"AFFIRMATIVE EQUALITY"

THE WAY TO EQUITABLE CAMPAIGN FINANCE REFORM

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Abstract

In this paper, I offer a new and cogent argument that would allow equitable campaign finance reform to be constitutional: the Supreme Court, beginning with *Buckley v. Valeo*, has consistently struck down campaign finance regulations that are necessary for making the electoral system as equitable as possible. The Court has ruled that such regulations are unconstitutional when evaluated against the First Amendment right to free speech. Because of past electoral discrimination in colonial and postcolonial America, and because the effects of that discrimination are extant and flagrant, a compelling argument for equitable campaign finance reform can be made. Through a new concept called "affirmative equality," which is based on affirmative action, I show that equitable campaign finance reform is attainable and that it should be carried out. At the end of the paper, I respond to objections to my argument, and show that these objections are wanting.

Introduction

In "Money Talks: Speech, Corruption, Equality, and Campaign Finance," Bradley A. Smith argues that campaign finance reform is, in most cases, unconstitutional. Smith's attacks focus on arguments that justify campaign finance on the basis of either, or both, the First and Fourteenth Amendments. His refutation of arguments that use the freedom of speech clause of the First Amendment to justify campaign finance reform is cogent, but his arguments against reform on the basis of the equality clause in the Fourteenth Amendment are wanting. Smith gives a strong refutation of arguments that use

the equality clause to justify campaign finance reform, but in his refutation, he ignores key arguments that bring his reasoning into question.

Some of Smith's objections to campaign finance reform may be strong, but in this paper, I offer a new argument for campaign finance reform that overcomes his objections—my argument for campaign finance reform also overcomes general objections that come from other legal theorists. I will argue for a campaign finance system that is as equitable as possible. The paper is divided into four parts. In Part I, I begin with a brief overview of precolonial and postcolonial American suffrage laws. Because of the general independence that colonial governments had from England—and then beginning in 1707, Great Britain—in making suffrage laws, I argue that the suffrage laws of the United States should be looked at linearly, originating in the colonial period and continuing into the post-Independence period (Nichols 1961, 246).[1] Because of this linear historical progression, I argue that the state governments and United States government have a responsibility to redress past wrongs in the electoral system that continue to have invidious and damaging effects—wrongs include, viz., laws that precluded minority groups from voting. In Part II, I outline Smith's First Amendment arguments against campaign finance reform. Because his arguments against campaign finance reform that are based on the First Amendment are cogent, I agree with Smith: laws that restrict individual monetary contributions and total campaign expenditures violate the speech clause of the First Amendment, and are thus unconstitutional—at least prima facie. Restrictions on monetary political gifts and total campaign expenditures are facially unconstitutional, but such legislation is constitutional if it passes strict scrutiny—governmental restrictions that burden First Amendment rights should be subject to strict scrutiny (see, e.g., *Brandenberg v. Ohio*, 447–49; *Broadrick v. Oklahoma*, 601, 611–12; *Consolidated Edison Co. v. Public Serv. Comm'n*, 530, 540–43; *Cox v. Louisiana*, 536, 551–52; *First Nat'l Bank of Boston v. Bellotti*, 765, 786; *Fiske v. Kansas*, 380, 386–87; *Linmark Associates, Inc. v. Township of Willingboro*, 85, 93–94; *Maryland v. Joseph H. Munson, Co.*, 947, 964–68; *National Socialist Party of Am. v. Village of Skokie*, 43, 44; *Street v. New York*, 576, 592; *Stromberg v. California*, 359, 369–70; *Terminiello v. Chicago*, 1, 4–6; *Texas v. Johnson*, 397, 412; *Tinker v. Des Moines Indep. Community Sch. Dist.*, 503, 509; *Village of Schaumberg v. Citizens for a Better Env't*, 620, 636–37; *Whitney v. California*, 357, 371;

Williams v. Rhodes, 23, 31; Smith 1997, 8). Are there any arguments for making the campaign finance system equitable that, if transposed into legislation, would pass the strict scrutiny standard? In Part III, I argue that there are such arguments, and I explain "affirmative equality," a new idea that, if properly transposed into legislation, would pass the strict scrutiny standard. I describe the details of "affirmative equality," and using arguments that several Supreme Court justices have used to justify affirmative action, I show why pro–"affirmative equality" legislation can pass the strict scrutiny standard. As many justices on the Court have supported affirmative action programs on the basis of past discrimination against certain groups, for instance, blacks and other minorities, "affirmative equality" can be similarly justified if it is viewed as a remedy to past discrimination in the electoral system—here, I will refer to some of the discriminatory laws on suffrage that I outline in Part I.[2] Finally, in Part IV, I take on arguments against "affirmative equality"—I put special emphasis on Bradley A. Smith's Fourteenth Amendment arguments—and I show why these arguments are insufficient in refuting pro–"affirmative equality" arguments.

