The Color of Money: How Our Broken Campaign Finance System Fuels Racial Inequality

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THE COLOR OF MONEY: HOW OUR BROKEN CAMPAIGN FINANCE SYSTEM FUELS RACIAL INEQUALITY

ABSTRACT

The laws upholding our campaign finance system are inadequate and under-enforced. These problems are felt disproportionately by African American voters. Election law experts agree that the structure and enforcement authority of the Federal Election Commission (FEC) severely limits the ability of the agency to achieve its goals. Several Supreme Court decisions have also limited the ability of Congress to control campaign contributions and expenditures. Tracking expenditures from corporations, groups, and individuals (to the extent possible), will show the link between favorable outcomes for these groups and their detrimental effects on African Americans. While closing racial disparities in wealth allows for African Americans to participate equally in the arms race of political contributions and expenditures, this too is harmful for our democracy. A limit on independent expenditures and public financing in federal elections would be a more feasible and equitable approach, as it would not drown out the voices of those with less resources. By setting these limits on campaign spending, African American voters will see a more responsive political class and a reduction in harm from monied interests.

INTRODUCTION

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II. DARK MONEY AND VOTING RIGHTS
III. HE WHO PAYS THE PIPER PICKS THE TUNE
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INTRODUCTION

In the wake of the COVID-19 pandemic, the 2020 Presidential Election saw an unprecedented expansion of ballot access.1 The expansion resulted in the largest participation in a Presidential election during the twenty-first century.2 In response to this increase,
Heritage Action, the political arm of the Heritage Foundation, launched a campaign to get states to enact stricter voting laws to limit access to the ballot. To fund this effort, Heritage Action raised millions from undisclosed donors. This money is also known as “dark money.” “Dark money,” is money spent to influence elections without the identity of the donor being disclosed. These bills passed in states that were hotly contested in 2020, and likely in the future.

Heritage Action was instrumental in helping craft and pass Georgia’s voter suppression law, S.B. 202. The legislation targets minority voters with laser-like precision. Black and brown voters in Georgia on average face longer lines and waits when trying to cast a ballot. This law makes it illegal to hand out water and


8. See Fischer & Pilkington, supra note 4. The language in the bill makes it illegal for localities to accept grants from organizations for funded poll workers, for organizers to pass out water and snacks to those facing long lines (a persistent issue in large, minority precincts), bans mobile voting (a method used overwhelmingly by Black voters), and narrows the time frame and heightens the requirements to request an absentee ballot early (a method preferred by Black voters). See infra notes 11–12.


snacks to voters waiting in line.\(^{11}\) Mobile voting units, used almost exclusively in the county with the state’s largest Black population to help cut down on long lines, are now illegal.\(^{12}\) As Democrats become more competitive in Georgia and elections fall within a few points, every effort, no matter how slight, to depress turnout could potentially swing the outcome of the election.\(^{13}\)

While Georgia’s S.B. 202 and other voter restrictions are the most prominent examples of the laws “dark money” help support, there are many others.\(^{14}\) Millions of dollars flood these campaigns from unknown sources looking to limit political participation and the overall impact of racial minority groups.\(^{15}\)

Unlimited and untraceable contributions by corporations and individuals severely undermine the democratic process and lead to adverse electoral and policy outcomes for racial minorities.\(^{16}\) This Note argues that the current campaign finance regime in America disproportionately harms voters of color. This Note calls for tighter regulation of campaign finance law to level the playing field for Black and Brown voters.

This Note begins by generally explaining the history of campaign finance law, its current structure, and “dark money.” While this is not a Note explaining the complete landscape of campaign finance law, knowledge of the legal background is necessary to understanding this Note’s main argument. Examining the history of campaign finance law, the regulatory schemes, and rationales behind the laws will help illuminate why the Supreme Court’s jurisprudence has had deleterious effects on not only America’s democracy, but particularly people of color.

Second, this Note will examine the ways dark money has been used to directly and indirectly harm people of color. Voting rights

