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Department of Political Science

AN IRIDESCENT DREAM:
MONEY, POLITICS, AND
THE AMERICAN REPUBLIC, 1865-1976

a thesis

by

HEITOR B. GOUVÊA

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The United States now has an extensive, publicly controlled, and bureaucratic system of election regulation. Until roughly a century ago, however, elections were viewed as private party contests subject to minimal state regulation. We examine how this changed, considering in particular the role played by the courts, given that for much of the nineteenth century they viewed the parties as private, constitutionally protected associations. We consider how and why the libertarian argument concerning free speech came to prominence in the campaign debate, and find that at first neither the reformers nor the courts at any level viewed this as a fundamental obstacle to—or even an issue to be considered in—the regulation of money in politics. This shift from a private to a public electoral system had a significant impact on American democracy that has not often been examined. To understand these changes, we examine the arguments put forth by advocates of campaign finance reform from the nineteenth to the latter part of the twentieth centuries. We focus on how the proponents justified these laws and how state and federal courts responded to these arguments, paying particular attention to court rulings on the constitutionality of these unprecedented statutes in the late nineteenth and early twentieth centuries and to the evolution of their jurisprudence in this regard during the twentieth century.
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1 Introduction

In 1890, Senate president pro-tempore John Ingalls (R-KS) remarked: “The purification of politics is an iridescent dream. Government is force. Politics is a battle for supremacy. Parties are the armies. The Decalogue and the Golden Rule have no place in a political campaign. The object is success . . . The commander who lost the battle through the activity of his moral nature would be the derision and jest of history. This modern cant about the corruption of politics is fatiguing in the extreme. It proceeds from tea-custard and syllabub dilettantism and frivolous sentimentalism.”¹ For Ingalls, politics represented a contest for power in which it was perfectly lawful for the opposing parties to use whatever methods were available, from hiring “mercenaries” to deceiving the enemy, to achieve their objective of taking or retaining control of the government.²

For many both in the past and today, nothing has been more responsible for the corruption of politics than the use of money in elections. Yet, there have been extraordinarily few efforts to study the long and complex debate over the propriety of money in politics that has existed in the United States since at least the middle of the nineteenth century. Most histories of campaign finance tend to be what Ken Kersch calls Whiggish narratives. They generally portray the emergence of a particular right or doctrine as a linear process in which the forces of progress struggled against and eventually overcame the forces of reaction to

¹ John James Ingalls, A Collection of the Writings of John James Ingalls, ed. William Elsey Connelley (Kansas City: Hudson-Kimberly Publishing Co, 1902), 393.
² Ingalls, 393.
enshrine their vision of the Constitution into law through the courts. These narratives, he further argues, are an integral part of the effort of the reformers to provide a new constitutional understanding to justify the policy initiatives of the powerful administrative state that displaced the nineteenth century state of courts and parties that was grounded upon the Constitution.\textsuperscript{3}

The traditional Whiggish account of efforts to control the use of money in elections tends to ignore or to neglect regulatory efforts undertaken in the late nineteenth and early twentieth centuries. In its view, the true struggle to control campaign funds began when the Watergate scandal revealed the inherent dangers to the democratic process of a system of privately financed elections, and arguably remains unresolved. On one side of this battle are the reformers, the forces of progress, who champion greater government intervention in the electoral process to equalize the resources available to citizens, and hence their relative political power, to guarantee their fundamental right to participate in the electoral process. Such radical measures are constitutionally justified in their view by the necessity of ensuring that the government truly represents the interests of the people, and not those of the wealthy or special interests. While on the other side are the libertarians, the forces of reaction, who seek to stymie the attempt to preserve the American republic by creating a more fair and egalitarian electoral process through their belief that only a private, unrestricted system of electoral financing is

compatible with the rights to freedom of speech, of the press, and of association enshrined in the Bill of Rights.

A few attempts have been made to break out of this traditional understanding of the history of campaign finance reform through an examination of the pre-Watergate reforms. Although these studies provide much valuable information, they have three critical flaws. First, there is a tendency to interject modern issues, such as the libertarian conception of the right to freedom of speech, into their studies of the past. Second, these works almost exclusively focus on the federal level even though the states were responsible for the passage of most campaign finance regulations until at least the mid-twentieth century. Third, and perhaps most importantly, they do not adequately capture the magnitude of the changes wrought by campaign finance regulations on the American political system, and how this transformation was made possible through shifting understandings of the role of government and of the meaning of particular rights.4

How did the United States acquire its extensive, publicly controlled, bureaucratic system of election regulation given that until roughly a century ago elections were viewed as private party contests subject to minimal state regulation? What role did the courts play in this

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transformation, especially given that they viewed the parties as private, constitutionally protected associations for much of the nineteenth century? How and why did the libertarian argument concerning free speech come to prominence in the campaign debate given that neither the reformers nor the courts at any level viewed this as a fundamental obstacle to—or even an issue to be considered in—the regulation of money in politics until the mid-twentieth century? And what effect has this shift from a private to a public electoral system had on American democracy? It is these questions that this work, *An Iridescent Dream: Money, Politics, and the American Republic, 1865-1976*, hopes to begin to answer through an investigation of the arguments put forth by advocates of campaign finance reform from the nineteenth to the latter part of the twentieth centuries to justify these laws. And how the state and federal courts responded to these arguments, paying particular attention to rulings on the constitutionality of these unprecedented statutes in the late nineteenth and early twentieth centuries, and to the evolution of their jurisprudence in this regard during the twentieth century.

**Liberalism and the Constitutional Order**

In his book *The Lincoln Persuasion*, J. David Greenstone challenged Louis Hartz’s contention that American liberalism has consisted of an unusually coherent and stable set of beliefs and practices. Pointing to events such as the Civil War which clearly represented a challenge to the liberal consensus thesis put forth by Hartz, Greenstone argued for a more nuanced understanding of liberalism in the United States that would more accurately describe the sources of the nation’s agreements
and disagreements about how best to shape and to guide the development of the polity. He suggests that three kinds of liberalism have manifested themselves over the course of American history. The first is what he refers to as republican, genus, or consensus liberalism, which consists of the traditional beliefs in private property, individual rights, and government by consent that are accepted by virtually everyone. Its purpose is to set the fundamental rules by which the governmental system will operate by defining political relations between individuals and the state, and within the government itself.5

What it leaves unanswered, and hence has been the primary source of conflict among Americans about the purposes of their polity, are the broader social and philosophical questions about what constitutes a good society and the nature of human beings. In seeking to address these questions, the other two kinds of liberalism, neither of which has ever been completely dominate, each interpret the fundamental principles espoused in republican liberalism in particular ways that have informed the solutions individuals or groups advocated to problems or issues in the United States. Humanist, or what this work will refer to as pluralist, liberalism, according to Greenstone, is concerned with “equitably satisfying individual desires and preferences’ and on achieving ‘the welfare of each human being as she or he defines it.’ Pluralist liberalism values negative liberty that is ‘the freedom of individuals to determine their goals and to consider how best to achieve those goals with a minimum of external constraint.’”6 Thus in its view, the good society

6 Greenstone, 36 footnote 1.
will be one in which the government adopts policies and strategies that freely allow individuals to set and to meet whatever goals they desire. The only restraint placed on them are rules of conduct that ensure they respect the right of others to do likewise.  

In contrast, what Greenstone refers to as reform liberalism believes that the satisfaction of individual preferences must be subordinated to the achievement of socially defined goals or standards. “Reform liberals value positive liberty and insist on ‘the obligation, not just the option,’ of individuals ‘to cultivate and develop their physical, intellectual, and aesthetic, and moral faculties,’ as well as to help others to do so in order ‘to achieve mastery . . . in activities of importance to one’s community.’ ”

For them, the ideal policy is one in which the government promotes policies or practices that encourage individuals to improve themselves, and consequently contribute to the excellence of their neighbors and their community, by cultivating their faculties and shaping their behavior or conduct according to certain communal moral or ethical precepts.

These distinctions in American liberalism that Greenstone observed are used in this study as a framework through which to understand how various conceptions of government and rights have implicitly influenced the debate over whether the state should regulate the use of money in elections, and if so to what extent. The first of these is that of the founders who established the basic principles of republican liberalism through the process of creating and adopting the Constitution. As is well-known, the central question they grappled with was how to limit and

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8 Greenstone, 36-37 footnote 1.
9 Greenstone, xxii, xxiv-xxvii, xxxii, 6, 33, 35-36, 59-64.
to control governmental power to preserve the liberties of the citizens, while at the same time leaving the government sufficient authority to fulfill its essential responsibilities to the nation. The solution to this problem put forth by Madison and Hamilton in *The Federalist Papers* was the intricate structure of the central government proposed by the Constitution, and in particular three features. First, it was to be a large commercial republic which would make it difficult for any faction to become a majority and use the power of the government in a tyrannical manner; provide opportunities for ambitious men to turn their energies to private pursuits; and increase the chance that worthy men would be selected to serve as the people’s representatives. Second, the government was to be one of limited and enumerated powers, which left the people free to exercise the vast number of freedoms and privileges that comprised their natural rights, and the states primary responsibility for regulating most aspects of people’s lives. And third, the power granted to the central government was to be checked both by the states who would zealously guard their authority against any intrusions, and by an internal system of checks and balances that gave each branch the ability and motive to resist encroachments by the others.\(^\text{10}\)

Although a Bill of Rights was eventually added to the Constitution as a further restraint upon the powers of the national government, nei-

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ther Hamilton nor Madison initially believed that such a document was an appropriate check on its authority as the anti-federalists did. In fact, they argued that it would actually be a menace to the liberties of the people as it would imply that the central government had powers beyond those enumerated in the Constitution, although it is unclear if their real reason for opposing the Bill of Rights was its potential to weaken the national government.\textsuperscript{11}

Over the course of the 1790s, the efforts of Hamilton and other Federalists to develop a strong central government led Madison and other individuals who became known as Democratic-Republicans to elaborate upon and modify the theory of government put forth in \textit{The Federalist}. Of particular interest for the purposes of this study are their writings during the debate over the Sedition Act at the close of the eighteenth century. This law was passed by the Federalist Party to silence criticism of its officials and polices by granting the government the power to prosecute for libel any individual who printed false, misleading, or otherwise offensive information about them. Proponents of the statute argued that it did not violate the First Amendment as it followed the understanding of freedom of the press found in British common law which had been operative in the United States since colonial times. According to the foremost expositor of that law, William Blackstone, this meant that the government could place no prior restraints on the right of the citizens to print whatever they choose. However, it could hold individuals responsible for the abuse of this liberty by punishing writings that had a bad tendency, especially those that made false, scandalous, or critical statements about

\textsuperscript{11} Madison et al., 478-483; Storing, 64-71; Gillman, 626-627.
the conduct of officials, or in short libeled them, as this diminished the public esteem for the government and made the enforcement of the laws more difficult.¹²

For Madison and others, this understanding of the First Amendment contravened the view that the Constitution had created a government of limited and enumerated powers. If British common law was applicable to the United States, he and others argued that the power of the federal government would be vastly increased. Judges would have legislative-like discretion in ruling on cases; the residual sovereignty of the states would be destroyed as the common law would be paramount to the state constitutions and law; and the supreme power to make and modify laws would be invested in Congress, which would not be restrained by the Constitution. Thus, they rejected this view on the ground that it nullified, and hence was incompatible, with the objectives of those who had written the Constitution. And as that document gave Congress no grant of authority whatsoever to regulate the press, the Sedition Act had to be unconstitutional they concluded.¹³

However, Madison and other opponents of the law did not merely rest their argument on The Federalist's theory that the design of the government, especially its limited and enumerated powers, prohibited the

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passage of the statute. Rather, they also placed a strong emphasis on the fact that the law violated the natural right of individuals to inquire about any subject of concern to them as embodied in the federal Bill of Rights’ guarantees of freedom of speech, of the press, and of association. They argued that as the people in a republican government constituted the sovereign power, it was absolutely essential that they exercise these rights to ensure that they would be adequately, and to the extent possible truthfully, informed about the conduct of their government and representatives. Only with such knowledge disseminated through speeches and writing could they properly perform their duty of electing all parts of the government.

Let it be recollected lastly that the right of electing the members of the government constitutes more particularly the essence of a free and responsible government. The value and efficacy of this right depends on the knowledge of the comparative merits and demerits of the candidates for public trust and on the equal freedom consequently of examining and discussing these merits and demerits of the candidates respectively.14

Especially important to the ability of the people to properly select their officials were the kinds of writings targeted by the Sedition Act: those that triggered hatred or contempt for the government among the citizens by criticizing its conduct. Only the arousal of such feelings could trigger change if it was needed as positive feelings would merely serve to maintain the people’s confidence in the current administration. Hence, to allow the government to control what opinions were expressed by individuals they believed would become a means by which the current rulers would perpetuate their authority indefinitely and destroy the republic. And it was precisely this danger in their view that the First Amendment

14 “James Madison Argues,” 225.
had been designed to combat by making explicit the inability of the state to interfere with the right of the people to evaluate and to express their approval or disapproval to the conduct of their government and representatives.15

Thus, the founders sought to create a political system characterized by a system of restraints and negative rights that protected the liberties and the freedom of the people through the creation of a government of limited powers and responsibilities. For Madison and others, the actions of the Federalists in the 1790s transgressed what they probably perceived to be the boundaries within which the Constitution and republican liberalism had sought to contain governmental power. Echoing strains of both republican and pluralist liberalism, they argued that the best government was the one that allowed the people to act on their own preferences with minimal constraints, particularly in the electoral process. The latter was especially important in their view as it was the primary opportunity the people had to gather information about their representatives and their government, and to express their judgment of their conduct. The First Amendment was designed to safeguard this freedom by ensuring that they would be allowed to use their natural and constitutional rights to “freely” give their consent or their disapproval of the actions taken by those they had previously entrusted with power.

The other conceptions of liberalism that have influenced the campaign finance debate over the past century and a half fall within the reform liberalism tradition. The most important of these in the late nineteenth century was arguably that of the Progressives who successfully built upon the groundwork laid by earlier reform movements, most notably the Populist and Mugwumps discussed in chapter two, to successfully pass the first campaign finance laws.

For the diverse group of individuals who comprised the Progressive movement at the turn of the twentieth century, the primary issue was how to redefine the role of government and of rights to address the issues that had arisen in a modern industrialized society as seen in the works of John Dewey and Herbert Croly. In his *Ethics*, Dewey criticized the constitutional order established by the founders based upon natural rights, equality before the law, and a suspicion of governmental power for stifling the moral and intellectual development of the citizens and society by granting individuals a formal and empty freedom that merely served to perpetuate inequalities in wealth and power. If democracy was to provide citizens with effective freedom and liberties, he argued that it had to be conceived of as more than simply an instrument by which to rule society. “Externally viewed, democracy is a piece of machinery, to be maintained or thrown away, like any other piece of machinery, on the basis of its economy and efficiency of working. Morally, it is the effective embodiment of the moral idea of a good which consists in the development of all the social capacities of every individual member.”16 And it was the duty of

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the state, according to Dewey, to make possible the fulfillment of this
democratic moral ideal, however it was defined, by providing the citizens
with the optimal environment and resources required for them to exer-
cise their distinctive and unique potentialities, and in the process both
contribute to their own individual growth and the common good.17

Dewey further argued that it was the responsibility of every gen-
eration to reevaluate the existing customs, institutions, and laws in light
of changing circumstances to determine what measures were required to
continue the advancement of society and individuals toward the demo-
cratic moral ideal. Crucial to this process for him was freedom of speech,
which allowed the citizens to debate and exchange ideas about how best
to address the challenges confronting them at a particular moment.
However, for Dewey, only constructive criticisms of the regime were ad-
missible, and not dissent that questioned the validity of the democratic
ideal itself or disrupted the consensus and harmony of the community.18

In his major works, The Promise of American Life and Progressive
Democracy, Herbert Croly argued that the constitutional regime estab-
lished by the founders could no longer sustain the nation’s historic
commitment to the gradual advance of democratic values and the im-

Press, 1978), 424. The chapters examined in The Ethics are those known to have been
written exclusively by Dewey.
17 John Dewey and James H. Tuft, Ethics (vol. 5: 1908), 385-386, 388-390, 392-395,
404, 418-419, 422, 424-426, 428, 430-433; John Dewey and James H. Tuft, Ethics in
(Carbondale: Southern Illinois University Press, 1985), 315-319, 327, 331-338, 340-
350, 354-358; David M. Rabban, Free Speech in Its Forgotten Years (New York:
Cambridge University Press, 1997), 219-222, 228-230; Richard Hofstadter, The Age of
18 John Dewey and James H. Tuft, Ethics (vol. 5: 1908), 399-401, 433; John Dewey
and James H. Tuft, Ethics (vol. 7: 1932), 315-316, 329-331, 338, 358-366; Rabban,
218, 223-228, 336-341.
provement of social and economic circumstances or what he called the American promise. For too long, he believed that the nation had been gripped by a fatal optimism that the American promise would be automatically fulfilled through the exploitation of the country’s unlimited material resources and the exercise of individual rights unhindered by governmental action. In reality, however, Croly argued that this path had become a threat to the very existence of the promise as the concentration of power and wealth in the hands of a few men and corporations had resulted in political corruption and social inequalities that divided the interests of the community and created class contempt. He feared that the continuation of these trends would not only destroy the vitality of American democracy, but also cause the disintegration of society itself.¹⁹

To preserve the American promise, it was necessary in Croly’s opinion for the citizens to come to view it as a constructive social and moral democratic ideal that each generation was to strive to fulfill in light of changing circumstances and the experiences of their predecessors. Central to this effort would be an expanded and activist central government that through its laws and institutions would not only seek to ameliorate social and economic discrepancies by controlling the exercise of individual rights, but more importantly strive to improve and ultimately perfect human nature. “Democracy must stand or fall on a platform of possible human perfectibility. If human nature cannot be improved by

institutions, democracy is at best a more than usually safe form of political organization; and the only interesting inquiry about its future would be: How long will it continue to work?"^{20} This transformation of human nature would be made possible by an education that taught the citizens to suppress their selfish desires, and instead base their actions and decisions upon disinterested motives that allowed them to contribute first and foremost to the broader goals of the nation and then to their own individual development. And as the people strove to perfect themselves and society, the social ideal would become incorporated into what Croly called a civil religion of brotherhood. This religion would sustain the nation and the genuine democratic community it sought to create by promoting loving-kindness towards one’s fellow citizens, reinforcing the obligations and responsibilities of citizens to the nation, and supporting them in the difficult task of maintaining the democratic ideal.\textsuperscript{21}

Whereas the liberalism of the founders was concerned with limiting government and controlling the effects of human nature by channeling the ambitions and interests of men into private and public pursuits that would benefit the republic, the Progressives developed an understanding of liberalism that essentially transformed democracy into a religion. For them, it was the duty of the government, which they viewed as a benevolent force, to assist in the redemption and perfection of the citizens and society by constantly seeking to remove all economic, social, and political impediments to the achievement of their vaguely defined goal known as

\textsuperscript{20} Croly, Promise, 400.
the democratic moral ideal. And furthermore, to teach them how to live morally and to act from rational and public-spirited motives to enable them to assume the growing responsibilities that accompanied the gradual perfection of the state. Rights in this progressive democracy were positive ones, or more accurately duties and obligations, that the citizens and the government had to each other to ensure that the state’s purpose of enriching the moral and intellectual lives of the citizens and society was fulfilled.22 All of these features of Progressive thought, as the next chapter will discuss, had a significant influence upon their understanding of how the electoral system should operate, and their standards for evaluating if it was functioning properly or not.

Another conception of reform liberalism that manifests itself in the debate over campaign finance is best characterized by the work of John Rawls, which reflects the central concern of modern liberals, one they arguably share with the Populists of the latter part of the nineteenth century as chapter four will discuss, with the growing inequality that they perceive to be developing in the polity, especially in regard to those who wield political power. Rawls sought to address this issue in his various works by proposing the development of a democratic constitutional order based upon what he called a system of social cooperation in which citizens were free and equal not only in theory, but also in practice. The achievement of this goal required the establishment of a well-ordered so-

ciety in which all citizens agreed upon certain principles of justice, and used them to make decisions in their daily lives and more fundamentally to determine the governing arrangements for their society.23

Rawls argues that these principles of justice must be adopted in what he calls the “original position,” the time before the social contract is adopted to establish political society and government. Individuals in the “original position” make their decision about what the principles of justice will be behind a veil of ignorance, which prevents anyone from being aware of his social status, his natural talents, or anything else about himself in relation to other citizens. This ensures that no one can choose principles of justice that will be to their advantage and potentially to the disadvantage of others, and that the resulting principles are fair because they are produced in a situation where everyone is equal. In deciding upon the principles, individuals are solely guided by their sense of justice; their rational desire to maximize their conception of the good by increasing to the greatest extent possible their share of primary social goods, such as income and authority, and a desire to protect their liberties. According to Rawls, the two principles of justice that individuals would eventually agree upon are:

1. Each person has the same indefeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all.

2. Social and economic inequalities are to satisfy two conditions: first, they are to be attached to offices and positions open to all under conditions of fair equal-

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ity of opportunity; and second, they are to be to the greatest benefit of the least-advantaged members of society.24

Rawls further argues that the first principle of justice must be fulfilled before the second in order to ensure that citizens are not tempted to exchange their basic liberties for the social and economic advantages promised by the second principle. These basic liberties are: freedom of thought and liberty of conscience, political liberties, freedom of association, freedoms specified by the integrity of the person, and the rights and liberties provided by the rule of law. The second principle, which will not be the focus of the following discussion, is meant to establish what inequalities are permissible in society.25

Having established the principles of justice, the members of society must then turn to the task of developing a constitutional democracy that fulfills them. One of the central problems that must be overcome in creating a government is how to preserve the fair value of the basic liberties promised by the first principle of justice. By fair value, Rawls means that “the worth of the political liberties to all citizens, whatever their social or economic position, must be approximately equal, or at least sufficiently equal, in the sense that everyone has a fair opportunity to hold public office and to influence the outcome of political decisions.”26 According to him, one of the primary means of preserving the fair value of the basic liberties in a society such as the United States that nonetheless allows

24 Rawls, *Justice as Fairness*, 42-43. It should be noted that the two principles of justice underwent minor changes over the course of Rawls’ life. The version cited here is the last one Rawls wrote before he died.
private ownership of the means of production, property, and wealth is to finance campaigns with public funds as well as to impose additional restrictions as needed (Rawls does not specify what those restrictions might be). This regulation of political speech is justified, according to Rawls, on the grounds that it will ensure just political institutions that take into consideration all viewpoints by allowing everyone to have equal power and representation in the political process as if they were in the original position. And thus prevents the government from being influenced solely by the more advantaged social and economic interests.\textsuperscript{27}

Thus, both Progressivism and modern liberalism are variants of the reform tradition discussed by Greenstone, and based their solutions to the dilemmas confronting the nation in these different eras on the use of governmental authority to establish standards of behavior, i.e. the democratic moral ideal and the principles of justice respectively, to guide the actions of the citizens and society. What differentiates them is that the Progressives sought to turn democracy into a moral force to direct the development of individuals and society; while Rawls and modern liberals are focused upon the necessity of preventing the disproportionate exercise of power, whether it be economic or political, by the wealthy as it distorts the actions taken by those elected by the citizens. Its objective in part is to reshape the political system in such a manner as to be able to provide an egalitarian distribution of resources among the citizens to ensure they can equally participate and influence their legislators who are

supposed to be responsive to their interests and needs, not those of their rich campaign contributors.

