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## “This Lawsuit Smacks of Racism”: Disinformation, Racial Coding, and the 2020 Election

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# “This Lawsuit Smacks of Racism”: Disinformation, Racial Coding, and the 2020 Election

Atiba R. Ellis\*

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## I. LITIGATION, INSURRECTION, AND THE EPISTEMIC CRISIS OF VOTER FRAUD

An epistemic crisis—a crisis of knowledge on which we make our decisions in the world<sup>1</sup>—threatened the legitimacy of the 2020 presidential

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\* Professor of Law, Marquette University Law School. The author wishes to extend his thanks to the editors of the *Louisiana Law Review* for the invitation to participate in this symposium and for their collaboration and patience in the publication of this Essay. The author also wishes to thank Professors Ray Diamond and Missy Lonegrass for their encouragement and support of this work. The author also wishes to acknowledge the support of the Marquette University

election, and the results of this crisis are yet to be fully known. The root of this crisis is the belief in the existence of unfounded claims of fraud, conspiracies, and corruption as clear and present threats to the American democratic process. This particular conspiracy theory supposes that rampant fraud by voters, election administrators, builders of voting machines, and others all coincided to somehow “steal” the 2020 election from now former President Donald J. Trump.

This belief—which is what it is, given that there is no evidence to support these claims—has served to substantiate pre- and post-election litigation around varied issues concerning the administration of elections (in a patent effort to overturn the election), as well as to question the validity of the election itself. Moreover, and maybe most importantly, the belief around the so-called “Big Steal”<sup>2</sup> led to a protest at the United States Capitol on January 6, 2021, the date required by the U.S. Constitution for Congress to certify the outcome of the Electoral College. This protest turned into a riot, which this Essay will refer to as the “Capitol

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1. As I noted in *Voter Fraud as an Epistemic Crisis for the Right to Vote*, an “epistemic crisis” is an emergency that concerns the way we know about facts in the world. Atiba R. Ellis, *Voter Fraud as an Epistemic Crisis for the Right to Vote*, 71 MERCER L. REV. 757, 759 n.9 (2020) [hereinafter Ellis, *Voter Fraud as an Epistemic Crisis*]. In particular, it relates to a crisis in the way that communities or societies come to know information. The epistemic crisis posed by the 2020 presidential election—which led one part of American society to accept the result and another part of American society, based on the belief of rampant voter fraud, to engage in insurrection in an apparent effort to overthrow the election—will be the specific epistemic crisis this Essay will engage.

2. The slogan “Stop the steal” was the marquee name for what Trump supporters who claimed there was election fraud supposed was going on. It was, in effect, a rallying cry to impose their belief that the election was somehow being usurped and thus action was necessary to intervene. See, e.g., Marianna Spring, ‘Stop the steal’: The deep roots of Trump’s ‘voter fraud’ strategy,’ BBC (Nov. 23, 2020), <https://www.bbc.com/news/blogs-trending-55009950> [<https://perma.cc/D7YU-UWMF>] (describing the origins of the #StopTheSteal hashtag).

Insurrection.”<sup>3</sup> To the date of the drafting of this Essay, the Capitol Insurrection has led to over 500 criminal charges.<sup>4</sup>

Regardless of his culpability for the Capitol Insurrection,<sup>5</sup> it is clear that former President Trump fueled this broad propaganda attack on the legitimacy of the 2020 vote. He repeatedly and without basis attacked the credibility of the electoral process throughout the 2020 election campaign.<sup>6</sup> He specifically attacked mail-in voting despite the evidence of it being a sound, effective mechanism for casting votes, particularly in light of the COVID-19 pandemic that was and still is ravaging the United States, and, as of the time of this writing, has infected over 53 million people and inflicted over 820,000 deaths in the United States.<sup>7</sup> He, his agents, and his allies litigated the results of the 2020 election at length, and this litigation was largely based on the aforementioned baseless belief of a vast conspiracy regarding voter fraud.

But was this conduct—by President Trump, by those who brought the varied and different forms of electoral litigation, by the perpetrators of the Capitol Insurrection—racist? And if it was, should there be a remedy

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3. As an effort to usurp the lawfully elected government of the United States from engaging in the task of completing the legally required transfer of power, the actions undertaken by the Trump supporters on January 6, 2021, at the United States Capitol amount to an attempt at insurrection, that is, “an act or instance of revolting against civil authority or an established government.” *See* Insurrection, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/insurrection#synonyms> [<https://perma.cc/M2KH-Z7KP>] (last accessed June 22, 2021); *cf.* 18 U.S.C. § 2383 (defining criminal penalties for rebellion and insurrection in the United States Code).

4. *See* Madison Hall et al., *726 people have been charged in the Capitol insurrection so far. This searchable table shows them all*, INSIDER <https://www.insider.com/all-the-us-capitol-pro-trump-riot-arrests-charges-names-2021-1> [<https://perma.cc/DT2Z-2N4Y>] (last updated Dec. 14, 2021).

5. Subsequent to the events of January 6, 2021, President Trump was impeached and tried for the high crime of inciting the Capitol Insurrectionists to act. *See* H.R. Res. 24, 117th Cong. (2021) (enacted) (alleging that President Trump’s statements to the crowd gathered at the Capitol incited them to “unlawfully breach[] and vandalize[] the Capitol” with the objective to interfere with the Joint Session of Congress’s duty to certify the Electoral College). The U.S. Senate failed to convict President Trump of this charge. *See* Roll Call Vote on H.R. Res. 24, U.S. SENATE ARCHIVES, [https://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=117&session=1&vote=00059](https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=117&session=1&vote=00059) [<https://perma.cc/9X8K-6356>] (last accessed Dec. 31, 2021).

6. *Infra* Part II.

7. *COVID Data Tracker*, CENTERS FOR DISEASE CONTROL & PREVENTION, <https://covid.cdc.gov/covid-data-tracker/#datatracker-home> [<https://perma.cc/9E4M-X97W>] (last accessed Dec. 31, 2021).

under federal or state election law for this type of expressive racist conduct that was clearly directed at interfering with an election, even if it did not affect the result of said election?<sup>8</sup>

This Essay seeks to pose this question and to suggest that our way of thinking about racist conduct within the context of the law of democracy is ill suited to the twenty-first century's problems of race and democracy. Indeed, the problem this Essay seeks to expose is really several interrelated problems. As I suggested at the outset, the problem we confront is one of an epistemic crisis regarding how we think about the right to vote.<sup>9</sup> In this sense, the propaganda around the "reality" of voter fraud serves as a heuristic for understanding, among other things, the validity of the political process. This is an important lesson in and of itself about the events that led to the Capitol Insurrection and its aftermath.

But it also asks questions about how we know and understand racist conduct and its effects within the context of the administration of the political process. The aforementioned rhetoric and litigation were directed at states and particularly cities where the voting strength of people of color

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8. This is to distinguish the type of conduct we saw in the 2020 presidential election from the direct forms of election interference and forms of vote denial and dilution already outlawed by the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.). While I explain the major principles of the Voting Rights Act of 1965 below, I note here that as part of its scheme to eliminate racial discrimination in voting, Section 11(b) of the Voting Rights Act outlaws acts of intimidation, threat, or coercion in federal elections that are intended to deny voters their voting rights or to coerce them into casting a particular vote against their will. *See* 52 U.S.C. § 10307(b). Sections 12(a) and 12(c) of the Voting Rights Act make it a crime to knowingly engage in conduct meant to deny an individual their voting rights or to engage in a conspiracy to interfere with voting rights. 52 U.S.C. § 10138(a), (c). These laws were designed to address the larger problem of terroristic violence intended to intimidate voters of color from participating in elections. However, notwithstanding one notable exception that I will discuss below, no participant in the litigation and campaigning around the aftermath of the 2020 election has alleged that the Trump Campaign's conduct amounted to coercion under Section 11(b) or criminal activity under Section 12. Thus, the question of this Essay is whether the *expressive harms* created by this course of conduct—but arguably not reachable under the Voting Rights Act and other statutes—should be sanctioned or shamed in a palpable way to protect the greater integrity of American democracy. This implicates questions of how we conceptualize free expression and its interrelationship with the idea of political equality, as well as the interaction of race, disinformation, and American democracy. Although it will discuss voter intimidation as currently conceived, the larger goal of this Essay seeks to address these larger conceptual issues.

