

Race and Election Reform
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1. "First Generation" cases

The first generation of voting rights cases were brought on behalf of voters seeking to participate in the political process. Although the Fifteenth Amendment outlawed racial discrimination in elections, Southern States found numerous ways to suppress or control the black vote. These included terrorist activities, economic intimidation, bribery, discriminatory registration procedures, and poll taxes. Two good examples of First Generation cases come from Alabama and Texas.

Shortly after Alabama adopted constitutional provisions limiting the right to vote, blacks sued to invalidate the provisions. The Alabama challenges reached the U.S. Supreme Court twice – once as an appeal from the U.S. Circuit Court and once as an appeal from the Alabama Supreme Court – and each time the Court used sophistry and hypertechnical reasoning to hold that black citizens could not sue to invalidate the registration plan because no one would be allowed to vote in Alabama if there were no voter registration. They ignored the fact that Alabama had existed for nearly a century without registration laws.³

A series of actions were brought against the Texas Democratic Party's white primaries.⁴ After each victory by the black voters, the State of Texas or the Democratic Party recast its regulations to continue to exclude blacks. After the decision in *Smith v. Allwright*, holding even "private" primaries to be "state action," most Southern States switched their defenses once again to discriminatory registration practices.

While some private suits were filed, most voting rights litigation in the late 1950's and early 1960's was brought by the U.S. Department of Justice (the Department brought 71 suits

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³*Giles v. Harris*, 189 U.S. 475 (1903); *Giles v. Teasley*, 193 U.S. 146 (1904).

⁴*Nixon v. Herndon*, 273 U.S. 536 (1927); *Nixon v. Condon*, 286 U.S. 73 (1932); *Grove v. Townsend*, 295 U.S. 45 (1935); *Smith v. Allwright*, 321 U.S. 649 (1944).

between 1957 and 1964). The frustratingly slow nature of the case-by-case challenges to discriminatory practices led the Justice Department to propose radical remedies for discrimination — which Congress adopted in 1965.

The provisions of the 1965 Voting Rights Act are quite broad.⁵ Section 2 of the Act restates the prohibition of the Fifteenth Amendment against race discrimination in voting. Section 4 defines the conditions that trigger the special provisions of the Act:

(1) the Attorney General determined that the state or political subdivision maintained a “test or device” on November 1, 1964;⁶ and

(2) the Director of the Census has determined that less than 50% of the voting-age population were registered or voted in November 1964.

Once those “triggers” were met, the “tests and devices” would be suspended, and any new voting qualifications, prerequisites to voting, or rules, regulations, or practices relating to voting would not be enforceable until the jurisdiction had done one of two things to obtain “preclearance.”⁷ First, the jurisdiction could file a declaratory judgment action in the U.S. District Court for the District of Columbia for a declaration that the new election rule was not passed with the intent to discriminate and will not have the effect of discriminating on the basis of race.⁸ In this action, the jurisdiction bears the burden of proof. Second, the jurisdiction may submit the change to the U.S. Attorney General. The Attorney General has 60 days to review the change. If he replies that he has no objection (or fails to reply within the 60 days), then the jurisdiction may enforce the new rule just as if it had received a favorable declaratory judgment.⁹ If the Attorney General objects, the jurisdiction may file a declaratory judgment action.

The Supreme Court upheld the constitutionality of these provisions in *South Carolina v.*

⁵42 U.S.C. § 1971 *et seq.*

⁶A “test or device” is defined as a requirement that a voter demonstrate an ability to read, write, understand, or interpret; demonstrate any educational attainment or knowledge on a particular subject; possess good moral character; or have a registered voter vouch for his qualifications.

⁷Sections 4(a) and 5.

⁸In *Beer v. United States*, 425 U.S. 130 (1976), the Supreme Court held that the jurisdiction had to demonstrate a lack of a “retrogressive” effect — that is, a situation in which the minority voters would have less electoral power than before. In *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000), the Court held that only an intent to regress, not simply an intent to discriminate, would defeat a request for a declaratory judgment.

⁹The guidelines for submissions to the Voting Section are at 28 C.F.R. Part 51.

