Race and Money in Politics

Terry Smith

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TERRY SMITH*

An intriguing discourse is developing around the question of whether campaign finance reform can be inclusive of multiracial interests, or whether it will ultimately materialize as a "white" issue, the legislative incarnation of which will resound overwhelmingly to the benefit of non-minorities. In this Article, Professor Terry Smith demonstrates an interrelationship between race and money in politics that lays bare the fallacy that meaningful campaign finance reform can be achieved without considering race. First, racial inequality creates a baseline differential in the meaning of equal citizenship such that claims regarding the equality that might be wrought by campaign finance reform require a significant qualification. Second, race and money enable each other in the political process, with money often being used to purchase a powerful political message that divides citizens along racial rather than class lines, thereby limiting the potential of reform to effect policy changes for the greater public good unless race is confronted head on. Moreover, according to Professor Smith, the notion that reform can bring about greater equality pays insufficient attention to the reality that race itself is a speech resource for voters of color that is very much analogous to money, yet expression through race is overregulated in the political process while money is underregulated. Given the baseline differential in equality between whites and people of color, greater equality through reform is only possible if citizens of color are allowed to employ their full expressive resources in the political process. The current legislative debates regarding McCain-Feingold do not address the unique difficulties faced by minority voters and candidates in the current system, and McCain-Feingold may well increase barriers to their full participation. This Article concludes by offering a set of "first principles" regarding race and campaign finance reform, principles which if

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effectively implemented through the legislative process or otherwise may resound to the benefit of voters of color.

INTRODUCTION

In Warren Beatty's *Bulworth*, Senator Jay Bulworth is a dated, erstwhile liberal attempting to dissemble himself in neo-conservative, "New Democrat" clothing in order to withstand a primary challenge. Suicidally depleted by the whole charade as well as by the money chase of politics in general, Bulworth finds a political and spiritual elixir in the socially disrupted, rap-saturated ghettos of Los Angeles. It is there that he witnesses the gratuitous brutality of white cops against black youths and is lectured on the life-and-death economics of an inner-city drug trade which, on one view of it, offers the most discrimination-free employment available to black youngsters.

The abandoned inner city and its dark inhabitants are curious vehicles for the mantra of Bulworth's campaign: campaign finance

reform. Or are they? Senator Bulworth, who is white and has become moderately well-off, rationalizes the linkage between the plight of black urbanites and campaign finance reform: "Rich people have always stayed on top by dividing white people from colored people. But white people got more in common with colored people than they do with rich people."[1] But do they? Bulworth, like other advocates of campaign finance reform, appropriates the cloak and legacy of political inequality that are the reality of black[2] political life in order to crystallize the perceived need for campaign finance reform.[3] The attempted metaphor should seem unexceptional in an age in which whites routinely equate their political and socioeconomic circumstances with the historical discrimination experienced by racial minorities.[4] The fictional Bulworth's crusade, his uncouth attempt to marry clean politics and racial justice, appears, at least superficially, to diverge from this broader cycle in American politics in which whites arrogate the political shoes of blacks for narrow, self-interested purposes, but abandon them when a broader application of the principles they advance would threaten racial hegemony.[5] Instead, Bulworth challenges the false consciousness of working and middle class whites that he claims permits money to unduly influence the current electoral process.

Fiction, of course, always has the luxury of eliding tough questions. Thus, when Bulworth proposes a "voluntary, free-spirited, open-ended program of racial deconstruction"[6] in which we rid our

1. BULWORTH (Twentieth Century Fox 1998).

2. As is my custom, I use black, minority, and people of color interchangeably, recognizing fully that in some cases, the interests of Latinos and Asians do not converge with those of blacks.

3. *See, e.g.*, John C. Bonifaz, *"Not the Rich, More Than the Poor": Poverty, Race and Campaign Finance Reform* (Sept./Oct. 1999), *at* http://www.prrac.org/topics/sep99/bonifaz.htm (on file with the North Carolina Law Review) (analogizing modern campaign finance barriers to the poll taxes that disproportionately disenfranchised African Americans).

4. *See, e.g.*, Johnson v. Transp. Agency, 480 U.S. 616, 677 (1987) (Scalia, J., dissenting) (arguing that employers' voluntary affirmative action programs under Title VII subjected white males to a "powerful engine of racism and sexism").

5. For example, in *Bush v. Gore*, 121 S. Ct. 525 (2000), the Supreme Court found that a manual recount of undercounted votes in the absence of a uniform statewide standard violated the Equal Protection Clause. *Id.* at 532. Yet because the undercounted votes resided primarily in minority precincts, *see* Katherine Q. Seelye, *Divided Civil Rights Panel Approves Election Report: Racial Disparities on Vote Rejections Noted*, N.Y. TIMES, June 9, 2001 at A8 (reporting that, according to findings of the United States Civil Rights Commission, ballots cast by black Floridians were nearly seven times more likely to be rejected), the Court's blockage of a recount amounted to the use of the Equal Protection Clause to deprive voters of color of their franchise.

6. BULWORTH, *supra* note 1.

nomenclature of racial categories, we awaken to a rash of difficult questions about the intersection of race and money in politics, and indeed, about the extent to which the use of race in politics has allowed money its present reign. Equality may be an animating principle for campaign finance reform,[7] but even if money were removed from politics, race would still remain. Race, like money, miscues the electorate to behave in ways that are less than public-regarding. Race, like money, hinders democratic pluralism, each ceding the political realm to subordinating elites. Moreover, while whites may have more in common with blacks than with rich people, white political life is not about who white people are, but rather who they insist on differentiating themselves from—blacks.[8] White political life is also about who white people are assured of never being—black. Thus, despite the interest of some reformers in "see[ing] wealth stand alone as a classification,"[9] the bridge that they and the fictional Bulworth have attempted to construct between antisubordination and money in politics could ultimately prove too narrow a passage unless the political realities of race are central to its creation. In short, money may enable race, and race may enable money in our political process.

Fictional and half-baked though it may be, *Bulworth* raises these difficult questions both directly and implicitly. Art is not law, but sometimes it can inform the law. In this vein, this Article picks up where Hollywood left off, but with what will hopefully be viewed as possessing more analytical rigor. This Article deconstructs and then recasts the concept of equality as it is used in the context of campaign finance reform, taking account of the race-bound definitions of equality. Broadly speaking, it does so by asking, first, are white voters disenfranchised, and if so, how so? Second, is the political reality of black voters sufficiently different from that of whites such that the political equality campaign finance reformers envision might mean something different for whites than for people of color? Finally, if white disenfranchisement is different—or even non-existent—and this difference affects campaign finance reform's

7. *See, e.g.*, David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1370 (1994); Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1392 (1994).

8. *See* KATHLEEN HALL JAMIESON, DIRTY POLITICS: DECEPTION, DISTRACTION, AND DEMOCRACY 100–01 (1992) (discussing the out-group status of blacks and the exploitation of that status in campaigns to prime white stereotypes of blacks).

9. John White, *The Campaign Finance System and Its Impact on Candidates of Color as a Civil Rights Issue*, 43 HOW. L.J. 12, 26 (1999).

effectiveness relative to different racial groups, how should we conceptualize campaign finance reform to make it more inclusive?

These broad queries are addressed in three parts. Part I of this Article discusses how the very equality arguments that reformers have advanced on behalf of campaign finance reform have been employed against black political aspirations, creating an inequality along racial lines which changes the assumptions and effect of campaign finance reform for voters of color versus white voters. Part II explores the extent to which race acts as a speech resource for voters of color that is analogous to money and suggests that, given this parallel, the Supreme Court has either overregulated race or underregulated money in the political arena, or perhaps has committed both missteps. Part III provides a racial critique of the politics on the ground in the current campaign finance movement, looking specifically at some of its principal architects, opponents, and the centerpiece legislation of the movement, the McCain-Feingold bill, as well as probing the extent to which the debate has essentialized voters notwithstanding the significant differences created by race.

I. RACE, MONEY AND SKEPTICISM: THREE CLAIMS

> Many minorities, women, and working class citizens feel stigmatized and excluded by the operation of the private campaign finance system, which benefits the wealthy, who are disproportionately white and male.[10]

> I think I'd be a great Senator.... [B]ut the price that I have to pay to get there, or anybody has to pay to get there is just too enormous.... [T]here aren't 500 people in my district who have a disposable grand.[11]

Permit me—at least for the moment—to dispense with some of the more widely held, though still contestable, premises of the debate concerning campaign finance reform and its impact on people of color. Let's take as given that: (1) minorities constitute a disproportionate share of the poor,[12] who in turn are most

10. Jamin B. Raskin, *The Supreme Court's Racial Double Standard in Redistricting: Unequal Protection in Politics and The Scholarship That Defends It*, 14 J.L. & POL. 591, 630 (1998).

11. Congressman Jesse Jackson Jr., *The Campaign Finance System and Its Impact on Candidates of Color as a Civil Rights Issue*, 43 HOW. L.J. 12, 39 (1999).

12. The poverty rate for white Americans is 11%, while the poverty rate for African Americans and Latinos is 27% each. Bonifaz, *supra* note 3.

disadvantaged by the current system of private contributions;[13] (2) minorities, because they constitute a disproportionate share of the poor, are least likely to make campaign contributions to candidates;[14] and (3) minority candidates are less well funded because the disproportionately white contributors to campaigns tend to discriminate (loosely speaking) in their giving.[15]

From these premises, it may well follow perforce that campaign finance is a civil rights issue and that reform will resound to the

13. The paucity of candidates who hail from the poor or working class and who champion these groups' interests is one manifestation of this disadvantage. *See* Terry Smith, *Parties and Transformative Politics*, 100 COLUM. L. REV. 845, 864–65 (2000); *see also* ANTHONY CORRADO, CAMPAIGN FINANCE REFORM 34 (2000) ("[M]any individuals lack the resources and personal contacts needed to generate the hundreds of thousands of dollars now required for most House races. These potential candidates are thus effectively priced out of the market, which reduces the pool of citizens capable of mounting bids for our nation's highest offices and significantly reduces the choices available to the electorate."). Some rebut this claim. Bradley Smith, for example, has criticized overhaul proposals for what he maintains is their tendency to disadvantage "working people" who would not be able to volunteer their time to campaigns in lieu of giving money. Bradley A. Smith, *Money Talks: Speech, Corruption, Equality, And Campaign Finance*, 86 GEO. L.J. 45, 91 (1997). Smith ignores the likely reality that under the current system the overwhelming majority of working people give neither money, which they lack, nor time—because they are too busy working.

14. *See* PUBLIC CAMPAIGN, THE COLOR OF MONEY: CAMPAIGN CONTRIBUTIONS AND RACE 37 (1998), *available at* http://www.publiccampaign.org/colorofmoney (reporting that substantially fewer and smaller campaign contributions for federal candidates come from zip code areas in which people of color comprise 50% or more of the population) (on file with the North Carolina Law Review). A 1990 demographic profile of individual contributors revealed that 92.1% were white. *See* FRANK J. SORAUF, INSIDE CAMPAIGN FINANCE: MYTHS AND REALITIES 34 (1992).

15. *See* Robert Moore, *Short Changed: Race and Campaign Finance Reform* (Aug. 24, 2000), *at* http://www.innercitynews.com/special_report_from_the_nnpa_inv.htm (on file with the North Carolina Law Review). This report contains some startling findings that inferentially support this supposition. First, as of June 2000, more than $1.2 billion had been raised for the 2000 federal elections, yet black House candidates (both incumbents and challengers) had received only $11.7 million, or less than 1%. *Id.* More than one million individual contributions had been made to political parties and congressional and presidential candidates as of June 2000 for the 2000 elections, yet black candidates had received only approximately 15,000 contributions, about 1.5% of the total. *Id.* Party committees had allocated just $29,006 to black candidates. *Id.*

An earlier and more comprehensive study of campaign contributions in congressional races during the 1980s confirms the inference of the NNPA report. In this earlier report, John Theilmann and Al Wilhite found "a pattern of racial discrimination in the allocation of total campaign contributions." JOHN THEILMANN & AL WILHITE, DISCRIMINATION AND CONGRESSIONAL CAMPAIGN CONTRIBUTIONS 78 (1991). The authors' study controlled for variables such as candidate strength, opposition strength, party affiliation, and incumbency. *Id.* They concluded that "[b]ecause the primary determinants of candidates' fund-raising abilities are included in the analysis, the [funding] differential appears to be racially motivated." *Id.*

For a more detailed discussion of these and other findings regarding contributions to minority candidates, see *infra* Part III.

benefit of minorities, though the details of reform may be quite consequential. No argument from me. Instead, I want to advance three potentially complicating claims, claims that may enhance the foregoing premises but which also raise questions, the answers to which I do not purport to fully know. The first such complicating claim has to do with the equality arguments which animate campaign finance reform as a civil rights issue. Many of the equal protection analogies made in the campaign finance area also have been made, but have failed, in the voting rights context. While trying again has never hurt, the upshot of potential success in the campaign finance context may well be to lay bare the reality that equality means something different for poor and middle class whites than for poor and middle class blacks because racial inequality, *effectuated under the guise of equal protection*, has created a different benchmark.[16]

A second claim follows from the first. Part of what equal protection has not been allowed to remedy effectively is white voter resistance to candidates of color, a resistance fueled by racial cuing in both campaigns and in the media. Money turns out to be a major culprit in the perpetuation of this phenomenon because much of what it buys, whether in bi-racial or same-race contests, is a color-coded political message that has become a dominant backdrop in American politics.[17] Perhaps not coincidentally, the same voters—white voters—who prove susceptible to such racial messages also prove more susceptible to the more general evil thought to be perpetuated by too much money in politics: television advertising.[18] Voters of color and whites may be victimized by an excess of money in politics, but they are victimized in different ways and have different degrees of culpability for their respective harms.[19]

Finally, if racial difference is consequential both in terms of defining inequality and examining money's effect across demographic groups, then it is likely relevant in defining the equality that campaign finance reform might achieve. This invites a third complicating claim: If policy preferences and priorities are marked by racial schisms, then the morning after reform, race will remain as a barrier to equality for the very citizens whose history has provided the model for the campaign finance reform movement.[20]

16. *See infra* notes 21–58 and accompanying text.
17. *See infra* notes 59–98 and accompanying text.
18. *See infra* notes 59–98 and accompanying text.
19. *See infra* notes 59–98 and accompanying text.
20. *See infra* notes 99–109 and accompanying text.

A. *Unequal Inequality*

Buckley v. Valeo[21] is a jarring setback to those who view money's influence on the political process as creating unequal citizenship. In declaring limitations on campaign expenditures *verboten*, the Supreme Court in *Buckley* inscribed on the First Amendment a decidedly inegalitarian cast: "[T]he 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 . . . ."[22] Yet both before and after *Buckley*'s rejection of equality as a compelling interest for restricting expenditures, campaign finance advocates had looked to other constitutional provisions, principally the Fourteenth Amendment's Equal Protection Clause, for justification for limiting both contributions and expenditures in the name of political equality. While relying on Fourteenth Amendment precedent with varying degrees of racial overtones, these advocates fail to appreciate the role of race in defining political equality in the context of campaign finance. Race complicates the definition, not merely because blacks are poorer, but rather because the very equal protection principles advocates advance in favor of campaign finance reform have themselves been inverted to create the racial inequality that ultimately renders reform less meaningful for people of color.

Early scholarship advocating the application of the Equal Protection Clause to campaign finance appeared to hedge the question of race and focus instead on wealth differences. In 1974, Professor Marlene Nicholson identified the intended class of beneficiaries of an equal protection critique of an electoral system financed by private contributions as "all persons so poor that they are unable to make contributions of sufficient size to have substantial multiple vote and multiple representation effects."[23] That this class may consist of persons whose perceived and/or actual political interests are hostile, namely poor whites and poor blacks, does not detain Nicholson. Instead, she fluidly analogizes the plight of the less wealthy in the campaign finance context to Fourteenth and Fifteenth Amendment precedents which upon closer scrutiny have racial

21. 424 U.S. 1 (1976).