**Preview of the Work**

Greenstone argued that major political events can best be understood by seeking to “account for the solutions in terms of the situations the individuals found themselves in.” Following this advice, this study relies extensively upon original sources, such as books, popular magazines, law reviews, newspapers, and scholarly journals, to study why elites and movements founded by them sought at different times to regulate the use of money in politics during the past century and a half. The work focuses upon elites as campaign finance has been predominantly a policy area that draws little attention from the public except in rare moments when massive scandals temporarily heighten its interest in this issue. It then turns to looking at state and federal court opinions, and to a very limited extent briefs filed by the parties in these cases, to examine the role of the courts in ratifying or challenging these changes.

There are many sources that remain unexplored due to constraints imposed by funding, such as the opinions of legislators, especially those at the state levels, and the briefs for the various court cases. It is hoped that these can be examined in the future. This work and its conclusions therefore represent an introductory and modest effort to begin to understand how elites and the courts over the past century and a half have reshaped our political and electoral system by altering accepted constitu-

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28 Greenstone xxix.
tional interpretations and understandings about parties, candidates, citizens, money in politics, and more generally democracy.

The next chapter examines the period from 1865, when some of the earliest agitation for electoral reforms began to emerge, to 1920 when most states and the federal government had adopted statutes of various kinds to regulate the use of money in elections. It begins by examining the unregulated electoral system that existed for much of the nineteenth century before turning to the question of who the various groups of reform liberals were, and what prompted each of them to desire to expand the authority of the state over elections. Lastly, the chapter describes the objectives that the Progressive reformers sought to achieve through the first great wave of campaign finance legislation that was passed in the late nineteenth and early twentieth centuries, and the impact of these new electoral laws on the liberties and rights of the citizens and others, especially in the South.

The third chapter examines the role of the state courts in redefining the prevailing understanding of the electoral and political systems from the mid-nineteenth century until the 1960s. As there is substantially little difference between the constitutional principles relied upon by the various courts in ruling upon these statutes in this era, the discussion of their opinions that follows is framed thematically around their rulings pertaining to specific kinds of campaign finance laws. In looking at the courts’ decisions, this study especially seeks to understand the extent to which the state judges shared the concerns of the reformers about money in politics; how they justified the passage of these unprecedented laws; and how they resolved the conflicts that arose between the
statutes and the rights of the citizens, parties, and other participants in the electoral process.

The fourth chapter discusses how the state legislatures and courts declined in importance as the federal courts, particularly the Supreme Court, became the primary guardians of the people’s liberties in the latter part of the twentieth century. In particular, it seeks to understand how the Court’s concerns in the electoral process shifted from questions related to federalism and race to those pertaining to free speech and campaign activities. The chapter first considers who the reformers of the second part of the twentieth century were, and whether their attitudes toward the use of money in elections differed from those of the previous reformers and hence potentially influenced the views of the courts. It then investigates the possibility that the constitutional revolution of 1937 had a significant impact upon how the Court perceived statutes that regulated the electoral process. It concludes by showing the effect of the new judicial or legal context upon the second great wave of campaign finance laws that were passed in the wake of the Watergate scandal.

The final chapter seeks to evaluate the merits of the arguments put forth by the reform liberals, and more importantly the implications and consequences that their efforts to regulate the use of money in politics and to transform the electoral system from a private to a public institution have had for American democracy. It argues that the efforts to regulate campaign finance over the past century and a half have been more harmful than helpful, since they have allowed extensive governmental interference with rights that are at the core of the democratic process and hence vital to sustaining the republican constitutional order.
I would like to thank the members, both past and present, of my dissertation committee for all their assistance in developing this work through their comments and criticisms: R. Shep Melnick, Ken Kersch, Jennifer Steen, Kay Schlozman, and Robert Faulkner of the Boston College Political Science Department, and Anthony Corrado of the Colby College Government Department. I would also like to thank my colleagues at the Boston College Academic Advising Center and my family for all their support and encouragement as I researched and wrote on this dissertation.
2 Commercialism, Politics, and Vice! Oh My!

As the United States was transformed from a predominantly rural community into an industrialized and urbanized polity in the latter half of the nineteenth century, reform liberals began to believe that freely allowing individuals to pursue their own desires or preferences, a feature of the pluralist liberalism that was arguably prevalent at this time, was inappropriate in this new context. What was necessary in their view to preserve the republic were community imposed standards that would restore the values associated with the nation’s agrarian past, and at the same time deal with the problems that had arisen as a consequence of the profound change in the character of the polity and the people. However, there was much debate among reform liberals as to what form these new ethical or moral precepts would take, and in how they interpreted the principles of republican liberalism, particularly its requirement that government be formed by the consent of the people.

Beginning with the Populists in the 1870s, one of the central concerns of reform liberals became with what they perceived to be the debasement of politics and government by the party bosses and the corporations. It was not until the rise of the Progressive movement in the late nineteenth and early twentieth centuries, however, that a widespread and sustained effort was made to attack what many reformers had come to believe was the source of the corruption of politics: the enervation of the civic virtue and political morality of the citizens. An essential part of the Progressive program to restore the moral character of the people and the vitality of the republic was the passage of laws to limit and to control the use of money in elections and the activities of the political parties.
These statutes were designed to counter the pernicious influence of the party bosses and corporations by preventing them from using the electoral system to satisfy their selfish interests by imposing clear moral standards that all were expected to follow in selecting their representatives.

**Elections in Mid-Nineteenth Century America**

For much of the nineteenth century, the most significant laws protecting the purity of the ballot were state statutes and constitutional provisions that sought to prevent bribery, intimidation, fraud, and other electoral crimes. With the exception of an 1829 New York statute which prohibited political contributions to be made for any purpose except to defray the costs of printing and circulating ballots, handbills, and other papers before an election, there were no laws to control or to limit how candidates, parties, and their supporters raised and spent money in elections. What little is known about the financial practices of the parties in this era suggests that the amounts raised for national campaigns were probably modest, and that campaign funds were raised largely through the assessment of civil service workers and gifts from wealthy individuals.1

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These laws, however, did not prevent the political parties and their agents from seeking to manipulate the electoral process by using any means available to influence the decisions of the citizens. For them, elections represented a high stakes competition over who would have political power and the material interests such power could secure, like party patronage for workers or lucrative tariffs for corporations. Consequently, they were fiercely contested not just in the months leading up to election day, but also at the polling place itself where party agents competed with each other to win the support of the citizens for their ticket. “The American polling place was thus a kind of sorcerer’s workshop in which the minions of opposing parties turned money into whiskey and whiskey into votes. This alchemy transformed the great political interests of the nation, commanded by those with money, into the prevailing currency of democracy.” What made this transformation possible was the fact that political parties were responsible for running the electoral process. They did everything from providing ballots to staffing the polling stations. As each party’s ballot was a distinct color and size, party agents were able to monitor a voter to ensure that he deposited the appropriate ballot before rewarding him with liquor, money, or some good that addressed his particular needs, such as a pair of shoes.

While today these practices would be considered bribery or improperly influencing voters, they were in this era viewed not only as le-

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1 Bensel, vii-xi, xiv-xv, 3, 14-17, 30, 43-49, 54-64, 84, 291-297; Robert Fuller, Government By the People (New York: The MacMillan Company, 1908), 4-6.
gitimate but also an important social transaction that formed the basis of many individuals’ partisan attachments. These citizens came to the polls to vote for a particular party based upon the expectation developed over the course of their lives that the party would reward them for their support. Hence, the citizen’s decision of how to vote, and carry out one of his fundamental duties to the republic, was not necessarily based upon his independent judgment formed through a careful evaluation of the issues and candidates, but rather his personal ambitions and self-interest.⁴

Although the practice of rewarding individuals for their votes was probably the most common means of manipulating the election results, the parties at times relied upon other methods to ensure an outcome favorable to their candidates. In regions where a party was in the majority, for example, it was possible to prevent supporters of the minority party from voting at all by having the crowd in front of the election window where the ballots were deposited obstruct their path. And even if such voters did reach the window, they would face hostile questioning regarding their qualifications to cast a ballot from the party challenger posted outside the window and the election judge who had to determine whether to accept his ballot or not. Conversely, if a voter was supporting the majority party, usually indicated by waving the appropriate ballot over his head, the crowd would let him through and the election officials would willingly accept his ballot.⁵

Neither the ineffectiveness of the laws regulating the electoral process nor the practices engaged in by the political parties to ensure their victory were new. Rather, they were arguably the continuation of

⁴ Bensel, vii-ix.
⁵ Bensel, 11, 17-21, 43-49, 296.
the campaign practices that had been developed by the gentlemen candidates of the eighteenth and early nineteenth centuries. For example, at that time it was expected that the candidate would reward his supporters with food and drink at the polls even though bribery was at the very least a crime according to the common law. The minimal regulation by the state and federal governments of the campaign practices engaged in by the parties and the people until at least the mid-nineteenth century therefore arguably reflected an adherence to the tradition of pluralist liberalism. Government by consent was understood to be allowing individuals to “freely” act on their personal preferences in selecting their representatives subject only to those constraints required to ensure that the rights of others were respected. Although Madison had hoped that the people would choose their leaders based on information about their merits and demerits, they increasingly relied upon the material motivations provided by the parties to vote for or against them.

Reform liberals of the latter part of the nineteenth century, however, did not view the customary practice of rewarding voters for their support to draw them to the polls as a legitimate means by which to make citizens fulfill their civic duties by appealing to their self-interest. Rather, they increasingly argued, as will be discussed below, that this was a form of bribery that prevented the true expression of the will of the people in elections. Some, such as Robert Mutch, have argued that this growing concern over the use of money and other material goods to influence voters in the nineteenth century was a consequence of the shift.

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from gentlemen candidates to professional politicians who relied on others to fund their elections. “Eighteenth century voters could not always be sure that their elected representatives were honest or intelligent, but they did know who was making policy. The concern of the industrialized nineteenth century was that their elected representatives might not be the real policymakers, that government might be controlled by those who provided campaign funds.”7 While there is some truth to this assertion, it must be understood within the broader context of how reform liberals conceived of republican government to fully explain why campaign practices that had existed for at least a century lost their legitimacy.

Who Were the Early Reformers?

I. The Populists and the “Money Power”

The reform liberals of the latter part of the nineteenth century consisted of a variety of individuals and movements that were concerned with addressing what they perceived to be the threats to the sustainability of the polity posed by industrialization and urbanization. Perhaps the earliest of these was the Populist movement that began in the 1870s with the Greenback, Granger, and anti-monopoly organizations, and culminated in the formation of the Populist Party in the 1890s. It considered the transformation that had occurred in the nation since the Civil War to be disastrous as it had allowed the money power, i.e. the new capitalists and their corporations, to use their immense wealth to unduly influence the policies of the state and federal govern-

7 Mutch, Campaigns, xvii.
ments to the detriment of the citizens. “The people versus the interests, the public versus the plutocrats, the toiling multitude versus the money power—in various phrases this central antagonism was expressed . . .

The problems that faced the Populists assumed a delusive simplicity: the victory over injustice, the solution for all social ills, was concentrated in the crusade against a single, relatively small but immensely strong interest, the money power.”⁸ As the corporations in essence controlled the political parties and the policies they enacted through the use of governmental power, one of the central questions for the Populists became how to restore the people to their rightful place as the rulers of the republic so the state would serve their interests again.⁹

For them, the solution to this dilemma was to give the citizens the power to directly influence their government and even to enact legislation through measures, such as the initiative and referendum. Government by consent meant in their view eliminating the distance that existed between the people and their rulers to allow the former to oversee the actions of the latter, and even veto them if necessary. However, more than simply wanting to restore the people to power, the Populists also arguably hoped to at the very least recreate the kind of citizens associated with the yeoman republic of the early nineteenth century. This was a time when there was no money power and plenty of opportunity for everyone. An era when the citizens lived frugally off of their own labor and shunned luxury for simple and honest lives resulting in a moral, virtuous, and patriotic citizenry that was indebted to no interests, not con-

⁹ Hofstadter, 4-8, 60, 62-67, 74-75, 121; Eric F. Goldman, *Rendezvous with Destiny* (Chicago: Ivan R. Dee, 1952), 3-6, 11, 16-17.
sumed with the unrestrained pursuit of wealth and luxury, and readily able to determine the public interest, to study the great issues of the day and to hold their representatives accountable for their decisions. Thus the goal of the Populists was in essence to restore republican government to an earlier state in which there had been fewer discrepancies in relative political power, and in which political decisions truly reflected the judgment of the citizens as to what was best for themselves and the community as a whole.

II. Mugwumps and Spoilsmen

Another reform movement that arose in the second half of the nineteenth century was that of the Mugwumps. Their central concern was with the partisanship and corruption that had come to characterize Gilded Age politics, especially under President Grant. They believed that the quality of government could only be improved if the best men, such as themselves, who knew how to practice the art of statecraft were elected. “Their ideal leader was a well-to-do, well-educated, high-minded citizen, rich enough to be free from motives of what they often called ‘crass materialism,’ whose family roots were deep not only in American history but in his local community. Such a person, they thought, would be just the sort to put the national interest, as well as the interests of civic improvement, above personal motives or political opportunism.”


11 Hofstadter, 140.
Led by men such as Carl Schurz, a prominent Republican senator, and Dorman B. Eaton and Edwin L. Godkin, two prominent journalists of this era, the Mugwumps attempted from the 1870s to the 1890s to pressure the Republican Party into accepting their demands for various kinds of reform measures to clean up government, especially civil service reform, to allow these ideal or best men to serve again. Their preferred tactic to express their discontentment with the party was to bolt from it, and support their own specially nominated candidate or the Democratic presidential candidate.12

Although there had been sporadic efforts since the late 1830s to eliminate the practice of raising money for political campaigns through the assessment of civil service workers, Congress did not pass a comprehensive reform measure until after the assassination of President Garfield in 1881 by a deranged office seeker. Prior to that event, it had responded to the problem through a series of piecemeal measures. The first was passed in 1867 as part of a naval appropriations bill, which included a provision that prohibited the assessment of government employees who worked in naval shipyards. This was followed by President Grant’s effort in 1871 to create a civil service commission to establish a merit system to be used for selecting public servants. It failed in 1874 when Congress refused to appropriate any additional funds to support its work. Finally, in 1876 a statute was passed that prohibited government employees not appointed by the president from assessing other government workers. President Hayes strengthened this measure by extending the ban to

cover any electioneering activities by government employees through an executive order issued in 1877 shortly after he took office. However, none of these measures proved effective in halting the practice of assessing civil service workers for campaign funds. It took the passage of the Pendleton Act in 1883 to begin the slow process of ending this practice. This law created a merit system to govern the civil service which initially covered only a small number of offices, prohibited the dismissal of federal employees for political reasons and the levying of political assessments on them, and created a Civil Service Commission to oversee the enforcement of the law.13

The constant attention that civil service reform began to receive from presidents and legislators in the 1870s can be attributed to the efforts of the Mugwumps during that decade to bring to the attention of the people the defects and dangers of the spoils system. For them, one of the most serious consequences of allowing the parties to continue assessing civil service workers was that it allowed those in control of the government to subvert the democratic process by using money from the public treasury to perpetuate their hold on power.

The truth is, that whenever a party is unable to find enough volunteers to give time and money to the canvass and organization of the voters, and the conduct of elections it is a sign that if out of power, it is not entitled to it, and if in power that it ought to lose it. The game of politics in a free country consists, or ought to consist, in the winning or keeping of the government by the party which brings most enthusiasm to preparation for elections, and can command the services of the best speakers, and procure [the] most money from its adherents. In politics, a party which confesses that it cannot win without using the Government [sic] officers to do the work of its canvass, and without making their bread depend on their doing it, confesses that it is unfit to govern. It is the next thing to the confession of a State [sic] that it can find no soldiers among its own citizens to defend its independence.14

Not only did this practice deny the people their fundamental right to chose who their representatives would be, it also in the view of the Mugwumps inured them to the corruption that had come to pervade politics by making such immoral means of raising money seem the norm. Thus, the citizens, according to the reformers, failed to perceive both that they were no longer in charge of their own government, and that they were entrusting political offices to the worst individuals possible.15

The civil service reformers attributed the ability of these aforementioned individuals to get elected not only to the blindness of the people, but also the unwillingness of the best men to serve in a government premised upon the spoils system. The Mugwumps viewed the civil servants and political leaders that thrived under this system as “mere politicians” who were motivated by partisanship, greed, and other selfish

motives as well as a willingness to court favoritism to ensure their continued success or advancement. In short, they were men with no moral convictions to restrain their lust for power.

It was the vicious use of money got by plunder, the debauching of the political conscience, the suppression of the higher sentiment at the elections and the blinding influence of irresponsible power thus secured which made it possible for a mere politician like Mr. Conkling [a Republican party boss in New York]—without popular qualities, without identification with any great public measure, without doing anything which the next generation will recall with respect—to be a party despot in a great state . . .

There was no place for the best men in a government dominated by people who turned politics into a commercial, for-profit business to benefit themselves. As they were honest, morally scrupulous, and concerned with formulating and guiding the implementation of great policy issues or principles, the best men could not bring themselves to sully their hands by serving in such a debased government. It was to restore the values of merit, duty, and a dedication to the public welfare as the basic qualifications for serving in government that the Mugwumps advocated the reform of the civil service system. Only when these characteristics once again came to define public servants would the best men, in their view, be willing to serve, and be able to use a honest and effective administration to govern in the people’s interests.

Thus, the Mugwump critique of the electoral and political practices that had developed under a regime based upon pluralist liberalism was that it denied the people their fundamental right to choose their leaders by tricking or forcing them to select the “mere politicians” put forth by

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the parties as their representatives. Furthermore by allowing individuals to pursue their ambitions and preferences without any restraints, it had transformed the state into nothing more than a mere instrument to be used to satisfy the needs of greedy men seeking political and personal gain, not the welfare of the nation. The Mugwumps believed that restoration of the nation’s republican principles, especially government by consent, was only possible if limited statutory reforms were used to prevent individuals from acting on their personal interests in politics, and thus elevate the character of government. Although never explicitly stated, these reform liberals seem to have assumed that the people had the capacity to elect the right leaders once they had been freed from their delusion that all was well with the republic.

III. Fat Fryers and Progressives

Neither the Populist nor the Mugwump movements were very influential as they were supported by only a narrow segment of the population. The former was largely a provincial movement whose appeal was primarily to the agrarian class especially in the Western states; while the latter was focused in the cities of New York and Boston, and was composed of men who viewed themselves as aristocrats and were deeply suspicious of popular rule. The proposals for reform and ideas put forth by these groups, however, did have some influence upon what can arguably be called the most significant reform movement of the late nineteenth and early twentieth centuries: that of the Progressives. Unlike the two earlier groups of reformers, they developed a nationwide base of support among members of the urban middle class, which consisted of doc-
tors, small merchants, preachers, academics, and lawyers among others.  

While the individuals who composed this movement were also critical of the changes wrought in the American polity by industrialization, the source of their discontentment was not so much with its economic effect on their material lives or those of other citizens. Rather, it was with how their prestige and status within their own communities and the nation had declined as the wealth and power of the new captains of industry had grown. They were particularly critical of the increasing “lack of opportunities of the highest sort for men of the highest standards” as politics and business were conducted more and more according to the vulgar standards of the corporations and party bosses as will be discussed further.  

Hence, the objective of the Progressives became to “redeem” the nation by restoring the kinds of economic and political opportunities that they believed were appropriate for the best men. Those that relied upon merit, rewards for past service, or other noble incentives rather than wealth, materialism, personal gain, or other similar crass motivations. In short, their goal was arguably to restore the morality and civic virtue that had existed in the yeoman republic without forsak-

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19 Hofstadter, 137.

ing the technological advances that had occurred in the latter part of the
nineteenth century.

