Voices from the Past: Race, Privilege, and Campaign Finance

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Although campaign finance reformers recognize that in a privately financed campaign system political inequality stems from wealth inequality, their analysis is incomplete because they do not question the validity of the existing distribution of property. This Response explores how state-sanctioned discrimination against racial minorities has contributed to current racial disparities in property distribution, which are replicated in political participation due to the current campaign finance system. A campaign system that adopts the existing distribution of property as a baseline of political influence has an ideological impact that disadvantages individuals of color and the articulation of their political perspectives.

INTRODUCTION

In Race and Money in Politics, Professor Terry Smith correctly observes that the plight of people of color is oversimplified when it is

equated with the claims of the economically disadvantaged. Advocates of campaign finance reform have not explored the “meaning of political equality” for the economically disadvantaged and the racially disadvantaged. They have failed to realize that these two groups are “unequal for different reasons and to different degrees.”

A consideration of campaign finance reform and race raises several complex issues, many related to the failure of courts, legislatures, and activists to address persisting racial inequality. Professor Smith asks:

What does it mean for white voters, who are a controlling majority, to claim that they are unequal? Can we realistically equate wealth inequality with racial inequality? If wealth inequality’s effect is to give the wealthier greater access to the legislative process and more favorable legislative outcomes, does not race inequality discriminate in a similar way even in the absence of such a wealth effect?

This Response makes a related, but distinct, observation. Professor Smith distinguishes racial disadvantage from economic disadvantage. Even when one focuses solely on economic disadvantage, however, many people of color have fewer resources for different reasons than their poor white counterparts. These reasons have been ignored by campaign finance reform activists who have made connections between race and campaign finance, as well

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2. Id. at 1482.
3. Id.
4. As Professor Smith mentions, the movie Bulworth, produced and directed by campaign finance reform activist Warren Beatty, made a connection between race and campaign finance. See id. at 1470-72; see also Todd S. Purdum, Plan to Limit Political Donations Gets Unlikely Help, N.Y. TIMES, Mar. 5, 2000, § 1, at 31 (noting that Warren Beatty “toyed ... with running for president on a platform of campaign finance overhaul”). In addition, several civil rights and campaign finance activists have addressed race and campaign finance at conferences sponsored by Howard Law School and the National Voting Rights Institute, the Brennan Center, and the Asian Law Journal at the University of California, Berkeley. The presentations contained critiques by activists, policymakers, and legal practitioners. They did not, however, constitute comprehensive treatment of race and campaign finance by academic legal commentators. See, e.g., John Bonifaz, et al., Challenging the Campaign Finance System as a Voting Rights Barrier: A Legal Strategy, 43 HOW. L.J. 65 (1999); Edward M. Chen, Introduction to Petition to U.S. Commission on Civil Rights, 5 ASIAN L.J. 353 (1998); Nat’l Asian Pacific American Legal Consortium et al., Petition for Hearing Before the U.S. Commission on Civil Rights, 5 ASIAN L.J. 357 (1998); L. Ling-chi Wang, Beyond Identity and Racial Politics: Asian Americans and the Campaign Fund-Raising Controversy, 5 ASIAN L.J. 329 (1998); Roger Wilkins et al., Campaign Finance as a Civil Rights Issue, 43 HOW. L.J. 41 (1999). A number of individuals and civil rights groups represented at the Howard Conference convened and established The Fannie Lou Hamer Project, which recognizes campaign
as by academic legal commentators in favor of reform ("reformers") who have not considered seriously the connection of the issues.\(^5\) Not only have reformers overlooked the distinctions between racial inequality and wealth inequality,\(^6\) but they also have failed to explore the "different reasons" that people of color have less wealth and are "political unequals" in the campaign finance context. This Response connects the history of state-sanctioned discrimination to current racial disparities in property distribution to reveal an important critique of the privately financed campaign finance system.\(^7\)

Reformers correctly observe that the inequalities in political participation under the current campaign finance system arise directly from the preexisting unequal distribution of property.\(^8\) Some finance as a civil rights issue and explores the racial impact of the current campaign finance system. See The Fannie Lou Hamer Project (1999), at http://www.fhlp.org (last visited Sept. 25, 2001) (on file with the North Carolina Law Review); see also Ben White, Shadow Moves To New Venue With Old Issue, WASH. POST, Aug. 17, 2000, at A15 (describing efforts of The Fannie Lou Hamer Project "to encourage Americans to think of campaign finance reform as a civil rights issue").