22. *Id.* at 48–49.

23. Marlene A. Nicholson, *Campaign Financing and Equal Protection*, 26 STAN. L. REV. 815, 830 (1974). Multiple votes result from the ability of wealthy contributors to influence the outcome of elections beyond merely casting a ballot; multiple representation ensues from multiple voting because wealthy contributors are given additional access to lawmakers and in some cases receive preferential legislation. *Id.* at 820–21.

overtones that unmask the over-simplification of her intended class of beneficiaries.

In invoking, for instance, the Supreme Court's one person, one vote jurisprudence as a justification for congressional regulation of campaign contributions,[24] Nicholson elides both the racialized factual context that gave rise to this renowned legal principle and the hollowness of the principle where racial factions exist within equi-populous electoral units. In *Reynolds v. Sims*,[25] white voters in the rural "Black Belt" districts who benefited from the over-concentration of voters in suburban districts did so because blacks in the rural districts were disenfranchised.[26] The plaintiffs who sought numerical parity among Alabama's legislative districts were white suburbanites.[27] The Court's failure to reckon with the group disenfranchisement of rural blacks rendered its remedy for white suburbanites of equi-populous districts illusory, because "[t]he 'weight' of a white vote in a remedial district with a heavily black [disenfranchised] population would be greater than that of a white vote in a heavily white district."[28] Even when taking cognizance of black disenfranchisement would have actually benefited the majority of white voters, the Court failed to do so.

Even if the specific remedy of equi-populous districts did not benefit blacks, the principle of *Reynolds* nevertheless held promise. In finding for the plaintiffs, the Supreme Court rested its decision on the principles that "each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies," and that "[f]ull and effective participation by all citizens in state government requires . . . that each citizen have an equally effective voice in the election of members of his state legislature."[29] Yet when confronted with these very same principles in cases in which black voters alleged unconstitutional dilution of their votes as black citizens, the Court saddled its one person, one vote precept with complexities of discriminatory intent[30] and sophistic

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24. *Id.* at 821 & n.36.

25. 377 U.S. 533 (1964).

26. Barbara Y. Phillips, *Reconsidering* Reynolds v. Sims: *The Relevance of Its Basic Standard of Equality to Other Vote Dilution Claims*, 38 HOW. L.J. 561, 566 (1995).

27. *Id.*

28. *Id.* at 585 n.21.

29. 377 U.S. at 565.

30. *See* Whitcomb v. Chavis, 403 U.S. 124, 149 (1971) ("[T]here is no suggestion here that Marion County's multi-member district, or similar districts throughout the State, were conceived or operated as purposeful devices to further racial or economic discrimination."); City of Mobile v. Bolden, 446 U.S. 55, 66 (1980) (plurality opinion) (requiring purposeful invidious intent "to minimize or cancel out the voting potential of

distinctions between partisan versus racial discrimination in the electoral process.[31] Whatever the one person, one vote analogy to campaign finance may mean for white voters, when one considers the failure of this principle to effectuate political equality on its original terms for voters of color, we may fairly question the impact of its importation into the campaign finance arena for minorities.[32]

Bullock v. Carter[33] is likewise a staple of the equality arguments on behalf of campaign finance reform. In *Bullock*, the Supreme Court invalidated on equal protection grounds a primary election filing fee that required candidates to pay upwards of $6,300 to gain access to the primary ballot.[34] The Court examined the fee system under heightened scrutiny because "the very size of the fees imposed under the Texas system gives it a patently exclusionary character" and thus has "a real and appreciable impact on the exercise of the franchise."[35] In finding that Texas could not justify its fee system as a law reasonably necessary to accomplish legitimate state objectives, the Court rejected claims that the fee system was necessary to prevent ballot cluttering and relieve the treasury of the cost of conducting primaries.[36]

In their widely cited 1993 critique of the current system of private campaign contributions,[37] Jamin Raskin and John Bonifaz read *Bullock* as a recognition by the Court of "nonaffluent citizens as a group with common interests in the political process."[38] And in her earlier analysis of *Bullock*, Nicholson finds an acknowledgment by

racial or ethnic minorities").

31. *Whitcomb*, 403 U.S. at 154 ("But are poor Negroes of the ghetto any more underrepresented than poor ghetto whites who also voted Democratic and lost, or any more discriminated against than other interest groups or voters in Marion County with allegiance to the Democratic Party, or, conversely, any less represented than Republican areas or voters in years of Republican defeat? We think not."). For an analysis of how race in fact tracks partisanship and vice versa, see Terry Smith, *Reinventing Black Politics: Senate Districts, Minority Vote Dilution and the Preservation of the Second Reconstruction*, 25 HASTINGS CONST. L.Q. 277, 323–43 (1998).

32. Thus Judge Skelly Wright's declaration that the role of money in politics was rendering the one person, one vote principle a "hollow mockery," *see* J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609, 609 (1982), fails to take stock of the faintness of that principle for voters of color to begin with.

33. 405 U.S. 134 (1972).

34. *Id.* at 149.

35. *Id.* at 143–44.

36. *Id.* at 145–48.

37. Jamin Raskin & John Bonifaz, *Equal Protection and the Wealth Primary*, 11 YALE L. & POL'Y REV. 273 (1993).

38. *Id.* at 287.

the Court of "the importance of economic class representation."[39] Taken as statements of case interpretation, these readings seem fair, if not incontrovertible. Taken, however, in the more concretized context of political equality for blacks, these interpretations have problematical implications. *Bullock* treated the right to vote as fundamental and correctly found the fee requirement a substantial burden on that right. There was little dispute that the fee created a disparity in voting power, giving affluent voters who could contribute the fee to their chosen candidate the opportunity to vote for that candidate while poor citizens could not similarly fund a standard bearer. The Court found this disparity subject to heightened scrutiny and ultimately invalidated the scheme even though "disparity in voting power based on wealth cannot be described by reference to discrete and precisely defined segments of the community as is typical of inequities challenged under the Equal Protection Clause."[40]

When presented, however, with a claim that Mobile, Alabama's at-large procedure for electing city commissioners discriminated against black voters in violation of the Fourteenth and Fifteenth Amendments,[41] a plurality of the Court, notwithstanding the fundamental right involved, denied relief, claiming that it needed a discrete and precisely defined group after all. Justice Marshall argued in his dissent that because black voters claimed that the at-large system unconstitutionally diluted their fundamental right to vote, no showing of intent was necessary, as would be the case if only suspect class discrimination were alleged.[42] The plurality, however, failed to perceive "how the implications of the dissenting opinion's theory of group representation could rationally be cabined."[43] Posing a series of hypothetical questions that purported to demonstrate the unwieldy effects of treating blacks as a political, rather than a racial, group whose fundamental right to vote had been burdened,[44] the plurality abandoned the premise of *Bullock*, even as it purported to recognize that "the right of a person to vote on an equal basis with other voters

39. Nicholson, *supra* note 23, at 826 (expressing dismay that a conservative Court, such as the Burger Court, would introduce economic class representation as an important factor).

40. *Bullock*, 405 U.S. at 144.

41. *See* City of Mobile v. Bolden, 446 U.S. 55, 58 (1980) (plurality opinion).

42. *Id.* at 104 (Marshall, J., dissenting) ("[O]ur vote-dilution decisions require only a showing of discriminatory impact to justify the invalidation of a multimember districting scheme, and, because they are premised on the fundamental interest in voting protected by the Fourteenth Amendment, the discriminatory-impact standard adopted by them is unaffected by *Washington v. Davis* and its progeny.").

43. *Id.* at 78–79 n.26 (plurality opinion).

44. *Id.* (plurality opinion).

draws much of its significance from the political associations that its exercise reflects."[45] As they do with *Reynolds v. Sims*,[46] in relying on *Bullock* advocates of campaign finance reform implicitly argue that a principle that has not been permitted to protect black voters as such can address their inequality in the context of campaign finance.[47]

Raskin and Bonifaz have made somewhat narrower use of the Supreme Court's decision in *Terry v. Adams*.[48] *Terry* is more explicitly racialized than either *Reynolds v. Sims* or *Bullock v. Carter*. In *Terry*, the Court struck down on Fifteenth Amendment grounds a Byzantine local election system in Texas in which a nominally private association conducted a whites-only pre-primary that effectively dictated the outcome of the formal state-run Democratic primary. The defendants contended that the so-called Jaybird primary, the antecedent contest, did not constitute state action because it was run by private citizens. The Court rejected this argument because as a factual matter the Jaybird primary had become so intertwined with the Democratic primary, dictating its outcome, that its operation discriminated against black voters in violation of the Fifteenth Amendment.[49] Raskin and Bonifaz employ *Terry* to remove the state-action hurdle from an equal protection challenge to the current system of privately financed campaigns, which they deem a "wealth primary."[50] According to Raskin and Bonifaz, "[t]he critical importance of the wealth primary to election results should be enough to warrant constitutional scrutiny even though the process of private fund-raising assumes the form of voluntary association of unofficial character."[51]

Terry and the other White Primary cases[52] are important contributions in defining an expansive doctrine of state action, one that is perhaps sufficiently broad to allow a challenge to the current campaign finance system of private contributions. *Terry*, however, is

45. *Id.* at 78 (plurality opinion).

46. 377 U.S. 533 (1964).

47. Moreover, because the basic rationale of *Bullock* derived from the Court's Fourteenth Amendment cases striking down poll taxes used to perpetuate black disenfranchisement, its extension to campaign finance and its rejection in the more race-specific context of *Bolden* underscore a more fundamental neglect of black interests.

48. 345 U.S. 461 (1953).

49. *Id.* at 469–70.

50. Raskin & Bonifaz, *supra* note 37, at 306–12.

51. *Id.* at 309 (internal quotations omitted); *see also* Nicholson, *supra* note 23, at 831–32 (arguing based on *Terry* that the current privately funded campaign finance system constitutes state action).

52. *See* Smith v. Allwright, 321 U.S. 649 (1944); Grovey v. Townsend, 295 U.S. 45 (1935); Nixon v. Condon, 286 U.S. 73 (1932); Nixon v. Herndon, 273 U.S. 536 (1927).

also a striking affirmation of Madisonian pluralism, for it "established a rule against invidious discrimination where party processes, even nominally private ones, intersect with the right to vote so as to prevent the effective exercise of that right."[53] Rather than employ *Terry*'s rule against invidious discrimination to encourage pluralism in the political process (a value that, incidentally, animates the Court's disallowance of campaign expenditure limitations[54]), the Court has used the rule as a tool of retrenchment against minority aspirations for political power, particularly in the redistricting context.[55] Thus, even though *Terry* has not been permitted to augment minority political power beyond the right not to be excluded from party primaries, the implicit promise of reformers is that it will assist in doing precisely that in the even less analogous context of campaign finance.

This claim, as well as arguments based on one person, one vote principles and protections against wealth discrimination, are all plausible. The Court's refusal to extend or consistently apply the principles on which these cases rest does not definitively portend that it will do the same in the case of campaign finance. Moreover, the commentators who invoke these principles are not blind to the inequality of race, even if they do not draw the connection between race and money. To his credit, for example, Professor Raskin has been highly critical of the Supreme Court's racial gerrymandering decisions,[56] while at the same time vigorously advocating campaign finance reform. And Cass Sunstein, another reformer, has offered a unified theory of constitutional interpretation that evaluates both affirmative action and campaign finance regulation in terms of the degree to which the Fourteenth and First Amendments, respectively, reject "status quo neutrality" that produces caste-like effects within the polity.[57] But a consistency across contexts does not recognize the problematical nature of the intersection of race and money. [58] The

53. Smith, *Parties and Transformative Politics*, *supra* note 13, at 849.

54. *See id.* at 857–60.

55. *Id.* at 850 (arguing that the Court's hyper-scrutiny of majority-minority congressional districts in cases such as *Shaw v. Reno*, 509 U.S. 630 (1993), departs from Madisonian pluralism).

56. *See generally* Raskin, *supra* note 10 (criticizing current legislative redistricting for dismantling majority-minority districts).

57. CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 154, 223–24, 338–44 (1993).

58. Scholars' recognition of this intersection has so far been fleeting and superficial. *See* Raskin & Bonifaz, *supra* note 37, at 332 n.26 (suggesting without detailed analysis that the current campaign finance system of private contributions may discriminate against minority candidates in violation of the Voting Rights Act of 1965, 42 U.S.C. § 1973(b) (1994)); *see also* Sunstein, *supra* note 7, at 1409–10 (demonstrating sensitivity to the

Court's refusal to apply its Equal Protection and Fifteenth Amendment jurisprudence consistently in the face of claims for black political equality has created a baseline differential in the meaning of political equality such that homogenized references to the poor or middle class and their need for campaign finance reform are too facile to be meaningful.

The different meanings of equality for different races of voters raise a series of complex questions. What does it mean for white voters, who are a controlling majority, to claim that they are unequal? Does white inequality in the context of campaign finance reform mean something different than claims of white inequality in the Fourteenth Amendment context, claims which often are bottomed on charges of "reverse discrimination"? Can we realistically equate wealth inequality with racial inequality? Is there any codependency between the two types of inequality—that is, within the context of campaign finance reform, must one be eradicated in order to successfully address the other? If wealth inequality's effect is to give the wealthy 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? These questions center on a reality to which reformers have thus far paid insufficient attention: the meaning of political equality among political unequals who are unequal for different reasons and to different degrees. To begin to sort some of these complexities, consider below a harm of money that is unique to voters of color, how the vehicle for its perpetration—the mass media—causes a distinct harm to white voters, and how reformers fail to appreciate the divergent consequences occurring along a common axis.

B. Cues and Miscues

Imagine that the first Senate contest between Jesse Helms, the ultra-conservative white Republican incumbent, and Harvey Gantt, his black opponent and the former mayor of Charlotte, took place not in our current campaign finance system but in a publicly funded one advocated by, among others, Professor Jamin Raskin and attorney John Bonifaz.[59] Raskin and Bonifaz have argued that democratically financed campaigns further the Equal Protection Clause's

question of race in the campaign finance reform debate by noting that the elimination of political action committees (PACs) may harm some minority candidates "who can succeed only with the help of PACs specifically organized for their particular benefit").

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

requirement that "all citizens enjoy sufficient equality in the political field to participate meaningfully in public elections as voters, speakers, and candidates whenever they so desire."[60] Meaningful participation, they appear to suggest, is not limited to having the opportunity to vote for candidates of varied socioeconomic backgrounds but also encompasses a correlative right of equal representation.[61] The praxis of the Raskin/Bonifaz theory has resulted in equal protection challenges to such varied offices as congressional elections in New York,[62] state senate elections in Georgia,[63] and judicial elections in Los Angeles County, California.[64]

Even in the more antiseptic world of democratically financed elections, however, an often formidable nemesis would have reared its head in the Helms/Gantt contest. Ten days before election day, Gantt was leading, and Helms broadcast a controversial television ad, which:

> showed the plaid-shirted arms and white hands of a male, a simple gold wedding ring on the third finger of his left hand, opening, presumably reading, and then crumbling a rejection letter as the announcer says "You needed that job, and you were the best qualified. But they had to give it to a minority because of a racial quota. Is that really fair? Harvey Gantt says it is. Gantt supports Ted Kennedy's racial quota law that makes the color of your skin more important than your qualifications. You'll vote on this issue next Tuesday. For racial quotas: Harvey Gantt. Against racial quotas: Jesse Helms."[65]

Helms went on to win the contest with 52.5% of the vote, and focus groups of North Carolina voters questioned about that ad suggest that it and other anti-affirmative action ads by Helms were effective, if not decisive.[66] The closeness of the race despite Gantt's monetary disadvantage[67] underscores a fact to which reformers pay

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60. *Id.* at 1164.

61. *Id.* at 1167, 1179.

62. *See* Albanese v. FEC, 884 F. Supp. 685, 687 (E.D.N.Y. 1995).

63. *See* Ga. State Conference of NAACP v. Cox, 183 F.3d 1259, 1261 (11th Cir. 1999).

