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## White Dollars, Black Candidates: Inequality and Agency in Campaign Finance Law

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Smith: White Dollars, Black Candidates: Inequality and Agency in Campaign  
**WHITE DOLLARS, BLACK CANDIDATES: INEQUALITY AND  
AGENCY IN CAMPAIGN FINANCE LAW**

TERRY SMITH\*

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I. INTRODUCTION

The summer preceding the 2004 presidential election has come to be known as the “summer of 527s,” a reference to the ubiquity during the election of independent political organizations established under § 527 of the Internal Revenue Code.<sup>1</sup> Section 527 organizations are tax-exempt, operate independently of political parties and their candidates, and seek to influence federal elections short of the outright endorsement of the election or defeat of a candidate.<sup>2</sup> Unregulated in the amounts and sources of the contributions they can receive, those organizations came to be personified by billionaires like George Soros, who used the § 527 vehicle to infuse millions of dollars into the 2004 election.<sup>3</sup>

If 527 organizations owned the summer, then the fall proved to be the autumn of discontent for community-based civil rights organizations, which traditionally played instrumental roles in voter registration and get out the vote (GOTV) drives in federal campaigns prior to the enactment of the Bipartisan Campaign Reform Act of 2002 (BCRA).<sup>4</sup> BCRA banned soft, or unregulated, money in federal elections<sup>5</sup>

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1. See Victoria S. Shabo, Comment, “*Money, Like Water . . .*”: Revisiting Equality in Campaign Finance Regulation After the 2004 “Summer of 527s,” 84 N.C.L. REV. 221, 224 (2005); I.R.C. § 527 (2000).

2. I.R.C. § 527.

3. Shabo, *supra* note 1, at 224–26.

4. Pub. L. No. 107-155, 116 Stat. 81 (codified at 2 U.S.C. §§ 431–456 (Supp. 2003)).

5. See *infra* notes 57–63 and accompanying text.

but vanquished a key source of funding for these groups in the process.<sup>6</sup> 527 organizations attempted to fill the void, not by supplying funding to these local grassroots organizations, but rather by undertaking their erstwhile functions.<sup>7</sup> The perceived usurpation of 527 organizations on the traditional role of minority grassroots organizations prompted University of Maryland political scientist Ron Walters to remark, “[W]e’re not putting the resources into the hands of those who can mobilize the Black vote . . . . They’re making some serious errors with these resources by not connecting up to the people who can move this full apparatus. This is another form of colonialism—colonialism is about control.”<sup>8</sup>

The pique of local civil rights organizations over resources for voter mobilization was symptomatic of a larger overhang left by BCRA for voters of color (though not exclusively for those voters): BCRA left minority candidates, voters, and issues as unequal as ever.<sup>9</sup> Although new reforms such as expenditure limitations and public financing are afoot and portend a better reckoning with equality concerns, the experience under BCRA highlights a truth that spoke even before BCRA’s enactment: minority political empowerment—whether from the standpoint of the election of minority candidates, GOTV, or the engagement of minority concerns during elections—has long been too dependent on white money.

The minority voting rights movement, under continuing attack from *Shaw v. Reno*<sup>10</sup> and facing the challenge of re-authorization of Section 5 of the Voting Rights Act of 1965,<sup>11</sup> has yet to rectify this troubling paradox of its movement. The movement’s focus on autonomy—the election of minority candidates without dependence upon white votes—is difficult to reconcile with minority candidates’ reliance on white dollars to finance their campaigns. No less contradictory is the effort to evaluate all candidates’ commitment to a minority-supported agenda when that agenda is often silenced during the campaign because of candidates’ preoccupation with the median voter and the relative paucity of independent expenditures devoted to minority issues. The common refrain to these observations is the plea of inequality: those who have less give less and are heard less.<sup>12</sup> I think this argument is indisputable and that inequality will persist in the absence of

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6. Brian DeBose, *Black Caucus Retreats on 527s Reforms*, WASH. TIMES, June 2, 2005, at A01.

7. *Id.*

8. Hazel Trice Edney, “Arrogant” White Liberals Seek to Manage Black Voter Turnout, S.F. BAY VIEW, Sept. 29, 2004, <http://www.sfbayview.com/092904/arrogantwhiteliberals092904.shtml>.

9. See *infra* notes 61–63 and accompanying text.

10. 509 U.S. 630 (1993).

11. 42 U.S.C. § 1973c (2000).

