J.L. & ECON. 371, 373 (1991) (noting that poll taxes were also due by deadlines Black voters were rarely advised of).

15. See *id.* at 374.

their arbitrariness—endlessly shapeshifting as Black voters became more educated.¹⁶

When voter suppression measures were challenged, the U.S. Supreme Court gave their architects broad sanction. For instance, in *United States v. Reese*, the Supreme Court failed to intervene when Kentucky refused to let a Black man register to vote on account of a poll tax.¹⁷ In a tortured opinion, the Court held that the Fifteenth Amendment did not guarantee a universal right to vote and that voting restrictions were a matter of states' rights so long as they were evenly applied.¹⁸ Likewise, in *Williams v. Mississippi*, a unanimous Supreme Court upheld Mississippi's complex web of poll tax laws, notwithstanding candid admissions from state officials that their aim was to disenfranchise Black male voters.¹⁹ Then, in *Giles v. Harris* and *Giles v. Teasly*, the Supreme Court rejected legal challenges to literacy tests brought on behalf of thousands of disenfranchised Black male voters in Alabama.²⁰ The Supreme Court's early and repeated endorsement of voter suppression tactics allowed these measures to become ubiquitous in Southern states—ensuring that Black men's voting rights remained largely symbolic for a century.²¹ It also paved the way for the disenfranchisement Black women voters encountered after the Nineteenth Amendment's passage.²²

16. See *id.* at 374, 387–89 (tracking the impact of literacy tests on Black voter turnout); Gidlow, *supra* note 13, at 55–56.

17. See *United States v. Reese*, 92 U.S. 214, 220–21 (1876).

18. See *id.*; see also CAROL ANDERSON, *WHITE RAGE: THE UNSPOKEN TRUTH OF OUR RACIAL DIVIDE* 32–37 (2016) (explaining that *Reese* formed part of a disastrous series of Supreme Court cases that rendered the Thirteenth, Fourteenth, and Fifteenth Amendments a virtual nullity).

19. See *Williams v. Mississippi*, 170 U.S. 213, 222 (1898) (noting that a stated goal of the poll tax was to “obstruct the exercise of suffrage by the negro race”) (citation omitted); see also ANDERSON, *supra* note 18, at 35 (demonstrating that animus towards Black voters motivated the poll tax's adoption). Interestingly, as poll tax laws expanded, poor white Southerners also became a casualty. According to a 1943 survey, over 6.8 million white voters were disenfranchised across the South as a result of poll tax laws, compared to at least 4 million Black voters. See William M. Brewer, *The Poll Tax and Poll Taxers*, 29 J. NEGRO HIST. 260, 265 (1944), for the total of “Whites Disfranchised” and “Colored People Disfranchised.”

20. See *Giles v. Harris*, 189 U.S. 475 (1903); *Giles v. Teasly*, 193 U.S. 146 (1904).

21. See ANDERSON, *supra* note 18, at ch. 2.

22. See, e.g., *Breedlove v. Suttles*, 302 U.S. 277 (1937) (upholding Georgia poll tax applicable to both women and men); *Lassiter v. Northampton Cnty. Bd. of Elections*, 360 U.S. 45 (1959) (upholding North Carolina's use of a literacy test).

When determined Black voters persisted in their efforts to vote and sought to overcome their legal barriers—saving up funds to satisfy poll taxes and studying for literary tests—new voter suppression measures unfurled in the South.²³ Chief among them were all-white primaries, which excluded Black voters from participation.²⁴ As one historian explained:

Ingeniously, the primary was, or could be considered, a private [political party] affair, rather than a public [governmental] function and as such immune to the strictures of the Fourteenth and Fifteenth Amendments. Thus blacks could be excluded from participation in Democratic Party primary elections and in the one party South it meant complete disfranchisement since winning the primary was tantamount to election.²⁵

All-white primaries were not completely dismantled until the 1950s, with Texas refusing to eradicate them until 1953.²⁶ Prominent Black political scientist Ralph Bunche dubbed white primaries “the most effective device for the exclusion of Negroes from the polls in the South.”²⁷

Black women seeking to exercise their constitutional right to vote also became targets of racialized violence as the Nineteenth Amendment sparked a revival of the Ku Klux Klan. The Klan unleashed a new wave of racial terrorism aimed at denying Black people entry into civic and political life.²⁸ Racial violence, coupled with the expansion of state-sanctioned voter

23. See Gidlow, *supra* note 13, at 54–55.

24. Darlene Clark Hine, *Blacks and the Destruction of the Democratic White Primary 1935-1944*, 62 J. NEGRO HIST. 43, 43 (1977).

25. *Id.*

26. See *Grovey v. Townsend*, 295 U.S. 45, 55 (1935) (initially upholding Texas’s white primary); *Smith v. Allright*, 321 U.S. 649, 661–62 (1944) (overruling *Grovey* and holding that primaries were subject to scrutiny under the Fourteenth and Fifteenth Amendments); *Terry v. Adams*, 345 U.S. 461, 470 (1953) (finally barring all-white primaries in all their forms); see also Robert B. McKay, *Racial Discrimination in the Electoral Process*, 407 ANNALS AM. ACAD. POL. & SOC. SCI. 102, 106–07 (1973) (describing the long half-life of white primaries in states like Texas); Ellen D. Katz, *Resurrecting the White Primary*, 153 U. PA. L. REV. 325, 332–50 (2004) (tracking history of legal challenges).

27. Gidlow, *supra* note 13, at 56.

28. Tara McAndrew, *The History of the KKK in American Politics*, JSTOR DAILY (Jan. 25, 2017), <https://daily.jstor.org/history-kkk-american-politics/> [<https://perma.cc/7XF6-RADN>]; Gidlow, *supra* note 13, at 54–55 (describing the Klan revival in Jacksonville, Florida).

suppression efforts, proved highly effective at depressing voter registration and turnout among Black women as time went on—particularly in the South where a majority of Black voters continued to reside.²⁹ Accordingly, while some Black women triumphantly succeeded in their quest to vote, far more did not, and the right to vote conferred by the Nineteenth Amendment was rendered all but ephemeral for Black women for decades to come.

B. Feminist Apathy, Republican Indifference, and the Black Organizing Revival

The disenfranchisement of Black women voters was met with apathy by white suffragists and Republicans, confirming the enduring significance of race in American life.³⁰ In addition to harboring notoriously bigoted views, prominent white suffragists like Susan B. Anthony and Elizabeth Cady Stanton made a political calculation to sideline Black women within the voting rights movement to clear a path for ratification of the Nineteenth Amendment in the South.³¹ White suffragists also maintained racial segregation in movement-organizing spaces, while others quite literally insisted that Black suffragists move to the back of parades and public assemblies.³² The fleeting moments of cross-racial organizing that preceded the Nineteenth

29. For instance, although Black people comprised just 10 percent of the U.S. population in 1940, they constituted approximately 35 percent of the population in Alabama, Louisiana, and Georgia; 43 percent of the population of South Carolina; and just under 50 percent of the population of Mississippi. Campbell Gibson & Kay Jung, *Historical Census Statistics on Population Totals by Race, 1790 to 1990, and by Hispanic Origin, 1970 to 1990, for the United States, Regions, Divisions, and States* tbls.1, 15, 25, 33, 39 & 55 (U.S. Census Bureau, Working Paper No. 56, 2002), <https://www.census.gov/content/dam/Census/library/working-papers/2002/demo/POP-twps0056.pdf> [<https://perma.cc/7D4Q-8ZUT>].

30. See Gidlow, *supra* note 13, at 56–59.

31. See, e.g., Brent Staples, Opinion, *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> [<https://perma.cc/L6BW-5E5H>]; Phillip N. Cohen, *Nationalism and Suffrage: Gender Struggle in Nation-Building America*, 21 SIGNS 707 (1996); Steven Mintz, *The Passage of the Nineteenth Amendment*, 21 OAH MAG. HIST.: REINTERPRETING THE 1920S 47, 47–48 (2007); Lynn Dumenil, *The New Woman and the Politics of the 1920s*, 21 OAH MAG. HIST.: REINTERPRETING THE 1920S 22, 22 (2007). But see Dasha Matthews, *Ida B. Wells: Suffragist, Feminist, and Leader*, UMKC WOMEN'S CTR. (Feb. 21, 2018), <https://info.umkc.edu/womenc/2018/02/21/ida-b-wells-suffragist-feminist-and-leader/> [<https://perma.cc/YM64-DBAH>] (noting the important contributions of Black women suffragists like Ida B. Wells).

32. See, e.g., Gidlow, *supra* note 13, at 58; Dumenil, *supra* note 31, at 22; Staples, *supra* note 31.

Amendment evaporated after its passage. As historian Liette Gidlow explains:

At the midpoint, in the 1920s, white women broadly failed to stand up for Black women’s voting rights or for those of Black men. And at the center of it all stood African American women who struggled across generations to secure voting rights for their community and for themselves and who sometimes reached out, with little success, to white women’s groups to join them in that fight.³³

Indeed, once empowered with the franchise, many white women saw voting as “an opportunity to solidify the political power of whites and native-born citizens.”³⁴ White suffragists began vocalizing support for poll taxes that served to depress Black women’s votes.³⁵ Others dismissed the widespread disenfranchisement of Black women voters as a “race issue[]’ unrelated to [the] women’s rights agenda.”³⁶ Another subgroup of white women began to enthusiastically join the Ku Klux Klan, forming women’s-only chapters for the express purpose of promoting “pure womanhood” and opposing racial equality.³⁷ The fractures in the suffrage movement presaged the racial fissures that emerged within feminism and may explain why, to this day, there is no cohesive cross-racial “women’s vote.”³⁸

The Republican Party also proved indifferent to the obstacles faced by Black women seeking to vote. By the 1920s, the Republican Party had placed considerable distance between itself and the Party of Lincoln that helped to engineer

33. Gidlow, *supra* note 13, at 58–59 (citing the National Women’s Party and the League of Women Voters as examples of prominent women’s rights organizations that eventually turned their backs on Black women voters); *see also* Dumenil, *supra* note 31, at 24 (discussing the fractures in the female community after ratification). *But see* Anita Shafer Goodstein, *A Rare Alliance: African American and White Women in the Tennessee Elections of 1919 and 1920*, 64 J. S. HIST. 219, 219–22 (1998) (describing a rare period of cross-racial voter rights organizing in Tennessee).

34. Katherine Blee, *Women in the 1920’s Ku Klux Klan Movement*, 17 FEMINIST STUD. 57, 58 (1991); *see also* JR Thorpe, *How the Fight for Women’s Voting Rights Actually Benefitted White Supremacy*, BUSTLE (Aug. 18, 2017), <https://www.bustle.com/p/white-supremacy-benefitted-from-womens-suffrage-the-impact-is-still-felt-today-76420> [<https://perma.cc/3TBA-QVGZ>].

35. Goodstein, *supra* note 33, at 238.

36. Gidlow, *supra* note 13, at 58.

37. *See* Blee, *supra* note 34, at 58, 72.

38. *See infra* Part II for a discussion of women’s voting habits.

Emancipation.³⁹ Aside from a few radical members of the party, many Republicans stood idle as Black Codes—laws that criminalized Black people for innocent conduct—swept across the American South.⁴⁰ Republicans increasingly remained silent as the Ku Klux Klan laid siege on Black Americans trying to participate in civil life.⁴¹ Republican-nominated judges and elected officials also failed to meaningfully intervene when Black men, newly empowered with the right to vote in 1870, were systematically disenfranchised by other means.⁴²

Likewise, Republican Party officials in the South looked on with bored indifference while Black women struggled to make their right to vote more than mere words on paper.⁴³ As Gidlow writes, “[t]he feeble southern Republican Party might have welcomed an influx of new supporters as an opportunity for growth, but it did not.”⁴⁴ Instead, “southern Republicans rebuffed Black supporters in order to reassure newly enfranchised white women that . . . they ‘were not joining a “Negro” party.’”⁴⁵ Thus, the struggle for voting rights precipitated by the Fifteenth and Nineteenth Amendments cemented the Republican Party’s rebrand from the Party of Emancipation to a Party squarely focused on white identity.⁴⁶

Although Black women were largely shut out of the political process and abandoned by the broader feminist movement and Republican Party, their resolve to vote did not diminish. In the half-century following the Nineteenth Amendment, aspiring Black voters in the South tirelessly organized and fought to build power. For instance, Fannie Lou Hamer became a crusader for voting rights in Mississippi who persisted with her activism,

39. See ANDERSON, *supra* note 18, at 22–24.

40. *Id.* at 19–20. Though Black Codes varied state to state, they included prohibitions on vagrancy, “disobedience or imprudence,” and a requirement that newly emancipated Black people obtain employment as plantation laborers or domestics or face criminal punishment. *Id.*

41. Gidlow, *supra* note 13, at 54–55, 59.

42. ANDERSON, *supra* note 18, at 32–37 (discussing the long line of cases that were regressively decided and joined by Republican-nominated justices and noting Republican Justice Joseph Bradley’s open contempt towards Black litigants seeking the Court’s protections).

43. Gidlow, *supra* note 13, at 57.

44. *Id.*

45. *Id.* (citing Glenda E. Gilmore, *False Friends and Avowed Enemies: Southern African Americans and Party Allegiances in the 1920s*, in JUMPIN’ JIM CROW: SOUTHERN POLITICS FROM CIVIL WAR TO CIVIL RIGHTS, 219, 222 (Jane Daily, Glenda Elizabeth Gilmore, & Bryant Simon, eds., 2000)).

46. Gidlow, *supra* note 13, at 55–56.

despite being arrested and brutally beaten.⁴⁷ Similarly, Amelia Boynton Robinson, a life-long activist and contemporary of Martin Luther King Jr. who fought tirelessly for voting rights, was viciously beaten while protesting for voting rights on Bloody Sunday—an event that became a turning point for the voting rights movement.⁴⁸

The activism and sacrifice of women like Boynton and Hamer helped usher in the Voting Rights Act of 1965, which outlawed the poll tax and other voter suppression measures, created a system for electoral oversight, and in turn, finally conferred Black women voters meaningful access to the franchise nationwide.⁴⁹

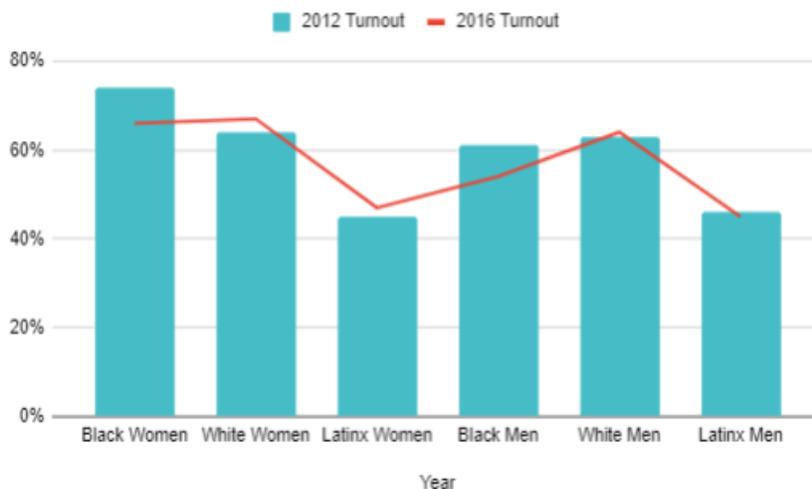
47. Jerry DeMuth, *Fannie Lou Hamer: Tired of Being Sick and Tired*, NATION (June 1, 1964), <https://www.thenation.com/article/archive/fannie-lou-hamer-tired-being-sick-and-tired/> [https://perma.cc/9SUC-73HB].

48. Margalit Fox, *Amelia Boynton Robinson, a Pivotal Figure at the Selma March, Dies at 104*, N.Y. TIMES (Aug. 26, 2015), <https://www.nytimes.com/2015/08/27/us/amelia-boynton-robinson-a-pivotal-figure-at-the-selma-march-dies-at-104.html> [https://perma.cc/T4UN-5S5A].

49. Voting Rights Act of 1965, 52 U.S.C. §§ 10101–30146; *see also* Chandler Davidson, *The Voting Rights Act: A Brief History*, in *CONTROVERSIES IN MINORITY VOTING* 7, 21 (B. Grofman & C. Davidson eds., 1992) (“[I]n the five years after [the VRA’s] passage, almost as many Blacks registered [to vote] in Alabama, Mississippi, Georgia, Louisiana, North Carolina, and South Carolina as in the entire century before 1965.”); Gilda R. Daniels, *Racial Redistricting in A Post-Racial World*, 32 *CARDOZO L. REV.* 947, 951, 951–56 (2011) (describing the operation of the Voting Rights Act and dubbing it “one of the most effective pieces of legislation in this country’s history”).