9. Ellis, *Voter Fraud as Epistemic Crisis*, *supra* note 1.

ultimately shifted the historical outcome that would favor Republicans to an outcome that favored Democrats. Particularly, in Arizona, Georgia, Michigan, Pennsylvania, and Wisconsin, the rhetoric of voter fraud charged the litigation around the results of the 2020 presidential ballot but was read quite publicly as a racist attack against the political process.

For example, Justice Jill Karofsky of the Wisconsin Supreme Court argued from the bench that the litigation brought by the Trump Campaign was a racist attack against the election outcome. She alleged that "[t]wo counties . . . are targeted because of their diverse populations. Because they're urban. I presume because they vote Democratic."<sup>10</sup> In addressing President Trump's attorney Jim Troupis, Justice Karofsky claimed that "this lawsuit . . . smacks of racism."<sup>11</sup>

The expressive message of directing a lawsuit against the two urban areas in a state, that is, the two areas that have the highest concentrations of people of color, as an effort to overturn the presidential election seems to clearly underscore Justice Karofsky's suggestion. It may well be easy to leave Justice Karofsky's suggestion—and the optics of the Trump Campaign's litigation—as merely rhetoric of two different types in a hyperpartisan environment.

As I have shown in prior work, and as the ultimate aftermath of the 2020 election teaches us, rhetoric can lead to action that damages the democratic process.<sup>12</sup> I have called the aforementioned vast conspiracy around invalidity of the voting apparatus based upon voter interference the "meme of voter fraud."<sup>13</sup> I have argued that the meme of voter fraud has served as a heuristic for understanding the legitimacy of certain voters.<sup>14</sup> I have also argued that, as illustrated in election of 2020 and the aftermath

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10. See Wisconsin Public Radio, *An Attack on Black Voters: Wisconsin Supreme Court Judge Says Trump's Election Lawsuit "Smacks of Racism,"* MILWAUKEE INDEPENDENT (Dec. 13, 2020), <http://www.milwaukeeindependent.com/syndicated/attack-black-voters-wisconsin-supreme-court-judge-says-trump-s-election-lawsuit-smacks-racism/> [<https://perma.cc/24FA-6LVV>].

11. *Id.*

12. I most recently argued this point in my blogpost, Atiba Ellis, *Race, the Epistemic Crisis of Democracy, and the First Amendment*, KNIGHT FIRST AMENDMENT INST. AT COLUMBIA UNIV.: LIES & THE L. (Oct. 12, 2021) <https://knightcolumbia.org/blog/race-the-epistemic-crisis-of-democracy-and-the-first-amendment> [<https://perma.cc/G9RB-CYSL>].

13. See Atiba R. Ellis, *The Meme of Voter Fraud*, 63 CATHOLIC U. L. REV. 879 (2014) [hereinafter Ellis, *The Meme of Voter Fraud*]; Ellis, *Voter Fraud as Epistemic Crisis*, *supra* note 1.

14. Ellis, *The Meme of Voter Fraud*, *supra* note 13, at 883 (noting that the meme of voter fraud is itself an argument to exclude the "unworthy" from the franchise).

of legislation passed in 2021, the meme distorts the legitimacy of the democratic process itself.<sup>15</sup> Such rhetorically motivated attacks certainly include the direct attack on the election that we saw in the 2020 cycle, but as I argue in this Essay, they also include attacks on the voting structure in the sense that the voter fraud crisis necessitates narrowing the right to vote for those who are deemed threats to the political process. As the logic goes, this necessitates stricter voter-qualification laws, more limited access to the franchise, and ultimately, an electorate based on some (ever-shifting) measure of the legitimacy of the voter. Arguably, this is the driver of voter suppression. And as of this writing, this logic is playing out in a number of state legislatures across the country.<sup>16</sup>

Modern election law focuses—rightly—on effects, rather than rhetoric. This is certainly true of the Voting Rights Act of 1965,<sup>17</sup> which at its heart relies on the “effects test” to measure the wrongfulness of racial discrimination in how states administer all aspects of voting rights.<sup>18</sup> But is this the right question in light of the rhetoric of voter fraud and the disinformation campaign that led to the clearest threat to the legitimacy of an elected official since the Civil War? The events of the 2020 presidential election illustrate how disinformation in the service of governmental usurpation can have the effect of coming close to undoing a validly conducted election.

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15. Ellis, *Voter Fraud as Epistemic Crisis*, *supra* note 1.

16. *Infra* Part II.

17. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.).

18. 52 U.S.C. § 10301 (“No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).”) By the terms of the statute, and its corollary in the Fifteenth Amendment to the United States Constitution, a procedure that is implemented by a State is required for a violation of the VRA. That procedure must have an effect of discriminating on the basis of race. Thus, mere rhetoric that would suggest such exclusion is not, in itself, a basis for action under the primary federal law for preventing racial discrimination in voting. However, as is clear under the VRA and the Constitution, if a law is imposed with the motivation of or the effect of discrimination on the basis of race, it would violate the law. *See, e.g.*, *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016) (finding sufficient circumstantial evidence of discriminatory intent in passing North Carolina omnibus voting rights bill to deem it unconstitutional under Fourteenth and Fifteenth Amendments).

This brief Essay seeks to offer some preliminary thoughts on this question in Part I. It will continue in Part II by offering a more detailed consideration of the events of the 2020 presidential election and the prevalence of the voter fraud myth. It will pay particular attention to the conduct many have alleged as "racist," so that the remainder of this Essay can then contemplate the questions set forth above. Part III will consider two heuristics for considering this question—voting rights realism and racial code—as ways of thinking about the validity (and limits) of arguing that the conduct of the 2020 election was racist. Voting rights realism, a concept articulated by Professor Gilda Daniels, would make central the permanence of racism as the grounding assumption of a race-conscious approach to voting rights law. Racial code is a long-established scholarly heuristic for interpreting rhetoric that appears neutral but evokes and signals racist connotations. Coded racial language's apparent neutrality often serves to mask the arguably racist intent, and thus allows it to escape antidiscrimination analysis. Part III will describe these approaches in more detail and analyze the events around the 2020 election's disinformation epidemic and subsequent litigation through those lenses.

Part IV returns to the animating question of this Essay—even if one would consider this conduct racist, ought that, in and of itself, provide a remedy against suppressive voting policies or the lawsuits themselves? It will discuss how a disjuncture exists between the courts, which largely rejected the mass-voter-fraud-myth litigation after the 2020 election, and the further aftermath of the 2020 election where legislatures, who perceive a crisis in confidence in elections based on the baseless meme that the election was "stolen," have proceeded to make elections stricter, arguably pushing forward an exclusionary effect that was avoided during the election itself.

If the beliefs that drive these laws are racial code for exclusion on the basis of race, and there is no remedy for the effects that follow until the laws are implemented, this poses a quandary for the administration of the right to vote and points precisely to the epistemic crisis and how it will continue for years and even decades to come. But to appreciate the depth of this crisis, we must begin by appreciating in detail what happened in the 2020 presidential election.

## II. THE EPISTEMIC CRISIS OF THE 2020 ELECTION

Claims of rampant voter fraud and election malfeasance dominated the 2020 presidential election. President Donald J. Trump advanced these claims for months through his rhetoric prior to Election Day on November 3, 2020. Even after the election, Donald Trump personally, the Trump for



America Campaign, and various allies of the Trump campaign all advanced conspiracy theories and litigation that sought to repeat and extend the specious claim that the 2020 presidential election was “rigged” and that the rightful winner of the election was President Trump.

Prior to the election, President Trump repeatedly claimed via social media and in various public statements that voter fraud would dominate the election.<sup>19</sup> Indeed, this is nothing new for President Trump. From the 2016 presidential campaign, during his presidency, and ultimately after his loss in the 2020 election, President Trump repeatedly claimed that voter fraud prevented him from obtaining a majority of the popular vote in 2016, was prevalent in the midterm elections, and was continually present in elections.<sup>20</sup> However, the voter fraud claims during the 2020 elections spoke specifically to voting concerns generated by the risks posed by the COVID-19 pandemic and the need for socially distanced voting approaches. Specifically, Trump repeatedly attacked mail-in voting as fraudulent.<sup>21</sup> He stated this claim as early as spring 2020 and repeated it throughout the general election campaign. This was despite the evidence that the risk of fraud in states that had already adopted mail-in voting was minimal.<sup>22</sup> Therefore, there were no grounds for attacking mail-in voting as a means for casting a ballot. Moreover, President Trump falsely claimed both before and after the election that massive voter fraud took place in the form of ballot dumping, the rigging of voting machines, votes being cast by dead voters, and the exclusion of poll watchers from polling places. Probably most memorable in Trump’s personal advocacy of this voter fraud conspiracy theory is his speech in the early morning of November 4, 2020, immediately after the polls closed across most of the country. Trump

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19. William Cummings, Joey Garrison, & Jim Sergent, *By the Numbers: President Donald Trump’s Failed Efforts to Overturn the Election*, USA TODAY (Jan. 6, 2021), <https://www.usatoday.com/in-depth/news/politics/elections/2021/01/06/trumps-failed-efforts-overturn-election-numbers/4130307001/> [<https://perma.cc/E9CJ-AB7T>].