\(^{/924527679/why-do-nonwhite-georgia-voters-have-to-wait-in-line-for-hours-too-few-pol ling-pl [https://perma.cc/4LKH-HVG2].}\n\(^{11.\ S.B.\ 202,\ 156th\ Gen.\ Assemb.,\ Reg.\ Sess.\ (Ga.\ 2021).}\n\(^{12.\ Id.;\ see\ Michael\ Waldman,\ Georgia’s\ Voter\ Suppression\ Law,\ THE\ BRENNAN\ CTR.\ (Mar.\ 31,\ 2021),\ https://www.brennancenter.org/our-work/analysis-opinion/georgias -voter-suppression-law [https://perma.cc/5BFP-CWRK].}\n\(^{13.\ See\ Madeleine\ Carlisle,\ Millions\ of\ Georgians\ Have\ Voted.\ It\ Hasn’t\ Been\ Easy\ for\ Everyone,\ TIME\ (Nov.\ 7,\ 2022),\ https://time.com/6229773/georgia-voters-barriers-mid terms-2022 [https://perma.cc/38TR-LBD9].}\n\(^{14.\ See\ Nick\ Vachon\ &\ Matt\ Cohen,\ The\ Dark\ Money\ Funding\ Conservative\ Anti-Trans\ Groups,\ TaiNEWS\ (May\ 31,\ 2023),\ https://americanindependent.com/dark-money -conservative-anti-trans-movement [https://perma.cc/AT85-6LRZ].}\n\(^{15.\ See\ David\ Armiak,\ ALEC\ Lied\ About\ Its\ Work\ on\ Election\ Suppression\ Bills,\ THE\ AMERICAN\ PROSPECT\ (Sept.\ 3,\ 2021),\ https://prospect.org/civil-rights/alec-lied-about-its -work-on-election-suppression-bills [https://perma.cc/TUT6-DSAD].}\n\(^{16.\ See\ Dark\ Money\ in\ Politics\ Threatens\ Black\ Interests,\ THE\ SEATTLE\ MEDIUM\ (Sept.\ 18,\ 2015),\ https://seattlemedium.com/dark-money-in-politics-threatens-black-in terests [https://perma.cc/36VT-CAQU].}\n
are only one area affected by the influence of “dark money.” 17 Other areas include the environment, health care, criminal justice, and a host of other issues. 18 Although news outlets pay attention to the results of these harmful policies, there is little to no coverage on the connection between the policies and who or what is funding the political operation that keeps them on the books.

“Dark money” can also be a way in which racial capitalism perpetuates itself. Racial capitalism, “the process of deriving social and economic value from the racial identity of another person—is a longstanding, common, and deeply problematic practice.” 19 Individuals or corporations benefit from a very laissez-faire campaign finance system which allows them to support politicians who will vote to keep their industries largely unregulated. 20 This is incredibly harmful as it places African Americans further at the mercy of the market. 21

Third, “dark money” theoretically helps advance the policy preferences of racial minorities as they overwhelmingly back Democrats. 22 Since 2020, Democrats and liberal groups have overtaken their Republican and conservative counterparts in terms of “dark money” raised and spent, and have shown no signs of slowing down. 23 This Note does not suggest that Democrats enacting policies are better for minority voters, but it is worth noting that their preferred candidates are benefitting greatly from the opacity of America’s current laws.


21. See id.


Arguments against reforming campaign finance laws have rested on the fact that minority candidates already have greater difficulty raising campaign funds than their white counterparts. In keeping with those arguments, the tightening of campaign finance laws would place minority candidates even further behind. Additionally, minorities hold less wealth than white Americans. Thus, theoretically, a tightening of campaign finance rules would hurt minority candidates even more. Black candidates do not have the same wealth base from which to draw donations. However, minority candidates no longer face the same barriers to fundraising to the extent they did before, as Black candidates now regularly outpace their white counterparts in fundraising. While there is no single reason to explain why Black candidates are now doing so well fundraising, it is clear that the gap is closing. Now that the landscape has changed, it is time to rethink campaign finance reform and its net positives for minority voters.

Lastly, reform of America’s campaign finance laws and tax code is a racial justice issue and would produce a healthier democracy overall. The current Supreme Court has expressed no interest in upholding any limits on contributions and independent expenditures, as they deem it violative of the First Amendment. While there are proposals for new arguments for campaign finance reform, it is difficult to see how they could withstand scrutiny from the Supreme Court given its current conservative supermajority.

27. See id.
30. See id.
Clarence Thomas, arguably the ideological leader of the conservative supermajority, has been hostile to any limits on political contributions and has swayed other justices to this position. Thomas holds political contributions at the most “significant level of constitutional protection,” as the contributions generate “essential political speech.” While this level of scrutiny does not inherently doom campaign finance regulations, it is difficult to imagine any regulation surviving this Court.

Some scholars have suggested that public financing of political campaigns would help ameliorate the racial inequalities in politics. They argue that white donors are over-represented in politics, thus, politicians are more likely to be responsive to their needs than the needs of their less wealthy, likely minority constituents.

While there is no shortage of proposed solutions, it is clear that America’s current campaign finance regime must change. This Note will make the case as to why campaign finance is one of the most pressing racial justice issues of today, and what Congress can do to solve it.