Part I: Electoral Discrimination

By the time of the American Revolution, most of the colonies adopted suffrage restrictions with regard to gender, age, religion, residence, and property qualifications—it was not until the early 1800s that a majority of the states adopted racial exclusions (McKinley 1905, 473–88; Keyssar 2001, 54–57). With the ratification of the United States Constitution in 1788, state governments continued to have the power to set voting mandates and many continued to implement discriminatory suffrage laws. Although the independence of the thirteen Colonies, and the influence of Enlightenment-era philosophy on Independence-era thinkers *did* have a great impact on the progression of electoral laws in the United States, this progression came from a change in the philosophical outlook of Americans—an outlook that embraced equality—and not freedom from Great Britain (Nichols 1961, 246).

Americans continued to adopt notions of equality, and by 1830 suffrage advocates made significant progress: many states dropped religion and property ownership as requirements for voting (Mintz 2004).

After the Civil War, though blacks were free from slavery, pro–universal suffrage advocates, usually Radical Republicans, argued for black suffrage rights and against conservative Southern Democrats who did not want suffrage rights extended to blacks: these arguments were showcased in the Congressional debates that preceded the adoption of the Fifteenth Amendment (15th Amendment Site). In 1870 with the adoption of the Fifteenth Amendment, the federal government barred states from precluding the extension of suffrage rights to any citizen on the basis of race—many states attempted to prevent blacks from voting by enacting discriminatory electoral laws that were facially neutral, that is, many states passed laws that made the right to vote contingent on the payment of poll taxes or literacy tests.[3] Finally, and as a major indication of growing support for egalitarianism in America, with the adoption of the Nineteenth Amendment in 1920, laws precluding women from the right to vote were invalidated, and women were granted the right to vote.

The evidence is clear: at least until 1920, and perhaps until 1965 and 1966 when discriminatory poll taxes and literacy tests were illegalized respectively, the governments of the colonies that would form the United States;[4] the United States government; and several state governments participated and encouraged systematic discrimination against specific groups of people living within their borders. Though American Independence marked a point when suffrage laws began to extend the franchise to most white males who were twenty-one years of age and over, progress in the electoral system came from continually changing notions of equality in American society, and not the freedoms that Independence granted (Nichols 1961, 246–47).

Today, to promote an equitable electoral system, the United States government has promoted equality in the electoral system insofar as all American citizens are given the right to vote (Holding 2006). But, as the United States government and state governments created and maintained discriminatory suffrage laws, should these entities take action to remediate the effects of past electoral discrimination? If so, what is to be done?

Part II: Smithian Arguments on Campaign Finance

I hold off on answering these questions for the moment. For now, I return to Bradley A. Smith, as I analyze his arguments against

campaign finance reform. Smith believes that most, if not all, campaign finance regulations are unconstitutional (Smith 1977, 2). He argues that the wealthy have a constitutional right to influence elections through private expenditures, and donations to politicians or political entities (ibid., 23). Smith's arguments are the progeny of the monumental case that has shaped campaign finance for the last thirty-two years, *Buckley v. Valeo* (1976). The *Buckley* case came in direct response to the 1971 Federal Election Campaign Act (FECA). The main argument against FECA, presented in *Buckley*, was that the act violated the speech clause of the First Amendment. In particular, the plaintiffs in the decision claimed that FECA's limits on individual contributions and campaign expenditures constituted unfair violations of the First Amendment (*Buckley*, 11). The Court, in a *per curiam* decision, made two pertinent conclusions: (1) The Court upheld individual contribution limits to campaigns, claiming that "to the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined" (*Buckley*, 26–27); (2) the Court struck down provisions in FECA—claiming that these provisions were in violation of the First Amendment—that restricted independent expenditures in campaigns, limited expenditures by candidates from their own personal or family resources, and limited total campaign expenditures (*Buckley*, 39–59). Smith, in his defense of the First Amendment, gives his approbation to the second conclusion, but his disapprobation to the first. He argues that most, if not all, limitations on campaign finance do not withstand the strict scrutiny standard—the standard he believes should be used to adjudge First Amendment cases directly affecting political speech—in cases where a piece of legislation regulating campaign finance has vitiated the rights guaranteed by the First Amendment.

Smith's arguments are convincing. In order for a law to pass the strict scrutiny standard, it must have been passed to further a "compelling governmental interest." The law must be narrowly tailored, and it must provide the least restrictive means for achieving the "compelling" interest ("Strict Scrutiny Law and Legal Definition"; see, e.g., *Austin v. Michigan Chamber of Commerce*, 652, 655; *Boos v. Barry*, 312, 334 [plurality]; see also *Burson v. Freeman*, 191, 198 [plurality]; *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 573; *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 788, 800; *United States v. Grace*, 171, 177; *Perry Educ.*

Ass'n v. Perry Local Educators' Ass'n, 37, 45). There is, however, a degree of ambiguity in *Buckley*: in *Buckley*, the Court claimed to use the strict or "exacting" scrutiny in evaluating the constitutionality of regulations that restrict the total number of political expenditures by candidates and political contributions by individuals. In truth, the Court applied strict scrutiny to regulations restricting total political expenditures, but it applied a pseudo-intermediate scrutiny standard to provisions of FECA that regulated individual political contributions to campaigns (Bhagwat 2007, 799–800).

