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## ARTICLE

# Campaign Finance Reform is a Voting Rights Issue: The Campaign Finance System as the Latest Incarnation of the Politics of Exclusion

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### I.

#### INTRODUCTION

Though the iron is hot for campaign finance reform,<sup>1</sup> at the political forefront the issue is framed one-dimensionally. The Black Congressional Caucus' ambivalent support of the recent reform bills proposed in Congress illustrates that these reform measures may fail to address the distinct implications of the campaign finance system for communities of color.<sup>2</sup> Conserv-

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1. See Elisabeth Bumiller & Philip Shenon, *President Signs Bill on Campaign Gifts; Begins Money Tour*, N.Y. TIMES, Mar. 28, 2002, at A1 (noting President George W. Bush's observation that the Bipartisan Campaign Finance Reform Act is "the culmination of more than six years of debate among legislators, citizens and groups").

2. See Cedric Muhammad, *A Deeper Look, The Real Campaign Finance Reform Issue*, (Sept. 7, 2000) at <http://www.blackelectorate.com/articles.asp?ID=191>; Alison Mitchell, *2 Groups in House are at a Focal Point on Campaign Bill*, N.Y. TIMES, July 12, 2001, at A1 (noting that a

atives and liberals agree that the present structure of campaign financing needs to be reformed, but neither has substantially addressed the issue of race. Reform is needed but the current debate is too narrow.

This paper will address the needs of low-income communities with particular focus on communities of color. Studies have shown that campaign finance systematically operates to exclude communities of color from the political process.<sup>3</sup> While looking at campaign finance is important, it can invite a myopic focus on money and ignore broader structural inequities that have a disproportionate impact on racial minorities.

We often approach existing and proposed reforms as though they are neutral, assuming comparatively even implications for various populations. Nothing could be farther from the truth. Structures carry with them important implications that are often uneven and unjust in effect and by design.<sup>4</sup>

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number of members of the black caucus were concerned that soft money bans would impede “get-out-the-vote” efforts) and Adam Clymer, *Black Caucus Members Find Themselves Courted Heavily in Soft Money Fight*, N.Y. TIMES, July 11, 2001, at A18 (regarding the request by black caucus members that if a soft money ban passed, the Democratic Party would provide ten to fifteen percent of its fundraising to voter mobilization efforts); see also Robert Moore, *NNPA Special Report: Shortchanged: Black Candidates See Few of the Millions of Dollars Raised For Elections*, NEW JOURNAL & GUIDE, Aug. 31, 2000, at [http://www.njournal.com/news/2000/08/shortchanged\\_blacks.html](http://www.njournal.com/news/2000/08/shortchanged_blacks.html) (observing that the unique challenges facing minority politicians are largely forgotten).

A study by the Brennan Center for Justice suggests that the concern that soft money reductions or bans will have a negative impact on candidates of color or on voters of color is unsupported by the statistics on expenditures. See Brennan Center for Justice, *The Purposes and Beneficiaries of Party “Soft Money”*, at [http://www.brennancenter.org/resources/downloads/purposes\\_beneficiaries070301.pdf](http://www.brennancenter.org/resources/downloads/purposes_beneficiaries070301.pdf). According to the Brennan Center, “[t]he picture of party soft money that emerges from a close look at where it comes from and how it is spent contradicts the claims that soft money strengthens the parties through voter mobilization activities,” since “[l]ittle soft money is actually used for [activities] designed to mobilize voters.” *Id.* at 2. The Brennan Center adds that “[v]ery few of the candidates who benefit from [the use of soft money for “issue ads,” ads that indirectly promote the election or defeat of federal candidates] are candidates of color. . .”. *Id.* The Brennan Center also argues “money for get-out-the-vote drives that may be lost by a ban on soft money would easily be replaced by hard money dollars.” *Id.* at 3.

While it may be true that a soft money ban, such as the one that just passed (signed into law by President George W. Bush on March 27, 2002) via the Bipartisan Campaign Finance Reform Act, will not injure candidates and voters of color, it is not clear that such a ban or the Act overall will create a more racially inclusive election system. In fact, Trevor Potter and Kirk L. Jowers of the Brookings Institution posit that “[t]he [Act’s] most predictable impact on the campaign finance world will be to enhance the relative influence of corporations, trade associations, and other organizations with large hard-money PACs, while diminishing the influence of entities that have relied primarily or solely on large soft-money contributions.” Trevor Potters & Kirk L. Jowers, *Recent Developments in Campaign Finance Regulation: Summary Analysis of Bipartisan Campaign Finance Reform Act Passed by House and Senate and Sent to the President*, at <http://www.brookings.edu/dybdocroot/gs/cf/headlines/FinalApproval.htm> (last visited Mar. 27, 2002).

The overarching point is that it is not evident that anyone has looked at, in any systemic regard, what impact proposed reforms and the recent Act will have on marginalized groups.

3. See *infra* note, .

4. See JOHN RAWLS, JUSTICE AS FAIRNESS 52-53 (2001). Rawls notes that even if a structure comes into being through a fair and just process and is initially fair in its application, it can still become unjust because of changing circumstances. In the matter of civil rights, it is clear that many of the structures that were adopted cannot claim such an innocent origin of application.

In order to evaluate the proposed changes to campaign finance in the United States, there must first be some understanding of the nature of the problems and the goal of such an effort. The current debate is conspicuously lacking a goal or vision. A potential goal is the attainment of what Barber calls a “strong democracy,”<sup>5</sup> particularly for historically marginalized members of the political polity. Some of the proposed reforms would further distance us from strong or real democracy while other reforms would bring us closer to that objective.<sup>6</sup>

Many of our voting reforms over the last several decades have apparently been concerned with ending what Michael Omi calls a “racial dictatorship.”<sup>7</sup> There is little doubt that the claim of democracy was and still is limited or extended on the basis of race and other factors. Part of the challenge that continues to confront us as a country is to move us toward a racial justice where citizenship is not distorted by race. While there has been some success in this effort, we are far from being able to claim that our vote and our voice are not shaped by race.<sup>8</sup> It is within the context of

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5. See BENJAMIN BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE* 117 (1984) (setting out what is needed for a strong democracy and why we have a thin democracy:

Strong democracy is a distinctively modern form of participatory democracy. It rests on the idea of a self-governing community of citizens who are united less by homogeneous interests than by active education and who are made capable of common purpose and mutual actions by virtue of their civic attitudes and participatory institutions rather than their altruism and their good nature. Strong democracy is consonant with—indeed it depends upon—the politics of conflict, the sociology of pluralism. . . .”

Barber describes thin democracy as denying the common good and based on an overly individualistic concept of democracy that focuses entirely on private ends. The end of thin democracy is to promote private liberty in the absence of public justice.

6. See generally, e.g., IRIS MARION YOUNG, *INCLUSION AND DEMOCRACY* 3-10 (2001) [hereinafter YOUNG, *INCLUSION*] (identifying the challenges for creating a deeper, more inclusive democratic process); AMY GUTMANN AND DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* (1996) (discussing how deliberation in a strong democracy should occur); see also YOUNG, *INCLUSION*, at 35.

7. Although this country came into being touted as a democracy, it was only a democracy for white, propertied males. See ERIC FONER, *THE STORY OF AMERICAN FREEDOM* 11 (1998). While the benefits of democracy were eventually extended to others, many of these benefits slow in being extended to non-whites and women. See *id.* at 39. Even now, as I will argue throughout this paper, the benefits of our present “democratic” structure are extended via a racial hierarchy, with whites receiving the lion’s share of these benefits. See MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES FROM THE 1960s TO THE 1990s* 65-66 (2d ed. 1994) (pointing out that “[f]or most of its existence both as a European colony and as an independent nation, the U.S. was a ‘racial dictatorship.’ . . . [a situation in which] most non-whites were firmly eliminated from the sphere of politics”). Omi and Winant explain that racial dictatorship has been normalized in this country and assert that it is a “norm against which all U.S. politics must be measured.” .

8. See *id.* (noting the elimination in the 1960s of formal barriers to the vote, but asserting that “the successes of the black movement and its allies [did not] mean that all obstacles to their political participation had now been abolished,” and that “[p]atterns of racial inequality have proven . . . to be quite stubborn and persistent.” Omi and Winant continue by describing these patterns and how racism has changed but persisted in the United States. See *id.* at 66-76. See also, e.g., JOHN A. POWELL, *An Agenda for the Post-Civil Rights Era*, 29 U.S.F.L. REV. 889, 909

these considerations that this paper will examine the current situation and suggest changes to campaign financing.

Meaningful reform requires an examination of the expansive structural web in which campaign finance is embedded.<sup>9</sup> In order to remove inequities we must first acknowledge that they are a function of institutions.<sup>10</sup>

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(1995) (observing that “[w]e have already achieved many of the purported goals of the civil rights agenda; most importantly we have achieved an end to formal inequality, [but] to the extent these goals have already been achieved, they were never bold enough in their reach to achieve substantive equality and structural change of racial hierarchy in the United States”).

9. While the reform bill recently pitched to Congress is misguided, it is important to note that the politically marginalized have themselves taken initiative in framing the issue to include the implications for communities of color within the larger context of democracy. The Fannie Lou Hamer Project has formed itself as a vehicle for traditional civil rights organizations and communities of color to engage in campaign finance reform, seeking to connect it with the history of earlier voting and civil rights struggles. See “About the Project,” at <http://www.flhp.org> (last visited July 31, 2001).

The Project also recently developed the Fannie Lou Hamer Standard (hereinafter FLH Standard), which functionally evaluates campaign finance reform proposals. See “The Fannie Lou Hamer Standard (a.k.a. ‘the Political Equality Standard’),” at <http://www.flhp.org> (last visited July 31, 2001). The paradigm proposed by the Fannie Lou Hamer Project for evaluating proposed reform measures asks “to what extent will the proposed reform go to create a campaign finance system that is free of built-in barriers or obstacles that would disenfranchise or disadvantage a person of color with limited financial means.” See *id.*

This standard has been applied to three campaign finance bills — the McCain-Feingold “Bi-Partisan Campaign Reform Act” the Hagel “Open and Accountable Campaign Finance Act,” and the Wellstone-Kerry “Clean Money Elections Act.” The first proposal gets a score of 0 (“no real progress toward FLH standard”) because the bill, if passed with its call for hard-money increases, would preserve the fact that the “ability to raise or contribute large sums of private money will still be the primary determinant of a person’s political access, influence and opportunity.” The second bill gets a -3 (“major step backward”), legitimizing soft money, containing minimally forceful “issue ad” rules, and tripling hard money limits. The final proposal gets a +9 (major leap forward, close to meeting the FLH standard”) because it “most importantly” contains public financing provisions that would allow candidates to avoid having to raise money from and be influenced by private sources, making it possible for the marginalized to have nearly equal access to their elected representatives, to elect representatives that reflect their interests, and to get elected to public office themselves. See *id.*

10. A number of scholars have functionally analyzed various structures and systems with implications for effective participation, including campaign finance, often in the context of how money affects free speech. See, e.g., C. Edwin Baker, *Campaign Expenditures and Free Speech*, 33 HARV. C.R.-C.L. L. REV. 1, 1-2 (1998) (analyzing the relationship between campaign expenditures and free speech and citing others who have discussed this issue). Others have looked a bit more beyond the scope of speech. See generally, e.g., Jamin Raskin and John Bonifaz, *Equal Protection and the Wealth Primary*, 11 YALE L. & POL’Y REV. 273 (1993) (arguing that the current system of financing elections, a combination of the “wealth primary” and incumbent self subsidies, prevents less affluent candidates from competing for office; and discussing how state action and legislative intent are involved in structuring the system); see also Spencer A. Overton, *Mistaken Identity: Unveiling the Property Characteristics of Political Money*, 53 VAND. L. REV. 1235, 1239 (2000) [hereinafter Overton, *Mistaken Identity*] (articulating a new analytical framework that looks at campaign finance restrictions in the context of constitutional property doctrines). And for a discussion of campaign finance’s implications for communities of color, see, e.g., Spencer A. Overton, *Money and Race: Campaign Finance Reform as a Civil Rights Issue*, at could find no traditional citation) <http://www.flhp.org/prntoverton.htm> (last visited March 21, 2002) [hereinafter, Overton, *Money*]. While Professor Overton’s analysis speaks to how campaign money functions to marginalize communities of color, this article proposes to draw the analytical framework more broadly by eliciting the importance of framing the issue of campaign

The campaign finance system is part of a much larger system that favors some and disfavors others. These injustices are not only reflected in our campaign finance systems, but are also intertwined with structural inequities via, *inter alia*, the Electoral College, voting blocs, redistricting, and voter education. This arrangement has historically favored white and affluent communities, while disfavoring racial minorities and people of low-income.

Although the marginalization of racial minorities and people of low-income is deeply rooted in our political structure, it does not mean that this marginalization can only be addressed by abandoning the structure. In terms of campaign finance, we must look and see how the structure works and how wealth serves to amplify some voices and drown out others. However, this recognition can conceal more than it reveals. A focus on finances alone will not necessarily assure that race and class marginalization is addressed. Although it is common knowledge that people of color are both disproportionately low income and low wealth, the cause of this is not nearly so obvious. We pay little attention to how money has been dramatically racialized in this country.<sup>11</sup> Fundamentally, political injustices derive from a structuring of wealth along racially dichotomous lines. Until we wholeheartedly acknowledge that wealth in this country is a racialized institution, effective participation by racial minorities in voting as well as in other important participatory arenas will be undermined. What is at issue in our weak democracy is not just money but racialized money, or more explicitly, racial domination and subordination.

In light of the history of racial hierarchy in our society, we should be skeptical that a single change or solution will address the problem of domination. Racial hierarchy is multifaceted and it has resisted many of the efforts to combat it. The persistence of racial hierarchy perplexed those who believed that the end of slavery and Jim Crow would beget a racially just society. As Omi and Winant have suggested, this confusion results because it is not always possible to prefigure the new forms that racial domination may take as we address any particular manifestation.<sup>12</sup>

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finance reform as it is interconnected to other political processes and to this country's democratic underpinnings.

11. Wealth continues to exclude the effective participation of minorities. In some ways, this arrangement suggests that minorities are not full members of the polity. In fact, the founding fathers used wealth to exclude certain groups based on the idea that those without wealth were dependent and could not exercise effective citizenship and therefore were not qualified for membership in the polity. See FONER, *supra* note 7, at 7-9. The founding fathers had it exactly backwards; it is only through effective citizenship that minorities can be full members of the polity.