20. I lay out these claims in Ellis, *Voter Fraud as Epistemic Crisis*, *supra* note 1, at 773–76.

21. Kendall Karson & MaryAlice Parks, *A Step-by-Step Look at Trump’s Falsehoods on Mail-in Voting: Analysis*, ABC NEWS (Oct. 1, 2020), <https://abcnews.go.com/Politics/step-step-trumps-falsehoods-mail-voting-analysis/story?id=73354979> [<https://perma.cc/9Z8F-RYPW>].

22. A significant body of research supports the idea that voting by mail has a low risk of fraud. *See, e.g.*, Elaine Kamarck & Christine Stenglein, *Low Rates of Fraud in Vote-by-Mail States Show the Benefits Outweigh the Risks*, BROOKINGS (June 2, 2020), <https://www.brookings.edu/blog/fixgov/2020/06/02/low-rates-of-fraud-in-vote-by-mail-states-show-the-benefits-outweigh-the-risks/> [<https://perma.cc/K4J5-VYET>].

recited a number of these same claims and baldly asserted that he had actually won the election.<sup>23</sup>

His assertions notwithstanding, major media outlets projected that Joe Biden would win the presidency a week and one-half after Election Day. Rather than concede the election at this point—which, with the exception of the presidential election of 2020, was the practice of every projected losing candidate in modern times—President Trump, his campaign, and his allies opted to mount a wide-ranging litigation campaign to contest the election result.

In all, the Trump campaign and its allies and affiliates filed over 86 lawsuits across the country to contest the result.<sup>24</sup> Most of this litigation was ultimately dismissed or withdrawn as moot.<sup>25</sup> For our purposes, this Essay will focus on the litigation brought in Pennsylvania, Michigan, Wisconsin, Arizona, Nevada, Georgia, Minnesota, and New Mexico. While the complaints and litigation strategies in these key states were wide ranging, several themes emerged. The litigation challenged a wide variety of election practices, including ballot drop boxes, claimed voting irregularities, alleged illegal voting by nonresidents, claimed voting software glitches, the use of sharpies on mail-in ballots, and the like.<sup>26</sup>

This throw-spaghetti-against-the-wall-and-see-what-sticks strategy, though ultimately unsuccessful for lack of facts to support a legal theory, made for fascinating television viewing. Probably most memorable of the months-long litigation were the appearances of Trump’s personal lawyer, and apparent lead litigator, Rudolph Guillani. In particular, his press conference at Four Seasons Total Landscaping in suburban Philadelphia to announce the election fraud theories on which the litigation would proceed was deemed by many as “bizarre.”<sup>27</sup> Again, as with President

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23. Christina Wilkie, *Trump Tries to Claim Victory Even as Ballots are Being Counted in Several States — NBC Has Not Made a Call*, CNBC NEWS (Nov. 4, 2020), <https://www.cnn.com/2020/11/04/trump-tries-to-claim-victory-even-as-ballots-are-being-counted-in-several-states-nbc-has-not-made-a-call.html> [https://perma.cc/89BY-2LDU].

24. Cummings et al., *supra* note 19.

25. *Id.*

26. Amanda Seitz, Ali Swenson, & Hope Yen, *AP FACT CHECK: Trump’s Claims of Vote Rigging are All Wrong*, AP NEWS (Dec. 3, 2020), <https://apnews.com/article/election-2020-ap-fact-check-joe-biden-donald-trump-technology-49a24edd6d10888dbad61689c24b05a5> [https://perma.cc/L2HQ-P3US]; *see also Court Cases*, DEMOCRACY DOCKET, [https://www.democracydocket.com/case\\_type/post-election/](https://www.democracydocket.com/case_type/post-election/) [https://perma.cc/8XRY-RKUJ] (last visited May 28, 2021).

27. Katelyn Burns, *The Trump Legal Team’s Failed Four Seasons Press Conference, Explained*, VOX (Nov. 8, 2020), <https://www.vox.com/policy-and>

Trump, the Guillani litigation strategy was based on the supposition of election fraud and not the actual existence of any fraud by any voters, campaigns, or election administrators.<sup>28</sup>

Yet the litigation and the major states noted here focused on states and areas with a large minority presence.<sup>29</sup> In particular, the litigation in several states focused principally not on the practices of a particular state, but on the practices in cities or counties that were principally urban or otherwise contained a significant presence of people of color.<sup>30</sup> For example, a substantial amount of the Pennsylvania litigation made claims about the practices in Philadelphia County, which is co-extensive with the City of Philadelphia, an area where a large number of the voters are people of color.<sup>31</sup> The litigation in the state of Wisconsin focused on practices undertaken principally in Milwaukee and Dane Counties, which contain the cities of Milwaukee and Madison respectively. These are the two urban areas of Wisconsin and the areas of the state where the supermajority of people of color live.<sup>32</sup> Similarly, in the state of Georgia, the litigation focused not on the practices across the state, but on the practices in Fulton County, which contains the majority of the city of Atlanta.<sup>33</sup>

The Trump campaign succeeded on only one of the 82 lawsuits filed, and that one successful lawsuit concerned a Pennsylvania judge's ruling that voters had three days to provide proper ID and "cure" their ballots.<sup>34</sup> To the extent that the Trump Campaign appealed claims to the United States Supreme Court, the Court denied certiorari to all eight of the

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politics/2020/11/8/21555022/four-seasons-landscaping-trump-giuliani-philadelphia-press-conference [https://perma.cc/3UE7-JR8B].

28. Jemima McEvoy, *Rudy Giuliani Claims He Has Proof of Voter Fraud, But Says He Can't Share It Yet*, FORBES (Nov. 15, 2020), <https://www.forbes.com/sites/jemimamcevoy/2020/11/15/rudy-giuliani-claims-he-has-proof-of-voter-fraud-but-says-he-cant-share-it-yet/?sh=6ead2124235e> [https://perma.cc/VU8V-6BFFK].

29. Pete Williams & Nicole Via y Rada, *Trump's Election Fights Includes Over 50 Lawsuits. It's Not Going Well.*, NBC NEWS (Nov. 23, 2020), <https://www.nbcnews.com/politics/2020-election/trump-s-election-fight-includes-over-30-lawsuits-it-s-n1248289> [https://perma.cc/JX9N-MP3J].

30. Kristine Phillips, *'Damaging to Our Democracy': Trump Election Lawsuits Targeted Areas with Large Black, Latino Populations*, USA TODAY (Dec. 1, 2020, 11:29 AM), <https://www.usatoday.com/story/news/politics/2020/12/01/trump-voter-fraud-claims-target-counties-more-black-latino-votes/6391908002/> [https://perma.cc/6NZ8-EMCW].

31. *Id.*

32. *Id.*

33. *Id.*

34. Cummings et al., *supra* note 19.

lawsuits that were brought before it for review.<sup>35</sup> By the time of the certification of the votes of the Electoral College, the courts had made clear that there were no grounds for upholding Trump's voter fraud claims.

Yet the full damage of the voter fraud propaganda campaign was yet to be done. During the Joint Session of Congress convened on January 6, 2021, to certify the result of the vote of the Electoral College electing President Biden, Trump supporters gathered at the nation's Capital to hold a "Save America" rally.<sup>36</sup> The rally then devolved into an angry mob that stormed the Capital, looted offices, brandished Confederate flags, and threatened politicians, including Speaker of the House of Representatives Nancy Pelosi and Vice President Mike Pence.<sup>37</sup> The mob breached security checkpoints and committed significant property damage in the Capitol—all in an attempt to stop the certification process.<sup>38</sup> As a result of the insurrection, five people lost their lives and hundreds were charged with unlawfully entering the Capitol, brandishing weapons on federal property, or committing violence on the Capitol grounds.<sup>39</sup>

President Trump himself addressed these supporters during the rally, though prior to the acts of insurrection and riot. As noted above, his remarks were deemed sufficiently inciteful of violence to warrant impeachment by the U.S. House of Representatives (although the U.S. Senate failed to convict Trump of incitement). During the riot itself, President Trump did not immediately issue a response condemning his supporters, but instead he kindly encouraged them to "go home now" via a video he posted on Twitter<sup>40</sup> He said they were "very special," yet he

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35. Andrew Chung & Lawrence Hurley, *U.S. Supreme Court Formally Pulls the Plug on Election-Related Cases*, U.S. NEWS (Feb. 22, 2021, 10:14 AM), <https://www.usnews.com/news/top-news/articles/2021-02-22/us-supreme-court-formally-pulls-the-plug-on-election-related-cases> [<https://perma.cc/C53Y-2XLU>].

