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RACE AND CAMPAIGN FINANCE REFORM

SAMUEL ISSACHAROFF*

Any examination of the racial implications of campaign finance reform will quickly require confronting the central theme of equality that animates so much of the reform effort in this arena. If the core defect in the current system of financing political campaigns is the way in which money translates into political power, then any system that fails to curb the role of money in elections will appear to redound inevitably to the detriment of those least well off. And it is far from surprising that black Americans, whose net wealth is significantly below that of whites, have less money to invest in the returns of the political enterprise. This Essay, however, introduces some cautionary notes to the claim that an equality-based reform strategy is necessarily required to expand the opportunity for black political advancement. This Essay makes two basic arguments. The first is that equality is an extraordinarily slippery concept and one that does not easily translate into anything resembling a likely reform agenda under our constitutional framework. Second, and more significantly, this Essay examines the actual success that black voters have had in recent years and the way in which the current reform agenda might actually disable recent advances. This Essay concludes that should many of the current reforms come to pass, black activists may find refuge in precisely the type of First Amendment liberty arguments that typically are eschewed by the proponents of equality-based reforms.

The question of racial justice has never been far from the center of legal oversight of the political process. Racial justice was the critical issue in the direct assault on Jim Crow laws. It played a muted role in the deep suspicion surrounding the constitutional elimination of poll taxes¹ and emerged forefront in the legislative repudiation of literacy tests.² Race then emerged as the central equality

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1. See *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666 (1966) (concluding that “a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard”).

2. See *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (upholding Voting Rights

consideration in the second generation of voting cases challenging at-large and multimember districting systems for their dilutive effect on minority political opportunity. And, of course, racial considerations—or their limits—animated the re-constitutionalization of politics in the *Shaw v. Reno*³ line of cases.

But the racial considerations of campaign finance law have remained curiously unexplored. Into this breach have stepped two young scholars of the law of democracy, Terry Smith⁴ and Spencer Overton.⁵ Each has sought to fill the void by addressing the implications of both campaign finance law as currently structured and its proposed reforms in light of their impact on the prospects for further minority advances in the political arena. Each addresses an important void in the literature. For Professor Smith, the issue is whether the equality claims advanced by reform advocates can stand independent of the erosion of constitutional protection for the right to representation claims of minorities undermined by *Shaw* and its progeny.⁶ For Professor Overton, the issue is the manner in which the current system of campaign financing not only exacerbates social disparities in wealth, but accentuates the racial divide in income and family wealth.⁷ In Professor Smith's view, the problem demands a more robust equal protection analysis for the entire arena of campaign finance based upon considerations of equality.

As well developed in the early work of Peter Westen, the equality claim is surprisingly difficult to ground in any stable set of variables.⁸ I share in the concern that an attempt to formulate an equality claim over campaign finance arrangements is likely to prove unsatisfying. Moreover, unlike the equal protection domain pure, the campaign finance arena has a competing formal constitutional principle in the form of the First Amendment. Thus, in *Buckley v. Valeo*,⁹ the Supreme Court has already unequivocally rejected as an impermissible constitutional objective the equalization of influence or speech opportunities. Despite a mild resuscitation in *Austin v.*

Act suspension of literacy tests).

3. 509 U.S. 630 (1993).

4. Terry Smith, *Race and Money in Politics*, 79 N.C. L. REV. 1469 (2001).

5. Spencer Overton, *Voices From The Past: Race, Privilege, and Campaign Finance*, 79 N.C. L. REV. 1178 (2001).

6. Smith, *supra* note 4, at 1469.

7. Overton, *supra* note 5, at 1178.

8. Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982). This point was pressed more fully at the Symposium by my former colleague, Sandy Levinson.

9. 424 U.S. 1 (1976).