Although the Progressives were, like the Mugwumps, elitists who
believed that an aristocracy of talent or merit should govern the nation,
they differed from them in two important ways. First, they were more
willing to rely upon the assistance of the citizens by giving them some
responsibility for the business of governing rather than having their sole
task be to select their leaders; and second, they were willing to rely upon
state intervention in the economy and the political system to a greater
extent to bring about the changes they desired. As the Progressives were
opposed to the existing governmental arrangements based upon the
courts and the political parties, they worked through what Eldon Eisen-
ach has called parastate institutions to put forth their arguments against
the old political regime and in favor of the new one they advocated. Per-
haps the most important of these parastate institutions were established
journals and the dozens of new mass circulation magazines that were
created at the turn of the twentieth century, which were either edited by
or carried articles by leading Progressives such Joseph B. Bishop,
Benjamin Orange Flower, and David Dudley Field to name a few. They
wrote in magazines such as The North American Review, The Century, The
Outlook, Scribner’s, The Nation, and McClure’s among many others.
Through articles written in these periodicals, the Progressives hoped to
make the citizens, who they believed had grown morally lax and had
been negligent in fulfilling their civic duties as they pursued the material
benefits of the new industrial state, aware of the problems that had
arisen in government and society as a consequence of their lack of vigi-
lance. Once the consciences of the people had been aroused, the Pro-

Of especial concern to the Progressives became the fundraising practices that developed in the late nineteenth century when the Pendleton Act’s ban on the assessment of civil service workers deprived the political parties of their primary source of campaign funds. To compensate for this loss, the parties, especially the Republicans, began to develop increasingly elaborate means of raising money from the corporations and the trusts. In the 1888 presidential campaign, the Republican National Committee (RNC) used business committees located in cities across the country to raise money from manufacturers and others by encouraging contributors to view their gifts as a security investment in their future since the Democrats wanted to repeal the tariff that protected American industry from foreign competition. For example, businessmen in Pennsylvania were asked, “How much would you pay for insurance upon your business? If you were confronted with from one year to three years of general depression by a change in our revenue and protective methods affecting our manufacturers and wages and good times, what would you pay to be insured for a better year?”\footnote{Herbert Welsh, “Campaign Committees: Publicity as a Cure for Corruption,” Forum, vol. 14 (Sept. 1892), 30.} This type of ap-
peal for campaign funds became known as “frying the fat” out of the corporations and trusts after a remark made by James P. Foster, president of the National League of Republican Clubs. “. . . I would put the manufacturers of Pennsylvania under the fire and fry the fat out of them.”23 It was designed to motive them to give generously to the Republicans by promoting the party as favoring the adoption of economic policies that would bring continued prosperity and political benefits to the business community. And it was highly successful given that the RNC raised at least $1 million ($15.6 million in 1996 dollars) for its campaign, probably an unprecedented amount at this point in American electoral history.24

That record, however, was quickly shattered by the Democratic success in “frying the fat” out of the corporations in the 1892 election. William Whitney, the manager of Grover Cleveland’s campaign, held an informal meeting with a variety of groups in the financial and industrial sectors at which he promised them continued political benefits, such as high tariffs or protection from government prosecution, if they contributed generously to the Democratic war chest. Each group was asked to make a gift that it believed was equivalent to the value of the benefits it sought from the national government. Whitney also organized various finance committees to raise money from specific industries, such as a bankers committee. It is generally estimated that he raised at least $2

23 Quoted in Josephson, 425. Ellipses and emphasis in original.
million ($32.3 million) for Grover Cleveland’s third presidential campaign.25

The “fat-frying” methods used in the past two presidential elections were refined in the 1896 and 1900 presidential campaigns by Mark Hanna into a system for assessing the corporations and the trusts based upon their overall wealth that resembled the post-Civil War system used to raise money from civil service workers. In the case of the trusts and the banks, for example, an assessment calculated at the rate of one-quarter of one percent of their capital was levied. Since they were much wealthier than any civil service worker, the RNC was able to collect enormous contributions such as a $250,000 ($4.3 million) gift from the Standard Oil Company. Overall, the Republicans raised approximately $3.7 million ($63.8 million) in the 1896 campaign, one of the largest campaign funds in American history, and about $2.9 million ($48.3 million) in 1900 using Hanna’s assessment system.26

By the time of the next presidential election in 1904, Mark Hanna had died taking his assessment system with him, and the practice of relying upon the business community for campaign funds had begun to be sharply criticized. Judge Alton Parker, the Democratic presidential can-

25 Josephson, 513-515; Pollock, 63; Alexander, 3,878; Overacker, 71-72. A 1905 article by The Washington Post says that the Democratic campaign fund was $4.1 million in 1892. This seems like a very high figure based on the discussions of the financing of the campaign in other sources, and hence the smaller amount has been used. See Frep Stareic, “Roosevelt’s Campaign Fund,” The Washington Post, 3 Dec. 1905, p. 1.
didate in this election, was especially important in bringing this issue to public attention when in the course of the campaign he accused the Republicans and the business community of corrupting the republic. He and many others believed that the corporations and the trusts were using their large, secret gifts to buy control of the party, and through it unduly influencing the policies of the federal government.

Many years have passed since my active participation in politics. In the meantime a startling change has taken place in the method of conducting campaigns—a change not for the better, but for the worse; a change that has introduced debasing and corrupt methods, which threaten the integrity of our Government [sic], leaving it perhaps a republic in form, but not a republic in substance, no longer a government of the people, by the people, for the people, but a government whose officers are practically chosen by a handful of corporate managers, who levy upon the assets of the stockholders, whom they represent, such sums of money as they deem requisite to place the conduct of the Government in such hands as they consider best for their private interests.27

For Parker and other critics of these fundraising practices, this belief was corroborated by the investigation of the New York legislature into the political activities of the state’s insurance companies following the 1904 presidential election. It revealed that these corporations since at least the 1896 presidential election had been using substantial portions of their clients’ insurance premiums (the equivalent of a bank giving up part of its depositors’ money for a political campaign) to make contributions to improperly influence the party controlling the state or national governments. “The testimony taken by the Committee [sic] makes it abundantly clear that the large insurance companies systematically attempted to control legislation in this and other states which would effect their interests, directly or indirectly . . . in short, that the use of the contributed monies in the election of candidates to office would place them under

more or less an implied obligation not to attack the interests supporting
them.”28 The fact that these companies had also gone to extraordinary
lengths to hide their largesse only served to strengthen the suspicion
that they had been engaged in activities that were at the very least im-
moral, if not outright illegal.29

What had allowed the development of these corrupting methods of
conducting elections in the view of the Progressives was not only the
availability of large amounts of money from corporations who sought fa-
vors from the government, but more importantly the deterioration of the
political morality and the civic virtue of the citizens that was required to
sustain the republic. One consequence of this that especially concerned
these reform liberals was the growing indifference of the people toward
their civic duties. It was this that had allowed in their view the develop-
ment of these corrupt fundraising methods by giving control of the politi-

28 New York Legislature, Joint Committee of the Senate and Assembly to Investigate
the Affairs of Life Insurance Companies, Final Report to the Legislature, 22 February
1906 (Albany: Brandow Printing Company, 1906), 23-25. Hence forth referred to as the
Armstrong Committee Report.
29 “Government Controlled by Trusts;” “Parker to Roosevelt: I Forbade Trust
Contributions; Why Did You Not?,” The New York Times, 7 Nov. 1904, p. 8; “Judge
Parker’s Great Service to the Country,” The New York Times, 7 Nov. 1904, p. 8; “Parker
Barred the Trusts From Democratic Fund,” The New York Times, 6 Nov. 1904, p. 1; “The
Dominant Issue—Buying the President,” The New York Times, 7 Nov. 1904, p. 8;
“Buying the President,” The New York Times, 1 Oct. 1904, p. 8; Pollock, 9-12; Perry
Belmont, Return to Secret Campaign Funds (New York: G. P. Putnam’s Sons, 1927),
30, no. 1 (July 1903), 59, 67-68; Henry George, “Money in Elections,” The North
American Review, vol. 136 (March 1883), 203-204; William Lindsay, “The Influence
15, supplement no. 13 (May 1900), 90-91; “The Scandal of Campaign Funds,” The New
New York Legislature, Joint Committee of the Senate and Assembly to Investigate the
Affairs of Life Insurance Companies, Testimony, 8 vols., (1905-1906), 1,472-1,474,
2,915-2,917, 3,895, 3,897-3,898. Henceforth referred to as the Armstrong Committee
Hearings.
cal parties and the government to men known as bosses. These indi-
individually relied upon gifts from corporations and a cadre of loyal party
workers and office-seekers to manipulate the entire electoral process
from the decision of who would run to the final counting of the ballots to
ensure their candidates won control of the government. These were not
the best and most worthy men, statesmen who merited such a public
trust based on their record of unselfish devotion and service to their
country, but rather the worst possible individuals. Professional or practi-
cal politicians who considered government a business into which they
entered with the expectation of making a return on the time and the ef-
fort they invested in getting elected, and who were loyal to the boss and
his backers, especially the corporations, rather than people.30
And even worse in the eyes of the Progressives was the continued
acquiescence of the people in the perversion of the republic by the
bosses, money, and corporations. Rather than carefully considering the
merits of each candidate and using their ballots to reject the clearly un-

worthy individuals put forth by the parties, they argued that the citizens would inevitably vote for their party’s candidates due to their superstitious belief that a victory by the opposition party would cause irreparable harm to the country. The extravagant political campaigns put on by the bosses and the parties were viewed by them as nothing more than a means of sustaining and encouraging the people to act on these partisan loyalties rather than their duty to act in the public interest. “The people are treated like children. Songs are made for them to sing. Their eyes are dazzled with banners and processions, and every possible effort is made to induce them to believe that the candidate is precisely what he is not and never was—the candidate of the people.”31 While not all citizens were deceived by these campaigns or motivated by partisanship, they had no choice in the general election except to select one of the slates of candidates offered by the political parties knowing full well that both were equally corrupt. The reformers believed that the lack of choice in elections led many citizens, especially the best men, who knew the candidates were unworthy of public office to abstain from voting, which further strengthened the bosses’ control over the electoral process.32

Perhaps the most incorrigible class of citizens in the opinion of these reform liberals were those who voted not based on either partisanship or their independent judgment of who the best candidates were, but rather on how much money a party was willing to pay for their votes. This practice became a particular concern to them in the latter half of the nineteenth century as the amount of money available to the parties increased through their reliance on corporate gifts, and hence allowed them to offer even greater incentives for voters seeking rewards. In the 1888 presidential election, for example, the Republicans were able to offer the thousands of “floaters,” individuals who sold their votes to the highest bidder, $20 for their vote (about $300 in 1996 dollars) in the critical state of Indiana instead of the usual rate of $2 to $5 (about $15 to $78) due to their success in “frying the fat” out of the corporations and trusts. The problem with these practices in the reformers’ opinion was not only that they corrupted the electoral process, but more fundamentally that citizens, both old and new, became acclimated to them and considered them to be a normal and acceptable part of politics. “Every man who sold his vote this time will, if alive and on the poll-list, be looking for a purchaser next time; and with him are pretty sure to be others, who have seen by his example how easy it is to make a few dollars without work; or the sacrifice of anything tangible . . .”33 And it was these voters especially that allowed the boss to consolidate his control over the electoral process, according to the reformers, as it took only a small

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33 “Bribery In Elections,” 503.
number of bought votes to swing an election since most party members willingly followed his dictates.34

Thus, what distinguished the era before the Civil War from the period after in the view of the Mugwumps, Progressives, and other reform liberals was that in the former the government had truly been formed by the consent of the people. Their arguments and descriptions of this era implicitly suggest that they believed the people were at this time sufficiently moral and virtuous to properly carry out their civic duties even although the evidence presented above about mid-nineteenth century campaigns suggests otherwise. In the view of the liberal reformers, the people’s civic virtue and morality had allowed them to be in control of their political parties; almost always select the best candidates, true statesmen, to represent them; prevented large sums of money from being available to be used for corrupt purposes in elections; and given the best men of the community an opportunity to influence the decisions of the citizens and to serve as examples of how they should carry out their civic duties. The republic, in short, was supported by a yeoman citizenry that was virtuous and patriotic enough to ensure that the most worthy and qualified candidates filled the public offices, and used them to promote the welfare the people and the nation.

This supposedly golden era of the American republic was brought to a sudden end in their view as the nation began in the latter half of the nineteenth century to be transformed into a modern polity. The lack of restraints on the ability of individuals to pursue their interests combined with the dazzling new opportunities presented by industrialization and urbanization led the citizens to give themselves wholeheartedly to the pursuit of wealth, material goods, and in general the betterment of their lives.\(^\text{35}\) It was the citizen’s unfettered and selfish pursuit of their well-being, in the view of the reform liberals, that allowed politics to become the business of a select group of professional politicians rather than all citizens. These men corrupted the republic by turning the government into a means by which they could satisfy their own interests and those of their clients to perpetuate their own power, and hence denied the people the ability to control their own government. Loyalty to an organization, an individual, or even worse money rather than virtue, morality, and patriotism became the defining motivation of citizens, politicians, and others to participate in politics and to serve in public office.

Restoring the Republic

While the reform liberals generally agreed upon what had led to the decay of the principles of republican liberalism and the necessity of restoring them, they differed significantly, especially the Mugwumps and Progressives, when it came to the question of how to accomplish this goal. While the Mugwumps believed that minimal governmental intervention was necessary and that the people should have at most indirect influence over their representatives as noted above, the Progressives advocated an extensive array of laws, some first proposed by the Populists, that were designed to restore the ability of the people to directly influence their government. And at the same time, they sought to ensure that these new powers were properly used by restraining the pursuit of individual preferences through the establishment of government enforced community standards to guide the behavior of the citizens. In the electoral process, these took the form of regulations whose purpose was to dispose men who were “mere” or “practical” politicians from the places of power by eliminating the resources that allowed them to maintain their pernicious control over the government and the people by appealing to the selfish interests of the citizens.

As the control of the bosses and money began at the primaries, the Progressives viewed these contests as “the place to begin the purification of our electoral streams and make the waters clear at the source and the fountain.”36 Although the earliest primary laws were passed in the 1860s and 1870s, these statutes were not mandatory and simply provided the parties with the option of conducting these contests under the auspices

of the state. It was only at the very end of the nineteenth century that mandatory primary laws were enacted to bring these internal party elections permanently under the control of the state governments. By the mid-1920s, every state except for New Mexico had switched from the use of nominating conventions to direct primary elections to select at least some of the party’s candidates for the general election.37

The reformers justified these laws by arguing that the right to vote must now include the right to nominate as the latter had become just as integral as the general election to the expression of the people’s will and their ability to control their government. And furthermore, the parties had demonstrated through the abuses that had developed in the primary and general elections that they could not be relied on to protect this fundamental right through their own private rules. They believed that these statutes would stimulate citizen involvement in these critical contests by guaranteeing their right to participate in them by ensuring they knew when and where the primaries were being held, and providing them with the opportunity to register as party members beforehand. More importantly, the reformers believed that the new laws would ensure that the will of the party members, not boss-selected delegates, would prevail, and that this would improve the quality of candidates for public office as the people would only select the best individuals as their nominees, i.e.

those who merited the positions, had the qualifications to fulfill the duties entrusted to them, and were prepared to serve the interests of the people.38

The rights of the people and the integrity of the electoral process at both the primary and the general elections were to be further protected in part by the adoption of Australian ballot laws which transferred the responsibility for printing ballots from the parties to the states, and therefore made it possible for the voter to cast his ballot without disclosing who he supported. Most states adopted these laws between 1889 and 1893 largely in reaction to the blatant use of money by the Republican Party in the 1888 presidential campaign to buy votes in Indiana and elsewhere, and in the opinion of many the election itself.39

However, the Progressives believed that these and other existing laws were insufficient to protect the rights of the voters at elections as they were designed to eliminate only the grossest forms of bribery. For them, what was truly needed to protect the integrity of the electoral process were statutes designed to prevent money from having any opportunity to corrupt the expression of the will of the voters. In seeking a model to emulate, they turned to the British Corrupt Practices Act of 1883 (BCPA) which in the eyes of both the Americans and the British had been highly successful in eliminating the worst abuses in elections. A further

attraction of the British statute to American reformers probably was that it represented the culmination of the knowledge that Parliament had gained about how best to suppress political corruption through its efforts since the 1850s to reform the electoral process.40

The BCPA was premised on the idea that the use of money in elections was evil as it inevitability led to the corruption of the electorate. “They [the authors of the law] evidently regarded extravagant expenditure as ‘the father of corruption,’ and considered that excessive and unnecessary payments became in many cases indistinguishable from bribery, and even where not in themselves questionable, always tended to make easy the descent to practices that were eminently pernicious.”41 Among the key provisions of the BCPA were: 1) classifying as corrupt practices bribery, treating, undue influence, and personification each of which was carefully defined; 2) classifying as illegal practices numerous campaign activities, such as transporting voters to the polls or engaging too many committee rooms for public meetings; 3) allowing a candidate through his agent to raise and to spend only as much money as he can “properly use” exclusive of his own personal expenses; 4) carefully defining what expenses were permissible, and banning those that were unnecessary or harmful, such as torches, parades, music and flags; 5) requiring candi-


41 Henry Hobhouse, ed., The Parliamentary Elections Act, 1883 (London: W. Maxwell & Son, 1883), 7. Those interested in further information on this law are referred to this book which contains the law and an annotated commentary.
dates and their agents to file a detailed public statement at the end of the election that disclosed who had contributed to the campaign and how the money was used; and 6) the provision of severe penalties for violation of the law regardless of whether the infraction was committed by the candidate or his agent including voiding of the election, disenfranchisement and inability to hold office for at least 7 years and potentially for life, fines, and imprisonment.42

Unlike their British counterparts, American reformers relied on a variety of laws rather than one statute that governed all aspects of the electoral process in their effort to purify elections of the evil and corrupting influence of money. The first, and most common, kind of law that they advocated were penal statutes called corrupt practices acts that sought to strictly limit how much money parties and candidates could use in elections, and that often minutely detailed what were legitimate and illegitimate expenditures in an effort to prevent candidates from securing votes by improper means. These statutes were also designed to equalize the resources available to candidates to allow poorer, but worthy men to run for public office. New York was the first state to enact a corrupt practices act in 1890, followed by Colorado and Michigan in 1891; Massachusetts in 1892; California, Missouri, and Kansas in 1893; Connecticut, North Carolina, Kentucky, Nevada, and Minnesota in 1895; Ohio in 1896; and Tennessee, Florida, Wisconsin, and Nebraska in 1897. By the late 1920s, only the states of Illinois, Mississippi, and Rhode Island did not impose some kind of restrictions on the use of money in

elections aside from the traditional laws prohibiting bribery and other electoral crimes. The rapid spread of these laws among the states in the late nineteenth century can probably be attributed to the controversies about how the Republicans raised and used money in the 1888 and 1896 presidential elections. This led state legislators to seek not only to impose stricter restrictions on the use of money in elections, but also to force parties and candidates to disclose their receipts and expenditures.43

These latter provisions of state corrupt practices acts requiring publicity of campaign funds represented the most significant difference between them and the British statute. The BCPA merely required candidates to disclose their receipts and expenditures, but made no effort to require the parties who raised and spent the bulk of the money in elections to do the same. In contrast, the American states required both parties and candidates to disclose their sources of money and how it was spent either through disclosure requirements incorporated into corrupt practices acts or separate statutes commonly known as publicity acts. The purpose of these laws was twofold. First, they were designed to assist in the enforcement of the restrictions on the use of money in elections by making it possible to monitor whether parties and candidates were complying with the law. Second, Progressives hoped that by making the giving of money in elections a public rather than a private activity, these statutes would not only ensure the free expression of the will of the people but also discourage large gifts altogether. They believed that the people would condemn and punish at the polls any party that became too

indebted to particular interests or was too reliant on large gifts. However, this hope was never fulfilled as most state publicity laws failed to provide for pre-election publicity, which was essential to providing the people the information required to form such a judgment. Hence, at best the publicity laws through post-election reporting could prevent parties from acting upon corrupt deals they had made to get their campaign funds by allowing either the law or the voters to punish them for these bargains.\(^{44}\)

At the federal level, a comprehensive publicity law and a corrupt practices act to regulate the use of money in congressional elections was not passed until 1910 when Congress enacted the Publicity Act. Crucial to the enactment of the statute was the lobbying campaign over the first decade of the twentieth century sponsored by Perry Belmont, a former Democratic member of the House of Representatives, and his organization the National Publicity Bill Organization (NPBO), which was composed of prominent civic and political leaders from both parties, to educate the public and Congress about the merits of such a law. This statute seems to have been designed to complement the state efforts to control money in politics by reaching those committees or candidates that the states lacked the ability to control, i.e. ones operating in more than one state or those pertaining to federal candidates. As will be discussed in chapter four, Congress’ authority to regulate elections was very limited in this era since this was believed to be a function that the Constitution left

to the state governments. This statute was amended in 1911 to require federal candidates to file reports before the election, and to disclose their primary contest expenses. The latter provision was bitterly opposed by Southern members of Congress as a new effort by the national government to intervene with the rights of their states to control the electoral process. Although never explicitly stated, probably the fear of the Southerners was that the federal government would use its new authority to interfere with their extensive efforts to maintain white supremacy by preventing blacks and poor whites from voting as discussed at length below.45

While corrupt practices acts were quickly adopted at the state level, statutes banning corporate gifts were less common. Prior to the twentieth century, only four states, Missouri, Nebraska, Tennessee, and Florida, had such laws on their books, all of which were passed in 1897 perhaps in response to Hanna’s fundraising methods. Perhaps thinking that the problem of corporate gifts had been adequately addressed by corrupt practices acts, neither Congress nor a majority of the states passed statutes addressing this issue until the New York insurance scandal revealed the corrupting nature of such contributions to the parties. Earlier efforts to show how corporations had been unduly controlling the electoral process had been made, most notably by Sen. William Chandler (R-NH) who introduced in 1901 a bill in Congress to ban corporate gifts. This legislative proposal was a reaction to how the railroad companies had subverted his campaign for reelection, as well as

perhaps the will of the people, by using their influence over the state legislators, i.e. calling upon past gifts and favors, to ensure their candidate was elected to the United States Senate. The bill died in committee, but Chandler saw an opportunity to revive it four years later when in the wake of the Armstrong Committee revelations he convinced his former colleague Senator Ben “Pitchfork” Tillman (D-SC) to reintroduce it (no Republican was willing to sponsor the bill). Tillman presented the bill as an opportunity for the Senate to demonstrate that its members were not merely the tools of the corporations. His persistence in keeping the issue before the Senate in the 1906 election year saw it eventually pass following the mid-term Congressional elections in an effort to appease public opinion.46

For the reformers, these statutes were necessary to not only prevent corporations from gaining undue influence over the people’s representatives, but also to protect the rights of the shareholders to support the political party of their choice. “The property of policy holders and stockholders in such institutions had been secretly diverted from legitimate channels to political purposes without their knowledge or consent, and against their own candidates and convictions, if they chanced to be of different opinions than those of the managers of the corporations.”47 It was further argued that the elimination of these large gifts would have the additional benefit of denying the parties the funds required for corrupt practices, and forcing the parties to instead raise smaller amounts of money for legitimate election expenses from the citizens. Even this,

46 Mutch, *Campaigns*, 4-8; Brooks, 245; Sikes, 127-128; Pollock, 250.
47 Belmont, “Campaign Fund Publicity,” 663.
however, did not completely remove the possibility of corruption in elections. The reformers claimed that the only means of ending corruption in elections and politics was through laws that provided for public funding of elections and eliminated any need for private money whatsoever. These kinds of laws were rarely passed in the early twentieth century as they were radical measures that found little public support.48

With the corrupting influence of money, and consequently of the bosses and the corporations, eliminated by these laws, the Progressive reformers believed that the people would have a meaningful opportunity to participate in elections, and as most citizens were honest, intelligent, and cared about public affairs, they would seize this opportunity to resume their civic duties and regain control of the republic. Furthermore, they argued that the citizens, especially the best men, would no longer be faced with two slates of unworthy candidates presented for their ratification by the bosses. Rather, they would through public debate and the use of their independent judgment select the best candidate to represent them from among the many worthy and qualified candidates for public office presented for their consideration by the parties. Thus, the ballot would once again become a sacred trust to be used to preserve and elevate the moral condition of politics and the republic by making patriotism and disinterestedness the motivations for becoming involved in poli-

tics and participating in elections rather than selfishness and loyalty to a party organization or a man or money.49

And even if the citizens desired not to abide by their highest motivations when making electoral and political decisions, the laws would force them to behave morally and virtuously by preventing them from using their basest motives to decide how to vote. “In a government of the people by the people and for the people, whose purpose is to secure the greatest good to the greatest number, it is necessary that each voter act not alone with freedom, but that he should be protected from exercising his own freedom through improper motives. If a voter were permitted to vote strictly in accordance with his own view of what was best for him, many thousands of what are called ‘commercial’ voters would decide the $2.50 paid them by the agent of the boss, or the drink given them on election day, was best for them.”50 Hence, the reform liberals believed that these electoral laws would not only deny the worst men the resources required to corruptly control the republic, but also be the new foundation of the civil virtue and the political morality of the people. They were designed to ensure that the standards set by the community to govern the citizens’ decisions in the electoral process would prevail over individual preferences, and hence ensure that the right leaders and policies were selected to guide the future progress of the republic.