12. See OMI & WINANT, *supra* note 7, at 69-71 (discussing the varying perceptions of "racism" over time and among groups and observing that the limitations of certain conceptions of racism have led to surprise when formal barriers were removed but racism in effect persisted, to futility for those who see racism as purely structural and unalterable and to substantial "obstacle[s] to efforts aimed at challenging it" due to a lack of a "clear 'common sense' understanding of what racism means").

While addressing wealth disparities might move us to a more democratic society, history suggests caution in placing too much faith in a single approach. Consider some of our previous efforts to address exclusion and undemocratic practices. One might have expected the Civil War or the subsequent Civil War Amendments, particularly the Fifteenth Amendment, to have resolved these matters. This did not happen. Later, those who desired a racially inclusive democracy would place their hopes in the substantial amount of legislation, beginning with the Civil Rights Act of 1866.<sup>13</sup> For example, legislative acts have invalidated the poll tax, the white primary and the literacy test. Yet despite this progress the problem of exclusion remains.

These efforts, while important, have nonetheless been more limited than we had hoped, in part, because we have not understood that many of our problems are symptoms of a system of racial subordination and hierarchy. The campaign finance system can be changed without affecting the practice of domination and hierarchy and thereby could in fact make things worse. For example, one can imagine a system where there is reform in campaign spending and yet the exclusion and marginalization of people of color and the poor continues. J. Eric Oliver in his recent book argues that fragmentation and segregation along municipal jurisdiction undermines and distorts democracy, with the greatest injury to poor people and people of color.<sup>14</sup> A reform in campaign financing would not address this concern. And yet, the construction of segregated municipalities is both a product and a cause of racialized wealth, a situation which must be addressed because it reinforces the racial dictatorship that marginalizes racial minorities and people of low income

While the redistribution of wealth is an important goal, its instrumentality lies in the larger goal of creating a more inclusive democracy; in particular a more racially inclusive democracy. The extent to which our democracy is inclusive should be the measure of our success or failure. Prerequisite to a more inclusive democracy, is a restructuring of the system so that racial injustices in wealth do not reproduce themselves in the political arena. Campaign financing reform that accounts for the inextricable and dynamic relationship between race, wealth and political voice might support the realization of the goal of a strong, inclusive democracy.

In this broader structural context, I argue in favor of reforming our campaign finance system, *including* limitations on wealth, but with the caveat stated above: that any reforms must address the racialization of wealth and the racialization of political voice and exclusion. This paper asserts that in order for reforms to be successful, campaign financing must be understood as an expression of a much larger problem. To be effective, it is

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13. See *infra* note 42 (quoting the first part of the Act).

14. See generally J. ERIC OLIVER, *DEMOCRACY IN SUBURBIA* 109-33 (2001) (discussing the implications of racial segregation for the civic participation of people of color).

necessary to situate our efforts within this larger context. The purpose of this paper then is not to give a detailed analysis of the campaign finance debate but to broaden the discussion and consequently, to articulate how we should conceptualize the vision of racially just democratic change.

In order to conceptualize this vision in the context of today's challenges, it is necessary to take a step back and examine the history of racial marginalization in our weak democracy.<sup>15</sup> This history elucidates the political maneuvering that pervades our revered structures and the practices that limit our reach as we seek strong democracy. Tracing the history of exclusionary politics from slavery to today reveals the underlying structural impediments to effective participation. For example, while formal rights have been granted and relative progress has been made, communities of color, especially Blacks,<sup>16</sup> continue to be excluded from decisions that impact their lives.<sup>17</sup>

In reviewing the struggle of this country to transform itself into a real democracy, we often assume that only two alternatives exist, slavery or freedom. Throughout the antebellum period, the subjugation of "free

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15. See *Challenging the Campaign Finance System as a Voting Rights Barrier: A Legal Strategy*, 43 How. L.J. 65, 81 (stating that the "past is prologue" in articulating that there is a link between the past struggle for the right to vote and the current struggle to "get private money out of politics"); see also John A. Powell, *As Justice Requires/Permits: The Delimitation of Harmful Speech in a Democratic Society*, 16 LAW & INEQ. 97, 136 (1998) [hereinafter Powell, *As Justice Requires*] (citations omitted)

'The soundness of legal interpretations and other legal propositions is best gauged [ ] by an examination of their consequences in the world of fact. . . . [T]here is a tendency in law to look backward rather than forward – to search for essences rather than to embrace the experiential flux.' The challenge posed by pragmatism is to recognize the extent to which the past, as represented by the present, implicates the future.'");

William N. Eskridge, Jr. and Philip F. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 346 (1990) (noting, "the temporal gulf is filled with traditions and experience that inform our current horizon and link it with the previous one"). Although Eskridge and Frickey discuss historical context as it applies to interpreting the text of statutes, their identification of the inherent value of historical context and development to understanding statutes applied in the present is also an immensely relevant framework for examining current structures and systems, such as campaign finance.

16. Because I argue that campaign finance reform needs to address the marginalization of *all* racial minorities, it is important that I note here why I focus on the experiences of Black Americans. Although many marginalized groups have had a long history of exclusion in this country, the history of Black Americans is a vivid illustration of an exclusionary legacy that is even today far from adequately being remedied; a stark inequality that is simultaneously invisible to most Americans.

17. See, e.g., *Campaign Finance As a Civil Rights Issue, The Campaign Finance System and Its Impact on Candidates of Color*, 43 How. L.J. 7, 7 (Symposium, Feb. 12, 1999) [hereinafter *Campaign Finance Symposium*, Feb. 12, 1999] (emphasis added) (powerfully summarizing the long and continuing history of exclusion:

More than 130 years after the passage of the 13th Amendment abolishing slavery, more than 100 years since the *Plessy v. Ferguson* Supreme Court decision upholding the doctrine of separate but equal, and forty-three years after the *Brown v. Board of Education* decision, and forty-two years after the Montgomery bus boycott, where Mrs. Rosa Parks, the mother of the Civil Rights Movement, sat down so the rest of us could stand up and fight for civil and human rights, *the struggle continues.*

Blacks” is often ignored. Although the *Dred Scott* case focused on the status of a slave from Missouri,<sup>18</sup> Justice Taney made it clear that the Court’s reading of the Constitution rejected any claim of rights or citizenship by free Blacks and slaves alike.<sup>19</sup> Today, we continue to make a similar binary error. We assume that the law either formally recognizes the rights of racial minorities, in which case equality has been substantially achieved, or that it does not, in which case change may be warranted.<sup>20</sup> Although we have progressed, we have yet to attain the ultimate purpose of the Civil Rights Movement: a transformative vision of politics that included the goal of effective participation.<sup>21</sup> This purpose will not be achieved until citizenship and effective participation in society is not qualified in form or in substance by race or other inappropriate statuses.

The contemporary problem of racial exclusion can only be understood by viewing this exclusion through a historical lens. Campaign finance reform is about democratic reform. In our society democratic reform is almost always linked with issues of race. The aim of this reform should be to enable low-income communities of color and others to become full members of the polity. Full membership necessitates having an effective voice in the political process.<sup>22</sup> It also entails exploring the galvanizing issue that Professor Gerken has aptly noted — that formulation of a coherent and practical response to vote dilution claims may place this country’s most basic notions of democracy at stake.<sup>23</sup>

In the vein of aligning democratic change with increasing inclusion in the polity, Stephen Loffredo signals a need for fundamental political and

18. See *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

19. See *id.* at 407.

20. See generally George Lipsitz, *Civil Rights Rhetoric and White Identity Politics*, in CULTURAL PLURALISM, IDENTITY POLITICS, AND THE LAW (1998) (examining why civil rights laws have not been able to achieve racial justice); see also Richard Morin, *Misperceptions Cloud Whites’ View of Blacks*, WASHINGTON POST, July 11, 2001, at A1 (showing that whites believe Blacks have achieved relative parity with whites across a number of indicators).

21. See, e.g., *infra* note 148.

22. For a good discussion of the right not just to a vote but to an effective voice, see JOHN DENVIR, *DEMOCRACY’S CONSTITUTION: CLAIMING THE PRIVILEGES OF AMERICAN CITIZENSHIP* 72-90 (2001). Professor Denvir asserts the right to an effective voice and the right to a vote that counts. He explains how the construction of voting districts leads to the majority of Americans voting in safe districts; demonstrating that the election was structured not to be competitive and voting is therefore more ritualistic than real. This problem is caused by both the campaign finance system and gerrymandering. See *id.* at 91-107.

23. In articulating the right to an undiluted vote as an “aggregate right,” Professor Gerken asserts that the Court’s ultimate decision as to whether to adopt the “aggregate rights” framework “may even call into question some of the basic principles that undergird our system of representative democracy.” See Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1669 (2001); see also, e.g., Samuel Issacharoff and Richard H. Pildes, *Election Law as its Own Field of Study: Not by “Election” Alone*, 32 LOY. L.A. L. REV. 1173, 1174 (arguing that we need to place democracy at the forefront of our concerns with the electoral process because “[a]s Mark Rush has observed, ‘the controversies that inhere in electoral process case law really have everything to do with the conflicting strains of democratic theory and, in reality, little to do with the inconsistencies of jurisprudence’”).



social transformations.<sup>24</sup> Some argue that a re-conceptualization of democracy is required to achieve social justice.<sup>25</sup> Ultimately, the ability to achieve effective participation for all may call for change at the macro and micro levels. Changes that will address the problems of exclusion discussed in this paper can only be achieved if there is recognition that democracy requires that all citizens have a meaningful and effective voice. The absence of these requirements calls into question the claim of democracy or what Rawls calls the “well ordered society.”<sup>26</sup>

## II.

### OUR EXCLUSIONARY HERITAGE

This nation prides itself on being the first modern democracy in which all people are politically equal, and yet exclusionary politics based on race, gender, class and property belies this claim.<sup>27</sup> We have addressed this contradiction by adopting reforms that move us closer to what can only be called a national aspiration. This aspiration is for universal democratic rights not limited by property, gender, race or space.<sup>28</sup> Despite a number of changes, we have sustained structures and institutions of exclusion.<sup>29</sup> This country has carried a tradition of political marginalization from the embarrassing annals of slavery and the formal exclusion of freed Blacks, women, Native Americans, and others to the present day de facto marginalization of these groups.

Although this exclusion is not always explicit, it would be a mistake to think it is simply inadvertent. Keyssar reminds us that there have always been powerful groups of anti-democratic Americans who have used whatever device available to disenfranchise blocs of voters.<sup>30</sup> The persis-

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24. See Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 U. PA. L. REV. 1277, 1284 (1993) (arguing that fundamental social and political changes are necessary to an inclusive and democratic politics that would fully enfranchise the poor).

25. See, e.g., YOUNG, INCLUSION, *supra* note, at 5; *id.* at 16-51; see also Northeast Action's homepage, at <http://www.neaction.org/> (last visited July 5, 2001) (identifying the group as a grass-roots coalition urging that social change requires democratic renewal and economic justice).

26. See *infra* note 182 (referencing Rawls discussion of a well ordered society).

27. See FONER, *supra* note 7, at xx (observing race, gender and class as “among the most crucial fault lines along which limitations on freedom have so often been demarcated”); see *id.* at 12 (noting the concept of property ownership as a precondition to freedom in America).

28. Space refers to exclusion from the polity driven by spatial arrangements, such as residential and racial segregation.

29. Consider this in light of the observation made by Alex Keyssar in a recent New York Times editorial where he discusses the report of the National Commission on Federal Election Reform issued the week of July 30, 2001: “[S]omehow, a nation fully committed to democratic processes let things slip” by “endors[ing] an array of election reforms that will not rock many boats . . . [and] remain[ing] squarely within a long tradition of minimal federal involvement in the conduct of American elections.” Alex Keyssar, *Reform and an Evolving Electorate*, N.Y. TIMES, August 5, 2001, at WK 13.

30. See *id.* (noting that “[a]lthough we don't like to acknowledge it, there have always been strong antidemocratic forces in the United States” and that “[l]arge numbers of Americans throughout our history, have not believed in universal suffrage and have acted accordingly”).

tent exclusion of communities of color and other marginal groups is not the result of innocent mistakes or mechanical error.<sup>31</sup> The history of black Americans is a vivid example of the invidious exclusionary process that has historically been and continues to be practiced in this country. Since the ending of slavery, Blacks have been granted formal rights to political participation yoked with debilitating de facto limitations.

Despite the formal emancipation of slaves in the North, the *Dred Scott* decision declared that black people were incapable of citizenship because Blacks had not been identified as members of the people of the United States in the preamble to the Constitution.<sup>32</sup> While a number of northern states had abolished slavery after the Revolution, the North compromised meaningful progress by making a deal with the South at the Constitutional Convention to get the southern states to join the Union.<sup>33</sup> This act had the effect of “postponing for twenty years any legislation to end the slave trade.”<sup>34</sup> Even free Blacks were effectively denied citizenship, as they were unable to serve in the militia, become naturalized citizens or obtain passports for foreign travel.<sup>35</sup> At the same time, most northern states discriminated against Blacks by limiting interstate immigration, restricting suffrage and segregating schools.<sup>36</sup> Rights that were officially granted were substantively undermined by public/private partnerships. Laws and social pressure restricted interracial marriage. Blacks who attempted to cast their votes at the polls faced organized resistance. Prejudiced judicial forums impeded the attainment of justice in the courts, and segregation was prevalent in churches and cemeteries.<sup>37</sup>

After the bloodiest war in this country’s history, the question of slavery was supposed to be resolved. While slavery was formally abolished, the beginning of efforts to resolve the questions of substantive freedom for Blacks and their incorporation into American society had to wait for over a century.<sup>38</sup> The Civil War Amendments were not only to end slavery and to afford Blacks racial equality, but also served to restructure the country.

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31. *See id.*: “[T]he prescriptions offered will do little to address the more subterranean faults in our political life that became visible during and after Election 2000: the alienation and anger of much of the black community; the pitfalls of the Electoral College and the ways in which it skews political campaigns; the high rates of nonvoting, particularly among the poor and less educated . . .”.

32. *See* KENNETH L. KARST, *BELONGING TO AMERICA* 43.

33. *See* ERIC FONER, *supra* note 7, at 35-36 (explaining how the sanction of slavery was constitutionalized during the 1787 Convention).

34. *See* KARST, *BELONGING*, *supra* note 32, at 48.

35. *See id.*

36. *See id.* at 49.