Michigan State Chamber of Commerce,¹⁰ the main tenor of First Amendment law is decidedly hostile to forging equality as the animating principle in the campaign finance arena.¹¹ Moreover, the infusion of equality concerns drawn from equal protection law is unlikely to push aside the ongoing force of deep-seated First Amendment considerations in campaign finance law.¹²

In this Essay, however, I do not want to focus on doctrine standing alone. Increasingly, I find the debates over doctrine in campaign finance context almost a side show to the issue of the practicalities of funding and the real-world consequences of the reform agenda.¹³ It is further worth noting that recent Supreme Court decisions on campaign finance have moved increasingly in the direction of analyzing the practical effects of even the underlying constitutional doctrines on the actual functioning of politics. This trend is evidenced by Justices Breyer and Kennedy in their recent *Nixon v. Shrink Missouri Government PAC* opinions,¹⁴ and Justice Thomas in his *Colorado Republican Federal Campaign Committee v. Federal Election Commission* opinion,¹⁵ all of which clearly invoke the concern that restrictive access to money may be a way of entrenching or locking up prior distributions of power.

In keeping with this approach, we may begin by assuming for the moment that the First Amendment is not an obstacle to greater regulation of campaign financing. Let us further assume that the relative inequality of access to wealth faced by black candidates, as identified by Professor Smith, and by black voters and would-be contributors, as identified by Professor Overton, give further impetus to the demand for greater restriction on current campaign finance practices. What would be the likely effect of a more regulated

10. 494 U.S. 652 (1990) (upholding regulation based on the perception that large contributions are a form of corruption).

11. For a discussion of the central trends in campaign finance law, see generally SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY* (1998).

12. For the main works on this issue, see Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 *YALE L.J.* 1049 (1996) and Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 *U.C. DAVIS L. REV.* 663 (1997).

13. This issue is the central thrust of Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 *TEX. L. REV.* 1705 (1999), and is an animating concern in the treatment of campaign finance issues in SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY* (1998 & Supp. 2001).

14. 528 U.S. 377, 399 (2000) (Breyer, J., concurring); *id.* at 405 (Kennedy, J., dissenting).

15. *Colorado Republican Fed. Campaign Comm. v. Fed. Election Comm'n*, 518 U.S. 604, 631 (1996) (Thomas, J., concurring in the judgment and dissenting in part).

campaign environment on black political participation? An examination of the last election cycle indicates that the impact is not quite so certain as some reform advocates would have it.

The most recent presidential election saw one million more black voters head to the polls than four years before.¹⁶ While blacks did not increase as an overall percentage of the national vote,¹⁷ the level of participation in several targeted and essential states rose significantly,¹⁸ playing a crucial and almost decisive role in the election. Whereas black voters accounted for only 10% of the nationwide electorate, in Florida they constituted 16% of the electorate, up from 10% in 1996, a 60% increase in participation.¹⁹ Because these voters favored Al Gore over George Bush by a nine-to-one margin, increased African-American participation was nearly the decisive factor in delivering the state to Vice President Gore.²⁰ Put most simply, the increased percentage of blacks who voted in the Florida election is what caused the race there to be so close, and set off a chain of events culminating in the Supreme Court's decision in *Bush v. Gore*.²¹ It can further be stated that, while black voting strength did not determine the actual result of the election, black voters influenced its course and started a significant debate about the very nature of the electoral process and cries for its revision.

Though Florida is the most noteworthy example, it was by no means the only state that experienced an increase in black voter turnout. Other states with significant jumps in African-American turnout, measured in relation to the electorate as a whole, include Missouri, Mississippi, and Tennessee.²² Less dramatic increases were also noted in Texas, Alabama, Maryland, Illinois, North Carolina,

16. Marian Dozier, *For Black Voters, Civic Right Hits Home; Election Irregularities Rekindle Cries for Action*, S. FLA. SUN-SENTINEL (Ft. Lauderdale, Fl.), Jan. 14, 2001, at 1A (noting the increase in turnout from 9.5 million black voters in 1996 to 10.5 million in 2000, though other sources place the 2000 number slightly lower).