But even though there is a strong point to be made that strict scrutiny is not to be used in adjudging campaign finance reforms that interfere with the First Amendment, and despite the Court's recent rulings, which hold that strict scrutiny is not the appropriate standard to be used in evaluating the constitutionality of regulations restricting individual contribution limits to political campaigns, there is no near-consensus on this matter. Several legal scholars, including Laurence Tribe (1988, 825–32), Dean Alfange Jr. (1968, 22–27), and others (Bevier 1985, 1056–57; Ely Hart 1975, 1482, 1496; Nimmer 1973, 29, 33) have convincingly argued that the speech-conduct dichotomy is a false one. As such, and because gift giving to politicians in the form of monetary contributions is an act of conduct, it is entitled to the highest level of protection; strict scrutiny is the appropriate standard of review.

Part III: The Case for "Affirmative Equality"

If the goal is to create an equitable campaign finance system, and indeed it is, then, as individual contribution restrictions on campaign finance might become subject to strict scrutiny—this is because it has been convincingly argued that such campaign finance restrictions should be subject to strict scrutiny—it is important to prepare an argument for equitable campaign finance reform that prima facie violates the First Amendment's speech clause, but which becomes constitutional by passing the strict scrutiny standard—if good campaign finance measures that make the campaign system more equitable are prima facie unconstitutional on the basis of the First Amendment's speech clause, then preparing this argument will be necessary to create the most equitable campaign finance system possible.

Heretofore, certain arguments for campaign finance reform have not passed the strict scrutiny standard. In *Buckley*, the Court, in using the strict scrutiny standard, struck down restrictions on total political expenditures. Though the Court allowed restrictions on individual contributions to politicians and political groups/committees, the Court did not evaluate these contributions under the strict scrutiny standard, as it did with total political expenditures. If it had, it is likely that the Court would have struck down FECA's regulations on individual contributions to politicians and political groups/committees. In that case, how can we create a law that regulates campaign finance—one that makes the system more equitable—and passes the strict scrutiny standard?

The answer can be found in the Court's decisions on affirmative action. An examination of affirmative action cases will be useful because affirmative action is similar to "affirmative equality." Affirmative action grants disadvantaged minorities certain unfair advantages—it has at least been accused of doing this—in order to redress past wrongs committed against members of those minorities. "Affirmative equality" is similar to affirmative action in that an "affirmative equality" policy aims to redress past wrongs, but "affirmative equality" differs from affirmative action in one key aspect. Whereas critics of affirmative action argue that affirmative action laws and policies discriminate against non-disadvantaged groups, namely, Anglo-Saxons, Jews, Asians, et cetera, such criticism cannot be effectively leveled against any policies and laws that only result from "affirmative equality"—this distinction will be elaborated upon later in this paper. "Affirmative equality" does not give groups that have been discriminated against an unfair advantage. If applied to campaign finance, "affirmative equality" would not allow members of groups that have been discriminated against vis-à-vis the electoral system more power in deciding which candidates should be financed. Blacks, women, and other formerly disenfranchised groups *would not* receive a disproportionate amount of money to finance the candidates of their choice, and their opinions *would not* be given more weight in deciding which candidates receive the most financing. Instead, the goal of "affirmative equality" is to "level the playing field" in order to ensure that past discrimination does not continue to negatively affect formerly disenfranchised groups. Though the concepts differ in that the former might be discriminatory whereas the latter is not, the two arguments are similar in that both are meant to

remedy past wrongs, and both are justified by the Supreme Court's interpretation of the Fifth Amendment's equal protection element and the Fourteenth Amendment's Equality Clause. Thus, if it can be shown that an argument for affirmative action can pass the strict scrutiny test, because of the similarity between the concepts, and because arguments against "affirmative equality" are not as strong as arguments against affirmative action, it can be shown that arguments for "affirmative equality" withstand strict scrutiny when evaluated against the Fifth Amendment's equal protection element and the Fourteenth Amendment's Equality Clause. And, if arguments for "affirmative equality" can withstand the strict scrutiny standard when evaluated against the Court's interpretation of the equal protection provisions, these arguments should also withstand the strict scrutiny standard when evaluated against the First Amendment's speech clause—as explained above, in order to attain equitable campaign finance reform, it will be necessary to vitiate the First Amendment's speech clause.

And the Court *has* ruled that strict scrutiny applies in all affirmative action cases (*Adarand Constructors v. Pena*, 225–28). With a definite standard in place, an affirmative action law or policy—if it is to withstand this standard—must be justified by a compelling governmental interest; it must be narrowly tailored; and it must provide the least restrictive means for achieving that interest. Some members of the Court have also clarified that an affirmative action policy can only be constitutional if undertaken for remediation from past discrimination (see, for example, *City of Richmond v. J. A. Croson Co.*, 469; *United States v. Paradise*, 167–71; *Wygant v. Jackson Board of Education*, 277–84).