50 Hutchinson, 346.
This vision of the citizens as enlightened, moral, and virtuous enough for republican self-government was almost universally accepted among the American elites of the latter half of the nineteenth century.\(^51\)

Those few who continued to adhere to the freedom granted by pluralist liberalism for individuals to act on their own preferences with few restraints believed that these reforms would be utterly ineffective. They argued that no laws would ever be able to make the citizens moral and virtuous nor would they be able to ensure that the participation of citizens in elections and politics would be based on their patriotism and disinterestedness. Rather, they argued that most voters knew little and cared even less about politics unless some personal or financial interests of theirs was directly affected by the election. Therefore, it was essential for the parties to use money in elections to spread their ideas and communicate with the voters to show how their interests were involved in the political campaign. “It is not sufficient for any cause, doctrine, or party to be good in itself. The good qualities must be shown, explained, and brought before the people, and all this costs money. When one opposing party explains its good points and advantages to the people the other side must do likewise, and for this the campaign contribution is needed, and as such it is lawful, fair, and proper.”\(^52\)

For the pluralist liberals, money was given to the parties by corporations and citizens not of a desire to corrupt the electoral process, but rather out of a belief in the

\(^51\) This observation is based upon the authors own research in which dozens of articles, books, pamphlets, and other sources from the era were examined. It was found that only a handful of them did not support the general view of the reformers about the possibility of reinvigorating republican government. See also Overacker, 2-3 for a commentary on this traditional view.

principles promoted by the party. Nor was the growing size of campaign funds a sign of corruption, but instead a reflection of the increased size of the country and the necessity of now paying for political workers. This is not to say that corruption was not possible. Rather, they argued that corruption would always exist in elections as some men would invariably be willing to sell their votes.53

The diametrically opposed views of those advocating the reform and pluralist liberalism traditions concerning the role of money in elections arguably derives from their contrasting visions of human nature and the possibility of creating a moral and virtuous citizenry. The reform liberals seemed to believe that the citizens were honest, moral, intelligent, and capable of acting out of altruistic motives. While the pluralists believed that the citizens were inherently self-centered individuals who cared more about themselves than others, and thus regardless of their honesty or intelligence were more likely to be motivated to act out of self-interest. In the latter's view, the challenge for republican government, as the founders had argued, was to channel the self-interest of the citizens toward the service of the republic in part through organizations and individuals who made politics a profession and used money to stimulate their interest and participation to maintain republican government.

Race and Electoral Reform

Since the end of Reconstruction in 1877, Southern Democrats had attempted to control the political and social destiny of the South by using fraud, force, intimidation, and other extra-legal methods to prevent blacks from voting and to discourage support of opposition parties. However, these techniques were not successful in preventing efforts to develop a competitive party system in the South during the 1880s as the Republicans and other minor parties were able to draw sufficient support from blacks and whites, both of whom turned out to vote in large numbers, to challenge the Democratic Party’s hold on power. What prevented them from actually gaining political power was generally the fraudulent counting of ballots, which led to the Congressional effort to pass the Lodge Act, or Force Bill, in the early 1890s. Had the law passed, it would have allowed for federal supervision of registration and elections in the South upon the request of a certain number of voters, and undoubtedly strengthened the opposition parties in the region. Despite the failure of Congress to pass this statute, the Populist Party developed into a major threat to the Democratic Party in the early to mid-1890s as it drew on support from Southern Republicans, the discontentment felt by poor whites and blacks with their plight, and those who sought an alternative to the Democrats to build a strong base of support among Southern voters.54

Faced with clear threats to their power, and more generally the continued preservation of white supremacy, the Southern Democrats in

the 1890s began to seek a new strategy to contain opposition parties and their supporters, namely blacks and to a lesser extent poor whites. Extra-legal methods were no longer a viable option as they tended to attract attention from Northern politicians in Congress, and led to efforts by the federal government to interfere with Southern elections. Hence, they turned to the new electoral laws advocated by the Progressives, which they believed would provide them with a subtle means of legally and permanently disenfranchising their opponents. To implement these new statutes, however, required Southern Democrats to seize complete control of the state governments, which they did either through legal means, such as legislative restrictions on voting, or as in the past extra-legal ones like fraud. Once in power, they proceeded to consolidate their hold on the political system by passing a host of measures that were designed to deny those who supported opposition parties, mainly blacks and poor whites, the opportunity to vote. This strategy was so successful that by the end of the first decade of the twentieth century, the Southern electorate had been reduced to a tiny, homogenous group of men who were deemed fit to vote: white, middle-class Democrats who were both literate and owned some property.55

Among the statutes used by the Southern Democrats to disenfranchise voters were registration laws that specified where and when a voter might register, what information was required of him to be able to register, and required him to bring his registration certificate to the polling place. The most important feature of these laws, however, was the broad

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discretion they gave to registrars to determine whether a voter met the stipulated qualifications. In some states, they virtually had the power to turn anyone away for any reason they chose to give. A few states adopted what became known as eight-box laws, which served as a quasi-literacy test since they required the voter to deposit his ballot into the appropriate boxes for each state and federal candidate if they were to be counted. Although election judges could read the names on the boxes to the voters, they did not always truthfully inform citizens about which ballots belonged in each box. Judges also frequently shifted the positions of the boxes to prevent illiterate voters from being able to simply memorize what box was associated with a particular ballot. The Australian secret ballot law also acted as a literacy test as the state printed ballot required a voter to be proficient in English. In order to vote, he had to be able to read through a list of candidates generally organized by office, and sometimes with no party designation, to select the individuals he wished to support. Two other measures frequently used were actual literacy tests that required a voter to read, and occasionally interpret to the satisfaction of the election official, a portion of the state or federal constitution, and property tests usually in the form of poll taxes. These were cumulative taxes which meant that if a voter failed to pay it one year, he had to pay two years worth of poll taxes before he could vote. As officials made no effort to collect these taxes from undesirable voters, i.e. blacks and poor whites, their taxes grew to such stupendous sums that it was impossible for them ever to vote.56

A final device adopted by Southern Democrats in the early twentieth century to solidify their control over the electoral process was the white primary election. Its purpose was to prevent intraparty conflicts from escalating to a level where divisions among white men might lead a faction to attempt to build a viable alternative party to the Democrats by appealing to blacks and other disadvantaged citizens as well as to legitimize the party’s nominees for the general election. It accomplished these tasks by providing a venue within the party for candidates with divergent views, all of whom pledged not to run in the general election if defeated, to campaign for the support of their fellow members who then chose who would represent the party. When combined with the disenfranchisement statutes adopted by the Southern states, the united front put forth by the Democratic Party in the general election made it virtually impossible for any opposition to form, let alone win an election.57

Thus, while the intention of the Progressives in passing the electoral reforms of the late nineteenth and early twentieth centuries had been to restore the right of the people to consent to their government, Southern Democrats ironically used these statutes to subvert the democratic process by excluding blacks and poor whites from participation in the political process as well as to crush any opposition parties. Nor was there any effort by the federal government, despite several Supreme Court cases pertaining to these disenfranchisement laws, to prevent Southern states from violating the spirit of the Fourteenth and Fifteenth Amendments through these discriminatory statutes. It was left to the

57 Kousser, 72-76, 78, 80-82
state courts to protect the rights of the citizens. And as the next chapter shows, they made no effort whatsoever to preserve these liberties. So far as is known, no state court in this era was called upon to adjudicate an electoral statute based upon a question pertaining to race.

**Conclusion**

In the constitutional state of courts and parties that existed for much of the nineteenth century, there was very little regulation of either the use of money in elections or the activities of the political parties. In this regime, the parties were essentially private voluntary associations created by the voters through which they exercised their rights to freedom of the press, of speech, and of association by expressing their views concerning the issues of the day and the actions of the government and their representatives. The state and federal governments did not interfere with the conduct of either the parties or the voters except to the extent that it believed was necessary to ensure an honest and fair electoral process.

Efforts to more thoroughly regulate the political parties and campaigns began in the mid-nineteenth century as reform liberals became increasingly concerned that the government was no longer truly based upon the consent of the people, and was being used to satisfy the personal greed of politicians. They sought to define what it meant to have an honest and fair electoral process in the new context of an industrialized

and urbanized republic. For them, this required an orderly process free of any and all influences that might tarnish the rational and disinterested judgment of the voters whether it be money or partisanship or organizations like interest groups. And furthermore, that ensured the nomination and election of the best candidates possible to guide the republic in the proper direction. To accomplish this objective, they enacted laws that greatly expanded the power of the state governments over the electoral process to end the corrupting influence of parties, bosses, and money in politics.

This effort to transform the elections from in essence a private function run by the political parties to a public one under the authority of the state did not go unchallenged however. In the view of many contemporaries, the statutes passed to effect this change intruded to an unprecedented extent upon the constitutional rights of both the parties and the voters to freedom of speech, of the press, and of association derived from their natural right to inquire about any subject of concern to them. Hence, they believed that the citizens were actually being denied the ability to “freely” express their preferences and give their consent to the government. These questions about the validity of these new statutes, their compatibility with republican principles, and their effect on the rights of the citizens would be addressed by the state courts starting in the final decades of the nineteenth century.
3 We Are All Progressives

From the foundation of the republic until approximately the mid-
twentieth century, it was understood that the state legislatures, not state judges or national level institutions, were the best guardians of the people’s liberties. Unlike Congress, they were relatively powerful institutions that through what was commonly known as the police power of the state had the authority to pass laws on any conceivable subject unless explicitly prohibited by the state constitutions which were designed to limit, not to enumerate, the responsibilities of the legislatures.

The police of a State in a comprehensive sense, embraces its whole system of internal regulation, by which the state seeks not only to preserve the public order and to prevent offenses against the State, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of rights by others.¹

It was expected that the state legislatures would use their broad powers to secure the rights of the people not by enforcing particular provisions of the state constitution’s Bill of Rights; but rather by translating the general principles expressed in them and in the state constitutions into meaningful legal guarantees through the laws they passed. Thus, the people’s liberties were constantly evolving as legislators and citizens through the political process debated and came to new understandings of

how best to implement those liberties that they considered essential to the maintenance of republican government.2

State judges encouraged this deliberation over the meaning of rights by rarely using the state bills of rights to overturn legislative judgments as this would have ended any debate over the meaning of a particular liberty. Instead, they sought to protect the rights of the citizens, and to contribute their own understanding of them to the debate, by basing their decisions mainly upon common law rules of construction. It was left to the legislature or the citizens to act upon the recommendation of the courts.

The courts are not the guardians of the rights of the people of the State [sic], except as those rights are secured by some constitutional provision which comes within the judicial cognizance. The protection against unwise or oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the representatives of the people. If this fail, the people in their sovereign capacity can correct the evil; but the courts cannot assume their rights. The judiciary can only arrest the execution of a statute when it conflicts with the constitution. It cannot run a race of opinions upon points of right, reason, and expediency with the lawmaking power.3

Those who challenged the new campaign finance laws in the late nineteenth and early twentieth centuries in the state courts arguably believed that judges would find that the legislatures had transgressed a limitation placed upon their authority by the constitution. After all, every state constitution had in its Bill of Rights guarantees designed to preserve the right of the citizens to freedom of speech, of the press, and of association. This argument was put forth in numerous cases including Leonard v.

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2 John D. Dinan, Keeping the People’s Liberties (Lawrence: University of Kansas Press, 1998), ix, 2, 6-11, 13, 16, 21, 31, 91, 150.
3 Cooley, 201.
Commonwealth, Ladd v. Holmes, and Spier v. Baker just to name a few.4 Yet, the courts often chose to ignore or dismiss these constitutional arguments, and instead showed great deference to the judgment of the people’s representatives by upholding these statutes usually on the basis of common law interpretations that reflected the reasoning of the reform liberals as will be discussed below.

There was some speculation in the contemporary literature as to why the state judges behaved in such a fashion. One suggestion was that they considered these laws to be of a political nature, and hence sought to avoid ruling on their wisdom by upholding them under the doctrine of the police power. It was left to the people to appeal to their representatives for relief if they believed these statutes were unwise. Another theory argued that the judicial approval of these laws not only stemmed from the fact that no property rights were threatened, but also that “the pressure of public opinion has been strong and steady, and the judges have been conversant with the facts and philosophy of the party system and hence have experienced little difficulty in justifying almost every kind of primary system adopted.”5 Probably the proponent of this view believed


that the fact that most states provided for the election of their judges, rather than their selection by the legislature or executive, influenced their decisions.\(^6\) A final conjecture was that the new electoral laws and the opinions of the courts represented the resentment felt by the “better elements” of American society at their exclusion from positions of leadership in the parties and the government.\(^7\)

An examination of the courts’ opinions and other evidence reveals little, if any support, for the last theory put forth to explain the behavior of state judges. Certainty, it might have had some influence given, as described in the last chapter, the belief of elites that they were being unjustly deprived of their rightful place in politics. However, the more likely explanation is that the courts were political and legal institutions whose doctrines were shaped by both the expectations of them as judges, and the social and political milieu of their time as the first two theories suggest. In this era spanning from the close of the Civil War to the 1960s, the state courts showed great deference to the judgment of the state legislatures that the electoral and political process was being corrupted by money and political parties controlled by bosses in alliance with special interests. And of the necessity of restraining those forces not only to restore the citizen’s morality and virtue, but more importantly the repub-

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\(^6\) The only states that did not have elected judiciaries by the early twentieth century were: Connecticut, Delaware, Maine, Massachusetts, New Hampshire, New Jersey, Rhode Island, South Carolina, Vermont, and Virginia. See Evan Haynes, *The Selection and Tenure of Judges* (The National Conference of Judicial Councils, 1944), 100-135 for a complete listing of state constitutional provisions pertaining to the selection of judges from the late eighteenth century to the mid-twentieth century.

lic itself by allowing the people once more to be able to select their leaders and control their own government. This was reflected in their opinions over the next century by their consistent willingness to rule that the new campaign finance laws were an appropriate and absolutely essential exercise of the legislature’s police power to secure the public interest in the purity and freedom of the ballot. As well as their acceptance of the arguments of the reform liberals that the state legislatures used to justify these reforms.

**Recreating the Political Parties**

The passage of mandatory primary laws starting in the late nineteenth century represented an unprecedented attempt to expand the scope of the state legislature’s power over the political parties in response to the problems that had developed in the electoral process. With few exceptions, state courts were willing to accept the determination of the legislature in regard to whether these statutes were necessary to protect the rights of the citizens. The small number of judges who chose to challenge the judgment of the legislature generally grounded their objections upon the traditional understanding of the parties as private voluntary associations. They argued that the primary election statutes unconstitutionally deprived citizens of their “natural” and constitutional rights to assemble and to associate with each other to influence the electoral process. “The right of the electors to organize and associate themselves for the purpose of choosing public officers is as absolute and beyond legislative control as their right to associate for the purpose of business or social intercourse or recreation. The legislature may, doubtless, forbid
fraud, corruption, intimidation or other crimes in political organizations, but beyond this it cannot go." These judges feared that upholding these laws would result in the state legislatures rather than the citizens who composed the parties being responsible for determining the rules and principles that would govern their internal and external conduct. This would not only prevent the people from forming new parties without the consent of the legislature in their view, but also deny the current parties the right to preserve their own existence by, for example, expelling disloyal members or setting strict standards as to who could be a party member. In short, these judges believed that giving approval to the primary laws would mean that the “life and death of political parties are held in the hollow of the hand by a state legislature.” This defense of the citizens’ right of association and the right of the parties to ensure their self-preservation through self-governance was never influential. It was generally expressed in only a few dissenting opinions, and had faded into obscurity by the early twentieth century.

Like the opponents of electoral regulation discussed in the previous chapter, these judges, whose reasoning drew at least in part from the pluralist liberalism tradition, believed that the citizens could only “freely”

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8 People v. Democratic Gen. Comm. of Kings County, 164 N. Y. 335 (1900), 349.
consent to their government or express their views if they were not subject to extensive governmental restraints like those found in the new statutes. Instead of restoring the right of the people to control their leaders, they believed that these laws would become the very means by which this fundamental liberty would be denied as they would prevent them from being able to act upon their own political preferences.

The predominant view, however, among the state courts in the late nineteenth and early twentieth centuries regarding the primary election laws was that they were an appropriate exercise of the state legislatures’ police power to address the growing problem of corruption in elections, especially in the nominating process.11 “It [the law] defines and punishes offenses of the gravest character, the existence of which has been known to every intelligent person . . . and which, more than anything else, has undermined and weakened our whole system of government. To say that the legislature may not lay its hand upon a public evil of such vast proportion is to say that our government is too weak to preserve its own life.”12 Such statutes, the courts further argued, were justified not only by the moral necessity of protecting the integrity of the ballot and the

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11 These laws generally required some or all of the party’s nominations for state and local offices, and in a few cases federal ones, to be selected through direct primaries rather than conventions. Typically, the statutes contained provisions specifying when the election would be held; what qualifications a voter must meet to vote in a particular party’s primary; how names were to be placed on the ballot; the order of those names on the ballot; the percentage of the vote required for a candidate to be nominated, and in some cases restrictions on the use of money. See Charles E. Merriam and Louise Overacker, *Primary Elections* (Chicago: The University Press of Chicago, 1928), 66-88, 93-94 for a detailed discussion of these provisions as well as Merriam, *Primary Elections* (1909) 273-288 for a detailed synopsis of early primary election laws and Louis Greeley, “The Present Status of Direct Nominations,” *Illinois Law Review* 403 (1910-1911): 407-408 for a list of states that incorporated corrupt practice acts into their primary laws.

republic, but also the state constitutions themselves. They noted that these documents contained no prohibitions that could be construed to prevent the regulation of such contests or in some cases even had specific mandates requiring the legislature to ensure the fairness and integrity of the electoral process. Thus for most judges, the primary election statutes represented an effort by the state legislatures to fulfill their implicit or explicit duty to protect the fundamental rights of the citizens to vote and to freely express their will through the electoral process rather than depriving them of the ability to influence the conduct of the government and their representatives.

13 The most common provision found in the state constitutions, usually in the bill of rights, was the requirement that all elections shall be free and equal. Among the states that had such a provision were: Arkansas (1874); Colorado (1876); Connecticut (1818); Delaware (1897); Illinois (1870); Indiana (1851); Kentucky (1890); Maryland (1867); Massachusetts (1780); Missouri (1875); Montana (1889); Nebraska (1875); New Hampshire (1792); North Carolina (1876); Oregon (1857); Pennsylvania (1873); Oklahoma (1907); South Carolina (1895); South Dakota (1889); Tennessee (1870); Utah (1895); Vermont (1793); Virginia (1902); Washington (1889); Wyoming (1889). A less common requirement found in the state constitutions was a provision directing the legislature to pass all laws necessary to secure the purity of elections and guard against the abuses of the elective franchise. This mandate was included in the state constitutions of: Colorado (1876); Connecticut (1818); Delaware (1897); Florida (1885); Texas (1876); West Virginia (1872); Wyoming (1889). Finally, a few states added specific provisions to their constitutions, either as part of the process of completely revising them or the passage of an amendment, to require the legislature to pass regulations to preserve the purity of primary elections: California (1900); Alabama (1901); Virginia (1902), Oklahoma (1907), Arizona (1912), and Ohio (1912). See also Merriam and Overacker, 40 footnote 1.

Some courts even argued that these laws not only were designed to guarantee the right of the citizens to vote, but also their ability to govern their political parties. They did so by eliminating the corrupt influence of the bosses over the affairs of the party, which restored the ability of the citizens to control these organizations, and use them as a meaningful way of associating with others who shared their opinions. This view was perhaps best expressed by the New York court of appeals in the case of *People v. Democratic General Committee* (1900) in which it denied the general party committee the power to remove a member duly elected by the people even if he acted contrary to the interests of the party.

The dominant idea pervading the entire statute is the absolute assurance to the citizen that his wish as to the conduct of the affairs of his party may be expressed through his ballot and thus given effect, whether in accord with the wishes of the leaders of his party or not, and that thus shall be put in effective operation, in the primaries, the underlying principle of democracy, which makes the will of an unfettered majority controlling. In other words, the scheme is to permit the voters to construct the organization from the bottom upwards, instead of permitting leaders to construct it from the top downwards.15

In the view of these judges, the state legislature had chosen to permit the lesser evil of forcing party members to associate with a hostile colleague to deal with the greater one of the people’s will being ignored by their leaders. One of the central purposes of the primary election laws in their view was to give party members, the citizens, a veto over the actions of their leaders. Should the latter make an improper decision or nominate unworthy candidates, the people would have the opportunity to freely exercise their will and reject them in the primary contest. Thus, the


knowledge that the citizens would be independently evaluating and judging their decisions would encourage party leaders and representatives to be loyal to the people's interests, and pick candidates worthy of their suffrages.16

The only other rationale used in the early twentieth century by a few state judges to justify the intrusion of the state into the internal affairs of the parties was based upon the Australian ballot laws. They argued that these statutes gave the legislatures the power to set reasonable conditions, such as regulations concerning their nominating process, that the parties had to accept in exchange for the valuable privilege of having the names of their candidates printed on the official ballot at public expense. Although the parties had the option of rejecting these terms, it was unlikely they would do so given that their chance of electoral success was heavily dependent upon having the names of their candidates appear on the official ballot.17

Although the state courts endorsed the principles underlying the new primary laws by upholding them as valid legislative enactments, there was less consensus among them concerning whether the state constitutions placed any limitations upon how the legislature could use its police power to regulate the nominating process. The answer to this question depended largely on whether they viewed primaries as constitu-

tional state elections or not. Nowhere in their opinions as far as is known did state judges consider this question in relation to the federal constitution, particularly the Fourteenth and Fifteenth Amendments. Their decisions relied solely upon the provisions found within the state constitutions related to the electoral process or common law doctrines.

The prevalent view among the state courts until the early twentieth century seems to have been that primaries were elections within the meaning of the state constitutions. In Maryland, the state court reached this conclusion by simply reasoning that if a state appropriated funds to pay for a primary election, then it must be a constitutional election or the use of public funds would be illegal. While in Oregon, the judges found that primaries were elections authorized by law as the state was responsible for financing them, and overseeing that they were properly conducted. Therefore, the legislature had to obey the constitutional provisions requiring that all elections be free and equal, and that stipulated who could vote in non-constitutional elections.18

Other courts, such as those in Pennsylvania, Illinois, Indiana, California, and North Dakota, reasoned that the primary and general elections had come to form one coherent process through which the people selected their representatives. Thus, to allow corruption at any stage of the process, would sanction interference with the right of the people to freely express their will at the ballot box. “Primary elections and nominating conventions have now become part of our great political system and are welded and riveted into it so firmly as to be difficult of sepa-
ration . . . It is as much an election law when it strikes at the fraud in the primary election as when it arrests the fraudulent ballot just as it is ready to drop into the box at the general election.”19 Regardless of how they reached their conclusions, the implication of the position taken by the courts in these cases was that all state constitutional provisions and laws that protected the rights of the voters were therefore applicable to both elections.20 Thus, state judges sought to contribute to the efforts of the legislatures to protect the electoral rights of the citizens by expansively, or broadly, interpreting the primary election statutes to provide the people with the full protection of the state constitutions.