II. BLACK WOMEN VOTERS: THE CURRENT PICTURE

Graph I: Voter Turnout by Race and Gender: 2012 & 2016⁵⁰



A. *Black Women Are America's Most Consistent Voters*

For more than a decade, Black women's turnout as a percent of the citizen voting-age population has consistently been one of the highest across demographic groups.⁵¹ In the 2012 election, 74 percent of eligible Black women voters turned out to vote, compared to 64 percent of white women and 45 percent of Latinx women voters.⁵² Black women voters also surpassed turnout among all groups of men by at least 10 percentage points, with just 61 percent of Black men, 63 percent of white men, and 46 percent of Latinx men turning out to the polls in 2012.⁵³

50. This graph was created by the author using data from DANYELLE SOLOMON & CONNOR MAXWELL, *WOMEN OF COLOR A COLLECTIVE POWERHOUSE IN THE U.S. ELECTORATE* 29 (2019), <https://cdn.americanprogress.org/content/uploads/2019/11/18120343/Women-of-Color-in-the-American-Electorate.pdf> [https://perma.cc/ZF26-2RD4] [hereinafter SOLOMON & MAXWELL, *WOMEN OF COLOR*], and CTR. FOR AM. WOMEN & POL., *EAGLETON INSTITUTE OF POLITICS, RUTGERS UNIVERSITY, GENDER DIFFERENCES IN VOTER TURNOUT 2* (2019), <https://cawp.rutgers.edu/sites/default/files/resources/genderdiff.pdf> [https://perma.cc/Z63Y-PQJT] [hereinafter CTR. FOR AM. WOMEN & POL., *GENDER DIFFERENCES*].

51. See *supra* Graph I.

52. SOLOMON & MAXWELL, *WOMEN OF COLOR*, *supra* note 50, at 29 (tracking voting patterns of women).

53. CTR. FOR AM. WOMEN & POL., *GENDER DIFFERENCES*, *supra* note 50, at 2 (providing data regarding turnout by men).

Although Black women's voter turnout saw a dip in 2016 with 66 percent of Black women participating, Black women voters still exceeded turnout by every demographic group besides white women, who showed up to the polls at a rate of 67 percent.⁵⁴ In comparison, only 47 percent of Latinx women, 54 percent of Black men, 64 percent of white men, and 45 percent of Latinx men participated.⁵⁵ While 2020 turnout numbers are still being calculated, the trend of strong voter participation by Black women appears to have continued unbroken.⁵⁶

B. Black Women Are the Democratic Party's Most Loyal Supporters

Black women also lead all other demographic groups when it comes to their support of the Democratic Party. As political scientist Kelly Dittmar declared after analyzing two decades of voting data, "Black women voters voted for the Democratic candidates in each year at the highest levels of any gender and race subgroup."⁵⁷ The voting habits of white women stand in stark contrast, as Dittmar explains, as white women have "voted for the Republican presidential candidate in each election since 2004."⁵⁸

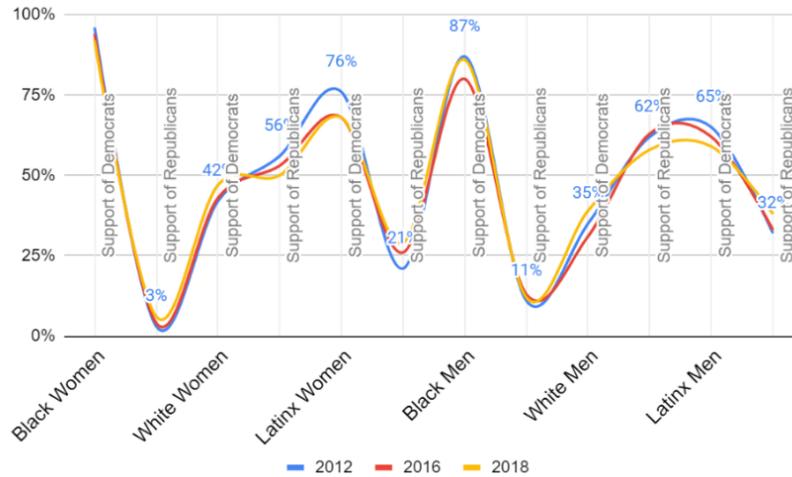
54. See Graph I (citing SOLOMON & MAXWELL, *WOMEN OF COLOR*, *supra* note 50, at 29).

55. See Graph I (citing CTR. FOR AM. WOMEN & POL., *GENDER DIFFERENCES*, *supra* note 50, at 2).

56. Erin Delmore, *This Is How Women Voters Decided the 2020 Election*, NBC NEWS (Nov. 13, 2020), <https://www.nbcnews.com/know-your-value/feature/how-women-voters-decided-2020-election-ncna1247746> [<https://perma.cc/QM6D-6FJ7>].

57. Kelly E. Dittmar, *Women and the Vote: From Enfranchisement to Influence*, in *MINORITY VOTING IN THE UNITED STATES* 99, 110 (Kyle L. Kreider & Thomas J. Baldino eds., 2015) (citations omitted).

58. *Id.*

Graph II: Party Affiliation by Race and Gender⁵⁹

Although polling data from the 2020 presidential election is still being finalized, the racialized voting patterns Dittmar describes were fully on display in several of our most recent elections.⁶⁰ In 2012, 96 percent of Black women voters supported Democratic incumbent Barack Obama, compared to 42 percent

59. This graph was created by the author using data from MAYA HARRIS, *WOMEN OF COLOR: A GROWING FORCE IN THE AMERICAN ELECTORATE* (2014), <https://www.americanprogress.org/issues/race/reports/2014/10/30/99962/women-of-color/> [<https://perma.cc/78LA-W4SC>]; Stanley Feldman & Melissa Herrmann, *CBS News Exit Polls: How Donald Trump Won the U.S. Presidency*, CBS NEWS (Nov. 9, 2016), <https://www.cbsnews.com/news/cbs-news-exit-polls-how-donald-trump-won-the-us-presidency/> [<https://perma.cc/3G5P-DC58>]; Whitney Blake, *The GOP Can Attract Young Black Voters—And Already Has*, WASH. EXAMINER (Aug. 12, 2014, 7:20 AM), <https://www.washingtonexaminer.com/weekly-standard/the-gop-can-attract-young-black-voters-and-already-has#> [<https://perma.cc/N6QH-TTBZ>]; John Cassidy, *What's Up with White Women? They Voted for Romney, Too*, NEW YORKER (Nov. 8, 2012), <https://www.newyorker.com/news/john-cassidy/whats-up-with-white-women-they-voted-for-romney-too> [<https://perma.cc/67SN-P7AS>]; Holly K. Sonneland & Nicki Fleischner, *How U.S. Latinos Voted in the 2016 Presidential Election*, AM. SOC'Y COUNCIL OF AMS. (Nov. 10, 2016), <https://www.as-coa.org/articles/chart-how-us-latinos-voted-2016-presidential-election> [<https://perma.cc/BZY9-74HX>]; Jessica Lavariega Monforti, *The Latina/o Gender Gap in the 2016 Election*, 42 AZTLAN; J. CHICANO STUD. 229, 238, 240, 245 (2017), http://mattbarreto.com/mbarreto/courses/lavariega_aztlan.pdf [<https://perma.cc/97Z5-NAFD>] (citing pre-election polling data which may be less reliable); *How We Voted in the 2018 Midterms*, WALL ST. J. (Nov. 6, 2018, 11:30 PM), <https://www.wsj.com/graphics/election-2018-votecast-poll/> [<https://perma.cc/P2VC-KJ7Z>].

60. See *supra* Graph II.

of white women and 76 percent of Latinx women.⁶¹ Black women also voted Democrat to a far greater extent than men irrespective of racial background.⁶² In 2012, 87 percent of Black male voters, 65 percent of Latinx male voters, and a scant 35 percent of white male voters supported Democrats.⁶³

Likewise, in 2016, Black women voted decisively in favor of Hillary Clinton, the Democratic presidential candidate, with less than 4 percent voting in support of then-Republican candidate Donald Trump.⁶⁴ No other demographic group's support of the Democratic Party was similarly unequivocal. For instance, only 80 percent of Black men, 68 percent of Latinx women, and 62 percent of Latinx men supported Democratic candidates in the 2016 election.⁶⁵

In 2016, Democratic support among white voters was even lower—with 43 percent of white women and 35 percent of white men voting for Clinton.⁶⁶ In contrast, 53 percent of white women and 63 percent of white men voted Republican and secured an electoral victory for Donald Trump.⁶⁷ However, even Black men defected from the Democratic Party at twice the frequency of Black women, with 13 percent of Black men voting Republican in 2016, compared to a mere 4 percent of Black women.⁶⁸ Defection rates among Latinx voters were even higher, with 26 percent of Latinx women and 33 percent of Latinx men supporting Republicans.⁶⁹

In the 2018 midterm elections, Black women replicated their strong Democratic turnout, with 92 percent voting for

61. HARRIS, *supra* note 59.

62. *See generally* Graph II.

63. Feldman & Herrmann, *supra* note 59 (reporting on white male voting habits); HARRIS, *supra* note 59 (reporting on voting by other groups).

64. Feldman & Herrmann, *supra* note 59.

65. *Id.*; *see also* Sonneland & Fleischner, *supra* note 59.

66. Feldman & Herrmann, *supra* note 59.

67. *Id.*; *see also* 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> [<https://perma.cc/Z2G3-99MR>]; Lorrie Frasure-Yokley, *Choosing the Velvet Glove: Women Voters, Ambivalent Sexism, and Vote Choice in 2016*, 3 J. RACE, ETHNICITY & POL. 3, 3–19 (2018) (attributing white women's support of Trump to racial resentment and ambivalent sexism).

68. *See* Feldman & Herrmann, *supra* note 59; *see also* Jane Coaston, *The Gender Gap in Black Views on Trump, Explained*, VOX (May 9, 2020, 12:30 PM), <https://www.vox.com/2020/3/9/21151095/black-women-trump-gop-conservatism-gap-2020> [<https://perma.cc/4D7P-8QRY>] (explaining that a gender gap between Black voters continues to persist regarding Trump).

69. *See* Feldman & Herrmann, *supra* note 59; Sonneland & Fleischner, *supra* note 59.

Democratic candidates, compared to 68 percent of Latinx women and 47 percent of white women.⁷⁰ Support of Democratic candidates among male voters was modest in comparison, with 86 percent of Black men, 59 percent of Latinx men, and 39 percent of white men voting Democrat.⁷¹ In contrast, 50 percent of white women, 58 percent of white men, 29 percent of Latinx women, 38 percent of Latinx men, and 12 percent of Black men voted Republican.⁷²

Black women have also made strong showings during the primary season and in special elections. In a 2017 special election to fill the Senate seat vacated by then-Attorney General Jeff Sessions, Black women were credited with delivering Alabama its first Democratic Senate seat in two decades with the election of one-term Senator Doug Jones.⁷³ An estimated 98 percent of Black women voters supported Doug Jones in his successful bid for Alabama's Senate seat.⁷⁴

Black women voters also played a significant role in the election of the 46th President of the United States, Joseph Biden. Black women voters turned out to the 2020 presidential primaries with such force that Biden secured the Democratic presidential nomination, despite losing both the Iowa caucus and New Hampshire primary and flipping conventional wisdom about presidential primaries on its head.⁷⁵ Biden's successful presidential run also appears to have been clinched by Black women voters in swing states like Georgia, Pennsylvania, and Michigan, who nudged him to victory in a closely contested election.⁷⁶

70. *How We Voted in the 2018 Midterms*, *supra* note 59.

71. *Id.*

72. *Id.*

73. Richard Fausset & Campbell Robertson, *Black Voters in Alabama Pushed Back Against the Past*, N.Y. TIMES (Dec. 13, 2017), <https://www.nytimes.com/2017/12/13/us/doug-jones-alabama-black-voters.html> [<https://perma.cc/S5UY-5DHJ>].

74. *Id.*

75. See, e.g., Jennifer Agiesta & Grace Sparks, *Black Voters, Older Voters and Moderates Fuel Joe Biden's Victory in South Carolina, Exit Polls Show*, CNN (Feb. 29, 2020, 11:31 PM), <https://www.cnn.com/2020/02/29/politics/south-carolina-exit-polls/index.html> [<https://perma.cc/5LW2-KY2Q>]; Kat Stafford & Hannah Fingerhut, *Black Voters Power Joe Biden's Super Tuesday Success*, ASSOCIATED PRESS (Mar. 5, 2020), <https://apnews.com/6da852f910238ecc2fd4f8a71e7d298a> [<https://perma.cc/26WP-HXVC>].

76. See, e.g., Janell Ross, *How Black Voters in Key Cities Helped Deliver the Election for Joe Biden*, NBC NEWS (Nov. 7, 2020), <https://www.nbcnews.com/news/nbcblk/how-black-voters-key-cities-helped-deliver-election-joe-biden-n1246980> [<https://perma.cc/YKA8-PLAZ>]; Courtney Connley, *How Stacey Abrams, LaTosha Brown and Other Black Women Changed the Course of the 2020 Election*, CNBC

Despite their long journey to obtain the franchise and their vulnerability to ongoing voter suppression tactics, Black women's electoral force cannot be debated. Indeed, the level of participation of Black female voters relative to other demographic groups led historian Liette Gidlow to dub the legacy of the Nineteenth Amendment as producing "a Black women's vote."⁷⁷ Although the civic engagement of Black women voters is unrivaled, the question remains whether there is political pay-off.⁷⁸

C. *Understanding Black Women Voters' Priorities*

Although Black women voters are hardly a monolith, nationwide surveys conducted in 2018 and 2019 reveal important trends when it comes to electoral policy priorities.⁷⁹ For instance, 75 percent of Black women voters surveyed in 2019 indicated that one of their key electoral priorities was ending racism and discrimination in America.⁸⁰ Black women voters also expressed overwhelming support for immigration reform, with 82 percent voicing strong disapproval for Trump's policies on immigration and 85 percent supporting pathways to citizenship for undocumented immigrants.⁸¹ According to polling data, Black women voters also desire robust protections for reproductive rights, including access to abortion.⁸² Black women voters surveyed also identified economic opportunities, including affordable healthcare access, as a critical priority.⁸³

(Nov. 6, 2020), <https://www.cnn.com/2020/11/06/black-women-continue-to-be-the-democratic-partys-most-powerful-weapon.html> [<https://perma.cc/XNJ4-ENMA>]; Delmore, *supra* note 56.

77. Gidlow, *supra* note 13, at 60.

78. *See infra* Part III (exploring the relationship between Black women's voting and their political power).

79. SOLOMON & MAXWELL, *WOMEN OF COLOR*, *supra* note 50, at 10–13 (citing SKDKNICKERBOCKER & INTERSECTIONS OF OUR LIVES, *UNDERSTANDING THE PRIORITIES OF WOMEN OF COLOR VOTERS: SURVEY FINDINGS* (Apr. 2019), <https://intersectionsofourlives.org/wp-content/uploads/2019/04/The-Intersections-of-Our-Lives-Survey-Findings-FINAL.pdf> [<https://perma.cc/2WFC-552N>], and ASSOCIATED PRESS & NORC CTR. FOR PUB. AFF. RES. AT U. OF CHI., *AP VOTECAST* (2018), <http://www.apnorc.org/projects/Pages/AP-VoteCast-2018.aspx> [<https://perma.cc/46XV-V343>]).

80. *See* SOLOMON & MAXWELL, *WOMEN OF COLOR*, *supra* note 50, at 13 (citations omitted).

81. *See id.* at 12 (citations omitted).

82. *See id.* at 11 (noting support among three-quarters of Black women voters).

83. *See id.* at 11–12 (noting that "80 percent of these voters believe the federal government should be responsible for ensuring all Americans have coverage" while

Thus, an important question remains: Are Black women's record-breaking levels of political participation furthering any of the aforementioned political goals?

III. EXPLORING THE RELATIONSHIP BETWEEN BLACK WOMEN'S POLITICAL PARTICIPATION AND POLITICAL POWER

In order to understand the relationship between Black women's voting and their political power, this Article explores three common assumptions about the benefits of political participation: (1) voting is a form of civic engagement that enhances a voter's lived reality and material well-being; (2) voting ensures that a voter's issues are prioritized by their political party; and (3) voting preserves a status quo where the Supreme Court advances and protects important civil rights.⁸⁴ By examining the validity of each of these assumptions as they pertain to Black women voters who support Democrats, this Article attempts to gauge the true extent of Black women's political power.

A. *Assumption One: Voting Improves Black Women's Experience of Lived Equality*

The first, and perhaps simplest, assumption that underlies voting is that civic and political engagement improves the material realities of voters over time.⁸⁵ Yet, in the case of Black women, this supposition proves false.

"65 percent of Black women consider congressional action to create well-paying jobs a national priority") (citations omitted).

84. See, e.g., Brown, *supra* note 2, at 2178 (stating "[w]omen's advocates pressed for the vote not only as a means to improve women's lives, but also because it would symbolize recognition of women's 'equal personal rights and equal political privileges with all other citizens'") (citation omitted); see generally, SEAN MCELWEE, DEMOS, WHY VOTING MATTERS: LARGE DISPARITIES IN TURNOUT BENEFIT THE DONOR CLASS (2015), <https://www.demos.org/research/why-voting-matters-large-disparities-turnout-benefit-donor-class> [https://perma.cc/EL98-L9GD] (surveying research linking voting and socioeconomic welfare); Maggie Astor & Matt Stevens, *Abortion Rises as a Pivotal Issue for At-Risk Senate Republicans*, N.Y. TIMES (June 29, 2020), <https://www.nytimes.com/2020/06/29/us/politics/2020-senate-abortion-susan-collins.html> [https://perma.cc/D6DZ-R66F]; Carl Hulse, *Progressives Begin New Push to Elevate Supreme Court as a Campaign Issue*, N.Y. TIMES (July 1, 2020), <https://www.nytimes.com/2020/07/01/us/progressives-begin-new-push-to-elevate-supreme-court-as-a-campaign-issue.html> [https://perma.cc/LVV9-DPSH].