64. *See* NAACP v. Jones, 131 F.3d 1317, 1320 (9th Cir. 1997).

65. JAMIESON, *supra* note 8, at 97.

66. *Id.* at 97–100; Carol M. Swain, *Affirmative Action Revisited, in* RACE VERSUS CLASS: THE NEW AFFIRMATIVE ACTION DEBATE 34 (Carol M. Swain ed., 1996).

67. Federal Election Commission records reveal that Gantt's total receipts from individual and political action committee contributions were $7,856,827, the highest amount raised by a challenger during the 1989–90 election cycle. *See* Federal Election Commission, Press Release, *1990 Congressional Candidates Post Spending Drop, Final FEC Report Shows*, Dec. 10, 1991, at 24. This compared with $13,329,025 raised by

insufficient attention: Money matters, but the messages that money buys and who those messages galvanize voters against are as relevant an issue for people of color as money itself.[68] In a world where partisan identification serves a decreased role as an electoral cue for white voters,[69] the symbolic content of what money purchases, particularly when it is imbued with race, supplies a premise for reform that differentiates along racial lines. For white voters, the immediacy of campaign finance may have less to do with curing the ills of blighted ghettos, as *Bulworth* suggests, and more to do with saving these voters from their own impulses.

Few dispute the proposition that the cost of television advertising drives the rapid increases in campaign costs and the corresponding money chase,[70] but the cost of television and the resultant lack of equal access to this medium are not the sole culprits in the eyes of many reformers. Instead, as Professors Samuel Issacharoff and Pam Karlan have observed:

Helms, the largest sum raised by any incumbent. *Id.* In terms of independent expenditures by groups nominally unaffiliated with either campaign, Helms had the largest amount of independent expenditures spent against him of any congressional candidate and the second largest amount spent on his behalf. *Id.* at 12.

68. I do not mean to suggest that additional funding would not have been helpful to Gantt in responding to and overcoming Helms's spurious claims. But we simply must appreciate that race has force independent of, and often times greater than, money. Thus, although a progressive incumbent Democrat, Governor Ray Mabus of Mississippi, outspent his challenger by five to one, the challenger, running on a race-laden platform of repealing the Voting Rights Act of 1965 and having prison inmates work in cotton fields, unseated Mabus. JAMIESON, *supra* note 8, at 93. And although the incumbent Democrat J. Bennett Johnston of Louisiana out-fundraised his white-supremacist opponent, David Duke, by almost $1.5 million in their 1990 Senate contest, *see* Federal Election Commission, Press Release, *supra* note 67, at 24, Duke still captured a majority of white votes. *See* 46 CONG. Q. ALMANAC 916 (1990) (reporting that Duke is estimated to have won 60% of the white vote).

69. *See* KAREN S. JOHNSON-CARTEE & GARY A. COPELAND, INSIDE POLITICAL CAMPAIGNS: THEORY AND PRACTICE 98–99 (1997) ("[The] reduction in party influence has led to an elevation of the power of the media and particularly of television in influencing elections.") (citation omitted); BRUCE E. KEITH ET AL., THE MYTH OF THE INDEPENDENT VOTER 31 (1992) (noting that blacks are substantially less likely to call themselves independents than whites).

70. HERBERT E. ALEXANDER, MONEY IN POLITICS 32–33 (1972) (noting the rise in campaign broadcasting costs throughout the 1950s and 1960s); DARRELL M. WEST, AIR WARS: TELEVISION ADVERTISING IN ELECTION CAMPAIGNS, 1952–1996, at 17 (2d ed. 1997) ("[A]dvertising represents the largest single expenditure in most contemporary campaigns . . . ."); Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 684–85 (1997) (reciting, with disapproval, the arguments of critics who call for expenditure limits in order to curtail the influence of television advertising by campaigns and force candidates to use less expensive, more informative channels of communication).

> The reformers' agenda is driven by the image of a quite different consumer of political news, sitting in his arm chair in front of a quite different screen. Most of the money that they see as having corrupted our political system goes into television spots, particularly emotional attack advertising. The thoughtful citizen can simply disregard these noxious offerings or turn off the TV.... But the reformers must believe that most voters are *not* thoughtful citizens.... Thus, money, in the guise of spending on substantively vacuous mass media advertising, distorts the election process by influencing how these slackers cast their ballots.... The real problem is that spots are an effective way of reaching the affective voter; money in the system allows this to happen.[71]

Issacharoff and Karlan are skeptical that this republican-communitarian perspective of campaign finance actually breeds equality. In fact, they claim, it unjustifiably privileges deliberative speech over affective speech and unfairly disadvantages the commodification of money in the political process relative to other political resources.[72] Loosely analogizing the republican-communitarian view of campaign finance reform to the antidemocratic practices of poll taxes, property qualifications and the exclusion of racial and gender groups, Professor Daniel Ortiz makes a similar observation about the potential inequality wrought by campaign finance reform.[73] According to Oritz:

> [C]ampaign finance regulation does frustrate certain voters from exercising choice in ways they otherwise would and minimizes the overall effect of their votes if they do. In a sense, then, campaign finance regulation is to many of these practices as racial gerrymandering is to outright racial exclusion. Like racial gerrymandering, campaign finance regulation does not bar anyone from voting, but it does dilute the effect of certain votes: the votes of those who respond to politics in certain disfavored ways.... Regulation starves these voters of the stimulus to which they are most likely to respond or at least makes sure that all the

71. Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1727 (1999).

72. *Id.* at 1727–31.

73. Daniel R. Ortiz, *The Democratic Paradox of Campaign Finance Reform*, 50 STAN. L. REV. 893, 905–10 (1998).

> candidates can make a roughly equal number of such appeals.[74]

In offering inequality as a downside to the regulation of money in politics, however, perhaps Issacharoff, Karlan, and Oritz pay too little heed to the racial inequality that money perpetuates. The infamous Willie Horton television spot from the 1988 presidential campaign was financed by an independent expenditure made on behalf of the George Bush campaign which current law leaves unchecked.[75] The inequality it perpetuated was not merely a resource differential in which one party or candidate is able to outspend the other with the aid of nominally unaffiliated groups,[76] but a racial inequality:

> Owing to Horton's visage, made clear in 'Weekend Passes' and network news coverage, skin color was an obvious factor in how voters saw the crime spree. Republicans had picked the perfect racial offense, that of a black felon raping a white woman.
>
> Experimental research demonstrates that viewers saw the story as involving race more than crime. According to researchers, the ad 'mobilized whites' racial prejudice, not their worries about crime.' Viewers became much more likely to feel negatively about blacks in general after having heard the details of the case.[77]

Nor is the Willie Horton episode atypical of the racial inequality that money perpetuates through the electoral process. Racial cuing—"the articulation of racial meaning and identities in conflictual, albeit somewhat masked terms"—continues to be a significant strategy in American politics.[78] Moreover, such appeals often take forms that

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74. *Id.* at 910.

75. *See* DARRELL M. WEST, CHECKBOOK DEMOCRACY: HOW MONEY CORRUPTS GOVERNMENT 16–38 (2000).

76. *See id.* at 38 (discussing the problems associated with one candidate having more resources than the other).

77. *Id.* at 30–31 (footnotes omitted); *see also* JAMIESON, *supra* note 8, at 24 ("It is no accident that the image chosen by the Republicans to symbolize the Massachusetts furlough system was a black male.").

78. Howard Winant, *Postmodern Racial Politics in the United States: Difference and Inequality, in* THE POLITICS OF RACE: AFRICAN AMERICANS AND THE POLITICAL SYSTEM 55, 61 (Theodore Rueter ed., 1995); *see also* KEITH REEVES, VOTING HOPES OR FEARS? WHITE VOTERS, BLACK CANDIDATES & RACIAL POLITICS IN AMERICA 45–47 (1997). In addition to exploring racial appeals by candidates themselves—appeals which Reeves defines as simply calling the public's attention to the race of one's opponent—Reeves explores the extent to which the media, through its gratuitous mention of a candidate's race, inadvertently engages in racial cuing. *Id.*

are more subtle than the Willie Horton advertisement, dissembling themselves in Aesopian terms to avoid political opprobrium, but all the while appealing to a latent racism in many white voters.[79] When a Nixon for President commercial claimed that the country had been deluged with programs for the unemployed and the poor and that it was time to take people from welfare rolls and place them on payrolls, "[i]t would appear that Nixon meant to keep poor and black America separate from middle America, and he was signaling middle America that, if elected, he would 'protect' them from the welfare cheats, youthful hoods, and other shiftless people on the dole."[80] Is race not at work when Bernard Epton, a white candidate challenging Harold Washington, a black congressman, for mayor of Chicago ends his commercials with "Epton—Before It's Too Late"?[81] And when Peter Fitzgerald, running against Carol Moseley-Braun, the first African-American woman ever elected to the United States Senate, airs television advertisements implying that his opponent had misappropriated campaign funds to purchase luxury personal items despite the absence of any such determination by the relevant investigative authorities,[82] his message is one of black criminality and profligacy as much as anything else.[83]

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79. *See* JEFF MANZA & CLEM BROOKS, SOCIAL CLEAVAGES AND POLITICAL CHANGE 157 (1999). Manza and Brooks write:

> [D]irect appeals along race lines, common between the 1940s and the 1960s, are now increasingly rare. The race divide has instead become more subtle, manifesting itself in coded or symbolic forms, in recent decades. Many analysts have demonstrated the powerful effects of racial attitudes in structuring whites' political behavior.... Although this literature spans several divergent theoretical perspectives, the most widely held view is that a 'new' or 'subtle racism' has emerged in recent decades. In contrast to earlier racial belief systems, this form of racism affirms individualistic principles of freedom and equal opportunity while simultaneously opposing the implementation of policies designed to achieve racial equality.

Id. (footnote omitted).

80. ROBERT SPERO, THE DUPING OF THE AMERICAN VOTER: DISHONESTY AND DECEPTION IN PRESIDENTIAL TELEVISION ADVERTISING 96–98 (1980).

81. JAMIESON, *supra* note 8, at 109.

82. Mary Jacoby, *'98 is not Sen. Moseley-Braun's Year*, ST. PETERSBURG TIMES, Oct. 31, 1998, at 1A, LEXIS, St. Petersburg Times File.

83. That Fitzgerald ran his campaign with race in mind is evidenced by his infelicitous victory speech on election night. Further perpetuating his theme that the black incumbent, Carol Moseley-Braun, had paid too much attention to the city of Chicago (which, perhaps only coincidentally, has a large black and Hispanic population), Fitzgerald said then that he would represent "all colors, all ages, the young and old, the people who live on our farms, in our small towns and our big cities." Flynn McRoberts & Bob Kemper, *Democrats Gain Nationally; Republican Ousts 1-Term Incumbent*, CHI. TRIB., Nov. 4, 1998, § 1, at 1. Money assisted Fitzgerald greatly in carrying his message. Fitzgerald, a man of considerable personal fortune, outspent Moseley-Braun by a

The reform that Oritz and others may characterize as an impingement on equality—namely the right of the voter to consume freely whatever a campaign wishes to communicate, however it wishes to communicate it—has direct victims. They are society's out-groups, racial minorities against whom there exists latent and overt antipathy ready to be tapped by the expenditure of money on ads ranging from Willie Horton to more subtle but equally insidious fare.

I am not suggesting that the government could or should outlaw Willie Horton-type demagoguery.[84] I do mean, however, to portray the racially different ways in which money in politics harms voters. For racial minorities, the harm is a classic perpetuation of their status as a "discrete and insular" minority, disfavored by society at large. But if some commentators have overemphasized campaign finance reform's potential burden on equality, reformers themselves appear to have underappreciated the racial difference in the harm of the current system. To speak generically of civic slackers making bad judgments from bad information consumed from thirty-second spots on television ignores the reality of to whom those spots are directed. Not black voters. Between 80 and 90% of all campaign resources are spent in pursuit of so-called "persuadable voters."[85] "A persuadable voter is generally defined as one who has voted in the past few elections and has had a history of splitting his or her ballot.... [T]he voter is 'pursuable' because (*a*) this person does vote and (*b*) this person has not exhibited past loyalty to either party."[86] Given their

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substantial margin. *See* Jacoby, *supra* note 82.

Criminality was also most recently the charge insinuated against a Latino candidate, Antonio Villaraigosa, in the Los Angeles mayoral runoff. *See* David S. Jackson, *How the West Was Won*, TIME, June 18, 2001, at 33. In that contest, the victor, James Hahn, a white Democrat, ran a television ad featuring images of a crack-cocaine pipe that discussed a 1996 letter that Villaraigosa wrote to the Clinton administration seeking a presidential pardon for a convicted drug trafficker. The commercial's tagline: "Los Angeles can't trust Antonio Villaraigosa." *Id.*

84. *But see* Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 449, 454–57 (arguing, within the context of racist speech on college campuses, that a balancing of the speaker's First Amendment interests with the constitutional harms visited upon the object of the speech supports limited content regulation of certain racist speech).

85. PAUL FRYMER, UNEASY ALLIANCES: RACE AND PARTY COMPETITION IN AMERICA 127 (1999).

86. *Id.* at 128; *see also* STEPHEN ANSOLABEHERE & SHANTO IYENGAR, GOING NEGATIVE: HOW ATTACK ADS SHRINK AND POLARIZE THE ELECTORATE 97 (1995) ("Because Independents are less responsive to political appeals, candidates who face increasingly nonpartisan constituencies must spend ever larger amounts of money simply to persuade voters."); Richard L. Berke, *Focusing on the Few, Blind to the Many*, N.Y. TIMES, Oct. 22, 2000, § 4 (Week in Review), at 1 (noting that Bush and Gore had "so narrow-casted their message to a sliver of voters in swing states crucial for an electoral

bedrock loyalty to (or captured status within) the Democratic Party, blacks are largely excluded from this group.[87] Instead, as Gore-Lieberman 2000 campaign manager Donna Brazile explained at a recent forum on the 2000 contest, core constituencies such as blacks are addressed with a "parallel strategy" while "the candidate is focused on reaching out to suburbanites and independent, middle class [voters]."[88]

The wisdom of pursuing independent voters so intently is not my immediate concern.[89] Instead, the point is that if the republican-communitarian description of the evil of money in politics is correct, it is an evil that is aided and abetted by white voters who lack strong ideological or partisan moorings. These voters may well be harmed by the system that they unwittingly foster, but we should appreciate that their "inequality"—the inequality of a white, controlling majority—is different from the harm of money visited upon racial minorities.

Money's harm to white voters may be appropriately analogized to the term-limits movement. Courts have upheld term limits on state and local elected officials against First Amendment attack on the grounds that states have legitimate, if not compelling, interests in (1) preventing unfair incumbency advantages through incumbent entrenchment;[90] (2) increasing voter participation in elections and involvement in government;[91] and (3) preserving the general integrity of the electoral process.[92] Commentators have observed that both

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college victory that they have deserted the rest").

87. FRYMER, *supra* note 85, at 128.

88. *Presidential Campaign Review* (C-SPAN television broadcast, Jan. 26, 2001) (Video Archives, Reference #162170). While Brazile credited this parallel strategy with turning out the Democratic base in the 2000 elections, *id.*, Gore's overarching aim of reaching swing voters led him to neglect issues of special importance to African Americans. *See, e.g.*, Berke, *supra* note 86 (reporting that for the sake of garnering undecided votes in swing states, Gore had declined to probe Bush's vulnerabilities on the death penalty, such as the racial disparities in its application).

89. *But see* FRYMER, *supra* note 85, at 120, 131–37 (arguing that the failure of the Democratic party to mobilize the black vote marginalizes the interests of blacks and alienates them from the political process). As Frymer cogently notes,

> When party leaders focus their appeals on white swing voters, those messages, with their valorization of whites, are communicated to the national electorate. Furthermore, when party leaders assume that messages focusing on black concerns will detract from their pursuit of the median white voter, the resulting silence regarding black concerns has significant consequences for national behavior.

Id. at 120.