And the Court's recent decisions on affirmative action confirm that it would be possible for an affirmative action law or policy to withstand strict scrutiny against the equal protection element of the Fifth Amendment and the Equal Protection Clause of the Fourteenth Amendment. In particular, *United States v. Paradise* (1987) provides an example of an affirmative action policy that almost survived strict scrutiny. The case was over a federal district court's 1972 decision that found that the Alabama Department of Public Safety practiced a "blatant and continuous pattern" of discriminatory hiring policies so malefic that during the thirty-seven-year history of the Alabama state troopers, not one black state trooper had ever been hired (*United States v. Paradise*, 154; Nelson 1988, 27). In order to rectify

past discrimination, the federal district court issued several orders to mandate the Department of Public Safety to hire and promote black state troopers. The Supreme Court ruled on one such order that required the department to promote one black state trooper for every white state trooper until the effects of past discrimination had been remedied. In a plurality opinion written by Justice Brennan and joined by three other justices—Justices Marshall, Blackmun, and Powell—the Court, using strict scrutiny, upheld the federal district court's affirmative action plan (*United States v. Paradise*, 166–86). In Brennan's opinion, because of the department's "pervasive, systematic, and obstinate past discrimination," (ibid., 167–71), there was a compelling interest for an affirmative action plan. The opinion also held that the affirmative action plan implemented by the federal district court was narrowly tailored to serve its purposes, as it "applied [only] to the initial set of promotions to the rank of corporal and as a continuing contingent order with respect to the upper ranks" (ibid., 171). Brennan went on to justify the federal district order by explaining that the order did not have to provide the least restrictive means for achieving its objectives, as the Court has not always "'required remedial plans to be limited to the least restrictive means of implementation'" (ibid., 184).

Justice Stevens upheld the district order, but he disagreed with the plurality's use of strict scrutiny. The four remaining justices—White, O'Connor, Rehnquist, and Scalia—dissented; though a majority of the Court did not come to the conclusion that the district order passed strict scrutiny, a majority of the Court agreed that the court order should be evaluated under strict scrutiny. Justice White believed that all remedial action was inappropriate in the given case, but Justices O'Connor, Rehnquist, and Scalia did believe remedial action to be proper if such action passed the strict scrutiny standard (*United States v. Paradise*, 196–97). In O'Connor's dissent—Rehnquist and Scalia signed on to this opinion—she explained that though she agreed that remedial action could be taken to rectify the department's discriminatory practices, she also believed that the federal court order was not narrowly tailored (ibid., 197). Writing with the tacit understanding that in order for an affirmative action law to be narrowly tailored, the law must provide the least restrictive means for attaining the sought-after remedial action—several judges conflate these two criteria of the strict scrutiny standard—O'Connor explained that the plurality improperly deviated from the

strict scrutiny standard in evaluating the federal district court order. If the goal of the one-black-state-trooper-for-one-white-state trooper promotional quota were to remedy the effects of past discrimination, the Court would not need such a quota, as blacks made up only 25 percent of the relevant work force. The justification of the one-to-one quota was that it would expedite the remediation process, but O'Connor found expedience to be an insufficient reason for a one-to-one quota (ibid., 196–201).

However, the important point is that it is safe to reason, judging from the O'Connor opinion, that O'Connor, Rehnquist, and Scalia would have accepted the affirmative action plan set forth by the district court had the order been narrowly tailored.

O'Connor's dissent is useful: it provides a basis for "affirmative equality." Since modern affirmative action jurisprudence began with *Defunis v. Odegaard* (1974), the Court has been unable to articulate a clear position on affirmative action. With *Adarand*, the Court concluded that strict scrutiny should apply in affirmative action cases; but the Court has been unable to come to any near-consensus, even when its members have adopted this standard in such cases. In *Fullilove v. Klutznick* (1980), an affirmative action case that displays the Court's inconsistency in affirmative action cases, the Court upheld the constitutionality of a congressionally enacted set-aside program for minority workers. Chief Justice Burger's opinion, joined by Justices White and Powell, did not specify the standard of scrutiny to be used in the case, but rather affirmed that the set-aside program would pass either intermediate or strict scrutiny (Spann 2000, 18). Though the Court affirmed the constitutionality of race-based affirmative action programs, in his dissent, Justice Stevens argued that the program was unconstitutional and implied that it could not survive strict scrutiny—he believed it was not narrowly tailored (ibid., 19).

There is a great degree of disunity in affirmative action cases: some justices—Brennan, Marshall, Blackmun, and Powell in *Paradise*, and Burger, White, and Powell in *Fullilove*—have proffered convincing arguments to uphold the constitutionality of specific affirmative action laws—these justices have upheld these affirmative action laws under the strict scrutiny standard—but in the cases in question, equally compelling arguments were made against their arguments. In *Paradise*, it was not clear whether the remediation law in question could pass strict scrutiny. A majority of the Court agreed that the

government had a compelling interest to remedy past discrimination carried out by the Alabama Department of Public Safety, but a majority did not agree that the remediation law could pass strict scrutiny. Whether the remediation law in *Paradise* was narrowly tailored is a matter of subjectivity.

Justices Brennan, Marshall, Blackmun, and Powell found the district court in its *Paradise* order to be narrowly tailored due to its "flexible, waivable, and temporary…application" (*United States v. Paradise*, 178, 171–79). However, in *Paradise*, Justices O'Connor, Rehnquist, and Scalia also made a compelling case in their claim regarding the court order's unconstitutionality. As noted above, they agreed that the government had a compelling interest in remedying the Alabama Department of Public Safety's past use of discriminatory hiring practices, but because the court order expedited the remediation process, they argued that the order was not narrowly tailored.