37. *See id.*

38. *See* William Wiecek, *The Origins of the Law of Slavery in British North America*, 17 *CARDOZO L. REV.* 1711, 1747-1768 (1996). Wiecek makes a useful distinction between slaves, the free, and the unfree. *See id.* Blacks who were not slaves were still part of the unfree. *See id.* at 1755. Many whites were also part of the unfree. *Id.* The Civil War apparently addressed the problem of slavery but not the problem of the unfree.

Professor Denvir refers to the Civil War Amendments as “the Second Constitution for the United States.”<sup>39</sup> The power of the national government was substantially reconfigured and the power of the states was limited.<sup>40</sup> There were moves and counter moves by the North and the South to provide or deny freed Blacks in the South degrees of citizenship. The South passed “Black Codes,” laws that systematically imposed legal disabilities on Blacks.<sup>41</sup> Although Congress responded by passing the Civil Rights Act of 1866<sup>42</sup> and the Fourteenth Amendment,<sup>43</sup> the Court narrowed these counter efforts to the point of near meaninglessness.<sup>44</sup> Some would argue that we still have not actualized the rights embodied in these declarations.<sup>45</sup>

When the Fourteenth Amendment was ratified, few white northerners thought freed slaves were entitled to the vote.<sup>46</sup> Justice Bradley’s opinion in the Civil Rights Cases of 1883, together with the Compromise of 1877 “sealed the fate of equal citizenship” for almost seventy years.<sup>47</sup> This refusal to recognize racial equality as a constitutional right, followed by the withdrawal of federal troops from the South, ended Reconstruction and left

39. DENVIR, *supra* note 22, at 4.

40. See CONSTITUTIONAL LAW 506-508 (Geoffrey R. Stone et al. eds., 1996) [hereinafter CONSTITUTIONAL LAW].

41. See KARST, BELONGING, *supra* note 32, at 50. Karst notes further that “[t]he codes were designed to exclude Blacks from real membership in southern society and to keep them in a status of inferiority and dependence closely resembling slavery.” *Id.*

42. See *id.*, quoting section one the Act:

*[A]ll persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States: and such citizens, of every race and color [including former slaves], shall have the same right, in every State and territory of the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any statute, ordinance, regulation, or custom, to the contrary notwithstanding.*

43. See U.S. CONST. amend. XIV:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State where they reside.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

44. See CONSTITUTIONAL LAW, *supra* note 40, at 508-509 (describing the Court’s narrow interpretation of the Reconstruction amendments and the consequent obstruction of the federal government’s ability to protect newly freed slaves). The Court’s diminishment of the amendments culminated in its decision in *The Civil Rights Cases*, 109 U.S. 3 (1883). See *id.* at 510. The Court essentially held that the thirteenth and fourteenth amendments did not empower Congress to prohibit private discrimination in public accommodations. See *id.*

45. See John A. Powell, *An Agenda for the Post-Civil Rights Era*, 29 U.S.F.L. REV. 889, 910 (1995); Kimberle W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1370 (1988); DENVIR, *supra* note 22.

46. See KARST, BELONGING, *supra* note 32, at 63.

47. See *id.* at 58

southern race relations to the absolute political control of the states.<sup>48</sup> Furthermore, the Supreme Court gave empty support to the Thirteenth Amendment by saying that Congress could enforce it by prohibiting the imposition of badges of slavery, while refusing to recognize the new form of servitude that occurred after the Civil War.<sup>49</sup> And the Court gutted the Fourteenth and Fifteenth Amendments by limiting enforcement of them to "state action,"<sup>50</sup> and reading the privileges and immunities clause to render it meaningless for over one hundred years.<sup>51</sup>

The amendments were further eroded by the "separate but equal" doctrine announced in *Plessy v. Ferguson*.<sup>52</sup> Exclusion continued into World War I, when Jim Crow laws that had disenfranchised Blacks extended segregation to practically all public forums where Blacks and whites might interact and to relations in the private realm, where social customs heaped humiliation on top of the legal barriers imposed.<sup>53</sup> All the while, the policies of the Freedmen's Bureau combined with northern resistance to their migration from the south reinforced the rampant exclusion of Blacks on every level of society.<sup>54</sup> Although the majority of Blacks continued to live in the South where the effort to exclude them was an organizing principle after the Civil War, it would be a mistake to assume that the Blacks in the North were treated as full citizens. Far from being accorded full citizenship, among other subjugations, black migrants to the North faced discrimination in the labor market, and the Illinois and Oregon constitutions forbade black immigration into the state.<sup>55</sup> As land reform was occurring in the great give away of Indian land, the North and the federal government con-

48. *See id.* .

49. *See id.* at 59.

50. *See id.*

51. *See generally*, DENVIR, *supra* note 22 (arguing for a substantive reading of the privileges and immunities clause of the Fourteenth Amendment that would grant *affirmative* rights of national citizenship).

52. *See* KARST, BELONGING, *supra* note 32, at 59.

53. *See id.* at 65-66 (describing how the social hierarchy instituted by the Jim Crow laws placed on Blacks "a categorical barrier on growing up," permanently keeping Blacks, regardless of age, in a child-like role relative to whites). This denigration was exponentially compounded by radicalism, the core of which was the concept that freed Blacks were rapidly "retrogressing" toward their natural state of bestiality:

The Radical motive was to depress the expectations of blacks, especially black men, to make them less secure and ultimately less aggressive, to lead them to follow with minimal resistance the inevitable path to racial extinction. Radicals readily recognized [that] blacks were already practically disenfranchised and segregated, but to Radicals the laws were useful in showing explicitly and blatantly the power of whites. They were tokens of hard and present truths and signs of things to come – of the surety of white supremacy and the futility of black resistance.

*See* CONSTITUTIONAL LAW, *supra* note 40, at 512, citing J. Williamson, THE CRUCIBLE OF RACE 109-111, 116-117, 224-25 (1984).

54. *See* KARST, BELONGING, *supra* note 32, at 67-68 (noting that the Freedmen's Bureau perpetuated the economic dependency of southern Blacks on whites even after emancipation and invalidation of the Black Codes).

55. *See id.* at 68.

spired with the South to make sure that Blacks could not effectively participate.<sup>56</sup> The exclusion of Blacks from land ownership was repeated in the 1940's and 50's when again the federal government assisted whites in acquiring land.<sup>57</sup> The two exclusions from land were significant in what Melvin Oliver describes as the facilitation of wealth that continues to define our racialized wealth patterns today.<sup>58</sup>

From 1938 until the 1960s, "when a political consensus favoring civil rights again emerged," the courts bore a comparatively progressive, but limited role in enforcing the law against race discrimination.<sup>59</sup> The goal of a series of litigation challenging the "separate but equal" doctrine from *Missouri Ex Rel. Gaines v. Canada*<sup>60</sup> to *Sweatt v. Painter*<sup>61</sup> and *McLaurin v. Oklahoma State Regents*<sup>62</sup> culminated in the *Brown v. Board of Education* decisions,<sup>63</sup> which recognized that segregated education was not equal and called for an end to segregation.<sup>64</sup> But while the language of *Brown I* was a great statement against an apartheid school system, *Brown II* was a great betrayal as it accommodated white supremacy even after *Brown I* condemned white supremacy as a constitutional wrong. In *Brown II*, which addressed the remedy in the case, the Court announced the need to go slowly with the now infamous phrase of "all deliberate speed." The Court implicitly acknowledged how deeply the subordination was entrenched in our educational institution, suggesting that it was not realistic to expect change overnight.<sup>65</sup> A later, more conservative Court saw the effects of this

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56. See CONSTITUTIONAL LAW, *supra* note 40, at 511-12 (describing the North-South compromise that ended Reconstruction). At roughly the same time as Reconstruction was abandoned, the federal government was crafting its large-scale takeover of Indian lands. See, e.g., DERRICK BELL, RACE, RACISM AND AMERICAN LAW 88-95 (4th ed. 2000) (describing the history of the genesis and exercise of the federal government's plenary power over Indian lands from the 1870s through the 1930s).

57. See Melvin L. Oliver, *The Social Construction of Racial Privilege in the United States: An Asset Perspective*, in BEYOND RACISM 251, 260 (Charles V. Hamilton et. al. eds., 2001)

58. See *id.* at 265.

59. See CONSTITUTIONAL LAW, *supra* note 53, at 518.

60. 305 U.S. 337 (1938) (in response to plaintiff's action for admission to the all white University of Missouri law school, the Court stated, "[t]he basic consideration is not as to what sort of opportunities other States provide, or whether they are as good as those in Missouri, but as to what opportunities Missouri itself furnishes to white students and denies to Negroes solely upon the ground of color").

61. 339 U.S. 629 (1950) (ordering the admission of a black student to the all white University of Texas Law School).

62. 339 U.S. 637 (1950) (holding that restricting black college student McLaurin to a special classroom seat, to a separate table in the cafeteria, and to a special table in the library was unconstitutional because the restrictions impaired his ability to learn).

63. See 347 U.S. 483 (1954); 349 U.S. 294 (1955).

64. See *id.*

65. See *Brown v. Board of Education*, 349 U.S. 294, 300 (1955):

While giving weight to [ ] public and private considerations, the [local] courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. . . .To

institutional entrenchment and stated that it is unrealistic for the Court to do anything at all.<sup>66</sup> *Brown II* undermined the reach and impact of *Brown I* creating a gradual and tokenistic response to a system of black subordination with which we still live.

Even this weak challenge to segregation created massive resistance from whites.<sup>67</sup> A "Southern Manifesto" was endorsed by most southern members of Congress and asserted that the *Brown* decision was void and that states had the right to ignore it.<sup>68</sup> Throughout the South, school districts concocted strategies to prevent or slow down desegregation including closing down schools completely.<sup>69</sup> Judicial responses were mixed,<sup>70</sup> and even with the powerful statement made by the Supreme Court in *Cooper v. Aaron*,<sup>71</sup> it was not until the 1960s that the Court began to take a more active role in the desegregation process.<sup>72</sup> Unfortunately, this active role was limited and short in duration. *Brown I* represented the hope of full inclusion and citizenship. The frustration that has now become all too familiar in the battle to desegregate schools has been repeated in virtually all spheres of civic society as Blacks still find themselves less than full members of society.

Throughout history, opponents of reform have repeatedly found ways to circumvent the promise of full freedom. In the context of voting, laws have been passed promising Blacks the right to vote only to see the continuation of the dilution of the black vote, with exclusion growing a new head every time progressive measures are implemented.<sup>73</sup> The most recent trend has been the judiciary's reluctance to recognize structural impediments to a full vote.<sup>74</sup> When the judiciary has acknowledged these barriers, it has

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that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems.

66. See *Freeman v. Pitts*, 503 U.S. 467 (1992); *Missouri v. Jenkins*, 495 U.S. 33 (1990); *Jenkins v. Missouri*, 115 S. Ct. 2038 (1995).

67. See CONSTITUTIONAL LAW, *supra* note 40, at 532 (noting that "*Brown II* was followed by an extended period of 'massive resistance' during which there was virtually no desegregation in the South").

68. See *id.* at 533, citing 102 CONG. REC. H3948, 4004 (daily ed. Mar. 12, 1956).

69. See CONSTITUTIONAL LAW, *supra* note 40, at 533.

70. See *id.* at 534.

71. See *id.*, quoting *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (the Court negated the Little Rock governor's assertion that he did not have to follow *Brown*, stating that "the federal judiciary is supreme in the exposition of the law of the Constitution," and "the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land").

72. See *id.* at 535.

73. See Keyssar, *supra* note 29, at WK 13 (noting that "[l]arge numbers of Americans, throughout our history, have not believed in universal suffrage and have acted accordingly. . . . delay[ing] the achievement of a fully [formally] enfranchised population until 1970. . .").

74. See James Thomas Tucker, *Tyranny of the Judiciary: Judicial Dilution of Consent Under Section 2 of the Voting Rights Act*, 7 WM. & MARY BILL OF RTS. J. 443, 451 (1999)

failed to actually do anything about them,<sup>75</sup> resigned to leave the remedy to the “political” branches.<sup>76</sup> Yet it is important to note that this confounded jurisprudence is mired in the replicating cycles of de facto disenfranchisement that characterize this country’s voting history.

In rejecting a challenge to the 1965 Voting Rights Act, Chief Justice Warren noted that the disenfranchisement of Blacks had been pervasive and systematic *since* the passing of the Fifteenth Amendment.<sup>77</sup> In spite of the Amendment’s enactment in 1870, there were continued and systematic efforts by most of the southern states to make sure that Blacks could not effectively use the franchise. A number of devices were used such as the poll tax, the primary, the literacy test,<sup>78</sup> and when all else failed, opponents to the black vote used intimidation, including lynching.<sup>79</sup> Despite widespread documentation, the federal government refused to protect the rights of Blacks to exercise the franchise. One of the problems was that the Congressional rules were set up so that the South, even though comprising only a minority of the states, could exercise an effective veto over any effort to pass legislation to protect Blacks.<sup>80</sup> Indeed, part of the power given to the southern minority states was not just about building a nation but essentially

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[hereinafter Tucker, *Judicial Tyranny*] (observing that the Supreme Court adheres to a theory that at best “sparingly protects against [structural] impediments to minority participation in the democratic process”).

75. See *id.* at 443 (noting that courts have chosen a passive approach that undermines the political voices of minorities).

76. See generally Loffredo, *supra* note 24 (arguing that the Supreme Court is too deferential to Congress regarding legislation that disadvantages poor people and that the political disempowerment of the poor requires greater judicial protection). Loffredo discusses the courts’ deference to the political realm regarding social and economic welfare issues and observes that in reality, “the political process provides little security for even the most basic interests of the poor.” *Id.* at 1285. If the political process does not afford the poor even minimal protections, it follows that it cannot protect them from the inequities perpetuated by the campaign finance system.

77. See *South Carolina v. Katzenbach*, 383 U.S. 301, 310-11 (1966). Furthermore, “[t]he course of subsequent Fifteenth Amendment litigation in this Court demonstrate[d] the variety and persistence of these and other similar institutions designed to deprive Negroes of the right to vote.” *Id.* at 311. Justice Warren noted that discriminatory application of voting tests was the latest strategy to bar the black vote, even after invalidation of the Grandfather clauses, the white primary, and gerrymandering. *Id.*

78. See *id.* at 310-11 (detailing the substantial weakening of protections for the black vote as enforcement provisions were repealed, and as the southern states instituted requisites to the vote that were specifically designed to block the black franchise – for example, registration tests that took advantage of disproportionate black illiteracy, alternate easier tests for white illiterates, grandfather clauses, property qualifications, and “good character” tests).