90. Bates v. Jones, 131 F.3d 843, 847 (9th Cir. 1997).

91. Ray v. Mortham, 742 So. 2d 1276, 1285 (Fla. 1999).

92. Miyazawa v. City of Cincinnati, 825 F. Supp. 816, 822 (S.D. Ohio 1993), *aff'd*, 45

campaign finance reform and term limits are directed at similar perceived evils.[93] Although courts' analyses of term limits typically assess their burdens on freedom of association rather than speech,[94] it is difficult to see how courts can forbid expenditure limitations as an abridgement of speech while upholding term limits. Term limits on state officeholders are nearly identical to limits on campaign expenditures because political association itself often has some expressive purpose.[95] Term limits, like expenditure limits, permit some expression but do not allow unlimited voice. While the limitation on expression in the case of term limits is temporal rather than monetary, this distinction cannot be legally significant, for in both cases the quantity of expression is controlled. Likewise, it cannot be legally controlling that in the case of term limits, the expression occurs by running for office (in the case of the candidate) or by voting (in the case of the candidate's supporters) rather than by spending. Surely expression through voting should at least be on constitutional par with expression by the expenditure of money. Either expenditure limits are valid, or term limits are invalid.

Putting to one side their doctrinal parallels, the campaign finance reform and term-limits movements also share an unflattering socio-political premise: they both admit of a majority electorate (in this case, predominated by white voters) who distrust their own decision-making capabilities—for they could, after all, simply not vote for a candidate who offends the principles of these two movements—and

F.3d 126 (6th Cir. 1995).

93. *See* John O. McGinnis & Michael B. Rappaport, *Supermajority Rules As A Constitutional Solution*, 40 WM. & MARY L. REV. 365, 398 (1999) ("Proponents of campaign finance reform attempt to restrain special interests by limiting campaign contributions. Proponents of term limits try to solve the problem by curtailing the power of long-term politicians who are likely to be beholden to special interests."); Sullivan, *supra* note 70, at 686 (noting that some prominent advocates of campaign finance reform as a tool against unfair incumbency advantage also support term limits); Steven G. Calabresi, *"The Era of Big Government Is Over"*, 50 STAN. L. REV. 1015, 1024 (1998) (reviewing ALAN BRINKLEY ET AL., NEW FEDERALIST PAPERS: ESSAYS IN DEFENSE OF THE CONSTITUTION (1997)) (noting that term limits and campaign finance reform could make elections more competitive, though campaign finance reform is less likely to achieve this goal and may well exacerbate the problem).

94. *See, e.g.*, *Ray*, 742 So. 2d at 1285 ("Candidate qualification rules, such as term limits, implicate the right to associate for the advancement of political beliefs and the right of qualified voters to cast their votes effectively, which are rights protected by the First and Fourteenth Amendments.").

95. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 22 (1976) (finding that congressional limits on independent campaign expenditures "precludes most associations from effectively amplifying *the voice* of their adherents, the original basis for the recognition of First Amendment protection of freedom of association") (emphasis supplied).

who, moreover, distrust the collective decision-making process of voting.[96]

Black voters lack the power of a controlling white majority, and, moreover, they often display a political judgment that is substantially at variance with that of white voters.[97] It is difficult, then, to ascribe the same (self-inflicted) harms to them as may be attributed to white voters.[98] Instead, money harms voters of color by creating for them, in the words of the Voting Rights Act of 1965, "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[99]

C. *The Morning After Reform*

Race is constitutive of any definition of political equality, whether that definition focuses on money's role in politics or any other dimension of equality. As illustrated in Parts I.A and I.B race not only establishes a distinctive baseline of political equality for people of color, it also collaborates with money, " 'driv[ing] a wedge through alliances of the working classes and the poor, and giv[ing] both momentum and vitality to the drive to establish a national majority inclined by income and demography to support policies benefiting the affluent and the upper-middle class.' "[100] Indeed, race

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96. *See, e.g.*, Robert Henry, *Deliberations About Democracy: Revolutions, Republicanism and Reform*, 34 WILLAMETTE L. REV. 533, 574 (1998) ("The animating force, besides occasional demagoguery, behind term limits is that you can fool most of the people most of the time and that we cannot always rely on majority rule.").

97. In presidential contests from 1976 to 1996, blacks provided a minimum of 82% of their votes to the Democratic candidates. Marjorie Connelly, *Who Voted: A Portrait of American Politics, 1976–2000*, N.Y. TIMES, Nov. 12, 2000, § 4 (Week in Review), at 4. In contrast, in each of these same elections, white voters provided a majority or a plurality of their votes to the Republican candidate. *Id.* This pattern persisted in the 2000 presidential contest, as Al Gore captured the votes of most black, Latino and Asian voters, while George W. Bush carried the white vote. *Id.* Somewhat astonishingly, notwithstanding the Supreme Court's pronouncement in *Bush v. Gore*, 121 S. Ct. 525 (2000), while a majority of Americans accept George W. Bush as the legitimate president, three-quarters of African Americans do not. *See* Richard L. Berke & Janet Elder, *60 Percent in Poll Approve of Bush Early in His Term*, N.Y. TIMES, Mar. 14, 2001, at A1. Perhaps no fact better underscores the dissonance between white and black voters.

98. Indeed, some have suggested that black voters are more politically sophisticated than other social groups. *See* KATHERINE TATE, FROM PROTEST TO POLITICS: THE NEW BLACK VOTERS IN AMERICAN ELECTIONS 124 (1994) (citing I. A. Lewis & William Schneider, *Black Voting, Bloc Voting and the Democrats*, *in* 6(5) PUB. OPINION 12–15, 59 (1983)).

99. 42 U.S.C. § 1973(b) (1994).

100. *See* JOHNSON-CARTEE & COPELAND, *supra* note 69, at 55 (quoting T.B. Edsall & M.D. Edsall, *Race*, ATLANTIC MONTHLY 53 (May 1991)); *see also* Frances Lee Ansley, *Stirring The Ashes: Race, Class and The Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993, 1025–34 (1989) (discussing the conception of white supremacy as a tool that

has played a critical role in the creation of the basic left-right continuum that now characterizes American political discourse and policy.[101] Thus, Professor Burt Neuborne's argument that "[t]he Supreme Court should recognize that a compelling governmental interest exists in fostering both the reality, and the perception, of the capacity of elected representatives to make principled choices, driven by a belief in the common good,"[102] begs the question: To what extent does race skew our definition of the common good, making elusive a principal aim of reform—that of a more public-regarding legislator—not only for voters of color, but for the poor and middle class whites who, because of race and racism, refuse to form governing coalitions with voters of color? If race is not a critical element of reform efforts now, the morning after reform will look much like the day before: the common good losing to narrower, elite interests because people are unable to overcome racial predispositions. In the words of the fictional Bulworth, "Rich people have always stayed on top by dividing white people from colored people."[103]

Race remains the most significant social cleavage in the formation of electoral and governing coalitions.[104] Although there is substantial dispute about whether racial cleavage has displaced class cleavage,[105] it is clear that "when the race cleavage grows during a particular election, the class cleavage experiences a corresponding shrinkage during that election."[106] Importantly, and consistent with the discussion in Part I.B this inverse relationship can be triggered even in the absence of explicit racial cues,[107] which suggests that race is often present even if not readily discernible. Thus, to the extent that reformers' conception of the common good means the implementation of policies that benefit the lower and middle classes,[108] race (meaning the division of lower-class whites from

facilitates the domination of poor people of all races).

101. *See* JOHNSON-CARTEE & COPELAND, *supra* note 69, at 54–55 (attributing the emergence of voter political ideology along a liberal-conservative issue dimension to the racial polarization of the 1960s civil rights era).

102. *See* Burt Neuborne, *One Dollar-One Vote: A Preface to Debating Campaign Finance Reform*, 37 WASHBURN L.J. 1, 46 (1997).

103. BULWORTH, *supra* note 1.

104. *See* MANZA & BROOKS, *supra* note 79, at 5, 168–70. Although the authors' study is primarily concerned with social cleavages in the formation of electoral coalitions, such cleavages ultimately affect policy preferences and agendas. *Id.* at 1.

105. *Id.* at 168–75.

106. *Id.* at 175.

107. *Id.*

108. Proponents of reform suggest that the current system of private campaign finance

blacks) may preclude the realization of this ideal as effectively as money.

Reformers, then, are left with a hard choice. They can engage in "consciousness-raising,"[109] which would, in blunt terms, require convincing poor and middle-class white voters of just how black (i.e., unequal) they really are. Or they can hide race, which, because of the racial predispositions which inform voter policy preferences to the detriment of their class interests, would have the paradoxical effect of defeating one of the broad-based aims of reform, that of creating a more public-regarding legislative process.[110] For reformers, then, it is either race now or later, but race it shall inevitably be.

II. THE EXPRESSIVE FUNCTIONS OF RACE

As explained in Part I, race and money are interrelated in politics because (1) Equal Protection jurisprudence has failed to protect the political aspirations of blacks *qua* blacks to the point of reducing the efficacy of any money reforms; (2) money in politics is used to subordinate voters of color through the use of racially coded campaign propaganda; and (3) the racial divisions that ensue from money's cuing role in electoral politics are also reflected in the policy preferences of whites who might stand to benefit from campaign finance, making it necessary for reformers to address race as a precondition, or at least a concurrent condition, to class. Race is integral to money in politics in yet another central way: Just as race is a caste when employed in the non-transformative manner previously discussed, it is also an agent of equality ascendancy in a different context.[111]

The unequal inequality described in Part I is rooted in an artificially cabined view of speech in relation to race, harbored by a Court which may possess an unreasonably expansive view of speech

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resounds primarily to the disadvantage of these groups.

109. *See* Mari J. Matsuda, *Pragmatism Modified and The False Consciousness Problem*, 63 S. CAL. L. REV. 1763, 1778–79 (1990) (defining consciousness-raising as "a collective practice of searching for self-knowledge through close examination of our own circumstances, in conjunction with organized movements to end existing conditions of domination").

110. For an analysis of the manner in which leaders of the current campaign finance movement hide or ignore race, see *infra* Part III.A.

111. I use the term "transformative" here in the same sense in which I have discussed transformative politics elsewhere: "Transformative politics are policies that are remedial in nature, that transcend ordinary political discourse, and that offer the promise of fundamental, positive change in the lives of those toward whom such policies are directed." *See* Smith, *Parties and Transformative Politics*, *supra* note 13, at 845–46.

in relation to money. Citizens have different speech resources.[112] Money is one such resource.[113] For those who lack this resource, however, other avenues of expression must be pursued. A constitutional jurisprudence that in effect permits the unfettered expenditure of one resource (money),[114] while substantially limiting the expenditure of others (in this instance, race),[115] hardly allows the people to "retain control over the quantity and range of debate on public issues in a political campaign."[116] To the contrary, the Supreme Court has privileged the expenditure of money over other avenues of participation.[117]

It is not difficult to conceive of race as a form of expression, especially within the context of politics. As a doctrinal matter, because the First Amendment protects political association as well as speech,[118] black voters petitioning state legislatures for the creation of majority-minority districts and joining together to elect their preferred candidate is protected activity which meets at the nexus of speech and association.[119] The oppression they share as black citizens motivates this protected expression.[120]

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112. *See* Issacharoff & Karlan, *supra* note 71, at 1731–32 (discussing multiple modes of political participation, and by extension, of political speech). My use of the term "resource" in the context of political participation will evoke for some readers the discussions among political scientists regarding group and individual resources which explain levels of political participation among various socio-economic groups. *See, e.g.*, TATE, *supra* note 98, at 75–108 (weighing the role of group consciousness, membership in black political organizations, church membership, and black office seeking in explaining levels of black political participation). I am not, however, interested in levels of participation as such, but rather in the modes of available participation and the degree to which the Supreme Court has facilitated or impeded access to these different modalities.

113. Issacharoff and Karlan, *supra* note 71, at 1731–32.

114. *See* Buckley v. Valeo, 424 U.S. 1, 38–59 (1976) (declaring unconstitutional the Federal Election Campaign Act's expenditure limitations).

115. *See infra* notes 120–59 and accompanying text.

116. *Buckley*, 424 U.S. at 57.

117. Smith, *Parties and Transformative Politics*, *supra* note 13, at 857–60 (arguing that the Court has failed to apply the same constitutional values and standards in its regulation of race in politics as it has required in the regulation of money in politics).

118. *Buckley*, 424 U.S. at 15.

119. *See* Terry Smith, *A Black Party?* Timmons, *Black Backlash and The Endangered Two-Party Paradigm*, 48 DUKE L.J. 1, 37, 56 n.243 (1998) (discussing black voters' efforts to create majority-minority districts as protected First Amendment activity uninhibited by the Equal Protection Clause).

120. *See id.* at 25–26 (discussing racial schisms in policy preferences between blacks and whites); *id.* at 55 (arguing that black political interests are founded on a common history of oppression). *See also* Nan D. Hunter, *Expressive Identity: Recuperating Dissent for Equality*, 35 HARV. C.R.-C.L. L. REV. 1, 6–7 (2000) (explaining the formation of group identity politics as resulting from a group's recognition of its exclusion and observing that this recognition has political consequences because "[t]he point of view(ing) shared by a specific group is formed by the group's outsiderness . . . .").

In equating race with expression, I necessarily embrace a broader view of race than that indicated by biology.[121] Racial identification is much more than a physical state, if it is that at all; it is an amalgam of the social and psychological effects of one's societal position,[122] effects which in the case of voters of color have found their expression in the body politic.[123] This reality escapes the Supreme Court in its reverse-racial-gerrymandering jurisprudence when the Court admonishes that race may not be used as a proxy for political characteristics.[124] Race itself may be but a set of proxies, political and social, which, in the case of black voters, form the very lexicon of their political discourse.[125] Thus, the significance of race, of blackness, in a socio-political context is its expression, for "[i]dentites, once formed, require expression in order to exist."[126] Blacks express a divergent sense of history and justice when, in contrast to most white Americans, they overwhelmingly support reparations to the ancestors of American slaves.[127] Blacks express their outsider voice when their votes in presidential contests consistently diverge from the majority of white Americans.[128] They express the extremities of their differences with the electorate at large when, unlike the majority of Americans, fully three-quarters of blacks reject George W. Bush as the legitimate President.[129] Absent expressions such as these—expression which Professor Nan Hunter (borrowing from Judith Butler) has termed race's "performativity"[130]—race would be utterly unimportant to our body politic. Once we recognize race as speech, as a phenomenon that must be performed in order to have import, we

121. *See* K. ANTHONY APPIAH & AMY GUTMAN, COLOR CONSCIOUS: THE POLITICAL MORALITY OF RACE 71–74 (1996) (refuting the notion of race as biology); IAN HANEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 30–31 (1996) (arguing that white identity is a social construct built on negative minority identities); Hunter, *supra* note 120, at 5 (discussing conceptions of race as not "simply inborn fortuities" but rather "as socialized meanings of communities and groups").

122. *See* APPIAH & GUTMAN, *supra* note 121, at 78; Hunter, *supra* note 120, at 6.

123. *See* APPIAH & GUTMAN, *supra* note 121, at 151–62; Hunter, *supra* note 120, at 12–17 (discussing black voter cohesiveness and affirming race as an accurate political proxy).

124. Bush v. Vera, 517 U.S. 952, 968 (1996) ("[T]o the extent that race is used as a proxy for political characteristics, a racial stereotype requiring strict scrutiny is in operation.").

125. *See* Hunter, *supra* note 120, at 12–18.

126. *See id.* at 9.

127. A 1997 poll found that two-thirds of blacks supported an apology for slavery and reparations, while two-thirds of whites opposed an apology and 88% opposed reparations. Oscar Avula, *Money Would Absolve the Sins of Slavery, Advocate Says*, KAN. CITY STAR, June 18, 1999, at A8.

128. *See supra* note 97.

129. *Id.*

130. *See* Hunter, *supra* note 120, at 9.

must then ask whether it is so different from other expression as to warrant curtailment or suppression.

