

VOICES FROM THE PAST:
RACE, PRIVILEGE, AND CAMPAIGN FINANCE

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In *Race and Money in Politics*, Professor Terry Smith correctly observes that the plight of people of color is oversimplified when it is considered synonymous with the claims of the economically disadvantaged.¹ Those in favor of campaign finance reform have not explored the “meaning of political equality” for the economically disadvantaged and the racially disadvantaged. They have failed to realize that these two groups are “unequal for different reasons and to different degrees.”² A consideration of campaign finance reform and race raises a number of complex issues, many related to the failure of courts, legislatures, and activists to address persisting racial inequality. Professor Smith asks:

What does it mean for white voters, who are a controlling majority, to claim that they are unequal? . . . Can we realistically equate wealth inequality with racial inequality? . . . If wealth inequality’s effect is to give the 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?³

This response makes a related, but distinct, observation. Professor Smith distinguishes racial disadvantage from economic disadvantage. Even when one focuses solely on economic disadvantage, however, many people of color have fewer resources for different reasons than their poor white counterparts. These reasons have been ignored both by campaign finance reform activists who have made connections between race and campaign finance,⁴ as well as by academic legal

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¹ ___ N.C.L. REV. __, ___ (2001).

² Terry Smith, *Race and Money in Politics*, ___ N.C.L. REV. __, ___ (2001).

³ Terry Smith, *Race and Money in Politics*, ___ N.C.L. REV. __, ___ (2001).

⁴ As Professor Smith mentions, the movie *Bulworth*, produced and directed by campaign finance reform activist Warren Beatty, makes a connection between race and campaign finance. See Terry Smith, *Race and Money in Politics*, ___ N.C.L. REV. __, ___ (2001); Todd S. Purdum, *The 2000 Campaign: The Initiatives*, N.Y. TIMES, Mar. 5, 2000, at 1-31 (explaining that Warren Beatty “toyed . . . with running for president on a platform of campaign finance overhaul”). In addition, several civil rights and campaign finance activists have addressed race and campaign finance in the context of conferences sponsored by Howard Law School and the National Voting Rights Institute (“NVRI”), The Brennan Center, and The Asian Law Journal at the University of California, Berkeley. The presentations from the Howard and Berkeley conferences published in law reviews contained important critiques by activists, policymakers, and legal practitioners. They did not, however, constitute comprehensive treatment of race and campaign finance by academic legal

commentators in favor of reform (the “Reformers”) who have as a group not seriously considered the connection of the issues.⁵ Reformers have not only failed to explore the distinctions between racial inequality and wealth inequality,⁶ but also have overlooked the “different reasons” that people of color have less wealth and are “political unequals” in the campaign finance context. This response connects the history of state-sanctioned discrimination to current racial disparities in property distribution to reveal an important critique of the privately financed campaign finance system.⁷

Reformers correctly observe that the inequalities in political participation under the current campaign finance system arise directly from the preexisting unequal distribution of property.⁸ The government, some Reformers note, has created the system of property laws that make possible

commentators. See, e.g., Roger Wilkins (and other speakers), *Campaign Finance as a Civil Rights Issue*, 43 HOW. L.J. 41, 41-61 (1999); John Bonifaz (and other speakers), *Campaign Finance as a Civil Rights Issue*, 43 HOW. L.J. 63, 63-86 (1999); L. Ling-chi Wang, *Beyond Identity and Racial Politics: Asian Americans and the Campaign Fund-raising Controversy*, 5 ASIAN L.J. 329 (1998); Edward M. Chen, *Introduction to Petition to U.S. Commission on Civil Rights*, 5 ASIAN L.J. 353 (1998); *Petition for Hearing Before the U.S. Commission on Civil Rights*, 5 ASIAN L.J. 357 (1998). A number of individuals and civil rights groups represented at the Howard Conference convened and established the Fannie Lou Hamer Project (<http://www.flhp.org>), which recognizes “campaign finance as a civil rights issue” and explores the racial impact of the current campaign finance system. See Ben White, *Shadow Moves To New Venue With Old Issue*, WASH. POST, Aug. 17, 2000, at A15 (describing efforts of the Fannie Lou Hamer Project “to encourage Americans to think of campaign finance reform as a civil rights issue”).

⁵ Reformers Jamin Raskin and John Bonifaz acknowledge that financial disadvantages faced by minority candidates may implicate concerns under Section 2 of the Voting Rights Act, but they relegate their examination to a footnote. See Jamin Raskin & John Bonifaz, *Equal Protection and the Wealth Primary*, 11 YALE L. & POLY REV. 273, 278 n.26 (1993) (admitting that their research is “[p]reliminary” and that “the question of a Voting Rights Act violation . . . is beyond the scope of this Article.”). Cass Sunstein briefly mentions that “[s]ometimes minority candidates can succeed only with the help of PACs specifically organized for their particular benefit. For this reason, PAC limits will in some circumstances diminish the power of minority candidates.” Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1409-10 (1994). Sunstein uses this as an example to explain why campaign finance restrictions are sometimes problematic, and does not engage in a comprehensive analysis as to why the current campaign finance system may benefit or disadvantage people of color. Richard Hasen has acknowledged ethnicity in explaining how his campaign finance proposal allows citizens to associate voluntarily and petition based on group identity. See Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CALIF. L. REV. 1, 56-58 (1996).