I. HISTORY OF CAMPAIGN FINANCE LAW AND “DARK MONEY”

In 1971, Congress passed the Federal Election Campaign Act (FECA) with the intent to regulate corporate and union contributions and disclosure of contributions in federal elections. In 1974, Congress amended FECA, establishing limits on contributions from individuals, political action committees (PACs), and political parties. The amendments also created the Federal Election Commission (FEC), tasking the agency with disclosing campaign finance information, enforcing FECA’s provisions, and administering public funding of presidential elections. The law also set limits on independent

37. See id.
38. See Federal Election Campaign Act, 52 U.S.C. § 30101 et seq. (1971) (Ironically, the bill was signed into law by Richard Nixon, whose scandals prompted amendments to the law in 1974 and provided the basis for the anti-corruption rationale the Government used to defend the law.).
39. See id.
40. See Mission and History, FED. ELECTION COMM’N, https://www.fec.gov/about/mission-and-history [https://perma.cc/TW5L-UHXH] (Contributing to the dysfunction in campaign finance law is the structure of the Board of Commissioners of the agency. The Board consists of six Commissioners, equally divided between Republicans and Democrats. The Commission also requires four votes for any action to be taken. While established
expenditures, which are funds spent that “expressly advocates the election or defeat of a clearly identified candidate and which is not made in coordination with any candidate or their campaign or political party.”

In 1976, in Buckley v. Valeo, the Supreme Court struck down provisions in the amended act, holding that limits on independent expenditures violated the First Amendment and were therefore unconstitutional. The Court reasoned that any limit on how much a person can spend reduces “the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today’s mass society requires the expenditure of money.”

In short, the Court ruled that money is speech. This idea laid the foundation for the Court’s ruling in Citizens United. The Court did, however, uphold contribution limits. The Court reasoned that the limits on the direct contributions to candidates were justified in the interest of safeguarding against corruption and the appearance of corruption. Surprisingly (though not to some), the Court found a connection between direct contributions and corruption and the appearance of corruption; however, it did not use the same logic for independent expenditures advocating for the election or defeat of a candidate.

In exempting from campaign finance laws those that did not expressly advocate for the election or defeat of a candidate, the Court gave rise to issue ads. By falling out of the category of “electioneering communications,” the ads fell outside of the law.

that way to dispel any attempt for political based enforcements, the Commission was not immune to the rise in partisan polarization. Now, the Commission usually deadlocks along partisan lines).

42. Buckley v. Valeo, 424 U.S. 1, 16 (1976).
43. Id. at 19 (footnotes omitted).
44. See id.
46. Buckley, 424 U.S. at 29.
47. Id. at 26–29.
48. Id.
49. Id. at 39–44.
50. Id. at 44 (This construction would restrict the application of § 608(e)(1) to communications containing express words of advocacy of election or defeat, such as “vote for,” “elect,” “support,” “cast your ballot for,” “Smith for Congress,” “vote against,” “defeat,” and “reject.”). These “issue ads” are the favorite vehicle for independent expenditure groups, raising and spending untold sums of money to support or defeat a candidate.
51. Id.
The next major movement in campaign finance reform came in 2002, when Senators John McCain (R-AZ) and Russ Feingold (D-WI) introduced the Bipartisan Campaign Reform Act (BCRA), more commonly known as “McCain-Feingold.”52 “McCain-Feingold” took issue with advocacy ads head-on, defining ads that named a federal candidate within thirty days of a primary and sixty days of a general election as “electioneering communication.”53 BCRA banned these ads paid for by corporations, non-profits, and any unincorporated entity using any corporate or union general treasury funds.54 Senate Majority Whip Mitch McConnell (R-KY) challenged this new law as the lead plaintiff in *McConnell v. FEC*.55 While the Court grew increasingly skeptical of laws trying to reign in huge spending and contributions in federal elections, the Court kept most of the law intact, keeping the regulations on “soft money” and electioneering communications.56 The Court reasoned that limiting some types of political campaign contributions was permissible if doing so furthers a compelling government interest.57 The compelling government interest in this case was reducing the corruption or the appearance of corruption in the electoral process.58 However, the victory would be short lived as seven years later, the Court would change its mind with its ruling in *Citizens United*.59

In 2010, the Supreme Court made its ruling in *Citizens United*, dealing a deathblow to the already woefully inadequate campaign finance laws.60 First, the Court ruled that prohibitions on independent expenditures by corporations are unconstitutional.61 Justice Kennedy, writing for the Court, said that a prohibition on independent expenditures and electioneering communications “interferes

54. Id.
57. Id. at 205–07.
58. See id. at 136.
with the ‘open marketplace’ of ideas protected by the First Amendment.”

By giving free speech rights to corporations and opening the door to unlimited sums of money being spent to influence American politics, the Court has effectively given rise to a plutocracy in the United States. Those plutocrats are making their voices heard.

