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A PLACE AT THE TABLE: *BUSH V. GORE* THROUGH THE LENS OF RACE*

SPENCER OVERTON**

In the 2000 presidential election, African Americans made up only 16% of the voting population in Florida but cast 54% of the ballots rejected in automatic machine counts ("machine-rejected ballots").[1] Across the state, automatic machines rejected 14.4% of the ballots cast by African Americans, but only 1.6% of the ballots cast by others.[2] Racial disparities appeared even when the same voting technol-

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* *Cf.* Langston Hughes, *I, Too, in* THE NORTON ANTHOLOGY OF AFRICAN AMERICAN LITERATURE 1258 (Henry Louis Gates Jr. & Nellie Y. McKay eds., 1997) ("I am the darker brother. They send me to eat in the kitchen when company comes. . . . Tomorrow, I'll be at the table when company comes. Nobody'll dare say to me, 'Eat in the kitchen,' then. . . . I, too, am America.").

** Acting Professor of Law, University of California, Davis. Several people read earlier drafts of this Essay and provided helpful comments, including Richard Banks, Roger Fairfax, Floyd Feeney, Heather Gerken, Lani Guinier, Bill Hing, Kevin Johnson, Tom Joo, Pamela Karlan, Kenneth Mack, Cynthia Overton, Leslie Overton, Marc Spindelman, Madhavi Sunder, and Tobias Wolff. This Essay also benefited from the author's conversations with Diane Amann, Holly Doremus, Frank Michelman, Martha Minow, Reggie Oh, Joseph Singer, and Terry Smith, as well as from the outstanding research assistance of Russell Johnson and Johanna Berta. Special thanks to Jim Rossi, Richard Hasen, Jason Kellogg, and Amanda Keener.

1. U.S. COMM'N ON CIVIL RIGHTS, VOTING IRREGULARITIES IN FLORIDA DURING THE 2000 PRESIDENTIAL ELECTION 2 (2001) [herinafter U.S. COMM'N ON CIVIL RIGHTS] ("Approximately 11 percent of Florida voters were African American; however, African Americans cast about 54 percent of the 180,000 spoiled ballots in Florida during the November 2000 election based on estimates derived from county-level data."); Josh Barbanel & Ford Fessenden, *Racial Pattern in Demographics of Error-Prone Ballots*, N.Y. TIMES, Nov. 29, 2000, at A25 (reporting that "black voters made up 16% of the vote on Election Day"). In compiling the data, the U.S. Commission on Civil Rights relied on the percentage of registered voters in Florida who were African American (11%), U.S. COMM'N ON CIVIL RIGHTS, *supra*, at 2, whereas *The New York Times* relied on the percentage of those who voted on election day who were African American (16%), Barbanel & Fessenden, *supra*, at A25.

2. Katharine Q. Seelye, *Divided Civil Rights Panel Approves Election Report*, N.Y. TIMES, June 9, 2001, at A8 (reporting on a study conducted by Allan J. Lichtman, a history professor at American University and an elections expert); U.S. COMM'N ON CIVIL RIGHTS, *supra* note 1, at 2 (showing that across Florida, ballots cast by African Americans were almost ten times more likely to be rejected than the ballots of whites); *see also U.S. to Look Into Possible Irregularities at the Polls*, CHIC. TRIB., Dec. 4, 2000, at 9 (reporting on a computer analysis finding that "the more black and Democratic a precinct, the more likely a high number of presidential votes was not counted"). Studies have shown that racial disparities in uncounted votes also exist outside of Florida. *See, e.g.,* David Stout, *Study Finds Ballot Problems are More Likely for Poor*, N.Y. TIMES, July 9, 2001, at A9 (reporting on a

ogy was used. For example, counting machines rejected punch card ballots in predominantly African-American precincts in Miami-Dade County at twice the rate they rejected ballots in predominantly Latino precincts, and four times the rate they rejected ballots in predominantly white precincts.[3]

In their discussions of *Bush v. Gore*,[4] legal academic commentators have not grappled with the significance of the racial disparities reflected in machine-rejected ballots. Despite the fact that the U.S. Supreme Court permanently halted the manual count of these ballots,[5] doctrinal analysis employing the facts as framed by the Justices has, by and large, commanded the most attention.

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study conducted by the U.S. House of Representatives Government Reform Committee that found "the votes of poor people and members of minorities were more than three times as likely to go uncounted in the 2000 presidential election.").

3. Barbanel & Fessenden, *supra* note 1, at A25.

> The impact of these differences on the outcome will never be known but their potential magnitude is evident in Miami-Dade County, where predominantly black precincts saw their votes thrown out at twice the rate as Hispanic precincts and nearly four times the rate of white precincts. In all, [one] out of [eleven] ballots in predominantly black precincts were rejected, a total of 9,904.

Id.; *see also* Kim Cobb, *Black Leaders Want Action on Florida Vote Complaints*, HOUS. CHRON., Nov. 30, 2000, at A24 ("U.S. Rep. Corrine Brown, D-Jacksonville, said that 16,000 of the 27,000 ballots left uncounted in Duval County were from predominantly black precincts."); *U.S. to Look into Possible Irregularities at the Polls*, *supra* note 2, at 9 ("In Miami-Dade, the state's most populous county, about 3 percent of ballots were excluded from the presidential tally. But in precincts with a black population of 70 percent or more, about 10 percent were not counted."). The disparity between African Americans and whites with regard to machine-rejected ballots was higher than racial disparities in the use of punch card technology. Barbanel & Fessenden, *supra* note 1, at A25 (observing that "64[%] of the state's black voters live in counties that used the punch cards while 56[%] of whites did so."). *But see* Stephen Ansolabehere, *Voting Machines, Race, and Equal Protection*, 1 ELECTION L.J. (forthcoming 2001) (arguing that nationally, no significant correlation exists between race and punch card machine-rejected ballots).

4. 531 U.S. 98 (2000).

5. The discussion of race has been more extensive outside of the legal academy. *See, e.g.*, Common Cause v. Jones, No. 01-03470 (C.D. Cal. filed Apr. 24, 2001) (alleging disparate voting procedures disadvantage racial minorities in violation of equal protection); U.S. COMM'N ON CIVIL RIGHTS, *supra* note 1 (2001); Ansolabehere, *supra* note 3 (political scientist's study of race and voting technology); Barbanel & Fessenden, *supra* note 1, at A25. A few legal commentators have touched upon the relevance of race. *See, e.g.*, Heather Gerken, *New Wine in Old Bottles: A Comment on Richard Hasen's and Richard Briffault's Essays on* Bush v. Gore, 29 FLA. ST. U. L. REV. 407, 422-23 (2001) ("The Court's failure to wrestle with these questions—what does equality mean, and how far should we go to attain it when the twin problems of race and poverty permeate our democratic structures?—gives an unwarranted patina of legitimacy to the election system."); Pamela S. Karlan, *Nothing Personal: The Evolution of The Newest Equal Protection from* Shaw v. Reno *To* Bush v. Gore, 79 N.C. L. REV. 1345, 1366-67 (2001).

> There is credible evidence that systems that disproportionately reject votes both have a racially disparate impact and are more often used in the populous jurisdictions in which minority voters are concentrated. Thus, the newest equal protection once again vindicates the interests of middle-class, politically potent voters, while ignoring the interests of the clause's original beneficiaries.

Id.; Richard A. Posner, *Florida 2000: A Legal and Statistical Analysis of the Election Deadlock and the Ensuing Litigation*, 2000 SUP. CT. REV. 1, 14 (engaging in a statistical analy-

Without a consideration of race, however, the conversation about *Bush v. Gore* remains woefully incomplete. Politics and race in the United States have characteristics that sometimes overlap.[6] Issues of racial identity and racial differences necessarily evoke questions of representation in the political process, particularly among groups that have been historically excluded. Because of the unique role of race in American politics, an examination of race yields important insights that might otherwise go unnoticed.

While this short Essay does not comprehensively analyze all of the components of race in *Bush v. Gore*, the piece does use race to address normative assumptions about democracy embedded in the opinion.[7] The use of a racial framework shows how these assumptions adversely impact racial minorities and other Americans as well. Professor Briffault acknowledges that the five U.S. Supreme Court Justices who voted to discontinue manual counting of the ballots in *Bush v. Gore* deviated from the Court's trend of including previously excluded groups in the political process.[8] In a similar spirit, Professor

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sis and observing that "the larger the black population and the lower the literacy level, the higher the incidence of undervotes even after other factors are taken into account.").