85. See, e.g., Ching-Hsing Wang, *Why Do People Vote? Rationality or Emotion*, 34 INT'L POL. SCI. REV. 483 (2013) (discussing the theory on the perceived benefits of voting).

1. Black Women Experience Heightened Economic Inequality

A staggering wage and employment gap exists between Black women and other demographic groups—one that has persisted for decades across Democratic and Republican administrations alike.⁸⁶ Black women are disproportionately likely to be unemployed or employed in positions that pay only the minimum wage.⁸⁷ In 2016, median wages for Black women who worked full time were \$35,382 per year, compared to annual median wages of \$43,346 for white women and \$56,386 for white men—an annual difference of \$7,964 and \$21,004, respectively.⁸⁸ Even Black women who completed a college education were compensated several thousand dollars less on average than their white female counterparts.⁸⁹ For every dollar in earnings white men received, Black women on average are paid less than 60 cents—lost wages that could pay for food, tuition, living expenses, or health insurance.⁹⁰ Homeownership rates among Black women are also low; Black women are three times more likely than white women to be denied a mortgage.⁹¹

86. See generally Melissa Harris-Lacewell & Bethany Albertson, *Good Times?: Understanding African American Misperceptions of Racial Economic Fortunes*, 35 J. BLACK STUD. 650 (2005) (discussing Black voters' economic misfortunes under the Clinton presidency); JOAN ENTMACHER ET AL., NAT'L WOMEN'S L. CTR., INSECURE & UNEQUAL: POVERTY AND INCOME AMONG WOMEN AND FAMILIES 2000–2013 (2014), https://nwlc.org/wp-content/uploads/2015/08/final_2014_nwlc_poverty_report.pdf [<https://perma.cc/CMF3-QSXG>] (noting that Black women's poverty remained high under the Bush and Obama administrations, even while national poverty rates dipped); KAYLA PATRICK, NAT'L WOMEN'S L. CTR., NATIONAL SNAPSHOT: POVERTY AMONG WOMEN & FAMILIES, 2016, at 1 (2017), <https://nwlc.org/wp-content/uploads/2017/09/Poverty-Snapshot-Factsheet-2017.pdf> [<https://perma.cc/MZ47-7NA8>] [hereinafter PATRICK, 2016 POVERTY SNAPSHOT] (noting disproportionate rates of poverty among Black women in 2016).

87. See, e.g., NAT'L URBAN LEAGUE, BLACK WHITE EQUALITY INDEX: 2018 STATE OF AMERICA, SAVE OUR CITIES: POWERING THE DIGITAL REVOLUTION 10 (2018) (noting that Black female unemployment rates were nearly twice as high as white women's); ASHA DUMONTHIER ET AL., INST. FOR WOMEN'S POL'Y RES., THE STATUS OF BLACK WOMEN IN THE UNITED STATES 22–23 (2017).

88. See NAT'L URBAN LEAGUE, *supra* note 87, at 10 (citing 2016 data); see also NAT'L P'SHIP FOR WOMEN & FAMILIES, BLACK WOMEN AND THE WAGE GAP 3 (2020) (observing even larger gaps using 2018 census data).

89. See DUMONTHIER ET AL., *supra* note 87, at 24.

90. See NAT'L P'SHIP FOR WOMEN & FAMILIES, *supra* note 88, at 2–3.

91. See NAT'L URBAN LEAGUE, *supra* note 87, at 11.

Black women also experience poverty at rates only exceeded by women in indigenous communities.⁹² In 2016, 21.4 percent of Black women were living in poverty, compared to 9.7 percent of white women, and 18.7 percent of Latinx women.⁹³ Black women's poverty rates also dwarfed rates of poverty among white men, which clocked in at just 7 percent.⁹⁴ In 2018, these numbers remained virtually unchanged, with 20 percent of Black women, 18 percent of Latinx women, and 9 percent of white women meeting the federal definition of poverty, compared to 7 percent of white men.⁹⁵

Rates of poverty among Black female-headed households have been even higher over the years, hovering around 38–39 percent in 2016 and 2018, 8–10 percentage points higher than the poverty experienced by white female-headed households.⁹⁶ Even more concerning, Black women experience disproportionate rates of extreme poverty—defined as earning less than two dollars per person per day—a trend believed to be a byproduct of President Clinton's disastrous welfare reform.⁹⁷

Data concerning Black women's rates of poverty are noteworthy for two reasons. First, it suggests that Black women's political participation has little to no bearing on their material well-being, making one of the perceived benefits of voting illusory.⁹⁸ Second, it shows that political science research positing that political participation tracks voters' affluence fails to

92. See PATRICK, 2016 POVERTY SNAPSHOT, *supra* note 86, at 1 (noting high rates of poverty among Native women).

93. See *id.*

94. See *id.*

95. See AMANDA FINS, NAT'L WOMEN'S L. CTR., NATIONAL SNAPSHOT: POVERTY AMONG WOMEN AND FAMILIES, 2019, at 1 (2019), <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2019/10/PovertySnapshot2019-1.pdf> [<https://perma.cc/RWZ5-9YS4>] [hereinafter FINS, 2018 POVERTY SNAPSHOT].

96. See PATRICK, 2016 POVERTY SNAPSHOT, *supra* note 86, at 3; FINS, 2018 POVERTY SNAPSHOT, *supra* note 95, at 3. Female headed Latinx and Native households also experience soaring rates of poverty, with rates ranging from 38 percent to 42 percent in the years surveyed. Poverty among these demographic groups merits serious concern, though unlike Black women, it does not stand in stark contrast to their political participation rates.

97. See generally DUMONTHIER ET AL., *supra* note 87, at 76–77; KATHRYN EDIN & H. LUKE SHAEFER, \$2.00 A DAY: LIVING ON ALMOST NOTHING IN AMERICA (2015); William Julius Wilson, *Why Sociologists Matter in the Welfare Reform Debate*, 46 CONTEMP. SOC. 627, 629 (2017). For an in-depth discussion of Clinton's legacy, see *infra* Section III.B.1.

98. See Wang, *supra* note 85, at 487–88 (discussing voting in terms of the perceived utility to the individual).

capture the experiences of Black women voters—specifically, their dedication to participating in the political process against all odds.⁹⁹

2. Black Women Have Reduced Healthcare Outcomes and Life Expectancies

Disparities also exist with respect to the healthcare outcomes of Black women. Black women have lower life expectancies than their white female counterparts—averaging seventy-eight years, compared to eighty-one years for white women.¹⁰⁰ Black women also experience higher rates of mortality than white women at virtually all stages of life. They are fifteen times more likely to be living with HIV/AIDS, and three to five times more likely (depending on age group) to die from homicide than their white female peers.¹⁰¹ Maternal mortality statistics among Black women are also incredibly dire, with Black women dying during pregnancy at three times the rate of white women.¹⁰²

Due to the barriers they face when accessing quality healthcare, Black women are more susceptible to chronic illness—a fact made all the more plain by the horrific toll of the coronavirus pandemic on Black communities in the United States.¹⁰³ Even after the passage of the Patient Protection and Affordable Care Act of 2010, nearly 25 percent of Black women

99. See Frederick Solt, *Economic Inequality and Democratic Political Engagement*, 52 AM. J. POL. SCI. 48, 57 (2008) (contending that “[e]conomic inequality plays an important role in depressing the electoral participation of nonaffluent citizens”); Fay Lomax Cook et al., *Political Engagement by Wealthy Americans*, 129.3 POL. SCI. Q. 381, 381–83 (2014) (confirming general acceptance of this proposition).

100. See NAT’L URBAN LEAGUE, *supra* note 87, at 12. These figures do not appear to capture the life expectancies of Black trans women, which tragically hover around thirty-five years. See Alicia Garza, *Trans Women Don’t Want Your Sympathy. They Want to Be Treated as Human Beings*, MARIE CLAIRE (June 24, 2019), <https://www.marieclaire.com/politics/a28169056/black-trans-women-murdered/> [<https://perma.cc/2X6N-HYTN>].

101. See NAT’L URBAN LEAGUE, *supra* note 87, at 13–14, 21 (observing a decrease in Black mortality relative to white women only among those aged eighty-five and up).

102. Roni Caryn Rabin, *Huge Racial Disparities Found in Deaths Linked to Pregnancy*, N.Y. TIMES (May 7, 2019), <https://www.nytimes.com/2019/05/07/health/pregnancy-deaths-.html> [<https://perma.cc/K97Y-JUFD>] (noting that indigenous women experience severe disparities as well).

103. See Tiffany Ford et al., *Race Gaps in COVID-19 Deaths Are Even Bigger than They Appear*, BROOKINGS (June 16, 2020), <https://www.brookings.edu/blog/up-front/2020/06/16/race-gaps-in-covid-19-deaths-are-even-bigger-than-they-appear/> [<https://perma.cc/QG27-DG3V>]; see also DUMONTHIER ET AL., *supra* note 87, at 89–104 (noting disparities in heart disease, cancer, and HIV/AIDS, among others).

lacked health insurance, compared to 11 percent of white women—numbers attributable, in part, to Southern states' strong resistance to Medicaid expansion.¹⁰⁴

Accordingly, although Black women vote consistently, a profound disconnect exists between Black women's political participation levels and their material well-being.

3. Black Women Are Disproportionately Impacted by Criminalization and Mass Incarceration

Criminalization and policing also disproportionately affect Black women from an early age. For instance, Black women and girls are frequently suspended or expelled for conduct such as being “loud,” “disruptive,” or “disobedient,” while white students engage in similar behavior without fear of discipline.¹⁰⁵ Not only do these discrepancies in school discipline reveal racial and gender biases—often punishing Black women and girls for perceived gender non-conformity—they interfere with educational attainment by keeping the school-to-prison pipeline well-oiled.¹⁰⁶ One study found that, although Black women comprised less than 17 percent of all female students, they constituted 43 percent of the female school children who had experienced a school-related arrest.¹⁰⁷ Perhaps unsurprisingly, Black women attend college at markedly lower rates than white women, at just under 25 percent compared to 44.7 percent.¹⁰⁸ Even among Black women who

104. See DUMONTHIER ET AL., *supra* note 87, at 67–69, 83 (analyzing 2014 data); see also Nat'l Fed. of Indep. Bus. v. Sebelius, 567 U.S. 519, 575–88 (2012) (invalidating the Medicaid expansion provision of the Affordable Care Act in a 7-2 majority decision that included Kagan and Breyer).

105. See DUMONTHIER ET AL., *supra* note 87, at 122 (noting that Black girls compose 45 percent of K-12 school suspensions in 2011 and 2012); LETICIA SMITH-EVANS ET AL., NAACP LEGAL DEF. & EDUC. FUND & NAT'L WOMEN'S L. CTR., UNLOCKING OPPORTUNITY FOR AFRICAN AMERICAN GIRLS: A CALL TO ACTION FOR EDUCATIONAL EQUITY 15–19 (2014), https://www.nwlc.org/sites/default/files/pdfs/unlocking_opportunity_for_african_american_girls_final.pdf [https://perma.cc/DX4N-AVRK] (noting that white students, in contrast, are only suspended when they engage in serious offenses such as vandalism or drug use).

106. See SMITH-EVANS ET AL., *supra* note 105, at 16.

107. *Id.*

108. See Richard V. Reeves & Katherine Guyot, *Black Women Are Earning More College Degrees, but That Alone Won't Close Race Gaps*, BROOKINGS (Dec. 4, 2017), <https://www.brookings.edu/blog/social-mobility-memos/2017/12/04/black-women-are-earning-more-college-degrees-but-that-alone-wont-close-race-gaps/> [https://perma.cc/A8T6-A9D9] (providing data on four-year colleges). Though lower than enrollment rates for white men and women, Black women's college attendance

attain bachelor's or professional degrees, racialized wealth gaps persist.¹⁰⁹

Mass incarceration also takes a heavier toll on Black women, who constitute the fastest-growing population in U.S. prisons and are twice as likely to be incarcerated as white women.¹¹⁰ Though it is rarely discussed, Black women also disproportionately fall victim to police brutality and law enforcement violence, particularly when they experience mental health episodes.¹¹¹ Because criminalization trumps public health interventions as a default response, the trauma, disability, and hardship that impact many Black women and girls in the criminal-legal system are rarely addressed by the officials Black women voters elect, further highlighting the disconnect between Black women's voting and their alleged political power.¹¹²

Black women experience heightened surveillance by the criminal legal system, including by social services agencies.¹¹³ Law professor and anthropologist Khiara Bridges has written extensively about the way that child welfare laws have been weaponized against Black female-headed households as poverty is conflated with neglect, and children are seized from households for "offenses" such as lacking a warm winter coat.¹¹⁴ Black

typically outpaces that of Black men. *See id.* (noting annual gap of approximately 10 percentage points since 2005).

109. *See id.* ("[B]lack households headed by a college graduate are less wealthy than less-educated white ones.")

110. *See* NAT'L URBAN LEAGUE, *supra* note 87, at 21; DUMONTHIER ET AL., *supra* note 87, at 122–23 (noting that drug-related arrests predominate, even though white women engage in drug crime to an equal extent); *see generally* Dorothy Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1491 (1991) (discussing the criminalization of addiction in the Black community).

111. Professor and legal scholar Kimberlé Crenshaw has written several articles about this trend. *See, e.g.*, MONIQUE W. MORRIS, STEPHANIE BUSH-BASKETTE & KIMBERLÉ CRENSHAW, *AFRICAN AM. POL'Y F., CONFINED IN CALIFORNIA: WOMEN AND GIRLS OF COLOR IN CUSTODY* (2012); KIMBERLÉ WILLIAMS CRENSHAW & ANDREA J. RITCHIE, *SAY HER NAME: RESISTING POLICE BRUTALITY AGAINST BLACK WOMEN* (2015) (discussing scope of disparities); *see also* Kimberlé W. Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control*, 59 UCLA L. REV. 1418 (2012) (discussing the role of gender-based violence in Black women's incarceration).

112. *See* SMITH-EVANS ET AL., *supra* note 105, at 18–19 (discussing the ways that trauma and mental illness drive incarceration).

113. *See generally* KHIARA M. BRIDGES, *THE POVERTY OF PRIVACY RIGHTS* (2017); Kimberly D. Bailey, *Watching Me: The War on Crime, Privacy, and the State*, 47 U.C. DAVIS L. REV. (2014); Wendy A. Bach, *The Hyperregulatory State: Women, Race, Poverty, and Support*, 25 YALE J.L. & FEMINISM 318 (2013).

114. *See* BRIDGES, *supra* note 113, at 115–18.

mothers who rely on public benefits are also subjected to frequent drug testing and are criminalized for using drugs as innocuous as marijuana—oftentimes losing custody of their kids as a result.¹¹⁵ The high rates of criminalization and policing that Black women experience also cast doubt on the thesis that voting and civic engagement materially improve the lives of Black women voters.¹¹⁶

4. The State of Black Trans Women

Black trans women as a subgroup also suffer profound forms of marginalization and exclusion, despite high voter turnout.¹¹⁷ Fifteen percent of Black trans people surveyed in 2015 reported

115. See, e.g., Haley Fox, *Weed and Pregnancy: How Cannabis Laws Are Hurting Mothers*, ROLLING STONE (Nov. 17, 2018), <https://www.rollingstone.com/culture/culture-features/weed-pregnancy-mother-family-marijuana-cannabis-755697/> [<https://perma.cc/A4GH-ZCVT>]; Dawn Onley, *Black Mom Sues Hospital for Drug Test After Giving Birth, Child Abuse Probe*, GRIO (Mar. 18, 2020), <https://thegrio.com/2020/03/18/Black-mom-sues-hospital-drugs/> [<https://perma.cc/U4K8-BL5T>].

116. Although beyond the scope of this Article, it is important to note that interactions with the criminal-legal system can also threaten one's ability to vote. For background on felon voter disenfranchisement laws, their racialized origins, and current impact, see, for example, Lauren Latterell Powell, *Concealed Motives: Rethinking Fourteenth Amendment and Voting Rights Challenges to Felon Disenfranchisement*, 22 MICH. J. RACE & L. 383 (2017); Amber Daniels, Note, *Felon Disenfranchisement: The Scarlet Label and Its Deep Roots in Facilitating Vote Dilution in America*, 11 CHARLESTON L. REV. 525 (2017); Daniel S. Goldman, Note, *The Modern-Day Literacy Test?: Felon Disenfranchisement and Race Discrimination*, 57 STAN. L. REV. 611 (2004). See also Erin Kelly, Note, *Do the Crime, Do the Time—and Then Some: Problems with Felon Disenfranchisement and Possible Solutions*, 51 U. TOL. L. REV. 389, 390 (2020) (“[O]ne in thirteen African American voters has lost his or her right to vote because of a felony conviction, as opposed to one in every fifty-six non-African American voters.”) (footnote omitted).