79. See KARST, *BELONGING*, *supra* note 32, at 65-66 (citations omitted):

The most chilling feature of the Jim Crow system was its enforcement through violence. The first great wave of lynchings of black men crested in 1889: “In the 1890s in fourteen Southern states, an average of 138 persons was lynched each year and roughly 75 percent of the victims were black.” By the turn of the century lynching was complemented by rioting in which white mobs inflicted violence on blacks indiscriminately – usually after a period of radical agitation. Between the late 1880s and the end of World War I nearly four thousand blacks were killed by southern white mobs.

80. See FONER, *supra* note 7, at 131.

guaranteeing the right to subordinate Blacks.<sup>81</sup> Every black school child knew that states rights, the heart of American federalism, meant black wrongs.<sup>82</sup> In a 1964 voting case, *United States v. Duke*, Chief Judge Tuttle, after reviewing the history of voting in Mississippi, noted that in Panola County, the black and white populations were about the same.<sup>83</sup> However, 5,343 white voters were registered, while only 1 black person was registered to vote and had been since 1892.<sup>84</sup> In 1966, in the entire nation, only 60 percent of Blacks were registered to vote, and Blacks have been consistently out-registered by whites.<sup>85</sup> As recently as 1998, only 58 percent of Blacks were registered to vote, while 64 percent of whites were registered.<sup>86</sup>

Justice Warren's observations in 1966 demonstrated that although the Civil Rights Act of 1964 and the Voting Rights Act of 1965 promised more concrete and effective protections of the black franchise,<sup>87</sup> "these new laws had done little to cure the problem of voting discrimination" as resistant states' newest strategy became discriminatory administration of voting qualifications.<sup>88</sup> And not much later, the Burger Court would slow if not derail progress, renewing a trend of formalism that would significantly limit

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81. See James U. Blacksher, *American Political Identity and History, The Right to Vote: The Contested History of Democracy in the United States* by Alexander Keyssar, 95 Nw. U. L. REV. 715, 728-30 (2000) (book review) (discussing Keyssar's narrative of the black franchise during reconstruction and post-reconstruction and asserting and demonstrating that "the details of his narrative point to the continuing national consensus for subordinating African Americans").

82. See, e.g., Keyssar, *supra* note 29, at WK 13: "'States' rights' was the cry of opponents of the 15th Amendment, the 19th Amendment and the Voting Rights Act of 1965."

83. See *United States v. Duke*, 332 F.2d 759, 760 (1964).

84. See *id.*

85. See U.S. Census Bureau website, at Table A-1, available at <http://www.census.gov/population/socdemo/voting/history/htab01.txt> (last visited Aug. 3, 2001).

86. See *id.*

87. The Civil Rights Act of 1964 and the Voting Rights Act of 1965 were upheld within months of enactment. See KARST, *BELONGING*, *supra* note 32, at 73. The new civil rights legislation contained more pragmatic provisions to combat school desegregation and most notably, prohibited discrimination in places of public accommodation. See CONSTITUTIONAL LAW, *supra* note 40, at 537. But what was to breathe life into the civil rights vision of eradication of all badges of slavery, in law and in fact, was the 1965 Voting Rights Act, a significantly more instrumental tool than prior efforts to combat the reincarnating "creative" barriers to black participation. The Voting Rights Act was particularly powerful because it would prospectively preempt states from engaging in their usual practice of erecting new discriminatory laws after predecessor laws were invalidated. See Scott E. Blissman, *Navigating the Political Thicket: The Supreme Court, the Department of Justice, and the "Predominant Motive" in District Apportionment Cases After Miller v. Johnson*, 5 WIDENER J. PUB. L. 503, 512-13. By requiring states to submit to preclearance of new voting practices, banning restrictions such as literacy tests and poll taxes, and empowering the federal government to enforce the Act (*see id.* at 513), it promised to substantially unfetter Blacks, and other politically marginalized groups, from the various restraints on a meaningful vote.

88. See *id.* at 312.



“the Second Constitution” and the effort to expand the substantive voting rights that remains a deferred dream even today.<sup>89</sup>

As a result of the courts’ acquiescence, the campaign finance system lives on as the latest manifestation of the politics of exclusion.<sup>90</sup> Although the invidious intent that fueled the political exclusion of Blacks and other minorities may not be as apparent today as it was thirty plus years ago, even a cursory view of how democracy works in our society reveals that current political processes, structures or systems do not operate to effectively exclude those of color from full citizenship. Our reluctance to recognize inequalities, which are not explicit, does not and cannot alter the reality that they exist. Statistical trends showing the continued disproportionate representation of minorities in poverty<sup>91</sup> should be enough to evoke legal remedies. For example, the average black family earns little more than half and has a net worth that is only ten percent of the average white household.<sup>92</sup>

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89. While the Supreme Court, in its decision in *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977), upheld the Voting Rights Act against constitutional attack on remedial minority districting practices, later in *Shaw v. Reno (Shaw II)*, the Court struck down a remedial districting plan. See *Shaw v. Reno*, 509 U.S. 630, 630-31 (1993). The Court erroneously applied an individualist framework to its analysis, even though it acknowledged that “[a]ppellants’ racial gerrymandering claims must be examined against the backdrop of this country’s long history of racial discrimination in voting.” *Id.* at 631. As discussed in this article, the Court’s misguided analysis stems from an insistence on a colorblind approach to voting claims, despite the fact that remedial plans are implemented for the express purpose of correcting for widespread and acknowledged past discrimination. See discussion *infra* Part III.

90. See *Campaign Finance Symposium*, Feb. 12, 1999, *supra* note 17, at 8 (recognizing that “[T]he fundamental right of political access by communities of color and the poor is being abridged by the campaign finance system as it is today”; and drawing the historical tie to the present, expresses that “Jim Crow is not dead. It’s not quite dead. It now focuses its energy in different areas. Instead of literacy tests or poll taxes, the new way to deny adequate representation is to allow us to vote for any candidate we want so long as they’re rich. We have a long way to go.”)

The ills of the campaign finance system are allowed to exist legally unrestrained despite the close analogy articulated by the National Voting Rights Institute, between the “wealth primary” (i.e., the campaign finance system) and the “white primary” (see *Challenging the Campaign Finance System as a Voting Rights Barrier: A Legal Strategy*, 43 *How. L.J.* 65, 86-87 (1999)), a line of cases culminating in *Terry v. Adams*, 345 U.S. 461 (1953), in which the Supreme Court ruled that the Jaybird Association’s exclusionary process had become “‘part of the machinery for choosing officials’” and that the organization unconstitutionally excluded African-American voters on the basis of their race from an “integral part” of the “elective process that determines who shall rule and govern.” See Raskin and Bonifaz, *supra* note 10, at 308.

91. See DALTON CONLEY, BEING BLACK, LIVING IN THE RED 25 (noting that in 1865, African Americans owned .5 percent of the total worth of the United States, and in 1990, 135 years after the abolition of slavery, black Americans owned only 1 percent of the total wealth); see also *id.* at 1:

[I]n 1994, the median white family held assets worth more than seven times those of the median nonwhite family. Even when we compare white and minority families at the same income level, whites enjoy a huge advantage in wealth. For instance, at the lower end of the income spectrum (less than \$15,000 per year), the median African American family has no assets, while the equivalent white family holds \$10,000 worth of equity. At upper income levels (greater than \$75,000 per year), white families have a median net worth of \$308,000, almost three times the figure for upper-income African American families (\$114,600).

92. Overton, *Money*, *supra* note 10.

The disproportionate concentration of Blacks and other racial minorities in poverty carries over to the political arena. Some will argue that this is not an issue of race, but of class, and that minorities just happen to have less income and wealth. While this assertion may appear reasonable, it is wrong on a number of counts. First of all, as discussed above, the very accumulation of wealth in this country is racialized and deeply embedded in racially discriminatory practices and structures of the recent and distant past.<sup>93</sup> The fact that the campaign finance system continues to over-represent whites,<sup>94</sup> even though Blacks and other ethnic minorities comprise roughly 30 percent of the population,<sup>95</sup> should raise red flags.

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93. See Oliver, *supra* note 57, at 264-65. (describing what Oliver calls the “racial sedimentation” of inequality, which wealth captures:

Wealth is one indicator of material disparity that captures the historical legacy of low wages, personal and organizational discrimination, and institutionalized racism. The low level of wealth accumulation evidenced by current generations of African Americans best represents the economic status of blacks in the American social structure. In contrast, whites in general, but well-off whites in particular, had far greater structured opportunities to amass assets and use their secure financial status to pass their wealth and its benefits from generation to generation.

(MELVIN L. OLIVER AND THOMAS M. SHAPIRO, *BLACK WEALTH/ WHITE WEALTH* (1995).

Even if the accumulation of wealth were done through a process that was racially fair, this would not provide justification for allowing wealth to distort the political process. See MICHAEL WALZER, *SPHERES OF JUSTICE, A DEFENSE OF PLURALISM AND EQUALITY* 120-21, 310 (1983). As Walzer explains, there are spheres of justice, but when one sphere starts to impact another, there is a problem. With regard to money and politics, “[w]hat is at issue . . . is the dominance of money outside its sphere, the ability of wealthy men and women to trade in indulgences, purchase state offices, corrupt the courts, exercise political power.” See *id.* at 120. Walzer adds that money confers control of people, “ceas[ing] to be a private resource” and inappropriately allowing the wealthy to “captur[e] political power or bend[ ] public officials to their will.” See *id.* at 121. In essence, “[t]he most common form of powerlessness in the United States today derives from the dominance of money in the sphere of politics [the sphere through which all other spheres are regulated].” See *id.* at 310

94. See Overton, *Money*, *supra* note 10 (noting that nearly 95 percent of reported contributions to federal races come from whites). Overton further points out that Blacks are less likely to be part of the affluent households that give 81 percent of reportable contributions, since under 3 percent of black households make over \$100,000, whereas almost 9 percent of white households make over \$100,000. For every 100 people who contribute money in a wealthier community, only one person contributes in a community of color. “Voting often simply consists of a choice between candidates preselected by contributors. Currently, all Americans are not equal because a wealthy contributor has significantly more power than a voter, and almost all contributors are White.” *Id.* at 1. See also *The Color of Money*, at <http://www.publiccampaign.org/colorofmoney/index.html> (last visited April 5, 2001) (analyzing the racial demographics of political contributions in the 1996 elections which demonstrates that the 26 zip code areas that, combined, provided the most money to federal candidates, parties, and PACs during the 1995-1996 election cycle contributed approximately the same amount as all 2,492 zip code areas in which people of color comprise 50 percent or more of the population, even though the combined population of the 2,492 zip code areas is 60 times greater than the combined population of the 26 zip code areas); *Campaign Finance Symposium*, Feb. 12, 1999, *supra* note 17, at 14 (“To put the question in context, 29 to 30% of the Georgia population are people of color, but only 17% of the Georgia Senate are people of color, so there’s a disproportionately low number of candidates of color.”).

95. See U.S. Census Bureau website, “QT-01 Profile of General Demographic Characteristics 2000”, available at [http://factfinder.census.gov/servlet/QTTTable?\\_ts=15260266943](http://factfinder.census.gov/servlet/QTTTable?_ts=15260266943).

Due to the role of money in the campaign finance system, Blacks are less able to help their candidates campaign and get elected, incumbent politicians give less attention to Blacks because there is little potential for financial support from the community, and economic disadvantages further dilute black political voices within a privately financed election system.<sup>96</sup> Effective participation is not just about being able to get candidates nominated and elected, but also about having a say in the process of agenda or issue setting, which is largely unavailable to Blacks and other marginalized groups. While there are various ways to exercise influence in the political process,<sup>97</sup> empirical data repeatedly shows that wealth distorts participatory input.<sup>98</sup> Because money increases the capacity to communicate information,<sup>99</sup> the predominantly white few, in whose hands this country's wealth is concentrated,<sup>100</sup> substantially amplify their voice, simultaneously suppressing the voices of low-income communities of color. Admittedly, the precise influential connection between wealth and political voice is multi-layered and difficult to tease out. Nevertheless, data that show over and over that participatory input is skewed toward the more economically privileged demonstrates a systematic bias in political representation.<sup>101</sup> Racial polarized voting by whites makes it all the more difficult for issues associated with Blacks to be given meaningful consideration.

Some might try to rebut this participatory disparity by pointing to those Blacks or other racial minorities holding office, or to the Black Congressional Congress and minority activist groups. The idea that putting a few Blacks or other minorities in political office will sufficiently represent the needs of communities of color, however, is naïve<sup>102</sup> and arguably racist.

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96. See Overton, *Money*, *supra* note 10.

97. See SIDNEY VERBA, KAY LEHMAN SCHLOZMAN, AND HENRY E. BRADY, VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS 42 (1995) (identifying that although voting is an important political participatory act, there are several political participatory acts, from working on campaigns to attending protests to contributing money).

98. See, e.g., *id.* at 483-84, 506.

99. See *id.* at 512.

100. See *supra* note, .

101. See VERBA ET AL., *supra* note 97, at 512.

102. See generally, Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077 (1991) [hereinafter Guinier, *Tokenism*] (discussing the misguided preoccupation with numerical black electoral success as an indicator of successful representation); see also Overton, *Money*, *supra* note 10 (arguing that we cannot expect current elected officials, black or white, to lead a revolution against the existing structure); Zoltan L. Hajnal, *White Residents, Black Incumbents, and a Declining Racial Divide* (draft of working paper prepared for presentation at the Harris Seminar, University of California, Berkeley), at <http://www.igs.berkeley.edu:8880/publications/workingpapers/99-10.pdf> (last visited July 30, 2001) (citations omitted) (noting,

[E]ven if black candidates can get elected, their leadership has not greatly improved the economic well-being of African-Americans in the city, region, or state where they have been elected[and] [s]tudies suggest that black incumbents can modestly change local hiring policies and spending priorities [ ] but these and other changes have not been dramatic. . .[so that the] overall substantive impact on most members of the black

Such a presumption ignores the power plays that occur within elected bodies, or that one's leverage undoubtedly varies with her position in the political hierarchy. As to mobilized groups, Verba et al. note that even when minority groups are politically active, their representatives tend to weaken the distinctive policy positions of their groups.<sup>103</sup> Other factors, such as lack of proportional representation<sup>104</sup> or differing narratives between groups,<sup>105</sup> also have important implications for how successfully communities of color can communicate their needs. The underlying message is that all of these factors are a function of institutions that can and should be restructured to equalize voices in the political process.