The alternative view, that primaries were not elections within the meaning of the constitution, began to emerge among the state courts during the first decade of the twentieth century. These judges argued that primaries were merely internal party contests for the purpose of nominating candidates and consequently not elections within the meaning of the constitution. “A primary election is not an election to public office. It is merely the selection of candidates for office by the members of a political party in a manner having the form of an election.”21 This meant that the constitutional provisions and laws pertaining to the rights of the voters in elections were applicable only to the general election. And hence the legislature had very broad authority, though not unlimited as discussed below, to make any reasonable regulations it chose to safe-

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guard the process of selecting party nominees and the liberties of the citizens. Although by the start of the second decade of the twentieth century there no longer was any consensus among the state courts regarding whether a primary was a constitutional election or a party contest subject to state regulation, all state judges agreed that these statutes were an essential means by which the legislature sought to protect the ability of the citizens to use their most basic freedoms to “freely” choose their government.

The only other limitation placed upon the police power of the state legislatures to regulate primary elections by the courts, regardless of whether they considered them to be elections or not, was the requirement that the statutes conform to the provisions of the state constitutions specifying how legislation should be drafted. Of particular importance was the prohibition against local and special legislation; the mandate that all laws be of uniform and general application; and the requirement that all laws clearly state their subject and purpose in their title. The courts never struck down a primary election law for violating a provision of the federal constitution in this era. In fact, the only time that document was used to challenge such statutes was in cases where it was argued that the classification of political parties by the state legislatures for some purpose, such as determining who could hold primaries, violated the Fourteenth Amendment’s guarantee of equal protection of the laws. State judges always rejected these arguments, and took the posi-

22 State v. Johnson, 840-841; Line v. Board of Election Canvassers, 731-732; State v. Nichols, 50 Wash. 508, 97 P. 728 (1908), 731; State v. Felton, 89; Ledgerwood v. Pitts, 1039-1043; Ritter v. Douglas, 451-455; State v. Miller, 78-83; Sargent, “Primary Elections I,” 102-104, 106; Tuttle, 475-476; Greeley, 408.
tion that such classifications were constitutional as along as they were reasonable and applied equally to all who were in similar circumstances.\footnote{Marsh v. Hanly, 370-373; Spier v. Baker, 372-374; Ladd v. Holmes, 716-718; People v. Board of Election Commissioners of Chicago, 25-28; Rouse v. Thompson, 528-534; State v. Felton, 571-577; Ledgerwood v. Pitts, 1043-1045; Sargent, “Primary Elections I,” 99-101, 106-108; Tuttle, 471-474.}

Overall, the rulings of the state courts in regard to the validity of the primary election laws represented a revolutionary departure from their belief earlier in the nineteenth century that parties were private voluntary associations whose conduct and internal affairs neither they nor the state legislatures had any right to intervene in beyond what was absolutely necessary to prevent bribery, fraud, and other electoral crimes. Their willingness to grant the state legislatures such broad authority over the parties, and in essence transform them into quasi-public organizations, can be largely attributed to their willingness to accept the arguments advanced by the state legislators and the reform liberals to justify the new statutes. Like them, state judges viewed the primary election statutes as one of the central means by which the bosses could be denied the resources and the power to corrupt the electoral process, and hence the ability to elect their candidates and use the power of the state for their own selfish purposes. In short, they understood these statutes as meant to make the state and national governments once again of the people, by the people, and for the people.\footnote{Leon Epstein, Political Parties in the American Mold (Madison: University of Wisconsin Press, 1986), 158-162; Fay, 263, 266; Winkler, 877.}

Another influence upon the reasoning of the state courts in regard to these statutes might have been the Supreme Court’s decision in \textit{Munn}...
v. Illinois (1877), one of the Granger cases, in which Chief Justice Waite upheld the regulation of grain elevator operators as a valid exercise of the state police power. Such a law, he argued, did not represent a deprivation of property under the Due Process Clause of the Fourteenth Amendment since the public had a vested interest in how these private companies carried out their business.  

“Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has created.”  

Although as far as is known there is no state court case that refers to this decision explicitly, it is possible that its reasoning helped to alter how state judges conceived of political parties. They were, after all, private organizations in which the public had a very clear and significant interest in how they conducted their activities, since they were the primary institutions representing the views of the citizens both in the electoral and the political process. Their failure to act in the public interest, like the grain elevator operators, justified therefore the use of legislative power to correct the abuses of their authority that had corrupted the electoral process.

Regardless of what led state judges’ to reconsider their understanding of parties, their rulings in the late nineteenth and early twentieth centuries were instrumental in revising how key clauses of the state

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25 Munn v. Illinois, 94 U.S. 113 (1877), 125-126, 130-134.
26 Munn v. Illinois, 126.
constitutions, especially those pertaining to the electoral process, were interpreted to provide broader protection for the rights of the citizens. Perhaps the most important transformation concerned the provisions requiring all elections to be free and equal or that the legislature preserve the purity of elections and guard against abuses of the electoral franchise. In the past, the courts seem to have understood these clauses as referring to the necessity of preventing traditional election crimes, such as bribery. This was consistent with the pluralist liberalism tradition that called for only those governmental restraints that were necessary to ensuring everyone had the equal opportunity to express their preferences. In this particular case, these laws were designed to control those who pursued their electoral interests too aggressively, and hence denied other citizens the ability to act on their own preferences in deciding which candidate or party to support.

However, starting in the late nineteenth century, the state courts redefined these constitutional mandates to also encompass efforts to control the use of money in elections, and to eliminate as far as possible appeals that encouraged citizens to act upon their selfish interests. In sum for reform liberals including most state judges, corruption came to refer to anything that prevented the citizens from having a meaningful opportunity to influence the affairs of his party and those of the republic based upon their rational judgment. The primary election statutes were understood as contributing to this purpose by establishing norms of behavior in party elections that would allow citizens to once again be able to “freely” express their preferences and give their consent to the government.
Citizens and Candidates

Unlike with the primary election statutes, challenges to the corrupt practices acts arose sporadically between 1843, when a suit was brought concerning the application of the 1829 New York corrupt practices act described in the last chapter, and 1953, when some provisions of Florida’s then new statute restricting the use of money in elections were challenged as violating the citizens’ rights to freedom of speech and of the press. Although over a century separates these two decisions, the rulings of the state courts in regard to these types of laws remained consistent over this period of time.

Perhaps what is most unexpected about the rulings of the state courts concerning corrupt practices acts in this era, especially given their general hostility to legislative regulations that interfered with property or private power, was the lack of discussion concerning whether the restrictions placed upon the use of money in elections by these statutes constituted a deprivation of property without due process. In fact, the only known instance in which a court was called upon to address this question was in the 1916 Michigan case of People v. Gansley. Seeking to overturn his conviction for violating the state law prohibiting corporate funds from being used to make political gifts, Jacob Gansley through his lawyers argued in part that corporations were persons within the meaning of the Fourteenth Amendment to the federal constitution. Hence, to deny them the right to make contributions to political contributions represented a deprivation of property without due process. This argument was based upon his expansive understanding of what constituted property. “[I]t does not consist of the mere ownership of it, but includes the
right to make proper and legitimate use of it, and to defend, not only the ownership, but also the use and enjoyment of it.”27 Thus, in his view, corporations had the right to use their property, i.e. money in this instance, to defend their broader business and property interests from being harmed, or taken away, by the proposed initiative to prohibit the manufacture and sale of alcohol.28

Largely adopting the reasoning of the state’s brief, the court rejected both the contention that corporations were persons within the meaning of the Fourteenth Amendment, and that the law adversely affected its property rights.

The instant case, in our opinion, does not present an instance of deprivation of property, not of fanciful or unjust classification for purposes of regulation. The expenditure of the money of the Lansing Brewing Company for election purposes cannot be deemed to be a property right within the meaning of the Fourteenth Amendment. We are not dealing with a measure that deprives a corporation of any of its property, or that impairs the value of that property . . . The Lansing Brewing Company was created under our statute, for the purpose of manufacturing beer. The privilege was not conferred upon it of using its funds for the purpose of influencing public sentiment in connection with any election.29

Both the court and the state argued that corporations were artificial entities that had been created by the state legislature for specific purposes. They could only claim that a statute threatened their property rights when it directly affected their legally designated activities as occurred in a case where a railroad company challenged a state law regulating railroad freight rates. The court further noted that only the legislature had

28 Brief for Appellant in the case of People v. Gansley 191 Mich. 357, 158 N. W. 195 (1916), 5, 7-10; Additional Brief, 4-5.
29 People v. Gansley (opinion of the court), 375-376.
the authority to expand the corporation’s charter to allow it to engage in other activities, such as participating in elections. In this case, the legislature had actually decided to restrict its ability to engage in such practices based upon the well-established fact that such participation led to the corruption of the ballot.30

The line of reasoning adopted by the court in this case, of course, is inapplicable to the question of whether natural persons, or individual citizens, were deprived of their property without due process by limitations placed upon the use of money in elections. Unfortunately, there is no known state court that addressed this question nor was it possible to examine the briefs relating to the various cases to know if the issue was ever raised. What is clear from the evidence available is that the argument that money is property was not at all influential during this era as it either was never presented to the courts, or if it was advanced the judges perhaps considered it so ridiculous that they chose not to address it.

The opinions of the state courts in *Gansley* and other cases pertaining to corrupt practices acts suggest that instead of viewing these laws as efforts by the legislatures to control property in the form of money, they considered them to be statutes designed to regulate the electoral and political process. And these laws, the judges further argued, were an appropriate and essential exercise by the state legislatures of their police power to prevent the excessive use of money in elections from debauching republican government, and preventing the people from be-

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ing able to properly select their representatives. Perhaps the best expression of this argument, albeit perhaps an extreme version of it, comes from the comments made by the Wisconsin Supreme Court in *State v. Kohler* (1930), a case dealing with the application of the state’s corrupt practices act to the governor-elect’s misuse of money in the primary election.

It has been said so many times it scarcely needs to be said again, that the realization of the democratic ideal of self-government rests upon an intelligent informed, and vigilant electorate . . . All efforts to educate and awaken the electorate amount to nothing if corrupt appeals made to its prejudices or its cupidity, lead it to cast a ballot otherwise than in accordance with its convictions, uninfluenced by anything save considerations of public policy. A democratic state must therefore have the power to protect itself against the consequences of ignorance, indifference and venality and prevent all those practices which tend to subvert the electorate and substitute a government of the people, by the people and for the people, a government guided in the interest of those who seek to pervert it.\(^{31}\)

And later in the same opinion, the court added:

It is a matter of common knowledge that men of limited financial resources aspire to public office. It is equally well known that successful candidacy often requires them to put themselves under obligation to those who contribute financial support . . . The evident purpose of the act is to free the candidate from the temptation to accept support on such terms and to place candidates during this period upon a basis of equality so far as their personal ambitions are concerned, permitting them, however, to make an appeal on behalf of the principles for which they stand, so that such support as may voluntarily be tendered to the candidacy of a person will be a support of principles rather than a personal claim upon the candidate’s consideration should he be elected.\(^{32}\)

As with the judgments pertaining to the validity of the primary election statutes, the opinion of the Wisconsin state court suggests a willingness to defer to the judgment of the legislature. In its view, the representatives of the people had passed the law to not only protect the most basic rights

\(^{31}\) *State v. Kohler*, 200 Wis. 518, 228 N. W. 895 (1930), 905.
\(^{32}\) *State v. Kohler*, 912.
of the people in the electoral process, but also to establish certain norms of behavior for the citizens, candidates, and parties. Of especial importance were the provisions of the statute that enabled the citizens to make rational and disinterested decisions based upon the principles and merits of the candidates by removing all incentives for them to act on partisan or selfish motives. The law was also designed, according to the court, to ensure that those candidates who were chosen to represent the people would be loyal to them rather than to the parties or their financial backers. Although not all state courts may have been as heavily influenced by Progressivism as the Wisconsin Supreme Court, they all generally accepted the argument advanced by the reform liberals in the state legislatures that the purpose of corrupt practices acts was to minimize the role of money and other negative influences in elections to ensure that the majority of the people would be able to express their will through the ballot and have that will acted upon by their representatives.33

Aside from technical challenges relating to how the corrupt practices acts had been drafted or were to be applied in practice, probably the most common charge leveled against them was that they violated the

constitutional rights of the citizens, parties, and candidates to freedom of speech and of the press. These arguments were presented at a time when judges at both the federal and state levels with few exceptions were hostile to any claims concerning these rights, and even at times ignored such challenges. When they did respond to them, many judges relied upon Sir William Blackstone’s bad tendency test to determine the validity of the law in question. As noted in chapter one, it held that while the right of free speech could not be subject to prior restraints, the state could punish anyone who abused this liberty in such a manner as to threaten or to harm the public welfare. Regardless of the approach taken by the courts in addressing claims pertaining to these liberties, their opinions were generally characterized by a lack of any effort to explain how they reached their conclusions or to develop guidelines to determine what constituted speech and when it was lawful or unlawful.34

The lack of a well-developed jurisprudence pertaining to freedom of speech and of the press to guide the thinking of the state courts was reflected in the diverse, and often ill-explained, conclusions which state judges in the late nineteenth and early twentieth centuries reached about whether the corrupt practices acts violated these fundamental rights. Some courts, like that of Wisconsin in *State v. Kohler*, upheld the authority of the legislature to impose restrictions on the use of these liberties.

A full exercise of the right of citizenship includes, not only the right to vote, but the right to assemble, the right of free speech, the right to present one’s views to one’s own fellow citizens, and the right to submit one’s claims to leadership to the people. These rights are of the very es-

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sence of democracy. When a citizen declares himself to be a candidate for public office, he does not forfeit these rights. He is in the interest of the public welfare, however, in the exercise of these rights, subject to restraint by reasonable regulation.35

And similarly Judge Siebecker in his dissenting opinion in State v. Pierce (1916) said:

Where the abuse of the purity of elections begins, through whatever means it be accomplished, liberty of speech and press must end, for without such a check this right could be made an effective instrument of mischief. The Corrupt Practices Act [sic] was framed to guard against such mischiefs, and the Legislature found its provisions appropriate and necessary to check existing evils, which threatened the rights and privileges of the elective franchise. In light of the public evils and the pernicious influences on voters in elections, which flow from the lavish expenditure of money, there is much justice and sound public policy in legislative restrictions imposed on persons by the Corrupt Practices Act.36

The judges who adopted this point of view seemed to have believed that the corrupt practice acts served the public interest in preserving the morality of the citizens by preventing them from acting on improper motives in making decisions, and the welfare of the republic by preventing the excessive use of money from debauching the electoral process. Thus, they ruled these statutes were reasonable regulations that were designed to stop citizens, candidates, and parties from abusing their liberties, and did not destroy them as they still left them the freedom to promulgate their views within the boundaries established by the state legislatures.37

In reaching their conclusions, these judges were perhaps influenced not only by the reasoning of the reform liberals in regard to the necessity of

35 State v. Kohler, 913.
36 State v. Pierce, 700.
establishing standards of conduct in the electoral process, but also perhaps the bad tendency test.

Other state courts, however, argued that some provisions of the corrupt practices acts despite their meritorious purposes were unconstitutional as they destroyed the citizens’ rights of freedom of speech and of the press. Examples of such rulings include: *Louthan v. The Commonwealth* in which the court ruled that a law prohibiting certain kinds of public servants from participating in elections violated their right to freedom of speech, of the press, and of association; *Ex parte Harrison* in which the judges struck down a law requiring civil leagues or their members to meet stringent requirements before reporting their findings to the public concerning candidates for office; and *State v. Junkin*, a case concerning Nebraska’s nonpartisan judiciary act in which the provision that prohibited political parties or conventions from criticizing judicial and educational candidates in the primary elections was declared unconstitutional on the grounds that it denied the citizens the opportunity to jointly exercise their right to freedom of speech.\(^{38}\) In short, in all these cases state judges found that the legislature had completely silenced the voice of certain groups of citizens rather than merely regulating their right to participate by placing reasonable restrictions upon their activities. Whether the extreme provisions of the corrupt practices acts discussed in these cases were typical of the statutes of this era or not is unclear as it was not possible to conduct an extensive survey of the provi-

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sions of state corrupt practices acts (all the available sources discussed them in very broad terms).

Perhaps the most egregious example of a legislative effort to silence citizens in elections was the case of State v. Pierce (1916) that arose in Wisconsin when a private citizen spent money to investigate political affairs outside of his own county and to communicate those findings to his fellow voters for the purpose of influencing their opinions on referendum questions in the upcoming election. This contravened a provision of the state’s corrupt practices act that prohibited such activities by citizens unless they conducted them as members of a party or candidate’s campaign committee or as speakers at a public meeting, i.e. an event that did not involve the expenditure of money.39

In his brief for the state, the attorney general rejected the contention that this statute violated the right of the citizens’ to freedom of speech and of the press guaranteed by the state constitution. It was, in his view, a perfectly valid enactment of the legislature that reflected its best judgment as to what was required to preserve the purity of the ballot. “A provision of the constitution securing freedom of speech should not be so construed as to strip the state of the power to protect itself through its most sacred institution—a pure and undefiled election where sober, honest judgment shall be recorded uninfluenced by improper consideration, secret influences, and one-sided presentation.”40 The law accomplished this latter objective by preventing individuals who ostenta-

39 Brief for Plaintiff in Error in the case of State v. Pierce, 163 Wis. 615, 158 N. W. 696 (1916), 3-9.
40 Appellant’s Reply Brief in the case of State v. Pierce, 163 Wis. 615, 158 N. W. 696 (1916), 10.
tiously appeared to be exercising their rights to freedom of speech and of
the press, but in reality were the servants of the corporations or other
moneyed interests, from using large, secret slush funds provided by
these organizations and other tactics to corrupt the electoral process in
such a manner as to prevent the selection of worthy representatives. Fur-
thermore, the attorney general believed that the law did not interfere or
prohibit the exercise of the citizens’ rights to freedom of speech and of
the press. It merely stipulated the conditions under which individuals
who wished to express their views in the course of an election could ex-
ercise their fundamental liberty to do so.41

While Pierce’s lawyers agreed with the attorney general that the
state legislature had the power to enact laws to prevent corruption in
elections, they believed that it had exceeded its authority in passing the
 provision of the statute in question by criminalizing activities that were
widely recognized as appropriate and essential ones under a republican
form of government.

The trouble with the state’s contention is that it assumes that all acts and
things which influence voting at an election are inherently bad, although it must
be admitted that the most potent influences, those which operate upon intelli-
gence and judgment, are not, and in the nature of things cannot in a govern-
ment like ours, be either wholly bad, or partly bad, for anything which appeals
to reason or judgment, or which increases one’s knowledge of government, the
doings of public servants, the fitness of candidates for office, cannot be bad, and
should not be outlawed, even though occasional instances of abuse may be
found.42

The restrictions imposed on the ability of the citizens to engage in activi-
ties to influence the “intelligence and judgment” of fellow voters were so
broad, according to Pierce’s lawyers, that they encompassed virtually any

41 Brief for the Plaintiff in Error, 13-19, 26-29; Appellant’s Reply Brief, 8
42 Brief of Respondent in the case of State v. Pierce, 163 Wis. 615, 158 N. W. 696
(1916), 33-34.
action a person might take to influence political affairs. Even buying a
postage stamp to mail a letter to an individual residing in another county
declaring their political views might cause a citizen to run afoul of the
law! Such an act, they therefore argued, must be unconstitutional. It not
only prevented citizens from using their rights to freedom of speech and
of the press to gather and disseminate the information required for them
to vote appropriately on men and measures, but also prohibited them
from using these liberties to ensure the protection of their other civil and
political liberties.43

In deciding this case, the Wisconsin Supreme Court took the ex-
traordinarily step of ruling that the provision of the law was void not
based upon principles of common law doctrine, but rather on constitu-
tional ones as it violated the provision of state constitution’s Bill of
Rights guaranteeing freedom of speech and of the press.

If this is not an abridgment of freedom of speech, it would be difficult to
imagine what would be. Under such a law no pioneer in any reformer
which depends for its success on a change in the law could leave his own
county and communicate his sentiments at his own expense to his fellow
citizens of other counties without committing a crime. Under such laws
no great propaganda for better laws and better political conditions which
has not been formally taken up by a political party can be carried on . . .
Almost every step forward in political and governmental affairs comes as
a result of long agitation and discussion in the press, on the rostrum,
and in the open forum of personal contact . . . for years before the idea is
formally indorsed [sic] by any party.44

And later in the same opinion the court added:

We are by no means unmindful of the high and admirable purpose which
inspired the authors of the Corrupt Practices Act [sic]. There is no mem-
ber of this bench who is not in the fullest sympathy with any legislation

43 Brief of Defendant in the case of State v. Pierce, 163 Wis. 615, 158 N. W. 696 (1916),
5-8, 11, 15-37; Brief of Respondent, 5-12, 14-17, 23-24, 32-33, 38-42; Brief for
Defendant in the case of State v. Pierce, 163 Wis. 615, 158 N. W. 696 (1916), 5-9, 12-20,
44 State v. Pierce (opinion of the court),, 698.
which will tend to reduce to an absolute minimum the danger of corruption and coercion during political campaigns, but when such a law goes beyond regulation, and absolutely prohibits that which the [state] Constitution expressly protects, the court can do nothing but say so.45

These judges contrary to their brethren in other cases believed that the restrictions the corrupt practices act placed on the liberties of the citizens by the state legislature could not be upheld on the grounds that it was merely seeking to prevent the abuse of the people’s right to engage in political discussion. For the court, this statute imposed a total prohibition rather than a partial one on fundamental freedoms that were not only essential to democratic government, but also were guaranteed by the Bill of Rights found in the state constitution. There was no question for the court that the legislature had transgressed boundaries placed on its authority by the state constitution, and that the law, or rather a specific portion of it, was null and void.46

Thus, the state courts seem to have viewed the corrupt practices acts as political laws, not economic ones, that were designed to correct abuses in the electoral process that were undermining the republic itself. As with statutes pertaining to primary elections, the central constitutional question that the courts had to address was the extent of the legislature’s power to regulate the electoral process, or more specifically whether corrupt practices acts infringed upon the rights of the citizens, parties, and candidates to freedom of speech and of the press. State courts with a few exceptions again showed great deference to the judgment of the state legislatures as it was considered their prerogative in

45 State v. Pierce, 698.
this era to define how best to protect, or give meaning to, the rights of the citizens. Campaign finance laws were viewed by the courts as providing an answer to this question so far as it pertained to the fundamental right of the citizens to consent to their government. They were designed to make this possible by ensuring that the liberties of freedom of speech, of the press, and of association were used properly, and that citizens were not prevented from using them through corruption or improper campaign practices.