Was the Court order narrowly tailored? Again, the answer to this question is a matter of subjectivity. A convincing case can be made that the Brennan-led majority was right to affirm the court order: expediting remediation for one group to the detriment of another group should, under normal circumstances, be unconstitutional. However, in this case, according to Brennan, the circumstance was unusual in that the Alabama Department of Safety continued its discriminatory hiring practices after several other court orders directed the Department of Safety to accept more equitable hiring practices. This unusual circumstance led Brennan to allow an expediting court order to be ruled as narrowly tailored and thus constitutional.

The *Fullilove* case is also telling. In *Fullilove*, the Court upheld a congressional set-aside program for minority contractors. The program, created by the Public Works Employment Act (PWEA) of 1977, required recipients of federal funds allocated for local public works projects to "use 10 percent of those funds to produce goods or services from minority contractors" (Public Works Employment Act of 1977).

In Chief Justice Burger's opinion—joined by Justices White and Powell—the Court ruled that the government *did* have a compelling interest in providing the set-aside program. Burger also argued for the constitutionality of the set-aside program on the basis that it was sufficiently narrow (*Fullilove v. Klutznick*). However, Justice Stevens provided, in his dissent, a claim that the congressional set-aside program was not narrowly tailored. Stevens believed that the act was too broad

insofar as it allowed assistance to six racial subclasses—"Negroes, Spanish-speaking, Orientals, Indians, Eskimos and Aleuts" (PWEA). For Stevens, to allow all of these groups to be included in the program would have been to discount the differences in the degree to which these groups were discriminated against:

> But that serious class-wide wrong cannot, in itself, justify the particular classification Congress has made in this Act. Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification. Quite obviously, the history of discrimination against black citizens in America cannot justify a grant of privileges to Eskimos or Indians. (*Fullilove v. Klutznick*)

Paradise and *Fullilove* demonstrate the penumbral aspects of affirmative action cases. Affirmative action is constitutional, but when can an affirmative action proposal pass strict scrutiny? The answer is not clear. In a case such as *Fullilove*, some members of the Court see an affirmative action proposition as able to pass strict scrutiny, whereas another member of the Court understands the act in question to be pernicious. If some members of the Court see an affirmative action proposal as justified when others see it as pernicious, then the ideals behind affirmative action have not been realized. Affirmative action programs, in order to be constitutional, should be reasonably objective. That is, affirmative action programs should be objective to the extent that all those on the Court who agree with affirmative action in principle should be able to accede to an affirmative action policy before it becomes constitutional. If the Court's decision does not appear to be reasonably objective—and it will not appear to be reasonably objective if the Court, in a divided ruling, rules in favor of an affirmative action program—there will be serious questions as to whether an affirmative action policy is pernicious.

And in order to prevent increased racial discrimination over affirmative action policies, the ideals behind affirmative action must not be pernicious once transposed into law. In order to ensure that this happens, we should withdraw ourselves from the affirmative action descant. A new discourse is needed; its participants need to uphold the original ideals of affirmative action. "Affirmative equality" provides that discourse. It avoids significant controversy by upholding O'Connor's standards on affirmative action. Because it

does not deviate from a firm commitment to O'Connor's standards, it is removed from the negative connotations and, arguably, denotations, of affirmative action. An "affirmative equality" law is justified because the government has a compelling interest for the law and the law is narrowly tailored insofar as the law provides for remediation in the least restrictive means possible. Thus, *the key difference between "affirmative equality" and affirmative action is that the former is narrowly tailored whereas the latter is arguably not.* "Affirmative equality" *avoids* controversy by eschewing the narrowly tailored debate. An "affirmative equality" law is unquestionably narrow, and thus it provides the fairest means for attaining remediation in a given case.

Thus, applied to campaign finance reform, "affirmative equality" provides the fairest means of remediation. But, before I argue for the constitutionality of an "affirmative equality" plan for campaign finance, I need to go back to some of the questions that I posed at the end of Section I. By answering these questions, I will be able to provide a key premise in my argument for an "affirmative equality" plan for campaign finance reform. I will be able to show that there is a basis for an "affirmative equality" plan for campaign finance. Thus, as the United States government and state governments created and maintained discriminatory suffrage laws, should these entities take action to remediate the effects of past electoral discrimination? If so, what is to be done?

Past discrimination within the electoral system *does* justify remediation. Just as the Alabama Department of Public Safety engaged in an "egregious violation of the Equal Protection Clause," (*United States v. Paradise*), the colonial ante–United States governments; several state governments; and the United States government engaged in systematic discrimination against several groups. There was a compelling governmental interest in remedying the discriminatory action of the Alabama Department of Public Safety because the effects of that discrimination were still present at the time *Paradise* was decided (ibid., 167–71). There is a compelling governmental interest in remedying past discriminatory electoral laws because the effects of this electoral discrimination continue to be felt. The effects of electoral discrimination are perhaps most noticeable in America's black community. If blacks had the franchise throughout this country's colonial and postcolonial history, it is almost certain that they would have faced less discrimination. As of 1770 blacks constituted more than 35 percent of the population in four colonies: Maryland (35.3%), North Carolina

(35.3%), Virginia (41.9%), and South Carolina (60.5%) (Lanning 2005, 198). As of 1861 blacks constituted more than 35 percent of the population in seven states: North Carolina (36.5%), Georgia (44.0%), Florida (44.6%), Alabama (45.4%), Louisiana (49.5%), Mississippi (55.3%), and South Carolina (58.6%) (Willis 2009). Had blacks been given the right to vote, it is fair to say that eligible black voters would have promoted their interests by demanding citizenship and full rights. Given the number of blacks in the antebellum South, many of the Southern states might have elected black senators—Mississippi elected the first black U.S. Senator, Hiram Rhodes Revels, in 1870 (State Library of North Carolina 2009) once blacks were given the right to vote—and representatives—several blacks were elected to the United States Congress during the Reconstruction Era. That blacks were unable to promote their interests in the electoral system until the Reconstruction Era—for Southern blacks, this right was taken away by the rise of Jim Crow—prevented them from attaining equality on all fronts.