Through September 30, 2020, independent expenditures for the 2020 federal elections totaled nearly $1.36 billion. Through June 30, 2022, independent expenditures totaled $419.4 million. There is no sign that the spending in federal elections will subside. And even though these entities are supposed to be operating independently of candidates or political parties, there is growing evidence to suggest that these groups are becoming more and more coordinated. For example, candidates now use a tactic called “red boxing,” directing independent expenditure groups on what to use when running ads.

II. Dark Money and Voting Rights

In the 2020 General Election, turnout among non-white voters was 58%, its highest since 2012. This increase in non-white turn...


68. See Saurav Ghosh, Voters Need to Know What “Redboxing” Is and How It Undermines Democracy, CAMPAIGN LEGAL CTR. (May 13, 2022), https://campaignlegal.org/update/voters-need-know-what-redboxing-and-how-it-undermines-democracy [https://perma.cc/S5BS-RRKS] (“Redboxing,” as it is known, is a practice where candidates direct Super PACs to approved campaign messaging and images. Egregiously flouting the anti-coordination rule, the Court’s ruling in Citizens United has allowed candidates to push the limits of how much they can get away with. The lack of a functioning FEC has also contributed to this law breaking).

69. See id.

out helped Democrats take the White House and both houses of Congress. Expanded voting method options adopted in light of the COVID-19 pandemic likely accounted for this increase. Although Democrats won the election, expanded voting methods certainly helped Republicans in down-ballot races.

However, these outcomes were not good enough for right-leaning groups who sought to pass laws in states to restrict the franchise for voters of color. Heritage Action, the political arm of the Heritage Foundation, pledged to spend $24 million on efforts to tighten state voting laws and lobby members of Congress to defeat voting rights measures. Because Heritage Action is a 501(c)(4) organization, they are not required to disclose their donors when making their tax forms publicly available. While Heritage Action has long been


73. See Domenico Montanaro, The 2020 Election Was a Good One for Republicans Not Named Trump, NPR (Nov. 11, 2020), https://www.npr.org/2020/11/11/933435840/the-2020-election-was-a-good-one-for-republicans-not-named-trump [https://perma.cc/SL3K-MHTK] (Down-ballot races are the elections that are not at the top of the ticket. So, while President or Governor may be at the top of a ticket, the down-ballot races are typically legislative races such as Senate or House of Representatives); Nathaniel Rakich, Republicans Are Just a Normal Polling Error Away from a Landslide—or Wiping Out, FIVETHIRTEENEIGHT (Nov. 3, 2020), https://fivethirtyeight.com/features/2022-polling-error [https://perma.cc/6XXB-J5XC] (While polling suggested doom and gloom for down-ballot Republicans, it underestimated Republicans by 5.4 points in Senate races and 6.3 points in House races). While Republican voters overwhelmingly preferred to vote in person on election day, large numbers took advantage of the expanded earlier voting options.


75. Id.

linked to the conservative billionaire Koch brothers, it is unknown where all the money is coming from. In Georgia, a state targeted by these dark money groups, leaked video shows Heritage Action Director Jessica Anderson bragging about the organization’s recommendations making it into the final version of the Bill. In Arizona, Heritage Action lobbied the Arizona State Legislature to pass HB 2492, which requires voters to show proof of citizenship to vote. According to the Campaign Legal Center, this Bill would place an undue burden on the large, Latino naturalized citizen population.  

Florida also took recommendations from Heritage Action when it passed SB 90 and elevated the requirements for voting methods non-white voters took advantage of in 2020. Florida went a step further when it passed SB 524, establishing its “Election Integrity

organizations to hide the identity of their donors. 501(c)(4)s are required to report contributions and the identity of those contributors to the Internal Revenue Service (IRS). 501(c)(4)s are not required to disclose their donors to the public. The Trump administration instituted new rules which removed the requirement for these tax-exempt organizations to report their donors to the IRS. These organizations now have total anonymity for their donors. While Democratic members of Congress have been pressing the Biden administration to reverse the rule, there has been no such action. See Naomi Jagoda, **Democrats Press IRS to Reverse Trump-Era Rule Limiting Donor Disclosure**, THE HILL (Apr. 27, 2021), https://thehill.com/policy/finance/550560-democrats-press-irs-to-reverse-trump-era-rule-limiting-donor-disclosure [https://perma.cc/GB5B-6X4A]. The Biden administration’s reluctance to act on this rule underscores just how much Democrats benefit from “dark money” as well. See **About, HERITAGE ACTION FOR AM.,** https://heritageaction.com/about [https://perma.cc/4CCM-NPGH]. Donor disclosure was dealt a further blow by the Supreme Court in **Americans for Prosperity Foundation v. Bonta**. The Court ruled that California’s disclosure requirement was facially invalid as it burdens donors’ First Amendment right to freedom of association. See 141 S. Ct. 2373 (2021). The sliver of hope for donor disclosure in this case was that it did not receive strict scrutiny. However, it is unlikely that the current makeup of the Supreme Court will allow any kind of required donor disclosure rules to pass constitutional muster.