12. See Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U.P.A.L. REV. 73, 74 (2004) (arguing that opponents of campaign finance reform “largely overlook the structural impact of vast disparities in wealth on the ability of most citizens to make financial contributions”); see also Antonio Gonzalez & Stephanie Moore, *Wealthy Campaign Donors Stifle Minority Voices*, USA TODAY, Dec. 11, 2003, at 23A (“Because the system implicitly relies on an elite group of wealthy, white donors to fund most campaigns, it discriminates against people of color and other underserved communities that don’t cough up as much money.”).

reforms such as expenditure limitations and public financing. Inequality and agency, however, can and do exist simultaneously in campaign finance law. A type of agency, in the representation or virtual representation sense, exists in minority voters' reliance on candidates supported but not funded by them to represent their interests. Yet a different kind of agency, agency that focuses on minority voters' capacity for self-help and independent action, has been largely unrealized. One reason agency in the empowering sense is so lacking is that minority voters have failed to critically assess their relationship with consumerism, which enriches political opponents by diverting resources to corporations and their owners that could otherwise be invested in minority voters' own political capital. What is needed is a mass re-orientation of thought regarding the worth of politics and the perils of disengagement. The gravamen of this re-education project must be the exhortation that politics has consequences for the everyday lives of people of color and should therefore be part of the bundle of goods to which their spending power is directed.

Part II discusses the financial dependence of minority candidates on white political contributions and the extent to which this relationship negatively impacts minority political autonomy. In addition, this Part focuses on how the absence of minority dollars from the campaign finance system—whether in the form of candidate contributions or independent expenditures—corresponds to the absence of discussion of minority issues. Part III discusses BCRA's failure to address the core concerns raised in Part II and how other initiatives such as public financing of campaigns might better, though still imperfectly, address these concerns. Regardless of whether more promising campaign finance initiatives are realized, the need for minority voters to exercise agency will remain. Part IV discusses that need. In so doing, I observe that minority consumerism has the ironic and circular effect of empowering anti-minority interests in the political marketplace. At the same time, containment and a rethinking of consumerism is the possible source of minority agency under campaign finance law. Part V provides a conclusion.

## II. CAN WHITE MONEY FUND MINORITY POLITICAL AUTONOMY?

The extent of minority voters' campaign giving is under-studied. Yet there is substantial evidence of minority invisibility.<sup>13</sup> During the 2000 election cycle, a mere thirty zip codes gave twenty or more contributions to black candidates.<sup>14</sup> Of those thirty zip codes, only six were majority black.<sup>15</sup> In the 2004 election cycle, predominantly black zip codes contributed only 2.7 percent of the federal campaign

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13. See Robert Moore, *Black Candidates See Little of the Millions Their Parties Raise*, THE CENTER FOR PUBLIC INTEGRITY, Sept. 15, 2000, <http://www.publicintegrity.org> (search "site Search" for "Black Candidates"; then follow "Black Candidates See Little of the Millions Their Parties Raise" hyperlink).

14. *Id.*

15. *Id.*

contributions of \$200 or more,<sup>16</sup> yet blacks constitute 1 percent of the Senate and 9 percent of the House of Representatives.<sup>17</sup> Predominantly Latino zip codes contributed only 2.2 percent of the federal campaign contributions of \$200 or more,<sup>18</sup> yet Latinos constitute 2 percent of the Senate and 5 percent of the House of Representatives.<sup>19</sup> Non-Latino white zip codes provided 89.1 percent of federal campaign contributions of \$200 or more during the 2004 election cycle.<sup>20</sup> Non-whites constitute 24.8 percent of the United States population.<sup>21</sup> Minority voters thus do not appear to be financing the campaigns of minority candidates.

All major 2004 presidential candidates raised the bulk of their individual contributions of more than \$200 from majority non-Latino, white neighborhoods.<sup>22</sup> This means the two African American candidates, Carol Moseley Braun and Reverend Al Sharpton, both raised most of their campaign funds from white neighborhoods.<sup>23</sup> Although the 2004 presidential contest marked a watershed in the rate of giving by small donors (those contributing \$100 or less),<sup>24</sup> there is no evidence that voters of color participated in this up-tick in small donor participation. Indeed, a recent Institute for Politics, Democracy & the Internet report on the increase in contributions by small donors during the 2004 presidential election provided demographic data on income, education, age, gender and religious faith—but not race.<sup>25</sup> Nevertheless, the data presented suggests voters of color were not participants in this phenomenon, for “[t]he small donors stand somewhere between large donors and the general public in many respects. Small donors were neither as wealthy nor as highly educated as large donors, although they were more wealthy and educated than the general population.”<sup>26</sup> Given the socioeconomic

16. PUBLIC CAMPAIGN ET AL., *COLOR OF MONEY: CAMPAIGN CONTRIBUTIONS, RACE, ETHNICITY, AND NEIGHBORHOODS* (2004), <http://www.colorofmoney.org> (follow “2004 Presidential Race” hyperlink; then click “Overall Federal Campaign Contribution Data”; press “Go”) [hereinafter *COLOR OF MONEY NATIONAL OVERVIEW*].

17. *African, Hispanic (Latino), and Asian American Members of Congress*, ETHNIC MAJORITY, <http://www.ethnicmajority.com/congress.htm> (last visited Apr. 5, 2006) [hereinafter *Minority Members of Congress*].

18. *COLOR OF MONEY NATIONAL OVERVIEW*, *supra* note 16.