5. Reformers Jamin Raskin and John Bonifaz acknowledge that financial disadvantages faced by minority candidates may implicate concerns under section 2 of the Voting Rights Act, 42 U.S.C. § 1973 (1994), but they relegate their examination to a footnote. Jamin Raskin & John Bonifaz, Equal Protection and the Wealth Primary, 11 YALE L. & POL'Y REV. 273, 279 n.26 (1993) (admitting that their research is "[p]reliminary" and that "the question of a Voting Rights Act violation . . . is beyond the scope of [their] Article"). Cass Sunstein briefly mentions that "[s]ometimes minority candidates can succeed only with the help of PACs specifically organized for their particular benefit. For this reason, PAC limits will in some circumstances diminish the power of minority candidates." Cass R. Sunstein, Political Equality and Unintended Consequences, 94 COLUM. L. REV. 1390, 1409–10 (1994). Sunstein uses this effect of PAC limits on minority candidates as an example to explain why campaign finance restrictions are sometimes problematic, but does not engage in a comprehensive analysis as to why the current campaign finance system may benefit or disadvantage people of color. See id. at 1413–14. Richard Hasen acknowledges ethnicity in explaining how his campaign finance proposal allows citizens to associate voluntarily and petition based on group identity. See Richard L. Hasen, Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers, 84 CAL. L. REV. 1, 57 (1996).

6. Smith, supra note 1, at 1481.

7. For a more extensive discussion of race and campaign finance, see Spencer Overton, But Some Are More Equal: Race, Exclusion, and Campaign Finance (working title for unpublished work-in-progress) (on file with author).

8. See J. M. Balkin, Some Realism About Pluralism: Legal Realist Approaches to the First Amendment, 190 DUKE L.J. 375, 379 (1990) ("One could argue that free speech in a situation of radically unequal economic power is not free speech at all because it is skewed by the preexisting distribution of property."); Edward B. Foley, Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance, 94 COLUM. L. REV. 1204, 1204 (1994) (advocating an "equal-dollar-per-voter" campaign reform system because "wealthy citizens should not be permitted to have a greater ability to participate in the electoral process simply on account of their greater wealth"); Burt Neuborne, Toward a Democracy-Centered Reading of the First Amendment, 93 NW. U. L. REV. 1055, 1072 (1999) ("A campaign financing system driven by extreme wealth disparity will inevitably
reformers recognize the role of the state in the creation of laws that make possible inequalities in property. The analysis of the reformers is incomplete, however, because they fail to question the legitimacy of the existing distribution of property. Reformers have not asked why past policies that have illegitimately shaped the distribution of property, such as state-sanctioned discrimination against racial minorities, should be replicated in the political process through the seemingly benign current campaign finance system. Nor have they asked why a campaign finance system based on a distribution of private property that clearly has been shaped by past discriminatory policies should be tolerated.

Part I of this Response observes that a history of state discrimination has contributed to current racial disparities in property distribution which are, due to the current campaign finance system, replicated in political participation. Part II explains how a campaign finance system built on the distribution of property sustains the effects of past discriminatory policies and has an adverse ideological impact on people of color. Though judicial and legislative rules regarding the financing of politics are couched as neutral, objective, impersonal, and indeterminate, they shape the racial distribution of political power no less than the location of electoral boundary lines drawn in redistricting.

I. RACIAL DISTRIBUTION OF WEALTH

Noble factors such as hard work, discipline, and intelligence only

reflect the needs and concerns of the persons who pay for the system, and it will ignore the needs and concerns of persons who lack the means to participate in the funding process... This means that issues of importance to the holders of great wealth are more likely to find themselves on the agenda than issues of importance to the poor...); Jamin Raskin & John Bonifaz, The Constitutional Imperative and Practical Superiority of Democratically Financed Elections, 94 COLUM. L. REV. 1160, 1162 (1994) ("Money is... unequally distributed, which means that persons who have more wealth can buy more goods, including political and governmental favors"); Sunstein, supra note 5, at 1390 (observing that "there is no good reason to allow disparities in wealth to be translated into disparities in political power").

9. See Balkin, supra note 8, at 414 ("The government is responsible for inequalities in access to the means of communication because it has created the system of property rights that makes such inequalities possible."); Foley, supra note 8, at 1242 (arguing that "[j]ust because the electorate previously approved laws that granted the wealthy their property rights does not mean these claims to wealth are ex ante legitimate for the next election."); cf. Sunstein, supra note 5, at 1399 ("[E]lections based on existing distributions of wealth and entitlements also embody a regulatory system...Th[is] regulatory system... is not obviously neutral or just. On the contrary, it seems to be neither insofar as it permits high levels of political influence to follow from large accumulations of wealth.").
partially shape the current distribution of property. A consideration of how racial discrimination has influenced the distribution of property is essential to understanding the structural problems inherent in the existing campaign finance system. This part briefly reviews a handful of past discriminatory policies and how they have created racial disparities in the distribution of property and political contributions.10