⁶ Terry Smith, *Race and Money in Politics*, ___ N.C.L. REV. ___, ___ (2001)

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

⁸ See J. M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 379 (1990) (“One could argue that free speech in a situation of radically unequal economic power is not free speech at all because it is skewed by the preexisting distribution of property.”).

inequalities in property.⁹ Thus, the Reformers argue, the government is not a neutral, detached observer of the political process, but is responsible for the political advantages some actors enjoy under the current campaign finance system,¹⁰ and should not be disempowered from enacting restrictions to curtail these government-created advantages. Indeed, the argument goes, an absence of restrictions on political money actually represents a regulatory decision to extend to certain actors not only economic benefits, but also political benefits.¹¹

While Reformers correctly note that the inequities in political participation arise directly from the unequal distribution of property, their analysis is incomplete because they have failed to affirmatively question the legitimacy of the existing distribution of property. Reformers have not inquired into why past policies that have illegitimately shaped the distribution of property, such as state-sanctioned discrimination against racial minorities, should be replicated in the political process through the seemingly benign current campaign finance system. They have not asked, “Why tolerate a campaign finance system based on a distribution of private property that has been clearly shaped by past discriminatory policies?”

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

I. RACIAL DISTRIBUTION OF WEALTH

Noble factors such as hard work, discipline, and intelligence only partially shape the current

⁹ See J. M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 414 (1990) (“The government is responsible for inequalities in access to the means of communication because it has created the system of property rights that makes such inequalities possible.”).

¹⁰ Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1399 (1994) (“[E]lections based on existing distributions of wealth and entitlements also embody a regulatory system, made possible and constituted through law. Here as elsewhere, law defines property interests; it specifies who owns what, and who may do what with what is owned. The regulatory system that we now have for elections is not obviously neutral or just. On the contrary, it seems to be neither insofar as it permits high levels of political influence to follow from large accumulations of wealth.”).

¹¹ See Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1399 (1994) (“Efforts to redress economic inequalities, or to ensure that they are not turned into political inequalities, should not be seen as impermissible redistribution, or as the introduction of government regulation into a place where it did not exist before. A system of unlimited campaign expenditures should be seen as a regulatory decision to allow disparities in resources to be turned into disparities in political influence.”).

distribution of property. A consideration of how racial discrimination has shaped the distribution of property is essential to an understanding of the structural problems inherent in the existing campaign finance system. This Part briefly reviews a handful of the past discriminatory policies that have shaped racial disparities in the distribution of property and political contributions.¹²

A. Past Discriminatory Policies Shape Property Distribution¹³

Governmental entities have long used racial identity to define and allocate property rights. Official government action in the form of proclamations, statutes, and court decisions took land from Native Americans based on their racial and cultural identity, and reallocated this property to private actors who were white.¹⁴ The law contemplated and enforced the appropriation of labor from African Americans through slavery,¹⁵ which primarily benefited white private actors.¹⁶ The law promoted immigration from European countries, essentially determining the racial makeup of those who would count as full citizens in the United States.¹⁷ As white Americans moved west in the

¹² The focus of this response on past state-sanctioned discriminatory policies is not meant to suggest that past and present discrimination by private individuals has not played a significant role in shaping the distribution of property.

¹³ While this section concentrates primarily on African Americans, Latinos, and Native Americans in the United States, the analysis is not limited to these groups. Distributions of property have been illegitimate due to other reasons, including but not limited to other forms of discrimination based on ethnicity (e.g., Asian Americans) and gender. The analysis is also applicable to groups in other democracies whose lack of control over resources stems in large part from historical decisions based on race or ethnicity (e.g., many indigenous and formerly segregated or enslaved peoples throughout North and South America, South Africa, Zimbabwe, Australia, Hawaii, and other areas).

¹⁴ See Joseph W. Singer, *The Continuing Conquest: American Indian Nations, Property Law, and Gunsmoke*, 1 RECONSTRUCTION 97, 102 (1991) (“[P]roperty and sovereignty in the United States have a racial basis. The land was taken by force by white people from peoples of color thought by the conquerors to be racially inferior.”).

¹⁵ Cf. John Locke, *Of Property*, in PROPERTY: MAINSTREAM AND CRITICAL POSITIONS 18 (C.B. MacPherson, ed.) (1992) (observing that “every Man has a Property in his own Person. . . . The Labour of his Body, and the Work of his Hands, we may say, are properly his.”).

¹⁶ See Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1718 (1993) (“The social relations that produced racial identity as a justification for slavery also had implications for the conceptualization of property. This result was predictable, as the institution of slavery, lying at the very core of economic relations, was bound up with the idea of property. Through slavery, race and economic domination were fused.”). But see Lea S. Vandervelde, *The Labor Vision Of The Thirteenth Amendment*, 138 U. PA. L. REV. 437, 466 (1989) (“Slavery was evil because it destroyed much of the richest land in the South; it degraded labor and the meaning of labor for poor white working men in the South. Thus, slavery pulled white workers down in two ways: one, by direct competition with slave labor in the South, and two, by associating all the industrious efforts of workers with those of the degraded slaves.”).

