



UNC
SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 79 | Number 5

Article 16

6-1-2001

Campaign Finance, Race, and Equality

Daniel H. Lowenstein

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>



Part of the [Law Commons](#)

Recommended Citation

Daniel H. Lowenstein, *Campaign Finance, Race, and Equality*, 79 N.C. L. REV. 1535 (2001).

Available at: <http://scholarship.law.unc.edu/nclr/vol79/iss5/16>

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized administrator of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

CAMPAIGN FINANCE, RACE, AND EQUALITY

DANIEL H. LOWENSTEIN*

Lowenstein agrees with Terry Smith that egalitarian campaign finance reformers may have given inadequate attention to the implications of their proposals for racial groups. However, he suggests that this inattention is symptomatic of a more general tendency to avoid the complexities of equality as a goal for campaign finance. Lowenstein expresses tentative skepticism of whether equality can withstand theoretical and empirical scrutiny as a rationale for campaign finance reform. He proposes instead goals such as avoiding conflict of interest, enhancing electoral competition, and reducing the resources devoted to fundraising. He suggests that a good rule of thumb for pursuing each of these goals is that reforms should make it easier, not harder, for politicians to get money.

Legal scholars writing on campaign finance in recent years have tended to divide into two camps. One group, including writers such as Lillian BeVier,¹ Joel Gora,² Bradley Smith,³ and Kathleen Sullivan,⁴ has been hostile to regulation, primarily on libertarian grounds. These scholars make policy arguments against most forms of regulation—disclosure usually being the prominent exception—and they make constitutional arguments that the regime initiated by *Buckley v. Valeo*⁵ is too permissive of regulation.

The other, more numerous group of scholars, favors enhanced regulation. Overwhelmingly, these writers support regulation in order to promote the goal of equality. At the extreme, they argue

* Professor of Law, University of California, Los Angeles.

1. See Lillian R. BeVier, *Campaign Finance Reform: Specious Arguments, Intractable Dilemmas*, 94 COLUM. L. REV. 1258 (1994); Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 CAL. L. REV. 1045 (1985).

2. See Joel M. Gora, *Campaign Finance Reform: Still Searching Today for a Better Way*, 6 J.L. & POL'Y 137 (1997).

3. See BRADLEY A. SMITH, UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM (2001).

4. See Kathleen M. Sullivan, *Against Campaign Finance Reform*, 1998 UTAH L. REV. 311; Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663 (1997).

5. 424 U.S. 1 (1976).

that the present campaign finance system, inadequately regulated in their opinion, violates the Equal Protection Clause.⁶ Few people will hold their breath until the Supreme Court accepts that position, but reformers argue, somewhat more plausibly, that contrary to *Buckley*, promoting equality should be recognized as a compelling state interest justifying regulation of campaign activity. And they urge Congress, state legislatures, and state voters to adopt reforms that they believe will promote equality. The many scholars in this camp include Edward Foley and Richard Hasen.⁷

Terry Smith generally identifies himself with the latter group of scholars,⁸ but he offers what appears to be intended as a friendly amendment to their position. The goal of equality, he argues, cannot be considered realistically in this country without serious consideration of race. Such serious consideration, he claims, has been lacking in writings of the egalitarian campaign finance reformers. On this, his most central point, I believe Professor Smith is correct. But he could strengthen his argument if he would clarify how he believes race and the campaign finance debate bear on each other. His Article seems to go back and forth between at least two quite distinct domains.

One is the domain of constitutional doctrine. Smith's main point is that *Shaw v. Reno*⁹ and its progeny are in tension, if not inconsistent, with the recognition of speech and associational rights of campaign donors and spenders in *Buckley*.¹⁰ I believe his attempt to enlist the First Amendment against *Shaw* is a stretch, though I agree with him that inhibiting the ability of minorities to participate in redistricting negotiations is one of the most outrageous aspects of the racial gerrymandering decisions.¹¹ But I fail to see Smith's purpose

6. See Jamin Raskin & John Bonifaz, *The Constitutional Imperative and Practical Superiority of Democratically Financed Elections*, 94 COLUM. L. REV. 1160, 1160 (1994).

7. See, e.g., Edward B. Foley, *Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204 (1994); Richard L. Hasen, *Campaign Finance Laws and the Rupert Murdoch Problem*, 77 TEX. L. REV. 1627 (1999); Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CAL. L. REV. 3 (1996).