117. Although the voting habits of Black trans women have not been disaggregated from statistics about Black women, they merit special study. Trans people are uniquely susceptible to voter disenfranchisement because of the difficulties they face when trying to obtain identity documents that correctly reflect their name and gender. Transgender people are also uniquely impacted by felon disenfranchisement laws because they experience disproportionate rates of mass incarceration. For articles discussing the challenges facing transgender voters, see, for example, Adam P. Romero, *The Nineteenth Amendment and Gender Identity Discrimination*, 46 LITIG. 48 (2020) (analyzing discrimination against transgender voters under the Nineteenth Amendment); Jordan Cozby & Ryan Thoreson, *Trans Voters Will Be Disenfranchised in 2020 Unless We Take Action*, ADVOCATE (June 26, 2019, 6:31 AM), <https://www.advocate.com/commentary/2019/6/26/trans-voters-will-be-disenfranchised-2020-unless-we-take-action> [<https://perma.cc/D8FR-LUXY>] (discussing, *inter alia*, the impact of felon disenfranchisement laws); Angela Sukurs, *How Strict Voter Registration Laws Will Affect Transgender Voters*, 20 PUB. INT. L. REP. 1 (2014) (discussing effect of voter ID laws).

a household income below \$10,000.¹¹⁸ Fifty-one percent of Black transgender women are currently or formerly homeless.¹¹⁹ Lifetime incarceration rates are also 47 percent among Black transgender people who, on account of the profound discrimination and social exclusion they suffer, are frequently profiled and incarcerated for poverty-related offenses like theft and survival sex work.¹²⁰ Black trans women also have reduced life expectancies, estimated to be as low as thirty-five years old.¹²¹

The socioeconomic status of Black transgender and cisgender women alike powerfully suggests that voting yields little to no material benefit. Black women voters lag behind their white female counterparts by every given metric, including poverty, education attainment, maternal mortality, and life expectancy.¹²² These realities beg the question: To what extent does civic engagement actually matter for Black women?

118. See SANDY E. JAMES ET AL., NAT'L CTR. FOR TRANSGENDER EQUALITY, THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 6, 141 (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf> [<https://perma.cc/5HZR-92K7>] [hereinafter JAMES ET AL., 2015 TRANS SURVEY] (finding that 21 percent of people with disabilities, 19 percent of Black respondents, and 18 percent of Latinx respondents reported a household income below \$10,000).

119. JAMES ET AL., 2015 TRANS SURVEY, *supra* note 118, at 174 (revealing that 30 percent of respondents experienced homelessness, and the rate was nearly twice as high among those who lost their job because of their gender identity or expression and transgender women of color).

120. JAMES ET AL., 2015 TRANS SURVEY, *supra* note 118, at 163; CATHERINE HANSENS ET AL., A ROADMAP FOR CHANGE: FEDERAL POLICY RECOMMENDATIONS FOR ADDRESSING THE CRIMINALIZATION OF LGBT PEOPLE AND PEOPLE LIVING WITH HIV 28 (2014), https://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/files/roadmap_for_change_full_report.pdf [<https://perma.cc/P29Z-HWBL>]; Chinyere Ezie, *Rainbow Police*, WASH. POST (June 20, 2019), <http://www.washingtonpost.com/graphics/2019/opinions/pride-for-sale/> [<https://perma.cc/RSH8-3GD5>] (noting that transgender women in New York State have been arrested for as little as waving, “wearing a skirt,” or “standing somewhere other than a bus stop or taxi stand”).

121. David Oliver & Rasha Ali, *Why We Owe Pride to Black Transgender Women Who Threw Bricks at Cops*, USA TODAY (June 24, 2019), <https://www.usatoday.com/story/opinion/voices/2019/06/24/pride-month-black-transgender-women-stonewall-marsha-p-johnson/1478200001/> [<https://perma.cc/3BC4-8MB4>] (estimating life expectancy of Black trans women to be thirty-five to thirty-seven years); see also Jen Richards, Opinion, *It's Time for Trans Lives to Truly Matter to Us All*, ADVOCATE (Feb. 18, 2015, 8:15 AM), <https://www.advocate.com/commentary/2015/02/18/op-ed-its-time-trans-lives-truly-matter-us-all> [<https://perma.cc/9LJ3-44FG>] (noting the role of homicide in Black trans deaths); Raquel Willis, *The Trans Obituaries Project: Honoring the Trans Women of Color Lost in 2019*, OUT MAG. (Nov. 20, 2019), <https://www.out.com/print/2019/11/20/trans-obituaries-project-honoring-trans-women-color-lost-2019#media-gallery-media-2> [<https://perma.cc/C5U7-RKP2>] (honoring trans victims of violence).

122. See generally *supra* Sections III.A.1–3.

B. Assumption Two: Voting Ensures that Black Women's Issues Are Prioritized Within the Democratic Party

Another common assumption about voting and political participation is that constituents' priorities will be taken into account when party leaders enact policies or set a legislative agenda.¹²³ Despite the strength of this assumption, in the case of Black women voters, little connection appears to exist.

1. The Legacy of the Clinton Presidency

Despite being dubbed the "First Black President" and cultivating broad support among Black Americans weary from the Bush and Reagan years, Bill Clinton's presidency wreaked havoc on the Black community—thrusting record numbers of Black Americans into prison or poverty.¹²⁴ Part of the insidiousness of the Clinton presidency was Clinton's personal mastery of doublespeak. As Michelle Alexander explains:

On the campaign trail, Bill Clinton made the economy his top priority and argued persuasively that conservatives were using race to divide the nation and divert attention from the failed economy. In practice, however, he capitulated entirely to the right-wing backlash against the civil-rights movement and embraced former president Ronald Reagan's agenda on

123. See, e.g., Wang, *supra* note 85, at 497 (explaining that support for a political party is linked to perceived utility in terms of policies).

124. See Harris-Lacewell & Albertson, *supra* note 86, at 652–53 (describing Black animosity towards Bush and Reagan as the salient feature behind Black electoral politics); Danielle Kurtzleben, *Understanding the Clintons' Popularity with Black Voters*, NPR (Mar. 1, 2016), <https://www.npr.org/2016/03/01/468185698/understanding-the-clintons-popularity-with-black-voters> [<https://perma.cc/NC5T-LV3N>] (describing origins of "First Black President" moniker and noting overwhelming Black support for Clinton); see also Michelle Alexander, *Why Hillary Clinton Doesn't Deserve the Black Vote*, NATION (Feb. 10, 2016), <https://www.thenation.com/article/archive/hillary-clinton-does-not-deserve-black-peoples-votes/> [<https://perma.cc/V47F-YJXA>] (discussing Clinton's harmful economic and criminal justice policies); Thomas Frank, *Bill Clinton's Crime Bill Destroyed Lives, and There's No Point Denying It*, GUARDIAN (Apr. 15, 2016), <https://www.theguardian.com/commentisfree/2016/apr/15/bill-clinton-crime-bill-hillary-black-lives-thomas-frank> [<https://perma.cc/C5Q5-4JP5>] (taking an in-depth look at criminal justice policies).

race, crime, welfare, and taxes—ultimately doing more harm to black communities than Reagan ever did.¹²⁵

Clinton aggressively courted Black voters on one hand, while promising to be “tough on crime,” “end welfare as we know it,” and “Make America Great Again” on the other—twenty years before Donald Trump popularized the phrase.¹²⁶

Once in office, President Clinton’s racial conservatism quickly won out as he signed into law the 1994 Crime Bill and sentencing laws that vastly expanded the system of mass incarceration.¹²⁷ Clinton also championed sweeping reforms that dismantled the welfare system, undermined the economic stability of countless Black families, and thrust record numbers of Black Americans into extreme poverty.¹²⁸ As political commentator Melissa Harris-Perry reported in 2008:

As Clinton performed Blackness, real Black people got poorer. The poorest African-Americans experienced an absolute decline in income, and they also became poorer relative

125. Alexander, *supra* note 124.

126. *Id.* (discussing campaign rhetoric); see also ADAM COHEN, SUPREME INEQUALITY: THE SUPREME COURT’S FIFTY-YEAR BATTLE FOR A MORE UNJUST AMERICA 73 (2020) (noting Clinton’s pledge to be a “new kind of Democrat”); Emma Margolin, ‘Make America Great Again’—Who Said It First?, NBC NEWS (Sept. 9, 2016), <https://www.nbcnews.com/politics/2016-election/make-america-great-again-who-said-it-first-n645716> [<https://perma.cc/UFM3-6BEL>] (mapping origins of the MAGA slogan); *User Clip: Bill Clinton: “Make American Great Again”*, CSPAN (Oct. 3, 1991) <https://www.c-span.org/video/?c4600782/user-clip-bill-clinton-make-america-great-again> [<https://perma.cc/8S5T-QLUW>]; Nathan J. Robinson, *The Death of Ricky Ray Rector*, JACOBIN MAG. (Nov. 5, 2016), <https://jacobinmag.com/2016/11/bill-clinton-rickey-rector-death-penalty-execution-crime-racism> [<https://perma.cc/K3TA-UJWC>] (discussing tough on crime messaging and noting that Bill Clinton left the campaign trail to personally oversee the execution of Ricky Ray Rector, a mentally disabled Black man accused of shooting an Arkansas police officer).

127. See, e.g., MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 140–77 (2010) (describing Clinton’s criminal justice policies); Frank, *supra* note 124 (explaining that in addition to the Crime Bill, Clinton adopted sentencing laws with a 100-to-1 crack to cocaine sentencing disparity over the pleas of Black civil rights activists).

128. See, e.g., Note, *Dethroning the Welfare Queen: The Rhetoric of Reform*, 107 HARV. L. REV. 126 (1994) (discussing President Clinton’s frontal attack on the welfare program and accompanying racialized rhetoric that typecast welfare recipients as lazy Black women who forego work in favor of state assistance); COHEN, *supra* note 126, at 42–43, 73–74 (discussing repercussions of Clinton’s welfare reform); Melissa Harris-Lacewell, *The Clinton Fallacy: Did Blacks Really Make Big Economic Gains During the ‘90s?*, SLATE (Jan. 24, 2008), <https://slate.com/news-and-politics/2008/01/black-americans-love-for-bill-clinton-is-built-on-a-fallacy.html> [<https://perma.cc/K5QV-JTCY>] (same).

to the poorest whites. The richest African-Americans saw an increase in income, but even the highest-earning Blacks still considerably lagged their white counterparts. Furthermore, the '90s witnessed the continued growth of the significant gap between Black and white median wealth.¹²⁹

Although President Clinton forged his path to the White House on the backs of Black voters, his policies heightened their misery—revealing that even when Black women are instrumental to a candidate's election, they rarely become a priority.¹³⁰

2. The Legacy of the Obama Presidency

President Barack Obama's momentous election in 2008 prompted political commentators to declare a new epoch of American racial progress. However, the impact of Obama's presidency on Black Americans remains an open question, in part because of Obama's own personal investment in the ideology of colorblindness.¹³¹

Although Black women voters fueled Obama's historic victory—delivering the White House, accompanied by majorities in the House and Senate—Obama placed racial justice initiatives on the back burner while pursuing initiatives he attested would “look out for the interests of every American.”¹³² During his first two years in office, Obama expended significant capital pursuing

129. Harris-Lacewell, *supra* note 128. Melissa Harris-Lacewell is now known professionally as Melissa Harris-Perry.

130. Although Clinton's policies on crime have since drawn widespread rebuke, in the 1990s they were not wholly without Black support. For analysis on the origins of Black support for the crime bill, see Alicia Montgomery, *Some Blacks Did Support Bill Clinton's Crime Bill. Here's Why*, NPR (Apr. 9, 2016), <https://www.npr.org/sections/codeswitch/2016/04/09/473648819/some-blacks-did-support-bill-clintons-crime-bill-heres-why> [<https://perma.cc/7TXD-4RLA>].

131. See Ian F. Haney López, *Is the "Post" in Post-Racial the "Blind" in Colorblind?*, 32 CARDOZO L. REV. 807 (2011) (discussing Obama's own post-racial politics); Keeanga-Yamahtta Taylor, *Barack Obama's Original Sin: America's Post-Racial Illusion*, GUARDIAN (Jan. 13, 2017), <https://www.theguardian.com/us-news/2017/jan/13/barack-obama-legacy-racism-criminal-justice-system> [<https://perma.cc/L86S-9DXG>] (same).

132. See Jocelyn Fyre & Michele L. Jawando, *Leveraging the Power of Black Women*, CTR. FOR AM. PROGRESS (July 31, 2017), <https://www.americanprogress.org/issues/women/news/2017/07/31/436903/leveraging-power-black-women/> [<https://perma.cc/5BTF-FJLT>] (reporting that Black women supported President Obama in 2008 and 2012 more forcefully than any other demographic group); Taylor, *supra* note 131 (noting unmet demands and frustrations of Black civil rights leaders).

two such initiatives: the Affordable Care and Patient Protection Act, which expanded healthcare access for uninsured Americans, along with important Wall Street reforms.¹³³ However, when Republicans swept both houses in the 2010 midterm elections, Obama permanently lost his legislative mandate.¹³⁴ In essence, Obama ran out of time for Black women voters.¹³⁵

With his legislative agenda neutered, President Obama spent much of his last year in office signing bills that renamed post offices or increased the mandate of federal law enforcement.¹³⁶ Even when Obama shifted his sights from pursuing legislation to exercising executive power, initiatives aimed at improving the lives of Black women did not garner much focus in his administration. Two of Obama's most important initiatives—

133. See, e.g., Elaine Kamarck, *The Fragile Legacy of Barack Obama*, BOS. REV. (Mar. 27, 2018), <http://bostonreview.net/politics/elaine-kamarck-fragile-legacy-barack-obama> [<https://perma.cc/X4JP-M8D7>]; *Wall Street Reform: The Dodd-Frank Act*, WHITE HOUSE: PRESIDENT BARACK OBAMA <https://obamawhitehouse.archives.gov/economy/middle-class/dodd-frank-wall-street-reform> (last visited Oct. 3, 2020) [<https://perma.cc/LPH8-FS72>]; see also Thomas C. Buchmueller et al., *Effect of the Affordable Care Act on Racial and Ethnic Disparities in Health Insurance Coverage*, 106.8 AM. J. PUB. HEALTH 1416, 1416–21 (2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4940635/> [<https://perma.cc/2UEE-GWA9>] (noting that the Affordable Care Act reduced, but failed to eliminate, racial disparities in health insurance access).

134. Kamarck, *supra* note 133 (noting that Republicans picked up a historic sixty-three congressional seats during the 2010 midterm elections, and swept state legislatures).

135. HARRIS, *supra* note 59; see also Taylor, *supra* note 131 (describing Obama's mixed legacy in the eyes of Black voters). Even the Patient Protection and Affordable Care Act now hangs in the balance thanks to partisan politics.

136. See, e.g., Act of Dec. 16, 2016, Pub. L. No. 114-312, 130 Stat. 1533 (designating a U.S. Postal Service facility in Florence, Arizona, as the “Adolfo ‘Harpo’ Celaya Post Office”); Act of July 1, 2016, Pub. L. No. 114-299, 130 Stat. 1512 (designating a U.S. Postal Service facility in Marietta, Georgia, as the “Marine Lance Corporal Squire ‘Skip’ Wells Post Office Building”); Eric Williams Correctional Officer Protection Act of 2015, Pub. L. No. 114-133, 130 Stat. 296-98 (2016) (issuing pepper spray to federal corrections officers); Northern Border Security Review Act, Pub. L. No. 114-267, 130 Stat. 1385, 1386 (2016) (expanding border operations); Federal Law Enforcement Self-Defense and Protection Act of 2015, Pub. L. No. 114-180, 130 Stat. 445-46 (2016) (authorizing furloughed law enforcement officers to retain government issued-firearms).

Although a few pieces of legislation aimed at addressing the indigenous community, conspicuously missing were statutes that addressed race justice beyond a bill that extended the Gullah/Geechee Cultural Heritage Corridor Commission for five additional years. See Act of July 9, 2015, Pub. L. No. 114-233, 130 Stat. 962 (amending the Gullah/Geechee Cultural Heritage Act); see also *Signed Legislation*, WHITE HOUSE: PRESIDENT BARACK OBAMA, <https://obamawhitehouse.archives.gov/briefing-room/signed-legislation> (last visited Aug. 8, 2020) [<https://perma.cc/M94V-XTTY>] (providing a complete catalog of the legislation passed under President Obama).

Deferred Action for Childhood Arrivals and a Department of Health and Human Services regulation expressly barring healthcare discrimination against transgender individuals—were principally aimed at supporting groups other than the Party’s loyal Black women voters.¹³⁷ The same can be said for My Brother’s Keeper, perhaps the only initiative rolled out by the Obama Administration that consciously centered around race.¹³⁸ The program, which devoted \$200 million dollars to improving the lives of men and boys of color and providing them mentorship and employment opportunities, *expressly excluded Black women and girls from participation*.¹³⁹

Although Obama’s Justice Department made some strides in the area of criminal justice reform and police accountability, the reform measures that the Obama administration pursued through agency action have been systematically unraveled by President Trump.¹⁴⁰ Ironically then, while one of the lessons of

137. See U.S. Dep’t of Homeland Security, Memorandum on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<https://perma.cc/N7EC-BZ6K>] (memorandum establishing the DACA program); 85 Fed. Reg. 37160–37248 (promulgating antidiscrimination regulations pursuant to § 1557 of the Affordable Care Act); see also *supra* Part II (discussing Latinx voting habits).

This is not to suggest that Black transgender people and Black immigrants (including those lacking status) do not exist. However, in perception as well as practice, the immigrants’ rights and LGBTQ rights movements in this country do not center around Black people. See, e.g., Jamila Osman, *Do Black Lives Matter in the Immigrant Rights Movement?*, AL JAZEERA (Dec. 10, 2017), <https://www.aljazeera.com/indepth/opinion/black-lives-matter-immigrant-rights-movement-171210095207677.html> [<https://perma.cc/PM5L-5U8R>]; Russell K. Robinson, *Justice Kennedy’s White Nationalism*, 53 U.C. DAVIS L. REV. 1027 (2019).