19. *Minority Members of Congress*, *supra* note 17.

20. *COLOR OF MONEY NATIONAL OVERVIEW*, *supra* note 16.

21. U.S. CENSUS BUREAU, *THE POPULATION PROFILE OF THE UNITED STATES: 2000*, at 2-2 tbl.2-1 (2001), <http://www.census.gov/population/pop-profile/2000/profile2000.pdf>.

22. PUBLIC CAMPAIGN ET AL., *COLOR OF MONEY: THE 2004 PRESIDENTIAL RACE 3* (2004), available at [http://www.colorofmoney.org/report/2004\\_cofm\\_pres\\_complete.pdf](http://www.colorofmoney.org/report/2004_cofm_pres_complete.pdf) [hereinafter *COLOR OF MONEY REPORT*].

23. *Id.*

24. INSTITUTE FOR POLITICS, DEMOCRACY & THE INTERNET, *SMALL DONORS AND ONLINE GIVING 1* (2006), available at <http://www.ipdi.org/UploadedFiles/Smallpercent20Donorspercent20Report.pdf>.

25. *Id.* at 11–16.

26. *Id.* at 16–17. This conclusion is consistent with available data from the 2000 presidential primaries that demonstrated people of color were “grossly underrepresented” in the \$100-or-less contribution category. See Overton, *supra* note 12, at 118 n.162.

indicators that portray blacks and Latinos as lagging the general public,<sup>27</sup> it is a fair inference that the new small donor class is disproportionately white.

The only published analysis that suggests black candidates raised most of their funds from black constituents focused on local elections in North Carolina. The study examined elections in Charlotte and Mecklenburg County from 1975 to 1980, finding black Democrats constituted 89 percent of the contributors to black Democratic candidates.<sup>28</sup> However, the study did not indicate that the majority of those candidates' campaign funds came from black contributors.<sup>29</sup>

The absence of proportionate or substantial minority monetary support for candidates of color is a double bind for the latter because candidates of color are generally under-financed relative to white candidates.<sup>30</sup> Thus, candidates of color are dependent on white dollars in an overall context of inequality. A principal schism in the campaign finance reform debate has been over whether money buys influence. On the one hand, there are former Federal Elections Commission Chairman Bradley Smith's repeated assertions that "[t]he plain and simple fact is that research shows, over and over, that campaign contributions just aren't that important."<sup>31</sup> On the other hand, there is the Supreme Court's thorough refutation of Smith's academic perspective in *McConnell v. FEC*,<sup>32</sup> which relied on the experience of legislators themselves in upholding key provisions of BCRA against constitutional attack.<sup>33</sup> But if we accept *McConnell*'s premise that money purchases access to candidates and influence,<sup>34</sup> what then is the relationship among black candidates, elected representatives, and the primarily white dollars that fund their campaigns?

Professor Lani Guinier suggests that we can no more assume the authenticity of black representatives under these circumstances than we could if those representatives were elected from a majority-white district.<sup>35</sup> While Professor

27. See *infra* notes 71–76.

28. Theodore S. Arrington & Gerald L. Ingalls, *Race and Campaign Finance in Charlotte, N.C.*, 37 W. POL. Q. 578, 579–80 (1984).

29. *Id.* at 580.

30. See JOHN THEILMANN & AL WILHITE, DISCRIMINATION AND CONGRESSIONAL CAMPAIGN CONTRIBUTIONS 77–78 (1991) (examining congressional races during the 1980s and concluding that incumbent black representatives received significantly lower large contributions from individual donors than did white incumbents in three of five election cycles); National Institute on Money in State Politics, *State at a Glance: Georgia State Senate 1992*, Summary of Campaign Funding Patterns, Georgia State Senate 1992, 1994, 1996 ([www.followthemoney.org](http://www.followthemoney.org)) (noting funding advantages by white candidates of 73 percent, 16 percent and 106 percent for each of the election cycles).

31. Bradley A. Smith, *Regulation and the Decline of Grassroots Politics*, 50 CATH. U. L. REV. 1, 9 (2000). Smith cites two studies from the 1980s in support of this assertion. See *id.* at 9 n.25.

32. 540 U.S. 93, 125, 146–52 (2003).

33. *Id.*

34. *Id.*

35. Cf. Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1108–09 (1991) (“Electoral success by culturally and ethnically black candidates in majority-white jurisdictions does not necessarily mean that black concerns will be addressed. For example, where ‘authentic blacks’ are elected by whites with

Guinier's focus was the color of the votes cast for black candidates, the critical question is whether there is equal reason to suspect less authentic minority representation when the minority candidate must substantially depend on whites to finance his campaign.