6. *Cf.* LANI GUINIER & GERALD TORRES, THE MINER'S CANARY (forthcoming Feb. 2002) (manuscript at 9, on file with author) ("[W]e begin by reclaiming the idea of race from its current, artificially limited conception as an exclusively individualistic form of personal identity. Rather than see race as merely denoting the biological facts of ancestry, we seek to deploy race as a proxy for political status."); Vikram David Amar & Alan Brownstein, *The Hybrid Nature of Political Rights*, 50 STAN. L. REV. 915, 976 (1998) (analyzing recent jurisprudence, and observing that "[t]he Supreme Court has dismissed the group dimension of political rights only, it appears, where race is involved"); Jerome McCristal Culp, Jr., *Colorblind Remedies and the Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims*, 69 N.Y.U. L. REV. 163, 191 (1994) ("The race of the voters matters in North Carolina precisely because the black voters have voted consistently against the racial politics of North Carolina's Congressional Club and Republican Party."); Lani Guinier, *[E]racing Democracy: The Voting Rights Cases*, 108 HARV. L. REV. 109, 130 (1994) ("In other words, minority group representation is not purely cultural, historical, or biological; it also has a political component. Group members may identify collectively along a common axis and organize to promote common interests in ways similar to other political associations."); Martha Minow, *Not Only for Myself: Identity, Politics, and Law*, 75 OR. L. REV. 647, 697 (1996) (asserting that "[i]dentity politics have been crucial and perhaps inevitable responses to perceived oppressions").

7. *Cf.* BELL HOOKS, FEMINIST THEORY FROM MARGIN TO CENTER xvi (2d ed. 2000) (asserting that a view from the "margin" allows one to understand both the center and the margin of society, and provides a sense of wholeness); Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928, 950-51 (2001) ("Critics of liberal theory, including critical race theorists, have offered another way to think about promoting equality and human dignity, one that reflects the perspective of the subordinated."); Spencer Overton, *Fannie Lou Hamer Wouldn't Like This*, L.A. TIMES, Mar. 29, 2001, at B11 (discussing the Fannie Lou Hamer standard, which considers the campaign finance system from the perspective of a poor woman of color like Fannie Lou Hamer).

8. Richard Briffault, Bush v. Gore *as an Equal Protection Case*, 29 FLA. ST. U. L. REV. 325, 347-49, 372 (2001) (describing *Bush v. Gore* as quite different from the Court's earlier inclusionary equal protection cases). Professor Gerken observes that the majority mistakenly believes itself to be agnostic, and she identifies many of the problems that re-

Hasen asserts that *Bush v. Gore*'s break from past cases may "ease the way for future Supreme Court majorities to pursue their own visions of political equality without much thought about whether that vision is supported by existing case law."[9] This Essay agrees with Professors Briffault and Hasen to the extent that they suggest that *Bush v. Gore* rejected more inclusionary assumptions about democracy articulated in earlier cases, but also asserts that the Court embraced merit-based assumptions that conditioned political recognition on an individual voter's capacity to produce a machine-readable ballot.[10] The use of race reveals how both the focus on individual responsibility and the expressive harm of exclusion that accompany the merit-based vision pose unique problems in the context of voting.

Though some might argue that taking race into consideration is inappropriate in a "colorblind" society,[11] a consideration of race need not entail the employment of a "race card" that trumps all other concerns and singularly insists on race-specific solutions. Instead, just as decisionmakers balance such concerns as individual rights, economic efficiency, and general welfare,[12] race can be used as one analytical tool to be considered in conjunction with other factors. Some might assert that race is irrelevant to an analysis of the machine-rejected ballots, preferring instead to attribute responsibility to voter inexperience, voter illiteracy, and substandard voting equipment in particular jurisdictions.[13] These explanations, however, are not pre-political or randomly distributed throughout society but dispropor-

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sult from the Court's failure to explicitly anchor its decision in a concrete, normative theory of democracy. Gerken, *supra* note 5, at 415. This Essay attempts to identify some of the unstated assumptions underlying the perspective of the majority per curiam and its defenders and begins to address some of the thornier normative issues embedded in the decision.

9. Richard L. Hasen, Bush v. Gore *and the Future of Equal Protection Law in Elections*, 29 FLA. ST. U. L. REV. 377, 380 (2001).

10. *See infra* Part I (discussing meaning of inclusionary and merit-based visions of democracy).

11. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 521 (1989) (Scalia, J., concurring) (citing Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)), for the proposition that "our Constitution is color-blind." *But see* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 336 (1978) (Brennan, White, Marshall, & Blackmun, JJ., dissenting in part and concurring in part) (noting that "no decision of this Court has ever adopted the proposition that the Constitution must be colorblind").

12. *See* JOSEPH SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES 279-82 (2d ed. 1997) (describing the use of various policy considerations as analytical tools in lawmaking).

13. *See, e.g.*, Ansolabehere, *supra* note 3 (arguing that nationally, no significant correlation exists between race and punch card machine-rejected ballots and that racial disparities are explained by a higher percentage of less reliable punch card technology in African-American precincts); Abigail Thernstrom & Russell G. Redenbaugh, The Florida Election Report: Dissenting Statement, *at* http://www.manhattan-institute.org/html/final_dissent.htm (asserting that the problems encountered during the Florida election were caused by bureaucratic inefficiencies, inexperienced voters, illiterate voters, substandard voting technology, and other issues unrelated to race).

tionately impact certain populations due in part to past state-sponsored racial discrimination.[14] A consideration of race allows scholars and legal decisionmakers to avoid the pitfalls of the "color-blind card," an ideological extreme that mechanically trumps historical considerations, silences discussion, removes relevant issues from the table, and ignores important problems.

Part I of this Essay reviews two opposing visions of democracy that emerged in *Bush v. Gore*. The Florida Supreme Court's more inclusionary vision prompted it to order that the ballots rejected by machines be counted manually, while the U.S. Supreme Court's more merit-based vision motivated it to prohibit a manual count of the imperfectly marked ballots. Part II uses race to reveal many of the shortcomings of the merit-based vision of democracy. Although the Court's facially neutral, merit-based criteria focus on individual responsibility, they interfere primarily not with individual rights, but with the ability of groups of voters like African Americans to identify with one another as a political community, to create alliances with others of different backgrounds, and to use the vote to enact political change. Further, the lens of race exposes how merit-based criteria convey an expressive harm of exclusion that carries particular potency in light of a history of poll taxes, literacy tests, and other devices used to suppress political participation by African Americans. While the merit-based vision's adverse impact on African Americans should prompt concern in and of itself, Part III explores how the shortcomings of the merit-based vision adversely impact other Americans.[15]

I. COUNTING VOTES AND ASSUMPTIONS ABOUT DEMOCRACY

Other commentators have recognized that one's choices regarding the law of the political process are shaped by one's assumptions about democracy, which reflect the individual's understanding about particular cultural, professional, and social realities of politics.[16] Two

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14. *Cf.* Gaston County v. United States, 395 U.S. 285, 291 (1969) (invalidating county's literacy test in part because the county's previous maintenance of a de jure segregated school system had "deprived its black residents of equal educational opportunities, which in turn deprived them of an equal chance to pass the literacy test").

15. This Essay concentrates primarily on African Americans due to the high rate of machine-rejected ballots among African Americans. As developed in Part III, however, the experience of African Americans can be used as a lens to reveal structural problems with the merit-based assumptions of the Court that impact many others, including but not limited to Latinos, the elderly, and the poor.

16. *See* Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 FLA. L. REV. 443, 444 (1989) (observing that with regard to issues "soaked with political interest[,] . . . legal argument and judicial explanation . . . unselfconsciously reflect underlying assumptions about actual and potential social relations, and about the institutional arrangements and forms of political life fit for those relations as they are and are capable of becoming"); *see also* James A. Gardner,

different understandings of democracy animate the judicial opinions in *Bush v. Gore*—an inclusionary vision and a merit-based vision.

The inclusionary vision of democracy values widespread participation and looks to remove criteria or conditions that act as barriers to such participation.[17] Under this vision, political participation is a right, and courts and democratic decisionmakers have a responsibility to create an environment that allows for, and even encourages, participation by all citizens.[18] Professor Briffault, for example, lists the legislative apportionment cases and the invalidation of the poll tax to illustrate the inclusionary nature of the Court's jurisprudence prior to *Bush v. Gore*.[19] The Voting Rights Act of 1965, which bans literacy tests and fluency in English as prerequisites for voting,[20] and

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Liberty, Community and the Constitutional Structure of Political Influence: A Reconstruction of the Right to Vote, 145 U. PA. L. REV. 893, 897 (1997) ("We can hardly expect to figure out what voting—or 'fair' voting, or 'meaningful' voting—means without some conception of what voting is *for*, what purpose it serves within a larger regime of democratic self-government."); Spencer Overton, *Rules, Standards, and Recounts: Form and the Law of Democracy*, 37 HARV. C.R.-C.L. L. REV. (forthcoming 2001) (observing that one's assumptions about democracy shape one's preference for using rules or standards to allocate discretion); Richard H. Pildes, *Democracy and Disorder*, 68 U. CHI. L. REV. 695, 696 (2001) (describing judicial culture as "the empirical assumptions, historical interpretations, and normative ideals of democracy that seem to inform and influence the current constitutional law of democracy").

17. *See* Pamela S. Karlan, *Undoing the Right Thing: Single-Member Offices and the Voting Rights Act*, 77 VA. L. REV. 1, 45 (1991) (describing the "inclusionary understanding of democracy" in amended section 2 to the Voting Rights Act); *cf.* Gardner, *supra* note 16, at 904 (describing democratic theory in which "exclusion from the electoral process is exclusion in the deepest possible sense from the essence of American society").