**Political & Educational Activities of Corporations & Labor Unions**

Even before the adoption of laws by the state legislatures prohibiting contributions from corporations, a few courts in the early twentieth century were already using general corporate law to declare such gifts to be *ultra vires*, i.e. an activity not authorized by the company charter. While the courts believed these gifts were illegal and morally repugnant, they noted that the corporations could not be subjected to criminal prosecutions as they had violated no state law. However, the companies had committed a private wrong by depriving the shareholders of their property without their consent, and this meant according to the judges that they had the right to initiate private civil actions against the directors and officers of the company to recover their property.47

Following the passage in the early twentieth century of laws explicitly prohibiting corporations to give money to parties and to candidates,

there were few challenges to these statutes that would have permitted the state courts to construe their validity and their purposes. Although there is no discussion in the literature of why corporations chose not to contest these bans, four reasons suggest themselves. First, they may have considered these statutes as a means of avoiding a shakedown for political money by party bosses. Second, they could easily circumvent the prohibition by having individuals affiliated with them make substantial contributions on behalf of their interests. Third, they might have believed that such challenges would only intensify the public hostility toward them, which had developed partially in response to allegations that they were using money to corrupt the electoral and the political process. And fourth, rulings such as that of the court in *Gansley* may have discouraged such challenges as they made clear that judges were unwilling to protect their rights. Later in the twentieth century, labor unions also rarely challenged state laws restricting the use of their money in political campaigns probably because not many legislatures chose to enact such bans. This may have stemmed from the fact that there was less pressure on them to address this issue than there had been in the early twentieth century in regard to corporations when evidence emerged of how they were using money to corrupt the electoral process. Thus, state constitutional law in regard to the rights of corporations and labor unions to participate in the electoral process was not well-developed in this era.

Generally, state judges were willing as with other kinds of electoral laws to defer to the state legislatures, and uphold the ban on the use of corporate, and later labor union, gifts as an appropriate exercise of the state’s police power to ensure the integrity of the electoral process. “It was for the Legislature [*sic*] to say, in the exercise of the police power,
whether such use of corporate funds opened the door to corruption and tended to destroy safeguards placed around elections to ‘protect the purity of the ballot.’” The courts further argued that these laws affected only the organization itself, and not the individual members who composed them. As citizens, they retained their rights to speak and to publish their sentiments on any subject or to make contributions to the parties and the candidates for the purpose of influencing the electoral process.

As the twentieth century progressed the central question for the state courts in regard to these laws became not their propriety, but rather the extent to which the ban on corporate gifts applied to non-profit corporations. Generally, the judges held that these laws prohibited them from making direct contributions to parties and candidates, but allowed them to make expenditures to educate voters or their own members about the issues or merits of the candidates. The reasoning behind this position was perhaps best expressed by the Minnesota Supreme Court in the case of *La Belle v. Hennepin County Bar Association* (1939), which involved the question of whether a bar association could make expenditures in judicial elections to promote particular candidates.

This statute is aimed at the evils of excessive expenditures for campaign purposes by political parties . . . and seeks to prevent such evils by pro-

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48 *People v. Gansley* (opinion of the court), 376.  
hibiting the acquisition of campaign funds or ‘war chests’ to be so expended. The words ‘pay’ and ‘contribute’ imply . . . the transfer, giving, and delivery of money, property, or services. Defendant does not turn over any money or property nor does it furnish any free service to any candidate. It expends the money itself in payment of expense incident to one of its authorized activities. The money is not expended on behalf of any candidate . . . But, says the plaintiff, the giving of a vote of preference is in itself a thing of value. That may be true for it is certainly sought after by candidates. It is not, however, a thing of value within the meaning of the statute which relates only to things which have a value measurable in money.50

The state judges seem to have believed that the objective of the legislature had been to prevent corporations, and possibly labor unions, from using money to influence the political process by making direct gifts to the parties and the candidates. In their opinion, this was the source of electoral corruption as it allowed the corporations to buy special privileges, and the parties and the candidate to build massive war chests to be used for the purpose of buying votes and engaging in other pernicious practices. Indirect support through educational efforts, however, was not necessarily corrupting as the candidates and the parties merely received intangible benefits from corporations and labor unions who were required to report these expenditures.51

These state court decisions pertaining to the rights of corporations and labor unions to participate in the electoral process raise the question of whether the decision in Gansley was an aberration or the norm. The evidence available suggests that it was the latter. The position of the courts was generally to defer to the judgment of the state legislatures by

50 La Belle v. Hennepin County Bar Association, 298-299.
granting them the authority to correct abuses in the electoral process related to the excessive use of money by these organizations through whatever means they deemed necessary. In the case discussed above, the court found that the legislature had sought to ban only for-profit corporations from participating in elections, and refused to extend that ban to non-profit ones as that was the duty of the legislature. Hence had a state legislature prohibited all types of corporations from participating in the electoral process, it is likely that the state court would have upheld this as a legitimate act even if it interfered with the corporation’s rights. They would have arguably understood the law as reflecting the judgment of the people’s representatives as to what was required to allow the citizens to meaningfully exercise their electoral liberties.

Public Funding

In 1909, Colorado became the only state in the early twentieth century to adopt a law providing for the public funding of state general election campaigns, which represented an extreme reaction to the problem of money in politics as it seems to been designed to eliminate all private funds in electoral contests. This relatively unknown statute both at the time it was passed and today gave the political parties a sum from the public treasury equal to twenty-five cents for each vote cast for the party’s candidate for governor in the last election. Furthermore, it prohibited them from raising or using any additional monies from private sources; required them to give a strict accounting of how the campaign funds were spent; and stipulated that at least half of the money provided to them by the state had be to given to the various party county commit-
tees to support their campaigns. The law also prohibited candidates from spending more than forty percent of the salary of the office they sought on their campaigns. What is not clear, however, is where they would get that money as the statute strictly prohibited corporations and *individuals* from making any contributions to candidates in the general election. This suggests that candidates would either have to be wealthy enough to run their own campaigns, raise all their money in the primary election stage, or rely on the political parties for their funds. Finally, the law prohibited any organizations with the exception of parties and candidates from spending money in political campaigns.\(^{52}\)

Following the nomination of its candidates for the state general election in 1910, the Democratic Party sought to collect from the state government the public money it had been promised under the statute to run its campaign. However, the state officials responsible for dispersing the funds refused to release the money since they believed the law to be unconstitutional. The Democrats then proceeded to file a suit in September of 1910 with the state supreme court asking it to compel the state treasurer to give them the money they were lawfully entitled to receive. Roughly one month later, the court held the public funding statute to be unconstitutional, but “unfortunately handed down no written opinion, and the arguments controlling its decisions are not on record.”\(^{53}\) An understanding of the issues involved in this case therefore requires an ex-

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\(^{53}\) Overacker, 363.
amination of the briefs, which are remarkably short. This is probably due to the limited time that the parties involved in this case had to prepare them which prevented the development of extensive arguments as well as the novelty of the law in question.54

The two briefs supporting the validity of the statute, those of the attorney general and of the lawyers representing the Democratic Party, largely focused upon technical constitutional questions, especially the issue of whether the state legislature had the power to pass such a law in the first place. Both briefs argued that there was nothing in the state constitution that prohibited the legislature from enacting such a statute, or from authorizing the expenditure of public money for such a purpose. They also believed that the title of the act was not defective, i.e. it properly specified the contents of the law, and that it was not class legislation prohibited by the state constitution. In support of the latter point, they noted that there was no provision in the statute, which would prohibit a new party from qualifying for public funding after the first election in which it ran a candidate for governor. An additional issue addressed by the attorney general pertained to whether the state officials had standing to challenge the statute. He cited the established principle of constitutional law that “only those persons whose rights are directly affected by an act, and who have therefore some right to, or interest in, the defeat of the same, can question its constitutionality.”55 As the state officials’ rights were not affected by the statute, they could not challenge the law.

54 Brief for Relator in the case of People v. Galligan, case number 7323 original proceeding in mandamus (1910), 2; Brief of Respondents on Demurrer to Petition, in the case of People v. Galligan, case number 7323 original proceeding in mandamus (1910), 1-2, 4; Brief of Amici Curiae, 2.
55 Brief of Respondents, 2.
on the ground that it violated the fundamental liberties of the citizens. They were required to limit their challenge to the question of whether the legislature had the authority to make such an appropriation.56

It was precisely that question, whether the statute violated the fundamental rights of people, that was the focus of the *amici curiae* brief written by four individuals: Charles S. Thomas, John A. Rush, Gail Laughlin, and Harry B. Tedrow. Unfortunately, it was not possible to determine who they were and their precise connection to this case. For them, the “chief vice” of the law was its third section that crushed the “free thought and independence” of the citizens by preventing them from forming new parties through its prohibition on individual gifts to candidates and other organizations. “This law might well be termed an act to perpetuate old political parties and prevent the formation of new ones. A new party may not even initiate a campaign and nominate a governor in order to qualify itself for state funds without the commission of penitentiary offenses by those, not candidates, who defray the expenses thereof.”57 Rather than weakening parties as electoral laws throughout the nation were doing, they believed the public funding act would strengthen them by making them no longer reliant on the financial or political support of the people for their continued existence. Parties would be able to preserve themselves regardless of the merits of the principles they put forth so long as their candidates were sufficiently popular to garner a large percentage of the vote. Based on this understanding of the consequences of the law, the *amici curiae* also contended,

56 *Brief of Respondents*, 1-5; *Brief of Relator*, 3-14; Overacker, 363-364.
although with little explanation, that it deprived citizens of their right to constitute their government as they saw fit by placing them in the “servitude of partisanship;” that it violated their right to a free and open election; and that it deprived them of their right to freedom of speech by prohibiting them from using their money to indirectly speak through state party committees.\(^{58}\)

The briefs therefore suggest that the primary issue in this case was not the authority of the legislature to pass such a statute to correct the grave evils that had arisen from the abuses connected to campaign funds. Even the *amici curiae* suggest that such a law might be constitutional if written differently. “It is not necessary in the particular instance for this court to determine the constitutionality of a law bestowing funds upon *all* political parties, regardless of size, age, or name. Such a law would demand greater scrutiny than this one.”\(^ {59}\) Louise Overacker has argued that the decision to strike down the law was probably based upon the fact that it was poorly drafted.\(^ {60}\) While certainly a plausible explanation, it is also possible based on the analysis presented above that the court chose to void the law because it interfered far too much with the most basic liberties of the citizens. As seen with the corrupt practices acts, some courts were willing to question legislative judgments in regard to electoral laws when they believed they were destructive, rather than regulative of the rights of the citizens, as this statute potentially was through its very broad ban on electoral activities. What can be said for certain is that the problem with the Colorado public funding law in the

\(^{58}\) *Brief of Amici Curiae*, 2-10; *Brief of Relator*, 6; Overacker, 363-365.  
\(^{60}\) Overacker, 365.
court’s view was probably not with the legislature’s desire to correct the evils of money in elections to protect the fundamental liberties of the citizens, but rather with the draconian measure it adopted to accomplish this objective.

**Conclusion**

At the same time as the state legislatures began to assert greater authority over the electoral process in the late nineteenth and early twentieth centuries, the state courts were called upon to construe the validity of the new campaign finance laws. Based upon the view of the courts in this era that predominates in today’s literature, one would have expected them to be major obstacles to these reforms since the statutes in question directly affected property in the form of money and the power of private organizations to control their internal affairs.

Yet, precisely the opposite happened. State judges proved to be very supportive of the efforts of the state legislatures to build a more powerful administrative state that had the capacity in the view of the reform liberals to preserve the fundamental right of the citizens to consent to their government by ensuring the integrity of the electoral process. Using the doctrine of the police power, the courts granted the state legislatures broad authority to regulate the conduct of the parties, candidates, and citizens in elections. The only limitation at times placed upon this power was that the state legislatures could not destroy those liberties central to their participation in the electoral process through the statutes it passed to prevent them from being abused. What constituted a law that was destructive rather than regulative of these rights was
often the most significant source of disagreement among the state courts, especially in cases pertaining to corrupt practices acts and the right to freedom of speech. However, no court seems to have attempted to systematically address this issue or develop a jurisprudence to govern its decisions. This resulted in a diverse array of opinions and reasons for sustaining or voiding these first campaign finance statutes that were united only by the common willingness of the judges to defer to arguments advanced by the state legislatures to support these statues based upon the principles and ideas of the reform liberals.

Considered from the standpoint of the late nineteenth and early twentieth centuries, however, the support given by the state judges to the legislative effort to redefine the meaning of the people’s liberties was not unexpected. Both of these institutions, which together were the primary guardians of the citizens’ rights in this era, were arguably significantly influenced by the arguments of the reform liberals in favor of these extraordinary new laws. The reformers framed the issue of money in elections as a question pertaining not to property, but rather political morality, or the necessity of establishing a code of proper conduct in elections to ensure government by consent. This belief is reflected in the opinions of the state judges who repeatedly emphasized the arguments advanced by the state legislators that it was the pernicious influence of money, party leaders, and organized interests that was corrupting the republic by destroying the civic virtue and political morality of the citizens, and more importantly preventing the free expression of their will. The state courts and legislators, like the reform liberals, seemed to believe that the citizens had the virtue and morality required for self-government, and would resume their civic duties if the electoral process was cleansed of
these corrupting influences. And that this in turn would restore the American republic by allowing a public-spirited citizenry to properly use their electoral rights to make independent decisions based upon patriotism, the issues and the principles of the day, and the merit and worth of the candidates in selecting their representatives.

The longevity of the doctrines developed by the state courts to govern their rulings in regard to electoral laws was not only due to the influence of the reform liberals understanding of what was required to implement the principles of republican liberalism upon the state judges, and their willingness to defer to the opinion of the state legislators regarding the necessity of these laws. Equally important probably was the large gap of time that occurred between this first wave of campaign finance legislation and judicial construction of it, which lasted roughly from 1890 to 1920, and the next wave in the 1970s. During the middle period, there were extraordinarily few court cases pertaining to electoral law that were brought before the state or federal courts. Why is not clear, but perhaps it was because many had come to accept the answers given by the courts and the legislatures to the fundamental questions pertaining to rights and to republican government raised by these statutes. It was only after the Watergate scandal raised renewed questions about the role of money in politics that the courts and the legislatures would be forced to re-evaluate their long established beliefs in regard to the regulation of the electoral system; a process that occurred in a polity that had undergone significant transformations, including a constitutional one, since the early twentieth century.
4 The Supreme Court and the Renaissance of Pluralist Liberalism

For almost a century, the established doctrine of the state courts was that the regulation of the use of money in elections was a reasonable exercise of the state legislature’s police power, which served the public interest in honest and fair elections that reflected the free and independent will of the people. This tenet of state constitutional law and the arguments grounded in the reform liberal tradition that had been used to justify it along with the deference that had earlier been shown to the judgment of the state legislatures, however, was suddenly repudiated in the early 1970s. In its place, a new doctrine was developed, which drawing on the pluralist liberal tradition, emphasized the necessity of constraining the power of the state governments to intervene in the electoral process. For the state courts, this meant more rigorously enforcing those provisions of the federal and state bills of rights that were essential to the ability of the citizens, parties, candidates, and others to freely participate in the electoral process by questioning the arguments advanced by state governments concerning the necessity of campaign finance regulations.

What caused this revolutionary shift in the judicial philosophy of the state courts was not changes in the attitudes of the reformers toward money. Throughout the twentieth century they continued to view strict limitations and controls on the use of campaign funds that would function as a code of conduct to guide the actions of the citizens in the electoral process as vital to preventing the corruption of the republic. Nor was it due to efforts by the state judges to revise their established constitutional doctrines. Rather, it arguably reflected the growing influence of
the federal courts’ free speech jurisprudence upon state judges, especially that of the Supreme Court, as they replaced the state legislatures and courts as the primary guardians of the people’s liberties. That jurisprudence had its origins in the constitutional revolution of 1937, which redefined the Court’s focus in the electoral arena from questions pertaining to state power, particularly those dealing with federalism and race, to those concerned with freedom of speech and its relation to campaign activities.

**From Legislative Deference to Constitutional Rights**

Starting in the early 1970s, even before the United States Supreme Court’s decision in *Buckley v. Valeo* in 1976, the state courts became much less supportive of legislative attempts to impose broad limitations upon the use of money in elections. Such laws, many judges began to argue in cases like *Fortson v. Weeks* and *Bare v. Gorton*, were of questionable validity as they prevented citizens from exercising the rights to freedom of speech, of the press, and of association guaranteed by both the states’ bills of rights and the First Amendment to the federal constitution that were critical to the functioning of the electoral process. This new position was exemplified by the Oregon Supreme Court in the case of *Deras v. Meyers* (1975) in which the constitutionality of the provision of the state’s then new corrupt practices act that limited contributions and expenditures by citizens, parties, and candidates was challenged on the grounds that it violated these critical liberties.

Conceding for the purposes of this case that limitation and control of campaign expenditures is of great importance in the catalogue of our social and political needs, the good it proposes to accomplish must be weighed against the danger which it generates in restraining our citizens
from freely expressing their views on candidates for public office. In weighing these competing interests, one must recognize the importance of the electorate’s liberties of expression of opinion and assembly in the overall system of government established by our state and federal constitutions. These rights have been termed the cornerstone of our democracy and so important as to require breathing space and protection even from the chilling effect of overbroad and ambiguous statutory restrictions.¹

Drawing not only on state constitutional law but also to an unprecedented extent on federal case law and the national Constitution, the state courts established a new rule of judicial construction that required all campaign finance statutes to be henceforth subject to strict scrutiny to ensure that the state legislatures did not use their broad powers to destroy those freedoms that were essential to the democratic process. Only those laws whose provisions were narrowly drawn to target a specific evil, a particular form of corruption rather than the use of money in elections generally, and used the least restrictive means possible to achieve the state’s compelling interest in maintaining a free and honest electoral process would be upheld.²

In construing the first wave of campaign finance legislation in the late nineteenth and early twentieth centuries, the state judges had willingly accepted the arguments of the reform liberals that restrictions, such as those found in the Oregon corrupt practices acts of the 1970s, were necessary to correct abuses in the electoral system that were preventing the citizens from being able to “freely” express their will and therefore consent to their government. They rejected constitutional chal-

¹ Deras v. Meyers, 272 Or. 47, 535 P. 2d 541 (1975), 55.
lenges to these statutes, and deferred to the wisdom of the state legislatures in granting them authority to establish a moral code of conduct in elections to ensure that the people made the right choices, and were truly in control of their parties and leaders.

However, as the state courts examined the validity of the statutes that were passed as part of the second great wave of campaign finance legislation in the wake of the Watergate scandal, they repudiated their previous understanding of campaign finance laws. In its place, state judges developed a new conception of these statutes, based arguably in part upon the pluralist liberalism tradition, that portrayed them as a potential threat to the ability of the people to “freely” express their preferences by expanding the power of government over elections, and restricting the use of those fundamental freedoms that allowed them to participate in politics. Thus, the jurisprudence of the state courts in the latter part of the twentieth century came to focus upon using constitutional rights to restrict the power of the states to regulate money in politics; rather than as in the past recognizing their broad authority under common law doctrines to enact such statutes to preserve the moral welfare of the community.

Even as the jurisprudence of the state courts, and as will be seen later in this chapter the federal ones as well, was undergoing this transformation, the reformers of the latter half of the twentieth century continued to believe that restrictions on the use of money in elections were vital to ensuring the purity of the electoral process and giving the people the freedom to choose their leaders.
The Reformers of the Latter Part of the Twentieth Century

As the Progressive movement, and more generally the reform impulse of the late nineteenth and early twentieth centuries, waned starting in the 1920s, so did much of the force that had driven the early efforts to regulate the use of money in politics. Between the passage of the first great wave of campaign finance legislation described in chapter two and the start of the next one in the 1970s, there would be no reform movement or coalition of individuals, such as the Mugwumps or the Progressives, that actively pursued new electoral reforms. Rather, this middle era, dating roughly from the 1920s to the 1960s, would be characterized by sporadic efforts by members of Congress to change the regulatory system usually in response to what they perceived to be evidence of the pernicious influence of money on the freedom of the people to make “rational” and “untainted” decisions in elections. It was only towards the end of this era that a new and diverse coalition of reformers emerged to not only actively lobby for changes in the election system as the Progressives and other reform liberals had done in the late nineteenth and early twentieth centuries, but to also put forth a new understanding of corruption and its effect on government by consent.