The only conceivable justification for disadvantaging black voters' expression in the political process, while allowing money its virtually free reign, is that the Constitution, namely the Equal Protection Clause of the Fourteenth Amendment, insists on this type of inequality. This is an extraordinary and implausible proposition. To understand why, let us first better understand the disharmony between the Supreme Court's treatment of money versus race. If I am a wealthy individual (and correlatively a white individual), I can contribute up to $2,000 per election cycle ($1,000 for the primary, $1,000 for the general election) to the candidate of my choice.[131] I may contribute a total of $25,000 in a calendar year in "hard money"[132] to candidates, political party committees, and political action committees.[133] I may add to this an unlimited amount of "soft money"[134] to a political party, which, though it may not funnel the money directly to my preferred candidate, can engage in "party building activities," which will benefit the candidate or candidates of my choice.[135] And, of course, I may expend unlimited sums of money directly on the candidate of my choice (provided I do not coordinate the expenditure with the candidate),[136] or I may declare my own candidacy and self-finance my campaign to a limit defined only by the depths of my wallet.[137] Moreover, the effect that my cash has on the political process is not limited to the election itself. Save for the highly unlikely instance of quid pro quo corruption, I can seek from the legislative process special access and outcomes that I would not

131. *See* 2 U.S.C. § 441a(1)(A) (1994). *See also* Association of The Bar, City of New York, Commission on Campaign Finance Reform, DOLLARS AND DEMOCRACY: BLUEPRINT FOR CAMPAIGN FINANCE REFORM 17 (2000) [hereinafter DOLLARS AND DEMOCRACY].

132. Hard money is raised within the contribution limits and other requirements of the Federal Election Campaign Act ("FECA") and is the only type of funding that can be used to directly benefit or specifically advocate the election or defeat of a federal candidate. CORRADO, *supra* note 13, at 67–68.

133. *See* 2 U.S.C. § 441a(3) (1994).

134. Soft money is money raised and spent outside the contribution and source limitations of the FECA because the money is not used to advocate directly on behalf of or against a particular federal candidate. CORRADO, *supra* note 13, at 68.

135. *Id.*; Stephen Ansolabehere & James M. Synder, Jr., *Soft Money, Hard Money, Strong Partes*, 100 COLUM. L. REV. 598, 598–601 (2000) (describing soft money as a loophole in the FECA's contribution restrictions that allows evasion).

136. Buckley v. Valeo, 424 U.S. 1, 77–81 (limiting the definitions of "contribution" and "expenditure" in the statute).

137. *Id.*

have absent my wealth and generosity.[138] All of these contributions and expenditures can be made with a subordinating intent or effect—that is, they can be used to mobilize majorities of voters against outsider groups.[139] Opponents of campaign finance reform respond, "that's just the way it is." Some people through no fault of their own have more money than others, and their preference as to how to expend it, even within the political arena, implicates no proscriptive powers of the government.[140] In sum, when it comes to money, the Constitution, at least as interpreted by the Court and opponents of reform, permits private resources a liberal (some would say virtually unchecked) influence on the public sphere.

Now assume that I am a black (and correlatively poorer) voter. I reside in the South, where racial bloc voting remains prevalent.[141] Because Georgia has been the situs for much of the conflict over reverse-racial gerrymandering,[142] I will place myself there. There are two facts of political life for me. First, even if I had lots of money, getting elected to Congress would be more difficult because racial bloc voting is a formidable barrier for black candidates.[143] In a thorough analysis of this problem, political scientist Keith Reeves conducted a "social experiment" to determine the extent to which racial appeals in a biracial political contest influence white voters' evaluative judgments of black candidates and their voting decision.[144] The social experiment involved manipulating a fictional mayoral candidate's race using news articles issued to a probability sample of

138. *See* Smith, *Parties and Transformative Politics*, *supra* note 13, at 865–66 (comparing legislative rewards to the wealthy for their campaign contributions to political patronage outlawed under the First Amendment).

139. *See supra* Part I.B.

140. *See* Bradley Smith, *supra* note 13, at 64–66 (arguing that the First and Fourteenth Amendments lack mandates to affirmatively promote equality of speech); *id.* at 79–80 (arguing that state action is absent from the current private system of contributions and thus the Fourteenth Amendment's Equal Protection Clause cannot be invoked).

141. Richard R. Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 YALE L.J. 2505, 2512 n.23 (1997).

142. *See* Miller v. Johnson, 515 U.S. 900, 916–17 (1995) (invalidating Georgia's majority-black Eleventh congressional district because race predominated in its creation); Abrams v. Johnson, 521 U.S. 74, 86–88 (1997) (upholding—on remand from *Miller*—the district court's refusal on equal protection grounds to implement a congressional districting plan that contained more than one black district).

143. *See* REEVES, *supra* note 78, at 93 ("[T]he contemporary tendency of whites to discriminate against black political candidates on account of race shows how little underlying attitudes have changed despite the significant gains made possible by the Voting Rights Act.").

144. *Id.* at 24 (setting forth the goal of his study), 31 n.17 (defining the term "social experiment" by distinguishing it from laboratory experimentation in the natural and social sciences).

voting-age white adults.[145] Each participant was given one article in which the candidates disagree on either an environmental issue or affirmative action. In each article, the description of the candidate was the same, except the race of one candidate, Gregory Hammond, was sometimes varied.[146] All other characteristics and positions being equal, Reeves sought to measure the participants' receptivity to Hammond in his black incarnation versus his white incarnation. Of particular significance are Reeves's conclusions regarding the preferences of the experimental group that was given the article describing Hammond as black and as favoring affirmative action as a remedy to "an identifiable history of discrimination by an employer."[147] The discussion of affirmative action in connection with the article's mention of Hammond as black served as a racial cue to the reader. Reeves notes a startling response of participants when asked for whom would they vote if the election were held today:

> [W]hites were unwilling to say that they would cast a ballot for either the white Christopher candidate or his black challenger [Hammond] .... [T]he findings reveal a striking tendency on the part of whites simply to "vacate the field," that is, stampede toward the undecided category, as evidenced by the 49 percent who declared themselves "undecided." Observe that among those who read the biracial contest story, *the percentage of undecided more than doubled.*[148]

Reeves concludes that given the negative attitudes that many of the "undecided" participants harbored about blacks, attitudes that Reeves gleaned through surveys of this group, these individuals would not likely support the black Hammond once inside the voting booth.[149] Reeves draws other conclusions that are relevant to an African American, including one with ample funding, who is considering a run for political office:

> First, because our study participants were randomly assigned to the experimental condition of reading one news story, as compared to another, the resistance to supporting the black Hammond candidate in the affirmative action story experiment can be attributed to only a single causal explanation: the subtle appeal of race. Second, because great

145. *Id.* at 30–33.
146. *Id.* at 35.
147. *Id.* at 38.
148. *Id.* at 87.
149. *Id.* at 88.

> care was taken "to anticipate and defend against" the weaknesses generally associated with experiments, the results here "can be safely generalized to populations of real interest."[150]

The second fact of political life that I must face as a black candidate running for Congress is that the possibility of my raising sufficient money against an opponent in a bi-racial contest is remote.[151] But I want to run for Congress because I believe, for instance, that blacks receive insufficient representation from white "blue dog" conservative Democrats[152] and because blacks have heretofore been systematically denied equal participation in the political processes of my state.[153] I, along with a group of other like-minded black voters, lobby members of our black state legislative caucus, who in turn put pressure on their white party cohorts, to create a majority-minority district.[154] We make all arguments, including legal ones, and seek all appropriate aid, including oversight

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150. *Id.* at 90 (emphasis removed). For a real-world reflection of Reeves's study, *see* Kevin Sack, *Pressed Against a 'Race Ceiling': Black Politicians Speak of Difficulties in Seeking Higher Office,* N.Y. TIMES, Apr. 5, 2001, at A12 (reporting the widespread difficulties of black candidates in winning statewide offices). The article notes:

> A number of black candidates, from former Mayor Andrew J. Young of Atlanta to former Mayor Harvey Gantt of Charlotte, N.C., have lost statewide races because of an inability to attract enough white votes. Others—like former Mayor Richard Arrington of Birmingham, Ala., and Representative John Lewis of Atlanta—have simply chosen not to compete because of their conviction that they could never win the needed crossover vote.

Id.

151. *See* National Institute on Money in State Politics, *Summary of Campaign Funding Patterns, Georgia State Senate* 1992, 1994, 1996, *at* www.followthemoney.org (on file with the North Carolina Law Review) (summarizing the disparities in funding for black versus white state senate candidates). For a more detailed discussion of these disparities, *see infra* Part III.

152. One need only read the accounts of former Senator John Ashcroft's confirmation as United States Attorney General for support of this belief. Senator Zell Miller of Georgia, a Democrat, voted in support of Ashcroft, despite hailing from a state that is nearly 30% black. *See* Karen Hosler, *Ashcroft Confirmed Amid Fierce Criticism,* BALT. SUN, Feb. 2, 2001, at 1A. Miller cast this vote notwithstanding the severe criticism leveled against Aschcroft's civil rights record by leading Senators and advocacy groups.

153. *See* Miller v. Johnson, 515 U.S. 900, 936–38 (1995) (Ginsberg, J., dissenting) (recounting Georgia's history of discrimination against blacks in the exercise of the franchise).

154. For a detailed account of how this process transpired in Georgia after the 1990 census and the Supreme Court's use of this process to invalidate the two majority-black districts in Georgia that ensued from the 1990 redistricting, see Smith, *A Black Party?* Timmons, *Black Backlash and The Endangered Two-Party Paradigm, supra* note 119, at 27–42 (analyzing Miller v. Johnson, 515 U.S. 900 (1995), and Abrams v. Johnson, 521 U.S. 74 (1997), in which the two districts to which the text hypothetical refers were struck down).

by the Justice Department, which is charged with enforcement of the Voting Rights Act of 1965.[155] We are successful.[156] I get my district. Indeed, two new majority-minority districts are created, bringing the total in my state to three.[157]

Both new districts are held unconstitutional on Fourteenth Amendment grounds, however, because the Court concludes that race predominated in their creation.[158] What is the evidence of such predominance of race? Ironically, the very petitioning of the state legislature to create such a district is evidence of its unconstitutionality.[159] But that is not the only *private* conduct that the Court finds probative of unconstitutionality. In striking down the districts, the Court makes a normative judgment about black political behavior: "When the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, 'think alike, share the same political interests, and will prefer the same candidates at the polls.' "[160] The short answer to the Court's concern is that blacks either do or do not prefer candidates of their same race; if they do, why is this expression not as protected as the expenditure of money under the First Amendment? Why, in short, is the Supreme Court soft on money but hard on race?

A. The Public/Private Distinction

Some might attempt to distinguish the Court's treatment of money from its treatment of race based on differences in the public nature of the conduct engaged in by the racial interests versus the monied interests. The argument is that an individual's or group's expenditure of money is a private act while the speech medium of black voters seeking the creation of a majority-minority district requires government action. Yet government action is as much a part of the expenditure of campaign dollars as private action is a part of the black voters' lobbying efforts. The congressional districts for which the money is used do not exist in the state of nature. Their creation requires state action. Legislatures can and do draw districts where certain kinds of candidates will have to spend more money to

155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.* at 30–31.
160. *Miller*, 515 U.S. at 911–12 (quoting Shaw v. Reno, 509 U.S. 630 (1993)).

get elected and other candidates will have to spend less.[161] They can also draw districts where money on the whole is less of a factor, which might be the case in majority-minority districts.[162] It is erroneous, then, to view the financing of a campaign as a private act when the state has a significant role in defining money's *raison d'etre* in a campaign as well as its ultimate impact.

Our system of campaign finance is public-oriented in another respect. To the degree that donors give to receive, they must petition the government for the salutary outcomes they seek. Why is it acceptable for Carl Linder to use his money to encourage favorable treatment of Chiquita bananas[163] but constitutionally objectionable for black voters to use their voice to encourage the Georgia legislature to create a majority-black district? The fact that black voters speak through the prism of race can only de-legitimize their conduct if the Court limits its view of race to race as biology rather than race as a reality that these voters have been forced to live.

Finally, even if one is inclined to believe that donating or expending money in connection with a campaign is a private act, *Shaw v. Reno*[164] and its progeny reveal that the Court is quite willing to regulate private expression that influences the public sphere. For instance, in *Shaw,* one alleged harm to the white plaintiffs in a newly created majority-minority district was that the creation of such a district "reinforces the perception that members of the same racial group . . . will prefer the same candidates at the polls."[165] If such a

161. In a marginal district, for instance, small shifts in voter preference can change outcomes because neither party is particularly dominant. *See* Michael J. Clarman, *Majoritarian Judicial Review: The Entrenchment Problem,* 85 GEO. L.J. 491, 541 (1997). Competition and the need for the expenditure of large sums of money to retain control of the district are thus greater in such a district. Conversely, when a legislature gerrymanders a district so that one party dominates its composition, there is little to no competition in the district and the same party, indeed the same representative, will likely win year in and year out by large margins. Eric O'Keefe and Aaron Steelman, *The End of Representation: How Congress Stifles Electoral Competition,* Cato Policy Analysis No. 279, 13, Aug. 20, 1997, *at* http://cato.org/pubs/pas/pa-279.html (on file with the North Carolina Law Review). There is logically far less need for the expenditure of large sums of money to retain control of such a safe seat.

162. *See* THEILMANN & WILHITE, *supra* note 15, at 148–49 (noting that the cost of election in predominantly black congressional districts is often low).

163. RANDALL ROBINSON, THE DEBT: WHAT AMERICA OWES TO BLACKS 103 (2000) (arguing that the Clinton administration sought to accommodate Carl Linder, who gave a large amount in campaign contributions, by seeking favorable European treatment of Linder's Chiquita Brands bananas). Robinson observes that Clinton's actions on behalf of Linder directly threatened the economies of four Caribbean democracies whose bananas would be usurped by Chiquita's. *Id.*

164. 509 U.S. 630 (1993).

165. *Id.* at 647.

preference existed, it would admittedly be private—as private as the act of registering that preference in the voting booth, and moreover, as private as giving a campaign contribution to a candidate for whom one had a racial preference. The Court is undeterred in regulating this private preference because "the Court is rejecting as harmful an official acceptance that racial identity reliably translates into political perspective."[166] But if *Buckley v. Valeo* is correct that "[i]n the free society ordained by our Constitution it is . . . the people—individually as citizens and candidates and collectively as associations and political committees—who must retain control over the quantity and range of debate on public issues in a political campaign,"[167] then the Court must respect concerted black action to create majority-minority districts and, moreover, must respect the judgment of these voters concerning who should represent their district. Yet *Shaw* illustrates that for all the debate about whether or not campaign finance involves state action sufficient to invoke the Fourteenth Amendment,[168] the Court is quite at ease with regulating private speech and association when it views such regulation as necessary to achieve its vision of the polity.

Although the Court has previously allowed regulation of speech and association in the voting process, it has done so under very different circumstances and with extraordinarily different results.[169] Thus, the Court's consideration of racial bloc voting as triggering liability under section 2 of the Voting Rights Act and the concomitant creation of a majority-minority district to remedy such a harm[170] is effectively a curtailment of white voters' speech and association rights.[171] Likewise, courts' explicit consideration of the racialized nature of the conduct of campaigns in determining liability under section 2 of the Voting Rights Act may have a chilling effect on

166. *See* Hunter, *supra* note 120, at 15.

167. 424 U.S. 1, 57 (1976).

168. *See supra* notes 48–51 and accompanying text.

169. *See* Smith, *Parties and Transformative Politics*, *supra* note 13, at 846–49.

170. *See, e.g.*, Gingles v. Thornburg, 478 U.S. 30 (1986).