18. *See* Kendall Thomas, *Racial Justice: Moral or Political?*, *in* LAW'S CENTURY (Austin Sarat ed., forthcoming 2001) (observing that, within a political conception of racial justice, American democracy is charged with three tasks: to maintain "equal and meaningful access for vulnerable racial publics" to institutions in which political identity is formed, to "modify the participatory practices through which" the political opinions of vulnerable racial publics "can be framed and communicated," and to "insure that the interests of vulnerable racial publics are represented in institutional arenas in which binding collective choices are discussed and made").

19. Briffault, *supra* note 8, at 347 nn.103-04 (citing Hill v. Stone, 421 U.S. 289 (1975) (concluding that a Texas provision impermissibly disenfranchised otherwise qualified voters solely because they had not rendered their property for taxation); City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970) (invalidating a provision excluding nonproperty owners from voting in an election to approve general-obligation bonds); Cipriano v. City of Houma, 395 U.S. 701 (1969) (concluding that a Louisiana provision limiting the right to vote on the issuance of revenue bonds to taxpayers violated the Equal Protection Clause); Harper v. Va. Bd. of Elections, 383 U.S. 663 (1966) (invalidating poll taxes). *But cf.* Ball v. James, 451 U.S. 355 (1981) (concluding that a state could rationally limit voting in a water district election to landowners and that each vote could be weighted respective to the amount of land each voter owned); Buckley v. Valeo, 424 U.S. 1, 49 n.55 (1976) (rejecting the argument that *Harper* allows Congress to restrict political expenditures); Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719, 726-30 (1973) (concluding that a property-based scheme for electing the governing board of water reclamation district does not violate equal protection).

20. Voting Rights Act of 1965, 42 U.S.C. § 1973aa (1994) (suspending use of literacy tests nationwide); *id.* § 1973b(f)(1)-(2) (2001) (prohibiting English-only elections and other voting qualifications or prerequisites intended to deny language minorities the right to

the Twenty-fourth Amendment, which prohibits exclusion from federal elections "by reason of failure to pay any poll tax or other tax,"[21] also embrace inclusionary notions of democracy. Proposals for public financing of politics fit into this category as well.[22]

The majority of the Florida Supreme Court embraced inclusionary assumptions about democracy in its conclusion that a "legal vote" constituted any ballot upon which the clear intent of the voter could be ascertained.[23] While the Florida court's articulation of the "clear intent standard" was based on state statutory language,[24] the state

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vote). *But cf.* Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 51 (1959) (upholding a literacy test that did not have a discriminatory effect because "[t]he ability to read and write . . . has some relation to standards designed to promote intelligent use of the ballot"); Hasen, *supra* note 9, at 397 ("[*Lassiter*] is of questionable value following cases like *Harper*. . . . But if *Lassiter* remains good law, it stands for the proposition that the state can condition the franchise on voters' ability to follow instructions—thereby insuring that only educated voters vote.").

21. U.S. CONST. amend. XXIV, § 1.

22. *See, e.g.,* Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CAL. L. REV. 1, 20-27 (1996).

> This Article argues for a new system of campaign finance. . . . Under this plan, each voter would have the opportunity to contribute vouchers to candidates or to interest groups in every federal election cycle. The interest groups would use the vouchers to contribute to candidates or to organize independent expenditure campaigns. With limited exceptions, only funds from the voucher system could be spent to support or oppose candidates for elected federal offices.

Id. at 6; Bruce Ackerman, *Crediting Voters: A New Beginning for Campaign Finance*, 13 AM. PROSPECT 71, 78-79 (1993); Edward B. Foley, *Equal-Dollars-Per-Voter*, 94 COLUM. L. REV. 1204, 1204 (1994) ("The Constitution of the United States should contain a principle, which I shall call 'equal-dollars-per-voter,' that would guarantee to each eligible voter equal financial resources for purposes of supporting or opposing any candidate or initiative on the ballot in any election held within the United States.").

23. *See* Briffault, *supra* note 8, at 372 (arguing that although it was not constitutionally mandatory, the Florida court's order was consistent with the inclusionary thrust of the United States Supreme Court's prior application of the Equal Protection Clause in the voting rights area); Pamela S. Karlan, *Unduly Partial: The Supreme Court and the Fourteenth Amendment in* Bush v. Gore, 29 FLA. ST. U. L. REV. 587, 598-99 (2001) (asserting author's belief that "as a matter of Florida law, the 'clear intent of the voter' standard meant that many of the ballots that were out of strict compliance with Florida law were nonetheless legal votes," but noting that if such ballots did "*not* contain legally cast votes, then a recount process that includes them might infringe upon the voting rights of those citizens who *did* comply with the state's requirements").

24. In ordering a manual recount of ballots on which automatic machine recounts had failed to detect a vote for President and which had not yet been manually recounted, the Florida Supreme Court embraced phrasing established by the Florida Legislature. The statute provided that "[n]o vote shall be declared invalid or void if there is a clear indication of the intent of the voter as determined by the canvassing board." FLA. STAT. § 101.5614(5) (2000), *amended by* 2001 Fla. Laws ch. 40, § 37, at 144, 145. According to the Florida Supreme Court's interpretation of the provision, legitimate votes included not only ballots completely punched through, but also all ballots that expressed the clear intent of the voter. The Florida Supreme Court stated that the "clear message from" the legislature was "that every citizen's vote be counted whenever possible," thereby imputing an inclusionary understanding of democracy to the Florida Legislature. Gore v. Harris, 772 So. 2d 1243, 1254 (Fla. 2000), *rev'd sub nom.* Bush v. Gore, 531 U.S. 98 (2000). Thus, the court required canvassing boards and officials to count a vote if there was a "clear indication of the intent of the voter" on the ballot, unless it was "impossible to determine the elector's

court noted that it had, in the past, "pointed to the 'will of the voters' as the primary guiding principle" in resolving election disputes.[25] In prior cases it "repeatedly held . . . that so long as the voter's intent may be discerned from the ballot, the vote constitutes a 'legal vote' that should be counted."[26] Rather than emphasizing the shortcomings of voters, the Florida court focused on the responsibility of the state and mentioned that the margins of error for punch card machines might be so significant as to require a reevaluation of the use of the machines.[27] In short, a majority of the Florida Supreme Court interpreted the Florida statutory scheme as containing a broad, inclusive definition of a vote that put responsibility on state officials to manually review ballots that lacked machine-readable markings. United States Supreme Court Justices Breyer, Ginsburg, Souter, and Stevens either agreed with or were prepared to defer to this interpretation and would have allowed a manual counting of the ballots.[28]

In contrast to the inclusionary vision of democracy, the merit-based vision conditions the right to political participation on a citizen's ability to comply with a particular set of criteria.[29] A merit-

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choice." *Id.* (citing FLA. STAT. § 101.5614(5)-(6) (2000)). The Florida Supreme Court may have focused on the legislative standard cognizant of earlier questions expressed by the U.S. Supreme Court Justices as to whether the Florida Supreme Court based an earlier holding on state constitutional provisions rather than state legislative provisions or, through interpretation, "changed" the law in violation of Article II, Section 1, Clause 2 of the U.S. Constitution. Bush v. Gore, 531 U.S. 98, 145 (2000) (Breyer, J., dissenting) (suggesting that "[i]n light of our previous remand, the Florida Supreme Court may have been reluctant to adopt a more specific standard than that provided for by the legislature for fear of exceeding its authority under Article II"). Note that inclusionary objectives were not absent in the consideration of the statutory structure containing section 101.5614(5), *Florida Statutes*. *See, e.g.*, Letter from Reubin O'D. Askew, Governor, State of Florida, to Members of the Florida Senate and House of Representatives (Mar. 15, 1977) (on file with the Florida State Archives) (observing shrinking voter participation nationally, and suggesting that electoral reform was needed that will "heighten public interest and participation" and "enhance[] the ability of citizens to exercise their right to vote").

25. Gore v. Harris, 772 So. 2d at 1254.

26. *Id.* at 1256; *see also id.* at 1261 n.20 (observing that "[t]his presidential election has demonstrated the vulnerability of what we believe to be a bedrock principle of democracy: that every vote counts").

27. *Id.* at 1261; *see also id.* at 1254 (asserting that the right to vote is not just the right to participate and to speak, "but more importantly *the right to be heard*") (emphasis in original).

28. Bush v. Gore, 531 U.S. at 127 (Stevens, J., dissenting, joined by Breyer and Ginsburg, JJ.) ("Thus, nothing prevents the majority, even if it properly found an equal protection violation, from ordering relief appropriate to remedy that violation without depriving Florida voters of their right to have their votes counted."). Justice Souter stated that he would defer to the Florida Supreme Court's interpretation of a legal vote, establish uniform counting standards, and allow the State to count the machine-rejected ballots. *Id.* at 131-35. (Souter, J., dissenting, joined by Breyer, J.).