36. Julia Jacobo, *A Visual Timeline on How the Attack on Capitol Hill Unfolded*, ABC NEWS (Jan. 10, 2021, 8:01 AM), <https://abcnews.go.com/US/visual-timeline-attack-capitol-hill-unfolded/story?id=75112066> [<https://perma.cc/JLD2-MBHW>].

37. Washington Post Staff, *Woman Dies After Shooting in U.S. Capitol; D.C. National Guard Activated after Mob Breaches Building*, WASH. POST (Jan. 7, 2021), <https://www.washingtonpost.com/dc-md-va/2021/01/06/dc-protests-trump-rally-live-updates/> [<https://perma.cc/JW8L-M6BN>].

38. *Id.*

39. Rachel Axon et al., *Capitol Riot Arrests: See Who's Been Charged Across the U.S.*, USA TODAY (Dec. 8, 2021, 8:45AM), <https://www.usatoday.com/storytelling/capitol-riot-mob-arrests/> [<https://perma.cc/DPJ2-J5FZ>].

40. Doha Madani, *Trump Tells Mob at Capitol 'We Love You' But 'Go Home,'* NBC NEWS (Jan. 7, 2021, 10:45 AM), <https://www.nbcnews.com/>

never once discouraged their conduct.<sup>41</sup> This was a vastly different approach by President Trump compared to his treatment of Black Lives Matters protesters during the prior year.<sup>42</sup>

After the litigation and insurrection came the next wave of election legislation. Republican legislators across the United States regarded the appropriate response to the manufactured concerns generated in the wake of the 2020 election cycle as the passage of new laws that further restrict access to the ballot box. As of March 24, 2021, legislators in 47 states have proposed around 361 restrictive bills.<sup>43</sup> Of those proposed bills, at least 55 are moving through 24 states' legislatures, with 6 laws being signed into action in Georgia, Iowa, Utah, Arkansas, and Alabama.<sup>44</sup> The majority of these restrictive bills limit access to absentee voting, while a substantial amount seek to implement more stringent requirements for early voting, valid forms of voter identification, and voter registration.<sup>45</sup> Unsurprisingly, these stricter requirements proposed by lawmakers would disproportionately impact marginalized racial and socioeconomic groups, as well as the disabled community and those struggling with homelessness.<sup>46</sup>

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politics/congress/blog/electoral-college-certification-updates-n1252864/ncrd1253120#blogHeader [https://perma.cc/Z4UD-RM7Z].

41. *Id.*

42. Trump called protestors at Black Lives Matters events “thugs,” “terrorists,” and “anarchists,” while his insurrectionist supporters were “great patriots” who he knew were “hurt[ing].” Tommy Beer, *Trump Called BLM Protesters ‘Thugs’ But Capitol-Storming Supporters ‘Very Special,’* FORBES (Jan. 6, 2021, 6:53 PM), <https://www.forbes.com/sites/tommybeer/2021/01/06/trump-called-blm-protesters-thugs-but-capitol-storming-supporters-very-special/?sh=1225aa8f3465> [https://perma.cc/X365-U8X3].

43. *Voting Laws Roundup: March 2021*, BRENNAN CTR. FOR JUST. (Apr. 1, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-march-2021> [https://perma.cc/W4AX-774L].

44. *Id.*

45. *Id.*

46. Meg Cunningham, *‘The New Jim Crow’: Republicans and Democrats at Odds over Voting Rights*, ABC NEWS (Apr. 20, 2021, 2:56 PM), <https://abcnews.go.com/Politics/jim-crow-republicans-democrats-odds-voting-rights/story?id=77188460> [https://perma.cc/SK9R-D86R]. It is worth acknowledging, however, that a number of other states have adopted measures that would be considered more progressive in terms of supporting access to the ballot box. According to the Brennan Center, “843 bills with expansive provisions have been introduced in a different set of 47 states.” *Voting Laws Roundup, supra* note 43. These bills actually expand absentee voting, ease voter registration

### III. HEURISTICS FOR UNDERSTANDING THE RHETORIC OF RACE AND THE 2020 ELECTION

The narrative above shows how the myth of voter fraud was accelerated to propaganda of national proportions during the 2020 election. It was used as grounds to destroy national confidence in the election (at least on the part of Republicans predisposed to believe that the election was “rigged”), a rationale for attacking the election results unsuccessfully, and a justification for a new wave of heightened regulation of the political process following the 2020 election.

At the heart of this account is the fact that the litigation spurred by the voter fraud propaganda of the 2020 election has arguably been a fulcrum to attack the voting rights of people of color, whether through attempting to erase the effects of the votes they cast in 2020 or through the passage of new strict regulations that seek to prevent (or at least to make more difficult) such electoral success in subsequent elections. It is this targeted use of voter fraud propaganda to effectively marginalize the votes of people of color and criminalize the voters themselves by passing laws that presume such voters’ ill intent—or at least the perception of this marginalization—that raises the question at the heart of this Essay: is this conduct racist?

Reaching such a conclusion often depends on the heuristic with which one approaches the question. By this, I mean one’s worldview about the circumstances of the election oftentimes shapes the decision of how to interpret the conduct we saw in the 2020 election.<sup>47</sup> In this particular context, the decision is shaped by one’s belief in the falsity or truthfulness of the voter fraud claims presented. Assuming one takes such claims as

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requirements, and address concerns around restoring voting rights to people who have a history of felony conviction. *Id.*

47. *Cf.* Ellis, *The Meme of Voter Fraud*, *supra* note 13, at 892 (discussing how one’s worldview shapes one’s understanding of an event and the context in which it occurs, thus providing a heuristic for understanding the rightness of certain actions). I build on this idea of ideology, drawn from J.M. BALKIN, *CULTURAL SOFTWARE: A THEORY OF IDEOLOGY* (1998), to discuss how an “ideology of participation” that creates a desire to foster inclusion or exclusion exists within the cultural ecosphere around debates concerning the right to vote. *Id.* at 893–99. I further outline how the history of the right to vote in the United States has been shaped by debates between these two positions, and in particular, was shaped by the desire to exclude on the basis of race, and then to maintain that exclusion despite the commands of the Reconstruction amendments to the Constitution. *Id.* at 896–97. In this sense, the problem of racial exclusion, coded to avoid constitutional scrutiny, is imbedded in our understanding of the history of participation in the franchise.

false, then the question becomes what may well motivate such claims. This Section of the Essay will unpack this latter point through discussing and applying concepts around race-conscious understandings of the effects of rhetoric used to justify on a neutral basis conduct that may have a disparate racial impact. In particular, this Section will explore the concepts of voting rights realism and racial coding to provide a view of how one may understand the conduct in the litigation and legislation around the 2020 presidential election as racist.

But before doing that, I will briefly acknowledge the position of those who would argue that such conduct is not racist.<sup>48</sup> This would depend on the belief that there is a neutral and objective ground for claiming without evidence that particular voters, particular voting practices, and various election administrators are all part of some grand design to “steal” an election. The evidence that this position was not taken in good faith is replete, and it only has currency to the extent that it is asserted repeatedly and thus amounts to a worldview without connection to objective fact. As I noted earlier in this Essay, this position amounts to a meme devoid of substance, and thus, though passionately believed, it does not have a connection to objective fact. While the possibility exists, however remote, that there may be evidence to support the claims of those who believe the election was stolen, the evidence points in the contrary direction. Given this, the question becomes whether this propaganda-motivated litigation is fairly seen as “racist.” Answering this question requires us to consider what our understanding of racism is in the context of voting rights—in other words, what is our heuristic around race and voting.