171. The First Amendment permits a citizen the right "to cast his vote . . . for whatever reason he pleases." *See* Anderson v. Martin, 375 U.S. 399, 402 (1964). The 1982 Amendments to the Voting Rights Act and *Gingles*, in interpreting those amendments, balance other constitutional concerns against the First Amendment, and where racial bloc voting is found—even though whites are free to engage in it with or without scienter—courts may disaggregate the electoral scheme that facilitates such expression, effectively curtailing it. *Cf.* Lawrence, *supra* note 84, at 438–40 (likening the school segregation in *Brown v. Board of Education*, 347 U.S. 483 (1954), to speech because of the white supremacist message it conveyed and reading *Brown* as regulating the content of this racist speech).

speech.[172] The Court, however, has accepted these types of speech constraints as a proper enforcement of Congress's authority under the Fourteenth and Fifteenth Amendments to prohibit racial discrimination in voting.[173] To allow misplaced First Amendment concerns to trump Congress's authority would both reduce and homogenize speech, investing a white majority with disproportionate and largely unchecked control over the body politic. Thus, vote dilution claims under section 2 of the Voting Rights Act, and their erstwhile common remedy of majority-minority districts, complement the First Amendment by preventing racially contrived barriers to effective political participation and infusing the political process with a broader, more representative spectrum of political viewpoints than would otherwise be possible.

Shaw claims, however, undo these very same free speech and association interests. The remedies in these cases dismantle majority-minority districts, creating less, not more, speech and less, not more, diversity of speech. White voters continue to resist black candidates, making their election in a predominantly white district improbable, absent unusual circumstances.[174] This reluctance diminishes the quality and quantity of political debate that *Buckley* places at a premium where money is concerned. Moreover, this reluctance diminishes the quality and quantity of expression of black voters' views and policy preferences at the very stage when such expressions matter the most—in the legislative process. *Shaw* and its progeny, then, are sharply at odds with the First Amendment.

B. Expressive Harms

Because *Shaw* plaintiffs cannot show that their votes have been diluted—since invariably even after the creation of majority-minority districts, white districts continue to constitute a disproportionate share of districts—these plaintiffs cannot claim a comparable harm to black plaintiffs who claim vote dilution. Lacking such a harm, the Supreme Court, now aided by academic commentary, has posited a different kind of harm that results from the creation of majority-minority districts, at least when those districts eschew so-called

172. The Senate Report accompanying the 1982 Amendments to the Voting Rights Act of 1965 specifically permits courts, in determining liability for vote dilution under section 2 of the Act, to consider "[w]hether political campaigns have been characterized by overt or subtle racial appeals." S. REP. NO. 97-417, at 9 (1982).

173. City of Boerne v. Flores, 521 U.S. 507, 525–29 (1997) (reviewing a history of voting rights cases).

174. *See supra* notes 143–50 and accompanying text.

traditional districting principles such as compactness of shape. Professors Richard Pildes and Richard Niemi, for example, have explained *Shaw* in this way:

> One can only understand *Shaw*, we believe, in terms of a view that what we call expressive harms are constitutionally cognizable. An expressive harm is one that results from the ideas or attitudes expressed through a governmental action, rather than from the more tangible or material consequences the action brings about. On this view, the meaning of a governmental action is just as important as what that action does. Public policies can violate the Constitution not only because they bring about concrete costs, but because the very meaning they convey demonstrates inappropriate respect for relevant public values. On this unusual conception of constitutional harm, when a governmental action expresses disrespect for such values, it can violate the Constitution.[175]

In First Amendment terms—which are the relevant terms for comparing the speech resources of voters of color to wealthier individuals—neither Pildes nor the Court explains why, in the absence of vote dilution, the Equal Protection Clause should be more concerned with the message the government conveys than the speech that it effectively suppresses by dismantling black districts.[176]

C. *Original Intent*

Finally, an original intent argument is perhaps the least persuasive justification for the Court's coddled protection of monetary speech versus racial expression. Substantial evidence indicates that the drafters of the Fourteenth Amendment did not intend to prevent remedial race-based measures.[177] By contrast, the

175. Richard H. Pildes & Richard G. Niemi, *Expressive Harms, 'Bizarre Districts,' and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483, 506–07 (1993) (emphasis removed).

176. Indeed, because the creation of the majority-black districts in *Shaw*, however untraditional their shapes, cannot rationally be understood to convey a disregard for the interests of white voters, it is fair to question why it falls within the province of the Equal Protection Clause at all. *See* Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1, 17–18 & n.59 (2000) (arguing that while expressive harms should be cognizable under the Equal Protection Clause, such harms exist only when their meanings convey that the government has not shown equal concern for all citizens).

177. *See* SUNSTEIN, *supra* note 57, at 150 ("[T]he history of the Fourteenth Amendment strongly suggests that the framers did not intend to prevent affirmative action."); Melissa L. Saunders, *Equal Protection, Class Legislation and Color Blindness*, 96 MICH. L. REV. 245, 326–27 (1997). Saunders, who specifically analyzes the Supreme

framers of the First Amendment did not likely contemplate the modern-day phenomenon of large political expenditures.[178] Yet the

Court's reverse-racial gerrymandering cases for their fidelity to original understanding, writes:

> Those who framed and ratified the Equal Protection Clause certainly intended it to prevent the states from using racial generalizations as a basis for singling out anyone for special disadvantage, except perhaps in very compelling circumstances. But the suggestion that the clause was also intended to render presumptively unconstitutional all race-based state action, whether or not it has such a discriminatory effect, would have absolutely astounded them. The Thirty-ninth Congress specifically rejected a number of proposals that would have done this. Even its most radical members understood that the Equal Protection Clause it finally passed did no such thing.

Id.

178. *See* ALEXANDER, *supra* note 70, at 12–13; Edward B. Foley, *Philosophy, the Constitution, and Campaign Finance Reform*, 10 STAN. L. & POL'Y REV. 23, 25 (1998) ("[I]t is highly unlikely that the ratifiers of the First Amendment had any specific intentions at all on the topic of campaign finance. . . ."); Frederick Schauer, *Judicial Review of the Devices of Democracy*, 94 COLUM. L. REV. 1326, 1331 (1994) (noting that the question of whether money is speech was not readily resolved by reference to original intent or constitutional history). Any original intent analysis of the First Amendment and campaign finance must account for or consider the Seventeenth Amendment, which, while not facially concerned with political speech, was enacted in part to curb the influence of money in the selection of United States Senators. *See* Terry Smith, *Rediscovering the Sovereignty of the People: The Case for Senate Districts*, 75 N.C. L. REV. 1, 65–66 (1996). Yet the law review literature on campaign finance reform makes little to no reference to the Seventeenth Amendment. The debates surrounding passage of the Amendment, however, suggest that such inattention is misguided. Those debates are replete with references to the corrupting influence of money in the legislative appointment of Senators, a process which predated the popular election of Senators mandated by the Seventeenth Amendment. *See, e.g.*, 47 CONG. REC. 2409 (1911) (statement of Rep. Young) (arguing for preserving the Time, Place and Manner Clause of Article I in order to maintain Congress's ability to prevent "selfish moneyed interest[s]" from controlling the legislative process in the Senate); 47 CONG. REC. 231 (1911) (statement of Rep. Norris) (arguing that direct election of Senators was necessary because "money has taken too important a part in the control of the [state] legislature when it comes to the election of a United States Senator, until it had almost become common knowledge among our people that no poor man need apply"); 47 CONG. REC. 1764 (1911) (statement of Sen. Works) (stating that his sole reason for supporting direct election of Senators was because special interests had corrupted the state legislatures in the process of appointing Senators "and that the only remedy for this evil that is threatening the integrity of our free institutions is to vest the power in the people to be exercised directly at the polls.").

Notwithstanding the enactors' clear intention to reduce the role of money in Senators' selection by reposing authority directly in the people, one Seventeenth Amendment historian has declared the amendment a victim of unintended consequences because:

> the historical trend toward greater popularization of Senate elections, by transferring direct responsibility from the legislators to the electorate en masse, had given rise to the very conditions which reformers hoped to end with even more popularization. Inevitably, big spending, the pressure of organized interests, and backstage maneuvering would continue to characterize the campaigns of senators long after the nostrum of direct elections had been administered.

Court has transformed a relatively well-established fact under the Fourteenth Amendment into a blank slate, while treating the inconclusive First Amendment as if its legislative history were that of the Fourteenth. The result is that money is privileged, while race is disadvantaged.

At the very least, the ease with which the Court has re-fashioned the Fourteenth Amendment notwithstanding its history and the decisions interpreting it prior to *Shaw* suggests that the absolutism of prohibitions on expenditure caps is more an exaggerated policy argument than an indelible feature of the First Amendment. Alternatively—and maybe even in addition—perhaps the Supreme Court has simply overregulated race in the political process. In either case, its differential treatment has removed from voters of color the

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C.H. HOEBEKE, THE ROAD TO MASS DEMOCRACY: ORIGINAL INTENT AND THE SEVENTEENTH AMENDMENT 106 (1995).

Hoebeke's pessimism, however, appears to confuse the effects of the original intent of the Seventeenth Amendment with the effects of the Supreme Court's decidedly ahistorical analysis of free speech in *Buckley v. Valeo*, 424 U.S. 1 (1976). (Indeed, the Supreme Court in *Buckley* makes only passing reference to the Seventeenth Amendment—in Justice White's partial dissent. *See id.* at 269 n.4 (White, J., concurring in part and dissenting in part).) The Amendment's supporters heard much the same arguments that Hoebeke makes regarding the possibility that upon passage of the Amendment, money may come to play a larger, rather than a decreased, role in the selection of Senators. *See, e.g.*, 47 CONG. REC. 1881 (statement of Sen. McCumber) (arguing that popular elections would increase the need for large expenditures of money by and on behalf of Senate candidates). Yet, up until the Amendment's ratification, supporters steadfastly maintained that "instead of having the Senate filled up with the representatives of predatory wealth who use their power to oppose the things that the people love," the Senate would now be composed of far more public-regarding individuals. *See* GEORGE H. HAYNES, THE ELECTION OF SENATORS 1042 (1906) (quoting Secretary of State William Jennings Bryan). Hoebeke cannot be correct in his conclusion that the Amendment created unintended consequences unless its supporters—who were well aware of arguments like Hoebeke's—were either hopelessly naive or simply intended that their statements regarding the reduction of money's influence be merely precatory.

A more plausible translation of the Seventeenth Amendment's language and history, however, supports the view that in reposing the power to elect Senators directly in the people, Congress also intended that the people have residual authority to effectuate one of the principal purposes of the Amendment, the reduction of the influence of money in selecting Senators. This interpretation would argue against *Buckley*'s invalidation of expenditure limitations, *see* 424 U.S. at 58, limitations which may reasonably be viewed as legislation incident to the execution of the Seventeenth Amendment. Indeed, the very Congress which passed the Seventeenth Amendment in 1911 that same year imposed restrictions on amounts that congressional and senatorial candidates could expend on behalf in their own elections. *See* Act of Aug. 19, 1911, ch. 33, 37 Stat. 25 (1911) (repealed 1925); SORAUF, *supra* note 14, at 5.

In sum, defending *Buckley* on original intent grounds requires reconciling the 62nd Congress's determination to reduce the role of money in the selection of Senators with *Buckley*'s effective handicapping of Congress's ability to achieve this goal.

ameliorative expressive aspects of race, while allowing money (through cuing and racial division) to further compound a pre-existing inequality wrought by the Court's equal protection jurisprudence.

III. POLITICS ON THE GROUND: A RACIAL CRITIQUE OF THE MOVEMENT'S ACTORS AND LEGISLATIVE FOCUS

Race creates an unequal inequality because of the disparate application of the Equal Protection Clause to voters of color.[179] Race imbues money's influence in politics with a subordinating caste through the use of color-coded political messages.[180] Race creates a barrier to recognition of common class-based interests, potentially minimizing the efficacy of any money reforms.[181] If race, however, is so central to money's role in politics, why is this relationship not evident when one looks at politics on the ground—the political actors and non-academics who propel the campaign finance reform movement? I suggest in this section that the answer is partially the neglect and racial conservatism of some of the movement's actors, but, less self-evidently, the answer also lies in the failure of reformers to recognize that just as money has been employed to perpetuate the malignant uses of race within the political process, reform might create an equal opportunity for promoting a transformative racial ideology. In the final portion of this section, I set forth some "first principles" that should guide a campaign finance movement so that it might include the interests of people of color.

A. The Actors: Left, Right, and Nowhere

At first blush, it is somewhat bewildering that the fairly conservative Senator from Arizona, John McCain, has teamed with the relatively liberal Senator from Wisconsin, Russell Feingold, who together have become the political poster children for campaign finance reform. But look again. Campaign finance reform is easily mistaken as a "white" issue advanced by middle-class suburbanites and good-government reformers.[182] McCain and Feingold, each roughly filling the modes of these two categories, help explain why. McCain's racial conservatism—his using the Confederate Flag to gain

179. *See supra* Part I.A.
180. *See supra* Part I.B.
181. *See supra* Part I.C.
182. Spencer Overton, *Money and Race: Campaign Finance as a Civil Rights Issue*, *at* http://www.flhp.org (last visited Sept. 10, 2001) (on file with the North Carolina Law Review).

the support of Southern primary voters during his presidential bid, his opposing a Martin Luther King federal holiday[183]—does not figure into his alliance with Feingold, who is not without questions regarding his own racial politics,[184] because neither man appears to appreciate the racial dimension of the movement they purport to lead. Under their odd-couple imagery, if campaign finance reform is not an issue of the Left or the Right, it isn't an issue of black or white either.

Race is ignored to an even more insidious effect by other prominent reformers. Ralph Nader campaigned extensively on a platform of campaign finance reform during the 2000 presidential election.[185] Nader said a great deal more during the course of his campaign about this topic than he did about race, and perhaps his relative inattention to race foreshadowed the impact of his reformist campaign: Despite the overwhelming preference of black voters for Gore, Nader threw the election to Bush.[186] With actors like Nader on the Left, it is little wonder why campaign finance reform is susceptible to being viewed as a "white" issue.

If Nader's disregard of black voters' wishes in pursuit of campaign finance reform helps to paint the issue as "white," opponents of reform fuel this perception even more. Take, for instance, Senator Mitch McConnell, a Kentucky Republican who has opposed reform on First Amendment grounds.[187] One would expect that such an ardent defender of free speech through the expenditure of money would be equally fervent in guarding other forms of political participation. McConnell, however, not only voted against the National Voter Registration Act (popularly known as the Motor-

183. *See* Smith, *Parties and Transformative Politics*, *supra* note 13, at 856 & n.45.

184. For instance, Ed Garvey, the 1998 Wisconsin Democratic gubernatorial candidate, has criticized as racially insensitive Feingold's vote in favor of John Ashcroft, President George W. Bush's arch-conservative Attorney General appointee, whose record on civil rights includes opposing desegregation in Missouri. *See* Editorial, *Feingold, McCallum Are Reasons Some Don't Vote*, CAPITAL TIMES (Madison, Wis.), Feb. 6, 2001, at 9A.

185. *See* Cody Ellerd, *Politics-US: Nader Takes Anti-Corporate Message On The Road*, INTER PRESS SERVICE, Oct. 16, 2000, LEXIS, Nexis Library, INTER PRESS SERVICE File (noting that Nader's platform consisted of three primary issues: campaign finance, trade, and health care).

186. *See Nader Could Lose Allies for Spoiler Role; Candidate Still Unfazed by Critics*, THE FLA. TIMES-UNION, Dec. 31, 2000, at A-13 ("Nader only took two percent in Florida—a state that was never considered a Nader stronghold—but that was enough to throw the state to Bush."); *Seesaw Battle for Bush, Gore*, SEATTLE TIMES, Nov. 8, 2000, at A1 (noting that Gore's performance in Florida was due to "the state's women and an astounding turnout of black voters").

187. *See* Robin Toner, *After a Marathon Debate, a Moment for Emotions*, N.Y. TIMES, Mar. 30, 2001, at A17 (noting that McConnell, a chief opponent of McCain-Feingold, had based his opposition on "simple free speech").