The first scandal that prompted Congressional action to enact new controls on the use of campaign funds arose in the early 1920s when Harry Sinclair and his partners bribed Secretary of the Interior Albert Fall to attain a lease on the federal naval oil reserve known as Teapot Dome. Subsequently as revelations of this deal emerged, Sinclair made a substantial contribution of at least $160,000 (about $1.1 million in 1996 dollars) to the Republican National Committee (RNC) to help it pay off
debts from the 1920 presidential election. Even though the federal Publicity Act of 1911 did not require post-election gifts to be reported, the Republicans still went to great lengths to hide this donation by dividing it among multiple contributors. When the extent of Sinclair’s largesse and the efforts of the RNC to disguise it were revealed by a Congressional investigating committee, many assumed that Sinclair had sought to buy protection for himself from further investigation and potential prosecution through his generous gift to the ruling party. “[T]he extraordinary sum yielded up at that critical time by Sinclair was not altogether voluntarily donated, and that either hope or fear, if not gratitude, simulated his generosity and accentuated his devotion to the principles of the Republican Party. In the predicament in which he found himself at that juncture he stood in dire need of friends at court.”3 Members of Congress, such as Senators William Borah (R-ID), Gerald Nye (R-ND), and Kenneth McKellar (D-TN) whose views of money in elections had been influenced by the Progressives, criticized this sordid bargain as yet another example of how secret campaign contributions, and money more generally, corrupted the electoral process by allowing donors to buy favors from the government.4

And as it was precisely those types of deals that the corrupt practices and publicity acts had been designed to eliminate, the Teapot Dome scandal indicated the need to tighten the restrictions on the use of

3 Quoted in Louise Overacker, Money in Elections (New York: Arno Press, 1974), 188.
money in elections. Led by Senator Borah and Representative John Cable (R-OH), Congress eventually responded to this event by passing the Federal Corrupt Practices Act (FCPA) of 1925, which largely served to codify all the piecemeal campaign finance statutes that had been passed earlier in the twentieth century, and to make a few adjustments to the regulatory regime. The most significant was that the parties were now required to report their receipts and expenditures in both election and non-election years. Through continuous publicity, the proponents of regulation believed it would be possible to once and for all eliminate large, corrupting gifts by threatening the party that accepted them not only with legal sanctions, but also the possibility that the people would punish them at the ballot box.5

The next threat to the integrity of the electoral process that drew the attention of federal legislators, especially conservative ones like Senator Robert Taft (R-OH), was the emergence of a “new” special interest group, labor unions. Starting in the late 1930s and early 1940s, unions began to make substantial direct contributions to the parties and candidates, especially the Democrats, and to finance other electoral activities, such as voter registration drives. As early as 1937, the Longeran Committee, which the Senate had charged with investigating the expenses of the 1936 presidential campaign, recommended that labor union contri-

butions to candidates and parties be prohibited in federal elections. For the committee and other Congressional proponents of such a measure, these contributions, like corporate ones in the early twentieth century, were corrupting and immoral as they allowed labor unions to “buy” legislators and favorable policies, and forced dues paying union members to support candidates and parties they opposed. Congress would eventually act on this recommendation by passing in 1947 the Taft-Hartley Act to extend the ban on corporate campaign gifts in federal elections to labor unions.6

The events surrounding the passage of the only other significant campaign finance statute prior to the 1960s, the second Hatch Act of 1940, suggest that it was perhaps an exception to the usual pattern of this era in which scandal proceeded reform. Originally, the statute was designed to extend the provisions of the Hatch Act of 1939, which prohibited political activities by all federal employees not covered by the Pendleton Act, to state and local officials who served in governmental departments that received federal money. In an effort to prevent the passage of the law, opponents in the Senate and the House added in the course of the debate over the bill two poison pills that they believed

would kill it by dividing its supporters. These were amendments to the FCPA that would limit the receipts and expenditures of political committees to $3 million and individual gifts to $5,000 per calendar year. State and local committees were exempted from these limitations. To their surprise, these amendments were accepted by other members of Congress with virtually no debate, and became part of the final version of the bill signed by President Roosevelt.7

These new restrictions on the use of campaign funds, however, were quickly rendered ineffective by the parties, candidates, and others who circumvented them by interpreting them not as aggregate limits as Congress had probably intended, but rather ones that applied to each individual committee. This led to the decentralization of the process of raising and spending money among dozens, even hundreds of committees, to meet the skyrocketing costs of campaigns in the 1950s and 1960s as television and other innovations became integral parts of political campaigns. Thus rather than preventing the corruption of the electoral process, the new statute actually encouraged it by rendering the publicity requirements of the FCPA useless, and making concealment of campaign funds and evasion of the rules an accepted practice. By the end of the 1960s, the campaign finance regulatory regime would be aptly described by President Johnson as “more loophole than law.”8

Faced with the growing ineffectiveness of the statutes governing the use of money in elections and evidence of its corrupting influence on

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the political process, members of Congress, presidents, policy experts, the media, and public interest groups began to lobby more extensively for more comprehensive reforms starting in the 1960s. Although they too drew on the reform liberalism tradition in developing their policy recommendations, they viewed money as perpetuating a different kind of corruption than the liberal reformers of the late nineteenth and first half of the twentieth centuries. The latter emphasized its detrimental effect on the ability of the citizens to make proper decisions by encouraging them to act on selfish motives, such as partisanship, in deciding who their representatives would be. While the new reform liberals, like the Populists earlier in the nineteenth century, were concerned with how the rising costs of campaigns were corrupting the electoral process by allowing those with the economic resources required to participate, the wealthy and organized interests, to have greater influence than the citizens who the government was supposed to represent.

I am not, of course, merely concerned because campaigns cost so much money. I am concerned about the vast majority of big donors who want something in return for their money which has necessarily financed a major part of a campaign of this proportion—contacts, jobs, loans, privileges, legislation, and so on. I am concerned about able men who either have no money of their own or cannot raise any appreciable amount from friends and supporters. Such men, despite their virtues, generally do not get selected as candidates for high office, or if nominated find themselves almost hopelessly handicapped in the race for election. I am concerned about the party which lacks money to buy radio and television time, print literature, put up billboards, or hire precinct workers. However, excellent may be its cause or its candidates, its inability to reach voters in these ways may insure its defeat.9

In their view, the extravagant amount of money required for modern campaigns to pay for television ads and the use of other innovations vio-

lated the fundamental tenet of republican liberalism that government had to be based upon the consent of the people in two ways. First, it prevented all citizens from participating equally in the electoral process, or even worse excluded some groups altogether, and hence made impossible a debate over the issues that considered all points of view. Only the unrepresentative views of those with money, i.e. the campaign contributors, were heard. Secondly, the people were denied the opportunity to consider the claims of all candidates for office as some individuals were “priced out” of the system. Those that did run represented in the view of the reformers not necessarily the interests of the people, but those of their wealthy supporters. Thus, there was a fear that the government was becoming one not of the people, but rather one of the wealthy and organized interests.10

Before the 1970s, Congress made few attempts to address this perceived corruption of the electoral process. The most notable was Senator Russell Long’s (D-LA) effort to revive the idea first proposed by President Roosevelt in 1905 that the federal government should subsidize either directly or indirectly political campaigns in order to equalize the resources and opportunities available to the candidates, citizens, and parties. Such a measure would have had the additional benefit of eliminating, or greatly reducing, the large gifts required to finance political campaigns that were unduly influencing the decisions of the citizens and those of their representatives. Although Senator Long managed to force Congress to pass a law providing for the public funding of presidential campaigns in 1966, it was repealed before it could take effect.\(^\text{11}\)

The executive branch sought to contribute to the debate over how to address the growing problem of money in elections through President Kennedy’s Commission on Campaign Costs. Under the guidance of two leading scholars in this policy area, Alexander Heard and Herbert Alexander, it was directed to investigate how to improve the financing of presidential campaigns. Among the commission’s suggestions were: the implementation of tax incentives to encourage small gifts and reduce reliance on large donors; the creation of an effective publicity regime run by an independent commission; the repeal of the existing limitations on contributions and expenditures; and the strict enforcement of existing laws. None of these recommendations were acted upon by Congress, and

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\(^{11}\) Zelizer, 85-86.
President Johnson dissolved the commission in 1963 after assuming office.\textsuperscript{12}

Heard and Alexander were members of another constituency that emerged to support the cause of campaign finance in the 1960s: policy experts whose research was supported by numerous philanthropists and organizations. One of the most significant was the Committee on Campaign Contributions, later renamed the Citizen’s Research Foundation, established in 1958 by former Rhode Island governor William Vanderbilt. Some of its more notable members were economist Seymour Harris, Eleanor Roosevelt, and Harvard University Law Professor Milton Katz. Although the committee favored the enactment of an effective publicity law by Congress, it did not devote its resources to lobbying the legislature directly. Rather, it choose to spend much of its resources supporting Alexander Heard’s work to study existing campaign finance reports in order to provide the public and members of Congress with unprecedented information on the costs of campaigns and how they were financed.\textsuperscript{13}

It therefore fell to the new public interest groups that emerged in the 1970s, which were devoted to improving government by making it more representative of the people through above all else ending the corruption of the electoral process, to actually lobby Congress for the passage of a bill to reform the nation’s system of electoral financing. The most famous of these was Common Cause, which was founded in 1970 by President Johnson’s former Secretary of Health, Education, and Wel-

\textsuperscript{12} Zelizer, 81; President’s Commission on Campaign Costs, \textit{Financing Presidential Campaigns}, April 1962.

\textsuperscript{13} Zelizer, 80-82.
fare John Gardner to be a Washington-based lobby for campaign finance reform. Its activities, such as placing advertisements and op-eds in newspapers or providing legislators with positions papers, were financed through gifts solicited from its members who tended to be educated, middle class professionals. One of the most important contributions made by Common Cause in the struggle for campaign finance reform was its use of the class action lawsuit to privately enforce the regulatory statutes. In 1971, it filed a lawsuit in federal district court to enjoin the Republican National Committee (RNC), the Democratic National Committee (DNC), and the Conservative Party of New York from continuing their practice of violating the campaign finance laws by creating multiple committees to raise and spend more money for a single candidate than was permitted by the Federal Corrupt Practices Act (FCPA) and the Hatch Act of 1940. Later that year, the court ruled both that Common Cause had the right to sue to enforce the law as Congress had provided no mechanism for its enforcement, and granted its petition to issue an order requiring that the parties and candidates strictly follow the campaign finance statutes in the upcoming election.  

All of the work undertaken by policy experts and the public interest groups to provide information about electoral financing and to expose corruption would have been far less effective if it was not for the renewed interest of the media in the subject of campaign finance reform. In this decade, professionally trained journalists began to actively make use of the growing body of information on campaign finance practices to pres-

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sure politicians for changes in the electoral system through countless articles and editorials. They also became more aggressive in their own efforts to uncover and to report on political scandals that demonstrated how money was undermining republican government. Thus, the 1960s saw the emergence of a diverse coalition of reformers each of which contributed in their own way to the effort to reform the use of money in elections. Most importantly, they played a critical role in keeping an issue that at the time the general public cared little about on the national agenda by constantly drawing the attention of members of Congress and the people to the problems they believed were threatening the continued vitality of democratic government.\textsuperscript{15}

What all the data gathered by these various organizations and individuals showed, according to the reformers, was that the costs of campaigns were escalating rapidly due to technological innovations, especially television. This in turn had led parties and candidates to rely increasingly upon wealthy contributors and special interests for campaign funds, which were now often raised virtually in secret due to the ineffectiveness of the publicity, and more generally the campaign finance, laws. Hence, this raised grave concerns for the reformers that the wealthy and organized interests were using their economic resources to unduly influence the political process. The increasing cost of running for office also concerned members of Congress, since they feared not only that they would be unable to raise sufficient funds to run their campaigns, but more importantly that millionaire candidates might be able to defeat them by using expensive media-based campaigns. In response to all of

\textsuperscript{15} Zelizer, 74-75, 83-84, 88, 92.

However, another important and often unrecognized motivation for Congressional passage of the FECA of 1971 was probably the outcome of the class action lawsuit filed by Common Cause regarding the enforcement of the second Hatch Act’s limitations on contributions and expenditures. This decision meant that parties and candidates could not use multiple committees, as had become their custom, to raise more than $3 million nor could donors circumvent the contribution limit of $5,000 by dividing their gifts among various committees. This literal interpretation of the law’s limits meant that presidential, congressional, and other fed-
eral candidates could spend no more than $9.4 million in 1996 dollars on their 1972 campaigns, which would make it impossible to run a campaign especially a presidential one. How drastic a reduction in campaign funds this would have been for the parties and candidates is evidenced by the fact that the Republicans with the exception of 1892 had never raised and spent less than about $15 million in a presidential election in 1996 dollars for years in which their receipts and expenditures are available; while the last time the Democrats had spent so little money in a campaign was in the 1924 presidential election. Thus, politicians in the wake of this court ruling found themselves suddenly very interested in reforming the electoral system to ensure they could run adequate campaigns to preserve their political careers.

Just as the insurance company scandal in the early twentieth century confirmed the fears of the early reform liberals that corporations were buying undue influence in the federal government and generated public support for reform, the Watergate scandal of the 1972 election was this generation of reformers defining event. Using their newly established right to privately enforce statutes, they actively monitored whether federal and state candidates were complying with the provisions of the FECA, and made active use of lawsuits and complaints to bring attention to violations in an attempt to enforce the law. These efforts of the reformers were vital in not only exposing the Nixon administration’s abuse of power and its questionable fundraising tactics in the 1972 presidential

election that were at the center of the Watergate scandal, but more importantly provided unquestionable evidence to the public and to politicians of the ineffectiveness of the existing laws and the necessity of significant reforms to prevent money and corruption from further dominating the political and electoral systems. The information collected by the reform coalition as well as growing public outrage over the abuses that had been exposed led Congress in the wake of the Watergate scandal to pass the FECA of 1974 to utterly revamp the nation’s campaign finance regulatory structure. Two features of the statute that were especially notable were its provisions providing for the public funding of presidential candidates and an independent commission to enforce the statute, both of which had long been sought by reformers but never before enacted into law.18

For both the early liberal reformers and the later ones, laws designed to regulate the use of money in elections were merely the first step in achieving broader reforms in the political process. They were meant to allow citizens to once again be able to consent to their government by

ensuring elections were conducted fairly and honestly to ensure their will was represented in the decisions made by the government. This required in their view that elections be decided not by money, but rather the people who “having had a reasonably equal opportunity to hear all the candidates, then make a rational choice on the basis of their own policy preferences and personal evaluations of the candidates. Intervening organizations or persons are suspect. They might obligate the candidates with political debts or warp the judgment of the electorate thorough the exercise of additional persuasive power.”19 What distinguishes these two groups of reformers was who they were and their broader objectives.

The late nineteenth century reform liberals consisted of a variety of groups and individuals, such as state legislatures, progressive journalists, and advocacy groups, who through their individual, and at times collective, efforts sought to draw attention to the need to regulate money in politics. They were loosely bound together by the reforming impulse of their era that manifested itself in Progressivism and other movements. Their hope was to use the new electoral laws, as discussed in chapter two, to create a code of conduct for the citizens in elections that would restore the legitimacy of republican government by encouraging them to act upon their civic virtue and political morality in making decisions pertaining to the future of the polity. In their view, this would ensure that the people would be able to select leaders who truly represented their interests and cared for the welfare of the nation.

In contrast, the reform liberals of the 1960s and 1970s consisted of advocacy groups, policy experts, professional journalists, and to a lesser extent members of legislative bodies. They too were largely bound together only by their common desire to reform the electoral process to end the corrupting influence of money. While never clearly stated, their objective in passing campaign finance laws was also to improve representative government by establishing a new code of electoral conduct. However, its rules were not designed to encourage moral decisions, but rather to create a more equitable electoral system that diminished the influence of the wealthy and interest groups on the decisions of the people and their legislators, and at the same time enhanced the ability of the citizens to express their preferences or even run for office themselves. It accomplished these goals by providing them with the resources required to undertake these tasks, and by establishing rules to give everyone a fair chance to speak and to be heard. Only when everyone had relatively equal political power would the government truly become capable of responding to the people’s interests and needs.

As in the late nineteenth and early twentieth centuries, there were some who questioned whether greater restrictions on the use of money in elections were appropriate. They tended to be mainly scholars who wrote in laws reviews, and used them as a forum in which to debate the merits of such regulation with the reform liberals. This scholarly discussion focused not on the question of whether the laws would be effective in altering the behavior of the people as had been the case in the late nineteenth and early twentieth centuries. Rather, the criticisms and concerns of opponents of campaign finance reform were now directed at the tendency of such laws to violate or to interfere with the First Amendment rights to
freedom of speech, of the press, and of association that were vital to permitting corporations, labor unions, parties, candidates, and citizens to participate in the electoral process.

In fact, it may be urged that political expenditures in a democratic society serve to implement rather than to obstruct the electoral process. If rational political decisions are to be made, the electorate must have access to factual information and conflicting opinions from all groups . . . But the furnishing of information is no longer the inexpensive undertaking that it was in Thomas Jefferson’s day . . . With the advent of new techniques and channels of communication, political costs have risen steeply . . . To the extent that political expenditures are curtailed, the education of the American electorate will suffer.\(^\text{20}\)

In their view, the expenditure of money was not corrupting to the electoral process. Rather, it was absolutely essential to enabling candidates to inform voters about themselves and their policy positions; allowing competing groups, including organized interests representing large numbers of citizens to be able to bring their viewpoints before the government and the electorate to influence their decisions; and to ensuring that the citizens were able to make truly informed decisions about who they desired to represent them and what policies they preferred. While opponents conceded that the government could regulate the use of money in campaigns, they argued that such restrictions should be minimal, and targeted at specific evils rather than broad limitations that inhibited legitimate debate about political affairs.\(^\text{21}\)


There are at least two possible explanations for why in the 1940s efforts arose to question the merits of campaign finance legislation, which reflected the reasoning of the pluralist liberalism tradition, reemerged after being ignored and dismissed for much of the past century. One is that it was at least in part a response to the nation’s recent involvement in World War II, especially its exposure to totalitarian regimes that ruthlessly suppressed any political dissent. And the other, and probably more significant factor, is the early efforts of the United States Supreme Court in this decade to shift the focus of its jurisprudence to using those freedoms it considered absolutely essential to the functioning of democracy to limit the powers of Congress rather than federalism as in the past.22 As the remainder of this chapter details, it was the Supreme Court’s evolving jurisprudence in regard to the electoral process, especially in the latter part of the twentieth century, that produced the dramatic changes in the views of the state courts in the 1970s concerning the constitutionality of the campaign finance laws passed after the Watergate scandal.


The Federal Courts and Campaign Finance

I. The Scope of Congressional Power Over Elections

In the latter half of the nineteenth and early twentieth centuries, the central questions in regard to the electoral process that the Supreme Court was called upon to adjudicate did not pertain to the effect of statutes on the civil liberties of the citizens. Rather, they focused upon the extent of Congress’ authority to regulate state elections which influenced the selection of officers of the national government, especially primary and presidential elections. Previous decisions of the Court had established that the time, places, and manner clause of the national Constitution gave the states and Congress concurrent authority over state elections if members of the House of Representatives, the only national officers directly elected by the people in this era, were selected at the same time as members of the state governments. This intervention into the affairs of the states was justified in the view of the Court by the necessity of preserving the national government and the republic itself by ensuring the integrity of the electoral process. “If this government is anything more than a mere aggregation of delegated agents of other states and governments, each of which is superior to the general government, it must have the power to protect the elections on which its existence depends, from violence and corruption. If it has not this power, it is left helpless before the two great natural and historical enemies of all republics, open violence and insidious corruption.” Any conflict that arose between federal and state laws would be resolved in favor of the former based upon the Supremacy Clause of the national Constitution. In all other circum-

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stances, state officers were subject exclusively to the authority of the state governments.\textsuperscript{24}

As Congress began to regulate the use of money in elections, the question arose as to whether it had the power to control the selection of presidential and vice-presidential electors as they had been declared by the Supreme Court to be state officers. Although it was generally believed that the national legislature had the authority to pass corrupt practices and publicity laws that applied to presidential elections based upon the fact that they occurred at the same time as those for members of the House of Representatives, the issue was not definitively settled until the Court’s decision in \textit{Burroughs and Cannon v. United States} in the mid-1930s. Writing for the majority, Justice Sutherland ruled that Congress must have the power to regulate the selection of these state officials as denying it such authority would leave the national government powerless to ensure its own self-preservation.

The President is vested with the executive power of the nation. The importance of his election and the vital character of its relationship to an effect upon the welfare and safety of the whole people cannot be too strongly stated. To say that Congress is without power to pass appropriate legislation to safeguard such an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self-preservation. Congress, undoubtedly, possesses that power, as it possesses every other power essential to preserve the departments and institutions of the general government from impairment or destruction whether threatened by force or corruption.\textsuperscript{25}

He further argued that such regulations did not interfere with the power of the states to appoint these electors as they saw fit, and finally that


\textsuperscript{25} \textit{Burroughs and Cannon vs. United States}, 290 U.S. 534 (1934), 545.
only Congress could regulate committees seeking to influence presidential elections as they generally operated in more than one state. Thus, the Court’s decision effectively established that Congress shared with the states the responsibility for protecting the integrity of the electoral process against fraud, intimidation, or any other form of corruption in elections involving the selection of both state and federal officers, but that it had exclusive power to control the activities of interstate committees.

However, whether Congress could regulate intrastate committees used by candidates in primary elections was unclear. This was a particularly important constitutional question from the perspective of the Southern states as the answer given by the Supreme Court would effect their ability to continue to exclude blacks and poor whites from the political and electoral process. When the issue first came before the Supreme Court in the 1920 case of Newberry v. United States, Justice McReynolds writing for the majority struck down the portion of the federal Publicity Act of 1910 that applied to primary elections on the grounds that the states had exclusive authority over contests for the party nomination and by implication intrastate committees. “We cannot conclude that authority to control party primaries or conventions for designating candidates was bestowed on Congress by the grant of power to regulate the manner of holding elections . . . its exercise of authority

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would interfere with the purely domestic affairs of the state and infringe upon liberties reserved to the people.”

In an opinion by Chief Justice White, the four dissenters argued that the majority in reaching its conclusion had not only interpreted the powers of Congress too narrowly, but more importantly had failed to consider the intimate relationship that had developed between the primary and the general elections. “In the last analysis the contention must rest upon the proposition that there is such absolute want of relation between the power of government to regulate the right of the citizen to seek a nomination for a public office and its authority to regulate the election after nomination . . . The influence of who is nominated for elective office upon the result of the election to fill that office is so known of all men that the proposition may be left to destroy itself by its own statement.”

Even if Congress lacked the power under the time, places, and manner clause to regulate primary elections, these justices believed that the necessary and proper clause provided ample authority for the passage of such laws. To rule otherwise in their view meant exposing the process of selecting the people’s representatives to all kinds of fraud and imperiled the existence of the national government.

Although the Court had appeared to reject in *Newberry* the notion that the federal Constitution permitted any kind of interference with state regulation of primary contests, it shortly thereafter in what became known as the white primary cases seems to have begun to abandon this

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27 *Newberry v. United States* 256 U.S. 232 (1921), 258.
28 *Newberry v. United States* 263.
view. In *Nixon v. Hendron* (1927), Justice Holmes writing for an unanimous Court struck down a 1923 Texas law that barred blacks from voting in the Democratic primary. However, rather than relying on the Fifteenth Amendment to invalidate the law on the grounds that it effectively disenfranchised blacks as victory in the primary meant certain election in the South, Holmes chose instead to declare it unconstitutional on the grounds that it discriminated against blacks and was therefore a violation of the equal protection clause of the Fourteenth Amendment.30

The next case, *Nixon v. Condon* (1932), arose in response to Texas’ effort to preserve its disenfranchisement of blacks by granting the state executive committee of the Democratic Party the authority to prescribe voter qualifications, which promptly passed a resolution limiting voting in primaries to only whites. Writing for the majority, Justice Cardozo declared that this action by the party also violated the equal protection clause of the Fourteenth Amendment, and thus was unconstitutional. He found that the discrimination against blacks was state, not private, action that could be reached by the Constitution as the executive party committee had been invested with the authority to set qualifications for party membership not by the party convention, but rather the state legislature.31

In an opinion by Justice McReynolds, the dissenters made a final attempt to defend the view that the parties were private voluntary associations. They argued that the state executive party committee did have the authority to speak for the organization, and that the statute in ques-

tion merely recognized the inherent power of any voluntary association to determine its membership. “Political parties are fruits of voluntary action. Where there is no unlawful purpose, citizens may create them at will and limit their membership as seems wise. The State may not interfere. White men may organize; blacks may do likewise. A woman’s party may exclude males. This much is essential to free government.”32 Hence for them, the decision of the Democratic executive committee to exclude blacks was a private action that could not be reached by the federal constitution. This became the position of Justice Roberts writing for an unanimous Court in *Grovey v. Townsend* (1935) as the discrimination against blacks in the primaries arose in this case not through state action since Texas had repealed all its primary laws, but rather private action taken by the Democratic Party convention.33

Prior to the Court’s final two decisions concerning the validity of the white primary, it had in *United States v. Classic* (1941) the opportunity to reconsider the question of whether Congress had the authority to regulate primary elections. Adopting the reasoning of the *Newberry* dissenters, the majority opinion by Justice Stone, and even that of the dissenters by Justice Douglas, upheld the authority of Congress to regulate primary elections. “The words of Sections 2 and 4 of Article I, read in the sense which is plainly permissible and in the light of the Constitutional purpose require us to hold that a primary election which involves a necessary step in the choice of candidate for election of representatives in

Congress . . . is an election within the meaning of the Constitutional provision and is subject to Congressional regulation as to the means of holding it."34 The Court further noted that such regulation was essential to protecting the rights of voters, especially in states where winning the primary election meant almost certain victory in the general contest.35 Thus, the justices effectively overruled their earlier decision in Newberry, although this was never explicitly stated, and gave Congress concurrent authority over all state elections and political committees that had the potential to influence the selection of federal officers.