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48. While I have resisted detailing at length the claims of the Trump campaign and its litigation team, it is worth noting to explicate this point that Jenna Ellis, a senior adviser to the campaign, said that “every American deserves to know that our elections are conducted in a legal manner, no matter who they are or where they live. That’s our only goal: to ensure safe, secure, and fair elections . . . .” See Juana Summers, *Trump Push to Invalidate Votes in Heavily Black Cities Alarms Civil Rights Groups*, NPR (Nov. 24, 2020, 6:26 AM), <https://www.npr.org/2020/11/24/938187233/trump-push-to-invalidate-votes-in-heavily-black-cities-alarms-civil-rights-group> [<https://perma.cc/B8JX-4SC6>]. This exemplifies the idea that the Trump campaign saw what it was doing as race neutral and only seeking a fair result, notwithstanding the claims in the same article, which included the statement that “[t]his is straight out, discriminatory behavior” from veteran election attorney (and Biden adviser) Bob Bauer. *Id.*

### A. *Voting Realism*

In her essay *Voting Realism*,<sup>49</sup> Professor Gilda Daniels persuasively argues that race consciousness is an important heuristic for understanding the ongoing battles around race and voting discrimination. She argues that as both a way of being informed by history and as a way to be open to creative solutions toward enfranchisement, race consciousness is necessary and essential to move voting rights discourse forward.<sup>50</sup>

Daniels develops her perspective of "voting realism" by synthesizing a definition of racial realism drawn from the work of seminal critical race theorist Derrick Bell and sociologist John Skrentny.<sup>51</sup> Bell's "racial realism" was premised on the permanence of racism and the need to accept racism's persistence, as well as recognize that this may in itself limit the ultimate progress that can occur around racial equality.<sup>52</sup> Skrentny's "racial realism" focuses on recognizing racial difference and utilizing that consciousness to more effectively influence organizations and policy<sup>53</sup>—an instrumentalist concern rather than Bell's ontological concern.

Daniels takes these two approaches to formulate a definition of "voting realism" that embraces persistence of racism as proof of the need for race-conscious heuristics for legislating about voting rights, and it embraces the instrumentalist and arguably hopeful side of this synthesis by endorsing, maintaining, and extending remedies like the Voting Rights Act.<sup>54</sup> Daniels illustrates this both through argumentation and through exegesis of the recent history of race-conscious voting rights remedies (and the dismantling of those remedies) to illustrate their continued need.<sup>55</sup> Additionally, Daniels' voting realism embraces aspirational ends through calling for broader and more imaginative thinking about the possibilities

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49. Gilda R. Daniels, *Voting Realism*, 104 KY. L. REV. 583 (2016).

50. *Id.* at 586 ("Voting realism requires (1) acknowledging that race has significance and usefulness and (2) developing more imagination in how we achieve racial equality. Voting realism recognizes that race and racism influence the voting process.").

51. *Id.* at 587–88.

52. *Id.* at 588–89.

53. *Id.* at 589–90.

54. *Id.* at 601 ("The answer for voting rights lies in the middle—it is important to redefine goals of racial equality and develop strategies that acknowledge difference and the historical and contemporaneous consequences and address current race based inequities.").

55. *Id.* at 592–98 (discussing the history of the Voting Rights Act and its decreased influence due to judicial interpretation as exemplifying why it is needed).



for the right to vote to the end of promoting a positive future trajectory for race relations.<sup>56</sup>

Relevant to our understanding here is the heuristic that Daniels espouses—that racism is permanent and thus is an ongoing force driving efforts around the right to vote, or as Professor Daniels puts it, “Race still matters.”<sup>57</sup> The structures that create detrimental racial impacts persist and create inequities, even if the intention of the policy makers may not *consciously* be toward the subjugation of the voting rights of people of color.<sup>58</sup> This heuristic allows us to presume that even without the evidence of intention to create a racial impact, the permanence of racism—in terms of the lived experience of the structural disadvantages that propagate disparate racial impacts—may nonetheless affect considerations around the right to vote.

Thus, a Danielsian “voting realist” may look at the course of conduct of the 2020 election and suggest that the deliberate proliferation of a myth of systemic election fraud has the clear impact of demeaning and attacking voters of color, whether deliberately intended or not. Such attacks have been the pattern that has come with the dismantling of remedies designed to protect against the effects of racial discrimination (as exemplified in *Shelby County v. Holder*<sup>59</sup> and its aftermath) and the use of neutral regulations such as voter identification laws and voter purges to have the effect of making it harder for voters of color to exercise their rights. A Danielsian voting realist may see the litigation and subsequent hyperregulation based on a myth of voter fraud as falling within said pattern.

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56. *Id.* at 600–04 (describing progressive approaches under the “voting realist” mindset).

57. *Id.* at 604.

58. It is fair to acknowledge, however, that this “permanence of racism” thesis is in and of itself a point of disagreement. *See, e.g.,* Leroy D. Clark, *A Critique of Professor Derrick A. Bell’s Thesis of the Permanence of Racism and His Strategy of Confrontation*, 73 *DENV. U. L. REV.* 23, 24 (1995) (“Professor Bell’s work propagates a damaging and dampening message which must be confronted and rejected if we are to fashion our future creatively.”). Bell’s work, in itself, has long been subject to this critique since it suggests that racism is a phenomenon that will persist despite the best intentions of those who wish to supersede or eradicate it. Yet even those who disagree with the permanence perspective would nonetheless acknowledge that the aspiration of eradicating racism is likely a long way off, perhaps even outside of our lifetimes.

59. *Shelby Cnty., Ala. v. Holder*, 570 U.S. 529 (2013).

### B. Racial Coding

Another approach to understanding the impact of discriminatory policy as informed through rhetoric is through what scholars call "racial coding." To speak in racial code is to offer rhetorical signifiers that may appear neutral on their face but in actuality send a signal that impliedly demeans and discriminates against a particular racial group.<sup>60</sup> As Richard Dvorak stated, code words are "phrases and symbols which refer indirectly to racial themes, but do not directly challenge popular democratic or egalitarian ideals."<sup>61</sup> Such code words then ultimately can serve as a rationale for policies that may discriminate given their neutral and democratic-seeming structure, but because of their signifying power they may constitute an "appeal to racist sentiments without appearing racist."<sup>62</sup> Moreover, the policies ultimately mask intention and serve as a heuristic to obscure the effect.<sup>63</sup>

In this sense, the relevance for our analysis is to understand how the discourse of discrimination through "racial coding" has continued throughout modern American political history and how it may serve as a heuristic for understanding the rhetoric and discourse around the 2020 election. In other words, the question is whether the rhetoric of voter fraud that was pervasive in the 2020 election can fairly be understood as a racist code for voters who are being disfavored on the basis of their race. This Section will catalogue the various forms of racially coded history, tactics, and tropes, and then argue that these tropes have salience for our understanding of the 2020 election.

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60. This is to say that such language makes use of racial stereotypes around behavior to suggest negative connotations about the people from those groups. As Ian Haney Lopez pointed out in an interview, "Current racial code operates by appealing to deep-seated stereotypes of groups that are perceived as threatening. But they differ from naked racial terms in that they don't emphasize biology—so it's not references to brown skin or black skin." German Lopez, *The Sneaky Language Today's Politicians Use to Get Away with Racism and Sexism*, VOX (Feb. 1, 2016, 4:30 PM), <https://www.vox.com/2016/2/1/10889138/coded-language-thug-bossy> [<https://perma.cc/9C82-VGBW>].

61. Richard Dvorak, *Cracking the Code: De-Coding Colorblind Slurs During the Congressional Crack Cocaine Debates*, 5 MICH. J. RACE & L. 611, 615 (2000) (quoting MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1980S, at 120 (1986)) (internal quotations omitted).

62. *Id.*

63. *Id.* ("More importantly, they can do so without leaving evidence that can be traced back as an intent to discriminate.").

### 1. Racial Coding, Profiling, and Stereotypes

Richard Dvorak argues that George Wallace's 1968 presidential bid can be traced as the beginning of racial coding.<sup>64</sup> In order to appeal to whites' "sense of justice and equal opportunity" to gain political influence, Wallace coded overtly racist words and symbols, and obtained greater support in northern blue-collar cities such as Milwaukee, Detroit, and Philadelphia.<sup>65</sup> Additionally, so-called "colorblind slurs" came into use in the 1970s. Terms like "fairness," "welfare," and "groups" were used to garner racial reactions.<sup>66</sup> Richard Delgado and Jean Stefanic observed that the racist impact of such racial code words can be invisible to white people, while people of color comprehend the meaning of language like "you people," "articulate," or "highly educated Black."<sup>67</sup> This, in itself, illustrates another divide in how one knows racism—the divide around whether a racial trope is neutral or a coded racist assault.