8. Terry Smith, *Race and Money in Politics*, 79 N.C. L. REV. 1469, 1520 (2001).

9. 509 U.S. 630 (1993).

10. Smith, *supra* note 8, at 1519–20.

11. I made a similar argument in Daniel Hays Lowenstein, *You Don't Have to Be Liberal to Hate the Racial Gerrymandering Cases*, 50 STAN. L. REV. 779, 825 (1998) (stating that the “freedom to compete and negotiate will be especially hampered [by the racial gerrymandering cases] in parts of the state where blacks and Hispanics reside.”); see also *id.* at 828–30 (showing that the racial gerrymandering doctrine forces minority political groups to adopt legal grievance tactics to promote their redistricting goals, because they are hamstrung in their use of ordinary political negotiating tactics).

here. Is he trying to persuade the egalitarian reformers that they ought to join him in opposing *Shaw*? Why bother, since most, if not all of them, undoubtedly oppose *Shaw* already? More likely, he is making an argument against *Buckley*, which he says he would like to see overruled.¹² But whether he is making an argument against *Shaw* or against *Buckley*, surely there are more compelling and straightforward reasons to oppose both decisions than their possible inconsistency with each other.

The second domain that Smith sometimes refers to is the effect of the campaign finance system on minority politicians. He asserts that minorities cannot raise money as effectively as whites.¹³ Living as I do in California, where Willie Brown, an African American, may have been more successful at fund-raising than any other politician in the state's history, I am skeptical.¹⁴ Smith cites figures showing that minority legislative candidates raise and spend less, on average, than white candidates.¹⁵ But such figures do not demonstrate, as Smith apparently believes, that minority candidates are relatively disadvantaged. For one thing, he does not break the figures down between minority candidates running against other minorities and those running against whites.¹⁶ Two black candidates opposing each

12. Smith, *supra* note 8, at 1520. Of course, what he means is that he would like that portion of *Buckley* declaring campaign expenditure limits unconstitutional to be overruled.

13. Smith, *supra* note 8, at 1520.

14. See generally JAMES RICHARDSON, WILLIE BROWN: A BIOGRAPHY 315–33 (1996).

15. Smith, *supra* note 8, at 1473–74.

16. Smith refers to the Senate contest in which Jesse Helms outspent Harvey Gantt, but that may reflect less an inability on Gantt's part to raise money and more Senator Helms' well known fundraising prowess. The only African-American senator in a position to run for reelection in recent years was Carol Moseley-Braun, who was defeated by Peter Fitzgerald in Illinois in 1998. Fitzgerald received more than twice as much as Moseley-Braun, \$15.0 million to \$7.2 million. However, Fitzgerald was a self-funded candidate who put \$11.7 million into his own campaign. See Federal Activity of 1997–98 Senate Campaigns (1998), <http://www.fec.gov/1996/states/il/en6.htm> (last visited Aug. 17, 2001) (on file with the North Carolina Law Review). Thus, in actual fund-raising, Moseley-Braun's \$7.2 million compared favorably to Fitzgerald's \$3.3 million. On the other hand, Fitzgerald might have worked harder to raise money had he not been able to fund his own campaign. A better comparison is between Moseley-Braun and the Democratic incumbent who ran in the 1996 Senate election, Richard Durbin. Durbin raised \$4.8 million in 1996. See Federal Activity of 1995–96 Senate Campaigns (1996), http://www.fec.gov/1996/states/il_02.htm (last visited Aug. 17, 2001) (on file with the North Carolina Law Review). Thus, the Illinois experience does not support Smith's hypothesis. Nor should that be a surprise. The parties and interest groups that fund hotly contested elections have a large stake in partisan control of the two houses of Congress, and are not likely to base their campaign finance activities on personal predilections.

other in one district would not be disadvantaged because two white candidates in a neighboring district spent twice as much.

To be sure, residents of a district are a major source of contributions to legislative candidates and, as Smith argues, they will be a less lucrative source in the low-income areas typically represented by minority legislators. It does not follow, however, that legislators from these districts are disadvantaged. To the contrary, the minority incumbents benefit. The more difficult it is to raise money, the less likely the incumbent legislator will face a well-financed challenger. When they do not face well-financed challengers, incumbents are extremely difficult to defeat.¹⁷ Not only minority incumbent legislators benefit from the decreased likelihood of strong electoral challenges. Their minority constituents are also likely to benefit, because seniority has at least some importance in most legislatures.