17. In both 1996 and 2000, blacks comprised 10% of the electorate. See Lori Rodriguez, *Black Voter Turnout Unaltered: NAACP Drive Pays Off in Some Places*, HOUS. CHRON., Nov. 9, 2000, at 27A.

18. Other states showing an increase in black voter turnout as a percentage of the electorate include: Missouri (from 5% in 1996 to 11% in 2000), Mississippi (27% to 34%), Tennessee (13% to 20%). Jill Lawrence, *Aggressive NAACP Urged African-Americans to the Polls*, USA TODAY, Dec. 8, 2000, at 8A.

19. See Lawrence, *supra* note 18. Another source cites the increase in black turnout in Florida at 65%. Editorial, *Little Evidence of Election Conspiracy*, TAMPA TRIB., Jan. 13, 2001, at 10.

20. See Lawrence, *supra* note 18 (noting that nationally, 90% of black voters cast their ballots for Al Gore).

21. 121 S. Ct. 525 (2000).

22. Lawrence, *supra* note 18.

New York, and California.²³ Several other states actually saw a decrease in their percentage of blacks heading to the polls,²⁴ enough so that the national percentage in 2000 remained the same as or similar to that of 1996. Many of the states showing an increased percentage of African-American voters were targeted because the Democratic party viewed them as crucial if Al Gore was going to prevail in the national election.

To consider only the national number belies the reality of the 2000 election. The states targeted by the National Voter Fund of the NAACP were the same states that saw an increased black turnout at the polls.²⁵ How was the increase in black voter participation engineered? To a large extent, as with so many other facets of our electoral process, the answer is money. The National Voter Fund spent ten million dollars to register black voters and get them to the polls.²⁶ Through the use of registration drives and “knock-and-drag” campaigns, most coordinated through black churches and their ministers, the NAACP successfully increased participation.²⁷ Though not directly coordinating with the Democratic Party itself—churches fearing for their 501(c)(3) status tread the partisan line delicately²⁸—church doors were thrown open to particular candidates courting the black vote (who happened to be predominately Democrats).²⁹ Ultimately, their efforts at the end of the campaign centered on energizing and mobilizing black voters.

23. See Gary Fields & Jennifer Davit, *Broken Ballot, America's Dysfunctional Voting System* (pt. 2), WALL ST. J., Dec. 18, 2000, at A1.

24. In New Jersey, the percentage of black voters dropped from 13% to 11%. In South Carolina, the percentage dropped from 25% to 22%. Michigan dropped from 13% to 11%, and Pennsylvania went from 9% to 7%, though in these battleground states the number reflects an increase in overall voter turnout, rather than a decline in black turnout. See *id.*

25. See Lawrence, *supra* note 18.

26. See Michael A. Fletcher, *In Targeted States, A Striking Turnout of Black Voters*, WASH. POST, Nov. 17, 2000, at A29.

27. See *id.*

28. See, e.g., Don Latten & Elaine Herscher, *S.F. Candidates Preaching to the Choirs: Brown, Ammiano Meet with Fans*, S.F. CHRON., Nov. 15, 1999, at A21 (describing appearances of a candidate for mayor at a local black church, but noting the risky nature of politicking and its impact on tax-exempt status).

29. See, e.g., Sonya Ross, *Clinton Urges Black Voters to Support Gore*, AP ONLINE, Sept. 20, 2000 (noting President Clinton's appeal before a conference of church leaders and the subsequent forum for his wife, Senate candidate, Hillary Rodham Clinton); Jody Wilgoren, *Just Before Election, Politics and Religion Mix Easily at a Michigan Church*, N.Y. TIMES, Nov. 6, 2000, at A23 (chronicling the political activities of a Michigan church).