In a nonracist society with no history of discrimination, goods should be more evenly distributed among racial groups. If the lingering effects of past discrimination did not persist, blacks, whites, and all other racial groups would be more evenly represented in most professions. Blacks would be able to achieve median salary and education levels that are at least closer to the median salary and education levels of white Americans. Blacks would have similar life expectancy levels as compared to other racial groups. However, in the United States, it is evident that the effects of past discrimination continue to linger insofar as goods are unevenly and unfairly distributed amongst racial groups. Had blacks been given the franchise from the beginning of American colonialism, society would not be nonracist, but, barring unforeseen circumstances, goods would be distributed more equitably. Blacks would have been influential in the development of the Constitution and the laws governing this country and thus would have been able to help shape the law so that it would have given them more rights. But this did not happen, and racial inequity has persisted (NPR 2009; Miniño, Heron, and Smith 2006; *Journal of Blacks in Higher Education*. 2009).

The case is clear: blacks continue to suffer the effects of being denied the franchise. Just as in *Paradise*, in which the Court found a compelling governmental interest in reforming the Alabama Department of Public Safety's hiring system, the Court should find a compelling

governmental interest in a law that would make the electoral system more equitable: such reform would redress the system that helped perpetuate racial inequity; resulted in an unequal distribution of goods; and which continues to maintain this unequal distribution of goods.

Established that the government has a compelling interest to make the electoral system more equitable, there is a strong case to implement an "affirmative equality" plan that would redress past discrimination in the electoral system. What would be the best means for making the electoral system more equitable? The answer: campaign finance reform.

The current campaign finance system is broken. The Bipartisan Campaign Reform Act (BCRA) (2002) addressed two important problems in campaign finance: (1) the influence of soft money in elections—the BCRA limited the use of soft money in elections; (2) limits on political advertising—the BCRA mandated that "electioneering communications" that "referred" to a candidate could not be broadcast thirty days before a primary and sixty days before a general election. However, the reform was not far-reaching enough. Despite the good intentions of BCRA, wealthy Americans continue to have a disproportionate influence in elections. Though BCRA illegalized the use of soft money in elections, it increased the amount of hard money that individuals can contribute in an election (Malbin 2006, 7; Thompson 2009; Federal Election Campaign Laws §441a. [B]; 441 [a][1][C]; 441 [a][1][D]; 441 [a][3][A]).

The lack of regulation toward individuals and political committees exacerbates the inequities created by the campaign finance system. FECA limited independent expenditures "relative to a clearly identified candidate…advocating the election or defeat of such candidate" to one thousand dollars.[5] In other words, the act put limitations on independent expenditures used to expressly advocate for a candidate. However, the *Buckley* decision overturned this limitation, declaring monetary limitations on independent expenditures to be an excessive burden on the First Amendment right to free speech.

Thus, two main problems have been identified in the campaign finance system. The first problem is the growing influence of hard money in elections. Because the BCRA allows individuals to donate thousands of dollars more—of hard money to political committees and causes—than was previously allowed under FECA, wealthy individuals have the opportunity to exert much more influence in elections than

middle-income or impoverished individuals who have little discretionary income. Wealthy individuals, through their donations to political candidates, are also able to engage in quid pro quo agreements with these politicians. Such agreements are illegal, but difficult to regulate, especially if such agreements entail a mere "wink or nod" (*McConnell v. Federal Election Commission*).

The second problem is the Court's allowance of independent advertisements that influence an election or vote, and which are financed by independent expenditures. Because no limits can be placed on such expenditures, the wealthy can have an inordinate amount of influence in persuading the electorate to vote for a candidate or issue. Wealthy individuals may run advertisements, spending as much money as they have, to encourage viewers to vote for or against a candidate for office or an issue. The problem occurs when some candidate(s) or issue(s) has/have the backing of wealthy financiers when one or more opposing candidates or issues do not have such backing. In such a case, although the opposition without wealthy support might have valid arguments for its position(s)—merely because it could not secure the backing of a wealthy financier—it would be confronted with greater difficulties in attempting to propagate the validity of its position(s). The current system is inequitable and unfair.

Ingeminating the goal, which is to provide an "affirmative equality" plan to redress past discrimination in the electoral system—the effects of which linger today—it makes sense to make the campaign finance system more equitable. Though it is difficult to devise exactly how the most equitable campaign finance system would be structured, as the equitability of hypothetical campaign finance systems can only be tested once put into action, it is fair to claim that the current campaign finance system can be made more equitable.