Justice Thurgood Marshall recognized the impact of apparent race-neutral language on the direction of policy in his dissent in *Memphis v. Greene*.<sup>68</sup> In *Greene*, the City of Memphis decided to close a parcel of land that adjoined a white neighborhood and a Black neighborhood to reduce the flow of "undesirable traffic."<sup>69</sup> Justice Marshall noted in his dissent that the language used by the City of Memphis included "code phrases for racial discrimination."<sup>70</sup> Further, Justice Marshall cited the nation's history in explaining why the City's language was not actually race-neutral, as the majority of the Court had found.<sup>71</sup>

It is well known that politicians deploy racially coded rhetoric to gain political influence. For example, phrases like "get tough" on crime are used to manipulate and induce fear in citizens.<sup>72</sup> An example of this "tough on crime" stance with racial underpinnings is the Willie Horton story.<sup>73</sup>

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64. *Id.* at 622.

65. *Id.*

66. *Id.* at 624.

67. *Id.* at 635.

68. *Id.* at 636 (discussing Justice Marshall's dissent in *Memphis v. Greene*, 451 U.S. 100, 135 (1981), in which the City of Memphis closed off a street that connected a white and Black neighborhood and the Court ruled that comments made by the City did not amount to intentional discrimination as they were race neutral).

69. *Id.*

70. *Id.*

71. *Id.*

72. Kelly Welch, *Black Criminal Stereotypes and Racial Profiling*, 23 J. CONTEMP. CRIM. JUST. 276, 282 (2007).

73. *Id.*

Horton was a Black prison inmate who committed rape while on work furlough from prison in Massachusetts during the governorship of Michael Dukakis. This story was used in an advertising campaign in the 1988 presidential campaign against Governor Dukakis, the Democratic nominee, to prove Dukakis's weak stance on crime.<sup>74</sup> The Willie Horton campaign, in the words of Professor Kelly Welch, served "as the visual representation of a criminal predator for fearful Americans."<sup>75</sup> As the image of a Black man, it served as a symbol that argued that all Black men represented criminality.<sup>76</sup>

The media also has a long history of using such racial stereotypes. These portrayals have been common since the days of slavery, with newspapers announcing slave insurrections with racial terms and including narratives of slaves being predisposed to criminal acts.<sup>77</sup> In modern times, "urban" has become synonymous with "Black," and media stories often link "urban" with crime, welfare, and drugs.<sup>78</sup> In the wake of the police shooting of Michael Brown in Ferguson, the media constantly used terms such as "thug(s)" to describe both Brown and protestors, and further described Brown (who was a teenager at the time) as a "man," further showing how Black boys are not likely to be seen as "childlike."<sup>79</sup> In comparison, the white Sandy Hook Elementary School gunman, Adam Lanza, was described as a "sweet little boy."<sup>80</sup>

## 2. *Police and Violence*

Racial insubordination and hyper-incarceration of Blacks has cast them as hypermasculine, criminal, and unintelligent.<sup>81</sup> The term "implicit dehumanization" has been coined by Professor Goff to describe the unconscious association between Blacks and beasts, and holds great implications when it comes to policing.<sup>82</sup> A study of the San Jose Police

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74. *Id.*

75. *Id.*

76. *Id.*

77. Bryan Adamson, *Thugs, Crooks, and Rebellious Negroes: Racist and Racialized Media Coverage of Michael Brown and the Ferguson Demonstrations*, 32 HARV. J. RACIAL & ETHNIC JUST. 189, 221 (2016).

78. *Id.* at 224.

79. *Id.* at 232, 236.

80. *Id.* at 245.

81. L. Song Richardson & Phillip Atiba Goff, *Interrogating Racial Violence*, 12 OHIO ST. J. CRIM. L. 115, 120 (2014).

82. *Id.* at 121, 123.

Department looked at the relationship between masculinity threat<sup>83</sup> and the use of police officer force, finding that officers who were more insecure about their masculinity were more likely to use force against Black men, due to both unconscious and conscious stereotypes of poor, urban Black men as criminal, dangerous, and animal-like.<sup>84</sup>

### 3. *Immigration and Xenophobia*

Supreme Court Justices have not been shy when it comes to the overt use of racist language. Chief Justice William Rehnquist called Mexican children “wetbacks” and defended it on the grounds that it carried “currency in his part of the country” after Justice Marshall objected to its use.<sup>85</sup> However, in judicial opinions, the Supreme Court has implemented metaphors when deciding immigration-related cases.<sup>86</sup> In *Plyler v. Doe*,<sup>87</sup> the Supreme Court uses “shadow population” to describe undocumented immigrants and other language such as “sealing” our borders and problems being caused by the “influx of uncountable millions.”<sup>88</sup> In oral arguments, the Supreme Court has further refrained from referring to an undocumented immigrant by his name, but rather used “the illegal alien” or “the alien” to describe the person.<sup>89</sup>

Legislation has been passed under the guise of enforcing immigration law but used to target certain groups such as Latinos. For example, Arizona’s SB 1070 essentially made it permissible to racially profile those who appeared to be in the country illegally, with supporters failing to cite non-ethnic factors as the basis for enforcement.<sup>90</sup> Rob Haney, the Maricopa County Republican Party Chairman, made statements with implicit racial appeals regarding the Act using terms such as “invaded,”

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83. Richardson and Goff define “masculinity threat” as “the fear of being judged to be insufficiently masculine.” *Id.* at 125. They root this in gender theory, which explains that masculinity, as a social construction, is performed and thus perceived. Thus, masculinity threat is the fear that others will perceive a person as insufficiently manly in one’s identity. *Id.* at 125–26.

84. *Id.* at 136.

85. Keith Cunningham-Parmeter, *Alien Language: Immigration Metaphors and the Jurisprudence of Otherness*, 79 *FORDHAM L. REV.* 1545, 1547 (2010).

86. *Id.* at 1559.

87. *Plyler v. Doe*, 457 U.S. 202 (1982).

88. Cunningham-Parmeter, *supra* note 85, at 1561–63.

89. *Id.* at 1565.

90. Lilian Jiménez, *America’s Legacy of Xenophobia: The Curious Origins of Arizona Senate Bill 1070*, 48 *CAL. W. L. REV.* 279, 304 (2012).

"illegal," "costing the taxpayer," and "enforcing our laws," with "invasion" being a favorite among proponents of strict immigration laws.<sup>91</sup>

#### 4. Racial Tropes

"Welfare Queen" was a racial trope used to categorize a particular type of Black woman.<sup>92</sup> This Black woman was categorized as unintelligent yet smart enough to trick the government out of billions of dollars; she was also uneducated, yet informed enough to make a business out of reproductive organs.<sup>93</sup> She was well-illustrated as a Black woman, usually a Black teenage mother who continuously has children to increase her government benefits, lives in public housing, and waits for her monthly check.<sup>94</sup> The Welfare Queen phenomena was a political tool used to belittle Black women.<sup>95</sup> The political, sociological, and economic disadvantages of the Black household created more single Black women as heads of households, which resulted in the dependency on governmental assistance.<sup>96</sup> This later resulted in the cycle of the Welfare Queen birthing new generations of welfare dependents that rely on the state for financial assistance.<sup>97</sup>

The Welfare Queen was subjected to ridicule in the Trump administration as well.<sup>98</sup> In the 2016 election, President Trump utilized the term "Welfare Queen" to express that Black women were stealing "American democracy" through voter fraud.<sup>99</sup> The twenty-first century Welfare Queens are still brown, female, and poor, but instead of utilizing the government to pay their wages, they are instead being called "voter fraud tricksters."<sup>100</sup> The new definition of the Welfare Queen was created because of the lack of trust white Americans had for Black female

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91. *Id.* at 305–07.

92. Khiara M. Bridges, *Wily Patients, Welfare Queens, and the Reiteration of Race in the U.S.*, 17 TEX. J. WOMEN & L. 1, 13 (2007).

93. *Id.*

94. *Id.*

95. *Id.* at 14.

96. Camille Gear Rich, *Reclaiming the Welfare Queen: Feminist and Critical Race Theory Alternatives to Existing Anti-Poverty Discourse*, 25 S. CAL. INTERDISC. L.J. 257, 274 (2016).

97. *Id.* at 261.

98. Catherine Powell & Camille Gear Rich, *The "Welfare Queen" Goes to the Polls: Race-Based Fractures in Gender Politics and Opportunities for Intersectional Coalitions*, 108 GEO. L.J. (19TH AMEND.) 105, 109 (2020).