### III.

#### DOCTRINAL BARRIERS TO REFORM

##### A. *Why Judicial Recourse Alone Won't Save Us*<sup>106</sup>

Intertwined with the inadequacy of the framing of the campaign finance issue to fail to include communities of color, are several legal barriers, which are grounded in a paradigm that increasingly views rights through an individualistic lens. George Lipsitz explains this analytic myopia in describing our persistent tendency to "define social life as the sum total of conscious and deliberative individual activities, such that we are able to discern as racist only *individual* manifestations of personal prejudice

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community has been negligible. 'Their elections,' in the words of Manning Marable, 'can be viewed as a psychological triumph, but they represent no qualitative resolution to the crises of black poverty, educational inequality, crime, and unemployment.'

Though not directly relevant to this article's focus, despite this perhaps counter-intuitive outcome for the effective representation of Blacks, Ms. Hajnal's paper discusses the positive impact that black incumbency in political offices can have on the attitudes of whites that may in turn result in better policies for improving race relations. *See id.* None of this is to say that black representation is not an important component to the effectiveness of black votes, but that it is not enough, especially in small numbers. Black representatives are important not because of physical similarities, but because of their shared experiences with black voters. We cannot expect a few Blacks in office to be able to change policy without a substantial amount of black representation to counter their white colleagues in the same decision making bodies.

103. *See* VERBA ET AL., *supra* note 97, at 241, 263.

104. *See generally, e.g.,* Lani Guinier, *No Two Seats: the Elusive Quest for Political Equality*, 77 VA. L. REV. 1413 (1991) (discussing proportional interest representation).

105. *See* VERBA ET AL., *supra* note 97, at 235 (suggesting that the problem may not be so much that racial minorities are not able to voice their views, but may be that their political discourse is not accepted); *see also infra* section IV (on discussion of narrative structures).

106. *See, e.g.,* KARST, *BELONGING*, *supra* note 32, at 68 (1989) (citations omitted).

As Chief Justice Warren eventually recognized in the *Brown* opinion, the law had its own demoralizing effects. Justice Louis Brandeis once remarked that government is 'the potent, the omnipresent teacher, teaching the whole people by its example.' The lesson taught to blacks by the Jim Crow laws was a lesson in self-deprecation and powerlessness, and the Supreme Court's response was to leave the whole system to a local politics reserved for whites.

As this section will discuss, as we reference wrongs in the past, we should not fool ourselves into thinking that the judicial *laissez-faire* in substantively protecting the effective voice of racial minorities has changed all that much.

and hostility.”<sup>107</sup> Consequently, “systemic, collective, and coordinated group behavior drops out of sight.”<sup>108</sup>

While the Supreme Court has in the past recognized a right to effective participation that goes beyond access to the ballot,<sup>109</sup> it has largely failed to actually enforce that right. Underlying judicial inaction are so-called neutral theories premised on an inclination to view harms primarily as individual events. Professor Gerken, quoting Professor Melissa Williams, attributes this to “‘liberal wariness of group-based claims . . . arising from a suspicion that such claims will make groups’ moral status prior to individuals’ moral status and will result in the denial of individual equality and autonomy in the name of group equality.’”<sup>110</sup> Such an individualistic framework, however, is inappropriate for addressing voting rights claims that inherently arise from the mistreatment (intentional or unintentional) of individuals based on their “membership” in certain groups (usually racial).<sup>111</sup> Adding to this judicial conundrum is the confusion over the primacy of rights,<sup>112</sup> and the end result of this confusion is usually “cured” by a default reliance on liberalist theories of rights that frustrates the fundamental purpose of voting rights.<sup>113</sup> Also, despite groundwork laid in Supreme Court voting rights jurisprudence for inferring intent based on discriminatory outcomes of political processes,<sup>114</sup> courts today seem overly

107. See GEORGE LIPSITZ, *THE POSSESSIVE INVESTMENT IN WHITENESS* 20 (1998).

108. See *id.*

109. See *Reynolds v. Sims*, 377 U.S. 533, 565 (1964) (stating that “each citizen [shall] have an equally effective voice in the election of members of his legislature”).

110. See Gerken, *supra* note 23, at 1723; *id.* at 1718 (explaining that “[t]he Court’s fear of the group-based aspect of aggregate rights, in turn, seems to stem largely from concerns about essentialization – the drawing of inferences about an individual’s substantive preferences based on her group membership”).

111. See *id.* at 1665 (arguing that vote dilution claims require analysis of the relative treatment of different groups to determine individual harm); see also, e.g., Barbara Y. Phillips, *Reconsidering Reynolds v. Sims: The Relevance of its Basic Standard of Equality to other Vote Dilution Claims*, 38 *How. L.J.* 561, 565 (1995) (critiquing the Supreme Court’s application of the “one-person, one-vote” principle and arguing that the Court fails to acknowledge the impact of factions on the equality of electoral systems; adding that, based on an examination of the connection between vote dilution claims brought by racial minority plaintiffs and the generic one-person, one-vote principle, the conclusion is that the principle inadequately protects voting rights in an electoral system impacted by factions).

112. See Robert A. Dahl, *On Removing Certain Impediments to Democracy in the United States*, in *THE MORAL FOUNDATIONS OF THE AMERICAN REPUBLIC* 230, 245 (Robert H. Horwitz ed., 1986) (suggesting that it “has never been clear which rights are to be understood as inalienable or primary and what rights are secondary and alienable”).

113. See Rachel E. Berry, *Democratic National Committee v. Edward J. Rollins: Politics as Usual or Unusual Politics?*, 2 *RACE & ETHNIC ANCESTRY L. DIG.* 44, 62 (1996) (noting that the underlying purpose of voting laws is to protect the non-individual components of voting).

114. See, e.g., James Thomas Tucker, *Affirmative Action and [Mis]representation: Part II – Deconstructing the Obstructionist Vision of the Right to Vote*, 43 *How. L.J.* 405, 444 (2000) (observing that the Court has recognized the value of looking at effects in voting abuse claims, points out that the “*Shaw I* majority rejected a color-blind norm, noting that the ‘Court never has held that race-conscious state decisionmaking is impermissible in all circumstances’ and that a

focused on requiring proof of deliberate intent to exclude.<sup>115</sup> All of these judicial hang-ups combine to create a highly formalistic paradigm for analyzing voting rights abuses,<sup>116</sup> which include the inequities produced by the campaign finance system. Such heavy-handed formalism ignores the undeniable relevance of this country's history of racial exclusion and hierarchy. Indeed, Young argues that the apparent neutrality and impartiality so critical in formalism are actually ideological moves to legitimate and maintain hierarchy.<sup>117</sup>

*B. Trying to Force a Round Peg through a Square Hole:  
the Problem with Individualism*

Examining the flaws of an individualist framework is relevant to campaign finance because the system operates to dilute votes, and the failure of courts to recognize that the campaign finance system abridges one's right to vote is narrowly and erroneously based on an analysis singularly concerned with whether a person has been prevented from physically casting his ballot.<sup>118</sup> Because the current campaign finance system is a form of vote dilution, it is useful to look at critiques of current vote dilution analysis. The initial inquiry is whether the right to an undiluted vote belongs to individuals or groups. Professor Gerken argues that it must be an aggregate right because the "individual injury at issue cannot be proved without reference to the status of the group as a whole" and because "no individual can assert that her vote has been diluted unless she can prove that other members of her group have been distributed unfairly within the districting scheme."<sup>119</sup>

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"State's interest in remedying the effects of past or present racial discrimination may in the proper case justify a government's use of racial distinctions").

115. Compare, e.g., Guinier, *[E]Racing*, *supra* note 115, at 128 (suggesting that a voting rights violation can be established with evidence that members of a racial group have been given less political and electoral opportunity versus requiring proof that a person has been explicitly denied equal electoral participation).

116. See Binny Miller, *Who Shall Rule and Govern? Local Legislative Delegations, Racial Politics and the Voting Rights Act*, 102 *YALE L.J.* 105, 112-113 (1992) (arguing that Supreme Court doctrine, emphasizing formalism over functionalism, is useless for combating voting discrimination, and that Congress should amend the Voting Rights Act "so that the process of legislative decisionmaking can be examined, and reformed where necessary, by the courts"). Miller offers the imperative that "only a functional view of [the entire political] process can adequately protect voting rights." See *id.* at 191.

117. See IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 111-16 (1990) [hereinafter, "YOUNG, JUSTICE"]; see also Chrenshaw, *supra* note 45, at 1346.

118. Lawsuits challenging the "wealth barrier" filed in Georgia, New York and North Carolina were dismissed on the grounds that the campaign finance system does not preclude people of color from voting. See Robert Moore, *Shortchanged: Activist Sees Campaign Finance Reform as Extension of Voting Rights*, *NEW JOURNAL & GUIDE*, Sept. 21, 2000, at [http://www.njournalg.com/news/2000/09/shortchanged\\_finance.html](http://www.njournalg.com/news/2000/09/shortchanged_finance.html); see also DENVIR, *supra* note 22, at 91-107 (discussing the court's error in not address issues of gerrymandering on the grounds that the claimant was not denied the right to vote).

119. Gerken, *supra* note 23, at 1667. In fact, "[t]he conception of harm that an aggregate rights framework helps explain is not limited to dilution claims but permeates much of our legal culture. . . many rights – particularly civil rights – fall along the same type of individual contin-

As Professor Lani Guinier points out, the issue incorrectly assumes that individual and group rights are mutually exclusive, when in actuality, individual rights are derivative of the political empowerment of the groups to which individuals belong.<sup>120</sup> Groups drive representative democracy,<sup>121</sup> and coalescing into groups is how voters influence decisions.<sup>122</sup> Professor Gerken argues that although the Supreme Court's voting rights jurisprudence tends to emphasize the individual, the Court has acknowledged that "electoral rights embody 'a constellation of concepts,' and that, as one moves from ballot access to influencing legislative policy, 'voting loses its purely individual character.'"<sup>123</sup>

The reality is that the Voting Rights Act has always been about group interests. It was enacted in response to categorical exclusions based on race and its aim is and always has been to implement group-conscious remedies that would enhance individual liberties. As a matter of statutory interpretation,

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uum that characterizes the right to vote. At some point, then, the Court must decide whether these competing visions of racial harm are irreconcilably in conflict." *Id.* at 1721.

120. See Lani Guinier, (*E*)*Racing Democracy: The Voting Rights Cases*, 108 HARV. L. REV. 109, 122-123 (1994) [hereinafter Guinier, (*E*)*Racing*] (citations omitted) (noting, "Justice Thomas's approach neglects the fact that representative democracy is neither exclusively individual nor discrete but is relational and inherently group-based"). Furthermore we need to recognize that individuals live in groups and that each group has a right to a "voice, a place, and a politics of its own." See GUINIER, VOICE, at 252. Democratic rules that facilitate organized political groups and encourage citizens groups are a good thing. See *id.*; see also Gerken, *supra* note 23, at 1665 (arguing that vote dilution claims require analysis of the relevant treatment of different groups to determine individual harm (i.e., analysis of "aggregate rights")).

121. See Gerken, *supra* note 23, at 1740, 1678, quoting Justices Powell and Stewart (noting that "[t]he concept of 'representation' necessarily applies to groups: groups of voters elect representatives, individual voters do not. . . ." and "[r]epresentative government is a process of accommodating group interests through democratic institutional arrangements").

122. See Gerken, *supra* note 23, at 1678 (citations omitted) (stating, "Under the structure of our representative system, an individual has the best chance of influencing the political process when she acts as part of a cohesive voting group that can cast its weight behind one candidate or another. Vote aggregation helps an individual convey her needs to her representative and creates an incentive for politicians to pay attention to her concerns."); *id.* at 1721, quoting *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 294 ("We begin by recalling the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process. . . Its value is that by collective efforts individuals can make their views known, when, individually, their voices would be faint or lost.") This decision references volunteer associations and political action groups, but it would be illogical not to apply the same reasoning to recognizing group interests of racial minority groups.

123. See *id.* at 126-127; see also *id.* at 1690 (noting, "while the courts lacked a fully articulated conceptual framework for dealing with dilution claims, until *Shaw II* they nonetheless instinctively moved toward an aggregate rights approach, even when that approach was at odds with a conventional view of individual rights"). Traditionally, fairness in dilution claims has been measured in group terms, by evaluating them against a baseline of "proportionality" (whether group members have an opportunity to exercise electoral control in a share of districts roughly proportional to their share of the relevant population). *Id.* at 1675-76. In fact, dilution claims have depended entirely on the treatment of the group as a whole (*id.* at 1667), as iterated in *De Grandy*. *Id.* at 1688.

The language of the Voting Rights Act explicitly recognizes racial categories of voters, whose behavior it measures against an ideal of political equality. The Voting Rights Act, especially as amended in 1982,<sup>124</sup> acknowledges that race can function as an impediment to the expression by certain groups of voters of their political preferences; accordingly, its goal is to remedy voting practices that have discriminatory results, regardless of the purposes of the practices. The Voting Rights Act also uses race to frame the remedy for group-based exclusion from the political process.<sup>125</sup>

The problem with an individualistic, colorblind model of decision-making is that it is irreconcilable with a statute that explicitly singles out racial groups for protection from political marginalization.<sup>126</sup> Despite the group-conscious heart of the Act, the Supreme Court reconstructed the Act, demonstrating a failure to recognize that group representation is not about race *per se* (though racial groups cohere because of shared experiences, social, political and economical),<sup>127</sup> but about democratic political community.<sup>128</sup> At a more pragmatic and normative level, the Court ignores the fact that it is white groups and the structure of our country that have voted and acted to exclude Blacks as a group.<sup>129</sup> Focusing on the individual cannot cure this

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124. In light of courts' current affinity for requiring intent for the success of modern voting rights claims, it is of tantamount importance to note that Congress amended section 2 to clarify that vote dilution claims are governed by an effects-based standard in response to the Court's 1980 holding in *Mobile v. Bolden* that section 2 and dilution claims raised under the Constitution require proof of invidious intent, not just harmful effects. See Gerken, *supra* note 23, at 1673-74. Adding to this, Berry appropriately asserts that the Voting Rights Act requires a "totality of the circumstances" test, including an evaluation of claims within their political and social process contexts, to accurately assess whether voting rights abuses have occurred. See Berry, *supra* note 113, at 59. The Voting Rights Act broadly interpreted means ensuring minority voters' rights to political inclusion, striking down *any* practices that interfere with this participation. See *id.* In asserting that vote dilution claims should be examined with reference to historical evidence of discrimination beyond the electoral arena, including in the area of education, Wills has argued against the Supreme Court's adherence to the position that the Voting Rights Act is not a panacea addressing social deficiencies. See John S. Wills, Comment, *Statistical Pools and Electoral Success in Vote-Dilution Cases*, 1995 U. CHI. LEGAL F. 527, 532 (1995).