We are handicapped in this inquiry by the lack of scholarly attention afforded the effects of campaign finance laws on minority candidates, representatives, and voters.<sup>36</sup> Nevertheless, Congress's passage of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005<sup>37</sup> and other legislation thought to be inimical to minority interests may offer some cautionary insights. According to the Leadership Conference on Civil Rights, black and Latino homeowners are 500 percent more likely to file bankruptcy than whites.<sup>38</sup> That venerable civil rights organization opposed the bankruptcy bill, which, among other punitive changes, created a presumption of abuse of bankruptcy if the debtor's income exceeds a specified threshold.<sup>39</sup> However, ten members of the forty-one member Congressional Black Caucus (CBC) voted in favor of the legislation.<sup>40</sup> Several of the ten defectors are heavily funded by and otherwise connected with business interests.<sup>41</sup> For instance, Representative Artur Davis of Alabama, who hails from the poorest district among caucus members, collected 75 percent of the monies he spent in his 2004 primary from business interests.<sup>42</sup> Similarly, Representative David Scott of Georgia received 61.1 percent of his 2005–2006 funding from political action committees (PACs); 84.9 percent of the PAC money came from business PACs.<sup>43</sup>

significant black support, electoral ratification by a majority of those blacks voting may not in fact send a recognizable message regarding substantive policies. Especially in winner-take-all electoral systems, 'the aggregation device of the election garbles these messages, producing winners while obscuring the reasons for their victories.' Thus, even where black support provides a critical margin, successful black candidates in majority-white electorates do not necessarily feel obligated to black voters." (quoting Kathryn Abrams, "*Raising Politics Up*": *Minority Political Participation and Section 2 of the Voting Rights Act*, 63 N.Y.U. L. REV. 449, 487 (1988)).

36. Even election law textbooks purporting to survey the area of campaign finance accord little or no treatment of the subject. See SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURES OF THE POLITICAL PROCESS* 450–543 (rev. 2d ed. 2002); DANIEL HAYS LOWENSTEIN & RICHARD L. HASEN, *ELECTION LAW: CASES AND MATERIALS* 717–1024 (3d ed. 2004). Undoubtedly, the lack of racial and ethnic diversity in the authorship of these and other works contributes to a lack of intellectual diversity.

37. Pub. L. No. 109-8, 119 Stat. 23.

38. Kanya Simon, *Blacks Could Feel Brunt of New Bankruptcy Law*, CAPITAL OUTLOOK, Apr. 14–Apr. 50, 2005, at 1–2.

39. *Id.*

40. *Black Caucus Conservatives Attempt to Clone Themselves*, BLACK COMMENTATOR, May 12, 2005, [http://www.blackcommentator.com/138/138\\_cover\\_cbc\\_clones.html](http://www.blackcommentator.com/138/138_cover_cbc_clones.html) [hereinafter *Black Caucus Conservatives*].

41. *Id.*

42. *Id.*

43. The Center for Responsive Politics, David Scott: Campaign Finance/Money, <http://www.opensecrets.org/politicians/summary.asp?CID=N00024871&cycle=2006> (last visited Apr. 5, 2006).

Scott is one of four caucus members who not only voted in favor of the bankruptcy legislation but also for two other issues—repeal of the estate tax and energy legislation—that were either antithetical to black interests or almost exclusively beneficial to wealthy white interests.<sup>44</sup> Davis voted for two of the three.<sup>45</sup> Only a fraction of one percent of blacks stand to benefit from repeal of the estate tax, and the recently passed energy legislation provided massive subsidies to the oil industry.<sup>46</sup> Davis and the Black Caucus members who aligned on bankruptcy, the estate tax, and the energy bill share a similar fund raising profile: a significant source of their campaign funds come from business interests.<sup>47</sup>

The concern over the influence of money in politics has not been limited to quid pro quo corruption,<sup>48</sup> and nor should concerns be so limited in examining the relationship of politicians of color to white money. If the appearance of corruption can serve as a constitutional basis for regulating contributions and banning soft money,<sup>49</sup> then “inauthentic” voting behavior by politicians of color who receive significant campaign funds from white interests is a legitimate basis for at least questioning whether white largesse can finance minority political autonomy.

The preeminence of 527 organizations in the 2004 campaign and the soft money expenditures in campaigns prior to 2004 amply demonstrate that candidate campaign finance and speech is but one dimension of the election process. Voters of color are no more visible in these alternate realms than they are in candidate contributions. The effect of their absence is compounding. White candidates who must rely on black support soft-pedal black issues during the course of a campaign in order to court median or swing voters.<sup>50</sup> Thus, minority issues are often only addressed in passing by white candidates rather than as a centerpiece of their

44. See *Black Caucus Conservatives*, *supra* note 40.

45. *Id.*

46. *How to Fix the Fractured Black Caucus*, BLACK COMMENTATOR, Apr. 58, 2005, [http://www.blackcommentator.com/136/136\\_cover\\_black\\_caucus.html](http://www.blackcommentator.com/136/136_cover_black_caucus.html).