¹⁷ See T. Alexander Aleinikoff, David Martin & Hiroshi Motomura, IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 152 (4th ed. 1998) (“Some federal [immigration laws] have been blatantly racist, prohibiting immigration and naturalization of aliens from China and Japan and favoring northern and western Europeans over southern and eastern Europeans.”); Louis Henkin, *The Constitution and United States Foreign Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 859 (1987) (“The Chinese Exclusion doctrine and its extensions have permitted, and perhaps encouraged, paranoia, xenophobia, and racism, particularly during periods of international

1800s, the law tolerated discriminatory practices in southwestern states that stripped Mexican Americans of the any opportunities to own property.¹⁸ In addition to conquest, slavery, and immigration policy, well-known public and private racial barriers in education, employment, and business have disadvantaged people of color while enuring to the benefit of others through artificially reduced competition.¹⁹

Other, less apparent factors also contribute to the perpetuation of economic disparities between whites and people of color. The benefits given by facially discriminatory government policies may be multiplied by facially neutral government policy and economic markets, and may thus have a greater impact today than they did when originally enacted and enforced.

For example, the Federal Housing Administration (“FHA”), formed in 1934, promoted a model racially restrictive covenant that whites could use to maintain neighborhood “stability,” thereby explicitly promoting segregated home ownership among whites, and discouraging home ownership among non-whites.²⁰ “Federally subsidized mortgages often required that property owners incorporate restrictive covenants into their deeds,”²¹ and builders adopted the covenants so that their property would qualify for federal insurance.²² After perpetuating this segregation, the federal government, concerned more about race than any other demographic trend, “consistently gave

tension.”); Kevin R. Johnson, *Race Matters: Immigration Law and Policy Scholarship, Law in the Ivory Tower, and the Legal Indifference of the Race Critique*, 2000 U. ILL. L. REV. 525, 529 (discussing “the legal requirement before 1952 that naturalization applicants be ‘white’”).

¹⁸ See generally Frank D. Bean & Marta Tienda, *THE HISPANIC POPULATION OF THE UNITED STATES* 17-22 (1987); Martin N. Marger, *RACE AND ETHNIC RELATIONS* 284 (1991); Charles F. Marden, Gladys Meyer & Madeline H. Collins, *MINORITIES IN AMERICAN SOCIETY* 135, 142, 152 (1992). [confirm and get precise cite]

¹⁹ See Melvin L. Oliver and Thomas M. Shapiro, *BLACK WEALTH / WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* 51 (1995) (stating that “every circumstance of bias and discrimination against blacks has produced a positive gain for whites . . .”); Gilbert Thomas Stephenson, *RACE DISTINCTIONS IN AMERICAN LAW* (1910) (arguing that race distinctions in the laws hamper economic and educational opportunities of African Americans since settlement in America).

²⁰ See Melvin L. Oliver and Thomas M. Shapiro, *BLACK WEALTH / WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* 39, 42 (1995); Kenneth Jackson, *CRABGRASS FRONTIER* 190-218 (1985) (recounting the development of Federal Housing Administration appraisal standards that discriminated against black communities by favoring lending in homogenous subdivisions); Douglas S. Massey & Nancy A. Denton, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 53-55 (1993) (extensively documenting the effect of discrimination resulting from Federal Housing Administration appraisal procedures in neighborhoods comprised of “inharmonious racial or nationality groups”).

²¹ Richard Thompson Ford, *The Boundaries of Race*, 107 HARV. L. REV. 1843, 1848 (1994) (citing Charles Abrams, *FORBIDDEN NEIGHBORS: A STUDY OF PREJUDICE IN HOUSING* 234-35 (1955)).

²² See Richard Thompson Ford, *The Boundaries of Race*, 107 HARV. L. REV. 1843, 1848 (1994) (citing Martha Mahoney, Note, *Law and Racial Geography: Public Housing and the Economy in New Orleans*, 42 STAN. L. REV. 1251, 1258 (1990)).

black neighborhoods the lowest rating for purposes of distributing federally subsidized mortgages.”²³ Private lenders often followed the federal system in making loan decisions.²⁴

The racial disparity in wealth realized through home ownership and home value originally caused by federal housing policies has since been compounded by seemingly neutral public and private decisions. Because people of color are less likely to own homes, they are less likely to take advantage of tax provisions allowing for the deduction of a large percentage of their housing costs (all property taxes and mortgage interest).²⁵ Further, homes purchased in the 1930s increased greatly in value by the 1970s, and this increase benefited whites more than people of color.²⁶ Even people of color able to purchase homes are less likely than comparable whites to benefit due to the slower rate of appreciation of property in non-white areas.²⁷

B. *Current Disparities in Income and Wealth*

Wealth disparities caused by past public and private discrimination have been perpetuated

²³ See Richard Thompson Ford, *The Boundaries of Race*, 107 HARV. L. REV. 1843, 1848, 1848 n.9 (1994) (citing Kenneth T. Jackson, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 198-99 (1985); Douglas S. Massey & Nancy A. Denton, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 52 (1993)).