125. Guinier, (*E*)*Racing*, *supra* note 120, at 110 (citations omitted).

126. See *id.* at 111.

127. See Guinier, (*E*)*Racing*, *supra* note 120, at 129 (arguing that

In the Voting Rights Act, Congress did not create race as a category; Congress simply acknowledged its political salience. Since race is a political cue for both whites and people of color, it is not surprising that race also correlates with voting behavior in many jurisdictions. In light of America's racial history, in many parts of the country race functions as a proxy, albeit a crude one, for the political interests of disadvantaged groups.)

128. See *id.* at 122-123 (citations omitted) (specifically noting,

Justice Thomas's approach neglects the fact that representative democracy is neither exclusively individual nor discrete but is relational and inherently group-based. Further, although Justice Thomas offered a theory of exit for minority group members who choose to emphasize their individual identity, he offered nothing to explain or empower those whose chosen identity is group-based.

129. See, e.g., Vikram D. Amar and Alan Brownstein, *The Hybrid Nature of Political Rights*, 50 STAN. L. REV. 915 (Symposium on Law and the Political Process, February, 1998) (discussing



continuing injury. And of course the injury that whites complain of in such cases as *Shaw v. Reno* does not make sense, even from the Court's perspective, without considering whites as a group.<sup>130</sup>

Further demonstrating the Court's contradictory position, Gunier compares Justice Thomas's interpretation reconstruction in *Holder v. Hall*<sup>131</sup> with the Reconstruction following the Civil War, arguing, "[i]t exploits many of the very stereotypes about Blacks that Justice Thomas tried so hard to dislodge."<sup>132</sup> An alternative approach to framing the issue should be that "[r]ather than the implicitly preferential suggestion that racial minority groups should be represented, the question could be whether racial minorities should be treated like other political groups."<sup>133</sup>

The judiciary's analytic framework is egregiously paradoxical. Courts, concerned about stigmatizing racial groups, adopt colorblind approaches to avoid stereotyping people of color. But in adopting such a framework, they allow the effective exclusion of those they are purportedly trying to protect while allowing whites to assert group rights.<sup>134</sup> The reality is that shared experiences along racial lines create shared interests along racial lines.<sup>135</sup> Defining rights in "highly individualistic terms," leaving

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the modern Court's failure to acknowledge the group dimensions of political rights in this country's history) .

130. See generally Gerken, *supra* note 23 (asserting that in vote dilution claims comparing the relative treatment of different groups is requisite to discerning whether there has been individual harm). What is the injury to a white voter that has to vote in a majority minority district if we are only concerned with individuals?

131. 114 S. Ct. 2581 (1994).

132. See Gunier, (*E*)*Racing*, *supra* note 120, at 123-24 (identifying that the

[C]oncern [is] that racial group members who do not share the dominant political viewpoint of the racial minority group will be ignored by representatives chosen by the minority group. This is a claim that, even when racial groups are treated as political interest groups, they will function in contravention of their own political interests. They will refuse to bargain. They will refuse to form coalitions. They will stamp their feet and demand racial group recognition but will not negotiate for racial group influence.

133. See *id.* at 132.

134. See Gerken, *supra* note 23, at 1732 (Gerken warns that while one can "accept[ ] [the apparent dilemma facing] the courts [in that they] cannot remedy the aggregate harm of dilution without indulging in some assumptions about the political preferences of minority voters. . . the cost of making such assumptions is minor when compared to the alternative: the dilution of minority votes that will inevitably result from a colorblind approach."); see also Tucker, *Affirmative Action*, *supra* note 114 (discussing the fiction of color-blindness in the context of redistricting and the reality that an individualistic approach to voting rights ignores the color-conscious realities of politics and districting). Color-consciousness, used remedially in the political arena has enabled Blacks and other racial and ethnic minorities to "participate in the political process on a basis approaching equality with voters in the majority." *Id.* at 451. In sum, "rejection of a colorblind absolute actually makes our government more democratic." *Id.*

135. See Gerken, *supra* note 23, at 1729 (noting the reality of and instances of polarized voting along racial lines); see also Phillips, *supra* note 111, at 584-85 and note 117 (imploing the Court to recognize the existence of race factions and noting that "analysis of voting patterns has shown that when confronted with a minority candidate, [ ] potentially various white voter subgroups disappear and a massive bloc vote consistently occurs to defeat the minority group's candi-

“no room for aggregate rights would prevent the courts and Congress from recognizing a large number of concrete racial harms, as well as rights that promote broader structural principles essential to a well-functioning democracy.”<sup>136</sup> Further, such a framework “might even raise questions about the viability of a representative democracy itself.”<sup>137</sup>

### C. *Democracy for Equals Assumes an Equal Society*

Loffredo points out that in *Austin v. Michigan*, the Supreme Court admitted “inequalities of private economic power tend to reproduce themselves in the political sphere and displace legitimate democratic governance.”<sup>138</sup> The Court’s current jurisprudence, however, ignores this recognition by granting substantial deference to the other branches on issues of economic and social welfare, resting on a mistaken assumption that decision-making is democratic with respect to the poor.<sup>139</sup> The Court’s reasoning rests on “empirical judgments about how the political process is *actually* functioning and on legal-normative judgments about what counts as a democratically legitimate process that merits deferential review.”<sup>140</sup> In actuality, our purportedly democratic process is distorted by disparities in wealth. Indeed one could argue that the amplification of the voices of the wealthy is not a distortion but the deliberate and intentional outcome of our values and structures in a limited democracy.

Unfortunately, the judiciary’s excess deference to the “political” branches has infected its review of voting rights claims.<sup>141</sup> This deference runs counter to the fact that when Congress enacted the Voting Rights Act of 1965, it envisioned a judiciary that would actively protect the right of

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date of choice.”); Guinier, (*E*)*Racing*, *supra* note 120, at 129 (explaining that members of racial groups share an immutable characteristic used by society to discriminate against them which ties the members together by common experience).

136. See Gerken, *supra* note 23, at 1721.

137. See *id.* (noting that there can be injurious consequences to true democracy if the Court chooses to define constitutional rights in a heavily individualistic paradigm); see also Guinier, (*E*)*Racing*, *supra* note 120, at 125 (explaining, “in order to legitimate the Voting Rights Act within the contemporary discourse of race, the Act must be considered from the perspective of a broader theory concerning the democratic representation of groups. First, group representation is not only consistent with, but is the very essence of representative democracy. Second, although race may be constitutive of identity, it should be treated as a political, not a biological category”).

138. See Loffredo, *supra* note 24, at 1285 (examining the implications of the Supreme Court’s *Austin* analysis as it pertains to the treatment of poverty in constitutional law and arguing that the Court’s “unremitting deference to political outcomes in social welfare with regard to the disequilibrating effect of wealth on the political process cannot be squared with *Austin*”).

139. See *id.* at 1278. The judiciary should recognize that because the political process is ailing it cannot cure itself and therefore the judiciary must act as a more substantive check on political processes.

140. See *id.* at 1286 (emphasis added).

141. See James Thomas Tucker, *Tyranny of the Judiciary: Judicial Dilution of Consent Under Section 2 of the Voting Rights Act*, 7 WM. & MARY BILL OF RTS. J. 443 (1999) [hereinafter Tucker, *Judicial Tyranny*].

minorities to effectively participate.<sup>142</sup> Tucker argues that the judiciary must analyze claims brought under the Act in a way that is “more consistent with the democratic theories embodied in the Constitution and in section two” of the Act.<sup>143</sup> This requires “recognizing participation as a value superior to any significant experience of or aspiration to liberty or equality” because

[A]uthentic democratic foundations presuppose that all actors share a common narrative grounding. Recourse to the regulative ideals of democracy will not, of course, prove to be a panacea. Rather, by recognizing the plasticity and multiplicity embedded in a mature democratic vision, we can identify and work toward resolving unnecessarily pronounced tensions. Contextualized discussions of opposing narratives demonstrate that in many ways the referents are the same – the demand for equal liberty is also a demand for democratic equality.<sup>144</sup>

Fundamentally, the courts must acknowledge that the perpetual exclusion of communities of color from the political process is a function of the United States’ historical and continuing status as a partial democracy.<sup>145</sup>

The inescapable question must be whether [our] government can equalize the voices of all citizens consistent with a democratic ordering of politics. The Court’s initial reaction was decidedly hostile. In *Buckley*, for example, the Court stated, “the concept that government may restrict speech of some ele-

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142. See *id.* at 455 (arguing that the judiciary needs to return to its role of protecting the democratic process and ensuring that all Americans are able to meaningfully exercise their right to vote).

143. See *id.* at 444.

144. See Powell, *As Justice Requires*, *supra* note 15, at 104.

145. See LANI GUINIER, *LIFT EVERY VOICE* 251 (1998). [hereinafter *GUINIER, VOICE*]; see also *id.* at 253-254 (observing that

The effect of our partial democracy is particularly egregious on poor people. In 1990, 13.8 percent of American voters came from families with incomes under \$15,000; in 1992, those low-income voters declined to 11.0 percent of voters; in 1994, they were just 7.7 percent. Why? ‘The basic cause is essentially that neither party is speaking to the interests of the lower-income brackets of Americans,’ explains Curtis Gans, director of the Committee for the Study of the American Electorate in Washington, D.C.

Guinier explains this observation by pointing to what she views as archaic winner-take-all elections for Congressmen and members of other collective decisionmaking bodies:

[T]he more representative [ ] a body, the more it can perform its deliberative function. A legislator or council member needs to consider a full range of views before he or she deliberates to reach consensus or participate in a public conversation about important policy issues. A legislative body that is truly representative is also more likely to channel dissenting voices into constructive public policy debates. When a legislature or council simply excludes minority viewpoints, it leaves them no formal opinions with which to express their grievances. Moreover, groups of citizens are more likely to participate and organize when they have a chance to influence the composition of a legislative body and then enjoy meaningful ways to hold those representatives accountable.

ments of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . .”<sup>146</sup>

The Court was less clear as to why limiting spending is even a First Amendment issue. Consideration of the history of property requirements to vote as well as the poll tax, which were accepted by the Court until recently, may reflect the bias in the judicial process. What is clear is that the Court is not, in the way it selectively exercises its deference, exercising impartiality; it is doing precisely the opposite by nurturing a democratically illegitimate political structure.

#### IV.

#### EFFECTIVE PARTICIPATION IS THE GOAL<sup>147</sup>

The Civil Rights and the Voting Rights movements were never merely about gaining access to the ballots.<sup>148</sup> A common misperception is that the Civil Rights agenda was fulfilled with the passing of the Civil Rights Act of 1964 and the Voting Rights Act of 1965. One of the reasons we live under this false illusion is that most of the obvious and formal barriers to effective participation to the vote have been removed. Our eyes and ears deceive us into the belief that the movement has fully achieved its goals and that the reason conditions have not substantially improved for marginalized popula-

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146. See SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURES OF THE POLITICAL PROCESS* 513 (2d ed. 2001), quoting *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976).

147. A fundamental problem, of course, is determining how to measure effective participation. One can try to quantify it as two social scientists attempted to do, but a mathematical model of how much a vote counts is wrought with shortcomings. See Andrew Gelman and Jonathan N. Katz, *How Much Does a Vote Count? Voting Power, Coalitions, and the Electoral College*, Social Science Working Paper 1121, May 2001 (Division of the Humanities and Social Sciences, California Institute of Technology, Pasadena, California) (concluding from an empirical study of past presidential elections, that the Electoral College effectively dilutes votes). They specifically determined that forming a coalition (e.g., an electoral college) increases the decisive vote probability for the voters within the coalition, but the aggregate effects of coalitions is to decrease the average decisiveness of the populations of voters. They also found that the college advantages small states because the random voting model overestimates the frequencies of close elections in larger states. The authors ultimately conclude that “one-person, one-vote” does not mean that all voters have equal voting power. See *id.* at 17. See also Alexander D. Rosati, *One Person, One Vote: Is it Time for a New Constitutional Principle?*, 8 N.Y.L. SCH. J. HUM. RTS. 523 (discussing how the “one vote” rule infringes the rights of minorities and conflicts with basic democratic notions).

148. See, e.g., Guinier, *Tokenism*, *supra* note 102, at 1134 (explaining the failure of black electoral success theory within the context of the civil rights movement:

First, the theory abandoned the civil rights movement’s transformative vision of politics. In that vision, the purpose of political equal opportunity was to ensure fairness in the competition for favorable policy outcomes, not just fairness in the struggle for a seat at the bargaining table. In addition, legislative responsiveness would not be secured merely by the election day ratification of black representatives. Rather, legislative responsiveness would depend on citizen participation, legislative presence, and legislative success in meeting the needs of the disadvantaged group.)

tions is the result of *their* inaction.<sup>149</sup> If we reexamine some of our cherished assumptions and recognize that wealth and the amplification of white voice is not about the First Amendment but about the legacy of a racial dictatorship, it becomes clear that we have only adopted a different set of barriers than prior to 1960 but no less harmful.

We have an apparent commitment to equality and democracy while our historical practices and structures make these publicly pronounced goals unattainable. To address these contradictions, we are given a story about why the poor and Blacks do not vote or when they vote, why their vote is not effective or counted.<sup>150</sup> The disadvantaged cannot realistically effectively participate in and influence decisions within a political structure that is designed to make sure that they do not effectively participate. The structure of our democracy was designed to amplify some voices while muting the voice of others.<sup>151</sup> Any change then that would seriously move toward effective participation suffers from the appearance of being too radical. This is because achieving this goal would require changes in structural and institutional arrangements that we have come to cherish. The way wealth is translated into political voice and advantage is but one example. In her work, Young explicates some of these structures and processes that exclude. She discusses both internal and external processes and structures that exclude and distort our democracy.<sup>152</sup> She identifies the current campaign finance system as one of the more pernicious external structures of exclusion.<sup>153</sup> Young argues that the ability for economically powerful actors to dominate the political arena is perhaps the most invidious form of this type of exclusion.<sup>154</sup> The domination of wealth substantially minimizes, and often extinguishes, the formally granted right of individuals to participate equally in debates and decision-making processes.<sup>155</sup>

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149. On the contrary, Verba et al. found that African Americans are as politically mobilized as whites and more likely to protest than whites, but that the problem may lie in lack of acceptance. See VERBA ET AL., *supra* note 97, at 235.