The conventional wisdom, echoed by Professor Smith,³⁰ is that the best use of campaign funds is to chase after the marginal swing voter. Thus, it is widely believed that in a tightly contested election, as with the 2000 Presidential election, money should be used to target the undecided median voter whose wavering loyalty might deliver success on election day.³¹ Undoubtedly, the most effective medium to reach such voters is television—hence Professor Smith’s concern that black voters are unlikely to be the subject of media-intensive campaign appeals because blacks are not generally part of the swing voter group.³² However, the next step of Professor Smith’s argument—namely that because of their predetermined status, black potential voters are excluded as targets from campaign spending, adopts too parsimonious a view of what it means to spend money on political campaigns. In the 2000 Presidential election and in other closely contested races, both political parties recognized that the swing vote depended as much, if not more, on the composition of the electorate, as it did on the decision of the individual undecided voter. Because less than sixty percent of eligible voters participate,³³ candidates may be just as able to tip the scales on election day by altering the mix of who votes, as by swinging the median voter from among the most likely voters to actually turn out.

In this fashion, a close election may be won by drawing most heavily from the poles, rather than from the center, as the conventional wisdom would posit. To draw from the poles without estranging the center requires different campaign strategies. By and large, this strategy includes the use of radio and its more targeted audience rather than television, and institutions capable of reaching voters down to the individual level. Hence, the wonderfully named “knock-and-drag” campaigns. These approaches tend to be relatively more labor intensive than large scale media campaigns, and paradoxically less expensive. By focusing on turnout of predictable supporters, rather than winning the hearts of the undecided, parties may spend their campaign dollars quite effectively, even if the percentage of the campaign war chest spent in this fashion is still small. With regard to the black vote in particular, this means that Al Gore did not need to convince blacks to vote for him; he simply

30. Smith, *supra* note 4, at 1515.

31. *See id.*

32. Smith, *supra* note 4, at 1517–18.

33. The overall voter turnout in the national election included only 50.7% of those eligible to participate. Yochi J. Dreazen, *Voter Turnout Stays Low Despite Barrage of Ads, Closeness of Race*, WALL ST. J., Nov. 9, 2000, at A16.

needed to convince them to vote. The evidence is clear that the Democratic Party and Al Gore campaigned and spent money (as did the NAACP) in this fashion.³⁴

This form of campaign activity may fall below the radar screen of those reform proponents looking at where the most dollars are spent. But this does not mean that the process of energizing the base does not face obstacles in the world of proposed reforms. Campaign finance reform proposals pose some threat to this typical and important type of activity in black communities. Though churches already take care to avoid jeopardizing their tax-exempt status, many reform proposals seek to limit electoral activity beyond the sweep of the Internal Revenue Code. This is because the tax code draws its primary line around partisan advocacy, while the reform proposals focus instead on activity surrounding elections.

There are serious reasons to resist the claim that black political participation can only be enhanced by campaign finance reform, given that black voters and candidates are greatly outspent and outmuscled in the struggle for campaign dollars. Focusing on potential restrictions on electoral activity might raise doubts about casting aside First Amendment concerns over reform-inspired limitations on campaign money. Most notably, portions of the McCain-Feingold bill give rise to concern about the future of church-centered activism and “knock-and-drag” campaigns.³⁵ While the current congressional debates leave uncertain what reform might be legislated, if any, it is nonetheless worth examining the potential impact of the legislation, even in its current early stages, for sources of concern. When examined from the perspective of the potential impact of reform legislation on proven avenues of black political mobilization, the most threatening limitation that emerges immediately would be potential restrictions on the traditional activity of black churches resulting from section 214 of the McCain-Feingold bill. That section amends the definition of “coordinated activity” from 2 U.S.C. § 431(8) and expands its definition to include “anything of value provided by a person in connection with a federal candidate’s election . . . (regardless of whether the value being provided is in the form of a communication that expressly advocates a vote for or

34. See, e.g., Ross, *supra* note 29 (using party machinery to organize a forum of black voters for Hillary Clinton); Wilgoren, *supra* note 29 (noting the meeting of black ministers held at the White House the week before the election). Al Gore himself made numerous campaign stops at black churches as the election approached.