Katzenbach.¹⁰

2. "Second Generation" cases

After the initial surge of registration of black voters, the private bar and public interest organizations became interested in overcoming the next set of barriers to minority political power. Even though blacks were voting in record numbers, they were having little success in electing officials of their choice because of the continued use of at-large elections. Professor Lani Guinier has noted: "Thus, second generation voting rights litigation focused on 'qualitative vote dilution.' Voting rights activists sought to elect more black officials, primarily by creating majority-black single-member districts."¹¹

The first of these cases arose in Alabama. In 1966, the Barbour County (Alabama) Democratic Executive Committee changed from 16 single-member districts and five at-large members to all members being elected at large. This change was adopted shortly after the number of blacks registered in Barbour County went from 723 to 3,100 because of the recently-enacted Voting Rights Act. The NAACP Legal Defense Fund filed suit under the Fourteenth and Fifteenth Amendments on behalf of local citizens to challenge the change to at-large voting and obtained an injunction requiring the Committee to return to its former system and to hold new elections in 1968.¹²

Shortly thereafter, blacks in Indianapolis brought suit seeking single-member districts in the legislature, but the Supreme Court denied them relief because they had not shown they had "less opportunity ... to participate in the political process and to elect legislators of their choice."¹³

Two years later in *White v. Regester*,¹⁴ the Court held that blacks in Dallas County, Texas, and Hispanics in Bexar County, Texas, had demonstrated that they had less opportunity to participate in the political process and to elect candidates of their choice. Using *White v. Regester* as a model, lawyers across the South began bringing suits to break up at-large plans.

Unfortunately for black voters, the path was still not clear. In *City of Mobile v. Bolden*,¹⁵

¹⁰383 U.S. 301 (1966).

¹¹Lani Guinier, "The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success," 89 *Mich. L. Rev.* 1077, 1094 (1991).

¹²*Smith v. Paris*, 257 F.Supp. 901 (M.D. Ala 1966), aff'd 386 F.2d 979 (5th Cir. 1967).

¹³*Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971).

¹⁴412 U.S. 755 (1973).

¹⁵446 U.S. 55 (1980).

the Supreme Court held that plaintiffs suing under the Fourteenth Amendment had to demonstrate an intent to discriminate, not just a discriminatory impact. Although the *Bolden* plaintiffs were able to do so on remand, the civil rights bar was concerned that the necessity of proof of intent would impede their efforts to empower black communities. The Voting Rights Act was up for renewal two years after the *Bolden* decision, so they began a push to have Congress amend Section 2 of the Voting Rights Act because Congress has the power to enforce the Fourteenth and Fifteenth Amendments with appropriate legislation. As part of the renewal of the Act, Congress amended Section 2 so that plaintiffs could win by “show[ing] that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by [minority voters] in that [they] have less opportunity than other members of the electorate to participate in the political process and elect representatives of their choice.” 42 U.S.C. § 1973(b).

In *Thornburg v. Gingles*,¹⁶ the Supreme Court held that plaintiffs in Section 2 cases had to show three prerequisites in order to demonstrate that the election system was to blame for their defeats. These three factors are:

- a. The minority group must be sufficiently large and geographically concentrated to make a majority in a single-member district;
- b. The minority group votes cohesively; and
- c. The majority usually votes so as to defeat the choices of the minority community.

In the twenty years following passage of the Voting Rights Act, the combination of the increased registration (as a result of the 1965 Act) and the switch to single-member districts in many Southern jurisdictions (mostly as a result of litigation following the 1982 Amendment) caused a great increase in the number of black elected officials. “By 1985, the percentage of blacks serving at every level of government with the exception of Congress was higher in the South than elsewhere. The primary reason for the disproportionate increase in southern black officeholding ... is the Voting Rights Act.”¹⁷

3. “Third Generation” cases

There was a brief effort at attacking what Professor Guinier called the Third Generation of voting rights cases – situations in which the black representatives are elected but shut out of power by the white representatives.¹⁸ For instance, after the Etowah County, Alabama, Commission was enlarged from five at-large members to seven single-member districts, and one

¹⁶478 U.S. 30 (1986).

¹⁷Lisa Handley and Bernard Grofman, “The Impact of the Voting Rights Act on Minority Representation,” in C. Davidson and B. Grofman, eds., *Quiet Revolution in the South: The Impact of the Voting Rights Act 1965-1990* (Princeton: 1994) at 335.

¹⁸Guinier, *supra* note 11, at 1127.

black was elected to one of the newly created districts, the white holdover commissioners immediately took away the power of each individual commissioner over road maintenance within his district and vested it in the whole commission and a committee made up of themselves.¹⁹ The two new commissioners (one black and one white) were given control of cleaning the courthouse and running the farmers' market (with one part-time employee). The black commissioner brought suit seeking fair and equal treatment. Although the Supreme Court held that such administrative changes did not have to be precleared under Section 5 of the Voting Rights Act,²⁰ the suit was later settled when the district judge agreed to try the Section 2 issue.