Voter Bill), but he also proposed an amendment to that statute which would have denied participants in the Women, Infants and Children (WIC) program the right to register to vote at state or local WIC offices.[188] In floor debate, McConnell insisted that his amendment was "not about the merits of the motor-voter bill," which required states to designate the offices of various public-assistance programs as voter registration sites.[189] Yet it was estimated that the effect of McConnell's amendment would have been to exclude 500,000 poor women from the benefit of the motor-voter law.[190] It appears, then, that it is not free speech that McConnell is seeking to protect in opposing campaign finance reform, but rather the free speech and participation of wealthy (and by extension, disproportionately white) citizens.[191]

The principal political actors in the campaign finance debate, those on both the Left and the Right, do not inspire confidence in minority communities that they are capable of being sensitive to minority concerns in formulating campaign finance reform proposals. The question remains whether the substance of their proposals corroborates the unfortunate impression left by the reform debates.

B. McCain-Feingold, Voters of Color, and Money Without Ideology

In this section I analyze a major piece of proposed campaign finance legislation, the McCain-Feingold bill, to illustrate how the thrust of current reform proposals ignores or does not adequately address issues of vital importance to minority voters and candidates. More specifically, McCain-Feingold, as recently passed by the United States Senate, does not assist in creating a level playing field for candidates of color and does not otherwise enhance the substantive incentives for people of color to participate in the political process—two essential elements in the formation of a transformative racial ideology to counteract the racial malignancy that has been purchased with political money.

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188. *See* 140 CONG. REC. 22102 (1994) (Amendment No. 2559).

189. *See id.* at 22103 (Statement of Sen. McConnell).

190. *See id.* at 22107 (Statement of Sen. Leahy).

191. If McConnell is selective in his protection of free speech, his principal nemesis, Senator John McCain, is no less discriminatory in his advocacy of democratic reforms that extend beyond money. Even in the wake of the Florida presidential debacle, McCain has opposed including electoral reform as part of campaign finance reform, implausibly claiming that Congress lacked "a clear understanding of the depth and significance of the problem." Hearing of the Senate Commerce, Science and Transportation Committee, FEDERAL NEWS SERVICE, Mar. 7, 2001, LEXIS, Nexis Library, FEDERAL NEWS SERVICE File.

1. The Hard Money Increase

While much attention has been focused on the McCain-Feingold "Bipartisan Campaign Reform Act of 2001,"[192] the heart of that legislation does not address the difficulties faced by minorities in the current system and may well increase barriers to their full participation. The gravamen of McCain-Feingold is a ban on the receipt of "soft money" contributions by national committees of political parties, federal officeholders, and candidates for federal offices.[193] Soft money contributions, now infamous, are contributions that do not have to comply with the Federal Election Campaign Act's (FECA's) dollar limitations and source prohibitions because such contributions are not used to directly advocate the election or defeat of a federal candidate.[194] Thus, while the FECA limits individual contributions to candidates to $1,000.00 "with respect to any election for Federal office" and caps the aggregate contributions of an individual at $25,000.00,[195] these limitations do not apply to soft money.[196] Likewise, while it is unlawful for a corporation or labor union to use its treasury funds to make a contribution or expenditure "in connection with" a federal election,[197] no such restriction applies to soft money contributions by corporations or unions.[198]

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192. *See* S. 27, 107th Cong., as amended on the floor of the Senate, *available at* http://thomas.loc.gov (Jan. 22, 2001) (on file with the North Carolina Law Review).

193. With respect to a national committee, the proposed legislation prohibits such committee to "solicit, receive or direct to another person a contribution, donation, or transfer of funds or any other thing of value, or spend any funds" not subject to limitations contained in the Federal Election Campaign Act (FECA), 2 U.S.C. §§ 441a and 441b (1997). With respect to a federal officeholder or a candidate for federal office, the proposed act forbids such person to "solicit, receive, direct, transfer, or spend funds in connection with an election for Federal office" outside the limitations set forth in the FECA. To further seal the soft money loophole, the bill requires that the expenditures and disbursements made by a state, district, or local committee of a political party must be made subject to the limitations established under the FECA.

194. DOLLARS AND DEMOCRACY, *supra* note 131, at 11, 44; CORRADO, *supra* note 13, at 68.

195. 2 U.S.C. § 441a(1), (3) (1994).

196. CORRADO, *supra* note 13, at 68.

197. *See* 2 U.S.C. § 441b (1994).

198. CORRADO, *supra* note 13, at 68; *see also* Stephen Ansolabehere & James M. Snyder, Jr., *Soft Money, Hard Money, Strong Parties*, 100 COLUM. L. REV. 598, 601 (2000) (noting that the soft money loophole enables corporations to avoid having to create a separate segregated fund to raise money for federal elections); Daniel M. Yamish, Note, *The Constitutional Basis for A Ban on Soft Money*, 67 FORDHAM L. REV. 1257, 1268 (1998) ("Under the soft money system, corporations and unions, otherwise barred from contributing to campaigns, are allowed to contribute unlimited sums to political parties.") (footnote omitted).

In theory, soft money is used for purposes other than the support of federal candidates, principally "party building activities," the support of non-federal political activities, and generic party advertising.[199] With the explosion of party issue advertisements, however, this distinction is now widely recognized as a hollow fiction.[200] Because party issue ads do not expressly advocate the election or defeat of a candidate, they fall outside of the FECA's purview and may be financed in part by soft money.[201] McCain-Feingold seeks to put an end to this practice by banning the raising and receipt of soft money by political parties.[202]

For present purposes, I am not at all interested in the constitutionality of McCain-Feingold's soft money ban or other aspects of the bill. Numerous commentaries have been and will continue to be written on that subject.[203] Instead, I wish to use

199. Anthony Corrado, *Giving, Spending, and 'Soft Money,'* 6 J.L. & POL'Y 45, 47–50 (1997).

200. *Id.* at 50–55; DOLLARS AND DEMOCRACY, *supra* note 131, at 11, 44.

201. DOLLARS AND DEMOCRACY, *supra* note 131, at 57.

202. Two kinds of issue advocacy are financed by soft dollars: party issue ads and issue ads run by nominally unaffiliated interest groups. *See* CORRADO, *supra* note 13, at 88. McCain-Feingold addresses issue ads financed in whole or in part by soft money differently depending on whether the source of the ad is a political party or an interest group. With respect to political parties, because the bill starves such entities of soft money, it effectively eliminates their ability to run soft money funded issue ads. With respect to interest groups, the measure is less draconian but still prohibitive. Corporations, labor unions, and certain federally tax exempt organizations are prohibited from using general treasury funds to engage in "electioneering communication." *See* S. 27, § 203. An "electioneering communication" is in turn defined as any broadcast, cable, or satellite communication that refers to a clearly identified federal candidate, that is made within a prescribed time period within the holding of an election, and the audience for which includes voters eligible to vote in that election. *Id.* § 201. Although section 203 initially exempts various not-for-profit groups from its reach, where such groups engage in "targeted electioneering communications," defined as a communication "distributed from a television or radio broadcast station or provider of cable or satellite television service whose audience consists primarily of residents of the State for which the clearly identified candidate is seeking office," that exemption is lost. *See id.* § 204. Finally, the bill attacks issue advertising by interest groups, treating "coordinated expenditures or other disbursement" made by any person "in connection with a candidate's election" as a contribution to the candidate. *See id.* § 214. The aim of this provision is facilitated by a rather capacious definition of "coordinated expenditure or other disbursement," which is defined as "a payment made in concert or cooperation with, at the request or suggestion of, or pursuant to any general or particular understanding with, such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents." *Id.*; *see also* Alison Mitchell, *Campaign Finance Bill Passes in Senate 59-41; House Vows a Fight*, N.Y. TIMES, Apr. 3, 2001, at A1 (detailing the major provisions of McCain-Feingold).

203. *See generally* Bradley A. Smith, *Soft Money, Hard Realities: The Constitutional Prohibition On A Soft Money Ban*, 24 J. LEGIS. 179 (1998) (arguing that a blanket ban on soft money would be unconstitutional under the First Amendment); Bradley A. Smith,

McCain-Feingold as a representative piece of reform legislation and to assess its responsiveness to the concerns of minority voters and candidates. On this score, the bill is largely unresponsive. While soft money may occupy the nation's and reformers' attention, the empirical studies suggest that it is the inability to compete effectively for hard dollars—sums regulated by the FECA in the form of dollar limits and source restrictions—that poses the most substantial barrier for minority candidates.[204] In their study of the patterns of contributions to black congressional candidates during the 1980s, John Theilmann and Al Wilhite make several important findings regarding the flow of hard money.[205] First, with respect to black candidates' financing from all hard money sources—political action committees, party contributions and coordinated spending, and contributions from individuals—Theilmann and Wilhite demonstrate "a pattern of racial discrimination in the allocation of total campaign contributions."[206] The authors' study controlled for variables such as candidate strength, opposition strength, party affiliation, and incumbency.[207] They concluded that "[b]ecause the primary determinants of candidates' fund-raising abilities are included in the analysis, the [funding] differential appears to be racially motivated."[208]

In their more particularized examination of individual contributions to black candidates, Theilmann and Wilhite, after controlling for electability and demographic characteristics, conclude that "[i]ndividual contributors apparently discriminate against black candidates."[209] Thus, "[i]ncumbent black representatives received significantly lower large contributions from individual donors than did white incumbents in three of five election cycles studied."[210] The same was true of non-incumbent blacks in two of five election cycles.[211] Moreover, because blacks were more dependent on smaller contributions, they incurred greater direct fund-raising costs because

The Sirens' Song: Campaign Finance Regulation And The First Amendment, 6 J.L. & POL'Y 1 (1997) (arguing that freedom of speech and political participation should override desires of campaign finance reformers).

204. *See infra* notes 208-14 and accompanying text.
205. *See* THEILMANN & WILHITE, *supra* note 15.
206. *Id.* at 78.
207. *Id.*
208. *Id.*
209. *Id.* at 148.
210. *Id.* at 145.
211. *Id.*

raising money in small amounts from several people is more time consuming than obtaining larger amounts from fewer donors.[212]

A later study focusing on black candidates for the Georgia state senate tends to corroborate Theilmann and Wilhite's findings.[213] Examining three election cycles through the mid-1990s, the study found that white candidates had funding advantages over black candidates of 73%, 16%, and 106% for each of the election cycles.[214] It concluded that "[a] comparison of campaign funds by race shows a growing advantage of white candidates over African-American candidates."[215]

McCain-Feingold's soft money ban does not address this nagging problem. To the contrary, because the version of the bill which passed the Senate actually raises the individual contribution limit per candidate from $1,000.00 per election to $2,000.00 per election, and raised the aggregate annual individual contribution amount to $37,000.00,[216] McCain-Feingold exacerbates hard money funding inequities between black and white candidates.[217] This provision ignores the empirical evidence suggesting that black candidates cannot effectively compete in the race for hard money individual

212. *Id.* at 146. The authors acknowledge that the disadvantage of lower levels of individual contributions is somewhat offset in predominantly black districts because the cost of campaigning tends to be lower. *Id.* at 148–49. Their study, however, predates *Shaw v. Reno*, 509 U.S. 630, 657–58 (1993), which removes in many instances the possibility of creating a majority-minority district. After *Shaw*, reforms that address the hard money funding inequities between white and minority candidates are especially needed.

213. *See* National Institute on Money in State Politics, *Summary of Campaign Funding Patterns, Georgia State Senate* 1992, 1994, 1996, *at* www.followthemoney.org (on file with the North Carolina Law Review).

214. *Id.* at 3.

215. *Id.* at 5.

216. *See* S. 27, § 308(a)-(b). These amounts are indexed for inflation. *Id.* The increase in the individual contribution limits has enjoyed support among some reform advocates who appear not to have taken account of the impact of such an increase on minorities. *See, e.g.*, DOLLARS AND DEMOCRACY, *supra* note 131, at 120–21 (proposing an increase in the individual contribution limit with indexing for inflation in the future).

217. *See* Dexter Wimpish, *Bad to Worse for Minorities with McCain-Feingold, at* http://www.tompaine.com/opinion/2001/02/01/ (Feb. 2, 2001) (last visited Oct. 1, 2001) (on file with the North Carolina Law Review) ("[T]he increase in hard money contributions would have a chilling effect on minority groups who struggle to have their voices heard above the rush of currency into the coffers of our elected officials."). The increase in the individual contribution allowance will also likely increase the disparity in the rates and amounts of political contributions made by whites versus minorities. *See* Spencer A. Overton, *Fannie Lou Hamer Wouldn't Like This*, L.A. TIMES, Mar. 29, 2001, at A13. A provision of McCain-Feingold that allows a candidate for the Senate to exceed the $2,000.00 contribution limit in response to a wealthy opponent financing his race from personal funds, *see* S. 27, § 304, would further compound these racial disparities.

contributions, contributions which, despite the focus on soft money, continue to constitute the majority of money raised by congressional candidates.[218]

McCain-Feingold treats money as raceless, and thus non-ideological, ignoring its disparate impact on candidates and voters of color. But money can be no less ideological than the representation it is used to secure. Race matters in determining the quality of representation for voters of color.[219] Campaign finance reform that fails to take account of this political reality by not reforming—indeed increasing—hard money inequities is not reform at all for people of color. The imperative for inclusionary reform is all the greater in light of *Shaw v. Reno*. Although running in a majority-minority district tends to be less expensive for a minority candidate,[220] *Shaw* makes such districts more difficult to create and thus makes minority candidates more dependent on the very resource—hard money—which eludes them.

2. The Party Soft Money Ban

The effects of the soft money ban on minority voters and candidates are more speculative. On the one hand, the experience of the 1980s, including party contributions to minority candidates and coordinated spending on behalf of these candidates, suggested that at least the Democratic Party was willing to use party-controlled money to fund black challengers and broaden black representation in Congress.[221] Direct assistance to candidates in the form of contributions or coordinated expenditures, however, does not constitute a major portion of the national party committee's

218. DOLLARS AND DEMOCRACY, *supra* note 131, at 61 (noting that in 1996, contributions from individuals constituted 53% of the funds received by all candidates for the House of Representatives, 65% received by Senate incumbents, 60% received by Senate challengers, and 52% received by Senate candidates for open seats).

219. KENNY J. WHITBY, THE COLOR OF REPRESENTATION: CONGRESSIONAL BEHAVIOR AND BLACK INTERESTS 91–112 (1997) (demonstrating that the voting behavior of black Representatives in Congress is, on the whole, more responsive to black interests than white representatives). The group of white Representatives who vote nearest ideologically to black Representatives are non-southern Democrats. *Id.* at 111. However, "[w]hile both are in the high final passage/high amendment category, on balance there is a good deal of space between the two groups on some important issues." *Id.* Thus, even the most liberal of white Representatives are not as responsive to black interests as are black Representatives.

220. THEILMANN & WILHITE, *supra* note 15, at 148–49.

221. *Id.* at 126 (noting that the Democratic party gave substantially greater contributions to black challengers than to their white counterparts in three of five election cycles).

expenditures.[222] By contrast, soft money receipts and expenditures have become part of the basic grist of the activities of national party committees, accounting for a third of all income of national parties.[223] Although soft money contributions cannot be used to directly benefit a federal candidate by, for instance, urging his election, parties do use this money to run ads that indirectly support a particular candidate.[224] In theory, then, party-controlled soft-money is one means of providing a type of campaign finance affirmative action to black candidates.[225] Yet, based upon individual campaigns' overwhelming allocation of resources to swing voters,[226] there is substantial reason to doubt that the major parties are using soft money to remedy racial inequities in the fund-raising and electoral processes.[227]

Quite apart from the development and election of black candidates, there is likewise scant evidence that soft money is used to promote minority issues, thus creating a greater substantive basis for minority voter participation in the electoral process. Concededly, Democrats have directed some soft money at minority voters in order to mobilize them to vote.[228] One should not, however, confuse get-out-the-vote efforts with the kind of courtship afforded white independent voters. The soft money ads that the Democratic Party ran on behalf of Al Gore largely tracked the issues of the Gore campaign itself: prescription drugs, education, and the

222. *See* CORRADO, *supra* note 13, at 74–76.