35. See Bipartisan Campaign Reform Act of 2001, S. 27, 107th Congress §§ 101(b), 214(c) (2001), available at <http://thomas.loc.gov>.

against a candidate).³⁶ “Coordination” also includes direct participation in fundraising or receiving contributions for a candidate; and extends to in-kind professional services: all of which could be interpreted to reach church activity.³⁷

Anything of value provided in coordination with a candidate under these provisions is considered a campaign contribution and is subject to the limit on campaign expenditures. The unexplored implications of such reform could reach as far as the activities of non-partisan institutions, such as churches, that assist in voter mobilization campaigns in cooperation with political parties. Although section 214’s clearest prohibitions relate to promoting candidates for federal office—an activity that should already be avoided by tax-exempt organizations—its further reaches could include many of the functions that have become a hallmark of black political mobilization.

It is difficult to predict with certainty what the effects of proposed reforms would be as a result of uncertainty over what would count as a “coordinated activity” under (iii). However, if one takes a snapshot of some of the mechanisms that have been employed to energize black voter participation, it is not difficult to imagine an argument that some of the most significant efforts made in the 2000 election might be in jeopardy. Thus, it is by no means a stretch of statutory construction to argue that appearances at a church might be seen as something of “value” that has been “coordinated” with the candidate. One need only examine some particulars from the last election to see ready examples. Last September, for example, before the Church of God in Christ’s (COGIC) annual meeting in New York, Bill Clinton made a plea on behalf of Al Gore and Hillary Clinton.³⁸ While the presiding bishop did not directly endorse Al Gore or Hillary Clinton, COGIC did pool 400 congregations of black voters as a forum for Hillary Clinton.³⁹ Because he was not a candidate himself, Bill Clinton’s appearance may fall outside the act. However, his wife’s subsequent appearance before a forum of congregants was clearly coordinated with her and had obvious value. Similarly, candidates regularly appear at church services on the Sundays leading up to election day to speak to voters—a practice that is, of course, not limited to Democratic candidates and black churches. Nonetheless, including these traditional forms of outreach to black communities within restricted campaign conduct would

36. *See id.*

37. *See id.* §§ 214(a)(1)(C), (D).

38. Ross, *supra* note 29.

39. *Id.*

severely hamper the ability of candidates to reach black voters and would decrease the presence and impact of black voters in elections.

Even absent specific advocacy on behalf of a candidate, “knock-and-drag” efforts might also be treated as campaign contributions under McCain-Feingold. In the November 2000 election, the Durham Committee on the Affairs of Black People, led by Reverend Philip Cousin, used local church vans to transport people—mostly the older voters—to the polls.⁴⁰ Though traditionally Democratic in their leanings, the group properly claims that its primary aim is to combat apathy rather than to advocate on behalf of specific candidates and parties.⁴¹ Would this fall within the prohibitions of (iii)? Again the answer is unclear. As long as black voters continue to vote in a particular manner, for example a nine-to-one margin of preference for one candidate over another, driving them to the polls provides something of value to a particular candidate. If the effort is supported by a partisan effort or political campaign in any way, or if discussions about targets for get-out-the-vote campaigns are held with any campaign officials, then this activity may also become endangered. The same holds true for voter registration drives and stumping from the pulpit for particular candidates. Precisely because, as Professor Smith notes, blacks are not swing voters, any attempt to mobilize, energize, and organize their vote can be seen as providing a benefit to a particular candidate. The questions will then center on the issue of “coordination,” and black political activists would have to use care to avoid even the slightest appearance of what, under this proposed system, would be considered improper.