²⁴ See Richard Thompson Ford, *The Boundaries of Race*, 107 HARV. L. REV. 1843, 1848, 1848 n.9 (1994) (citing Douglas S. Massey & Nancy A. Denton, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 52 (1993)). In addition to housing policies that promoted home ownership along racial lines, a number of other government policies have promoted racial disparities in property distribution. For example, “[i]n the first half of the twentieth century, various western states passed ‘alien land laws’ that limited the right to own property to aliens racially eligible to naturalize, thereby effectively prohibiting foreign-born Asian residents from acquiring certain types of land.” Joseph Singer, PROPERTY LAW: RULES, POLICIES, AND PRACTICES 42 (1997); *Oyama v. California*, 332 U.S. 633 (1947) (invalidating alien land laws).

²⁵ See I.R.C. 164(a) (1994), I.R.C. 163(h)(2)-(3); Melvin L. Oliver and Thomas M. Shapiro, BLACK WEALTH / WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY 44 (1995) (“The U.S. tax code channels benefits and encourages property and capital asset accumulation differentially by race.”).

²⁶ See Richard Banks, *Nondiscriminatory Perpetuation of Racial Subordination*, 76 B.U.L.REV. 669, 684-85 (1996).

²⁷ See Melvin L. Oliver and Thomas M. Shapiro, BLACK WEALTH / WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY 39, 150 (1995) (observing that “similar housing investments made by whites and blacks yield vastly divergent returns - to the distinct disadvantage of blacks”); Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841 (1994) (arguing that race-neutral legal doctrine reinforces residential segregation created by public policy and private actors, causing significant disparity in the appreciation of black- and white-owned homes, in education, and in political influence); Raymond S. Franklin, SHADOWS OF RACE AND CLASS (1991); Reynolds Farley et al., *Stereotypes and Segregation: Neighborhoods in the Detroit Area*, 100 AM. J. SOC. 750 (1994) (arguing that racial stereotypes play an important role in explaining whites' resistance to integrated neighborhoods).

by intergenerational transfers of wealth.²⁸ While assets conveyed at death are important and perhaps the most obvious permutation of these transfers,²⁹ wealth also originates from other types of intergenerational transfers. For example, wealth often derives from the “education, experiences, friendships, and contacts” a child obtains from parents.³⁰ Whites also tend to receive disproportionate financial assistance from parents to handle the challenges of early adulthood. For example, whites are twice as likely as blacks to receive family assistance in purchasing a home.³¹ Indeed, wealth itself reflects a type of “resource available for improving life chances, providing further opportunities, securing prestige, passing status along to one’s family, and influencing the political process.”³² Intergenerational transfers of wealth, despite being motivated by a concern for offspring rather than racial animus, perpetuate the effects of racially discriminatory policies from over a century ago, such as slavery and conquest. These intergenerational transfers also perpetuate discriminatory policies enforced only a few decades ago, such as racially disparate immigration policy, and segregation in education, employment, and housing.

The effects of past discriminatory policies are partially reflected in contemporary disparities among racial groups in median household income and net worth. In 1998, median household income was \$42,439 for whites, \$28,330 for Latinos, and \$25,351 for African Americans.³³ Examination of contemporary household net worth, which consists of all assets less any debts, reveals a more complete picture of the effects of intergenerational transfers of wealth.³⁴ In 1995, the median net

²⁸ See Dalton Conley, *BEING BLACK, LIVING IN THE RED: RACE, WEALTH AND SOCIAL POLICY IN AMERICA* (1999) (arguing that many racial inequities result from the disparities in accumulated family wealth). Note that the disparities in intergenerational transfers of wealth are most relevant among communities in which interracial marriage is minimal. See Bureau of the Census, 56, tbl. 62 (1994) (“Among interracial married couples, the largest number, 920,000, were white/other race couples; Black/white couples were only 242,000, or less than one out of five interracial couples.”).

²⁹ See Melvin L. Oliver and Thomas M. Shapiro, *BLACK WEALTH / WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* 155 (1995).

³⁰ Melvin L. Oliver and Thomas M. Shapiro, *BLACK WEALTH / WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* 152 (1995). See also Ngina S. Chiteji and Frank P. Stafford, *Portfolio Choices of Parents and their Children as Young Adults: Asset Accumulation by African-American Families*, 89 AM. ECON. REV. 377,377-80 (1999) (studying cross-generational influences on wealth and finding that a young family’s likelihood of owning stock, a home, and other assets is influenced by whether parents held these financial assets).[confirm and get author]

³¹ See Melvin L. Oliver and Thomas M. Shapiro, *BLACK WEALTH / WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* 145, 153 (1995) (citing suggestion by the Los Angeles Survey of Urban Inequality that whites are twice as likely as blacks to receive family assistance in purchasing a home).

³² Melvin L. Oliver and Thomas M. Shapiro, *BLACK WEALTH / WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* 32 (1995).