29. *Cf.* Jacob Katz Cogan, *The Look Within: Property, Capacity, and Suffrage in Nineteenth-Century America*, 107 YALE L.J. 473 (1997) (monitoring the nineteenth century shift in locating a person's capacity for political participation externally in material things like property to internal characteristics such as literacy, and the continued disenfranchisement of women and African Americans); Michelman, *supra* note 16, at 480-85 (discussing en-

based vision is individualist to the extent that an individual citizen rather than government has a responsibility to secure or meet the conditions necessary for his or her political participation.[30] The merit-based vision of democracy also enhances societal well-being, the argument goes, because better political decisions arise from an electorate made up of citizens who are either competent enough or care enough to meet the criteria.[31] Examples of devices that have been considered legitimate under merit-based assumptions about

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franchisement on the basis of competence); James Thomas Tucker, *Affirmative Action and [Mis]representation: Part II—Deconstructing the Obstructionist Vision of the Right to Vote*, 43 HOW. L.J. 405, 452-55 (2000) (discussing the merit-based approach as applied to voting).

While the merit-based and inclusionary visions differ, they are not mutually exclusive, and both might be embraced in varying degrees. For example, while the Florida Supreme Court employed a more inclusionary vision than the U.S. Supreme Court, the state court's order would have been even more inclusionary had it, in addition to ordering a manual review of undervotes, ordered a manual review of overvotes. Also, many merit-based practices may not have been repudiated due to a rejection of merit, but because the practices arbitrarily excluded many who were believed just as competent or interested in making political judgments. In other words, the argument goes, the devices were not sufficiently precise in their task of allocating membership in political community based on merit. *See* Daniel R. Ortiz, *The Democratic Paradox of Campaign Finance Reform*, 50 STAN. L. REV. 893, 896 (1998) ("We have rejected [poll taxes, property qualifications, and literacy tests] not because we have come to believe their aim of ensuring the independent exercise of political judgment is not worth pursuing [but] . . . because we have come to think that some people had misappropriated these practices to unjustly exclude groups that were just as capable as the rest of us of exercising this kind of judgment. Their central democratic aim remains untarnished.").

30. *Cf.* R. Richard Banks, *Meritocratic Values and Racial Outcomes: Defending Class-Based College Admissions*, 79 N.C. L. REV. 1029, 1036 (2001) ("Meritocracy is individualist insofar as it seeks to distribute opportunities and resources on the basis of the conduct or attributes of individuals. It is productivity-oriented to the extent that it distributes opportunities and resources based on predictions of future performance that will enhance societal well-being.").

31. *Cf.* 1 WILLIAM BLACKSTONE, COMMENTARIES 171 ("The true reason of requiring any qualification, with regard to property, in voters, is to exclude such persons as are in so mean a situation that they are esteemed to have no will of their own. If these persons had votes, they would be tempted to dispose of them under some undue influence or other."); Harper v. Va. Bd. of Elections, 383 U.S. 663, 684-85 (1966) (Harlan, J., dissenting):

> [I]t is certainly a rational argument that payment of some minimal poll tax promotes civic responsibility, weeding out those who do not care enough about public affairs to pay $1.50. . . . [I]t was probably accepted as sound political theory . . . that people with some property have a deeper stake in community affairs, and are consequently more responsible, more educated, more knowledgeable, more worthy of confidence, than those without means, and that the community and Nation would be better managed if the franchise were restricted to such citizens.

Id.; Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 52 (1959) ("Yet in our society where newspapers, periodicals, books, and other printed matter canvass and debate campaign issues, a State might conclude that only those who are literate should exercise the franchise. It was said last century in Massachusetts that a literacy test was designed to insure an independent and intelligent exercise of the right of suffrage.").

democracy include poll taxes, literacy tests, and a privately-funded campaign finance system.[32]

As acknowledged by Professors Briffault and Hasen, the five U.S. Supreme Court Justices who voted to discontinue manual counting of the ballots did not adopt the Florida Supreme Court's inclusionary language.[33] Instead, Chief Justice Rehnquist and Justices Kennedy, O'Connor, Scalia, and Thomas adopted a more merit-based interpretation that put responsibility on the voter to produce a ballot that could be read by a properly functioning counting machine. The per curiam opinion repeatedly emphasized the failure of those who cast machine-rejected ballots in its reference to punch cards that "have not been perforated with sufficient precision" and were "not punched in a clean, complete way by the voter" due to either "error or deliberate omission."[34] Upon its conclusion that the clear intent standard lacked uniformity in its application and violated equal protection, the Court did not order a manual count of ballots based on a uniform standard. Instead, the Court prohibited any further recognition of the imperfectly marked ballots by asserting that the Florida Legislature preferred to submit the state's presidential electors by December 12.[35] A separate concurrence by Chief Justice Rehnquist and Justices

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32. Some have asserted that racial and gender exclusions were merit-based devices that excluded those who were not deemed sufficiently independent and competent to make political decisions. *See* Ortiz, *supra* note 29, at 908-09 ("Many believed that freed blacks were uniquely vulnerable to their former masters, employers, or opportunistic whites, and women were thought to be easily swayed by their husbands.").

33. Briffault, *supra* note 8, at 372 (describing *Bush v. Gore* as quite different from the Court's earlier inclusionary equal protection cases).

34. Bush v. Gore, 531 U.S. 98, 104-05 (2000); *cf.* Oral Argument Tr. at 58, Bush v. Gore, 531 U.S. 98 (2000) (No. 00-949) (indicating a question of Justice O'Connor as "Well, why isn't the standard the one that voters are instructed to follow, for goodness sakes? I mean, it couldn't be clearer. I mean, why don't we go to that standard?").

35. The Court stated that the Florida Legislature preferred to conclude the vote tabulation process by December 12 in order to secure a federal statutory guarantee that Congress would not challenge its election results. Bush v. Gore, 531 U.S. at 109-11. *But see* Michael W. McConnell, *Two-and-a-Half Cheers for* Bush v. Gore, 68 U. CHI. L. REV. 657, 675 (2001) (observing that the two Florida Supreme Court opinions cited by the Court do not "supply any authoritative pronouncement that December 12 is the absolute deadline for state law purposes"). The majority reasoned that Florida could not possibly tabulate the votes in accordance with minimal constitutional requirements by the deadline, and thus reversed the Florida Supreme Court's manual recount order. Bush v. Gore, 531 U.S. at 109-11. If imperfectly marked ballots contained votes as legitimate as perfectly marked ballots, then presumably equal protection guarantees would have required a manual review, and such constitutional concerns would have trumped any federal statutory deadline. *Cf.* Briffault, *supra* note 8, at 359 ("If equal protection guarantees applied to imperfectly marked ballots, then presumably even 'the press of time' would not have justified the failure to review them."); *id.* ("[T]here was nothing in the per curiam opinion that indicated that a voter who casts any particular sort of imperfectly marked ballot had any substantive entitlement to have that ballot treated as a valid vote."). *But see* Hasen, *supra* note 9, at 389:

> Nonetheless, the Court held that the Florida Legislature's interest . . . in taking advantage of the "safe harbor" provisions of federal law for counting the state's

Scalia and Thomas explicitly concluded that the Florida statutory scheme required counting only the ballots on which chads had been punched completely by voters.[36]

According to the merit-based assumptions of political participation underlying the majority's opinion, voter intent was less important than voter compliance. If a voter did not "properly" mark his or her ballot in a manner that machines could read, more pressing concerns outweighed a manual review of the ballot. The Court extended a conceptual understanding of formal equality to invalidate the use of the clear intent standard. At the same time, the Court used the seemingly natural and logical cultural values of merit to limit the protection afforded by its particular brand of equality to machine-readable ballots.[37] Capacity to punch a ballot so as to completely remove a chad constituted a relevant criterion that the Court used to define the political community.

II. MERITOCRACY THROUGH THE LENS OF RACE

By employing a seemingly neutral, merit-based qualifier to identify those ballots that deserve recognition, the Court in fact avoids deeper and more difficult normative questions about structural inequalities in our political process. This Part employs race to illuminate some of the more troubling implications of the merit-based vision.

A. Race Exposes the Shortcomings of the Merit-Based Vision's Individualized Focus

The lens of race reveals that the merit-based vision's individualized focus overlooks both the collective nature of political participation and the structural nature of racial disadvantage.

> electoral votes trumped the rights of all Florida voters to have valid votes counted. It is not self-evident that such a state interest was compelling and trumped the right, recognized in *Reynolds* but ignored by the Court in *Bush v. Gore*, to have every vote count . . . .

36. Bush v. Gore, 531 U.S. at 120-22 (Rehnquist, C.J., concurring) (concluding that "there is no basis for reading the Florida statutes as requiring the counting of improperly marked ballots" based on an opinion by Secretary of State Katherine Harris and an argument that the statutory provision was inapplicable because it allegedly applied only to damaged or defective ballots, not ballots imperfectly marked by voters). The concurrence reasoned that the clear intent of the voter was irrelevant and that the Florida Supreme Court's flawed interpretation changed Florida election laws in violation of Article II of the U.S. Constitution. *See id.* at 114-15 (Rehnquist, C.J., concurring).

37. The Court did not extend its conceptual understanding of equality to require that all voters have access to similar types of voting machinery. *See id.* at 109 ("The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections.").

In the absence of a racial analysis, the Court's merit-based criteria may appear neutral, reasonable, and benign. Because the Court gave all eligible Florida citizens the formal opportunity to vote on roughly the same terms, each Floridian had an equal opportunity to participate. The fact that some individuals were better able to follow instructions and perform the simple tasks necessary to produce a machine-countable ballot reflected differences in voter motivation, voter education, or voter experience.[38] Individuals with greater education and wealth are more likely to participate in politics generally,[39] one might argue, and it is not surprising that these individuals were more likely to cast machine-readable votes. From this perspective, no outcast or disenfranchised groups existed that required protection. Instead, there were only responsible individuals whose political entitlement was threatened by the claims of those who failed to exhibit an appropriate amount of personal responsibility.