79. 2022 Ariz. Legis. Serv. Ch. 99 (H.B. 2492) (Lexis) (Failure to provide proof of citizenship when registering to vote in Arizona will result in voters only being able to vote for federal candidates in federal elections. Until that voter provides proof of citizenship, they will not be able to cast a vote in state and local elections).


While illegal voting is virtually non-existent, Governor DeSantis announced the arrest of Florida residents who had violated the law—mostly Black citizens. While it appears that most of these residents will have their cases dismissed, the damage was already done. Black voters were sufficiently spooked from registering to vote. Like campaigns of racial terror in the past, only a few victims who were punished publicly for some alleged violations were needed to instill fear in the targeted population.

While the data comes in for the 2022 midterm, we will not know just how these new laws affected non-white voters until a deeper analysis is done. The biggest issue, however, is that we do not know who is behind the funding of these “voter suppression” laws. Without disclosure of who is putting the money behind these campaigns, big donors deprive voters of making a more informed choice when voting.
they cast a ballot. Voters are denied the chance to ask themselves, “Why is X person/group funding these efforts and what do they have to gain by it succeeding?”

While outside groups can spend money on voter suppression, they can also spend to boost turnout. While Heritage Action was spending millions in Georgia, Stacy Abrams’ Fair Fight was also spending millions to increase voter turnout. Fair Fight’s Political Action Committee (PAC) spent over $44 million to super charge non-white turnout to counteract these new laws. Again, while we still will not know how well these forces countered each other until all the votes are counted, we do know that the money will only grow and the battle over voter accessibility will wage on.

As noted earlier, Democratic politicians are generally in favor of getting rid of “dark money” from politics. However, the Biden

92. See PAC Profile: Fair Fight PAC, OPEN SECRETS, https://www.opensecrets.org/political-action-committees-pacs/fair-fight-pac/C00693515/summary/2022 [https://perma.cc/9Z3N-NGEV]. While Fair Fight PAC is required by law to disclose their donors to the FEC, they are still allowed to raise and spend unlimited sums of money. While the raising and spending of unlimited sums is deeply troubling to campaign finance reformers, this level of transparency required is far preferable to the alternative. See Abby K. Wood, Voters Use Campaign Finance Transparency and Compliance Information, POLITICAL BEHAVIOR, 6 (2022), https://link.springer.com/content/pdf/10.1007/s11109-022-09776-4.pdf [https://perma.cc/FTJ6-FP26].
administration has not yet reversed the rule allowing 501(c)(4)s to not disclose their donors. It is a mixed bag at the state level, as some legislation passed by Democrats favors more disclosure while others do not.

While Democrats are seen as the party supportive of voting rights and getting rid of “dark money” (Democrats’ H.R. 1 does both), their actions on campaign finance suggest otherwise. Neutral observers need to look no further than the work of leading Democratic lawyer, Marc Elias.

Elias is the Democrats’ go-to litigator in their voting rights and redistricting cases, handling suits in almost every circuit and the Supreme Court. While Elias has been a staunch defender of voting rights, his campaign finance work has led some to question his methods.

In 2010, Elias, then an attorney at Perkins Coie, filed the request leading to the creation of Super PACs. Elias was also partially


96. See Virginia’s HB970 which excluded mandatory disclosure from 501(c)(4)s as to their donors. The bill, while introduced and sponsored by Republicans in the General Assembly, passed with substantial support from Democrats. California required all 501(c)(4)s to disclose their donors. It was this provision in the state law that was struck down in America.


100. See Fed. Election Commission Advisory Opinion 2010–11 on Commission Regulations to Proposed Plan to Solicit and Accept Unlimited Contributions Under the Federal Election Campaign Act (July 22, 2010), https://saos.fec.gov/aods/AO%20202010-11.pdf [https://perma.cc/WR86-CG4P]. While Elias has sided with Democrats on voting rights, he is often on the opposite side for campaign finance issues. Elias’s work in private practice has been marked by undermining transparency in campaign advertising and
responsible for raising the limits individuals could contribute to political parties. While this is certainly excellent work for his clients, it severely undermines his work and beliefs in expanding and protecting voting rights. While Elias argued in a since deleted tweet that pro-voting rights dark money is different, it is a horrible excuse. What should also be understood is that while millionaires and billionaires can donate vast sums to support voting rights and ostensibly good things for non-white voters, they can just as easily dictate their funding be used to harm non-white voters as well.