Now I would like to return to Professor Smith's general point, that the egalitarian reformers have failed to consider race in their conceptions of the equality that campaign finance reform is supposed to support. In my opinion, the problem that Smith identifies is a part of a larger problem, namely the failure of the egalitarian reformers to give any serious attention to what kind of equality they expect campaign finance regulation to accomplish and how they expect regulation to accomplish equality of any sort. They speak indifferently of equalizing the voice of every voter, of equalizing the opportunities of all candidates, of equalizing "political power" in general, and of remedying deficiencies in our society's distribution of resources caused by present campaign finance systems, as if all these were the same.

Manifestly, the subject I have just opened is much too large for adequate discussion here. I shall simply state, in a conclusory way, that I believe the only one of these goals that could have much chance of standing up as a social desideratum to serious analytical scrutiny is the last, namely the goal of general distributional fairness. Pursuit of this goal by means of campaign finance regulation is almost certainly doomed to failure on empirical grounds. There is no reason to suppose that the general distributional effects of any imaginable form of campaign finance reform would be more than slight. Whatever effects did occur would be the indirect result of interaction with

17. See, e.g., Gary C. Jacobson, *The Effects of Campaign Spending in House Elections: New Evidence for Old Arguments*, 34 AM. J. OF POL. SCI. 334 (1990).

innumerable other factors and therefore would be entirely unpredictable.

For these reasons, I have increasingly come to the view that certain forms of campaign finance regulation are desirable, but for reasons other than the promotion of equality. This is a rather solitary position within legal academe, but it has consistently been the position of a majority of the Supreme Court and, I believe, it is held by many among those in the general public who think about campaign finance issues.¹⁸

Among the goals of campaign finance reform, I would include reduction of undue influence or, as I prefer to call it, conflict of interest; promotion of somewhat more electoral competition than we have typically experienced in certain legislative races in recent decades; and reduction of the time and energy politicians presently must devote to fund-raising. Although working out the details is a most difficult chore, there is one basic approach best calculated to promote each of these goals: *reduce the pressure by making it easier, not harder, for politicians to get campaign money*. The reasons are simple. First, the harder it is to raise money, the more likely it is that recipients will be influenced by the contributions they receive. Second, the greatest barrier to more competitive legislative elections is not the large amounts incumbents can spend but the inability of many challengers to raise adequate amounts. Third, the easier it is to get money, the less time and energy politicians will need to devote to getting it.

Here is a simple idea: Quintuple the amount provided to presidential candidates and quintuple all the limits contained in the Federal Election Campaign Act. This quintupling plan is by no means a perfect solution, but I believe that if it were put into force today, it would quickly mitigate many of today's most salient sources of discontent in campaign finance. For example, evasive devices such

18. The Supreme Court has upheld campaign restrictions only when it believed the restrictions served anti-corruption purposes. *See, e.g., Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480 (1985). Corruption has been a major theme in the public debate over campaign finance reform. Other than myself, few if any legal academics have seriously defended reforms on anti-corruption grounds. Compare Bruce E. Cain, *Moralism and Realism in Campaign Finance Reform*, 1995 CHI. LEGAL F. 111, and David A. Strauss, *What Is the Goal of Campaign Finance Reform?* 1995 CHI. LEGAL F. 141 (both arguing that campaign finance reform is unjustifiable on anti-corruption grounds but defensible, in theory at least, on egalitarian or equity grounds), with Daniel Hays Lowenstein, *Campaign Contributions and Corruption: Comments on Strauss and Cain*, 1995 CHI. LEGAL F. 163 (defending the anti-corruption rationale). Bruce Cain will be justifiably annoyed at being referred to as a legal academic, but that's what he gets for publishing in legal journals.

as sham issue advocacy funded by soft money or independent spending would become less necessary if the public funding of presidential campaigns were restored to a level adequate to fund a campaign, and if higher contribution limits made it more feasible for congressional candidates to fund their campaigns.

Professor Smith's central insight is as applicable to these ideas as to egalitarian-based reforms. These reforms also should be vetted for any particular effects on different groups, including racial and ethnic groups. On first blush, the goals I have mentioned appear to be good government goals in which all citizens have an interest, whatever their race or ethnicity. But perhaps Professor Smith will some day find the time to point his antennae in their direction.

In the meantime, I do not expect the egalitarian reformers to give up their ground. If Professor Smith's Article prompts them not only to press the particular inquiry he proposes but to engage in a more comprehensive investigation into their egalitarian premises, he will have performed a most valuable service.