³³ UNITED STATES DEPARTMENT OF COMMERCE ECONOMICS AND STATISTICS ADMINISTRATION, *MONEY INCOME IN THE UNITED STATES* i, viii (1999). [no newer stats]

³⁴ See Melvin L. Oliver and Thomas M. Shapiro, *BLACK WEALTH / WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY*, 58 (1995) (“net worth . . . conveys the straightforward value of all assets less any debts.”).

worth for white households (\$61,000) was over eight times greater than African American households (\$7,400) and over twelve times greater than Latino households (\$5,000).³⁵ When equity in owner-occupied housing is subtracted, the disparities are even more glaring. Financial wealth was \$18,000 for the typical white household in 1995, \$200 for the typical African American household, and \$0 for the typical Latino household.³⁶

Similarly, African Americans, Latinos, and Native Americans are disproportionately represented among those Americans having the most dire financial conditions. Whereas only 7.7 percent of whites live in poverty, 23.6 percent of African Americans, 22.8 percent of Latinos, and 25.9 percent of Native Americans live in poverty.³⁷ In 1995, 15 percent of white households had a zero or negative net worth (greater debt than assets), compared to 31 percent of African American and 38 percent of Latino households.³⁸

The aforementioned data should not suggest that one can engage in the measurement of racial inequality with straightforward, mathematical precision. A number of complicating factors exist. For example, Asian Americans are not a single, uniform community, but consist of over 30 different ethnic groups. Some of these Asian American ethnic groups have, on average, higher incomes than whites, while others have much lower average incomes.³⁹ Some citizens of color migrated to the United States after discriminatory laws were repealed. Government policies have attempted to

³⁵ See Chuck Collins, Betsy Leondar-Wright & Holly Sklar, *SHIFTING FORTUNES: THE PERILS OF THE GROWING AMERICAN WEALTH GAP* __ (1999) (finding that the median black household had a net worth of just \$7,400 in 1995, including home equity – at about 12 percent of the \$61,000 in median wealth for whites and that the median Hispanic household had a net worth of only \$5,000 in 1995, including home equity – at just 8 percent of the median for whites).

³⁶ See Chuck Collins, Betsy Leondar-Wright & Holly Sklar, *SHIFTING FORTUNES: THE PERILS OF THE GROWING AMERICAN WEALTH GAP* __ (1999) (observing that while the typical white household had \$18,000 in financial wealth (net worth minus equity in owner-occupied housing) in 1995, the typical black household had just \$200 and the typical Hispanic household had zero).

³⁷ UNITED STATES CENSUS BUREAU, *POVERTY: 1999 HIGHLIGHTS* ___(DATE). See Naomi Mezey, *The Distribution of Wealth, Sovereignty, and Culture Through Indian Gaming*, 48 *STAN. L. REV.* 711, 714 (1996) (“According to Stephen Cornell and Joseph Kalt, researchers with the Harvard Project on American Indian Economic Development, ‘American Indian reservations are notable for their extreme and persistent poverty - reservation Indians are the poorest minority in the United States.’ . . . [I]n some tribes, such as the Navajo, more than 45 percent of families live in poverty.”) (citing Stephen Cornell & Joseph P. Kalt, Malcolm Wiener Ctr. for Social Policy, *WHERE'S THE GLUE? INSTITUTIONAL BASES OF AMERICAN INDIAN ECONOMIC DEVELOPMENT* 6 (Harvard Project on Am. Indian Econ. Dev., Report No. 52, 1991)).

³⁸ See Chuck Collins, Betsy Leondar-Wright & Holly Sklar, *SHIFTING FORTUNES: THE PERILS OF THE GROWING AMERICAN WEALTH GAP* __ (1999) (finding that in 1995, 31 percent of black and 38 percent of Hispanic households had zero or negative net worth (greater debt than assets), compared to 15 percent for whites).

³⁹ The median income for Asian Americans as a group is 12 percent higher than whites, but the poverty rate of Asian Americans is 50 percent greater than whites. Although data regarding the wealth of Asian Americans is not available, it is likely that it is lower, as Asian Americans have a lower rate of home ownership and business ownership than white Americans. http://www.prb.org/pubs/population_bulletin/bu54-3/Income_Wealth_Poverty.htm.

aggressively recruit well-educated and highly-skilled foreign-born workers, including people of color. These complicating factors, however, do not detract from the proposition that past discriminatory laws have shaped the existing racial distribution of resources.

C. *Disparities in Contributions*

It should come as no surprise that racial disparities in the control over economic resources are mirrored in the context of political contributions. A 1997 study directed by scholars at Georgetown University, the University of Akron, the University of Maryland, and the University of Rochester surveyed individuals who contributed \$200 or more to congressional campaigns in the 1996 election cycle (smaller contributions need not be reported to the Federal Election Commission).⁴⁰ Of those who responded to the survey, 95 percent identified themselves as white, and less than 1 percent identified themselves as people of color.⁴¹ These trends do not appear to be unusual, as a separate study of contributors to Georgia campaigns conducted by University of Georgia and Georgetown University professors revealed that 97 percent of contributors were white while only 2 percent were African American.⁴²

Another study found that a disproportionately small number of contributions come from neighborhoods that are populated predominately by people of color. The study, sponsored by Public