138. See Kimberlé Crenshaw, *The Girls Obama Forgot*, N.Y. TIMES (July 29, 2014), <https://www.nytimes.com/2014/07/30/opinion/Kimberl-Williams-Crenshaw-My-Brothers-Keeper-Ignores-Young-Black-Women.html> [<https://perma.cc/V24D-TARJ>] (describing program parameters); *We Are Our Brothers’ Keepers*, OBAMA FOUND., <https://www.obama.org/mbka/> (last visited Sept. 13, 2020) [<https://perma.cc/BW2C-8S72>].

139. Crenshaw, *supra* note 138 (calling the initiative “an abandonment of women of color, who have been among [Obama’s] most loyal supporters”); Vanessa Williams, *Obama’s Call to Lift up Black Women Gets Applause, but Some Want Specific Plan*, WASH. POST (Sept. 20, 2015), <https://www.washingtonpost.com/news/post-politics/wp/2015/09/20/obamas-call-to-lift-up-black-women-gets-applause-but-some-want-specific-plan/> [<https://perma.cc/22P3-7842>] (noting that more than a year after the launch of My Brothers’ Keeper, no comparable initiatives existed for Black women and girls).

140. Matt Zapotosky et al., *The Trump Administration Abandoned Obama-Era Police Reform Efforts. Now Critics Want Them Restored*, WASH. POST (June 1, 2020), <https://www.washingtonpost.com/national-security/the-trump-administration-abandoned-obama-era-police-reform-efforts-now-critics-want-them-restored>

the Obama presidency is the enduring relevance of race—as evidenced by the backlash he faced—it did not stop President Obama from embracing the ideology of post-racialism in ways that limited the capacity of his presidency to be a lasting vehicle for racial progress, particularly in the lives of Black women.¹⁴¹ The exclusion of Black women from presidential initiatives like *My Brother's Keeper* also shows that, in the moments where Obama overcame his politics of racial neutrality, Black women voters were not his priority, even though their support was essential to him securing the presidency.¹⁴²

3. Democratic President Joseph Biden's Record on Race and Gender

Joseph Biden secured the 2020 Democratic presidential nomination and was elected the 46th President of the United States in large part due to Black women voters.¹⁴³ Yet, his record on race and gender leaves much to be desired, mirroring the impoverished record of prior Democratic presidents like Clinton and Obama.¹⁴⁴ As a Senator, President Biden was one of the architects of federal sentencing laws that singled out (primarily Black) crack users for mandatory prison terms and 100-to-1 sentencing disparities relative to (primarily white) cocaine users.¹⁴⁵

/2020/06/01/4615bc1c-a413-11ea-b473-04905b1af82b_story.html [https://perma.cc/V52U-XZ7S].

141. See, e.g., Taylor, *supra* note 131; Kimberlé Williams Crenshaw, *How Colorblindness Flourished in the Age of Obama*, in *SEEING RACE AGAIN: COUNTERING COLORBLINDNESS ACROSS THE DISCIPLINES* 128-152 (2019); Richard Marsico, *The Harms of Race-Neutrality in Obama-Era Affordable Housing Policy*, 9 *GEO. J.L. & MOD. CRITICAL RACE PERSP.* 175 (2017).

142. Crenshaw, *supra* note 138.

143. See, e.g., Delmore, *supra* note 56; Ross, *supra* note 76; Taylor Crumpton, Opinion, *Black Women Saved the Democrats. Don't Make Us Do It Again*, *WASH. POST* (Nov. 7, 2020), <https://www.washingtonpost.com/outlook/2020/11/07/black-women-joe-biden-vote/> [https://perma.cc/YC57-UDEG].

144. See Crumpton, *supra* note 143 (describing Biden's mixed racial justice record); Eric Levitz, *Will Black Voters Still Love Biden When They Remember Who He Was?*, *N.Y. MAG.: INTELLIGENCER* (Mar. 12, 2019), <https://nymag.com/intelligencer/2019/03/joe-biden-record-on-busing-incarceration-racial-justice-democratic-primary-2020-explained.html> [https://perma.cc/QAY7-J695] (same); Keeanga-Yamahtta Taylor, *Joe Biden, Kamala Harris, and the Limits of Representation*, *NEW YORKER* (Aug. 24, 2020), <https://www.newyorker.com/news/our-columnists/joe-biden-kamala-harris-and-the-limits-of-representation> [https://perma.cc/P2MZ-PLCD] (calling Biden “a cultural warrior who was particularly adept at exploiting racial resentment for political gain”).

145. Levitz, *supra* note 144; Ryan Cooper, *Joe Biden's Record on Race Is Even Worse than Kamala Harris Lets on*, *WEEK* (July 1, 2019), <https://theweek.com>

President Biden also helped author the 1994 Crime Bill, which led to an explosion in Black mass incarceration after the Clinton era.¹⁴⁶ Biden opposed busing initiatives aimed at integrating American schools.¹⁴⁷ Biden also routinely makes statements denigrating the Black community in racialized gaffes.¹⁴⁸

President Biden also has a mixed record on issues related to gender. Although Biden is credited for supporting the Violence Against Women Act, he stands accused of sexually assaulting his staffer Tara Reade.¹⁴⁹ Biden's sharp rebuke of Black professor Anita Hill during the 1991 confirmation hearings for Clarence Thomas when he served as Chairman of the Senate Judiciary Committee also prevented a full vetting of her sexual harassment allegations and cleared Justice Thomas's path to the Supreme Court.¹⁵⁰

While enthusiasm for Biden among Black voters is often tepid, Biden garnered broad support from Black women primary voters who correctly judged him to be the candidate primed to

/articles/850349/joe-bidens-record-race-even-worse-than-kamala-harris-lets [https://perma.cc/5HWX-RDYP].

146. Sheryl Gay Stolberg & Astead W. Herndon, *Lock the S.O.B.s Up: Joe Biden and the Era of Mass Incarceration*, N.Y. TIMES (June 25, 2019), <https://www.nytimes.com/2019/06/25/us/joe-biden-crime-laws.html> [https://perma.cc/F43L-PCUP].

147. See Levitz, *supra* note 144.

148. See, e.g., Jason Lemon, *In Private Meeting, Joe Biden Said Part of Education Problem in Black Communities Is That 'Parents Can't Read or Write Themselves'*, NEWSWEEK (Feb. 20, 2020), <https://www.newsweek.com/private-meeting-joe-biden-said-part-education-problem-black-communities-that-parents-cant-1487177> [https://perma.cc/NJU9-VLWA]; Averi Harper, *After Joe Biden's Comments on Diversity in Black Community, Some Worry Blunders Could Impact Support*, ABC NEWS (Aug. 8, 2020), <https://abcnews.go.com/Politics/joe-bidens-comments-diversity-black-community-worry-blunders/story?id=72246145> [https://perma.cc/7QBC-3ESK]; Joan Vennoch, *How Many Insults Are Black Voters Supposed to Take from Joe Biden?*, BOS. GLOBE (Aug. 10, 2020), <https://www.bostonglobe.com/2020/08/10/opinion/how-many-insults-are-black-voters-supposed-to-take-joe-biden/> [https://perma.cc/2PVZ-LF3L].

149. Lisa Lerer & Sydney Ember, *Examining Tara Reade's Sexual Assault Allegation Against Joe Biden*, N.Y. TIMES (Apr. 12, 2020), <https://www.nytimes.com/2020/04/12/us/politics/joe-biden-tara-reade-sexual-assault-complaint.html> [https://perma.cc/QL9W-7FQP]. Reade has also accused Biden of terminating her employment in retaliation for filing a complaint, though the veracity of these allegations is still unknown.

150. See, e.g., Anita Hill, *Let's Talk About How to End Sexual Violence*, N.Y. TIMES (May 9, 2019), <https://www.nytimes.com/2019/05/09/opinion/anita-hill-sexual-violence.html> [https://perma.cc/QL9W-7FQP]; Jane Mayer, *What Joe Biden Hasn't Owned up to About Anita Hill*, NEW YORKER (Apr. 27, 2019), <https://www.newyorker.com/news/news-desk/what-joe-biden-hasnt-owned-up-to-about-anita-hill> [https://perma.cc/QX5C-REPR]. Thomas replaced Justice Thurgood Marshall, and although Biden ultimately voted against him, the damage was already done.

defeat Trump.¹⁵¹ Whether the Biden Administration's approach to racial and gender justice will extend past mere platitudes remains to be seen. Two forces may disrupt this trend: the first is Biden's historic selection of Kamala Harris, a woman of Black and South Asian descent, to be the nation's first female vice president following a sustained advocacy campaign by people eager to see a Black woman represented on the ticket.¹⁵² The second is the groundswell of support racial justice causes received from white voters following the police lynching of George Floyd, though signs suggest support for these causes may already be waning.¹⁵³

However, pessimism about the Biden-Harris ticket also persists.¹⁵⁴ Drawing a through line between the presidential

151. Jonathan Martin & Astead W. Herndon, *The Black Vote Is Not Monolithic: 2020 Democrats Find Split Preferences in South Carolina*, N.Y. TIMES (June 22, 2019), <https://www.nytimes.com/2019/06/22/us/politics/black-voters-south-carolina-democrats-primary.html> [<https://perma.cc/8EUC-957A>] (noting Black voters' divided opinions about Biden, as well as the common perception that he was "the play-it-safe choice"); Theodore R. Johnson, *Why Do Black Voters Support Biden? They Just Want to Beat Trump*, WASH. POST (May 31, 2019), https://www.washingtonpost.com/outlook/why-do-black-voters-support-biden-they-just-want-to-beat-trump/2019/05/31/74b37ca8-7b33-11e9-8ede-f4abf521ef17_story.html [<https://perma.cc/6L8U-QDM5>] (describing Black Democratic voters as pragmatic); Elie Mystal, *Black Voters Didn't Vote for Biden in South Carolina Because They Lack Information*, NATION (Mar. 2, 2020), <https://www.thenation.com/article/politics/biden-black-vote/> [<https://perma.cc/NPJ9-N6VV>] (confirming that Black voters were looking for a candidate likely to unseat Trump). A broader discussion of this tendency toward "caretaker voting" appears *infra* Part IV.

152. See, e.g., Jasmine Wright et al., *I Want To See Myself: Black Women Mount Public and Private Campaign for Biden to Pick a Black Woman Running Mate*, CNN (June 20, 2020), <https://www.cnn.com/2020/06/20/politics/black-woman-biden-running-mate/index.html> [<https://perma.cc/P9KT-FX3Z>]; Joe Garofoli, *Black Lives Matter Co-Creator: Biden Must Choose a Black Woman for VP*, S.F. CHRON. (Aug. 1, 2020), <https://www.sfchronicle.com/politics/article/Black-Lives-Matter-co-creator-Biden-must-choose-15450363.php> [<https://perma.cc/L8M5-KSFX>]. The import of Kamala Harris's selection as vice president is discussed further *infra* Part V.

153. See Kim Parker et al., *Amid Protests, Majorities Across Racial and Ethnic Groups Express Support for the Black Lives Matter Movement*, PEW RESEARCH CTR. (June 12, 2020), <https://www.pewsocialtrends.org/2020/06/12/amid-protests-majorities-across-racial-and-ethnic-groups-express-support-for-the-black-lives-matter-movement/> [<https://perma.cc/J7HS-65Q9>] (noting initial increase in support for the Black Lives Matter movement among white suburban voters); Aaron Blake, *A Slip in Support for Black Lives Matter?*, WASH. POST (Aug. 29, 2020), <https://www.washingtonpost.com/politics/2020/08/29/slip-support-black-lives-matter/> [<https://perma.cc/APK8-STZH>] (noting a decline in support among the same demographic group several months later).

154. See, e.g., Paulina Cachero, *Black Lives Matter Co-Founder Alicia Garza Says Joe Biden Is 'Far Away' from Changes Democratic Voters Want*, TIME (July 16, 2020), <https://time.com/5867282/alicia-garza-black-lives-matter-biden/> [<https://>

candidacies of Clinton, Obama, and Biden, Keeanga-Yamahtta Taylor writes: “Too often . . . in Black politics, symbolism has stood in for making a meaningful difference in the lives of Black people.”¹⁵⁵

C. Assumption Three: Voting Empowers the Supreme Court to Act as a Guardian of Constitutional Democracy

Year after year, a key justification for electoral participation is the future of judicial appointments, particularly to the Supreme Court.¹⁵⁶ Here, the assumption appears to be that voting in presidential elections can fend off a conservative takeover of the Supreme Court and preserve the Court’s institutional role as a guardian of civil and constitutional rights.¹⁵⁷ This assumption falters as well because it misunderstands the status quo. Specifically, it fails to appreciate that—even prior to the confirmation of conservative ideologue Amy Coney Barrett—the Supreme Court had already abdicated its role in advancing and protecting civil rights in a manner that cannot easily be undone.¹⁵⁸

1. The Supreme Court’s Open Hostility Toward Voting Rights

The Court’s decision to relinquish its role in enforcing civil rights is no more apparent than in the area of voting rights. In *Crawford v. Marion County Election Board*, a decision authored

perma.cc/3BXW-U5VP] (voicing doubt about Biden’s platform); Rebecca Morin, *Young Black Voters Say They Aren’t Enthusiastic About a Joe Biden Presidency*, USA TODAY (July 8, 2020), <https://www.usatoday.com/story/news/politics/elections/2020/07/08/joe-biden-young-black-voters-say-not-excited-candidate/5344135002/> [https://perma.cc/M5XR-JZ49] (noting Black voters’ ongoing concerns); Taylor, *supra* note 144 (questioning whether the Biden-Harris ticket will usher in racial progress).

155. Taylor, *supra* note 144.

156. *Top Voting Issues in 2016 Election*, PEW RESEARCH CTR. (July 7, 2016), <https://www.pewresearch.org/politics/2016/07/07/4-top-voting-issues-in-2016-election/> [https://perma.cc/8WTB-JP4M] (noting that Supreme Court appointments were deemed “very important” to a majority of voters surveyed in 2016).

157. *Id.*

158. Indeed, in *Supreme Inequality*, which tracks nearly fifty years of Supreme Court decisions, Adam Cohen argues that apart from a brief blip in the 1960s when Earl Warren served as Chief Justice of the Court and was buoyed by a strong liberal majority, the Supreme Court has stood as an obstacle to meaningful justice. See COHEN, *supra* note 126.

by now-retired liberal Justice John Paul Stevens, the Supreme Court rebuffed a challenge to Indiana's voter identification law brought by indigent voters who argued that the state ID requirement was tantamount to a poll tax.¹⁵⁹ The Court acknowledged that one of the express purposes of the law was to disenfranchise voters.¹⁶⁰ However, applying a standard that cannot even be described as rational basis review, the Court reasoned that the law survived scrutiny because it served a secondary purpose too: "protecting the integrity and reliability of the electoral process."¹⁶¹

Five years later in *Shelby County v. Holder*, the Supreme Court delivered a stunning blow to voting rights activists by dismantling one of the most important provisions of the Voting Rights Act.¹⁶² In tandem with Section 5 of the Act, the Section 4 coverage formula deemed unconstitutional by the Court subjected nine states (including Alabama) with a demonstrated track record of voter disenfranchisement to federal oversight.¹⁶³ The Court ruled that Section 4 violated the principle of "equal sovereignty" because it subjected states like Alabama to special scrutiny based on "decades-old data" and "decades-old problems."¹⁶⁴ In reaching the conclusion that supervision was no longer necessary, however, the Court disregarded a substantial body of evidence regarding the ongoing need for federal oversight over elections that appeared in the Congressional record.¹⁶⁵

In the years since *Crawford* and *Shelby County* were decided, voter suppression has exploded across the country as legislators have taken the Supreme Court's decisions in *Crawford*

159. 553 U.S. 181, 189–91 (2008).

160. *Id.* at 203.

161. *Id.* at 204 (internal citations and quotation marks omitted). Notably, at the time of the *Crawford* decision, and even in the present day, cases of documented voter fraud at the polls are virtually non-existent. As one commentator explained, people reporting being kidnapped by aliens was equivalent to people reporting being impersonated at the polls. COHEN, *supra* note 126, at 180 (citing John S. Ahlquist et al., *Alien Abduction and Voter Impersonation in the 2012 U.S. General Election: Evidence from a Survey List Experiment*, 13 ELECTION L.J. 460, 460 (2014)).

162. 570 U.S. 529, 557 (2013).

163. *Id.* at 537, 544 (describing the preclearance process).

164. *Id.* at 552–53.

165. *Id.* at 563–65 (Ginsburg, J., dissenting); *see also* COHEN, *supra* note 126, at 184–85 (describing the expansive record concerning necessity before the Court, and that the "equal sovereignty" doctrine was legal fiction on the part of Chief Justice Roberts).

and *Shelby* as a permission slip to disenfranchise Black voters and other Democratic constituencies.¹⁶⁶ This political gamble was not accidental: since 2013, the Supreme Court has declined to engage in meaningful oversight of the electoral process even as voter suppression intensifies—delivering four losses to voting rights advocates in 2020 alone.¹⁶⁷ For instance, in *Husted v. A. Philip Randolph Institute*, the Court upheld an Ohio statute that purged duly-registered voters who failed to vote in a recent election, endorsing another powerful tool of voter suppression.¹⁶⁸ In *Rucho v. Common Cause*, the Court declared that partisan gerrymandering is outside the purview of federal courts, a decision that will have tremendous lasting significance on Black voters since racial gerrymandering and partisan gerrymandering are hard to disentangle.¹⁶⁹

Given the steady creep of voter suppression laws, Black women's strong voter turnout speaks to their determination to participate in the political process, notwithstanding the Supreme Court's growing hostility towards disenfranchised minorities.