99. *Id.* at 110.

100. *Id.*

Americans who had the ability to vote. It is believed that Black Americans are unworthy of the franchise because they are incompetent and a waste.<sup>101</sup>

### 5. Racism/Implicit Bias

Racism will truly never leave if we continue to use the language that separates us.<sup>102</sup> Throughout the Obama administration, the phrase “first black president” was penciled everywhere.<sup>103</sup> Spotting Obama’s blackness in this context demonstrates how racial terms can become political, thus allowing us to hear it in a customary and uncritical way, and effectively allowing acceptance of the divisive racialized discourse.<sup>104</sup> Racial language is a mechanism used to continually divide the country, and those terms have been included throughout American history.<sup>105</sup> Racial terminology is included in state constitutions as well as the U.S. Constitution, which stated that Blacks were three-fifths of a person.<sup>106</sup>

Many people believe that we live in a post-racial era.<sup>107</sup> What society should really understand is that deaths such as Trayvon Martin’s are perfect examples proving that we are not in a post-racial era.<sup>108</sup> A post-racial society cannot come to fruition if mechanisms such as implicit bias still exist. Implicit bias in some cases comes from negative stereotypes about Black people.<sup>109</sup> Social science further provides insight as to how white people always seem to “see” a weapon in the hands of a Black person, when in actuality one is not there.<sup>110</sup>

Implicit bias does not just affect society, but our judicial system as well.<sup>111</sup> The decision makers in our court systems have an element of implicit bias based on their human beliefs.<sup>112</sup> In other words, the judges and juries that make the critical determinations in the judicial system suffer from implicit bias like all human beings. Understanding what implicit bias

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101. *Id.* at 111.

102. SpearIt, *Enslaved by Words: Legalities & Limitations of “Post-racial” Language*, 2011 MICH. ST. L. REV. 705, 712 (2011).

103. *Id.* at 726.

104. *Id.* at 709.

105. *Id.* at 720.

106. *Id.* at 711.

107. Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555, 1560 (2013).

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

is and understanding where it comes from are two dynamically different things.<sup>113</sup>

### 6. *The 2020 Election Through the Lens of Racial Coding*

Racial language continuously divides the country.<sup>114</sup> This remains true in the second decade of the twenty-first century. This is obvious. The question is whether the racial tropes we have explored in this section are fairly imputed to the actions of the Trump Campaign, the agents of that campaign, or to President Trump personally. The evidence would suggest that the Trump Campaign and President Trump's own rhetoric deployed racial code.

Racial tropes that equate Blacks with criminality and violence persist, and it is well documented that Trump's rhetoric through tweeting and otherwise portraying Black people protesting as thugs continues to dehumanize them. For example, during the 2020 Presidential debate, Trump stated that he was "the least racist person in this room."<sup>115</sup> Self-labeling as the *least* racist person still results in disassociating from minority communities and yet manages to speak to white voters who may feel the same way and are not self-aware of their actions or inactions that may show otherwise. In this sense, it is clear that Trump's rhetoric seeks to speak to a new type of racial coding through appealing to an extremist white base that has openly sought to foment racial division.

Yet, read as coded racial rhetoric, this tactic further promotes the white radical voters' belief that Trump is about fairness and understands the needs of the people. He tweeted "go home now" and that they were "very special" as a means to diffuse the Capitol Insurrection.<sup>116</sup> This fosters an insulation from accusations of racist acts. Moreover, the distinction between how he treated his supporters and how he treated Black protesters in the BLM context appears to be a racial dog whistle tactic<sup>117</sup> that

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113. Cunningham-Parmeter, *supra* note 85, at 1561–63

114. SpearIt, *supra* note 102, at 721.

115. Jenna Amatulli, *Trump Says He's 'The Least Racist Person in This Room' at Final Presidential Debate*, HUFFPOST (Oct. 22, 2020, 11:21 PM), [https://www.huffpost.com/entry/trump-kristen-welker-least-racist\\_n\\_5f923e9dc5b686eaaa0fb460](https://www.huffpost.com/entry/trump-kristen-welker-least-racist_n_5f923e9dc5b686eaaa0fb460) [https://perma.cc/B88K-XLD8].

116. Madani, *supra* note 40.

117. A racial dog whistle tactic is another way of using racial code to signal a racial disparagement against a minority group. Indeed, the Merriam-Webster dictionary defines the figurative meaning of a dog whistle as "a coded message communicated through words or phrases commonly understood by a particular group of people, but not by others." *What's the Political Meaning of 'Dog*



implicitly distinguishes on a discriminatory basis. He treats one group as violent yet praises another group as very special even though the insurrection was violent.

It is through this lens that we must examine the political tactics of using litigation and propagating the myth of voter fraud to question the outcome of the election. Many of the counties that Trump demanded a recount in had a higher Black or minority population. In the state of Wisconsin, for example, Trump did not demand a recount for the entire state, but instead focused on the Dane and Milwaukee counties, which were not only Biden-leading counties but also counties that have a higher Black and minority population. Milwaukee's Black residents make up about 27% of the Black population in the state. Dane County has a higher Black population as well but is also home to liberals and students from University of Wisconsin.<sup>118</sup> As opposed to Wisconsin, Trump requested the recount of the state of Georgia because of the shocking results of Biden winning the electoral votes. The last time Georgia went blue was in 1992.<sup>119</sup> Trump demanded a recount because Fulton County, which has a higher Black population, and the surrounding counties were able to get more Black people to vote than ever before.

These few examples illustrate the point that the discourse surrounding the illegitimacy of the 2020 presidential election can be read as containing

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*Whistle??: A Message Only Some Can Hear*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/words-at-play/dog-whistle-political-meaning> [<https://perma.cc/P2JT-5RSM>]. Indeed, this topic has been explored at length in IAN HANEY LOPEZ, *DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS* (Oxford University Press 2015).

Thus, in this context, the racial code (or dog whistle) of treating BLM protesters disparagingly while treating January 6 insurrectionists virtuously equates to using discriminatory tropes against supporters of the cause of racial minorities while praising the arguably white supremacist motives of the insurrectionists. Moreover, as coded rhetoric, these claims are insulated from being directly shown as racially derogatory.

118. Kate Brumback, *Georgia Counties Set to Start Recount Requested by Trump*, AP NEWS (Nov. 23, 2020), <https://apnews.com/article/election-2020-joe-biden-donald-trump-georgia-state-elections-352e729f14a243b98fdefda94ff164ce> [<https://perma.cc/8Q7Q-TVR9>].

119. See Rosalind S. Helderman & Elise Viebeck, *'The Last Wall': How Dozens of Judges Across the Political Spectrum Rejected Trump's Efforts to Overturn the Election*, WASH. POST (Dec. 12, 2020, 1:12 PM), [https://www.washingtonpost.com/politics/judges-trump-election-lawsuits/2020/12/12/e3a57224-3a72-11eb-98c4-25dc9f4987e8\\_story.html](https://www.washingtonpost.com/politics/judges-trump-election-lawsuits/2020/12/12/e3a57224-3a72-11eb-98c4-25dc9f4987e8_story.html) [<https://perma.cc/9SBW-9WPJ>].

racial undertones that render invisible racist intent. The discussion of “illegitimate voters” can also be fairly read to attack undocumented individuals, and the voting litigation targeted areas with large minority presence. This implicitly invokes race without the use of racist or racial language. The promotion of the idea of voter fraud is a combination of implicit bias, stereotyping, engraining of racial perceptions, and years of systemic racism, indirectly calling voters of color unworthy of voting; therefore, questioning their vote has become a tactic to delegitimize the minority vote. In this sense, the rhetoric of the Trump Campaign in the substance of its politics as well as the strategy it deployed to contest a fairly executed election may be fairly perceived as racially coded.

#### IV. REMEDIES AND RACIAL REALISM: A DISCONNECT IN THE LAW

The conclusion that the attacks on the 2020 election—whether by rhetoric, litigation, or insurrection—may be fairly racially coded leaves us to contemplate the larger question with which this Essay began: If one would consider this conduct racist, ought that, in and of itself, provide a remedy against suppressive voting policies or the lawsuits themselves?

As I suggested earlier on, the traditional conception of the legal issues here would suggest that the answer is no. In the background of all this discourse is the constitutional commitment to the First Amendment of the U.S. Constitution and the protection of freedom of speech, which ultimately includes what might be considered racist speech. Thus, as one might contemplate, the speech at issue here cannot in and of itself be the target of limitation by the government, for it would put the government in the position of discriminating based on the content of the speech and making implicit judgments about the message provided.