⁴⁰ The Joyce Foundation funded the study, and the principal investigators included John Green (Professor of Political Science and Director of the Ray C. Bliss Institute at the University of Akron), Paul Herrnson (Professor of Government and Politics at the University of Maryland), Lynda Powell (Professor of Political Science at the University of Rochester), and Clyde Wilcox (Professor of Government at Georgetown University). See John Green, Paul Herrnson, Lynda Powell, & Clyde Wilcox, *INDIVIDUAL CONGRESSIONAL CAMPAIGN CONTRIBUTORS: WEALTHY, CONSERVATIVE AND REFORM-MINDED* (1998). The study was based on data obtained through a 1997 mail survey to contributors randomly drawn from Federal Elections Commission records. *Id.* at 12. About half of those drawn responded to the survey, and the conclusions of the study were based upon these 1,118 usable responses. *Id.* The margin of error is plus or minus four percent. *Id.*

⁴¹ See John Green, Paul Herrnson, Lynda Powell, and Clyde Wilcox, *INDIVIDUAL CONGRESSIONAL CAMPAIGN CONTRIBUTORS: WEALTHY, CONSERVATIVE AND REFORM-MINDED* 13 (1998) (showing that 95 percent of contributors surveyed indicated they are white); Ellen Miller, *Guess What? Political Donors are Old, Rich, White Men*, *The Hill*, July 1, 1998, at 5 (“less than 1 percent in the Joyce survey identified themselves as people of color.”). While minorities gave less than 5 percent of the political contributions, they cast 23 percent of the votes in the 2000 general presidential election, suggesting that the contribution disparity is more closely related to an inability to give than political apathy. See Marjorie Connelly, *Who Voted: A Portrait of American Politics, 1976-2000*, *N.Y. TIMES*, Nov. 12, 2000, at WK 4.

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

Campaign,⁴³ compared the racial composition of zip codes to zip code data disclosed by political contributors.⁴⁴ The study noted that in zip codes populated predominately by people of color, the average per capita income was \$9,046.⁴⁵ For every 10,000 residents in these zip codes, only eight political contributions were made.⁴⁶ In contrast, in the average American zip code, incomes were 37 percent higher and residents were three times more likely to make political contributions.⁴⁷ In the 26 zip codes where residents gave the most money, incomes were 408 percent higher and residents were 54 times more likely to contribute than those in predominately non-white areas.⁴⁸ Also, in comparing the 26 zip codes where residents gave the most money to the 2,492 predominately non-white zip codes, the study found that the 0.68 million inhabitants of the former contributed more money than the 41.3 million inhabitants of the latter.⁴⁹

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

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

⁴³ Public Campaign is a public interest organization that favors public financing of campaigns. *See* PUBLIC CAMPAIGN, *THE COLOR OF MONEY: CAMPAIGN CONTRIBUTIONS AND RACE* 2 (1998).

⁴⁴ The Federal Election Commission does not require that contributors disclose their racial identity. *See* PUBLIC CAMPAIGN, *THE COLOR OF MONEY: CAMPAIGN CONTRIBUTIONS AND RACE* 11 (1998). Therefore, to obtain its findings, the Public Campaign study compared Census Bureau data on racial composition of zip codes with Federal Election Commission data on contributions given by individuals in particular zip codes to federal candidates, Political Action Committees, and political parties during the 1995-1996 election cycle. *See* PUBLIC CAMPAIGN, *THE COLOR OF MONEY: CAMPAIGN CONTRIBUTIONS AND RACE* 11 (1998).

⁴⁵ *See* PUBLIC CAMPAIGN, *THE COLOR OF MONEY: CAMPAIGN CONTRIBUTIONS AND RACE* 37 (1998).

⁴⁶ *See* PUBLIC CAMPAIGN, *THE COLOR OF MONEY: CAMPAIGN CONTRIBUTIONS AND RACE* 37 (1998).

⁴⁷ *See* PUBLIC CAMPAIGN, *THE COLOR OF MONEY: CAMPAIGN CONTRIBUTIONS AND RACE* 36 (1998).

⁴⁸ *See* PUBLIC CAMPAIGN, *THE COLOR OF MONEY: CAMPAIGN CONTRIBUTIONS AND RACE* 37 (1998). Note that while Public Campaign reports that the average American zip code is 75.7 percent white, the 26 highest giving zip codes have an only slightly higher white population of 78 percent. *See* PUBLIC CAMPAIGN, *THE COLOR OF MONEY: CAMPAIGN CONTRIBUTIONS AND RACE* 22 (1998) (calculation based on chart). One might argue that these figures indicate that higher end neighborhoods contain significant numbers of people of color who are making contributions. Public Campaign suggests that, instead, this data often reflects that a single zip code may contain both high-contributing wealthy white neighborhoods and low-contributing working-class neighborhoods populated predominately by people of color. *See* PUBLIC CAMPAIGN, *THE COLOR OF MONEY: CAMPAIGN CONTRIBUTIONS AND RACE* 6 (1998).

⁴⁹ *See* PUBLIC CAMPAIGN, *THE COLOR OF MONEY: CAMPAIGN CONTRIBUTIONS AND RACE* 37 (1998). While racial disparities in spending political money have not been studied as extensively as racial disparities in contributing political money, there is no evidence that the expenditure racial disparity is any less stark than the contribution racial disparity.

perspectives.