Overall, these are the dangers of unaccountable and untraceable spending. This power of the purse, so to speak, is the exact kind of corruption Congress intended to safeguard against when it passed limits on independent expenditures in FECA.

III. He Who Pays the Piper Picks the Tune

The unleashing of unlimited and untraceable spending has given outsized influence to those who can afford to spend. While political parties face direct accountability in terms of elections, “dark money” donors do not. As Heather Gerken argues, “Super-PACs and 501(c) organizations might someday become shadow parties, as political elites adapt to the new regulatory environment ushered in by Citizens United.” While Gerken is correct to argue

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102. See Hasen, supra note 99.

103. See id.


that political parties will and have already adapted to this changing legal landscape, it will at some point become untenable. But, while the coordination between politicians and these “independent” groups become more pronounced, so do their priorities.

Political pundits and Black voters themselves have long argued that their support is taken for granted by the Democratic party because of their extreme loyalty. And it is arguably their lack of wealth and donor power that exacerbates their being ignored. White Americans hold over ten times the wealth of Black Americans. This certainly plays out in the disparities between major donors. Research has shown that, exactly as critics and cynics of American politics have long suggested, major donors have much more power over legislation and political priorities than average citizens. Political scientists, testing the responsiveness of politicians to high-dollar donors, write “the preferences of economic elites (as measured by our proxy, the preferences of ‘af[fl]uent’ citizens) have far more independent impact upon policy change than the preferences of average citizens do.” They also argue that average citizens do not always lose out, as an interest convergence between these economic elites and average citizens produces outcomes favored by both. The interest convergence between these mostly white economic elites and average Black citizens begins and ends at voting rights. This is perfectly illustrated by the work of the National Association for the Advancement of Colored People (NAACP) and its legal arm, the Legal Defense Fund (LDF). While the organizations have worked tirelessly to secure and defend the voting rights of Black

108. See id. at 915.
114. Id.
115. See id.
Americans and other minority groups, they have done little to nothing to better the material conditions of the mass of Black people.¹¹⁶

Professor Derrick Bell promulgated this “interest convergence” theory to explain the Supreme Court’s decision in Brown v. Board.¹¹⁷ The decision in Brown is better understood when you consider the value it would have to whites, with Bell writing, “whites in policy-making positions [were] able to see the economic and political advances.”¹¹⁸ Bell further writes: “[T]here were whites who realized that the South could make the transition from a rural, plantation society to the sunbelt with all its potential and profit only when it ended its struggle to remain divided by state-sponsored segregation.”¹¹⁹

The same analysis should be applied in a campaign finance context, as wealthy, mostly white donors seem to align with the interests of non-white voters when they converge.¹²⁰ Some have argued that a change in candidates could turn the tide of white donor hegemony in U.S. politics.¹²¹

Political scientists Jacob Grumbach and Alexander Sahn argue that more candidates of color on the ballot increase the number of donors of color.¹²² While it does not speak to the number of wealthy donors, we can assume that wealthy donors of color would continue to back these candidates as they have with white candidates. In 2008, wealthy Black donors raised record amounts to support the candidacy of Barack Obama.¹²³

While this was before the era of “dark money,” for the sake of Grumbach’s argument, let’s assume that there would also be an increase in “dark money” spending to support candidates of color. We still run into the overall problem of this anonymous money flooding our political campaigns. This is another weak justification for the idea that this “dark money” is “better” because it is supposedly going towards advancing the interests of voters of color.

¹¹⁸. See id.
¹¹⁹. Id. at 525.
¹²². See id. at 207.
The premise of this argument is that donors of color would prioritize racial solidarity over class interests. While there is no specific data analyzing the donor habits between Black men and women, cross-tabs from surveys show us that the donor patterns follow their voting habits. While Black voters overwhelmingly back Democrats, Black women vote for Democrats at higher rates than Black men. While these numbers show us that Black women seem to place racial solidarity over class interests (in as much as they are least likely to break away from group voting patterns), they show us that Black voters are anything but a monolith.