A. Past Discriminatory Policies Shape Property Distribution11

Governmental entities have long used racial identity to define and allocate property rights. Official government action in the form of proclamations, statutes, and court decisions took land from Native Americans based on their racial and cultural identity, and reallocated this property to white private actors.12 The law contemplated and enforced the appropriation of labor from African Americans through slavery,13 which primarily benefited white private actors.14 The law

10. The focus of this Response on past state-sanctioned discriminatory policies is not meant to suggest that past and present discrimination by private individuals has not significantly shaped the distribution of property. See, e.g., EUNICE GRIER & GEORGE GRIER, DISCRIMINATION IN HOUSING; A HANDBOOK OF FACT 20–21 (1960) (finding that “[a] very large proportion of the homeowners public supports discrimination by builders, brokers and agencies of government”).

11. While this section concentrates primarily on African Americans, Latinos, and Native Americans in the United States, the analysis is not limited to these groups. Distributions of property have been illegitimate due to other reasons, including but not limited to other forms of discrimination based on ethnicity (e.g., Asian Americans) and gender. See, e.g., NATIONAL COUNCIL OF NEGRO WOMEN, INC., WOMEN & HOUSING: A REPORT ON SEX DISCRIMINATION IN FIVE AMERICAN CITIES, passim (1975) (reporting problems that women in American cities face when they try to acquire and maintain a decent place to live). The analysis is also applicable to groups in other democracies whose lack of control over resources stems in large part from historical decisions based on race or ethnicity (e.g., many indigenous and formerly segregated or enslaved peoples throughout North and South America, South Africa, Zimbabwe, Australia, Hawaii, and other areas). See, e.g., HUMAN RIGHTS AND PROPERTY: A BILL OF RIGHTS IN A CONSTITUTION FOR A NEW SOUTH AFRICA 298–319 (Roel de Lange et al. eds., 1993) (proposing a differentiation of property rights in South Africa to incorporate a concept of ownership attuned to the needs and desires of several interest groups).

12. See Joseph William Singer, The Continuing Conquest: American Indian Nations, Property Law, and Gunsmoke, in 1 RECONSTRUCTION 97, 102 (1991) (“[P]roperty and sovereignty in the United States have a racial basis. The land was taken by force by white people from peoples of color thought by the conquerors to be racially inferior.”); see also WILLIAM B. SCOTT, IN PURSUIT OF HAPPINESS: AMERICAN CONCEPTIONS OF PROPERTY FROM THE SEVENTEENTH TO THE TWENTIETH CENTURY 1, 6, 120, 133 (1977) (stating that the English crown claimed dominion over American land inhabited by primitive aboriginal tribes and proceeded to parcel it out to royal favorites).

also promoted immigration from European countries, essentially determining the racial makeup of those who would count as full citizens in the United States.\textsuperscript{15} As white Americans moved west in the 1800s, the law tolerated discriminatory practices in southwestern states that stripped Mexican Americans of nearly all opportunities to own property.\textsuperscript{16} In addition to conquest, slavery, and immigration policy, well-known public and private racial barriers in education, employment, and business have disadvantaged people of color while benefiting others through artificially reduced competition.\textsuperscript{17}

Less apparent factors also perpetuate economic disparities between whites and people of color. The benefits derived from facially discriminatory government policies may be multiplied by

Positions 15, 18 (C.B. MacPherson ed., 1992) ("[E]very Man has a \textit{Property} in his own \textit{Person}.... The \textit{Labour} of his Body, and the \textit{Work} of his Hands, we may say, are properly his.").

14. \textit{See} Cheryl I. Harris, \textit{Whiteness as Property}, 106 Harv. L. Rev. 1707, 1718 (1993) ("The social relations that produced racial identity as a justification for slavery also had implications for the conceptualization of property. This result was predictable, as the institution of slavery... was bound up with the idea of property. Through slavery, race and economic domination were fused."). \textit{But see} Lea S. VanderVelde, \textit{The Labor Vision of the Thirteenth Amendment}, 138 U. Pa. L. Rev. 437, 466 (1989) ("[Slavery] degraded labor and the meaning of labor for poor white working men in the South.... Thus, slavery pulled white workers down in two ways: one, by direct competition with slave labor in the South, and two, by associating all the industrious efforts of workers with those of the degraded slaves.").