Few other cases have been brought regarding Third Generation problems.

4. The backlash

The 1990 round of redistricting produced a record number of black and Hispanic members of Congress primarily because State legislatures — under pressure from minority groups and the Justice Department — created more majority-minority districts. Shortly after the North Carolina legislature drew a plan including two majority-black districts, four white plaintiffs sued to enjoin the plan on the grounds that it was a racial gerrymander. In *Shaw v. Reno*,²¹ the Supreme Court held that persons objecting to such plans had a right to sue. While the initial focus of the Court was on the actual appearance of the majority-black districts, the Court soon held that appearance was an indicia of a racial motive, but the motive could be proven in a variety of ways. The basic outline of a *Shaw* case is as follows:

- a. Plaintiff must prove that race was the predominant factor motivating the drawing of the district.
- b. This triggers strict scrutiny.
 - i. To satisfy strict scrutiny, the State must demonstrate that its districting plan is narrowly tailored to achieve a compelling interest.
 - ii. Compliance with Section 2 or 5 of the Voting Rights Act is a compelling interest.
 - iii. Narrow tailoring is shown by a district substantially like the hypothetical *Gingles* district that could be used to demonstrate that the minority group

¹⁹The Commission had previously had five members with four elected at-large from residency districts. Each "district" commissioner had been in charge of the road work in his residency district.

²⁰*Presley v. Etowah County Commission*, 502 U.S. 491 (1992).

²¹*Shaw v. Reno*, 509 U.S. 630 (1993) (*Shaw I*).

is sufficiently numerous and compact to form a majority in a single-member district.

The most recent case in the *Shaw* line is *Hunt v. Cromartie*,²² in which the Court re-emphasized the deference that must be paid to the legislature's decisions in drafting a plan. North Carolina contended that it had drawn the 1997 plan (to replace the 1992 plan invalidated in *Shaw II*) for political reasons and that the Twelfth Congressional District was heavily black simply because the most Democratic areas in North Carolina are also predominantly black. The Court summarized its decision with this paragraph:

In a case such as this one where majority-minority districts (or the approximate equivalent) are at issue and where racial identification correlates highly with political affiliation, the party attacking the legislatively drawn boundaries must show at the least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles. That party must also show that those districting alternatives would have brought about significantly greater racial balance.²³

Thus, where a legislature defends its plan on the grounds that it was attempting to draw a Democratic district and it *just happened* to turn out to be a black or Hispanic district, the party attacking the plan must show that the legislature could have adopted another plan which (1) achieves the same political objective (2) using "traditional districting principles" while (3) having "significantly greater racial balance."

5. The Future — a mixture of *Gingles* and *Shaw*

In the round of redistricting that has already begun, it is likely that *Shaw* principles may be mixed with those of *Gingles* whenever there is a challenge to a legislative or local redistricting plan where there are any significant numbers of a minority group. The first case of the redistricting season has already contained such a mixture.

The New Jersey Apportionment Commission adopted a redistricting plan for the legislature and changed the racial composition of several legislative districts in Essex County. The Commission's plan (proposed by its Democratic members) had reconfigured four contiguous districts so that the black population was more evenly spread among the four; it had been concentrated in three of the four in the 1990's plan. Republicans sued and claimed that the plan

²²*Hunt v. Cromartie*, ___ U.S. ___ (Apr. 18, 2001) (*Cromartie II*). The intervening cases since *Shaw I* were *U.S. v. Hays*, 515 U.S. 737 (1995); *Miller v. Johnson*, 515 U.S. 900 (1995); *Shaw v. Hunt*, 517 U.S. 899 (1996) (*Shaw II*); *Bush v. Vera*, 517 U.S. 952 (1996); *Abrams v. Johnson*, 521 U.S. 74 (1997); *Hunt v. Cromartie*, 526 U.S. 541 (1999) (*Cromartie I*); *Sinkfield v. Kelley*, ___ U.S. ___, 121 S.Ct. 446 (2000).

²³Slip op. at 23.

diluted black voting strength in four districts (each electing one senator and two representatives) under the *Gingles* standard and had been drawn with a predominantly racial purpose in violation of the *Shaw* standard. The three-judge district court upheld the plan.²⁴ The evidence presented in favor of the plan showed that blacks would still have an equal opportunity to elect candidates because white Democratic voters would vote for Democratic candidates who were white, black, or Hispanic.