150. There are many explanations given as to why low-income people, Blacks and other minorities vote in lower numbers. Reasons given usually avoid structural problems or the desire to keep these groups from voting.

151. See, e.g., YOUNG, INCLUSION, *supra* note, at 11 (noting that “[m]any criticize actually existing democracies for being dominated by groups or elites that have unequal influence over decisions, while others are excluded or marginalized from any significant influence over the policy-making process and its outcomes”).

152. See YOUNG, INCLUSION, *supra* note, at 53 (Young points out as less obvious forms of exclusion are those that “occur even when individuals and groups are nominally included in the discussion and decision-making process”). In other words, Young is concerned with the barriers to inclusiveness that individuals internally possess via differing assumptions and differing styles of expression. See *generally id.* at 53-57, for a more informative discussion of the distinction between internal and external exclusion.

153. See *id.* at 54-55.

154. See *id.* at 54.

155. See YOUNG, INCLUSION, *supra* note, at 54.

Compounding the obstructions to effective participation is the superficial way in which traditional reforms are framed. With reference to campaign finance reform, focusing on money alone is an important but limited approach at best.<sup>156</sup> But, of course, leaving the system the way it is will not do either. What is required is change that ensures a fully democratic government that facilitates effective participation by all. This in turn demands a re-conceptualization of our democracy.<sup>157</sup> As Young has recognized, our formal democracy often operates to reinforce structural inequality.<sup>158</sup> She cites the current arrangement of cities and suburbs as an example of formal democracy that is in fact undemocratic.<sup>159</sup> Gary Chartier explains that real democracy is self-government in which all people are able to influence the structures and processes that shape their environments and constrain their choices.<sup>160</sup> Voting is obviously an important component to effective participation, but is rendered meaningless when structures and institutions perpetuate people's inability to participate in and influence the decisions that impact their lives.<sup>161</sup> A powerful example of this dilemma can be seen in the way that many of the structures and institutions that effect the lives of inner city dwellers are located in the suburbs outside of the sphere of their electoral influence.<sup>162</sup> As Karst has articulated, "voting is the preeminent symbol of participation in the society as a respected member, and equality in the voting *process* is a crucial affirmation of the equal worth of citizens."<sup>163</sup>

To reformulate democracy so that the politically marginalized have an equal voice, entrenched structures and institutions must change. This reformulation entails changing the way we think about our institutions and ourselves.<sup>164</sup> In one sense, we are presented with a dilemma, where democracy is essential to civil rights and economic justice, which are in turn essential

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156. I do not necessarily suggest that capping contributions or expenditures are not positive steps toward reforming our campaign finance system. What I am asserting and what this article is premised on is that campaign finance reform is part of the larger goal of restructuring our political system to enable effective participation. Therefore, a reform that focuses solely or primarily on dollar amounts does not address the dynamics of campaign finance as it is tied to other political systems and structures.

157. See *supra* note 25.

158. See YOUNG, INCLUSION, *supra*, at 17.

159. See *id.* at 8-9.

160. See Gary Chartier, *Civil Rights and Economic Democracy*, 40 WASHBURN L.J. 267, 274 (2001).

161. See *id.* at 268 (adding to Karst's articulation that a meaningful vote is essential to belonging to the society in which one lives, Chartier suggests that "[t]o participate in decision making. . . is a matter of belonging, inclusion, overcoming alienation: only if I participate in the decisions that affect me can I reasonably regard myself as part of the institutions that shape my life.").

162. See YOUNG, JUSTICE, *supra* note 117, at 241-56.

163. See KARST, BELONGING, *supra* note 32, at 94 (emphasis added).

164. See Robert A. Dahl, *On Removing Certain Impediments to Democracy in the United States*, in *THE MORAL FOUNDATIONS OF THE AMERICAN REPUBLIC* 230, 245 (Robert H. Horowitz ed., 1986).

to effective participation and democracy.<sup>165</sup> The underlying problem is that wide disparities in wealth result in substantial disparities in political voice and influence thereby perpetuating the hierarchical privilege that maintains the wealth divide. The courts have it exactly backward. They use the existing structural arrangement to justify the limitation on democracy and racial justice. Yet it is only through democracy and justice that the structures can be legitimated.<sup>166</sup>

As we get to the root of this structural mis-arrangement, we must recognize, as I established at the outset, that the anemic state of our democracy is not just about the distortion of wealth in the political process, but more poignantly, the racial implication of this arrangement. There is a growing body of literature that makes the case that wealth accumulation in the United States is a racialized process.<sup>167</sup> The government as recently as the 1950s and 60s supported a process of wealth accumulation in the white community while depressing the wealth accumulation in the black community.<sup>168</sup> The Court and commentators attempt to justify the current arrangements that amplify white voice and dilute the voices of Blacks and other racial minorities by referring to a neutral arrangement that cannot be disturbed. But there is nothing neutral about wealth accumulation and use in our society. Nor, as some have alleged, does limiting the use of wealth in the political process entail an attack on the First Amendment.<sup>169</sup> Indeed the

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165. See Kenneth L. Karst, *Citizenship, Law, and the American Nation*, 7 *IND. J. GLOBAL LEGAL STUD.* 595, 597 (2000) [hereinafter Karst, *Citizenship*].

166. See YOUNG, *INCLUSION*, *supra* note, at 5-6 (“The normative legitimacy of a democratic decision depends on the degree to which those affected by it have been included in the decision-making processes and have had the opportunity to influence the outcomes.”).

Rawls argues that we cannot use current structures to identify justice because the structures themselves reflect and therefore reproduce certain injustices. See RAWLS, *supra* note 4, at 52-56. Given how Blacks have been and continue to be excluded from wealth, leaving wealth distribution to the political process is a serious flaw because it is the political structures themselves that determine the creation and distribution of wealth. When we talk about institutions and structures we are creating winners and losers. The pivotal question is how to do this fairly. Certainly, the history we are trying to claim is moving toward a system that does not create winners and losers based on race and other inappropriate factors. Given our history, it is more than disturbing to continue a process that allows whites to dilute the voice and vote of Blacks.

167. See, e.g., generally Oliver, *supra* note 93 (examining the social construction, in the United States, of racial privilege with respect to asset accumulation); CONLEY, *supra* note, at 91 (arguing that racial inequality in the United States is due to wealth disparities, which are a function of asset disparities).

168. See OLIVER & SHAPIRO, *supra* note 93, at 16-18 (1995); CONLEY, *supra* note, at 8-9 (1999); John A. Powell, *How Government Tax and Housing Policies Have Racially Segregated America*, in *TAXING AMERICA* (Karen B. Brown & Mary Louise Fellows eds., 1996).

169. There has been a great deal of scholarship written on whether the First Amendment really does present a bar to regulation of campaign finance, but the basic point is that regulation is generally constitutional. See, e.g., Brief for Respondent Joan Bray in Support of Petitioners, *Nixon v. Shrink Missouri Government PAC*, No. 98-963, available at [http://www.brennancenter.org/resources/downloads/shrink\\_brief.pdf](http://www.brennancenter.org/resources/downloads/shrink_brief.pdf) (arguing that regulation of campaign finance is not in violation of the First Amendment).

First Amendment itself is concerned with protecting voice and participation in the political process.<sup>170</sup>

The issue that lingers from this observation of our tortured democracy is how to break the cycle of wealth distortion of political voice. *Inclusive communicative democracy* is one way to break the cycle of wealth distortion in the political process.<sup>171</sup> It also offers a democracy more firmly grounded in the foundation of justice.<sup>172</sup> This kind of democratic process is more likely if marginalized groups are “politically mobilized and included as equals in a process of discussing issues. . .that lead to decisions.”<sup>173</sup> To state the obvious, inclusiveness is needed to ensure adequate protection for those who may be excluded.<sup>174</sup> And while full economic justice is likely a long time in coming, there are solutions that we can begin to implement now that would facilitate providing an influential voice to marginalized groups despite substantial wealth inequality.

Iris Marion Young’s *differentiated solidarity* model is visionary, but also practical enough to be effectively implemented. Generally speaking, Young’s model of social and political inclusion seeks to combat exclusion and foster individual freedom, but simultaneously wishes to affirm “the freedom of association that may entail residential clustering and civic differentiation.”<sup>175</sup> *Differentiated solidarity* requires identifying the structures and real life processes that exclude populations from participation. Using this model, Young identifies and explains how residential segregation<sup>176</sup> magnifies material privileges, simultaneously obscures this fact from the beneficiaries of this privilege, and thereby impedes communication among segregated groups,<sup>177</sup> who are often separated along racial lines.<sup>178</sup> The current campaign finance system reinforces both this white privilege and white “innocence” with policies that promote the narrow interests of the wealthy,<sup>179</sup> predominantly white,<sup>180</sup> few. This reward system removes any

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170. See John A. Powell, *Worlds Apart: Reconciling Freedom of Speech and Equality*, 85 Ky. L.J. 9, 70 (1997); Powell, *As Justice Requires*, *supra* note 15, at 148.

171. See YOUNG, INCLUSION, *supra* note, at 36 (arguing that because inclusion is a widely accepted condition of legitimacy in democratic politics, it can help break the cycle of political inequality perpetuated by social and economic inequality).

172. See *id.* at 17.

173. See *id.* at 209.

174. See Dahl, *supra* note 164, at 243.

175. See YOUNG, INCLUSION, *supra* note, at 197.

176. Residential and class segregation are the practices and processes that tend to homogenize the income and wealth level, occupational status, and lifestyle consumer tastes of communities. See YOUNG, INCLUSION, *supra* note, at 210.

177. See YOUNG, INCLUSION, *supra* note, at 196.

178. See *id.* at 198-99.

179. See VERBA ET AL., *supra* note 97, at 222 (noting that since the advantaged are substantially more active than the disadvantaged, political officials hear much less about basic human needs issues even though this is a relatively predominant concern for the poor); *id.* at 265 (even when human needs issues do get aired, they are framed through a privileged lens, often in the advocacy of policies opposing government aid to the poor); *id.* at 489 (observing that the way



incentive for the wealthy and candidates funded by the wealthy to consider and implement the vast array of policies that would empower politically marginalized communities of color.

For Young's model to enable us to transform our democracy and swing the pendulum towards racial inclusion, there must be respect and a sense of mutual obligation between individuals and groups.<sup>181</sup> Rawls also observes that a well-ordered democracy requires cooperation between members of the polity.<sup>182</sup> Concomitant with this respect and mutual obligation is public empathy as a core democratic value.<sup>183</sup> This empathy embraces meaningful, contextualized encounters.<sup>184</sup> While this may seem like a very individualized process with no role for the government and public policy, this position is clearly wrong, especially in addressing matters of race. Although racial value and attitudes may be experienced at an individualized level, they are socially instantiated and indeed race itself is socially constructed and reproduced through structural and material arrangements.<sup>185</sup>

In other words, what *Dred Scott* and the present arrangement stand for is the position that racial minorities are not full citizens and their voices can be diluted unless their interests coincide with white interests.<sup>186</sup> In order to free our society of the legacy of *Dred Scott* and end the legacy of our racial exclusion rather de facto or de jure, transformation of our democratic structure is essential. This structural transformation is required so that race is no

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political activity is structured underrepresents those who support government programs for disadvantaged groups because they largely lack the bundle of resources that foster participation).

180. See *supra* note 91.

181. See YOUNG, INCLUSION, *supra* note, at 221; see also *id.* at 209 (suggesting that effective participation requires being "able to make claims upon others [so] that together [the less privileged and the privileged can] take action to address [injustices]; that "[i]f those with such claims can participate equally with members of the dominant groups in political discussion and decision-making, they may be able to change the way others see the social relations in which they stand together, the problems they generate, and the priorities they should have for action").

182. See RAWLS, *supra* note 4, at 8-9 (discussing the idea of a well-ordered society).

183. See POWELL, *As Justice Requires*, *supra* note 15, at 118.

184. See *id.* at 112 (defining true empathy as beyond the superficial empathy that leads to the marginalized becoming complicit in their own oppression). This is likely not possible without personal experiences to draw on since knowledge, which informs judgments, is gleaned through a wide range of experience and human interaction. See *id.*

185. See generally, JOHN A. POWELL, *The "Racing" of American Society: Race Functioning as a Verb Before Signifying as a Noun*, 15 LAW & INEQ. 99 (1997) [hereinafter POWELL, *Racing*] (discussing the idea of race as a social truth and the importance that recognizing the social construction of race has for eliminating racial inequality). There is a growing acceptance among scholars that race is not a biological fact but a social construct. This insight, which has found its way into Supreme Court decisions, is often misappropriated for the position that if race is not biologically real, it is not real at all. This supports the colorblind discourse. But this is an error. See generally JOHN A. POWELL, *The Colorblind MultiRacial Dilemma: Racial Categories Reconsidered*, 31 U.S.F.L. REV. 789 (1997) (discussing the acceptance of race as a social construct and the misuse of this concept in the colorblind discourse). While race and more importantly racism may not be a biological fact, it remains a social fact that can only be refigured through social practices and material arrangements. See generally OMI & WINANT, *supra* note 7, at 54-76 (discussing the social construction of race and racism and outlining the concept of racial formation).

186. See, e.g., POWELL, *Racing*, *supra* note 185, at 107-108.

longer a maker of the degree of citizenship or the claim to belong. Those call racial minorities or white will not necessarily have a fix and distinct a interests. At the same time minorities will be able to legitimately make claims on and challenge the foundation and formation of white and non-white interest. to the extent that they are rooted in exclusion and white hierarchy. But for such democratic change to occur, the racial dictatorship in this country must be deconstructed.

One of the vital first steps in the déconstruction of our racial hierarchy is recognizing that many of our institutions reflect an essentialism that marginalizes racial minorities from the polity. Young's discussion of the "ideal of community[,] . . . a vision of political life that privileges local face-to-face direct democracy" is a pertinent illustration of such essentialism.<sup>187</sup> The desired goal of this ideal is "social wholeness" or homogeneity.<sup>188</sup> The ideal of community sounds like the civic ideal, where every person has a voice but it actually "often operates to exclude or oppress those experienced as different."<sup>189</sup> The truth is that in many towns, suburbs and neighborhoods, groups of strangers, who do not actually possess the same sets of values as each other, coexist.<sup>190</sup> Consequently, those groups who can dominate the discourse will be able to bring about policies that reflect their "ideal of community," while excluding those who do not fit the ideal.<sup>191</sup> The more realistic and inclusive alternative is "a form of social relations" in which strangers "interact within spaces and institutions they all experience themselves as belonging to, but without those interactions dissolving into unity or commonness."<sup>192</sup> This model of interaction sounds unwieldy, but if mediated, it can produce a set of policies that reflect the interests of different groups without marginalizing those who seem different or not part of the "community."