Even after the dissolution of racially discriminatory laws against people of color, the law has ratified the misallocation of property by protecting the settled expectations of those who obtained economic benefits under a discriminatory regime.⁵⁰ Legal protection of settled expectations, along with doctrines that build upon existing property rights – such as First Amendment applications that protect the use of political expenditures and contributions – obscure continued privilege based on past discriminatory practices. These doctrines make the existing economic order appear fair and equal.⁵¹ The existing campaign finance system, however, advances certain political ideologies by legitimizing and empowering the settled expectations of those who have profited from the racial misallocation of property. “These state-created advantages” allow individuals with certain racial backgrounds to “obtain ‘an unfair advantage in the political marketplace.’”⁵²

By accepting arguments that base campaign finance on existing distributions of private property, courts and legislatures simply reaffirm discriminatory public and private decisions of the past.⁵³ For example, a discriminatory law that prevented a young African American woman in Alabama from attending a good public school in 1951 affected more than just the educational and economic opportunities available to her and her children. Due to the current private property-based campaign finance system, the discriminatory law also impairs their ability to participate in politics

⁵⁰ See Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1714 (1993) (“After legalized segregation was overturned, whiteness as property evolved into a more modern form through the law’s ratification of the settled expectations of relative white privilege as a legitimate and natural baseline.”). In some situations, courts refuse to protect or ratify expectations in property acquired under a discriminatory regime. See e.g., *Shelley v. Kraemer*, 334 U.S. 1, 4 (1948) (invalidating judicial enforcement of racially restrictive covenants).

⁵¹ See Kimberle Williams Crenshaw, *Race, Reform, and Retrenchment*, 101 HARV. L. REV. 1331, 1351-52 (1988) (“Law is an essential feature in the illusion of necessity because it embodies and reinforces ideological assumptions about human relations that people accept as natural or even immutable. . . . Thus conflict and antagonism are contained: the legitimacy of the entire order is never seriously questioned.”); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1777 (1993) (“The law masks what is chosen as natural; it obscures the consequences of social selection as inevitable. The result is that the distortions in social relations are immunized from truly effective intervention, because the existing inequities are obscured and rendered nearly invisible.”).

⁵² *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 659 (1990) (permitting restrictions on corporate expenditures in support of political candidates, reasoning that the state gives to corporations special advantages in accumulating resources).

⁵³ Cf. Eric Schnapper, *Perpetuation of Past Discrimination*, 96 HARV. L. REV. 828 (1983) (exploring the employment of legal doctrine to prevent perpetuation of past racial discrimination); Kevin R. Johnson, *Race Matters: Immigration Law and Policy Scholarship, Law in the Ivory Tower, and the Legal Indifference of the Race Critique*, 2000 U. ILL. L. REV. 525, 529 n.20 (“Although the most invidious discrimination in the naturalization laws has been removed, the legacy of exclusion must be examined to ensure that its discriminatory influence can be extracted root and branch.”).

in 2001.⁵⁴ Further, privately financed politics are likely to create future racial disparities in the distribution of resources. Due to the inability of the same African American woman and her children to participate in the current campaign finance system in 2001, it is more probable that future lawmaking will steer economic resources and opportunities away from her, her children, and their descendants. The benefits of lawmaking will more likely be directed toward contributors and similarly-situated persons with resources, who have directly or indirectly benefited from past discriminatory policies.⁵⁵

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

The analysis advanced in this response may not gain universal acceptance. Some will contend that racial disparities in property holdings reflect a coincidental distribution of individual merit, and it is thus fair to construct a campaign finance system based on private property. Others assert that proposed reforms will fail to address the problems of the existing system, and will likely cause new problems.⁵⁸ Some great thinkers articulate these perspectives, and they should not be

⁵⁴ Some have argued that segregation is inherently unequal. See *Brown v. Board of Education*, 347 U.S. 483, 495 (1954) (“We conclude that in the field of public education the doctrine of ‘separate but equal’ has no place. Separate education facilities are inherently unequal.”). Others, however, have noted that improved funding and educational opportunities for African-American children in schools should have been the true goal, and that this objective went unmet. See Derrick Bell, *RACE, RACISM & AMERICAN LAW* 612-616 (3d ed. 1992). Regardless of one’s definition of the problem and solution, discriminatory laws created a situation in which our 11-year-old young woman in 1951 received a substandard education.

⁵⁵ Cf. Spencer Overton, *Mistaken Identity: Unveiling the Property Characteristics of Political Money*, 53 *VAND. L. REV.* 1235, 1266-67 (2000) (discussing the cycle of entrenchment that arises from failure to restrict the use of political money).

⁵⁶ Professor Foley’s argument that the existing distribution of resources should not determine future distributions of resources is strengthened when one considers that the existing distribution has been shaped by policies that are no longer legitimate. See Edward B. Foley, *Equal-Dollars-Per-Voter*, 94 *Colum. L. Rev.* 1204, 1204 (1994) (“An important function of electoral politics is to determine how wealth should be distributed among society’s members. The existing distribution of wealth at the time of any particular election should not affect the electorate’s determination of what the distribution should be henceforth.”).