6. A new First Generation case – felon disenfranchisement

An estimated 3.9 million U.S. citizens are disenfranchised based on a felony conviction.²⁵ More than 36% of this population are African American men.²⁶ Currently, all but 2 states prohibit some felons from voting. Most bar voting only for those who are in prison or on probation or parole, but 14 also bar at least some ex-felons who are no longer under state supervision of any form. Ten of these states bar ex-felons for life: Alabama, Delaware, Florida, Iowa, Kentucky, Mississippi, Nevada, New Mexico, Virginia, and Wyoming.²⁷ While states have established procedures for ex-felons to apply for restoration of their civil rights, the process is often unclear and cumbersome, leading to *de facto* permanent disenfranchisement.²⁸

In *Richardson v. Ramirez*,²⁹ the plaintiffs challenged a provision of the California Constitution that permanently disenfranchised persons convicted of infamous crimes. The Court upheld the law, holding that felon disenfranchisement laws are not subject to the strict scrutiny applicable to other restrictions on voting, and finding that the Fourteenth Amendment did not impose an outright ban on felon disenfranchisement. The Court has established, however, that not all forms of felon disenfranchisement are constitutionally permissible. In *Hunter v.*

²⁴*Page v. Bartels*, No. 01-1733 (U.S. Dist. Ct., D. N.J., decided May 4, 2001) (three-judge court).

²⁵The Sentencing Project & Human Rights Watch, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States* 1 (1998). This estimate includes both those who are currently incarcerated or under state supervision and those who have completed their sentences.

²⁶*Id.*

²⁷*Id.* at 5.

²⁸*See, e.g., Florida Conference of Black State Legislators v. Moore*, No. ____ (Fla. Cir. Ct., 2d Jud. Dist., Leon Cnty.) (challenge to Florida's administrative process governing restoration of rights and the failure of the Department of Corrections to assist felons in applying for restoration, as required by law).

²⁹418 U.S. 24 (1974).

Underwood,³⁰ the Court invalidated a provision in Alabama's Constitution that disenfranchised persons convicted of crimes involving moral turpitude. The Court found that the provision was enacted with an intent to discriminate against African Americans and therefore violated the Equal Protection Clause. Other cases challenging felon disenfranchisement based on intentional racial discrimination have been unsuccessful largely due to the nature of the factual records presented by the plaintiffs. On the other hand, plaintiffs have had some success challenging these laws under the Equal Protection Clause as arbitrary or irrational.³¹

Several cases have been brought challenging felon disenfranchisement laws not only on constitutional grounds, but also as a violation of the Voting Rights Act. In *Wesley v. Collins*,³² the Sixth Circuit denied the Voting Rights Act challenge to Tennessee's felon disenfranchisement statute. Analyzing the case as a question of vote dilution, the court concluded that disproportionate racial impact on its own is not enough and that the totality of the circumstances demonstrated there was no violation of Section 2 of the Act. In an *en banc* decision in which the court split 5-5, the Second Circuit upheld the dismissal of a Voting Rights Act challenge to New York's disenfranchisement of felons.³³ To avoid raising the constitutionality of Section 2 of the Act and so as not to interfere with state control over elections and enforcement of criminal law, the evenly divided court determined that Section 2 of the Act was not applicable to felon disenfranchisement. *Farrakhan v. Locke*, a case now pending in the Ninth Circuit Court of Appeals, raises the issue of the proper method of analyzing a claim under Section 2 of the Voting Rights Act and the type of proof needed to establish such a claim.³⁴

In September 2000, a class of ex-felons filed a lawsuit challenging Florida's permanent disenfranchisement of felons as intentional discrimination in violation of the Equal Protection Clause and as a violation of the Voting Rights Act. The case, *Johnson v. Bush*,³⁵ also raises claims under the First Amendment, Fifteenth Amendment, and the Twenty-Fourth Amendment (arguing that the repayment provision for restoration of rights is equivalent to a poll tax). The future of this new First Generation theory is yet to be decided.

³⁰471 U.S. 222 (1985).

³¹*Mixon v. Commonwealth*, 759 A.2d 442 (Pa. Comm. Ct. 2000) (striking down Pennsylvania's ban on newly released ex-felons registering to vote, finding that there was no rational basis for barring convicts from registering to vote for 5 years after their release but allowing felons who were registered before entering prison to vote upon their release).