223. *See* DOLLARS & DEMOCRACY, *supra* note 131, at 48. Underscoring soft money's growing centrality, the 2000 Presidential election was the first in history where the national party committees spent more on television ads than the presidential candidates themselves spent on television ads; the majority of the party spending was financed by soft money. *See 2000 Presidential Race First In Modern History Where Political Parties Spend More On TV Ads Than Candidates*, Dec. 11, 2000, *at* http://www.brennancenter.org/presscenter/pressrelease_2000_1211cmag.html (last visited Oct. 1, 2001) (on file with the North Carolina Law Review).

224. *See* WEST, *supra* note 75, at 12.

225. Indeed, because Democrats as a whole do not raise small contributions for individual candidates as successfully as do Republicans, *see* Lizette Alvarez, *Race is Underway for Campaign Cash Before New Limits*, N.Y. TIMES, Feb. 11, 2001, at A1, the soft money ban may harm the party generally, with disproportionate harm accruing to its disproportionately minority rank and file.

226. *See* FRYMER, *supra* note 85, at 125.

227. *See, e.g.*, Robert Moore, *Shortchanged: Black Democrat's Campaign Suffers As Officials Back White Independent*, Sept. 15, 2000, *at* http://www.njournalg.com/news/2000/09/shortchanged_black_demos.html (Sept. 15, 2000) (last visited Oct. 1, 2001) (on file with the North Carolina Law Review) (providing anecdotal details of the Democratic Party's lack of financial support for a black challenger in Virginia's Fifth Congressional District).

228. *See* CORRADO, *supra* note 13, at 79 (noting that in 1996 the Democratic Party spent $5 million on generic party advertisements tailored to minority communities and contributed some monies to groups to help turn out the minority vote).

environment.[229] Gore's incessant pursuit of white swing voters to the exclusion of black concerns, such as drug sentencing disparities and the racially disparate impact of the death penalty, did not go unnoticed by black voters.[230] Soft money without a racially transformative ideology is of ephemeral benefit to these voters.[231] It renders them mere supplicants in the political process rather than equals to glorified white independents.

Some skeptics of reform have argued that eliminating party soft money will have a "hydraulic" effect, pushing these funds out of the mediating hands of political parties and into the sole control of largely single-issue groups engaging in unlimited independent expenditures.[232] Perhaps this is so. In such a world, perhaps single-issue groups will prove even less scrupulous in their use of racially-coded campaign messages and will prove even more neglectful of black interests than the parties themselves. The question begs, however, should campaign finance reform really be this kind of Hobson's choice for voters and candidates of color? Reform for them must be better than a choice between the organized neglect of political parties and the cacophonous neglect and racial malignancy of single-issue interests groups. Reform must be an affirmation of their equality.

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229. *See Battle of 'Soft Money' Spending On TV Ads Rages On Between Bush and Gore*, Oct. 16, 2000, http://www.brennancenter.org/presscenter/pressrelease_2000_101600.html (last visited Oct. 1, 2001) (on file with the North Carolina Law Review).

230. Terry M. Neal, *Some Black Voters View Gore as the Lesser of Two Evils; Concerns Go Unaddressed, They Say*, WASH. POST, Oct. 29, 2000, at A24 (reporting that many of the blacks interviewed "said they got the impression that Democrats were focused on courting white, suburban women—and to a lesser extent, Latinos—almost to the exclusion of blacks").

231. It is ephemeral because after the money has been spent to get out the black vote, even if the preferred candidate of blacks prevails, policies of special importance to blacks are not given precedence. Nothing better illustrates the point than President Bill Clinton's tenure in office. At times referred to as the "the first black president," Clinton ironically laid bare the fallacy of that moniker when in his final days in office he made sweeping civil rights recommendations, including outlawing racial profiling and eliminating the disparity in sentencing between crack and powder cocaine offenses. *See* Steven A. Holmes, *In His Final Week, Clinton Issues Proposals on Race*, N.Y. TIMES, Jan. 15, 2001, at A11. Civil rights activists rightly noted that Clinton had had eight years to press these issues but had failed to do so. *See id.*

232. *See* Issacharoff & Karlan, *supra* note 71, at 1713–14; *see also* Alison Mitchell, *Before Debate, Added Scrutiny of Finance Bill*, N.Y. TIMES, Mar. 12, 2001, at A1 (reporting that opponents of McCain-Feingold believe that the soft money that parties are prohibited from collecting will be spent in another form by less accountable single-issue interest groups).

3. Coordination, Base Voter Mobilization, and Fear of Reform

Professor Issacharoff's response to this Article uses one provision of the McCain-Feingold bill that concerns coordination between non-profit groups such as churches and candidates and political parties (section 214) to broadly question the ameliorative impact of campaign finance reform on black political participation.[233] Section 214 treats coordinated expenditures or other disbursements by nonprofits and other entities as a contribution to the candidate.[234] Its potential overbreadth lies in its definition of "coordinated expenditure or other disbursement," which it defines as "a payment made in concert or cooperation with, at the request or suggestion of, or pursuant to any general or particular understanding with a candidate, his agents, or a political party committee."[235] Professor Issacharoff contends that this definition may prohibit black churches and advocacy groups like the NAACP from encouraging African Americans to vote by, *inter alia*, conducting voter registration drives.[236] As my foregoing analysis makes clear, I oppose certain provisions of McCain-Feingold and strongly question the efficacy of others. Even if, however, specific skepticism about McCain-Feingold's redefinition of coordination is warranted—and it appears to be—unlike Professor Issacharoff, I am unwilling to allow the tail to wag the dog. Section 214 does not render reform any less imperative or possible.

Professor Issacharoff's analysis of McCain-Feingold's impact on the mobilization of the minority vote is a testament to the subservient role that minorities have been forced to play in the current political process. Professor Issacharoff proclaims that "Al Gore did not need to convince blacks to vote for him; he simply needed to convince them to vote."[237] The less expensive "knock-and-drag" campaigns, rather than large-scale media blitzes, are an effective way to achieve this end, so if the sums of dollars directed at minorities are relatively small, it is simply because there are cheaper ways to reach them.[238] First, Professor Issacharoff's working assumption that black voters need only be mobilized to vote, rather

233. Samuel Issacharoff, *Race and Campaign Finance Reform,* 79 N.C. L. REV. 1523, 1529–31 (2001).

234. *See* S. 27, 107th Cong., § 214, as amended on the floor of the Senate, *available at* http://thomas.loc.gov (Jan. 22, 2001) (on file with the North Carolina Law Review).

235. *Id.* § 214(b).

236. Issacharoff, *supra* note 233, at 1529.

237. *Id.* at 1528–29.

238. *Id.* at 1529.

than persuaded how to vote, is one that prominent campaign professionals of color reject. According to Donna Brazile, the manager of Al Gore's 2000 presidential campaign, a key error that the Democratic Party has made in the past and continues to make is to treat base voters such as minorities as "mobilization" voters only, and not as "persuasion" voters.[239] According to Brazile, this mentality often leads Democratic officials to give short shrift to the support of grassroots efforts directed at minority voters, providing too little money too late in the campaign.[240] This observation was echoed by Andy Hernandez, the Democratic National Committee's Director of Base Vote from 1995 to 1997.[241] According to Hernandez, Democratic officials do not view voters of color as people who determine election outcomes; instead, they view them as people who must be placated as "constituents."[242] It is not that Professor Issacharoff is wrong to focus on the importance of money in mobilizing the minority vote; the problem is that he appears to be offering the potential curtailment of these erratic and underfunded efforts as a reason for minorities to embrace the status quo in campaign finance.

In his apparent opposition to some reforms, Professor Issacharoff treats money in largely the same fashion as equality proponents of reform—without a racially transformative ideology. Thus, Professor Issacharoff seems to think it is reasonable that black issues are excluded from large-scale media campaigns and instead are more specifically targeted to blacks. Yet substantive action on the major concerns of black Americans is only possible if the electorate at large is convinced of their importance and legitimacy—an improbable outcome if these issues are shunted to narrow venues in the national discourse of a presidential campaign. In order for the mobilization that Issacharoff seeks to protect to have a substantive benefit to blacks, money must mobilize mass opinion, not just black votes.

239. Telephone Interview with Donna Brazile, Campaign Manager, Al Gore 2000 Presidential Campaign (June 1, 2001).

240. Brazile noted that the mid-term elections of 1998, in which efforts were targeted at minorities in June of the election year, and the presidential election of 2000, in which grassroots efforts directed at minorities were fully funded one month before the election, are exceptions to the general rule. *Id.* However, even in these instances, funding was not put in place as early as Brazile had urged, diluting the potential of black voter participation.

241. Telephone Interview with Andy Hernandez, former Director of Base Vote, Democratic National Committee (May 15, 2001).

242. *Id.*

Finally, Professor Issacharoff's analysis is far too reticent in observing the myriad ways in which the current campaign finance system disadvantages minorities and in balancing these disadvantages against his narrow focus on section 214. Donna Brazile observes that even Congressional Black Caucus members who hail from majority-black districts, in which the races are less expensive, are underfunded in the current system.[243] Thus, for instance, unlike their white counterparts, they lack seed money to seek higher office and cannot fully exercise other prerogatives of incumbency that better-funded white incumbents are free to exercise.[244] Andy Hernandez noted that in his experience at the Democratic National Committee, race hurt the funding possibilities for a minority candidate.[245] According to Hernandez, if minority candidates trailed in a race, rather than attempt to buttress their chances with money, Democrats were more inclined to write off the candidate than a similarly-situated white candidate.[246] In examining "the likely effect of a more regulated campaign environment on black political participation,"[247] Professor Issacharoff fails to adequately address travails such as these, instead offering much caution about reform but too little critical observation about the pall of the current system.

C. *Toward First Principles: Money and Black Ideology*

Law professors are in the habit of asking both students (in the classroom setting) and colleagues (in the scholarly setting) to put forth a statute that will address the problems that their analyses point out. I save this exercise for another time and venue, for I believe it is important to begin with the establishment of first principles, the effective application of which may well result in a concrete legislative proposal.

1. The *Shaw/Buckley* Nexus

In the long term, in order to be inclusive of minority interests, the reform movement must seek (and achieve) the reversal of both *Shaw v. Reno*[248] and *Buckley v. Valeo*.[249] The reversal of *Shaw* would acknowledge that race is a valuable and necessary speech resource for

243. Interview with Donna Brazile, *supra* note 239.
244. *Id.*
245. Interview with Andy Hernandez, *supra* note 241.
246. *Id.*
247. Issacharoff, *supra* note 233, at 1526.
248. 509 U.S. 630 (1993).
249. 424 U.S. 1 (1976).

voters of color, even in a political system in which money is more closely regulated. To return to the Helms-Gantt contest for a moment, even if Helms and Gantt were evenly matched in their spending—perhaps through a public financing scheme—this would not preclude Helms from seizing the racial low ground, priming white voters' fears and biases. The equalization of dollars in a bi-racial contest may compel the race-baiter to be more judicious in the expenditure of his resources, but it will not eliminate race-baiting. Seeking the reversal of *Shaw* would be a recognition by reformers that majority-minority districts enable the voices of minority voters and candidates to be heard—both at the electoral stage and ultimately in the legislative process—when those voices might otherwise be shut out by racial bloc voting.

The overruling of *Buckley*'s prohibition on expenditure caps is essential not only for greater equality among white voters of different means and for greater white-black parity in bi-racial contests but for two arguably larger reasons as well. If we seek a more public-regarding legislative process—and by this, I mean at a minimum one that is less corrupted by both money *and* race—we must make money less of a tool for division. This begins by limiting its role. Money buys racial division, and these schisms express themselves in the legislative process as well as at the polls. If poor and middle class whites view the "special interests" that siphon their tax dollars as the black welfare cheats rather than corporate interests and the wealthy, while blacks continue to suspect that whites as a whole are unresponsive to their needs, we cannot expect these groups—a majority of the population—to see their mutual interests. As long as they do not, someone else's interests will continue to be served.

Overturning *Buckley* is also an important complement to the creation of majority-minority districts. We cannot assume that black candidates are immune to the negative influences of money.[250] To treat expenditures as protected speech in the context of a majority-minority district is simply to advantage the minority candidate who has access to greater funds, even if that candidate would not best represent the interests of the district. Thus, *Buckley*'s operation in majority-minority districts may well elevate symbolic representation above substantive representation, an odd throwback to the fallacious premise of *Shaw* that blacks elect blacks just to elect blacks.

250. *See* Jonathan P. Hicks, *Expert Fund-Raiser Challenges Congressman*, N.Y. TIMES, June 8, 1998, at B10 (reporting a challenger's attack on Congressman Adolphus Towns, a black incumbent, for taking contributions from the tobacco industry and allegedly voting the industry's interests).

2. Affirmative Action in Campaign Financing

Beyond the conjoining of *Shaw* and *Buckley*, inclusionary campaign finance reform must promote minority candidates *and* minority issues. As Part I.B of this Article illustrates, political money is seldom if ever non-ideological and is often used with racial malice. Campaign finance reform, then, cannot credibly be presented to minorities in terms other than the ideological and racialized context of political money itself.

For the time being, the Democratic Party is the home of the overwhelming majority of black Americans.[251] The organizational politics and policies of the Democrats have permitted blacks to play significant leadership roles, constituting, for instance, 21.1% of the Democratic National Committee and 20.1% of the delegates to the 2000 Democratic National Convention.[252] These numbers are a reward, albeit an inadequate one, for black loyalty to the Democratic Party. In a political process where money is essential, blacks and other minorities must also seek a proportionate share of this type of reward. Minorities must insist on a pact with the Democratic Party in which the party will set goals for the nomination and election of minority candidates to high-visibility political offices *and* will commit to ensure that these candidates have the resources to compete effectively for that office. The latter commitment would entail (1) a hard money affirmative action program, in which donors are actively encouraged to contribute to minority candidates through the creation of incentives which parallel traditional incentives for party donors; and (2) if party soft money survives, either because McCain-Feingold is defeated or struck down by a court, a soft money affirmative action program of a similar vein.

The nomination and election of minority candidates is not always possible or even desirable. This should not mean, however, that minority issues are neglected in a campaign, as they were during the 2000 presidential contest.[253] Minorities, then, must also insist that party monies be spent not merely to bring them to the polls, but more importantly to address issues of unique interest to them so that there is a greater substantive basis for their support.

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251. David A. Bositis, *Blacks and the 2000 Democratic National Convention* 2, *available at* http://www.jointcenter.org/campaign2000/Democratic.htm (2000) (last visited Oct. 1, 2001) (on file with the North Carolina Law Review) (noting that 80% of African Americans have consistently identified themselves as Democratic and an even higher percentage usually votes Democratic).

252. *Id.* at 8.

253. *See supra* note 88.

3. Economic Inequity and Public Financing or Subsidies

Neither of the foregoing principles addresses the fundamental economic disparities between black and white Americans, which in turn translate into disparities in levels of political contributions and access to the legislative process.[254] There is arguably no short-term solution to this problem other than a system of public financing or public subsidies to poorer candidates.[255] Inclusionary reform will perhaps have to embrace such a scheme, whatever its imperfections.

CONCLUSION

Bulworth may be right: "Rich people have always stayed on top by dividing white people from colored people. But white people got more in common with colored people than they do with rich people."[256] Yet, it is precisely because of judicial ratification of this process of division, in the form of the Supreme Court's disparate application of the Equal Protection Clause to people of color, that blacks and whites need campaign finance reform for different reasons and in different ways. Until reformers recognize how race changes the dynamics of reform—indeed, how it threatens the goals of reform—reform will not only be ironically exclusionary, but its goals, such as a more public-regarding legislative process, may remain elusive.

254. *See generally* Model NAACP Resolution on Campaign Finance Reform, *at* http://www.flhp.org (last visited Sept. 10, 2001) (on file with the North Carolina Law Review) (detailing the economic disparities between blacks and whites and their consequences with respect to political donations and access to power).

255. *See id.* (calling for the enactment of voluntary public financing of elections).

256. BULWORTH, *supra* note 1.