⁵⁷ Cf. Kimberle Crenshaw, *Color Blindness, History and Law*, in *THE HOUSE THAT RACE BUILT: BLACK AMERICANS*, U.S. TERRAIN 285 (Wahneema Lubiano ed., 1997) (observing that “[f]ormal equality in conditions of social inequality becomes a tool of domination, reinforcing that system and insulating it from attack.”).

⁵⁸ See Samuel Issacharoff & Pamela Klaran, *The Hydraulics of Campaign Finance Reform*, 77 *TEX. L. REV.* 1705, 1707 (1999) (arguing that reform “proposals may increase, rather than dampen, the role of money in politics” and make politics less accountable to democratic control). But see Daniel Hays Lowenstein, *The Root of All Evil is Deeply Rooted*,

casually dismissed in making political judgments about campaign finance regulation. Nevertheless, there is no apolitical, determinate organizing principle that mandates that society as a whole must adopt these judgments to the exclusion of the historical and continuing relationship between race and private property.⁵⁹ While supporters of a privately financed political system with minimal regulation may specify a vision of the world that tolerates the protection of participatory rights acquired due to past discriminatory policies, others should not be forced to embrace this normative interpretation.⁶⁰

One problem with current campaign jurisprudence is that it limits the political understandings of the role of property by extending high constitutional protection to property used in the campaign finance context.⁶¹ While property rights shaped by racial discrimination are generally subject to restriction and redistribution in the economic sphere,⁶² these same property rights are more absolute and impenetrable when exercised in the political money context.⁶³ Unfortunately, current campaign finance jurisprudence strictly protects the settled expectations of those who have benefited from illegitimate distributions of property, and generally ignores those disadvantaged by illegitimate

18 HOFSTRA L. REV. 301, 303-304 (1989) (arguing that opponents of reform have little empirical evidence to support their proposition that reforms “are far more likely to be harmful than beneficial,” and that there are also unintended consequences in maintaining the status quo).

⁵⁹ Cf. Kimberle Williams Crenshaw, *Race, Reform, and Retrenchment*, 101 HARV. L. REV. 1331, 1346 (1988) (“[L]aw itself does not dictate which of various visions will be adopted as an interpretive base. The choice between various visions and the values that lie within them is not guided by any determinate organizing principle.”).

⁶⁰ Arguments for both campaign finance reform and the status quo rest upon a descriptively and normatively contestable vision of politics. Cf. Samuel Issacharoff & Pamela Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1708 (1999) (contending that “once the case for reform is understood to rest on a descriptively and normatively contestable vision of politics, we will be in a better position to discuss both the attractiveness of particular proposals for reform and the limits of a reform strategy”); William P. Marshall, *The Last Best Chance for Campaign Finance Reform*, 94 NW. U.L. REV. 335, 376 (2000) (finding that “Democracy does not have an ideal archetype” and thus the case for campaign finance reform “must be tempered by the awareness that there is no clear guidepost from which to evaluate whether democracy is, or is not, working”).

⁶¹ See *Nixon v. Shrink Missouri Gov't PAC*, 120 S. Ct. 897, 903-04 (2000) (interpreting the appropriate standard for reviewing contribution limits as more stringent than intermediate scrutiny but “different” from the strict scrutiny applied to expenditure limits).

⁶² See Spencer Overton, *Mistaken Identity: Unveiling the Property Characteristics of Political Money*, 53 VAND. L. REV. 1235, 1239 (2000) (observing that “courts . . . generally allow for broad legislative regulation of property and economic transactions in areas as varied as minimum wage, antitrust, rent control, and environmental law.”).

⁶³ Cf. Jennifer Nedelsky, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 260 (1990) (“Why give up the overt formal limits [on the legislature] with respect to economic regulation and social assistance, and enforce the power and privilege of property against the egalitarian measures of campaign finance laws?”); Frank I. Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 IOWA L. REV. 1319, 1344-45 (1987); Frank I. Michelman, *Political Truth and the Rule of Law*, 8 TEL AVIV U. STUDIES IN L. 281, 288 (1988) (“For is it not, after all, a fair question why realism and relativism should have been such potent destroyers of juristic absolutism shielding the market manifestations of property rights against legislative control, but so impotent as the *Buckley* manifesto implies when it comes to their manifestations in the political sphere?”).

distributions.⁶⁴

CONCLUSION

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

It is unlikely that any campaign finance reform proposal will result in a political process that is completely immune from disproportionate influence arising from the illegitimate distribution of property. There are also conceptual challenges in drawing bright lines that distinguish campaign finance regulation from restraints on the exercise of other expressive and associational liberties.⁶⁵ Nevertheless, racial hierarchy cannot be tempered when decisionmakers ignore or passively tolerate the ways in which current campaign finance jurisprudence frames the economic and political experiences of people of color. A more comprehensive understanding of the campaign finance problem requires that race be integrated as an important analytical consideration.

⁶⁴ See *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (rejecting as illegitimate the government's alleged interest in equalization of the ability of citizens to affect elections by stating that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.").

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