47. See *Black Caucus Conservatives*, *supra* note 40; Ctr. for Responsive Politics, Total Raised and Spent, 2006 Race: Georgia District 2: Sanford Bishop, <http://www.opensecrets.org/races/summary.asp?ID=GA02&Cycle=2006> (last visited May 1, 2006); Ctr. for Responsive Politics, Total Raised and Spent, 2006 Race: Alabama District 7: Artur Davis, <http://www.opensecrets.org/races/summary.asp?ID=AL07&Cycle=2006> (last visited May 1, 2006); Ctr. for Responsive Politics, Total Raised and Spent, 2006 Race: Louisiana District 2: William Jefferson, <http://www.opensecrets.org/races/summary.asp?ID=LA02&Cycle=2006> (last visited May 1, 2006); Ctr. for Responsive Politics, Total Raised and Spent, 2006 Race: Georgia District 13: David Scott, <http://www.opensecrets.org/races/summary.asp?ID=GA13&Cycle=2006> (last visited May 1, 2006); Ctr. for Responsive Politics, Total Raised and Spent, 2006 Race: Maryland District 4: Albert Wynn, <http://www.opensecrets.org/races/summary.asp?ID=MD04&Cycle=2006> (last visited May 1, 2006).

48. See *McConnell v. FEC*, 540 U.S. 93, 136 (2003) (describing the interests that justify contribution limitations as preventing both “actual corruption” and “the eroding of public confidence in the electoral process through the appearance of corruption” (quoting *FEC v. Nat’l Right to Work*, 459 U.S. 197, 208 (1982))).

49. *Id.*

50. See, e.g., Terry Smith, *Race and Money in Politics*, 79 N.C. L. REV. 1469, 1515–16 (2001) (citing the 2000 Gore presidential campaign as an example).



campaigns. Prior to BCRA's ban of party soft money, this money was likewise not usually devoted to campaign messages aimed at minority communities.<sup>51</sup> Expenditures by interest groups unaffiliated with parties or candidates, whether 527 organizations or other tax-exempt groups, have not been directed at minority voters to any significant degree except for purposes of registering and turning these voters out on election day. The one notable exception during the past two presidential elections to the focus of third-party interest group advertising was an issue-ad the NAACP National Voter Fund ran during the 2000 election. The ad attacked then-Governor George W. Bush for his opposition to hate-crimes legislation in Texas.<sup>52</sup> However, the NAACP financed the ad with a \$10 million donation by an anonymous individual<sup>53</sup> who was widely rumored to be non-black.<sup>54</sup>

With so little money devoted and so little heed paid to minority concerns during the course of national campaigns, it is little wonder that even candidates thought to be favorably predisposed to minority interests produce policies that are not in the interest of minorities, such as President Clinton's welfare reform compromise.<sup>55</sup> Blacks and Latinos should continue to brace themselves for such betrayals, for "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."<sup>56</sup>

### III. THE NEGLECT OF REFORM—PAST, PRESENT, AND FUTURE

BCRA's objective was to ban soft money from federal elections. Soft money is the unregulated funds donated by wealthy individuals, corporate donors, and labor unions and used by political parties and interest groups primarily on so-called issue advocacy advertisements.<sup>57</sup> The Supreme Court upheld that central objective

51. *Id.* (noting the Democratic Party's soft-money television buys largely tracked the Gore campaign message).

52. Philip Shenon, *The Nation: The Color of Money; Is Green the One that Counts the Most?*, N.Y. TIMES, July 15, 2001, at 1.

53. *Id.*

54. Cedric Muhammad, *The Congressional Black Caucus' and the Black Electorate's Campaign Finance Dilemma*, BLACKELECTORATE.COM, May 10, 2001, <http://www.blackelectorate.com/articles.asp?ID=30>.

55. See Bruce A. Dixon, *Muzzling the African American Agenda with Black Help: The DLC's Corporate Dollars of Destruction*, BLACK COMMENTATOR, June 12, 2003, [http://www.blackcommentator.com/46/46\\_cover.html](http://www.blackcommentator.com/46/46_cover.html) (calling President Clinton's welfare reform "more punitive than anything Reagan-era Republicans could have wrested from the Congress"). For a discussion of the myriad and misguided ways in which President Clinton's Personal Responsibility and Work Opportunity Reconciliation Act of 1996 departs from past welfare policy, see Matthew Diller, *Working Without a Job: The Social Messages of the New Workfare*, 9 STAN. L. & POL'Y REV. 19, 25–30 (1998).

56. Smith, *supra* note 50, at 1518.

57. *Id.* at 1510–11.

in *McCConnell v. FEC*.<sup>58</sup> The contribution and spending patterns from the 2004 election cycle suggest the expectations that BCRA-banned soft money would simply be replaced by other forms of soft money were, at least in part, apocryphal. Although contributions to 527 organizations increased significantly after BCRA's enactment, 527 organizations failed to replace some \$337 million in BCRA-banned soft money.<sup>59</sup> Thus, BCRA has been moderately successful in attaining its purported objective.