While the simple task of punching a ballot may not appear to be a significant barrier for any individual voter, the merit-based vision fails to recognize that politics involves not simply individual rights but also associational and structural concerns.[40] Although individuals

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38. *Cf.* Dana Canedy, *Florida Governor Calls Commission Report on Election Biased*, N.Y. TIMES, June 6, 2001, at A22.

> Gov. Jeb Bush's office sent a scathing letter to the United States Commission on Civil Rights today denouncing its preliminary findings on the problem-plagued presidential race in Florida last November. The letter dismissed the investigation's findings as irresponsible and biased. . . . Mr. Bush's letter took aim at many of the findings, including the issue of widespread disenfranchisement among minority voters. The letter said that, as with all voters, minorities could have been affected by a number of variables that the commission failed to take into account, such as "the voter's education level, the voter's experience with voting, the ballot design and the voting machine used."

Id.

39. *See* U.S. CENSUS BUREAU, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 1998, at 7 (2000), *available at* http://www.census.gov/prod/2000pubs/p20-523.pdf ("In 1998, citizens who had bachelor's degrees were nearly twice as likely (58 percent) to report that they voted as those who had not completed high school (30 percent). At each level of educational attainment from high school completion and above, voting rates increase significantly."); John Green, Paul Herrnson, Lynda Powell & Clyde Wilcox, *Individual Congressional Campaign Contributors: Wealthy, Conservative and Reform-Minded, Individual Donors and Campaign Finance* 13 (1998), *at* http://www.opensecrets.org/pubs/donors/donors.htm (providing that, of contributors to the 1996 congressional elections who responded to an academic survey funded by the Joyce Foundation, 81% had annual incomes over $100,000 and 20% had annual incomes higher than $500,000).

40. *Compare* Reynolds v. Sims, 377 U.S. 533, 561 (1964) (describing voting rights as "individual and personal in nature"), *with* Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes*, 71 TEX. L. REV. 1589, 1595 (1993) (suggesting "that the one-person, one-vote doctrine is consistent with both group and individual conceptions of voting"), *and* Samuel Issacharoff & Pamela S. Karlan, *Standing and Misunderstanding in Voting Rights Law*, 111 HARV. L. REV. 2276, 2282 n.30 (1998) (asserting that one-person, one-vote cases like *Reynolds* "should be viewed as cases about group political power . . . rather than purely about individual rights").

cast votes, individual voters enact political change by associating with political groups.[41] Under a constitutive understanding of voting, the experience of participation in politics is valued "as a process of formation or field of exertion of self or community" through which "persons or communities (or both, reciprocally) forge identities."[42] Voting is seen as a "vehicle for self-development and identification, and a means for creating alliances and thus a community among individuals so engaged."[43]

The Court's seeming unwillingness to recognize these values in *Bush v. Gore* is especially evident when one considers race. In its focus on individual responsibility,[44] either the Court fails to consider or is indifferent to the manner in which its merit-based criteria interfere with the ability of voters like African Americans to identify with one another as a political community, create alliances with others of

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41. *Cf.* Davis v. Bandemer, 478 U.S. 109, 167 (1986) (Powell, J., concurring in part and dissenting in part) ("The concept of 'representation' necessarily applies to groups: groups of voters elect representatives, individual voters do not."); Alexander M. Bickel, *The Supreme Court and Reapportionment*, *in* REAPPORTIONMENT IN THE 1970S, at 57, 59 (Nelson W. Polsby ed., 1971) ("We have, since Madison, realized that people tend to act politically not so much as individuals as in groups."); Anthony A. Peacock, *Voting Rights, Representation, and the Problem of Equality*, *in* AFFIRMATIVE ACTION AND REPRESENTATION: *SHAW V. RENO* AND THE FUTURE OF VOTING RIGHTS 17 (Anthony A. Peacock ed., 1997) ("Although representational politics is necessarily group oriented—groups of voters electing representatives, not individuals—the individual right to vote must be respected in any system of representation."); Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1742 (2001) ("[I]f we are going to recognize an aggregate harm like dilution, we must take into account its group-like qualities."); Samuel Issacharoff, *Groups and the Right to Vote*, 44 EMORY L.J. 869, 884 (1995) ("[T]he right to effective voting is incomprehensible without that conception of the group.").

42. Michelman, *supra* note 16, at 451.

43. Ellen D. Katz, *Race and the Right to Vote After* Rice v. Cayetano, 99 MICH. L. REV. 491, 513 (2000).

44. The merit-based vision's focus on individual responsibility is not inconsistent with the concentration by some Justices on the individual characteristics of voting. *See* Shaw v. Hunt, 517 U.S. 899, 917 (1996) ("To accept that [a remedial] district may be placed anywhere implies that the claim, and hence the coordinate right to an undiluted vote (to cast a ballot equal among voters), belongs to the minority as a group and not to its individual members. It does not."); Miller v. Johnson, 515 U.S. 900, 911 (1995) (explaining that a state may not create voting districts on the basis of race because "[g]overnment must treat citizens as individuals"); Shaw v. Reno, 509 U.S. 630, 647-49 (1993) (describing harms that arise from districting based upon groups and not individuals); *see also* Amar & Brownstein, *supra* note 6, at 917 (criticizing "the Court's exclusively individualistic perspective" in the voting and jury contexts); Gerken, *supra* note 41, at 1665-66 (describing the "highly individualistic view of rights developed by the Rehnquist Court"); Guinier, *supra* note 40, at 1601 (referring to "the efforts of some members of the Court to characterize representation as an exclusively individual notion"); Pamela S. Karlan & Daryl J. Levinson, *Why Voting Is Different*, 84 CAL. L. REV. 1201 (1996) (criticizing the Court's application of its general equal protection doctrine, which focuses on individual rights, to the voting context); Tucker, *supra* note 29, at 410 (claiming that the majority in *Shaw v. Reno* "assumed that the right to vote was an individual, and not a group right").

different backgrounds, and use the vote instrumentally to enact political change.[45]

By limiting the relevant political community to those who exhibited the capacity to create a machine-readable ballot, the Court's decision diluted the political choices of both African Americans whose ballots were rejected by machines and African Americans who properly punched their ballots but identified politically with those whose ballots were rejected.[46] African Americans who exhibited the capacity to punch ballots were no longer allowed to aggregate their preferences with those excluded by the Court's ruling.[47] While the Court justifies its decision on a lapse in individual responsibility, its decision penalizes all African Americans who identify as part of a political group equally, with no distinction between those who did or did not completely punch their ballots. The Court did not individually reprimand those who failed to punch the ballot properly and who most probably do not even know of their transgression. Whereas a more inclusionary vision would have allowed African Americans to more freely forge a common identity and exert some degree of collective self-determination in improving their lives through shaping the political environment,[48] the merit-based vision disabled a critical device used to engage in these activities.

The Court's failure to recognize this dilution of political strength as illegitimate arises, in part, from a related problem of the merit-based vision's focus on individuals. The merit-based vision fails to adequately appreciate that racial disadvantage arises not simply from isolated, intentional actions of malicious individuals but also

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45. *Cf.* Roberts v. Wamser, 679 F. Supp. 1513, 1532 (1987), *rev'd on standing grounds*, 883 F.2d 617 (8th Cir. 1989) (concluding that election board's failure to manually review punch card ballots rejected by tabulating equipment constituted a violation of the Voting Rights Act because such a failure results "in the City's black voters having less opportunity than other members of the City's electorate to participate in the political process and to elect representatives of their choice").

46. Terry Smith, *A Black Party?* Timmons*, Black Backlash and the Endangered Two-Party Paradigm*, 48 DUKE L.J. 1, 51 (1998) ("Blacks have historically functioned as a party within a party. Even during the era of limited black enfranchisement, blacks formed 'satellite' or 'parallel' parties to advance their interests within the two-party structure.").

47. Gerken, *supra* note 41, at 1669-70 (distinguishing vote dilution claims from claims based on conventional individual rights by observing that with regard to voting: "fairness is measured in group terms; an individual's right rises and falls with the treatment of the group; and the right is unindividuated among members of the group"); Tucker, *supra* note 29, at 414 ("When an electoral scheme systematically prevents the collective exercise of voting rights for particular groups, the individual right to vote is diminished accordingly.").