The gains of the Civil Rights Movement, led by groups like the NAACP, disproportionately benefitted the Black middle class. As Joy James notes:

In the process of [African American] assimilation we acquired traits of a particular class, and that we are not the bourgeoisie. We are really the petite bourgeoisie because we don’t collectively own that kind of wealth. But the way in which we perform and structure acts as if we were invested in capital. And so that creates a split between us and the working class and the poor, the so-called lumpenproletariat. But it’s a split that’s massed when we claim this universal Blackness, as if experientially we all live with the same vulnerability to the police and poverty.

The idea of a Black donor class that contributes funds to support candidates who would support the masses of Black people does not correspond with how the donor class of any race behaves. Robert Johnson, founder of Black Entertainment Television (BET) and America’s first Black billionaire, told CNBC that as a business man, he would rather deal with the “devil [he] knows,” talking about his...
preference for President Trump’s business-friendly policies. While this is anecdotal, it underscores the idea that African Americans, like any other group, hold diverse ideological viewpoints. Further to that point, the small-dollar donations of Black voters overwhelmingly favored Senators Bernie Sanders and Elizabeth Warren, who raised around $17 million collectively. Larger donations from outside groups who face no limits on contributions overwhelmingly favored Biden and opposed Sanders and Warren.

The priorities and preferences of wealthy and working-class Blacks could not be more opposite. So, while “dark money” that goes towards the priorities of Black voters may be “good,” one must ask: good for whom? While voting rights are certainly a top priority for Black voters, there are other pressing issues as well that need to be addressed.

Arguably, it would be unwise for one political party to unilaterally disarm in the “dark money” race. However, using “dark money” to get candidates elected who will hopefully enact legislation to curb the money flooding the political system is not the answer. But as we have seen, those who decry the dangers facing our democracy are helping tear it down. “Dark money” is the cancer on American democracy, it cannot also be the cure.

Further complicating the matter is the rise of Black politicians representing majority white districts.


132. See id.


districts elected Black members of Congress.\textsuperscript{137} That number grew to thirty after the 2022 midterm elections.\textsuperscript{138} While most of those Representatives are Democrats and joined the Congressional Black Caucus (CBC),\textsuperscript{139} their priorities, given the districts they represent, may not be the same as someone who represents a majority-minority district.\textsuperscript{140}

The diverse viewpoints within the Black community and the competing priorities of being Black representing a majority white district throws more cold water on the idea that more representation within the donor and political class will temper the scourge of “dark money” in our political system. In fact, majority-minority districts are increasingly under fire as white suburban voters cross over and support Democrats in higher numbers.\textsuperscript{141} As coalitions change, majority-minority districts, once the driving force behind Blacks making it to Congress, are now being questioned as being necessary at all.\textsuperscript{142}

\section*{IV. Solutions}

In a per curium opinion, the Supreme Court in \textit{Buckley} wrote about limiting expenditures that:

\begin{quote}
the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of
\end{quote}

\textsuperscript{137} Id.
\textsuperscript{142} See id.
others is wholly foreign to the First Amendment, which was designed “to secure ‘the widest possible dissemination of information from diverse and antagonistic sources,’” and “to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”

Until there is a change in the law from the Supreme Court, judges are bound by this decision.

The First Amendment absolutists were at their zenith with *Citizens United v. FEC*. The Supreme Court ruled that the government may not suppress political speech based on the speaker’s corporate identity. Justice Kennedy, writing for the Court said, “[w]ith the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters.” Commentators at the time knew this not to be true (or even exist), and Kennedy now admits that he was wrong about the way disclosure would work post-*Citizens United*. Even if Congress passes the most robust disclosure requirements, it is unlikely to pass muster with the current conservative majority on the Supreme Court. While not a campaign finance case, the Supreme Court in *Americans for Prosperity Foundation v. Bonta* issued a concerning ruling for required disclosure of political contributions to “dark money” groups. The unlimited spending unleashed

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143. Buckley v. Valeo, 424 U.S. 1, 48–49 (internal citations omitted).
144. See Lau, supra note 59.
147. Id. at 370.
150. See Richard Corin, Amanda Nussbaum & Carrie Slaton, *The Impact of Americans for Prosperity Foundation v. Bonta on Donor Disclosure Laws*, JDSUPRA (July 30, 2021), https://www.jdsupra.com/legalnews/the-impact-of-americans-for-prosperity-4494942 [https://perma.cc/8ESU-7AVK] (The concern with the ruling in *Bonta* is that some heightenened level (whether it be exacting or strict scrutiny remains to be seen) of review would be the standard for compelled disclosure cases. While exacting scrutiny has been the standard since *NAACP v. Alabama*, any move to strict scrutiny would almost certainly doom any effort at compelled disclosure of political donations. If the strict scrutiny barrier was not already high enough, the Court concluded that some heightened standard could apply without requiring plaintiffs to prove harms or burdens on donors’ associational rights. Only
by *Citizens United* has likely made our government even more susceptible to capture.