166. For scholarship documenting the astronomic rise of voter suppression laws and their racialized impact, see generally CAROL ANDERSON, ONE PERSON, NO VOTE: HOW VOTER SUPPRESSION IS DESTROYING OUR DEMOCRACY (Bloomsbury Publ'g ed., 2018); COHEN, *supra* note 126, at 179–92; Keith G. Bentele & Erin E. O'Brien, *Jim Crow 2.0? Why States Consider and Adopt Restrictive Voter Access Policies*, 11 PERSP. POL. 1088 (2013).

167. See, e.g., Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205, 1207–08 (2020) (blocking injunction that extended the deadline for absentee votes to be counted in Wisconsin due to the pandemic). For a summary of the Court's other 2020 decisions, see Emmett Wtikovsky-Eldred & Nina Totenberg, *As Concerns About Voting Build, the Supreme Court Refuses to Step in*, NPR (July 25, 2020, 7:00 AM), <https://www.npr.org/2020/07/25/895185355/as-concerns-about-voting-build-the-supreme-court-refuses-to-step-in> [<https://perma.cc/XW3C-N9MR>]; Adam Liptak, *A More Liberal Supreme Court? Not When It Comes to Voting Rights*, N.Y. TIMES (July 18, 2020), <https://www.nytimes.com/2020/07/18/us/supreme-court-voting-rights.html> [<https://perma.cc/M8M5-KASL>].

168. 138 S. Ct. 1833, 1842–43 (2018) (holding that voter purges were lawful under the National Voter Registration Act even where non-voting was a but-for-cause of the purge). *But see id.* at 1863–65 (Sotomayor, J., dissenting) (condemning the majority for authorizing voter suppression).

169. 139 S. Ct. 2484, 2508 (2019). In addition to neutering the ability of the federal judiciary to supervise the fairness of elections, the Court has obliterated safeguards preventing corporations and the wealthy elite from exerting undue influence on the political process. See, e.g., *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) (bestowing First Amendment speech rights on corporations while likening money to speech). *Citizens United* is the crowning achievement in a decades-long effort by conservatives to make wealth and fundraising determinative in elections. Indeed, the Court's message to poor disenfranchised voters seems clear: you are on your own.

2. The Supreme Court's Stagnant Jurisprudence on Racial Justice and Constitutional Torts

Voting is not the only area where the Court has shown cynicism towards racial justice and civil rights. In addition to giving plaintiffs alleging racial discrimination a heightened burden,¹⁷⁰ strict scrutiny has been a wolf in sheep's clothing in the Court's Equal Protection cases—one that the Court has used to attack initiatives aimed at remediating structural racism and inequality. The Court has repeatedly held that affirmative-action programs intended to redress historic discrimination are constitutionally suspect, but sustained them for the purpose of promoting “diversity” or non-remedial, cross-racial learning.¹⁷¹ Even here, the Court has imposed strict limits: in *Parents Involved in Community Schools v. Seattle School District No. 1*, the Supreme Court ruled that an initiative aimed at mass integration of Seattle-area schools with “sufficient numbers so as to avoid . . . any kind of specter of exceptionality,” violated Equal Protection and the legacy of *Brown v. Board of Education*.¹⁷²

By ruling that diversity is a compelling state interest but remediation of discrimination or “racial balancing” is not, the Court has posited that the core permissible aim of affirmative action is to provide cross-racial educations to non-minority students. The Supreme Court has also gotten dangerously close to mandating a jurisprudence of colorblindness, despite the ever-present footprint of systemic racism on this country.¹⁷³

170. See *Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media*, 140 S. Ct. 1009, 1019 (2020) (holding that racial discrimination claims brought under 42 U.S.C. § 1981 were subject to a higher burden of proof and causation than a plausible showing that discrimination played some role).

171. See *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 308–09 (2013) (summarizing Court's jurisprudence and stating that “[r]edressing past discrimination” was not a compelling state interest in the context of education).

172. *Parents Involved in Cmty. Schs. v. Seattle Sch. Distr. No. 1*, 551 U.S. 701, 727, 747 (2007); see also *id.* at 748 (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”).

173. See *Parents Involved*, 551 U.S. at 730, 743 (affirming beneficial racial classifications are subject to strict scrutiny and voicing an intention to treat race as irrelevant to American life). The jurisprudence of colorblindness and its harms were succinctly described in a 2019 article by scholar and professor Dorothy Roberts. See Dorothy E. Roberts, *2018 Term – Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 77–85 (2019). As Roberts explains:

Colorblindness is a conservative strategy that shields white privilege through a rationalization that appears raceneutral on its face. It emerged after the civil rights movement formally ended Jim Crow in the South and de jure segregation in the North. . . . “[M]uch as Jim Crow racism served

The Court's jurisprudence on constitutional torts has been equally rights-restrictive, due in part to the Court's aggrandizement of qualified immunity, a judge-made doctrine that, in the Court's own words, immunizes "all but the plainly incompetent or those who knowingly violate the law."¹⁷⁴ Pursuant to the doctrine, governmental officers who violate an individual's statutory or constitutional rights can only be held liable for damages in cases where they "violate clearly established statutory or constitutional rights of which a reasonable person would have known."¹⁷⁵ But in *Pearson v. Callahan*, a unanimous Court ruled that judges do not have to address the legality of a defendant's actions prior to granting immunity so long as they conclude the background law was not "clearly established."¹⁷⁶ The *Pearson* decision continues to have significant reverberations because it has led courts to abandon their traditional function of "say[ing] what the law is" and ossified recognition of constitutional rights in many jurisdictions.¹⁷⁷

as the glue for defending a brutal and overt system of racial oppression in the pre-Civil Rights era, color-blind racism serves today as the ideological armor for a covert and institutionalized system in the post-Civil Rights era." Colorblind theory argues that because society has conquered racism and people of color and white people have full equality, social policies should not take account of race.

Id. at 77 (footnotes omitted) (citing EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES* 3 (2003)).

174. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1867 (2017) (citation omitted).

175. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

176. *Id.* at 236 (holding that claims could be dismissed so long as the law at the time was not clearly established). Prior to *Pearson*, courts evaluating qualified immunity engaged in a two-step test that asked whether (1) the defendant's actions violated a Constitutional or statutory right and (2) whether the law was clearly established such that a reasonable person should have known of the illegality of their actions. *Id.* at 232 (citation omitted).

By addressing the legality of a defendant's actions as a first step, qualified immunity decisions under the pre-*Pearson* regime reliably advanced understandings of the law. *See, e.g.*, Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 17 (2015) (explaining that advancement of the law was the express rationale for the prior rule requiring sequencing); Greg Sobolski & Matt Steinberg, *An Empirical Analysis of Section 1983 Qualified Immunity Actions and Implications of Pearson v. Callahan*, 62 STAN. L. REV. 523, 538–39 (2010) ("[The pre-*Pearson* regime of] mandatory sequencing . . . resulted in a proliferation of rights-affirming holdings . . .").

177. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); *see also* Nielson & Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 33–42 (describing the asymmetries and constitutional stagnation that resulted in the wake of the *Pearson* decision). Although the principle of constitutional avoidance was cited by the

The Court also expanded the footprint of qualified immunity in a series of recent cases involving victims of police brutality and unlawful law-enforcement action.¹⁷⁸ These decisions found that overly generalized descriptions of a constitutional right and even the slightest factual variations between precedents can be sufficient to render the law not clearly established and trigger the immunity defense.¹⁷⁹

The Court has similarly immunized federal law enforcement officers from most constitutional claims by launching a frontal attack on *Bivens v. Six Unknown Agents*, the case in which the Court found that an implied cause of action exists against federal officials who violate the Constitution.¹⁸⁰ In *Ziglar v. Abbasi*, the Court rejected a *Bivens* claim brought by federal detainees challenging their conditions of confinement under the Eighth Amendment,¹⁸¹ despite approving a federal prisoner's Eighth Amendment claim nearly three decades

Pearson majority as a rationale for its decision, *Pearson*, 555 U.S. at 241, the decision still creates a catch-22 for plaintiffs who stand likely to lose simply because of the decline in precedential rulings they can cite as authority for the proposition their rights are established.

178. See, e.g., Will Baude, *The Supreme Court's Double Standard for Qualified Immunity Cases*, WASH. POST (Aug. 24, 2017, 12:06 PM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/04/24/the-supreme-courts-double-standard-for-qualified-immunity-cases/> [<https://perma.cc/Z4PW-LRUG>].

179. See, e.g., *City of Escondido v. Emmons*, 139 S. Ct. 500, 503–04 (2019) (reversing appellate decision that premised denial of qualified immunity on the insufficiently particularized “right to be free of excessive force”); *Mullenix v. Luna*, 577 U.S. 7, 11–14 (2015) (conferring qualified immunity to officer who shot and killed fleeing motorist because prohibition on using deadly force against “fleeing felons” did not clearly govern fleeing felons in vehicles); *Stanton v. Sims*, 571 U.S. 3, 4, 7 (2013) (officer who assaulted homeowner while entering her property in pursuit of a Black man who looked “suspicious” did not violate clearly established law); *Reichle v. Howards*, 566 U.S. 658, 668–69 (2012) (granting qualified immunity to officer accused of retaliatory arrest, without clarifying what the law is). The Court also cast doubt on the ability of anyone but the Supreme Court to issue controlling decisions on the law's contours. *Carroll v. Carman*, 574 U.S. 13, 17 (2014) (“Assuming for the sake of argument that a controlling circuit precedent could constitute clearly established federal law . . .”).

180. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 395–97 (1971) (finding that plaintiff could sue federal law enforcement officers who violated the Fourth Amendment using an implied damages remedy). For decades, *Bivens* actions have been essential to the protection of civil rights because no express statutory mechanism exists for holding federal officials accountable to the U.S. Constitution. See Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 CAL. L. REV. 933, 935 (2019) (“[Furnishing] remedies for official wrongdoing, including constitutional violations, is as old as the Constitution itself.”).

181. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1869 (2017).

earlier in *Carlson v. Green*.¹⁸² In denying the remedy, the Court declared, “expanding the *Bivens* remedy is now a ‘disfavored’ judicial activity.”¹⁸³ Likewise, in *Hernandez v. Mesa*, the Court denied a *Bivens* remedy to a Mexican family whose son was shot and killed by Border Patrol officials on the ground that their Fourth Amendment seizure claim arose in a “new context.”¹⁸⁴

The Court has also given a wide berth to law enforcement action in ways that have legitimated police brutality and expanded the system of mass incarceration.¹⁸⁵ In the past decade alone, the Supreme Court held in *Plumhoff v. Rickard* that officers who shot an unarmed Black motorist fifteen times acted reasonably because the motorist attempted to flee.¹⁸⁶ In *Heien v. North Carolina*, the Court authorized arrests based on “reasonable mistakes of law.”¹⁸⁷ Then, in *Utah v. Strieff*, the Court held that police officers who arbitrarily stop and frisk individuals could use any evidence recovered during an illegal search so long as an intervening act—here, a warrants check—could justify the stop.¹⁸⁸

Collectively, these decisions have had the effect of ensuring that the Constitution and its guarantees are neither self-executing nor judicially enforceable.¹⁸⁹ For victims of police brutality

182. *Carlson v. Green*, 446 U.S. 14 (1980) (authorizing Eighth Amendment *Bivens* claim for prisoner’s medical neglect).

183. *Ziglar*, 137 S. Ct. at 1857 (citation omitted) (reviewing long line of recent Supreme Court cases that have curtailed access to *Bivens* remedies).

184. *Hernandez v. Mesa*, 140 S. Ct. 735, 743–44 (2020). In explaining why Hernandez’s Fourth Amendment claim was different than the one taken up in *Bivens*, the Court stated without irony that one episode of unlawful policing took place at the border, and *Bivens* occurred in New York. *Id.*

185. See generally ALEXANDER, *supra* note 126, 97–139 (chronicling the Supreme Court’s complicity in the rise of mass incarceration).

186. 572 U.S. 765, 768, 770, 777–78 (2014). The motorist and his passenger, who were stopped for having a broken headlight, died at the scene, but the Court proceeded to dismiss their decedents’ Fourth Amendment Excessive Force claim. *Id.*

187. 574 U.S. 54, 60–62 (2014) (“[R]easonable suspicion [for purposes of an arrest] can rest on a mistaken understanding of the scope of a legal prohibition.”).

188. 136 S. Ct. 2056, 2061–63 (2016) (holding that fruit of the poisonous tree doctrine did not apply when man who was stopped without reasonable suspicion was later found to have an open arrest warrant for a traffic violation).

189. While qualified immunity and the demise of *Bivens* remedies has not limited the availability of injunctive claims, other Court decisions have. See *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324–25 (2015) (rejecting equitable claim seeking to enforce federal Medicaid statute). The Court has also curtailed access to meaningful injunctive relief through decisions like *City of Los Angeles v. Lyons*, 461 U.S. 95, 107–08 (1983), which held a chokehold victim lacked standing to challenge the LAPD’s chokehold policy because he was not likely to be subjected to a chokehold again.

and law enforcement abuses, it is difficult to see constitutional rights as more than mere words on paper.¹⁹⁰

3. The Supreme Court's Impoverished Jurisprudence on Reproductive Rights

Despite anxious commentary about the future of abortion rights and *Roe v. Wade*, the constitutional right to abortion has been a nullity for poor Black women since the Supreme Court's 1977 and 1980 decisions in *Maher v. Roe* and *Harris v. McRae*.¹⁹¹ In *Maher*, the Court upheld a state welfare regulation that denied Medicaid coverage for abortions unless a physician certified that the procedure was medically necessary.¹⁹² Then, in *Harris*, the Court upheld the federal Hyde Amendment, which banned Medicaid recipients from receiving abortion care through their insurance, except in cases of rape, incest, or life endangerment.¹⁹³

The Court openly acknowledged that these laws were intended to prevent indigent women from receiving abortions, but it was untroubled by this result. Instead, the Court voiced general support for laws restricting abortion, stating that it was permissible for legislators to “encourage[] childbirth except in the most urgent circumstances”¹⁹⁴ and to make “a value judgment favoring childbirth over abortion . . . by the allocation of public funds.”¹⁹⁵ The Court also held that states could not be expected to make up the shortfall in federal funding, effectively putting

190. See, e.g., Fallon, *supra* note 180, at 951–61. Indeed, the doctrine of qualified immunity has strayed so far that even Justice Clarence Thomas questioned the validity of the doctrine during the Supreme Court's 2019 Term. See *Baxter v. Bracey*, 140 S. Ct. 1862, 1864 (2020) (Thomas, J., dissenting from denial of petition for certiorari) (discussing origins and purpose of § 1983 and voicing “strong doubts” about the Court's decision to authorize a qualified immunity defense).

191. *Maher v. Roe*, 432 U.S. 464 (1977); *Harris v. McRae*, 448 U.S. 297 (1980).

192. *Maher*, 432 U.S. at 473–74.

193. *Harris*, 448 U.S. at 321–26. While initial versions of the Amendment did not include a rape or incest exception, by 1980 the Amendment read:

[N]one of the funds provided by this joint resolution shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest when such rape or incest has been reported promptly to a law enforcement agency or public health service.

Id. at 302 (alteration in original) (quoting Joint Resolution of Nov. 20, 1979, Pub. L. No. 96-123, § 109, 93 Stat. 926 (1979)).

194. *Id.* at 324–26.

195. *Maher*, 432 U.S. at 474.

abortion out of reach for poor women.¹⁹⁶ Explaining its decision to turn its back on this disadvantaged group, the Court stated glibly that poverty is not a “suspect classification.”¹⁹⁷

While the Court’s recent decisions in *Whole Woman’s Health v. Hellerstedt*¹⁹⁸ and *June Medical v. Russo*¹⁹⁹ could be cited as a triumph of liberalism and the rule of law, they followed decisions where the Court expressed apathy about the rise of mandatory waiting periods, parental consent and notification requirements, fetus burial mandates, and other laws that inconvenience or chill abortion seekers.²⁰⁰ As such, the Court has merely guarded abortion for those with the privilege and

196. *Harris*, 448 U.S. at 309–11. Importantly, the Affordable Care Act did nothing to relieve these coverage exclusions. Instead, it classified abortions as a non-essential healthcare benefit that healthcare plans under the ACA need not cover. It declared that health care providers and facilities who consciously objected to abortions—for religious reasons or otherwise—could not face penalties. It also maintained the broad footprint of the Hyde Amendment by banning the use of federal funds or even insurance risk for abortion care under community-based healthcare plans. *The Patient Protection and Affordable Care Act Abortion Provisions*, U.S. SENATE DEMOCRATS, <https://www.dpc.senate.gov/healthreformbill/healthbill18.pdf> (last visited July 27, 2020) [<https://perma.cc/6NZD-ZPYR>].

197. *Harris*, 448 U.S. at 322–23. True to form, the Supreme Court has ruled almost uniformly against plaintiffs seeking to vindicate rights to economic justice or workers’ rights since the end of the Warren Court in 1969. COHEN, *supra* note 126, at chs. 2, 6. In the Roberts Court, the *Bostock* decision, which bestowed discrimination protections to LGBTQ+ workers into the orbit of Title VII, is a rare exception. *Id.*; see also Aimee Minbiolo, *Court Ruling During Pride Month Cause for Celebration, Caution*, DARTMOUTH NEWS (June 29, 2020), <https://news.dartmouth.edu/news/2020/06/court-ruling-during-pride-month-cause-celebration-caution> [<https://perma.cc/ZY3D-3478>] (cautioning against a jurisprudence of “pink-washing” whereby LGBTQ+ rights are uplifted to “compensate for lack of progress in other areas”).