BCRA and the debate that preceded its enactment were unapologetically neglectful of minority interests.<sup>60</sup> The Act's impact on minority voters and politicians was nevertheless felt, and it elicited two characteristic responses motivated by common concern but divergent in their remedy. Alarmed that 527 organizations, few of which are run by or for minorities, had demonstrated an inability to motivate and organize minority voter turnout, Representative Albert Wynn proposed the 527 Fairness Act.<sup>61</sup> The Act would allow individuals to contribute more money to federal parties and candidates during a two-year campaign cycle with the presumed objective of giving them a greater role in GOTV efforts.<sup>62</sup> However, Donna Brazile, Vice President Al Gore's 2000 campaign manager, called for the creation of new sources of funding for minority electoral

58. 540 U.S. 93 (2003). The court found "substantial evidence" to support Congress's ban of soft money contributions to political parties. *Id.* at 154. The court upheld BCRA's prohibition on the contribution of soft dollars to state and local party committees to finance federal election activity because Congress reasonably concluded that the national parties would re-direct "soft-money contributors to the state committees, and that federal candidates would be just as indebted to these contributors as they had been to those who had formerly contributed to the national parties." *Id.* at 161-65. The court upheld BCRA's restrictions on national, state, and local party committees' ability to direct funds to tax-exempt and Section 527 organizations on the finding that these committees would "mobilize their formidable fundraising apparatuses . . . into the service of like-minded tax-exempt organizations that conduct activities benefiting their candidates." *Id.* at 174-75. The Court upheld BCRA's ban on the raising and soliciting of soft money by federal officeholders and candidates. *Id.* at 181-82. The Court sustained BCRA's ban on state and local officeholders and candidates from using soft money to support or oppose a federal candidate. *Id.* at 184-85. BCRA addressed the use of soft money by corporations and labor unions to run issue advocacy ads by prohibiting these entities from using their general treasuries to fund communications that have the intent or effect of influencing the outcome of federal elections. *Id.* at 132. The Court upheld the broad definition of "electioneering communication" that triggers the latter restriction. *Id.* at 189-94. The Court vitiated the express advocacy/issue advocacy distinction and held Congress is not limited to regulating only the former. *Id.* at 190-94.

59. Steve Weissman & Ruth Hassan, *BCRA and the 527 Groups*, in *THE ELECTION AFTER REFORM: MONEY, POLITICS, AND THE BIPARTISAN CAMPAIGN REFORM ACT* (Michael J. Malbin ed.) (forthcoming 2006), available at [http://www.cfinst.org/studies/ElectionAfterReform/pdf/EAR\\_527Chapter.pdf](http://www.cfinst.org/studies/ElectionAfterReform/pdf/EAR_527Chapter.pdf).

60. See, e.g., Smith, *supra* note 50, at 1509-19 (discussing how BCRA inordinately focused on soft money while allowing substantial increases in hard, or regulated, contributions by wealthy individuals and noting black candidates have the most difficulty raising hard dollars, which constitute the majority of money raised by congressional candidates).

61. See Debose, *supra* note 6, at A01.

62. *Id.*

activity that would “allow for more independence from the major two political parties.”<sup>63</sup> Brazile’s suggestion is far more systemic.

Even the most egalitarian of campaign finance systems will require financial agency on the part of minorities. Arizona’s public finance system, the Arizona 1998 Citizens Clean Election Act,<sup>64</sup> has been shown to increase the number of contributions and to diversify the economic strata from which contributions come.<sup>65</sup> Expenditure limitations, a re-emergent frontier of campaign finance reform, portends an expansion of citizen participation as well. In *Landell v. Sorrell*,<sup>66</sup> the United States Court of Appeals for the Second Circuit upheld Vermont’s expenditure limitations in state legislative and executive elections, in part on the justification that, absent an expenditure cap, candidates and officeholders will allow fundraising activities to plunder their time to the detriment of performing legislative duties and engaging voters on issues.<sup>67</sup> That argument has a patina reminiscent of a different line of First Amendment cases involving government employees’ right to engage in free speech in and about the workplace.<sup>68</sup> Courts have balanced that right against a government employer’s interest in the efficient operation of its office.<sup>69</sup> Voters are employers of those whom they elect to office and certainly have as strong an interest in the efficient operations of legislative and executive offices as do other government employers of their bailiwick.

Still, even in light of the increased democratization effected by public finance, and even if expenditure limitations are upheld on one theory or another, these reforms only address the candidate-finance component of the electoral process. What if no candidate will forthrightly address the concerns of minority voters? Minority voters must be financially prepared to take their own concerns to the electorate and to not merely rely on candidate agency and all its vagaries. Moreover, reforms must coexist with a political culture in which corporate media often plays a role in anointing frontrunners and marginalizing black candidacies.<sup>70</sup> Reliance on white media for the promotion of a minority political agenda is even less wise than reliance on white candidates. Ongoing reform, in sum, facilitates equality but is no substitute for agency.