The activities of a Lansing, Michigan church serve as an excellent example of the problems engendered in politics from the pulpit under a campaign finance regime. The sermon given on the Sunday before election day opened with a reminder to vote on Tuesday.⁴² Perhaps this reminder could be viewed as nothing more than traditional civic efforts by a middle-class congregation that had a history of service to the community, including voter registration efforts. However, those in attendance also received two African-American published newsletters endorsing numerous candidates.⁴³ The minister of the church, Reverend Murphy, had been invited to the White House the

40. Suzanne Smalley, *Parties' Big Job Now is to Get Voters to Polls*, HERALD-SUN (Durham, NC), Nov. 7, 2000, at A4.

41. *Id.*

42. See Wilgoren, *supra* note 29.

43. *Id.*

week before the election and enlisted to help get out the vote.⁴⁴ He hosted a prayer luncheon with local leaders and personally campaigned door to door in black communities.⁴⁵ While an ardent Democrat himself, Reverend Murphy refrained from mentioning the names and political parties of candidates from his pulpit.⁴⁶ Could McCain-Feingold reach such conduct? Is it possible that a reform law would focus on the known political affiliation of Reverend Murphy, the likely political affiliation of his congregants, and his invitation to the White House to infer some coordination—if not with Vice President Gore himself, then with some arm of his campaign?

While churches arguably should be barred from coordination with candidates and parties, expanding the definition of restricted campaign activity would serve to vitiate the already limited political leverage these groups had. By visiting the White House, Reverend Murphy gave the Democrats the opportunity to receive something of value: help with black turnout in the swing state of Michigan. In return, the Democrats gave him an opportunity to present and express the concerns of his community and perhaps someday call on the White House for a favor. In the context of the African-American community, this quid pro quo may be seen benignly or even positively as providing a voice for an underrepresented minority. In reality, however, it differs little from the more traditional targets of campaign finance reform: wealthy individuals who donate money in exchange for a friendly ear in powerful places, or simply an opportunity to plead their case. And, given the sweep of proposed reforms, such activity might find itself vulnerable to attack.

It is, of course, possible to dismiss these arguments as those consistent with the views of someone who has been publicly skeptical over both the constitutionality of many proposed reforms and their likely efficacy in truly curbing the influence of money in the political process. Of late, however, the same concerns have been expressed by insiders to the political process, much more schooled in the real world techniques of political effectiveness. It is noteworthy that as the McCain-Feingold Senate bill made its way to the House for further consideration, a group of black and Hispanic Democrats announced their potential opposition to the measure as drafted for fear that it would undo advances in minority political participation. In the words of Representative Albert Wynn, the head of a committee created by the Congressional Black Caucus, "Florida made all of us aware of

44. *Id.*

45. *Id.*

46. *Id.*

what goes on at the street level, the need for voter registration for example.” Without the ability to use soft money for the get-out-the vote efforts, “I’m concerned about the adverse effects on voter registration, voter mobilization.”⁴⁷

Much of this assessment must of course take the form of a hypothetical. We are obviously still a long way from legislation and the certain judicial review that will follow. But if we focus on the potential impact of campaign finance reform on the more plebian forms of voter mobilizations, such as with black voters, two points emerge. First, sweeping attempts to curtail the role of money in politics may have all sorts of paradoxical effects.⁴⁸ One effect might be to curtail grassroots activism that has proved surprisingly effective, even if not at the apex of campaign expenditures. Second, the experience of black political mobilization in Election 2000 should raise cautions about discounting or even jettisoning the First Amendment protections of freedom of expression and association. To continue with the movie imagery employed by Professor Smith, albeit at a more prosaic level, should campaign finance reform threaten the viability of renewed black voter engagement, “who you gonna call?”⁴⁹ I suspect that friends of black political participation will quickly turn to the First Amendment.

47. Alison Mitchell, *Blacks and Hispanics in House Balk on Campaign Finance Bill*, N.Y. TIMES, May 9, 2001, at A1.

48. This is the central theme of Issacharoff & Karlan, *supra* note 13, which argues that one of the consequences of restricting the flow of money to candidates and parties would be to increase the political centrality of other actors in the political arena, such as purveyors of issue advertising. Issacharoff & Karlan, *supra* note 13, at 1708–17.

49. This is the limited insight that I draw from *GHOSTBUSTERS* (Columbia Pictures 1984).