198. 136 S. Ct. 2292 (2016).

199. 140 S. Ct. 2103 (2020).

200. See, e.g., *H. L. v. Matheson*, 450 U.S. 398 (1981) (upholding mandatory parental notification law that imposed criminal penalties on providers who failed to comply); *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989) (upholding law that banned use of state funds or facilities even for medically necessary abortions); *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320 (2006) (demurring on the constitutionality of parental notification laws once again); *Planned Parenthood v. Casey*, 505 U.S. 833, 887, 899 (1992) (holding that waiting periods and parental consent laws did not unduly burden the constitutional right to abortion); *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780 (2019) (upholding law that required fetuses be cremated or buried identical to a deceased person). Commentators have also noted that Chief Justice Roberts’ controlling opinion in *June Medical* rebuked the balancing test for determining when abortion restrictions are unconstitutionally relied upon just four years earlier in *Whole Woman’s Health*. Melissa Murray, *The Supreme Court’s Abortion Decision Seems Pulled From the ‘Casey’ Playbook*, WASH. POST (June 29, 2020, 6:51 PM), <https://www.washingtonpost.com/opinions/2020/06/29/problem-with-relying-precedent-protect-abortion-rights/> [<https://perma.cc/KD9T-23MV>].

wherewithal to navigate a herculean web of state restrictions and pay for services out of pocket—a policy with pronounced racial impacts.²⁰¹ The Supreme Court’s recent decisions have also put family planning out of reach of the working poor by authorizing employers with moral objections to exclude contraception from their insurance plans.²⁰²

4. Shiny Baubles: The Supreme Court’s Deceptive Jurisprudence on Other Social Issues

Thanks to the growing influence of conservatism on the Supreme Court and the recent confirmation of Justice Barrett, many of the Court decisions celebrated by progressives may be Pyrrhic victories in the end.²⁰³ For instance, although the Supreme Court has delivered victories to LGBTQ+ rights advocates in five successive cases,²⁰⁴ the Court has simultaneously

201. See JESSICA ARONS & MADINA AGÉNOR, *SEPARATE AND UNEQUAL: THE HYDE AMENDMENT AND WOMEN OF COLOR* (2010), https://cdn.americanprogress.org/wp-content/uploads/issues/2010/12/pdf/hyde_amendment.pdf?_ga=2.44294244.13815473.1602651583-27642816.1602651583 [<https://perma.cc/SD54-ARA4>] (discussing the disparate impact of abortion funding exclusions on Black women); Elizabeth Jones, *Looking Back to Move Forward: An Intersectional Perspective on Harris v. McRae*, 1 GEO. J.L. & MOD. CRITICAL RACE PERSPS. 379 (2009) (same).

Because of the formidable barriers the Hyde Amendment and companion state laws have created for people seeking abortions, a complex web of abortion funds have popped up to manage funding and logistics of poor—primarily Black and Latinx—women and trans people in need. See, e.g., NAT’L NETWORK ABORTION FUNDS, <https://abortionfunds.org/about/> (last visited Sept. 8, 2020) [<https://perma.cc/YZ5H-H8M4>] (establishing national clearinghouse for abortion funds); *Mission, Vision, and Values*, YELLOWHAMMER FUND, <https://yellowhammerfund.org/mission-vision-and-values/> (last visited Sept. 8, 2020) [<https://perma.cc/TT5J-HC62>] (servicing abortion seekers in Alabama); ACCESS REPROD. CARE – SOUTHEAST, <https://www.arc-southeast.org/> (last visited Sept. 8, 2020) [<https://perma.cc/3576-CD9X>] (coordinating care across the Southeast).

202. See generally *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (holding that private “closely held” corporations could object to the Affordable Care Act’s contraception mandate on First Amendment Free Exercise grounds); *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020) (upholding HHS rule granting employers with religious or moral objections an exemption from the Affordable Care Act’s contraception mandate with support of Justices Breyer and Kagan).

203. See Sahil Kapur et al., *Senate Confirms Amy Coney Barrett, Heralding New Conservative Era for Supreme Court*, NBC NEWS (Oct. 26, 2020), <https://www.nbcnews.com/politics/congress/amy-coney-barrett-set-be-confirmed-supreme-court-monday-n1244748> [<https://perma.cc/2E62-P4VX>] (discussing the impact of Amy Coney Barrett’s confirmation to the Court).

204. *Romer v. Evans*, 517 U.S. 620 (1996) (striking law that singled out LGBTQ+ people on equal protection grounds); *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down sodomy bans as unconstitutional); *United States v. Windsor*, 570 U.S. 744

enlarged the religious refusal rights of companies and individuals. For instance, in *Bostock v. Clayton County*, a decision which found that LGBTQ+ employees were protected under laws banning sex discrimination, the Court also signaled its receptiveness to the argument that LGBTQ+ employees could lawfully be terminated due to an employer's religious objections.²⁰⁵ Then, in *Our Lady of Guadalupe School*, the Court held that discrimination claims brought by certain employees of religious organizations were categorically barred, casting even greater doubt on the reach of *Bostock's* holding.²⁰⁶

In *Little Sisters of the Poor*, the Court authorized private employers to deny contraception coverage to employees based on religious and moral objections, on the heels of striking down restrictive abortion laws in *June Medical*.²⁰⁷ In *Espinoza v. Montana Department of Revenue*, the Court ordered the State of Montana to provide taxpayer-funded tuition reimbursements to

(2013) (requiring nationwide recognition of duly performed same-sex marriages pursuant to the Fifth Amendment); *Obergefell v. Hodges*, 576 U.S. 644 (2015) (requiring nationwide recognition of same-sex marriage pursuant to the Fourteenth Amendment); *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020) (finding LGBTQ+ people were protected against employment discrimination by Title VII).

Black LGBTQ+ people have undoubtedly benefited from these decisions. But because LGBTQ+ rights have been embraced by the Court in a singular manner that racial justice claims have not, some view these gains as evidence that support for LGBTQ+ rights and white nationalism can coexist. *See, e.g.*, Robinson, *supra* note 137, at 1029–30; Minbirole, *supra* note 197.

205. *Bostock*, 140 S. Ct. at 1754. The Court also stated that its decision did not reach the issues of how its decision impacted bathroom and locker room access or dress codes. *Id.* at 1753.

206. *See* *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020) (barring age and disability discrimination claim pursuant to the so-called ministerial exception, even though the employees seeking protection were middle school teachers).

The Court also accepted certiorari in *Fulton v. City of Philadelphia*, 922 F.3d 140 (3d Cir. 2019), a case challenging a Catholic services agency's policy of denying foster children to LGBTQ+ couples, and directed the parties to brief whether a prior Court decision immunizing generally applicable laws from First Amendment challenge should be overturned. *See* Adam Liptak, *Supreme Court to Hear Case on Gay Rights and Foster Care*, N.Y. TIMES (Feb. 24, 2020), <https://www.nytimes.com/2020/02/24/us/supreme-court-gay-rights-foster-care.html> [<https://perma.cc/HY5D-E6FJ>]; *see also* *Emp. Div., Dep't of Hum. Res. v. Smith*, 494 U.S. 872 (1990) (holding that generally applicable laws that incidentally burden religious conduct are not susceptible to First Amendment Free Exercise challenges).

207. *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2386 (2020) (approving exemption to contraception mandate by a 7-2 margin).

religious schools, further clawing away at the doctrine of separation of church and state.²⁰⁸

And although the Supreme Court blocked the Trump Administration from dismantling DACA in 2020, the Supreme Court—including late Justice Ruth Bader Ginsburg and Justices Breyer and Kagan—did not find that terminating DACA raised constitutional concerns.²⁰⁹ The Court merely chided the Trump Administration for not following the proper procedure.²¹⁰ Likewise, in *Department of Homeland Security v. Thuraissigiam*, the Supreme Court, in a 7-2 decision, curtailed the due process rights of undocumented immigrants seeking protection from removal.²¹¹ These decisions serve as an important reminder that even the Court's liberal justices have shied away from demanding robust enforcement of civil and human rights. Thus, for Black women voters, supporting Democrats who can make liberal judicial appointments still offers only a limited reward.

5. Implications for Voting

Based on recent Court decisions, the assumption that voting preserves a status quo wherein the Supreme Court safeguards civil rights and democracy is simply a myth. In recent decades, little progress has been made toward advancing racial justice and police accountability—two of the issues Black women voters hold most dear—even though the Court only gained a decisive

208. 140 S. Ct. 2246 (2020) (ruling tuition reimbursement program that excluded private religious schools violated the First Amendment); *see also* *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017) (ruling that taxpayer subsidy only offered to secular schools violated the First Amendment's Free Exercise Clause); *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067 (2019) (ruling that forty-foot cross built as World War I memorial on state land did not violate the First Amendment's Establishment Clause).

209. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1907–16 (2020) (the Court, joined by Justices Ginsburg, Breyer, and Kagan, rejecting equal protection claims and solely finding the DACA rescission arbitrary and capricious under the Administrative Procedure Act).

210. *Id.*

211. 140 S. Ct. 1959 (2020). By denying habeas remedies and a meaningful judicial challenge, the *Thuraissigiam* decision also casts doubt on the ongoing validity of *Boumediene v. Bush*, 553 U.S. 723 (2008) (holding that Guantanamo detainees could challenge their detention through habeas petitions) and *I.N.S. v. St. Cyr*, 533 U.S. 289 (2001) (ruling that immigrant with a pending deportation order could use habeas to challenge his detention).

conservative majority in October 2020 following the confirmation of Amy Coney Barrett.²¹²

The notion that the Supreme Court will chart a new course under a Democratic president also appears to be mythical. Reversing the Court's cynical jurisprudence on civil rights requires more than securing a coveted fifth liberal vote, since rights-restrictive decisions on qualified immunity, voting, economic justice, and corporate personhood currently blanket the field.²¹³ Unlocking the Court's potential to act as a protector of civil and constitutional rights likely requires revisiting the doctrine of *stare decisis* in favor of a jurisprudence more willing to acknowledge judicial error—a paradigm shift that few would countenance.²¹⁴ In addition, since even “liberal” justices have been willing to deliver racial justice advocates stinging losses, it would also require applying an even greater level of partisan scrutiny to the judicial confirmation process—a move that is at odds with the air of impartiality that judges are called upon to convey.²¹⁵

Accordingly, another key belief about voter turnout in presidential elections—namely, that it is a stopgap measure to

212. See *supra* Section II.C (discussing Black women's priorities); see also SOLOMON & MAXWELL, WOMEN OF COLOR, *supra* note 50, at 13 (discussing nationwide survey and noting that “75 percent of Black women consider it extremely important for the current Congress to make progress on ending racial, ethnic, and cultural discrimination in America”); Leila Fadel, *What Black Women Want to See in Candidates' Policy Proposals*, NPR (Mar. 1, 2020, 7:41 AM), <https://www.npr.org/2020/03/01/810873406/what-black-women-want-to-see-in-candidates-policy-proposals> [<https://perma.cc/KS5J-FMAA>] (discussing importance of criminal justice reform); see also Kapur et al., *supra* note 203 (discussing Barrett's confirmation).

213. See *supra* Sections III.C.1–3.

214. While I reserve judgement on the right approach, there is important writing on the subject. See, e.g., David J. Luban, *Legal Traditionalism*, 43 STAN. L. REV. 1035, 1042 (1991) (explaining viewpoint that by calling for adherence to possibly arbitrary past decisions, “stare decisis seems more than occasionally like an injunction to persevere in injustice”); Frederick Schauer, *Stare Decisis-Rhetoric and Reality in the Supreme Court*, 2018 SUP. CT. REV. 121, 132 (2018) (noting that fidelity to stare decisis is already “tissue-thin”); Randy J. Kozel, *Stare Decisis in the Second-Best World*, 103 CAL. L. REV. 1139 (2015) (exploring alternatives); Note, *Constitutional Stare Decisis*, 103 HARV. L. REV. 1344 (1990) (same). Nor would revisiting stare decisis necessarily spell an end to *Roe v. Wade* or same-sex marriage. See *id.* at 1359–62 (advocating for “constitutional stare decisis” that considers the alternatives and consequences to overruling a precedent such as *Roe*).

215. Here I also demure judgment on whether greater partisanship would be welcome. I just pause to acknowledge the scholarship of critical race theorists who have painstakingly documented the extent of conservative “judicial activism,” and the results-driven nature of the judicial process. See, e.g., Bernie D. Jones, *Critical Race Theory: New Strategies for Civil Rights in the New Millennium?*, 18 HARV. BLACKLETTER L.J. 1 (2002) (tracking origins and development of the movement).

prevent the Supreme Court as an institution from doing harm—has proven uniquely untrue in the case of Black women voters. Once more, this inevitably invites the question: *Why vote at all?*

IV. THE PARADOXES OF BLACK WOMEN’S VOTING: THE TRAPPED CONSTITUENCY PROBLEM AND THE CARETAKER VOTE

Examining the socioeconomic status of Black women and the extent to which they have been prioritized by the political branches leads to a startling but inescapable conclusion: Black women’s engaged political participation bears an inverse relationship to their overall political power.²¹⁶ This Article contends this phenomenon is by design. Stated simply, Black women’s eager and enthusiastic use of the right to suffrage is paving the way for their disenfranchisement in electoral politics for two reasons: the “trapped constituency problem” and “caretaker voting.”

A. *The Trapped Constituency Problem*

The “trapped constituency problem” is one of the most significant challenges facing Black women voters. While the term “trapped constituency” is a unique contribution made by this Article, the phenomenon it describes is well known.²¹⁷ At the root of the trapped constituency problem is America’s two-party system where third-party voting is inviable and where one party—the Republican Party—has purposefully branded itself as the party of white identity.²¹⁸ As political scientist and gender and sexuality scholar Jane Junn explains:

216. See *supra* Part III.

217. See, e.g., Toni Monkovic, *Clinton, Sanders and the Underrated Power of the Black Voter*, N.Y. TIMES (Feb. 17, 2016), <https://www.nytimes.com/2016/02/18/upshot/clinton-sanders-and-the-underrated-power-of-the-black-voter.html> [<https://perma.cc/4BUA-6755>] (noting that the concerns of Black voters are “more easily ignore[d]” because they lack bargaining power relative to other groups); Farai Chideya, *Black Voters Are So Loyal That Their Issues Get Ignored*, FIVETHIRTYEIGHT (Sept. 9, 2016, 7:15 AM), <https://fivethirtyeight.com/features/black-voters-are-so-loyal-that-their-issues-get-ignored/> [<https://perma.cc/YDQ9-65ZH>] (describing ways that Black voters are sidelined); PAUL FRYMER, *UNEASY ALLIANCES: RACE AND PARTY COMPETITION IN AMERICA* (1999) (theorizing that Black voters are “captured”).

218. See FRYMER, *supra* note 217, at 6 (describing the two-party system as one that excludes Black voters and denies them “their democratic rights”); Michael Scherer, *White Identity Politics Drives Trump, and the Republican Party Under Him*, WASH. POST (July 16, 2019, 4:00 AM), <https://www.washingtonpost.com>

There is no uncertainty about where the Republican Party stands relative to the Democratic Party on gender issues, on women's equality issues, nor is there much misunderstanding about where the Democratic Party stands relative to the Republican Party in terms of race.²¹⁹

Stated another way, Black women “understand that they have nowhere to go other than Democratic candidates, even if they’ve got to hold their nose to do so.”²²⁰ As the trapped constituency thesis contends, the political establishment also appreciates that Black women lack viable alternatives. Therefore, in any given election year, Democratic Party officials can feel confident that Black women will not defect from the Party in any meaningful numbers.²²¹

By virtue of the trapped constituency problem, not only are Black women's electoral concerns deprioritized within the party to whom they remain loyal, Democrats are free to direct their resources to courting coveted “swing voters”—a group that, on the whole, trends white and conservative—in ways that diminish Black women's power.²²² Once Democratic presidents take office, Black women's priorities frequently yield due to the perceived lack of consequence for these moments of political abandonment.²²³

/politics/white-identity-politics-drives-trump-and-the-republican-party-under-him/2019/07/16/a5ff5710-a733-11e9-a3a6-ab670962db05_story.html [https://perma.cc/6RBA-877G].

219. Coaston, *supra* note 68 (quotation marks omitted).

220. *Id.* (quoting Junn) (quotation marks omitted).

221. *Id.* (Junn noting that when it comes to party affiliations, “[i]t’s not like everybody has the same amount of choice”).

222. See FRYMER, *supra* note 217, at 87–88 (explaining that appeals to swing voters are often racialized); Geoffrey Skelley, *Just How Many Swing Voters Are There?*, FIVETHIRTYEIGHT (Sept. 19, 2019, 5:58 AM) <https://fivethirtyeight.com/features/just-how-many-swing-voters-are-there/> [https://perma.cc/4T4X-VPHU] (confirming that swing voters tend to be white); Doug Sosnik, *Swing Voters Hold the Key to 2020. Here’s Who They Are.*, WASH. POST (June 19, 2019), <https://www.washingtonpost.com/opinions/2019/06/18/swing-voters-hold-key-heres-who-they-are/> [https://perma.cc/8XX5-RGLE] (explaining that swing voters are “mostly Republicans and independents” who “don’t particularly care for Democrats as a rule”).