Eliminating or drastically reducing the amount of hard money spent in an election; replacing this money with public funds; putting a cap on total campaign expenditures and independent expenditures would greatly increase the equitability of the electoral system. Still, it would be a near-Sysiphean task to devise the most equitable campaign finance reform possible—it is impossible to know whether a plan for campaign finance reform is the most equitable one until that plan and all other campaign finance plans have been implemented. Appropriate campaign finance reform—reform that would meet the "affirmative equality" standard's "narrowly tailored"

requirement—therefore must only be *theoretically equitable* and *implementable*, and *not overly excessive* insofar as it uses the least restrictive means toward achieving equitability and implementation.

It has been established that an "affirmative equality" plan for equitable campaign finance reform would be constitutional if it passed the strict scrutiny standard when evaluated against the Fifth Amendment's equal protection element and the Fourteenth Amendment's Equal Protection clause. However, in order for such reform to be constitutional, it must also vitiate the First Amendment right to free speech: equitable campaign finance reform entails reforms declared unconstitutional by *Buckley*. Because the *Buckley* Court ruled that there was not a compelling interest in regulating certain campaign finance reform measures, such as caps on total campaign and independent expenditures, these measures were declared to be unconstitutional when evaluated against the right to free speech. However, because equitable campaign finance reform passed strict scrutiny against the Fifth Amendment's equal protection element and the Fourteenth Amendment's Equal Protection Clause, it also withstands strict scrutiny against the First Amendment right to free speech. It has been established that there is a compelling interest for equitable campaign finance reform. It has been established that an "affirmative equality" plan for equitable campaign finance reform can be narrowly tailored insofar as the plan provides the least restrictive means for remediation. When evaluated against the First Amendment right to free speech, an argument for equitable campaign finance reform does not become less compelling: the premises and conclusion remain the same. The only question is whether the argument passes the same strict scrutiny standard. Since the argument and standard remain the same when evaluated against the First Amendment right to free speech, an "affirmative equality" plan for equitable campaign finance reform is constitutional.

Part IV: Defending "Affirmative Equality"

Several objections may be made against my proposal for campaign finance reform on the basis of an "affirmative equality" plan. I begin by addressing Smithian arguments against my proposal. In "Money Talks," Bradley A. Smith argues that the Fourteenth Amendment's Equal Protection clause cannot be used as the basis for equitable campaign

finance reform. He reasons that if wealth cannot be used to influence elections because it creates inequity in the electoral system, then many other forms of political influence must be illegalized. He explains:

> Personal hostility to wealth is hardly a sufficient basis to ban it from the political arena. After all, there are many sources of political influence other than wealth: fame, time, holding political office, writing law review articles, and obtaining foundation grants that permit one to spend one's days lobbying Congress for campaign finance reform. Many persons are hostile to these forms of influence, yet there is little talk of banning them. Why should access to money be singled out? (Smith 1997, 18)

In part, Smith's argument is specious. As explained in Part III, overall patterns of income disparity among different groups—especially between blacks and whites—that have been discriminated against in the electoral system can be attributed to past discrimination, viz., electoral discrimination. In a nonracist society, income distribution in one ethnic group should be more equitable than it is today. In contrast, there is no direct correlation to past discrimination and fame and discretionary time availability—there are many famous people, for example, gangsta rappers and actors, who have benefited from a difficult upbringing, and there are many poor blacks who have more discretionary time than many wealthy white Americans.[6]

Indeed, Smith's point that political officeholders might have to be banned from exercising political influence if private money is banned from financing political campaigns is without merit. As long as equitable campaign finance measures are carried out, there is no need to suppress the influence of politicians during political campaigns. With equity in the electoral system through an equitable campaign finance system, the views of the American electorate will be fairly represented through the political officeholders they elect. If officials are fairly elected, then there will be no need to restrict politicians from exercising their influence in the political arena. The fairly elected politician—with all other laws being fair and assuming that the politician is a rationally self-interested political actor—represents his/her constituency and speaks for his/her constituency, not for a privileged few.

Smith's argument that law review articles affect the electoral system in the same way that private financing of elections does is perhaps one of his only valid points. Those who write and read law review articles—i.e., legal scholars, academics, and lawyers—often exert considerable political influence, and are undoubtedly influenced in their own philosophical dispositions by the hermeneutics of law review articles. However, given that most law schools have adopted and continue to use affirmative action plans, Smith's point is moot. Past discrimination that has resulted in the large educational gap between blacks and whites, which could result in an inequitable electoral system, is being remedied through affirmative action plans (Inside Higher Ed. 2009).

Foundation grants might also have a similar affect on elections as do private contributions to campaigns. However, as Google searches of "minority grants" and "white grants" or "grants for white people," minorities have much greater access to grants that are targeted toward their population than do whites. Past discrimination, if it has affected grant giving at all, has increased the availability of grants to minority groups that have been discriminated against. Still, because the effects of past discrimination continue to plague much of the minority population in this country, there will be no compelling interest to regulate grant giving until our society becomes significantly more equitable.