17. \textit{See} Melvin L. Oliver & Thomas M. Shapiro, \textit{Black Wealth/White Wealth: A New Perspective on Racial Inequality} 51 (1995) (stating that "every circumstance of bias and discrimination against blacks has produced a... positive gain for whites"). \textit{See generally} Gilbert Thomas Stephenson, \textit{Race Distinctions in American Law} (1910) (arguing that race distinctions in laws have hampered the economic and educational opportunities of African Americans).
facially neutral government policy and economic markets. Thus, they may have a greater impact today than when they were originally enacted and enforced. For example, the Federal Housing Administration (FHA), formed in 1934, promoted a model racially restrictive covenant that whites could use to maintain neighborhood “stability,” thereby explicitly promoting segregated home ownership among whites, and discouraging home ownership among non-whites. Federally subsidized mortgages often required that owners incorporate into their deeds racially restrictive covenants, and builders adopted the covenants to ensure that their property qualified for federal insurance. After perpetuating this segregation, the federal government, concerned more about race than any other demographic trend, “consistently gave black neighborhoods the lowest rating for purposes of distributing federally subsidized mortgages.” Private lenders often followed the federal system in making loan decisions.

This racial disparity in wealth realized through home ownership and home value originally caused by federal housing policies has since been compounded by seemingly neutral public and private decisions. Because people of color are less likely to own homes, they are less likely to take advantage of tax provisions allowing for the deduction of a large percentage of their housing costs (all property taxes and

18. See OLIVER & SHAPIRO, supra note 17, at 39–41; see also KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 190–218 (1985) (recounting the development of FHA appraisal standards that discriminated against black communities by favoring lending in homogenous subdivisions); DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 53–55 (1993) (documenting the effect of discrimination resulting from FHA appraisal procedures in neighborhoods comprised of “inharmonious racial or nationality groups”). In addition to housing policies that promoted home ownership along racial lines, a number of other government policies have promoted racial disparities in property distribution. For example, “[i]n the first half of the twentieth century, various western states passed ‘alien land laws’ that limited the right to own property to aliens racially eligible to naturalize, thereby effectively prohibiting foreign-born Asian residents from acquiring certain types of land.” JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES 42 (2d ed. 1997); see also Oyama v. California, 332 U.S. 633, 640 (1947) (invalidating specific application of California’s Alien Land Law as violating the Equal Protection Clause of the Fourteenth Amendment).


20. Id. (citing Martha Mahoney, Note, Law and Racial Geography: Public Housing and the Economy in New Orleans, 42 STAN. L. REV. 1251, 1258 (1990)).

21. Id. at 1848 & n.9 (citing JACKSON, supra note 18, at 198–99; MASSEY & DENTON, supra note 18, at 52).

22. See id. at 1848 (citing MASSEY & DENTON, supra note 18, at 52).
Further, homes purchased in the 1930s increased greatly in value by the 1970s, and this increase benefited whites more than people of color. Even people of color who were able to purchase homes are less likely than comparable whites to benefit due to the slower rate of appreciation of property in non-white areas.

B. Current Disparities in Income and Wealth

Past racial disparities in wealth arising directly from state-sponsored discrimination have been carried forward by intergenerational transfers of wealth. While assets conveyed at death are perhaps the most obvious permutation of these transfers, wealth also originates from other types of intergenerational transfers. For example, wealth often derives from the “education, experiences, friendships, and contacts” a child obtains from parents. Whites tend to receive disproportionate financial assistance from parents to handle the challenges of early adulthood. For example, whites are twice as likely as blacks to receive family assistance in purchasing a home. Indeed, wealth itself reflects a type of “resource available for improving life chances, providing further opportunities, securing prestige, passing status along to one’s family, and influencing the

23. See I.R.C. §§ 163(h)(2)-(3), 164(a) (West 2000); OLIVER & SHAPIRO, supra note 17, at 44 (“[T]he U.S. tax code channels benefits and encourages property and capital asset accumulation differentially by race.”).


25. See RAYMOND S. FRANKLIN, SHADOWS OF RACE AND CLASS 124–25 (1991) (noting that homes owned by middle-class blacks “do not appreciate as rapidly in value over time as homes owned by whites”); OLIVER & SHAPIRO, supra note 17, at 40, 150 (observing that “similar housing investments made by whites and blacks yield vastly divergent returns—to the distinct disadvantage of blacks”); Ford, supra note 19, at 1849–52 (arguing that race-neutral legal doctrine reinforces residential segregation created by public policy and private actors, causing significant disparity in the appreciation of black-owned homes and white-owned homes, in education, and in political influence). See generally Reynolds Farley et al., Stereotypes and Segregation: Neighborhoods in the Detroit Area, 100 AM. J. Soc. 750 (1994) (arguing that racial stereotypes play an important role in explaining whites’ resistance to integrated neighborhoods).