The 2020 Democratic Convention exemplifies this trend, as several of the Convention's keynote speakers were “worried Republicans” appealing to others in their party. Peter Baker, *John Kasich, a ‘Deeply Worried’ Republican, Steps Up for Biden*, N.Y. TIMES (Aug. 17, 2020), <https://www.nytimes.com/2020/08/17/us/politics/john-kasich-biden.html> [https://perma.cc/QDS9-X77U].

223. See *supra* Sections II.A, II.B (discussing Black women's strong and steady voting); *supra* Section III.B (discussing Black women's abandonment in recent

B. Black Women and the Caretaker Vote

Even Black women voters who grasp the fullness of their status as a trapped constituency continue to vote in ways that safeguard the rights of others while threatening their own political power.²²⁴ I have coined the phrase “caretaker voting” to describe this behavior.

While Black women voters have rightfully decried the notion that it is their duty to “save America from itself,” their voting habits suggest otherwise. Rather than voting primarily to advance their self-interest, Black women appear to be voting with the welfare of a much larger polis in mind—American democracy itself—motivated in part by their own experiences of navigating racism, misogyny, and bias.²²⁵ Black women’s voting habits in the 2016 and 2020 elections offer a clear example of caretaker voting.²²⁶ In each election, Black women consolidated their support around Democratic candidates with obvious flaws to block what they perceived as a greater evil—a Donald Trump presidency.²²⁷ Black women also flooded the polls in 2012 to stave off a Mitt Romney presidency and preserve legislative victories like the Affordable Care Act, all while overlooking the

presidencies). Whether the deprioritization of Black women is conscious or unconscious is beyond the scope of this Article, but the trend is beyond dispute.

224. Classic rational choice theory would posit this type of voting behavior as irrational because it does not produce material benefits for individualized voters, absent some more generalized sense of moral or civic duty. *See, e.g.*, Wang, *supra* note 85, at 484–85.

225. *See* Gabriele Magni & Andrew Reynolds, *The Empathy of Black Voters*, NEW REPUBLIC (July 17, 2020), <https://newrepublic.com/article/158477/empathy-black-voters-support-gay-lgbtq-candidates> [<https://perma.cc/6BR8-CP9V>]; Renita Weems, *Why Black Women Vote*, NEWSDAY (Mar. 10, 2020, 2:00 PM), <https://www.newsday.com/opinion/commentary/black-women-voters-2020-election-democrats-trump-1.42717136> [<https://perma.cc/F6QW-N8G2>]; Blue Telusma, *Angela Davis Backs Biden Because He ‘Can Be Most Effectively Pressured’ by the Left*, GRIO (July 14, 2020), <https://thegrio.com/2020/07/14/angela-davis-backs-biden/> [<https://perma.cc/PR8N-5X8Z>].

226. *See* Coaston, *supra* note 68; Crumpton, *supra* note 143.

227. *See supra* Sections II.A, II.B (discussing Black women’s voting habits in 2016 and 2020); Kristen Johnson, *What Do Young Black Women Want from This Election?*, NATION (Sept. 9, 2020), <https://www.thenation.com/article/politics/young-black-women-voting/> [<https://perma.cc/YJN3-FRH4>] (noting Black women’s support for Hillary Clinton in contest against Trump); Johnson, *supra* note 151 (explaining how support for Biden is motivated by fears of Trump); Mystal, *supra* note 151 (same).

ways Black women were ultimately sidelined by the Obama Administration.²²⁸

Explaining these voting habits in a poignant op-ed, Reverend Renita Weems writes: “Voting allows us [Black women] to marshal our agency to love ourselves, to write our own history, and to use our anger *in the service of hope for a better world*.”²²⁹ However reluctantly, Black women have assumed the role of caretaker for American democracy.

How do we overcome this phenomenon of caretaker voting? The answer is not adopting a politics of self-interest that makes Black women lose the distinction of being highly empathetic, multi-issue voters. Instead, the solution lies in disrupting the powerlessness that Black women voters face by abandoning the model that equates voting with self-sacrifice.

V. NOT YOUR MULE: ANSWERING THE TRAPPED CONSTITUENCY PROBLEM

Although the trapped constituency problem and caretaker voting are formidable challenges that work in tandem to limit Black women’s political power, an important avenue exists for Black women to reclaim power: becoming proverbial “swing voters” whose loyalty must be earned election after election. Devising strategies for Black women to become swing voters within the confines of a racialized two-party system is no easy feat. However, instead of hinging swing voting on the non-credible threat that Black women intend to join the Republican Party *en masse*, Black women can act like swing voters *by placing their voter turnout in jeopardy*. There are four key aspects of this swing-vote strategy.

First, since Black women’s electoral power is at its zenith in presidential primaries, an initial strategy could be lobbying candidates ahead of the primaries and hinging votes on articulated demands.²³⁰ For instance, voters could demand the inclusion of

228. Susan Page & Paul Overberg, *A Changing America: In 2012, Blacks Outvoted Whites*, USA TODAY (May 8, 2013, 6:57 PM), <https://www.usatoday.com/story/news/politics/2013/05/08/2012-election-voting-rates-blacks-whites-hispanics/2144571/> [<https://perma.cc/L684-3AJW>] (noting the pivotal role of Black women voters in Obama’s reelection); HARRIS, *supra* note 59, at 1, 7 (same).

229. Weems, *supra* note 225 (emphasis added).

230. See Nick Corasaniti & Manny Fernandez, *With Black Voters and a Suburban Surge, Joe Biden Took Texas*, N.Y. TIMES (Mar. 4, 2020), <https://www.nytimes.com/2020/03/04/us/politics/joe-biden-texas-primary.html> [<https://perma.cc/2VR5-BLSE>] (explaining how Black voters delivered Joe Biden a series of

certain policies on a candidate's platform or interrogate their positions on key racial justice issues, forcing candidates to sharpen and refine their racial justice and gender justice commitments ahead of Democratic primaries. Black women voters could direct their votes to the primary candidates who demonstrate the strongest social justice bona fides, rather than the person deemed most electable, forcing candidates to compete against one another with respect to their credentials. This would help to overcome the trapped constituency problem because it would mean that only candidates committed to making lived equality a reality for Black women would advance to the general election.

Second, deepening the tradition of Black feminist organizing, Black women voters could continue their political engagement after elections to make sure electoral promises made are executed. The Black Futures Lab, originated by Black Lives Matter co-founder Alicia Garza, describes one aspect of this work as “mobilizing voters year-round and building relationships with candidates on our own terms.”²³¹

Third, and perhaps most significantly, Black women voters overlooked by the political establishment could consider staging a *protest non-vote*—that is, publicly refusing to vote in national elections where candidates refuse to prioritize Black voters' needs. To ensure that protest non-voting would not be mistaken for voter apathy, such as the across-the-board drop in turnout in 2016, voters who pursue this strategy would need to clearly announce their tactics and intentions in advance. Ideally, this would entail Black women voters collectively signing on to a pledge or platform that explains their votes are being strategically withheld until Black women's needs and demands are prioritized. Black women could also try to redirect their civic engagement work to issue-organizing and local elections in the interim.²³²

unexpected victories on Super Tuesday); Monkovic, *supra* note 217 (tracking the influence of Black voters in primaries over time); Astead W. Herndon, *Black Voters, a Force in Democratic Politics, Are Ready to Make Themselves Heard*, N.Y. TIMES (Dec. 25, 2018), <https://www.nytimes.com/2018/12/25/us/politics/blacks-democrats-president-2020.html> [<https://perma.cc/KTG3-76L5>] (noting how Democratic strategists have begun to recognize the influence of Black voters in primary elections).

231. *Our Work*, BLACK FUTURES LAB, <https://blackfutureslab.org/our-work/> (last visited July 26, 2020) [<https://perma.cc/KT7H-VX6S>].

232. Though beyond the scope of this piece, the opportunities presented by local civic engagement merit further study. *See, e.g.*, Becky Kip, *Voting for Mayor Is More Important than Voting for President*, THE HILL (Oct. 6, 2016, 9:15 AM), <https://thehill.com/blogs/pundits-blog/state-local-politics/299565-voting-for-mayor-is->

In a year that has been marred by the twin pandemics of Covid-19 and racialized police violence—one where the enduring realities of systemic racism have been laid bare—important conversations about the Democratic Party’s relationship to Black voters are already taking place.²³³ Black women voters have begun interrogating the assumptions that led prior generations to dutifully vote for Democrats who ignored or demeaned them, and Black women voters are increasingly making their own demands of the political system.²³⁴ One prominent demand—to add a Black woman to the presidential ticket—was resoundingly answered when Joe Biden added Kamala Harris to his ticket as vice president.²³⁵ Harris’s selection as the nation’s first female vice president is thus a case study on the power that Black women can wield when they couple their voting with political demands—albeit, a strategy that could benefit from refining to place greater emphasis on policy priorities.²³⁶

more-important-than-voting-for [https://perma.cc/8HYJ-L6SE] (emphasizing the importance of local elections).

233. See Jack Healy & Dionne Searcey, *Two Crises Convulse a Nation: A Pandemic and Police Violence*, N.Y. TIMES (May 31, 2020), <https://www.nytimes.com/2020/05/31/us/george-floyd-protests-coronavirus.html> [https://perma.cc/2ALR-L786] (describing the twin pandemics brought about by police brutality and Covid-19); Claire Galofaro & Kat Stafford, *If Not Now, When?: Black Women Seize Political Spotlight*, ASSOCIATED PRESS (Aug. 3, 2020), <https://apnews.com/254094ddb21a967fd54c97c2260b5a7f> [https://perma.cc/2Y49-2E2U] (describing Black women’s political mobilization in response to these crises).

234. See Galofaro & Stafford, *supra* note 233; see also Julia Craven, *A Conversation About America’s Most Influential Voting Bloc*, SLATE (July 23, 2020, 10:01 AM), <https://slate.com/news-and-politics/2020/07/errin-haines-explains-what-2020-means-to-black-women.html> [https://perma.cc/P7S2-4YPC]. Summarizing this moment of voter activation for *The New York Times*, civil rights leader Jesse Jackson stated, “Our needs aren’t moderate The absence of Trump is not enough.” Astead W. Herndon, *Black Americans Have a Message for Democrats: Not Being Trump Is Not Enough*, N.Y. TIMES (May 31, 2020), <https://www.nytimes.com/2020/05/31/us/politics/black-americans-democrats-trump.html> [https://perma.cc/6AY5-KSRV].

235. See Wright et al., *supra* note 152; Garofoli, *supra* note 152; Nikole Killion, *Black Democratic Women Jubilant About Kamala Harris’ Selection as Biden’s Running Mate*, CBS NEWS (Aug. 12, 2020, 4:52 PM), <https://www.cbsnews.com/news/kamala-harris-vice-presidential-candidate-black-women/> [https://perma.cc/7P77-T3C3]; Jennifer Medina & Evan Nicole Brown, *Black Women Asked Their Party for What They Wanted. What Happens Next?*, N.Y. TIMES (Aug. 12, 2020), <https://www.nytimes.com/2020/08/12/us/politics/black-women-voters-kamala-harris.html> [https://perma.cc/2UU3-QHK8].

236. Indeed, while demands for representation predominated in 2020, criticisms of Harris suggest demands for representation alone may be too imprecise. See, e.g., Derecka Purnell, *Why Black Progressive Women Feel Torn About Kamala Harris*, GUARDIAN (Aug. 12, 2020, 4:31 AM), <https://www.theguardian.com/commentisfree/2020/aug/12/kamala-harris-joe-biden-vp-black-progressive-women> [https://

Calling on Black women to become a “swing voting bloc” whose turnout depends on the quality of a candidate *and their political platform* seems a logical next step.²³⁷ Yet, articulating a strategy for Black women voters to become “swing voters” in a highly contested election year inevitably prompts questions and perhaps even skepticism. This is especially true on the heels of the 2020 elections, which served as a referendum on, and rebuke of, Donald Trump—albeit by a razor’s edge.²³⁸ Herein lies the fourth and final strategy articulated by this Article: “exceptional circumstances.” Exceptional circumstances voting accommodates election years like 2020 where the argument for voting Democrat is especially compelling due to the perceived costs of nonparticipation, even if voters’ concerns have not been meaningfully prioritized. Black women voters who find themselves in this situation can draft and sign onto a national pledge that explains their decision to engage in caretaker voting, their expectations of the Democratic Party and candidates going forward, and their commitment to withdraw support in future elections if

perma.cc/7229-93DL] (describing Black progressives’ conflicted feelings on the Biden-Harris ticket); Lara Bazelon, Opinion, *Kamala Harris Was Not a Progressive Prosecutor*, N.Y. TIMES (Jan. 17, 2019), <https://www.nytimes.com/2019/01/17/opinion/kamala-harris-criminal-justice.html> [https://perma.cc/V6ZG-B5CT] (interrogating Harris’s track record of criminal justice reform); Derecka Purnell, *Many Americans Are Ready for a Black Woman President. Just Not Kamala Harris*, GUARDIAN (Dec. 3, 2019, 10:34 PM), <https://www.theguardian.com/commentisfree/2019/dec/03/black-woman-president-kamala-harris> [https://perma.cc/UW4R-76YM] (same); Taylor, *supra* note 144 (opining that demands for representation fall short of achieving systemic change). Accordingly, future campaigns may want to focus more on policy platforms.

237. Given the controversies surrounding the Biden-Harris ticket, the emphasis on policy platform is intentional. See Taylor, *supra* note 144.

238. See, e.g., Nicholas Riccardi, *Referendum on Trump Shatters Turnout Records*, ASSOCIATED PRESS (Nov. 9, 2020), <https://apnews.com/article/referendum-on-trump-shatter-voter-record-c5c61a8d280123a1d340a3f633077800> [https://perma.cc/ES68-B6WK] (noting historic 2020 election turnout motivated by support for, and opposition to, Trump); Juan Williams, Opinion, *Black Voters Are Coming for Trump*, N.Y. TIMES (June 3, 2020), <https://www.nytimes.com/2020/06/03/opinion/sunday/biden-black-vote-trump.html> [https://perma.cc/97D4-SHUW] (describing Black voters mobilizing against Trump); Sydney Ember & Astead W. Herndon, *Progressives Didn’t Want Harris for V.P. They’re Backing Her Anyway*, N.Y. TIMES (Aug. 12, 2020), <https://www.nytimes.com/2020/08/12/us/politics/kamala-harris-progressives-popularity.html> [https://perma.cc/8JKA-HRHB] (describing how progressives consolidated support for the Biden-Harris ticket because of fears about Donald Trump); Peter Baker, *From Obama, Plenty of Drama in a Rare Display at the Democratic Convention*, N.Y. TIMES (Aug. 20, 2020), <https://www.nytimes.com/2020/08/20/us/politics/obama-trump-democratic-convention.html> [https://perma.cc/T9FS-3HCY] (framing the 2020 election as a battle for the future of democracy).

their policy demands are ignored.²³⁹ That way, Black women voters can respond to urgent “all hands on deck” political moments without engaging in the same cycle of caretaker voting that leads Black women’s political priorities to be sacrificed year after year, along with their overall well-being.²⁴⁰

CONCLUSION

Although Black women have fought hard to realize the promise of the Nineteenth Amendment and grown into an electoral force that votes at incredible odds, the fruits of this labor have yet to materialize for voters themselves. Ironically, Black women’s faithful and unwavering support for the Democratic Party in recent years has led them to become “trapped constituents” whose votes are largely taken for granted by the political establishment. As a consequence, Black women’s political participation has come to bear an inverse relationship to Black women’s socioeconomic and political power in ways that challenge conventional wisdom about voting. This Article argues that Black women should disrupt this trend by proliferating strategies—including non-voting—that put them on equal footing with traditional swing voters.

It is unclear whether the swing voting strategies I identify here will gain widespread traction. If they fail to do so, it may be a result of the continued pull of the precise forms of caretaker voting described in this Article—voting habits that lead Black women to act as the guardians of American democracy, time and again. Yet, as this Article has illuminated, Black women’s tendency to prioritize the well-being of the collective over their own political goals is a costly strategy: one that allows all three branches of government to turn their backs to Black women’s concerns.

Without putting Black women’s voter turnout into issue, Black women’s electoral taken-for-grantedness will persist in ways that continue to threaten their welfare as well as their

239. At the time of writing, I am not aware of campaigns that have incorporated a similar call to action. However, organizations like Woke Vote and Black Futures Lab have encouraged Black voters to “pledge” to participate in national elections. See, e.g., Woke Vote, *Commit to Vote*, FACEBOOK (Sept. 11, 2020), <https://www.facebook.com/wokevote/posts/724798111432724> [<https://perma.cc/8L4C-R4GH>]; *Take Action*, BLACK FUTURES LAB, <https://blackfutureslab.org/take-action/> (last visited Sept. 12, 2020) [<https://perma.cc/XN79-PCXR>].

240. See *supra* Part III.

political power. The swing vote strategy articulated here disrupts this cycle of powerlessness. By conditioning voting on the *quality* of the Democratic Party's platforms and making election turnout something Democratic candidates must earn, Black women voters have "nothing to lose but our chains."²⁴¹

241. Assata Shakur, *To My People by Assata Shakur (Written While in Prison)*: 4 July 1973, ASSATASHAKUR.ORG: ARTICLES/LETTERS, <http://www.assatashakur.org/mypeople.htm> (last visited Oct. 15, 2020) [<https://perma.cc/M8LK-SNVE>].