The fastest way to capture the legislature and ensure favorable treatment is to finance their campaigns. 151 Most members of Congress spend about thirty hours a week raising money for re-election or, “dialing for dollars” as it is known. 152 More time on the phone is more time not spent looking over the bills that come before Congress and handling constituent issues. 153 This gives even greater importance to lobbyists, operating on behalf of giant corporations and interest groups. 154 While corporations and interest groups in certain sectors may prefer one party over the other (labor organizations prefer Democrats and the oil and gas organizations prefer Republicans), 155 most donate to both sides. 156 Corporate and interest group donations to candidates and incumbents on both sides of the political aisle signal that these groups are not interested in electoral outcomes so much as they are in access. 157 That access gives them an advantage over the average American.

The first step to fixing our broken campaign finance system is to return the jurisprudence to the *Austin* framework. The *Austin* framework works because it correctly recognizes the massive benefits the state bestows upon corporations. 158 Justice Marshall wrote in *Austin v. Michigan Chamber of Commerce*:

> We emphasize that the mere fact that corporations may accumulate large amounts of wealth is not the justification for § 54; rather, the unique state-conferred corporate structure that facilitates the amassing of large treasuries warrants the limit on independent expenditures. Corporate wealth can unfairly influence

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153. See Potter & Penniman, supra note 152, at 49.
154. See id. at 47.
155. See Lowery & Brasher, supra note 151, at 138.
156. See id.
elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions.\footnote{159}{Id. at 660.}
The corporation logically argues for a reduction in costs and seeks ways to increase profits. This push for deregulation in commercial and business law often hurts the poor and people of color the most.\footnote{161}{See Stephen Wilks, Private Interests, Public Law, and Reconfigured Inequality in Modern Payment Card Networks, 123 DICK. L. REV. 307, 348 (2019).}
The state need not be consumed by creatures of its own creation. This idea is shared by the founders of this nation.\footnote{162}{See Letter from Thomas Jefferson, 3rd Pres. of the U.S., to George Logan, Fmr. U.S. Senator from Pa. (Nov. 12, 1816) (on file with the National Archives).}

In a letter written to a friend, Jefferson writes, “I hope we shall take warning from the example and crush it’s [sic] birth the aristocracy of our monied corporations which dare already to challenge our government to a trial of strength, and to bid defiance to the laws of their country.”\footnote{163}{Id.}

Logically, the Court’s ruling in \textit{Austin} makes the most sense: if the state sets the terms for how corporations can operate, then setting limits on how they can interact with the political system should be within its capacity.

The return of the \textit{Austin} framework would also trickle down to the state level, where not enough attention is paid on the campaign finance front. States, laboratories of democracy, have long experimented with ways to remove the undue influence of money from politics.\footnote{164}{See Strategy 1: Achieve Equality of Voice and Representation, OUR COMMON PURPOSE, https://www.amacad.org/ourcommonpurpose/report/section/6#_5 [https://perma.cc/B7VG-CPZE].}

Another solution to this problem of “dark money” and our broken campaign finance system is mandatory public financing for candidates. Public financing or funding is the use of tax dollars or public funds to be used by candidates for campaign purposes.\footnote{165}{See Richard Briffault, The Future of Public Funding, 49 WILLAMETTE L. REV. 521, 525 (2013).}

Candidates would be limited in spending, as they only have available the funding provided to them through the public funding system.\footnote{166}{See id. at 528.}

Adopting
public financing of these campaigns would hopefully eliminate the need for candidates to spend a majority of their time “dialing for dollars,” instead spending time helping their constituents and studying legislation.

The push-back to public financing is that it does nothing to stop the flood of outside spending in our elections.167 Outside spending surpassed $1 billion in the 2018 midterm elections.168 The 2022 midterm elections saw outside spending top $2 billion.169

To curb this spending, compelled disclosure of these donors is not enough. When the Court shifts in ideological balance, a majority of justices must adopt limits to independent expenditures as constitutional. Without it, voters of color risk being permanently locked out or ignored from American democracy.

CONCLUSION

People of color are consistently and disproportionately affected by the worst aspects of our society, and the negative effects of our broken campaign finance system on people of color are rarely discussed or even connected. However, it is time to start addressing it.

The road to reforming our broken campaign finance system seems long and arduous, and there are legitimate First Amendment concerns about how to appropriately limit independent expenditures. But nowhere in our Constitution does it suggest that the voices of a few should drown out the voices of the many.

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