27. See OLIVER & SHAPIRO, supra note 17, at 155.

28. Id. at 152; see also Ngina S. Chiteji & Frank P. Stafford, Portfolio Choices of Parents and Their Children as Young Adults: Asset Accumulation by African-American Families, 89 AM. ECON. REV. 377, 377–80 (1999) (studying cross-generational influences on wealth and finding that a young family's likelihood of owning stock, a home, and other assets is influenced by whether their parents held these financial assets).

29. See OLIVER & SHAPIRO, supra note 17, at 145.
political process." Intergenerational transfers of wealth, despite being motivated by a concern for offspring rather than racial animus, perpetuate the effects of racially discriminatory policies from over a century ago, such as slavery and conquest. These intergenerational transfers also perpetuate discriminatory policies enforced only a few decades ago, such as racially disparate immigration policy, and segregation in education, employment, and housing.

The effects of past discriminatory policies are partially reflected in contemporary disparities among racial groups in median household income and net worth. In 1995, median household income was $35,766 for whites, $22,860 for Latinos, and $22,393 for African Americans. Examination of contemporary household net worth, which consists of all assets less any debts, reveals a more complete picture of the effects of intergenerational transfers of wealth. In 1995, the median net worth for white households ($61,000) was over eight times greater than African-American households ($7,400) and over twelve times greater than Latino households ($5,000). When equity in owner-occupied housing is subtracted, the disparities are even more glaring. Financial wealth was $18,000 for the typical white household in 1995, $200 for the typical African-American household, and $0 for the typical Latino household.

Similarly, African Americans, Latinos, and Native Americans are disproportionately represented among those Americans having the most dire financial conditions. Whereas only 7.7% of whites live in poverty, 23.6% of African Americans, 22.8% of Latinos, and 25.9% of Native Americans live in poverty. In 1995, 15% of white

30. See id. at 32.
32. See OLIVER & SHAPIRO, supra note 17, at 58 ("[N]et worth ... conveys the straightforward value of all assets less any debts.") (emphasis omitted).
33. CHUCK COLLINS ET AL., SHIFTING FORTUNES: THE PERILS OF THE GROWING AMERICAN WEALTH GAP 57 (1999) (finding that in 1995, the median household net worth for whites was $61,000, African Americans $7,400, and Hispanics $5,000); see also CONLEY, supra note 26, at tbl. A2.1 (finding that in 1994, the median family net worth for whites was $72,000 and for African Americans was $9,771).
34. COLLINS, supra note 33, at 57; see also CONLEY, supra note 26, at tbl. A2.1.
35. U.S. BUREAU OF THE CENSUS, POVERTY IN THE UNITED STATES: 1999, at v (2000); see Naomi Mezey, The Distribution of Wealth, Sovereignty, and Culture Through Indian Gaming, 48 STAN. L. REV. 711, 714 (1996) ("According to ... researchers with the Harvard Project on American Indian Economic Development, 'American Indian reservations are notable for their extreme and persistent poverty—reservation Indians are the poorest minority in the United States'. ... [I]n some tribes, such as the Navajo, more than 45 percent of families live in poverty.") (quoting STEPHEN CORNELL & JOSEPH P. KALT, MALCOLM WIENER CTR. FOR SOCIAL POLICY, WHERE'S THE GLUE?
households had a zero or negative net worth (greater debt than assets), compared to 31% of African-American and 38% of Latino households.\footnote{36}

The aforementioned data should not suggest that racial inequality can be measured with straightforward, mathematical precision. A number of complicating factors exist. For example, Asian Americans are not a single, uniform community, but consist of over thirty different ethnic groups. Some of these Asian-American ethnic groups have, on average, higher incomes than whites, while others have much lower average incomes.\footnote{37} Some citizens of color migrated to the United States after discriminatory laws were repealed. Government policies have attempted to aggressively recruit well-educated and highly-skilled foreign-born workers, including people of color.\footnote{38} The adverse impact of discriminatory laws is more attenuated for some individuals of color than for others. These complicating factors, however, do not detract from the proposition that past discriminatory laws have shaped the existing racial distribution of resources.\footnote{39}
C. Disparities in Contributions

It should come as no surprise that racial disparities in the control over economic resources are mirrored in the context of political contributions. A 1997 study directed by scholars at Georgetown University, the University of Akron, the University of Maryland, and the University of Rochester surveyed individuals who contributed $200 or more to congressional campaigns in the 1996 election cycle. Of those who responded to the survey, 95% identified themselves as white, and less than 1% identified themselves as people of color. These trends do not appear to be unusual. For example, a 1992 study of contributors to winning candidates for the Georgia Legislature revealed that 97% of contributors were white while only 2% were African-American.