63. *Id.*

64. ARIZ. REV. STAT. ANN. §§ 16-940 to -960 (Supp. 2005).

65. See COLOR OF MONEY REPORT, *supra* note 22, at 2, 11–13.

66. 382 F.3d 91 (2d Cir. 2005), *cert. granted sub nom.*, Vt. Republican State Comm. v. Sorrell, 126 S. Ct. 35 (2005).

67. *Id.* at 124–25.

68. See *Connick v. Myers*, 461 U.S. 138 (1983); *Pickering v. Bd. of Ed. of Twp. High Sch. Dist.* 205, 391 U.S. 563 (1968).

69. *Connick*, 461 U.S. at 150–51; *Pickering*, 391 U.S. at 568.

70. See, e.g., *The Issues: Sharpton: Going the Distance with Low Finance*, BLACK COMMENTATOR, May 1, 2003, [http://www.blackcommentator.com/40/40\\_issues.html](http://www.blackcommentator.com/40/40_issues.html) (discussing corporate media’s devaluing of Al Sharpton’s presidential campaign); see also Laura Washington, Editorial, *Conventional Wisdom a Crock in Guv Race*, CHI. SUN-TIMES, Feb. 4, 2002, at 31 (reporting that black gubernatorial candidate Roland Burris believed that white-owned media were over-emphasizing his race and marginalizing his background as a statewide elected official).

#### IV. A PRESCRIPTION FOR SELF-HELP

Equating inequality with a lack of agency is easy, particularly when the inequities are as stark as they are between black and white Americans. The black unemployment rate is more than double that of whites, and the gap is wider than it was in 1972.<sup>71</sup> The income gap between black and white families has increased since 1968, with black families now making only 58 percent of the typical white family's income.<sup>72</sup> In 2001, the typical black household possessed only 16 percent of the net worth of the median white household (\$19,000 versus \$121,000).<sup>73</sup> These are but a few of the despairing statistics that discredit assertions, such as Bradley Smith's, that if certain viewpoints are not being heard, it is not due to inequality but rather because they lack popular electoral support.<sup>74</sup> The black agenda is shunned in the national discourse for fear of alienating white voters,<sup>75</sup> and it defies earthly reason to argue that blacks' relative socioeconomic disadvantage does not handicap their ability to promote that agenda.

But disadvantage should not be conflated with dependency. Even as economic unequals, and even if only on unequal terms, minorities have the capacity to exercise agency—to engage the campaign finance system on independent terms. A principal impediment to minorities' exercise of agency, however, is consumerism. Black and Latino consumerism transfers money to many of the interests that oppose a minority political agenda. Although this paradoxical consequence may be inevitable in an economy in which minorities by and large do not own the means of production,<sup>76</sup> there is no reason for voters of color to enrich others while failing to invest in their own political capital.

The Selig Center for Economic Growth at the University of Georgia pegs African Americans' 2005 disposable income at \$761 billion and estimates it will grow to \$1 trillion in 2010.<sup>77</sup> The comparable figures for Latinos are \$736 billion in spending power in 2005, and \$1.087 trillion in 2010.<sup>78</sup> Some will be tempted to misuse this data to suggest minority economic inequality is the result of profligate

71. DEDRICK MUHAMMAD ET AL., *THE STATE OF THE DREAM 2004: ENDURING DISPARITIES IN BLACK AND WHITE I* (2004), available at <http://faireconomy.org/press/2004/StateoftheDream2004.pdf>.

72. *Id.*

73. *Id.*

74. See Bradley A. Smith, *Money Talks: Speech, Corruption, Equality, and Campaign Finance*, 86 GEO. L.J. 45, 70 (1997).

75. See Terry Smith, *Parties and Transformative Politics*, 100 COLUM. L. REV. 845, 852, 870 (2000).

76. Although minorities constitute 28 percent of the United States population, they compose only 15 percent of all businesses. Shera Dalin, *Study Outlines Strategies for Minorities Entrepreneurs*, ST. LOUIS POST-DISPATCH, June 29, 2005, at D3. "Minority firms account for less than 3 percent of all business revenue." *Id.*

77. Jeffrey M. Humphreys, *The Multicultural Economy 2005: American's Minority Buying Power*, 65 GA. BUS. ECON. CONDITIONS 1, 3 (2005), available at <http://www.selig.uga.edu/forecast/GBEC/GBEC053Q.pdf>.

78. *Id.* at 6–7.

spending habits. But consumptive behavior cannot explain the systemic differences between minorities and whites in household wealth and other indicators.<sup>79</sup> What the data plausibly suggests, however, is that diversion of even a fraction of a percentage of minority disposable income for political purposes would constitute a formidable sum. The new sources of funding for greater political independence to which Donna Brazile aspires already exist—minorities, while neither wealthy nor economically equal, can aggregate small amounts to create such sources.