³²791 F.2d 1255 (6th Cir. 1986).

³³*Baker v. Pataki*, 85 F.3d 919 (2d Cir. 1996).

³⁴No. 01-35032 (9th Cir. 2001), *appeal pending*.

³⁵No. 00-3542-CIV-King (S.D. Fla., filed Sept. 21, 2000).

7. Reform of election administration

Voting irregularities in the 2000 election highlighted the manner in which the method of election administration can result in disparate treatment of voters, particularly based on race. These problems are being addressed through legislation, rule-making, and litigation.

A leading basis for challenging non-uniform election practices is *Bush v. Gore*.³⁶ In deciding the outcome of the 2000 presidential election, the Court held:

The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another [citation omitted]. It must be remembered that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."³⁷

The Court noted that after problems in the 2000 general election with the counting of ballots and punch card machines, "it is likely legislative bodies nationwide will examine ways to improve the mechanisms and machinery for voting."³⁸

Not surprisingly, the most common election reform challenges based on *Bush v. Gore* address the use of punch card voting machines. States generally certify a number of voting machines from which a jurisdiction can select its equipment. Thus, voters in different jurisdictions are not treated in a uniform manner. To ensure that voters have an equal opportunity to have their votes counted, voters and concerned community groups in Florida, Georgia, Illinois, Indiana and California have sued various governmental entities to de-certify use of the punch card balloting method.³⁹

³⁶531 U.S. 98, 121 S.Ct. 525 (2000).

³⁷*Id.* at 530 (quoting *Reynolds v. Sims*, 337 U.S. 533, 555 (1964)).

³⁸*Id.* at 529.

³⁹*NAACP v. Harris*, No. 01-0120-CV-Gold (U.S. Dist. Ct., S.D. Fla., filed Jan. 10, 2001) (class action on behalf of NAACP and individual plaintiffs seeking declaratory and injunctive relief including decertification of punch card ballots and other election reform measures); *Payton v. Harris*, No. 01-55 (Fla. Cir. Ct., 2d Jud. Dist., Leon Cnty., filed Jan. 9, 2001) (class action by voters in 15 counties that use the punch card voting system known as the "Votomatic" seeking to enjoin use of the system); *Andrews v. Cox*, No. 1:01-CV-0318-ODE (U.S. Dist. Ct., N.D. Ga.); *Toth v. Gilroy*, No. 49-D-06-0101-CP-158 (Ind. Superior Ct., Marion Cnty., filed Jan. 30, 2001); *Black v. McGuffage*, No. 01-CV-208 (U.S. Dist. Ct., N.D. Ill., filed Jan. 11, 2001); *Common Cause v. Jones*, No. 01-CV-3470 (U.S. Dist. Ct., C.D. Cal., filed April 17, 2001); *Wirth v. Election Systems & Software, Inc.*, No. ___ (Ill. Cir. Ct., 20th Jud. Cir., St. Clair Cnty., filed Jan.

In addition, two pending lawsuits address a wider variety of election reform measures. The Lawyers' Committee for Civil Rights Under Law, along with the NAACP and a coalition of civil rights organizations, filed a complaint in Florida challenging not only the use of the punch card system, but also practices such as the improper purging of voters from the registration rolls, failure to timely process voter registration applications, and failure to provide equal access to voter lists at the polls. The case, *NAACP v. Harris*, raises claims under the *Bush v. Gore* equal protection theory as well as the federal Voting Rights Act and the Florida Voting Rights Act, and claims based on the National Voter Registration Act. A similar challenge to election practices such as the use of inactive voter lists was filed in St. Louis, Missouri.⁴⁰

Finally, one cannot discuss race and election reform without considering the legislative remedies that are available. While hundreds of bills were introduced in state legislatures to address election reform, only a handful have been passed. In May 2001, the Florida legislature passed the Florida Election Reform Act of 2001⁴¹. The Act includes measures such as decertification of punch card balloting devices, availability of a provisional ballot for certain voters, and establishment of a Voter Bill of Rights and Voter Responsibilities. In Georgia, the legislature likewise put an end to the use of the punch card system, but it has not yet appropriated funds to carry out the reforms.⁴² On the federal level, several legislators have introduced bills to address election reform. Most of these bills establish a fund to provide grants to states to undertake election reform and appoint a temporary or permanent commission to study election practices and make recommendations to the states.⁴³

8. Campaign finance reform

Currently pending before the U.S. House is the Senate-passed McCain-Feingold bill.⁴⁴ If enacted, this bill would (among other things) —

9, 2001); *Tally v. Orr*, No. 01CH959 (Ill. Cir. Ct., Cook Cnty).