48. Even after reviewing all of the imperfect votes, no undisputed winner of the 2000 presidential election emerged. Dennis Cauchon & Jim Drinkard, *Florida Voter Errors Cost Gore the Election: Bush Still Prevails in Recount of All Disputed Ballots, Using Two Most Common Standards*, USA TODAY, May 11, 2001, at 1A (finding that had all disputed ballots been counted by hand, George W. Bush would have won under two of the most widely used standards for counting votes, Al Gore would have won under the two least used, and that overall, most voters intended to vote for Gore).

from structural factors that fail to account for context and history.[49] The merit-based vision seems to assume that constitutionally sufficient equity exists in the status quo—that the baseline has some degree of fairness. Under these assumptions, differences in political outcomes that result from ballots not counted by machines do not reflect past discrimination but rather differences between autonomous individuals. Whereas the inclusionary vision actively seeks and removes context-specific obstacles to political participation, the merit-based vision fails to question whether its facially neutral criteria have a disparate impact upon certain populations. The merit-based vision either ignores or tolerates that factors such as lower education, a greater percentage of first-time voters, a greater reluctance to ask for assistance, segregated residential patterns, and substandard voting equipment and assistance at the polls in predominantly African-American neighborhoods are not fully pre-political or merit-based[50] but stem in part from illegitimate factors such as past state-sponsored racial discrimination.[51]

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49. *See* Charles R. Lawrence III, *Foreword: Race, Multiculturalism, and the Jurisprudence of Transformation*, 47 STAN. L. REV. 819, 824-25 (1995) ("The substantive approach sees the disestablishment of ideologies and systems of racial subordination as indispensable and prerequisite to individual human dignity and equality. The nonsubstantive approach sees the individual right to be treated without reference to one's race as primary."); *cf. Introduction* to CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT xiii, xxiv (Kimberlé Crenshaw et al. eds., 1995) ("The debate that ensued in light of this different orientation engendered an important [Critical Race Theory] theme: the absolute centrality of history and context in any attempt to theorize the relationship between race and legal discourse.").

50. *Cf.* Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1379 (1988) ("The rationalizations once used to legitimate Black subordination based on a belief in racial inferiority have now been reemployed to legitimate the domination of Blacks through reference to an assumed cultural inferiority."); *id.* at 1370 ("Throughout American history, the subordination of Blacks was rationalized by a series of stereotypes and beliefs that made their conditions appear logical and natural.").

51. *Cf.* S. REP. NO. 97-417, at 29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206 (describing one factor used to determine a violation of section 2 of the Voting Rights Act as "the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process . . . ."); Lawrence, *supra* note 7, at 953 ("[The liberal theory] makes no effort to inquire into the ways that current facially neutral practices may have a foreseeable and unjustifiable discriminatory impact or to account for unconscious bias in their administration."); Spencer Overton, *Voices from the Past: Race, Privilege, and Campaign Finance*, 79 N.C. L. REV. 1541 (2001) (observing that the existing distribution of property upon which the privately-funded campaign finance system is based is not pre-political, but is shaped in part by past state discrimination). Judges and other decisionmakers' assumptions about the democratic process are likely shaped, in part, by preferences and judgments about race. If one subscribes to a colorblind ideology and believes that race is irrelevant outside of intentional actions by malicious individuals, merit-based assumptions about democracy that happen to exclude people of color may seem more logical. If one has a more expansive view that appreciates the structural nature of race, one might adopt more inclusionary assumptions about the nature of democracy.

In short, the merit-based vision isolates broader structural concerns, both about historical disadvantage and contemporary racial identities, because its individualized focus is not sufficiently expansive to take the broader problems into account.[52] The narrowness of the merit-based vision, however, should not suggest that it is a neutral or impartial tool completely removed from political outcomes.[53]

B. Race Exposes Particular Expressive Components of Merit-Based Vision

In addition to exposing the merit-based vision's failure to appreciate the unique characteristics of voting that extend beyond the individual, a consideration of race allows one to more broadly comprehend the expressive effect of the Court's decision in *Bush v. Gore*.

Voting's expressive component "rests on the message the electoral system is understood to disseminate, and accordingly represents something bestowed on the political community."[54] To members of the majority of the Court, the Florida Supreme Court's manual recount order sent a message of haphazardness and arbitrariness that was "not well calculated to sustain the confidence that all citizens must

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52. *Cf.* Tucker, *supra* note 29, at 453 ("The individual portrait . . . is very ill-suited for the political landscape in which voting occurs. . . . [P]oliticians are keenly aware of the racial, social, political, and economic characteristics of voters, and redraw district boundaries to comport with those groups they believe will best enhance the political strength of themselves or their party.").

53. *See* Martha Minow, *Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 32 (1987) ("The unstated point of comparison is not neutral, but particular, and not inevitable, but only seemingly so when left unstated."); *see also e.g.*, Banks, *supra* note 30, at 1034 ("Merit is a functional concept—no quality or characteristic is inherently meritorious. Merit is necessarily defined with respect to particular contexts, goals, and values."); Jamin B. Raskin, *Affirmative Action and Racial Reaction*, 38 HOW. L.J. 521, 551 (1995) ("Merit is neither self-defining nor self-revealing; it is an ever-changing concept that is historically, socially, and institutionally contingent—and often contested. It is impossible to define merit without asking what kinds of institutions we want to have and for what purposes."); Daria Roithmayr, *Deconstructing the Distinction Between Bias and Merit*, 85 CAL. L. REV. 1449, 1503 (1997) ("Reason and merit are culturally and ideologically specific constructs that depend on a particular ideological discourse and can adjudicate only for those who subscribe to that ideology.").

54. Katz, *supra* note 43, at 513 n.119; *see* Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1520 (2000) ("On the rights and equality side of constitutional law, [expressive] theories assert that state action is required to express the appropriate attitudes toward persons."). Some might suggest that the consideration of race in analyzing the Court's decision to exclude the imperfectly marked ballots is dangerous because such an analysis might send the message that individuals are less competent in political participation simply because of race. *Cf.* Shaw v. Reno, 509 U.S. 630, 657 (1993) ("Racial classifications of any sort pose the risk of lasting harm to our society. They reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin."). *But see* Lawrence, *supra* note 49, at 838 ("The colorblind race baiter completes his white supremacist wizardry by blaming affirmative action itself for creating hostility, resentment, and racial divisiveness.").

have in the outcome of elections."[55] The message sent by such a recount would cast "a cloud" over the "legitimacy" of the election and might threaten democratic stability.[56] The Court, however, did not explore the message sent by its merit-based qualifier that resulted in imperfectly marked ballots being disregarded.

The expressive harm that the Court's exclusion of the ballots generated is especially potent when one examines the problem through the lens of race. Recognizing that a "voter is a full member of the political community,"[57] the dismissal of the imperfectly marked ballots sends a message of exclusion from the political community.[58] Exclusion from the political process conveys a form of second-class citizenship on those who are excluded.[59] Historically, election administra-

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55. *See* Bush v. Gore, 531 U.S. 98, 109 (2000) ("The contest provision, as it was mandated by the State Supreme Court, is not well calculated to sustain the confidence that all citizens must have in the outcome of elections.").

56. *Cf.* Bush v. Gore, 531 U.S. 1046, 1046 (2000) (Scalia, J., concurring with the Court's order to stay the manual count of ballots).

> The counting of votes that are of questionable legality does in my view threaten irreparable harm to petitioner, and to the country, by casting a cloud upon what he claims to be the legitimacy of his election. Count first, and rule upon legality afterwards, is not a recipe for producing election results that have the public acceptance democratic stability requires.

Id.

57. Karlan, *supra* note 17, at 5 (noting that voting "announces that the voter is a full member of the political community"); *see also* KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION 93 (1989) ("Voting . . . is an assertion of belonging to a political community."); QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT 1965-1990, at 15-16 (Chandler Davidson & Bernard Grofman eds., 1994) (noting that the right to vote "confer[s] full citizenship on the members of the group"); JUDITH N. SHKLAR, AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION 26 (1991); Gardner, *supra* note 16, at 906 ("To seek the vote is to seek formal recognition as a full member of society; to be denied the vote is to be either excluded altogether from membership in the community or consigned to some kind of second-class citizenship."); Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173, 179-82 (1989) [hereinafter Karlan, *Maps and Misreadings*] (discussing the symbolic value of civic inclusion).

58. *Cf.* Katz, *supra* note 43, at 512-13 ("Denial of the vote is tantamount to exclusion from the community or relegation to second-class citizenship, with the message of exclusion being the primary harm produced.").

59. *See* Lani Guinier, *Voting Rights and Democratic Theory: Where Do We Go From Here?*, *in* CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE 283, 284-85 (Bernard Grofman & Chandler Davidson eds., 1993). The Voting Rights Act:

> is premised on a broad vision of political equality and empowerment. The vision of empowerment anticipated an electorate actively participating in policy reform, not merely reconfigured districts that ensure legislative voting privileges for a few black elected officials. The vision imagined a transformative politics that would value political participation for its own sake in order to recognize the autonomy and dignity of black voters. Participation would affirm their status as first-class citizens in a democracy.