As a second matter, the question of whether the speech or the litigation “smacks of racism,” as Justice Karofsky put it, was not determinative to the outcome of that litigation itself. Indeed, the courts almost uniformly came down on the side of the Biden Campaign in the face of the voter fraud and election malfeasance claims made by the Trump Campaign. There was no proof, and thus no grounds to grant nearly any of the many lawsuits brought forward.<sup>120</sup> And this, as was often touted, was the success of the rule of law.<sup>121</sup> Indeed, as one court chose to emphasize, “Democracy

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120. *Id.*

121. *See, e.g.,* Artemio V. Panganiban, *Defeat for Trump, Victory for Rule of Law*, INQUIRER (Dec. 27, 2020, 4:03 AM), <https://opinion.inquirer.net/136462/defeat-for-trump-victory-for-rule-of-law> [<https://perma.cc/3J85-WET9>] (noting that “the rule of law is much alive in the US, and that after losing its way during

depends on counting all lawful votes promptly and finally, not setting them aside without weighty proof. The public must have confidence that our government honors and respects their votes.”<sup>122</sup>

This is a victory, as far as it goes.

But the larger quandary revolves around the fact that as this Essay goes to press, a number of states are using the crisis of confidence created by the outcome of the election as justification for limiting laws that provide access to the vote, and that those rules will likely impact people of color more harshly. As noted earlier, this rationale has served to justify what some would call a new wave of voter suppression. Moreover, if the claims developed in this Essay are to be believed, this underlying rationale of a crisis of confidence is predicated on racially coded rhetoric that served to stoke those same fears. In essence, the suggestion in attacking the voting strength of people of color in urban areas through rhetoric, litigation, and now legislation, is that those areas are dangerous. The suggestion made by some is that such strength of the right to vote by people of color is a threat to the current political structure, and thus the use of racially coded rhetoric as a means to motivate suppressive legislation is a ploy to maintain power.<sup>123</sup> Indeed, as one news story said while discussing the changes ongoing in Texas, and quoting Myra Perez of the Brennan Center for Justice at New York University School of Law, “Their manipulation has got a shelf life, and I think that’s part of the reason why they’re so desperate to do it right now because they see the end. They see what’s coming down the road for them.”<sup>124</sup> That “end” likely refers to the end of the GOP’s goal of maintaining traditional racial dominance.

Given this, it may well be the case that the coded racial rhetoric is a preservation mechanism to deploy the strategies of voter suppression to maintain power. This pattern in itself is consistent with the strategies of the Jim Crow era, where hyperregulation of the franchise through poll taxes, literacy tests, understanding tests, and the like was used as a means

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the last four years, that mighty country could now be looked up to by the free world for leadership”).

122. *Donald J. Trump for President, Inc. v. Sec’y of Pa.*, 830 F. App’x 377, 390–91 (3d Cir. 2020).

123. See Alexa Ura, *Texas Republicans Begin Pursuing New Voting Restrictions as They Work to Protect Their Hold on Power*, TEX. TRIBUNE (Mar. 22, 2021, 9:00 AM), <https://www.texastribune.org/2021/03/22/texas-republicans-voting-restrictions/> [<https://perma.cc/DQ6H-8SJZ>] (“The wave of new restrictions would crash up against an emerging Texas electorate that every election cycle includes more and more younger voters and voters of color. They risk compounding the hurdles marginalized people already face making themselves heard at the ballot box.”).

124. *Id.*

to reverse the gains of Reconstruction and to prevent Black voting strength from disrupting the power held by the white majority. In the Jim Crow era, the threat to the franchise was expressed in terms of unworthiness and dangerousness of the individual voters, and that unworthiness was made manifest in practices like felon disenfranchisement. These practices were easily seen in the context of racial code and for their antidemocratic effects.

If we read the account of 2020 and 2021 offered here as one of racially coded rationales motivating voter suppression, one cannot help but conclude that this history of exclusion on the basis of race may well be repeating itself in a modified form. Certainly, the forms of exclusion cannot be as complete in the twenty-first century as they were in the twentieth, but the exclusionary ideology as a means of preserving power in an increasingly multicultural and multiracial world raises the specter of inequality of the vote.

Of course, the ultimate advantage of racial code seen through the lens of voting rights realism is that the desire to suppress remains real and salient, but it also is plausibly invisible enough from the consideration of the courts seeking to apply antidiscrimination law in voting. In this context, it means that claims of election integrity are the guise of the motivation for these new laws, but seen in the context of the 2020 election, it becomes plausible that this was racially coded discriminatory motivation. Yet for purposes of the Voting Rights Act or the U.S. Constitution, that connection is insufficient to merit questioning the laws themselves. As noted at the beginning of this Essay, the law requires evidence of disparate impact in terms of the law itself or evidence of discriminatory motivation that, either expressly or through the clearest inference of circumstantial evidence, would deem the law discriminatory. Racial code and its veil of neutrality allows avoidance of this scrutiny by allowing the plausible deniability of this discriminatory animus. And a facially neutral rationale for a more restrictive voting policy is sufficient under current law.<sup>125</sup>

This leaves open the disturbing possibility that the motivations for racial voter suppression can remain invisible, but the effects thus protected will not have a remedy in the courts. This becomes clearer as we recognize that it may be possible for the Supreme Court to limit the reach of the Voting Rights Act itself, and the disinformation around the election—accelerated by social media and persuasive enough to bolster the

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125. See *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008) (upholding Indiana's 2005 voter identification law on a facial challenge in part on the rationale that the state had an interest in preventing voter fraud).

worldview of those who believe it—will be sufficiently persuasive to lawmakers and their supporters to encourage more of these laws rather than fewer of them. The disconnect from the objective truth may continue to escalate and accelerate voter suppression in the states that embrace it.

In this light, the only recommendation that this Essay can make is a reconsideration of the fundamental rules that allow this combination of disinformation, racial coding, and its resulting voter suppression to go forward. The 2020 election has taught us that the legitimacy of the electoral process relies on faith in the political process. That faith can be easily eroded by disinformation, and the argument of this Essay is that the disinformation campaign of the 2020 election pushed forward by President Trump and his campaign was racially coded and sought to have a disparate racial impact. While it was not successful, the ideology persists and arguably motivates a new wave of racially suppressive voting laws. While the courts remain the ultimate recourse for those laws once passed, the larger problem of the allowance of disinformation to shape the structure of American democracy remains.

Perhaps the ultimate reconfiguration of the legal structure regarding voting rights is the only solution to these problems. Elections may need to be protected like critical infrastructure, and accordingly, different standards of proof may be necessary to change election laws to make them stricter. Indeed, as I have argued in *The Meme of Voter Fraud*:

Practically speaking, the evaluation of right to vote denial claims should be grounded in something greater than a mere assertion that the government's interest in abstract policy justifies a particular electoral rule. Courts should place the burden of proof on the government to demonstrate an actual electoral problem before changing a rule if that revised rule may exclude voters. A court may then determine whether or not the reason for the change is based in fact or on a meme. Further, courts should reject vague concerns for inchoate electoral dilemmas like "voter fraud." This method is the most useful and necessary intervention to counter the meme.<sup>126</sup>

That burden should extend to legislatures seeking to enact more restrictive voter requirements. The ultimate ability to exercise legislative power lies in the discretion the legislature has to make election changes on any rationale that appears neutral and reasonable. This would include baseless assertions of voter fraud. The same kind of firewall for democracy

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126. Ellis, *The Meme of Voter Fraud*, *supra* note 13, at 914–15 (internal citations omitted).

that prevented baseless voter fraud allegations from subverting a legitimate election may well be needed to protect from legislation passed on similar baseless grounds. This, of course, would require constitutional intervention on federal or state grounds, but it seems the only remedy for the problem described in this Essay.

#### CONCLUSION

The heuristics we use to understand racism matter, particularly in the context of promoting a right to vote free of racial animus. This Essay has offered an examination of the 2020 election as a case study in how coded racial rhetoric can distort the right to vote yet evade review under extant law. At the same time, it examined how the courts and their ability to examine and dismiss baseless claims for want of evidence was preservative of the outcome of the 2020 election, and thus protected the interests of the nearly 150 million voters who exercised the franchise. Ultimately, the commitment to both evidence-based understanding of transformation of our laws coupled with a moral constitutional commitment to a truly universal right to vote will be what is ultimately preservative of the franchise against the storms of racially coded disinformation to come.