Smith also argues that a ban on private monetary contributions favors those with volunteer time and those who are skilled in political advertising. Here, Smith's arguments are specious. First, there is no direct correlation between volunteer time and class/racial status. Several occupations require a worker to labor many hours for little pay, and several occupations require a worker to labor many hours for a substantial pecuniary reward. Similarly, several occupations require few labor hours and little pay and several occupations require few labor hours and substantial pecuniary reward. Second, because of affirmative action programs, minorities that have been underrepresented—because of the effects of past discrimination—have been more equitably represented in the student population, a group that tends to have more discretionary time, and thus more time to spend on political activity than other groups in the general population. Because affirmative action programs offer minorities an opportunity to succeed professionally, it is fair to expect that the income gap between minorities, especially blacks, and whites

will narrow. As such, minorities should be more fairly represented among retirees, the other group that has a relatively large amount of discretionary time. Thus, because remediation programs are in place to help minorities that have been discriminated against, and because these remediation programs should allow minority groups to be fairly represented within groups that have large amounts of discretionary time, there is no compelling governmental interest in regulating volunteer political activities. Such a restriction, as it would regulate the right to free speech, should be evaluated under strict scrutiny, and would thus require a compelling governmental interest in order to be constitutional. Because there are remediation programs in place, even if such a restriction was evaluated under intermediate scrutiny, there is no important governmental interest in regulating volunteer political activities; any such regulation would be declared unconstitutional.

Smithian arguments aside, other objections might be raised against an "affirmative equality" plan that calls for equitable campaign finance reform. Someone might ask, Why not just redistribute wealth among the disadvantaged groups so that the wealth distribution within these groups is equivalent to that of white Americans? The answer is that equitable campaign finance reform as a remediation measure for an equitable electoral system is a more logical action than a total redistribution of wealth. Although there might be a good reason for such a redistribution program, a plan for electoral fairness, based on economic redistribution, would not be narrowly tailored. Because it would be nearly impossible to adjudge what the economic status of individual members of an ethnic group would have been had no discrimination ever existed, it would be nearly impossible to fairly assign individuals different amounts of wealth. The only fair alternative is equitable campaign finance reform.

However, there are some who might argue that an "affirmative equality" plan would promote reverse discrimination. The argument is that such a program would discriminate against the wealthy and groups of people who have not faced discrimination in the past. Had there been no history of discrimination against certain minority groups in this country, this argument might prove to be compelling. But there has been a long history of discrimination against certain minority groups in this country. Had such discrimination not existed, it is impossible to know how wealth would have been distributed. It is fair to say, however, that the income levels of minority groups that

have been discriminated against in the past would have been closer to the income levels of whites had such discrimination not existed. Because of this, it is unfair that those who had not been discriminated against continue, as an aggregate, to have an advantage over groups that continue to be affected by past discrimination.

If charges of reverse discrimination became prevalent, some might argue that an "affirmative equality" plan for campaign finance reform would create antipathy toward minorities that would benefit from such a plan. In order to avoid the spread of antipathetic views toward minorities, those against an "affirmative equality" plan for campaign finance reform could offer a cost-benefit argument against such a plan. They could argue that the costs of the antipathetic views that would propagate from the plan's implementation outweigh the benefits created by the plan. To ensure that antipathetic views do not propagate, the argument would follow, it would be necessary to prevent implementation of any campaign finance reform measures based on "affirmative equality." Though the cost-benefit argument against an "affirmative equality" plan for campaign finance reform seems compelling, it too fails to provide an adequate argument against "equality" reform. Though an "affirmative equality" plan for campaign finance reform should not be carried out if the costs of implementation would be too great, if proper action is taken, antipathy toward the minority groups that will benefit from an "affirmative equality" plan for campaign finance reform will not spread. The government could promote large-scale educational programs to promote the idea of an "affirmative equality" program for campaign finance reform. It will probably be difficult to explain to the American people that campaign finance reform is important and that "affirmative equality" is the only way to equitable campaign finance reform as according to *Buckley v. Valeo*, but if proper action is taken, an "affirmative equality" plan for campaign finance reform can be enacted without resultant antipathy.

Conclusion

Equitable campaign finance reform is possible. Despite the Supreme Court's past rulings that have precluded equitable campaign finance reform, given the history of electoral discrimination in the United States, and in the colonies that formed the United States, there is a

compelling governmental interest in making the electoral system as equitable as possible. As an "affirmative equality" plan for campaign finance would be necessary to make the electoral system as equitable as possible, an "affirmative equality" plan for campaign finance reform would be constitutional. Because of the importance of campaign finance reform, and because it has been shown that objections to equitable campaign finance reform are either invalid or specious, equitable campaign finance reform, through an "affirmative equality" plan, can and should be implemented.

NOTES

1. In 1707, the "Acts of Union" created the Kingdom of Great Britain.

2. If I can show that many state governments and the United States government are responsible for discriminatory practices against certain groups, as I intend to in Part I, then I can provide justification for "affirmative equality."

3. The last poll taxes were declared to be unconstitutional in 1966 and racially discriminatory literacy tests were effectively eliminated with the National Voting Rights Act of 1965.

4. In the case of the colonial governments, I mean "until 1781" and not "until 1920," as the colonies officially became the United States in 1781 with the ratification of the Articles of Confederation.

5. Formerly 18 U.S.C. §608(e)(1).

6. Though some rich people are famous because of their wealth, some poor people are also famous because of their background.

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