Id.; KARST, *supra* note 57, at 94 ("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."); SHKLAR, *supra* note 57, at 2-3 (contrasting slavery to voting, and arguing that "the ballot has always been a certificate of full membership in society," an indicator of "social standing" that has the "capacity to confer a minimum of social dig-

tors used merit-based qualifications, such as literacy tests, understanding and character clauses, property ownership, and poll taxes, to unfairly secure political power through the exclusion of African Americans and others.[60] The dramatic drop in voter registration and participation among African Americans in the thirty years following passage of the Fifteenth Amendment's prohibition on racial discrimination in voting illustrates the effectiveness of these tools.[61] The percentage of voting-age African Americans who participated in Florida gubernatorial elections plummeted from 87% in 1884 to just 5% in 1896.[62] Just as facially race-neutral poll taxes and literacy tests disseminated the message that African Americans were to be disproportionately excluded from the political process, the Court's prohibition on a review of the imperfectly marked ballots, the majority of which came from the African-American community, conveyed a message of racial exclusion.[63]

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nity" on those who have it, and describing the vote as "a demand for inclusion in the polity, an effort to break down excluding barriers to recognition"); Ronald Dworkin, *What is Equality? Part 4: Political Equality*, 22 U.S.F. L. REV. 1, 4 (1987) (voting is a means by which a "community confirms an individual person's membership, as a free and equal citizen . . . ."); Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1710 (1993) ("The primary value underlying the participation cases . . . is an aspect of . . . civil inclusion: 'a sense of connectedness to the community and of equal political dignity; greater readiness to acquiesce in governmental decisions and hence broader consent and legitimacy'") (quoting Karlan, *Maps and Misreadings*, *supra* note 57, at 180); *see generally* CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION (1993); David M. Estlund, *Who's Afraid of Deliberative Democracy? On the Strategic/Deliberative Dichotomy in Recent Constitutional Jurisprudence*, 71 TEX. L. REV. 1437 (1993); Miriam Galston, *Taking Aristotle Seriously: Republican-Oriented Legal Theory and the Moral Foundation of Deliberative Democracy*, 82 CAL. L. REV. 331 (1994).

60. *See* Harman v. Forssenius, 380 U.S. 528, 543 (1965) ("The Virginia poll tax was born of a desire to disenfranchise the Negro."); DERRICK BELL, RACE, RACISM AND AMERICAN LAW § 4.4.1-.2, at 191-93 (3d ed. 1992) (discussing white primaries); SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 78 (1998); *see also* J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTIONS AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910 (1974); Armand Derfner, *Racial Discrimination and the Right to Vote*, 26 VAND. L. REV. 523, 524 (1973); Emma Coleman Jordan, *Taking Voting Rights Seriously: Rediscovering the Fifteenth Amendment*, 64 NEB. L. REV. 389, 397 (1985) (observing that "[i]n the South, state and local governments began to use gerrymandering, poll taxes, literacy tests, 'grandfather clauses,' white primaries, malapportionment, residency requirements, property ownership requirements, fraud, and violence to bring about the total disenfranchisement of Black voters").

61. *See* ISSACHAROFF ET AL., *supra* note 60, at 68.

62. KOUSSER, *supra* note 60, at 91-103 (discussing the racially exclusionary impact of Florida poll taxes and eight-box provisions designed to disenfranchise illiterate African Americans, and the decline in African-American voter turnout); *see also* Katz, *supra* note 43, at 512-13 n.117 (discussing the expressive harm generated by post-Reconstruction disenfranchisement and citing LEON F. LITWACK, BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY 531-556 (1979), and GLENDA ELIZABETH GILMORE, GENDER AND JIM CROW 123-24 (1996)).

63. The Court was complicit in the messages of disenfranchisement sent to African Americans in the 1800s and early 1900s. *See* Giles v. Harris, 189 U.S. 475 (1903) (denying jurisdiction of a federal court over claim brought by African-American resident of Alabama

The Court's use of merit-based criteria also has special meaning in light of recent controversies regarding affirmative action. As in the affirmative action context, some might interpret the Court's reliance on merit with regard to the law of democracy simply as a pretext to exclude African Americans, or at least as a misplaced set of priorities in which seemingly neutral criteria are valued over the presence and participation of Americans from all backgrounds in public institutions.[64] Indeed, merit has been used as an argument to invalidate race-conscious measures that secure the political rights of historically disadvantaged voters.[65]

Some might claim that the merit-based vision sends the message that "voters must follow the rules of voting." Such a message, however, loses its appeal when one recognizes that Florida officials included many votes that did not comply with a literal and generally undisputed interpretation of the law, including but not limited to improperly submitted absentee votes.[66] Recognizing this inconsistency, one message of the Court interpreted through the lens of race is that "members of politically disfavored groups must follow the rules of voting." Another possible message, the substance of which is consistent with merit-based criteria, conveys that "those with the foresight,

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to compel local board of registrars to enroll his name upon the voting lists of the county); Williams v. Mississippi, 170 U.S. 213 (1898) (concluding that literacy tests do not facially discriminate on the basis of race and do not violate equal protection); United States v. Reese, 92 U.S. 214, 221-22 (1875) (invalidating legislation providing for punishment of a Kentucky election inspector who refused to receive and count the votes of African Americans). *But see* Guinn v. United States, 238 U.S. 347 (1915) (concluding that Oklahoma grandfather clause violated the Fifteenth Amendment).

64. *See generally* Charles R. Lawrence III, *The Id, the Ego and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

65. *Cf.* Rice v. Cayetano, 528 U.S. 495, 517 (2000) (striking down a state law that allowed only native Hawaiians to vote for trustees of public agency that managed programs designed to benefit native Hawaiians and asserting that "[o]ne of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities"); Katherine Inglis Butler, *Affirmative Racial Gerrymandering: Fair Representation for Minorities or a Dangerous Recognition of Group Rights?*, 26 RUTGERS L.J. 595, 621 n.72 (1995) (arguing that "[o]nce we recognize that racial groups are entitled to be represented as racial groups, we are well on our way to enthroning group fairness, rather than individual merit, as the basis for all societal decisions"). *But cf.* Tucker, *supra* note 29, at 454-55 (describing the "merit-based approach" of critics of affirmative action as inappropriate in the voting rights context).

66. *Cf.* Jacobs v. Seminole County Canvassing Bd., 773 So. 2d 519 (Fla. 2000) (holding that a county supervisor's decision to allow representatives of one political party to add information to absentee ballot request forms in violation of Florida law did not invalidate requests); David Barstow & Don Van Natta Jr., *How Bush Took Florida: Mining the Overseas Absentee Vote*, N.Y. TIMES, July 15, 2001, at 1 (reporting that "[u]nder intense pressure from the Republicans, Florida officials accepted hundreds of overseas absentee ballots that failed to comply with state laws"). While some might assert that the neutrality of a merit-based vision of democracy is necessary when resolving a disputed election (as opposed to prospectively setting forth the processes for running an election), the selective application of merit-based criteria establishes the transparency of such neutrality.

determination, resources, and skill to manipulate rules will be rewarded."

The lens of race also exposes the democratic instability that arises from the expressive harm of exclusion. Whereas an inclusionary vision conveys government's respect for all of its citizens and lends legitimacy to government decisions, the same cannot be said about the merit-based vision. A political victory based on merit-based assumptions sends an exclusionary message that undermines the confidence necessary to ensure the voluntary consent of citizens. In such an atmosphere, it is even more difficult to build coalitions, accommodate diverse viewpoints in political discourse and government policy, and engage in constructive dialogue across racial lines.[67] Reconciliation and healing are almost impossible because African Americans have not been fully included in decisionmaking.[68]

Instability in the wake of exclusion arises not only from the perceived illegitimacy of political results, but also from the perceived illegitimacy of the institutions that led to those results.[69] African Americans overwhelmingly vote against conservative politicians, and five Justices appointed by Republican presidents prohibited the counting of thousands of ballots, the majority of which were from African-American precincts.[70] The perception that the Court attempted to secure its political objectives by ignoring the political choices of African Americans is potentially destabilizing.[71] It taps into a reservoir

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67. *Cf.* Guinier, *supra* note 6, at 131 ("Exclusion of a racial or language minority group exposes a deep fissure in the American democratic bargain, which purportedly reconciles majoritarian preferences with minority interests.").

68. *Cf.* Guinier, *supra* note 59, at 285 ("A transformative politics would also ensure government legitimacy because it would give disadvantaged groups a substantive basis for lending their consent to government decisions.").

69. *Cf.* Bush v. Gore, 531 U.S. 98, 157-58 (2000) (Breyer, J., dissenting) ("And, above all, in this highly politicized matter, the appearance of a split decision runs the risk of undermining the public's confidence in the Court itself. That confidence is a public treasure. . . . [W]e do risk a self-inflicted wound—a wound that may harm not just the Court, but the Nation.").

70. Others might raise suspicions about the Florida Supreme Court's political motives in including the undervotes. In the context of history which has excluded African Americans from political, educational, and economic spheres, however, the high federal court's message of exclusion may convey a message to some that extends past mere political posturing.