Another study found that a disproportionately small number of contributions come from neighborhoods that are populated predominately by people of color. The study, sponsored by Public Campaign, compared the racial composition of zip codes to zip code data disclosed by political contributors. The study noted that in zip

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40. Smaller contributions need not be reported to the Federal Election Commission. See John Green et al., Individual Congressional Campaign Contributors: Wealthy, Conservative and Reform-Minded, at 2 (1998), available at http://www.opensecrets.org/pubs/donors/donors.htm. The study was based on data obtained through a 1997 mail survey to contributors randomly drawn from Federal Election Commission records. Id. at 12. About half of those drawn responded to the survey, and the conclusions of the study were based upon these 1,118 responses. Id. The margin of error is plus or minus 4%. Id.

41. See id. at 13 (showing that 95% of contributors surveyed indicated that they are white); Ellen Miller, Guess What? Political Donors are Old, Rich, White Men, THE HILL, July 1, 1998, at 5, LEXIS, The Hill File (“[L]ess than 1 percent in the Joyce survey identified themselves as people of color.”). While minorities gave about 1% of the political contributions, they cast 23% of the votes in the 2000 general Presidential election, suggesting that the contribution disparity is more closely related to an inability to give than political apathy. See Marjorie Connelly, Who Voted: A Portrait of American Politics, 1976-2000, N.Y. TIMES, Nov. 12, 2000, at WK 4.

42. See JOHN A. CLARK & JOHN M. BRUCE, CAMPAIGN CONTRIBUTIONS IN GEORGIA 7 (1994) (“In the 1990 Census, the population of Georgia was reported to be 71% white and 27% black. Our pool of respondents was just over 97% white, with only about 2% black.”); Richard Whitt, Typical Donor no Average Georgian, ATLANTA J. CONST., Dec. 14, 1994, at C2 (“More than 97 percent of contributors responding to the survey were white and only 2 percent were black.... Questionnaires were mailed in August and September to 1,155 contributors, with 357 initial responses.”).


44. See PUBLIC CAMPAIGN, supra note 43, at 11-13. The Federal Election
codes populated predominately by people of color, the average per capita income was $9,046. For every 10,000 residents in these zip codes, only eight political contributions were made. In contrast, in the average American zip code, incomes were 37% higher and residents were three times more likely to make political contributions. In the twenty-six zip codes where residents gave the most money, incomes were 408% higher and residents were fifty-four times more likely to contribute than those in predominately non-white areas. Also, in comparing the twenty-six zip codes where residents gave the most money to the 2,492 predominately non-white zip codes, the study found that the 0.68 million inhabitants of the former contributed more money than the 41.4 million inhabitants of the latter.

In summary, current racial disparities in contributions are not isolated from current racial disparities in income and wealth or past state-sponsored discrimination.

II. RACE AND THE FALSE NEUTRALITY OF THE CAMPAIGN FINANCE SYSTEM

As explained in part I, the current distribution of property is not natural or free of racial bias, but is shaped in large part by past racially discriminatory laws. A privately financed campaign system that adopts the existing distribution of property as a legitimate baseline of political power has an ideological impact that disadvantages individuals of color and the articulation of their political perspectives.

Commission does not require that contributors disclose their racial identity. Id. at 11. Therefore, to obtain its findings, the Public Campaign study compared Census Bureau data on racial composition of zip codes with Federal Election Commission data on contributions given by individuals in particular zip codes to federal candidates, political action committees, and political parties during the 1995–1996 election cycle. Id.

45. Id. at 37.
46. See id.
47. See id. at 36–37.
48. See id. at 37. Note that while Public Campaign reports that the average American zip code is 75.7% white, id. at 36, the twenty-six highest giving zip codes have an only slightly higher white population of 78%. See id. at 22–23 (calculation based on chart). One might argue that these figures indicate that higher end neighborhoods contain significant numbers of people of color who are making contributions. Public Campaign suggests that, instead, this data often reflects that a single zip code may contain both high-contributing wealthy white neighborhoods and low-contributing working-class neighborhoods populated predominately by people of color. See id. at 6.
49. Id. at 37. While racial disparities in political spending have not been studied as extensively as racial disparities in political contributions, there is no evidence that the expenditure racial disparity is any less stark than the contribution racial disparity.
Even after racially discriminatory laws have been eliminated, the law has ratified the misallocation of property by protecting the settled expectations of those who obtained economic benefits under a discriminatory regime. Legal protections of settled expectations, along with doctrines that build upon existing property rights—such as First Amendment applications that protect the use of political expenditures and contributions—obscure continued privilege based on past discriminatory practices. These doctrines make the existing economic order appear fair and equal. The existing campaign finance system, however, advances the political ideologies of those who have profited from the racial misallocation of property. These state-created advantages allow individuals with certain racial backgrounds to obtain an unfair advantage in the political marketplace.