In order to overcome essentialism and the domination of the white norm, we must create a more inclusive model of civic interaction. We must expose ourselves to other and unfamiliar referents and recognize claims falling outside traditional racialized narrative structures.<sup>193</sup> "To some extent our willingness to experiment will depend on the degree to which we believe that problems such as racism. . . cannot be eradicated without a fundamental alteration of our norms, our psychology and even our identity."<sup>194</sup> I argue that ending racial disparities in political voice requires an alteration

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187. See YOUNG, *JUSTICE*, *supra* note 117, at 235.

188. See *id.*

189. *Id.* at 234.

190. See *id.*

191. See *id.*

192. See *id.* at 237.

193. See powell, *Racing*, *supra* note 185, at 117-120 (elaborating on Professor Roberto Unger's suggestion that self-exposure empowers us to open up and revise our narrative so that we can be actively empathetic

194. *Id.*

of our norms because racial hierarchy has been and continues to operate as a dominant norm in our society. But this norm is in conflict with other values and norms in our society such as effective participation and a meaningful vote for all. While such a change poses a serious challenge for our society, the continuation of racial hierarchy poses its own set of challenges. Expanding our narrative base is required if we are to have a strong democracy and abandon the stance of racial hierarchy embedded in both racial segregation and assimilation.<sup>195</sup> What is at issue are not just the rights and interests of racial minorities but the future of our struggling democracy.

What is so promising about Young's *differentiated solidarity* model is that it recognizes that we have to move away from a unitary political ideal.<sup>196</sup> Her democratic ideal does not shy away from difference or conflict. Young recognizes that conflict is inherent in politics,<sup>197</sup> but that there is a way to engage conflict without suppressing differences. Politics arises out of conflict<sup>198</sup> and its whole purpose is to resolve conflict in a way that allows meaningful consideration of all citizens' viewpoints, while recognizing the interconnectedness of citizens and groups. How society is to address conflict and fairly allocate benefits and costs and meaning is the focal point of justice and democracy.<sup>199</sup> Barber argues that "strong democracy" demands that participants reexamine their values and interests in light of all others.<sup>200</sup>

One of the primary objections to meaningful reform, however, is the assertion that reforms such as campaign financing will undermine autonomy. While agency must be preserved and even enhanced, autonomy is a problematic concept. Young suggests that among communities we drop the term autonomy because implicit in the concept is the right to dominate

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195. See generally john a. powell, *Achieving Racial Justice: What's Sprawl Got to Do With It?*, Poverty & Race Research Action Council newsletter (September/October, 1999), available at <http://www.prrac.org/topics/sep99/powell.htm> (last visited Aug. 21, 2001) (asserting that both segregation and assimilation is based on white supremacy).

196. See YOUNG, INCLUSION, *supra* note, at 221 ("Differentiated solidarity does not presume mutual identification and affinity as an explicit or implicit condition for attitudes of respect and inclusion."); see also powell, *As Justice Requires*, *supra* note 15, at 97-98 (articulating that a fundamental problem with our partial democracy is due to the fact that "[m]uch of our thinking about law, liberty and equality is based on an enlightenment view of a unitary stable self that is not plausible. . . .the self is multiple, fractured, and interdependent," with "important implications for how we should think about speech and equality as part of a democratic project").

197. See BARBER, *supra* note, at 117.

198. See *id.* at 128.

199. See YOUNG, JUSTICE, *supra* note, at 33-34; see also OLIVER, *supra* note 14, at 202.; RAWLS, *supra* note 4.

200. See *id.* at 137; see also, e.g., YOUNG, INCLUSION, *supra* note, at 223 (arguing that we have obligations of justice to one another to the extent that we presuppose the "specific agency of others as premises for [our] own action"). In other words, "we assume that many others will or will not do things whose institutional and causal consequences can affect our lives and actions, and we likewise implicitly assume our actions our institutionally and causally connected to the lives and actions of others." *Id.*

others.<sup>201</sup> She would use the term empowerment instead.<sup>202</sup> A full discussion of autonomy is beyond the scope of this article. But for any concept of autonomy to be workable in a democracy, it must deal with the relational aspect of citizens and groups and consequently, with the relational arrangement between minorities and whites. With respect to campaign finance, those rewarded by the system would argue that regulation of contributions or a restructuring of the system would undermine their free speech and their autonomy to spend their money as they wish. This argument is fatally flawed. Restructuring of the campaign finance system to limit the influence of the wealthy few would promote the agency of all, including that of currently marginalized communities of color. Furthermore, recognizing our obligations to one another does not mean that individuals or communities have to completely surrender their voice, but that we exist in a relational context.<sup>203</sup> Collaboration requires structuring relationships to support the maximal pursuit of each and every community allowing constituencies to have a political voice –and thereby influence the decision-making that affects them.<sup>204</sup>

Applying Young's model to campaign finance reform translates into changing the system to support the equitable pursuit of each and every individual by ensuring that all citizens have an equal political voice, so that low-income communities of color have an influential say in the decisions and structures that order their lives. Undoubtedly, such a change would also impact non-minorities and the wealthy, but this is equally true of the present arrangement. The decisions made today to protect the wealthy and whites impacts the lives of the non-wealthy minorities. Those who attempt to defend the present arrangement on claims of autonomy or free speech often ignore this. If the system was properly restructured, policies could be implemented that would not allow the wealthy to continue further segregating themselves physically and ideologically from communities of color. Campaign finance as currently structured is exclusionary in and of itself, but it also amplifies physical segregation by preventing socially and economically just policies that would combat this segregation.<sup>205</sup> Racial resi-

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201. See YOUNG, JUSTICE, *supra* note, at 249.

202. See YOUNG, JUSTICE, *supra* note, at 248-56 (distinguishing empowerment from autonomy and explaining the democratic primacy of the former); see also powell, *Worlds Apart*, *supra* note 170 (analogously discussing participation as a mediating value in the conflict between free speech and equality).

203. See YOUNG, INCLUSION, *supra* note, at 230-31 (autonomy is limited to allow for "regulation of wider social processes and issues of justice"; noting that autonomy should be exercised within the context of relationships); see also YOUNG, JUSTICE, *supra* note, at 250-51 (discussing how absolute local autonomy of municipalities would lead to even greater inequities; that autonomy has to be relational when "actions affect a plurality of agents").

204. See YOUNG, INCLUSION, *supra* note, at 231.

205. Consider this alongside Young's suggestion that the way wealth creates residential segregation is less determined by economic status and preference than by policies that produce and

dential segregation, which appears to be increasing<sup>206</sup> despite widespread perception that we live in a racially egalitarian era,<sup>207</sup> perpetuates the advocacy of narrow interests by maintaining and possibly increasing ideological segregation.<sup>208</sup>

Young's approach is only one alternative, but a powerful one, as we think about what is required for the creation of a participatory democracy. For example, widespread recognition of the fundamental necessity of quality education for all and a consequent restructuring of education systems is also vital to achievement of a full democracy. For more people to have a meaningful vote, education is needed that equips them to make informed choices and encourages them to understand themselves as part of the body politic.<sup>209</sup> Although Young's differentiated solidarity is discussed with specific reference to combating the impediments to democracy created by residential segregation,<sup>210</sup> implementation of this model could empower communities to evince other structural reforms, including the restructuring of campaign finance, necessary for a substantively equal society.<sup>211</sup>

## V.

### WHAT DOES ALL OF THIS MEAN FOR CAMPAIGN FINANCE? A PROPOSED FRAMEWORK FOR REFORM.

As this paper has hopefully made clear, the campaign finance system allows the wealthy to virtually monopolize the marketplace of ideas excluding and thereby reproducing disparities in participatory access that leave the poor and people of color without adequate options or an effective voice.<sup>212</sup> Because class and racial privilege are seldom questioned, they appear as natural and inevitable.<sup>213</sup> The problems of the poor are perceived as unrelated to institutions and structures that privilege the more powerful. Part of

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maintain legal and illegal discrimination in the housing market, and through other institutions. See *id.* at 200.

206. See, e.g., Evelyn Nieves, *Blacks Hit by Housing Costs Leave San Francisco Behind*, N.Y. TIMES, August 2, 2001, available at <http://www.nytimes.com>.

207. See Morin, *supra* note 20.

208. See, e.g., YOUNG, INCLUSION, *supra* note, at 196 (identifying that "[p]rocesses that produce and reproduce residential segregation are obvious forms of social, economic, and political exclusion").

209. See Chartier, *supra* note 160, at 271.

210. See YOUNG, INCLUSION, *supra* note, at 197.

211. See *Campaign Finance Symposium*, Feb. 12, 1999, *supra* note 17, at 12 ("[S]ome of the practical issues that we have had to deal with on a daily basis relate directly to the issue [ ] on the table. Questions of the property tax, the foundation of educating our children, clearly will never be addressed until we deal with questions of the role of money in funding elections. I see a direct nexus."). In other words, establishing open forums between the privileged and the marginalized is imperative to a healthy debate on the issue of reforming campaign financing.

212. See powell, *As Justice Requires*, *supra* note 15, at 110 (1998) (observing that "[t]he marketplace of ideas excludes and thus reproduces disparities in power. . . . [that] lead to disparities in participatory access").

213. See YOUNG, INCLUSION, *supra* note, at 213.

the role of this paper has been to help make inequitable arrangements that appear innocent more visible so that they can be questioned and ultimately changed.<sup>214</sup> The historical struggle for inclusion in this country reflected in the struggle for voting rights recognized the ideal of ending the racial dictatorship that has defined our history. But the core of this value is not contained in particular policies even one as instrumental to a more inclusive democracy as campaign finance reform. This and other reforms must be measured by the ultimate vision of full citizenship and participation in a strong democracy. At this moment in our history, achievement of this goal requires that we look at wealth and its use and creation through a racial lens. I am not advocating for the proposed campaign reform bills or for the recent Act signed into law. As I have tried to demonstrate, the passage of a bill can increase the existing racial inequality in political participation or lessen it. If we are serious about racial justice in our “emerging” democracy, we must look at the impact of proposed reforms and ask the question: “Does this bring us closer to a racial democracy or does it perpetuate the exclusion articulated in *Dred Scott*?”

In asking this question we should not be distracted by process or the passage of a law or policy. We must look at the real impact on the lives of real people. Our goal should not be simply to pass a fair law but to create a fair society. Rawls reminds us that even if a structure is brought into being fairly and for legitimate reasons, circumstances may still cause it to operate in an unjust way.<sup>215</sup> This requires looking at campaign finance reform within this larger context. Collaboration between the more privileged and less privileged and between different racial groups has to be recognized as vital to a fair democracy and cannot be on terms set out by the dominant groups.<sup>216</sup> Such one-sided rule setting “leaves untouched the material disadvantages created by exclusionary processes.”<sup>217</sup> If differently advantaged groups can learn how to communicate meaningfully with each other, the structural impediments to effective democracy can be made visible removing the cloak of innocence that is used as an excuse for the status quo of our

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214. See, YOUNG, INCLUSION, *supra* note, at 208 (noting that in order for the privileged to see themselves as privileged, they must be able to compare their environment with others, but that because they are spatially separated from those less privileged than they are, they are not forced to make this comparison). See also generally *id.* at 196-235 for a more insightful discussion of the implications residential segregation has for democracy.

215. See RAWLS, *supra* note 5, at 52-53.

216. See, e.g., *id.* at 217-218 (suggesting that the reason integration fails to be truly integrative is because the dominant want integration on their terms on the notion that merely throwing people together in the same physical spaces will achieve true integration). For our purposes, Young’s observation suggests that campaign finance should not continue to operate under the rules set out by the dominant whereby money as the requisite to political voice means those of color are muted.

217. See *id.* at 218.

thin democracy.<sup>218</sup> Those who have been locked out of our thin democracy need not stand at the door as supplicants. They too have power and can use it, as they better understand the flaws of the present arrangements. Because many of the problems today are structural and institutional, as opposed to individual and personal, there will have to be institutional and structural reform. This will likely necessitate mechanisms that require different groups to take into account each other's needs and that facilitate negotiation.<sup>219</sup>

The purpose of this article is to broaden the focus of our efforts so that we can create a more racially just society and to shed some light on what I believe should be our vision for a strong racial democracy. It is clear that through most of our history this vision has not been our goal. We have been more than willing to subordinate the interest of racial minorities and the poor to accommodate the interest of whites and the wealthy.<sup>220</sup> It is not clear that the present intent in the debate around campaign financing is prepared to break with this troubled history. When we are, reform will become a must. But it must go beyond the narrow discussion of campaign financing and wealth. We must address forthrightly the question of racial hierarchy in fact and in law. This vision does not speak just to the hope of racial minorities and the poor. This vision speaks to the hope and promise of our nation.

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218. Of course, there is the issue of those who are better off not desiring to change a system that benefits them, and therefore, there has to be a way to encourage them to want to improve processes for the less advantaged. Mandatory public financing for campaigns may be one of those ways. See generally the Public Campaign website, at <http://www.publiccampaign.org>. Gwen Patton argues that a truly democratic society "means public financing for all political campaigns." See *Challenging the Campaign Finance System as a Voting Rights Barrier: A Legal Strategy*, 43 *How. L.J.* 65, 74-75 (1999).

219. See YOUNG, *INCLUSION*, *supra* note at 232 (parenthetical). I do not suggest that there should exist no municipalities distinct from cities. There are some advantages to small units of government. However, there is a pressing present problem wherein municipalities are in a destructive competition with one another, and such a situation creates incentive for the rich to segregate themselves from others. I have called for a federated regionalism that balances the need for small units of government and neighbor and group affiliation with the need for regional cooperation and a just set of regional relationships. See generally john a. powell, *Addressing Regional Dilemmas for Minority Communities*, in *REFLECTIONS ON REGIONALISM* (Bruce Katz ed., 2000)

220. See generally, e.g., ANTHONY W. MARX, *MAKING RACE AND NATION: A COMPARISON OF SOUTH AFRICA, THE UNITED STATES, AND BRAZIL* (1998) (comparing how race has been constructed in each of these countries and the concomitant patterns of racial subordination, placing whites or whiteness at the top of the hierarchy); BELL, *supra* note 56.