Creating the mentality and infrastructure necessary to realize this vision is difficult but not insurmountable. Parting with even a nominal sum of money will require not simply a renewed appreciation of the power of politics but a critical understanding of the value of an investment in politics relative to, say, an incremental consumer good. The corporate competition for minorities' disposable income has become multiculturally targeted.<sup>80</sup> The plea for political dollars takes place against this backdrop as well as against a puzzling notion that economics, not politics, matters. The wealth transfers conferred by the federal tax code alone should readily silence the latter rhetoric.<sup>81</sup> Convincing voters of color of the value of an investment in politics in lieu of consumer spending is difficult precisely because the worth of politics should be apparent from the harm they incur when they disengage. How many police brutality incidents under Mayor Rudolph Guiliani were necessary before black and Latino voters understood the importance of who controls the police force?<sup>82</sup> How many more conservative judges—who usually, if not systematically, rule against minority interests, such as in discrimination claims<sup>83</sup>—must occupy a seat on the federal bench before minority voters recognize that who wins the presidency and which party controls the Senate determine what kind of justice they receive from our courts? Politics is at least as important as the next lottery ticket purchase and is far more likely to have a direct

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79. See *id.* at 4 (attributing spending habits of blacks to their lower per capita income and wealth rather than attributing the latter to the former); Rod Watson, *Social Policy? Stereotypes Are Simpler*, BUFFALO NEWS (N.Y.), Oct. 21, 2004, at B1 (citing authorities who conclude that the legacy of United States social policy and discrimination account for the wealth gap between minorities and whites).

80. Doreen Hemlock, *Companies Find Profit in Focus on Minorities*, SUN-SENTINEL (FORT LAUDERDALE, FL.), Oct. 8, 2004, at 1D.

81. See generally, DAVID CAY JOHNSTON, PERFECTLY LEGAL: THE COVERT CAMPAIGN TO RIG OUR TAX SYSTEM TO BENEFIT THE SUPER RICH—AND CHEAT EVERYBODY ELSE 2 (2003) (arguing that “our tax system now levies the poor, the middle class and even the upper middle class to subsidize the rich”).

82. Police abuse complaints rose in New York by forty-four percent between 1990 and 1999, a period encompassing most of Guiliani's tenure as mayor. See City of N.Y., Civilian Complaint Review Bd., Semiannual Status Report: January–June 2000, at 22 (Sept. 2000), available at <http://www.nyc.gov/html/ccrb/pdf/ccrbsemi2000.pdf>.

83. See, e.g., Michael J. Songer, Note, *Decline of Title VII Disparate Impact: The Role of the 1991 Civil Rights Act and the Ideologies of Federal Judges*, 11 MICH. J. RACE & L. 247, 268–70 (2005) (presenting data that reveals a correlation between the increase in federal judges appointed by Republican presidents and the decrease in successful disparate impact employment discrimination claims).

impact on minority voters' lives. A massive re-education project to convey this reality is essential.

The funding for the creation of a financial infrastructure for an independent minority campaign finance vehicle has been the source of some debate. Some have called for the creation of a black progressive PAC, the seed money for which would come from white progressive PACs and 527 organizations, after which the start-up organization would become independent.<sup>84</sup> This approach is consistent with the notion that white progressives and the Democratic Party should not be able to rely on overwhelming black support without providing that community with tangible benefits.<sup>85</sup> One potential refinement of the proposal would modify the political committee form that the proposal envisions. Political committees are subject to contribution amount and source limitations as well as disclosure rules that 527 organizations currently are not.<sup>86</sup> Given the current state of the law, a 527 organization may be preferable to a PAC, allowing the black fundraising conduit to draw, for example, from like-minded black entertainers who could give more generously than would be allowed to a PAC.

A corresponding tact would build on the preeminent role played by black churches in minority communities by supporting pending legislation that would protect a religious organization's tax-exempt status even when its leaders or members express "personal views on political matters or elections for public office during the religious service."<sup>87</sup> Although the adoption of such legislation would not allow a religious organization to convert its mission or directly engage in fundraising for political purposes, its language would, for instance, inoculate a church whose leader uses its services to endorse a black progressive PAC. In building an infrastructure and donor base for an independent minority campaign finance operation, drawing on existing institutions in the minority community is essential.

## V. CONCLUSION

A full exposition of the myriad forms an independent operation could take is the subject for another work. Yet the imperative of independence—of agency—should be plain. There should not be another election cycle in which grassroots community organizations are prevented from doing what they do best: organizing minority voters. Nor should white business interests be empowered to ordain minority legislative leaders. Minorities must wean themselves from other peoples' money—money that those other people possess in part by virtue of dollars spent by minority consumers—and begin to invest in their own political capital.

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84. See *Black Caucus Conservatives*, *supra* note 40.

85. *Id.*; see also Smith, *supra* note 50, at 1521–22.

86. For a discussion of these distinctions and proposed legislative and regulatory changes, see Richard Briffault, *The 527 Problem . . . and the Buckley Problem*, 73 GEO. WASH. L. REV. 949, 950–52 (2005).

87. H.R. 235, 109th Congress (2005).

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