By accepting arguments that base campaign finance on existing distributions of private property, courts and legislatures simply reaffirm discriminatory public and private decisions of the past. For example, a discriminatory law that prevented a young African-American woman in Alabama from attending a good public school in 1951 affected more than just the educational and economic opportunities available to her and her children. Due to the current

50. See Harris, supra note 14, at 1714 (“After legalized segregation was overturned, whiteness as property evolved into a more modern form through the law’s ratification of the settled expectations of relative white privilege as a legitimate and natural baseline.”). In some situations, courts refuse to protect or ratify expectations in property acquired under a discriminatory regime. See, e.g., Shelley v. Kraemer, 334 U.S. 1, 4 (1948) (invalidating judicial enforcement of racially restrictive covenants).

51. See Kimberlé Williams Crenshaw, Race, Reform, and Retrenchment, 101 HARV. L. REV. 1331, 1351–52 (1988) (stating that law “embodies and reinforces ideological assumptions about human relations that people accept as natural or even immutable” thereby suppressing conflict, antagonism, and questions regarding the legitimacy of the status quo); Harris, supra note 14, at 1777 (“The law masks what is chosen as natural; it obscures the consequences of social selection as inevitable. The result is that the distortions in social relations are immunized from truly effective intervention, because the existing inequities are obscured and rendered nearly invisible.”).


53. Cf. Johnson, supra note 15, at 529 n.20 (“Although the most invidious discrimination in the naturalization laws has been removed, the legacy of exclusion must be examined to ensure that its discriminatory influence can be extracted root and branch.”); Eric Schnapper, Perpetuation of Past Discrimination, 96 HARV. L. REV. 828, passim (1983) (exploring the employment of legal doctrine to prevent perpetuation of past racial discrimination).
private property-based campaign finance system, the discriminatory law also impairs their ability to participate in politics in 2001.54 Further, privately financed politics are likely to create future racial disparities in the distribution of resources. Due to the inability of the same African-American woman and her children to participate in the current campaign finance system in 2001, it is more probable that future lawmaking will steer economic resources and opportunities away from her, her children, and their descendants. The benefits of lawmaking will more likely be directed toward contributors and similarly situated persons with resources, who have directly or indirectly benefited from past discriminatory policies.55

Unexamined by reformers, the exacerbation of racial disparities in the distribution of resources caused by privately financed politics has profound consequences for race relations in America. Privately financed politics, framed by a history of facially discriminatory laws that have contributed to a present-day disparity in control over resources, reproduce racial disparities in the distribution of resources.56 Campaign finance doctrine plays a significant part in maintaining the skewed racial allocation of economic and political resources.57

The analysis advanced in this Response may not gain universal acceptance. Some will contend that racial disparities in property holdings reflect a coincidental distribution of individual merit, and it

54. Some have argued that segregation is inherently unequal. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate education facilities are inherently unequal."). Others, however, have noted that improved funding and educational opportunities for African-American children in schools should have been the true goal, and that this objective went unmet. See DERRICK BELL, RACE, RACISM & AMERICAN LAW 612–616 (3d ed. 1992). Regardless of one's definition of the problem and solution, discriminatory laws created a situation in which our young woman in 1951 received a substandard education.


56. Professor Foley's argument that the existing distribution of resources should not determine future distributions of resources is strengthened when one considers that the existing distribution has been shaped by policies that are no longer legitimate. See Foley, supra note 8, at 1204 ("An important function of electoral politics is to determine how wealth should be distributed among society's members. The existing distribution of wealth at the time of any particular election should not affect the electorate's determination of what the distribution should be henceforth.").

is thus fair to construct a campaign finance system based on private property. Another group may claim that no manageable method of accounting for the impact of past racial wrongs exists. Thus, that group may choose to tolerate the status quo not only in the economic marketplace, but also with regard to democratic participation under the current campaign finance system. Others assert that proposed reforms will fail to address the problems of the existing system, and will likely cause new problems. Some important scholars articulate these perspectives, and their insights should not be casually dismissed in making political judgments about campaign finance regulation. Nevertheless, there is no apolitical, determinate organizing principle that mandates that society as a whole must adopt these judgments to the exclusion of the historical and continuing relationship between race and private property. While supporters of a privately financed political system with minimal regulation may specify a vision of the world that tolerates the protection of participatory rights acquired due to past discriminatory policies, others should not be forced to embrace this normative interpretation.