⁴⁰*Moore v. Board of Election Commissioners of City of St. Louis*, No. 014-00587 (Mo. Cir. Ct., 22nd Jud. Cir., St. Louis City).

⁴¹Fla. Laws, Ch. 2001-40.

⁴²Ga. Senate Bill 213 (2001).

⁴³For example, HR 49, HR 57, HR 263, HR 561, HR 775, HR 1080, S 218, S 602 (107th Congress, 1st Session).

⁴⁴"The Bipartisan Campaign Reform Act of 2001," S. 27. For the full text of the bill, see, <http://www.brook.edu/gs/campaign/s27es.pdf> (last visited May 10, 2001) or http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_bills&docid=f:s27es.txt.pdf (last visited May 10, 2001).

(1) limit political parties to raising or spending only "hard money" from individuals and political action committees ("PACs"); all "soft money" contributions to parties would be banned, as would hard money contributions from corporations and labor unions.⁴⁵

(2) require state political parties to use hard money for all voter registration or "get out the vote" (GOTV) drives within 120 days of a federal election.

(3) raise the hard money contribution limits for individuals to \$2,000 per election per candidate; \$25,000 per year to national party committees; \$10,000 per year to state party committees; and an aggregate limit of \$37,500 per year.

These changes may have a differential impact on the minority community. Non-whites already contribute far less than whites to political campaigns. A study of the 1996 election cycle showed that the per capita political contribution was \$2.77 with only a quarter of one percent contributing. In the 100 ZIP codes with the largest non-white percentages, the per capita contribution was \$0.24 with an average of only 3 of every 10,000 people making a contribution. Raising hard money contribution limits is hardly likely to assist the minority community in electing its candidates of choice.⁴⁶

Similarly, raising the hard money limits is unlikely to assist minority candidates who generally raised less money than their white counterparts. A 1991 study of congressional campaigns found black candidates had less money than their white opponents.

[T]here does seem to be a pattern of racial discrimination in the allocation of total campaign contributions. After controlling for attributes such as candidate strength, opposition strength, party affiliation, and the incumbency advantage, black candidates received substantially lower levels of funds than did nonblack candidates. Because the primary determinants of candidates' fund-raising abilities are included in the analysis, the differential appears to be racially motivated.

When the race or sex of a House candidate had an impact on contributions from individuals in the eighties, that impact was negative. Furthermore, this negative result was more prevalent for large contributions [defined as \$500 or more]. These results suggest two things: first, individuals appear to discriminate against black candidates (and to a smaller extent women challengers), and second, black and female candidates appear

⁴⁵"Hard money" is that which is subject to the contribution limits of the federal law. "Soft money" has previously been unregulated.

⁴⁶Public Campaign, *The Color of Money: Campaign Contributions and Race* (1999), available online at <http://www.publiccampaign.org/ColorOfMoney/> (last visited May 10, 2001).

to be dependent on smaller contributions.⁴⁷

By regulating the money to be used for voter registration drives and GOTV efforts for the first time, McCain-Feingold may reduce the flow of money to such efforts. For instance, Congressman Albert Wynn, a Maryland Democrat and member of the Congressional Black Caucus, recently said, "Florida made all of us aware of what goes on at the street level, the need for voter registration for example. ... I'm concerned about the adverse effects [of McCain-Feingold] on voter registration, voter mobilization."⁴⁸

In contrast to the McCain-Feingold approach, some states are adopting full or partial public financing. The usual technique is a voluntary limitation on expenditures in return for public funding of the campaign.⁴⁹ While there is no empirical evidence yet that such funding will equalize the opportunities for black candidates and voters, such a program ought to alleviate many of the problems of unequal funding which are associated with the race of the candidate or voter.

⁴⁷John Theilmann and Al Wilhite, *Discrimination and Congressional Campaign Contributions* (Praeger 1991) 76-77, 78, 146.

⁴⁸Alison Mitchell, "Blacks and Hispanics in House Balk on Campaign Finance Bill," *New York Times*, May 9, 2001, page 1.

⁴⁹See, for example, the details of the Minnesota and Maine systems in *Rosenstiel v. Rodriguez*, 101 F.3d 1544 (8th Cir. 1996), and *Daggett v. Commission on Governmental Ethics and Election Practices*, 205 F.3d 445 (1st Cir. 2000).