71. Others, including but not limited to the Justices themselves, have addressed whether political motivations influenced the Court. *Compare* Bush v. Gore, 531 U.S. at 128-29 (Stevens, J., dissenting) ("Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law."), *and* William Marshall, *The Supreme Court*, Bush v. Gore, *and Rough Justice*, 29 FLA. ST. U. L. REV. 787 (2001) (accepting that the Court's decision was political, and inquiring as to whether it was appropriate), *and Ginsburg Recalls Florida Recount Case*, N.Y. TIMES, Feb. 4, 2001, at A25 (reporting that Justice Ginsburg stated that "[w]hatever final judgment awaits *Bush v. Gore* in the annals of history, I am certain that the good work and good faith of the U.S. federal judiciary as a whole will continue to sustain public

of suspicion among African Americans that they do not count as citizens within the political community.[72] The indifference of others who either rationalize or idly tolerate such exclusion only compounds the anger, resentment, and frustration felt by those who are excluded.[73] In effect, the merit-based vision's message of exclusion can promote racial distrust and detachment, factionalism, and political instability generally.[74]

III. MERIT AND THE EXCLUSION OF US ALL

The problems associated with the merit-based vision are especially visible through the lens of race due to the unique interaction of history, political identity, and race in the United States. While racial

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confidence at a level never beyond repair"), *with* Bush v. Gore, 531 U.S. at 111 ("None are more conscious of the vital limits on judicial authority than are the members of this Court, and none stand more in admiration of the Constitution's design to leave the selection of the President to the people, through their legislatures, and to the political sphere."), *and* Bill Rankin, *The Ruling: Was it Politics? That, Too, is in Dispute,* ATLANTA J. & CONST., Dec. 14, 2000, at 2B (reporting that in response to questions about political motives of the Court following *Bush v. Gore*, Justice Thomas stated that one should not "apply the rules of the political world" to the Court, that the Justices "have no axes to grind" but simply protect the Constitution, and that he had never heard any discussion "of partisan politics among members of the court").

72. *Cf.* Lawrence D. Bobo, Michael C. Dawson, & Devon Johnson, *Enduring Two-Ness*, PUB. PERSP., May/June 2001, at 12 (reporting the results of the National African American Election Survey that show blacks are politically alienated even when compared to white Democrats).

73. *Cf.* DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 111 (1992) ("Isn't this the point of *Invisible Man* . . . where Ralph Ellison depicts blacks as a category of human beings whose suffering is so thoroughly ignored that they, and it, might as well not exist?") (citing RALPH ELLISON, INVISIBLE MAN 261-80 (1972)); PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 56 (1991) (observing that invisibility results from "not being part of the larger cultural picture"); Martin Luther King, Jr., *Letter from Birmingham Jail*, *reprinted in* 26 U.C. DAVIS L. REV. 835, 843 (1993) ("We will have to repent in this generation not merely for the hateful words and actions of the bad people but for the appalling silence of the good people.").

74. As recently as 1997, the Court recognized that "[s]tates . . . have a strong interest in the stability of their political systems," and political stability has most often been invoked to justify ballot access laws that favor the two major parties to the disadvantage of other parties. Timmons v. Twin Cities Area New Party, 520 U.S. 351, 366 (1997) ("States also have a strong interest in the stability of their political systems."); Rutan v. Republican Party of Ill., 497 U.S. 62, 107 (1990) (Scalia, J., dissenting) ("The stabilizing effects of such a [two-party] system are obvious."); Davis v. Bandemer, 478 U.S. 109, 144-45 (1986) (O'Connor, J., concurring).

> There can be little doubt that the emergence of a strong and stable two-party system in this country has contributed enormously to sound and effective government. The preservation and health of our political institutions, state and federal, depends to no small extent on the continued vitality of our two-party system, which permits both stability and measured change.

Id.; Storer v. Brown, 415 U.S. 724, 736 (1974) ("Splintered parties and unrestrained factionalism may do significant damage to the fabric of government. It appears obvious to us that the [provision at issue] furthers the State's interest in the stability of its political system. We also consider that interest as not only permissible, but compelling . . . .") (citations omitted).

disadvantage in and of itself warrants concern, it is also important to note that the vulnerability of African Americans to the Court's remedy serves as a diagnostic tool that exposes structural faults in a merit-based vision of democracy that impact others.[75]

Many Americans of various backgrounds, including but not limited to the elderly, the poor, the language and religious minorities, and the disabled, use voting as a means to maintain communities of identity and to exert collective self-determination in shaping their world through the political process.[76] Exclusionary, merit-based assumptions about democracy that ignore context and history interfere with the ability of these Americans to identify with one another and ally themselves with others in the political sphere.[77] Further, a diverse group of Americans suffer the expressive harms associated with an exclusionary, merit-based vision of democracy, whether the message is "you are too old and senile to vote," or "English is our primary language," or "you are poor and don't deserve the same equipment as other voters."

By confronting merit-based assumptions about democracy embedded in the majority's reasoning in *Bush v. Gore*, one discovers that there is more to fix in American democracy than vote-counting machinery. Indeed, a focus on better machines and more uniformity may push other, more weighty questions about the meaning of democracy to the background. Significant disparities in participation and even the counting of votes are likely to continue under a system of formal equality that fails to account for context-specific barriers to political inclusion.[78] Some commentators may make seemingly persuasive ar-

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75. *Cf.* GUINIER & TORRES, *supra* note 6 (manuscript at 1):

> Those who are racially marginalized are like the miner's canary. It is easy enough to think that when we sacrifice this canary the only harm is to communities of color. Yet if those who are racially marginalized do function as the miner's canary, others ignore problems that converge around racial minorities at their own peril. We are ignoring the symptoms that tell us we are all being poisoned.

Id.

76. *Cf.* KOUSSER, *supra* note 60, at 49 (noting that poll taxes and literacy tests disenfranchised poor whites in addition to African Americans).

77. *See* Dana Canedy, *Vote Spices Up Bubbling Ethnic Stew*, N.Y. TIMES, Nov. 11, 2000, at A13 (describing similarities between Jews and African Americans in Florida, and reporting that many "elderly Jewish voters in Palm Beach County said confusing ballots had caused them to mistakenly vote for Patrick J. Buchanan . . . who is perceived by some as anti-Semitic" and that many Jews "believe they lost out on a chance to elect the first Jewish vice president").

78. For example, a state might provide matching funds to every county for the purchase of optical scanner voting systems. This proposal, however, might fail to result in meaningful inclusion and might even increase racial disparities, as poorer counties might not be able to afford the systems. Similarly, every county might have optical scanners, but the majority of spoiled ballots might still come from precincts of color. Rather than responding with indifference to these situations, reasoning that every voter had an equal opportunity, decisionmakers should seek strategies that maximize inclusion. *Cf.* Jordan,

guments that educational and economic markets should reward compliance with uniform merit-based criteria with no regard for context or history.[79] With regard to democratic exchange and governance, however, the need for commitment from a diverse, broad base of perspectives suggests that we should not limit political community with narrow, merit-based assumptions.[80]

In challenging the merit-based vision, perhaps the most difficult questions ask how far courts and legislatures should go to promote inclusion. Should decisionmakers consider every context-specific issue that impacts any individual in interpreting and restructuring election laws? At what point does this analysis become too unmanageable and impracticable?

These questions reflect inevitable tensions between administrative convenience on the one hand and important substantive values related to inclusiveness and participation on the other. This Article does not purport to identify the proper place to draw a bright line between the two, as further discussion is necessary to determine how to balance the competing values. It is clear, however, that mechanical rules that prioritize administrative convenience over a meaningful view of participation value the time of administrators over citizens' interests in democratic inclusion. Administrative convenience alone cannot be the primary basis of a democracy that purports to reflect the will of the people.[81]

CONCLUSION

Examining race allows us to see more clearly the shortcomings of merit-based assumptions of democracy harbored by the majority in

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supra note 60, at 397 (noting that majority rule and formal equality through the Fourteenth Amendment "have created havens for racial and political gerrymandering, while at the same time providing inadequate protection for the rights of representation of Blacks and other discrete and insular minorities").

79. *See, e.g.,* STEPHAN THERNSTROM & ABIGAIL THERNSTROM, AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE 171-80, 393-461 (1997) (criticizing affirmative action programs); *see also* SHELBY STEELE, THE CONTENT OF OUR CHARACTER: A NEW VISION OF RACE IN AMERICA (1990).

80. *Cf.* ABIGAIL M. THERNSTROM, WHOSE VOTES COUNT? 242 (1987) (admitting that "[a] white denied a seat on a city council cannot claim entitlement on the ground of 'merit.' . . . Qualification for office is not measured by meritocratic standards in the customary sense"); Karlan & Levinson, *supra* note 44, at 1202 (arguing that "the Court's attempt to integrate voting rights law into its more general approach to affirmative action is both misguided and incoherent . . . because government decisionmaking with respect to voting, at least in its functional sense of rationing and apportioning the power to govern, is different from other governmental decisionmaking"); Tucker, *supra* note 29, at 454-55 (criticizing the merit-based approach as applied to voting, distinguishing redistricting from employment, contracting, and college admissions decisions).

81. *Cf.* Dunn v. Blumstein, 405 U.S. 330, 351 (1972) ("States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State." (quoting Carrington v. Rash, 380 U.S. 89, 96 (1965))).

Bush v. Gore, and to understand why this limited vision of democracy inadequately protects the political rights of racial minorities and other Americans as well. By conditioning political participation on the capacity to create a machine-readable ballot, the merit-based vision interferes with the ability of groups of voters to identify with one another in order to form a political community, create alliances with others of different backgrounds, and use the vote to enact political change. The merit-based vision also conveys an expressive harm of exclusion that may lead to democratic instability. Improved dialogue and a more comprehensive understanding of democratic visions and election procedures generally, as well as *Bush v. Gore* specifically, require the integration of race as an important analytical tool.