One problem with current jurisprudence, however, is that it limits the political understandings of the role of property by extending high constitutional protection to property used in the campaign finance context. While property rights shaped by racial

58. See Samuel Issacharoff & Pamela S. Karlan, The Hydraulics of Campaign Finance Reform, 77 TEX. L. REV. 1705, 1707 (1999) (arguing that reform “proposals may increase, rather than dampen, the role of money in politics” and make politics less accountable to democratic control). But see Daniel Hays Lowenstein, On Campaign Finance Reform: The Root of All Evil is Deeply Rooted, 18 HOFSTRA L. REV. 301, 303–04 (1989) (arguing that opponents of reform have little empirical evidence to support their proposition that reforms “are far more likely to be harmful than beneficial,” and that there are also unanticipated consequences in maintaining the status quo).

59. Cf. Crenshaw, supra note 51, at 1346 (“[L]aw itself does not dictate which of various visions will be adopted as an interpretive base. The choice between various visions and the values that lie within them is not guided by any determinate organizing principle.”).

60. Arguments for both campaign finance reform and the status quo rest upon a descriptively and normatively contestable vision of politics. Cf. Issacharoff & Karlan, supra note 58, at 1708 (contending that “once the case for reform is understood to rest on a descriptively and normatively contestable vision of politics, we will be in a better position to discuss both the attractiveness of particular proposals for reform and the limits of a reform strategy”); William P. Marshall, The Last Best Chance for Campaign Finance Reform, 94 Nw. U. L. REV. 335, 376 (2000) (finding that “[d]emocracy does not have an ideal archetype and thus the case for campaign finance reform “must be tempered by the awareness that there is no clear guidepost from which to evaluate whether democracy is, or is not, working”.

discrimination are generally subject to restriction and redistribution in the economic sphere,62 these same property rights are more absolute and impenetrable when exercised in the political context.63 Unfortunately, current campaign finance jurisprudence strictly protects the settled expectations of those who have benefited from illegitimate distributions of property, and generally ignores those disadvantaged by illegitimate distributions.64

CONCLUSION

Professor Smith's critique of reformers is important, in part, because it prompts a consideration of the ways in which racial inequality is distinct from other forms of inequality. The disparities in wealth that disproportionately disadvantage people of color in the context of campaign finance cannot be explained solely by differences in work ethic, discipline, or talent, but are shaped by illegitimate factors such as past racial discrimination. The choice to maintain the existing system of campaign finance perpetuates the effects of past discriminatory laws and the historical devaluation of racial minorities as participants in democracy.

It is unlikely that any campaign finance reform proposal will result in a political process that is completely immune from disproportionate influence arising from the illegitimate distribution of property. There are also conceptual challenges in drawing bright lines that distinguish campaign finance regulation from restraints on

62. See Overton, supra note 55, at 1239 (observing that “courts... generally allow for broad legislative regulation of property and economic transactions in areas as varied as minimum wage, antitrust, zoning, rent control, and environmental law”).

63. Cf. JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY 260 (1990) (“Why give up the overt formal limits [on the legislature] with respect to economic regulation and social assistance, and enforce the power and privilege of property against the egalitarian measures of campaign finance laws?”); Frank Michelman, Political Truth and the Rule of Law, 8 TEL AVIV U. STUDIES IN L. 281, 288 (1988) (asking why realism and relativism “have been such potent destroyers of juristic absolutism shielding the market manifestations of property rights against legislative control, but so impotent... when it comes to their manifestations in the political sphere”); Frank I. Michelman, Possession vs. Distribution in the Constitutional Idea of Property, 72 IOWA L. REV. 1319, 1344-45 (1987) (“Why have realism and relativity been such potent destroyers of juristic absolutism regarding legislative control of the market manifestations of possessive property rights, while absolutism still shields their manifestations in the political sphere?”).

64. See Buckley v. Valeo, 424 U.S. 1, 48-49 (1976) (rejecting as illegitimate the government's alleged interest in equalization of the ability of citizens to affect elections by stating that “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment”).
the exercise of other expressive and associational liberties. Nevertheless, racial hierarchy cannot be tempered when decisionmakers ignore or passively tolerate the ways in which current campaign finance jurisprudence frames the economic and political experiences of people of color. A more comprehensive understanding of the campaign finance problem requires the integration of race as an important analytical consideration.

65. See, e.g., Sanford Levinson, Regulating Campaign Activity: The New Road to Contradiction?, 83 Mich. L. Rev. 939, 947 (1985) (reviewing Elizabeth Drew, Politics and Money: The New Road to Corruption (1983)) ("To the extent that it strikes us as dubious... to limit the ability of a newspaper to campaign actively for its favorite candidates, then we should at least question why it would be any more legitimate to limit the amount of spending by an individual eager to support the same candidate.")