A further consequence of this ruling was that it effectively undermined the Court’s distinction between state and private action that had been used to sustain the constitutionality of the white primary. In Smith v. Allwright (1944), Justice Reed writing for the majority abandoned this position, and instead argued based upon the Classic decision that political parties and primary elections were both integral parts of the machinery created by the state to carry out the electoral process. “We think that this statutory system for the selection of party nominees for inclusion on the general election ballot makes the party which is required to follow these legislative directions an agency of the State in so far as it determines the participants in a primary election. The party takes its character from the duties imposed upon it by state statutes; the duties do not become matters of private law because they are performed by a political party.”36 The implication of this new view of the primaries and parties

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36 Smith v. Allwright, 321 U.S. 649 (1944), 663.
was not only that the Court no longer considered the discrimination against blacks to be of a private nature, but also that it could apply the Fifteenth Amendment to end once and for all the white primary as nomination contests would now be considered a part of the electoral process, and thus a state function reachable by the Constitution.37

The question of whether discrimination against blacks in the electoral process was state or private action was only definitively settled, however, in the last of the white primary cases *Terry v. Adams* (1953). Eight justices reached the conclusion, although for very different reasons, that the Jaybird Democratic Association, a self-governing, voluntary club solely for white voters in Fort Bend County, Texas, was performing a public function by holding an unofficial primary to endorse candidates for the Democratic Party primary. Hence, its activities could be reached and prohibited by the Fifteenth Amendment as they constituted state action. Justice Black joined by Douglas and Burton reached this conclusion on the grounds that since the Jaybird Association’s inception in 1889 virtually all victorious candidates in the Democratic Party primary and general election had won this unofficial primary. Thus in their view, the Jaybird primary represented an effort supported by the state to circumvent the Fifteenth Amendment, and deprive blacks of the ability to influence the political affairs of the county. While Justice Frankfurter argued that the participation of state election officials in the unofficial primary, usually by voting in it, represented the acquiescence of the state in an attempt to circumvent the Constitution by predetermining the results of the legal, state sponsored primary. And Justice Clark

joined by Jackson, Reed, and Vinson believed that the Jaybird Democratic Association was an auxiliary organization of the state regulated Democratic Party, and therefore was a public, not a private, organization whose activities must comply with the Constitution. Only Justice Minton dissented from the decision arguing that the Democratic Jaybird Association was merely a pressure group, which in no way received or sought support from the state. Therefore, the Fifteenth Amendment was not applicable to its unofficial primary as this was a private action undertaken by individuals.\(^\text{38}\)

For the Supreme Court in the late nineteenth century and the first part of the twentieth century, the central question in cases involving electoral laws was not freedom of speech but rather federalism and racial discrimination. Through their rulings, the justices established that Congress could pass corrupt practices and publicity acts to preserve the integrity of the national government although it is not entirely clear what clauses of the Constitution they viewed as giving it such authority. Their opinions suggest that the three most likely sources of Congressional power were: the interstate commerce clause (political committees operating in two or more states); the time, places, and manner clause, and the necessary and proper clause. What the Court did establish beyond any doubt is that Congress’ regulatory authority was limited by federalism as it could only intervene in state elections if the use of money would in some manner influence the selection of federal candidates or if the states lacked the authority to regulate the actions of certain political committees.

Racial discrimination was the other major theme of the Court’s electoral decisions, and was inseparable from questions pertaining to federalism and the nature of political parties. In responding to these issues, the Court, like the state judges, increasingly came to recognize that the electoral process was not a private function carried out by individuals operating through parties and to a lesser extent pressure groups as it arguably had been for much of the nineteenth century. It was now a state function that required the establishment of constitutional standards to not only govern the extent of this regulatory authority, but also to protect the rights of citizens, especially blacks, to freely participate in the electoral process as it was the primary means through which they gave their consent to the actions of the government. Who would be responsible for the development and the enforcement of these new standards was unclear at this time. However, after the constitutional revolution of 1937 as will be discussed more fully below, this duty increasingly fell to the Supreme Court rather than to Congress or the state legislatures as in the past. Hence, its efforts to bring the Southern states into conformity with the guarantees of the Constitution in regard to the civil and political rights of blacks, especially its two decisions in the 1940s, are perhaps best understood as an early attempt to assert its role as the final arbiter of the meaning of the fundamental law to enforce its definition of the rights of the citizens. Equally important these decisions helped to establish the boundary between public and private actions in the electoral arena, and hence began to delimit the scope of the state’s power over parties, money, candidates, and other aspects of the electoral process.
II. Other Restrictions on Congressional Power Over Elections

There were extraordinarily few federal cases in the early twentieth century, in fact probably only two, in which the federal courts were called upon to construe campaign finance laws in response to a challenge that they violated the federal Constitution’s guarantee of freedom of speech. This probably stemmed from the fact that the states, not the federal government, were the primary guardians of the people’s liberties, and the general hostility of the courts to such claims in this era as previously noted.

The first was United States v. Curtis (1882) in which the defendant argued that the 1876 ban on executive officials or government employees not appointed by the president with the advice and consent of the Senate from giving or receiving contributions for political purposes from other government employees violated the First Amendment. Writing for the majority, Chief Justice Waite gave little attention to this argument in his opinion merely noting that the law did not impose a total prohibition as it still allowed these civil service workers to receive money from non-government officials or to give it to them. He upheld the statute as the latest installment in a series of Congressional enactments passed under the necessary and proper clause since 1789 that were designed “to promote efficiency and integrity in the discharge of official duties, and to maintain proper discipline in the public service.” While the primary purpose of the law in question was to prevent arbitrary dismissals from the service for the failure to make a contribution, the Court noted that it served other valuable purposes. These included improving the quality of the civil

service by preventing the dismissal of good and honest men who refused to pay assessments, and preventing the party in power from perpetuating its hold on the government by using public funds to indirectly finance its campaigns.\textsuperscript{40}

The lone dissenter in this case, Justice Bradley, acknowledged that Congress had the authority to prohibit the assessment of civil service workers, and more generally to regulate the use of money in elections. However, the method it chose to accomplish that end could not interfere with the right of the citizens to actively participate in the electoral and political process.

Among the necessary and proper means for promoting political views or any other views are association and contribution of money for that purpose both to aid discussion and to disseminate information and sound doctrine . . . The freedom of speech and of the press and that of assembling together to consult upon and discuss matters of public interest and to join in petitioning for a redress of grievances are expressly secured by the constitution. The spirit of this clause covers and embraces the right of every citizen to engage in such discussions and to promote the views of himself and his associates freely, without being trammeled by inconvenient restrictions.\textsuperscript{41}

Hence, the 1876 law in his opinion was unconstitutional since the means Congress had chosen to achieve its goal of purifying elections prevented citizens from exercising their fundamental rights.\textsuperscript{42} This argument was unique for its time, and reflects the reasoning of the pluralist liberal tradition that the Court would adopt almost a century later in construing the validity of campaign finance laws.

The other case involving a First Amendment challenge to Congressional authority to regulate money in elections was \textit{United States v.}

\textsuperscript{40} \textit{Ex Parte Curtis}, 371-375; Overacker, 232-233; Sikes, 184-185.

\textsuperscript{41} \textit{Ex Parte Curtis}, 377.

\textsuperscript{42} \textit{Ex Parte Curtis}, 376-379.
United States Brewers Association (1916) in which several corporations were indicted for making contributions to congressional candidates in contravention of the Tillman Act of 1907. Before a federal district court, they argued that the indictments should be dismissed as Congress had no power to pass such a law, and furthermore that it violated their right to freedom of speech and of the press. The court rejected this argument on the grounds that the statute in question in no way implicated these rights, but rather was a judgment on the part of Congress as to the propriety of such gifts.

[An] election is intended to be the free and untrammeled choice of the electors; that any interference with the right of the elector to make up his mind how he will vote is as much as interference with his right to vote as if prevented from depositing his ballot; that the concerted use of money is one of the many dangerous agencies in corrupting the elector and debauching the election; that any law the purpose of which is to enable a free and intelligent choice, and an untrammeled expression of that choice in the ballot box, is a regulation of the manner of holding the elections—the power of Congress to prohibit corporations of the state from making money contributions in connection with any such election appears to follow as a natural and necessary consequence . . . The section itself neither prevents nor purports to prohibit, the freedom of speech or of the press. Its purpose is to guard elections from corruption, and the electorate from corrupting influences in arriving at their choice.”

Like the state court in Gansley, the federal court viewed corporations as artificial organizations who were organized for specific purposes defined by Congress or the state legislatures. The right to participate in elections was not among them, and furthermore the legislature had the authority to bar their participation if in its judgment this would endanger the purity of the electoral process as Congress had done in this case. Hence, the Tillman Act was an appropriate exercise of Congress’ power under the time, places, and manner clause, especially given that only it could

control contributions to federal candidates or to political committees operating in more than one state.44

Thus, at neither level of government in the late nineteenth and early twentieth centuries were constitutional rights, especially those pertaining to freedom of speech, of the press, and of association, viewed by the courts as limitations upon the power of the legislatures to regulate the electoral process. Although there were extraordinarily few federal cases pertaining to this issue, the national courts, like the state ones, seem to have deferred to the judgment of Congress regarding the necessity of these regulations. Their willingness to do so at a time when they were otherwise trying to restrict the national legislature’s power over the economy and private actors may have been due to either the fact that they viewed these statutes to be ones pertaining to the political system and hence their necessity was properly left to the judgment of the legislature; or were influenced by the arguments of the reform liberals to some extent; or perhaps some combination of the two.

III. Labor Unions and the Taft-Hartley Act

The next opportunity the Supreme Court had to consider a First Amendment challenge to a campaign finance law came more than fifty years after its decision in *Curtis*. In the 1948 case of *United States v. CIO*, the Congress of Industrial Organizations argued that its indictment for violating the Taft-Hartley Act’s prohibition on the use of labor monies in

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federal elections should be dismissed. The CIO, which had been charged with violating the law for publishing a political editorial in its newspaper concerning a congressional candidate that was then distributed to its members and to the general public, contended that the law was an unconstitutional infringement upon its First Amendment rights. Arguing that it was the duty of the Court to avoid if at all possible declaring a statute unconstitutional, Justice Reed writing for the majority quashed the indictment. He did so on the ground that Congress could never have intended to include the activities alleged in it within the scope of the statue's prohibition as the legislature “did not want to pass any legislation that would threaten inferences with the privileges of speech or press or that would undertake to supersede the Constitution.” To hold otherwise, the justices felt would raise grave doubts as to the validity of the law. Nor did such activities in their view undermine the other purpose of the statute, which was to protect the rights of dissenting union members and corporate stockholders. These individuals were well aware, the justices argued, that the regular publication of periodicals advocating candidates and policies were normal organizational activities.

For many people, including the dissenting justices, the majority had avoided the constitutional issue by simply rewriting the law. In an opinion by Justice Rutledge, the dissenters argued that the statute had been intended to prohibit all political activity by labor unions and corporations, and that such a patently unconstitutional law should be struck down. “A statute which, in the claimed interest of free and honest elec-

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45 United States vs. Congress of Industrial Organizations, 335 U. S. 106 (1948), 120.  
tions, curtails the very freedoms that make possible exercise of the franchise by an informed and thinking electorate, and does this by indiscriminate blanketing of every expenditure made in connection with an election, serving as a prior restraint upon expression not in fact forbidden as well as upon what is, cannot be squared with the First Amendment.”47 Adopting the same position as Justice Bradley in Curtis, they acknowledged that Congress had the authority to pass laws designed to prevent the corruption of the electoral process, but that the means chosen to accomplish this objective had to be narrowly drawn to avoid violating the fundamental rights of groups and individuals.48

Over the next decade, the question of whether the ban on labor union contributions and expenditures in federal elections was constitutional remained squarely before the federal courts. In United States v. Painters Local, a union challenged its conviction for using monies from its general treasury to pay for radio and television broadcasts in support of congressional candidates partly on First Amendment grounds. In overturning the conviction, the federal district court argued that as in the CIO case the expenditures had been designed to allow the union to communicate with its members. As the union had no newspaper of its own “a publication in the daily press or by radio was as natural a way of communicating its views to its members as by a newspaper of its own.”49 And the expenditure of this money did not in the view of the court violate the rights of minority members as it been duly approved by a meeting of

47 United States vs. Congress of Industrial Organizations, 155.
48 United States vs. Congress of Industrial Organizations, 130-155; Epstein, 23-25; Tanenhaus, 454, 457-459; Mager, 348-351; Lane 731.
49 United States v Painters Local Union No. 481, 172 F.2d 854 (1949), 856.
all union members. The court refused to address the constitutional issue merely noting that as these activities were similar to those in *CIO*, they too must be outside the ban if the law was to be upheld. Similarly, another federal district court in *United States v. Construction General* avoided addressing the question of whether the law violated the rights of a labor union to freedom of speech and of the press in overturning its conviction for political activities that appeared targeted at a particular congressional candidate. The judge simply noted that Congress could not have intended to prohibit patriotic activities, such as registering voters and getting out the vote, through the Taft-Hartley Act’s ban.50

The controversy returned to the Supreme Court in the 1957 case of *United States v. UAW-CIO* in which a union challenged its indictment under the law for financing television broadcasts advocating the election of certain congressional candidates as violating its First Amendment liberties. Writing for the majority, Justice Frankfurter distinguished this case from *CIO* on the grounds that the expenditures were targeted at the general public rather than just members of the union. “Thus unlike the union-sponsored political broadcast in this case, the communication for which the defendants were indicated in *CIO* was neither directed nor delivered to the public at large. The organization merely distributed its house organ to its own people. The evil at which Congress has struck in §313 is the use of corporate or union dues to influence the public at large to vote for a particular candidate or particular party.”51 However,

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50 *United States v Painters Local Union No. 481*, 856; *United States v. Construction & General Laborers Local Union No. 264*, 101 F.Supp. 869 (1951), 875-877; Epstein, 25-27; Tannehaus, 460-461; Clover, 667-668.

51 *United States vs. UAW-CIO*, 352 U.S. 567 (1957), 589.
he did not dispose of the case by ruling on whether this was a valid exercise of Congress’ power given the restrictions of the First Amendment, but rather remanded it for trial as the union would have to be convicted of violating the law before it had standing to challenge its constitutionality.52

As in the CIO case, the dissenters in an opinion by Justice Douglas criticized the majority for failing to perform their duty, and strike down a statute that clearly infringed upon the fundamental right of labor unions and others to freedom of speech.

Until today political speech has never been considered a crime. The making of a political speech up to now has always been one of the preferred rights protected by the First Amendment. It usually costs money to communicate an idea to a large audience . . . Nor can the fact that it costs money to make a speech—whether it be hiring a hall or purchasing time on the air—make the speech any the less an exercise of First Amendment rights. Yet this statute, as construed and applied in this indictment, makes criminal any ‘expenditure’ by a union for the purpose of expressing its views on the issues of an election and the candidates.53

In their view, the right to free speech in elections was so vital to the functioning of the democratic process that any Congressional regulation of it was suspect. Only a law that was precisely targeted at the evil of money in elections and chose the least restrictive means to deal with that problem should survive judicial scrutiny.54

These decisions of the federal courts, particularly the Supreme Court, in the 1940s and the 1950s reflect a profound transformation in the understanding of who was to be responsible for securing the liberties of the citizens as well as in how they were to be protected. Whereas in

52 United States vs. UAW-CIO, 568, 588-593; Epstein, 27-30; Lane, 731-732; Mager, 352-354.
53 United States vs. UAW-CIO, 594.
54 United States vs. UAW-CIO, 593-598; Epstein, 30-31; Lane, 731-732; Mager, 355.
the past the federal courts had generally deferred to the judgment of Congress when questions arose over how best to protect the rights of the people, they now began to more actively assert their authority to decide if the national legislature had acted appropriately. Furthermore, their decisions were increasingly based upon the federal Bill of Rights, which foreclosed any additional debate within the political process over these liberties, and made the courts, not Congress, the final arbiter of their meaning.55

The source of this change was arguably the constitutional revolution of 1937, which marked the end of the Court’s efforts to restrain Congressional power to intervene in the economy and society. And the beginning of its attempts, as famously stated in footnote four of the *Caroline Products* decision, to protect the civil and political rights of the citizens, especially those of minorities or that pertained to the political process, against the broad powers of the federal government. This was to be accomplished by enforcing the provisions of the Bill of Rights, and subjecting statutes affecting these individuals or processes to greater judicial scrutiny. The scope of this judicial revolution, however, was still very limited in the mid-twentieth century for three reasons. First, the states remained the guardians of most of the fundamental liberties of the citizens. Second, state legislatures continued to be primarily responsible for defining how those rights would be protected. And third, the state courts still relied upon common law doctrines in reaching their decisions.56

55 John D. Dinan, *Keeping the People’s Liberties* (Lawrence: University of Kansas Press, 1998), xi, 115-127, 150.
Still, this transformation of the Court’s jurisprudence was arguably significant as it marked the beginning of the end of the hegemony that the reform liberals had enjoyed in the area of electoral regulation since the turn of the twentieth century. Up until this time, the unwillingness of federal and state courts to question the judgment of the legislatures, as well as the lack of strong support for a competing interpretation of the fundamental principle of government by consent that was found in republican liberalism, had allowed them the freedom to define why and how the use of money in elections was problematic, and impose their solutions to this issue on the country. With its incorporation into the jurisprudence of the Supreme Court, the alternative understanding of government by consent grounded in pluralist liberalism, which had always existed in some form, found new support and legitimacy. Following Madison’s argument against the Sedition Acts, those who followed the reasoning of this variant of liberalism argued that the people could only truly consent to their government if they were given the freedom to act upon their own preferences subject only to minimal governmental restraints. It placed its emphasis therefore on using rights to restrain the government and to allow the people to act as they pleased; in contrast to the reform liberalism tradition that believed rights could only be properly exercised within the context of a clearly established code of conduct to ensure they were used to make moral or fair decisions.

**IV. The States and the Federal Bill of Rights**

It was not until the era of the Warren Court in the 1960s that the electoral law jurisprudence of the Supreme Court, and more fundamentally its new understanding of its role to safeguard the people’s liberties, would have an impact upon the state legislatures and courts. Two sets of decisions of the Court in this decade related to the Fourteenth Amendment would have significant implications for how federal and state courts would construe any new campaign finance statutes. The first were those concerning the federal Bill of Rights and the Due Process Clause, particularly freedom of speech; and the second pertained to its decisions regarding the equal protection clause and the political process.

Although the Court as early as 1897 in the case of *Chicago B & Q R. R. v. Chicago* had begun to apply the provisions of the federal Bill of Rights to the states through the Due Process Clause of the Fourteenth Amendment, the doctrine of incorporation was only sporadically used in the Court’s jurisprudence until the 1960s. During that decade, the Warren Court through its rulings completed the process of establishing that the limitations placed by the Bill of Rights upon the national government were equally applicable to the state governments as part of its effort to provide broader protection for the liberties of the citizens by constraining the power of government at all levels.

Over the past two decades, the decisions of the Supreme Court of the United States have returned to the fundamental promises wrought by the blood of those who fought our War between the States, promises which were thereafter embodied in the Fourteenth Amendment—that the citizens of all our states are also and no less citizens of our United States, that this birthright guarantees our federal constitutional liberties against encroachment by governmental action at any level of our federal system, and that each of us is entitled to due process of law and equal protection of the laws from our state governments no less than our na-
In the Court’s view, its intrusion into the affairs of the states was justified by the failure of the state courts to protect the rights of their citizens from pervasive invasions by the state legislatures and executives. Perhaps one of the significant consequences of this doctrine was that it eradicated federalism, which had served as a means of giving the states the freedom to experiment with different policies and standards than those of the national government. By extending the protections of the Bill of Rights to the citizens of the states, the Supreme Court assumed responsibility for creating uniform standards to govern the actions of the state and federal legislatures and courts to ensure that the rights of the citizens were properly protected from unwarranted governmental encroachments.

Few rights were more precious and fundamental, or more threatened by arbitrary governmental action, for the Warren Court than those guaranteed by the First Amendment. In several of their opinions, the justices repeatedly emphasized that it was these liberties that made possible democratic government by allowing the citizens to influence the electoral and political process by expressing and debating their views on

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the critical issues of the day and the candidates. Perhaps one of the best expressions of this view can be found in *Garrison v. Louisiana* (1964) in which Justice Brennan writing for the majority reiterated the principle established in *New York v. Sullivan* (1964) that citizens should be able to freely criticize their public officials without fear of being prosecuted for libel if they made misleading statements.

For speech concerning public affairs is more than self-expression; it is the essence of self-government. The First and Fourteenth Amendments embody our ‘profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.’

Since freedom of speech, of the press, and of association were in the view of the Court so fundamental to ensuring the openness and responsiveness of the political system, the justices were willing to tolerate only the most minimal interference with them by the state and federal governments. Any statute that chilled these rights by threatening individuals with punishment if they exercised them was struck down as unconstitutional since it interfered with the robust debate required for democratic government. Only those laws that respected the First Amendment rights of the citizens by leaving them breathing space, i.e. narrowly drawn laws that precisely targeted the evil the legislature sought to address through the least restrictive means available, would be upheld by the Court.

This belief of the justices that the First Amendment liberties were so vital to the electoral process that few, if any restrictions, could be im-

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posed on them first directly affected state campaign finance laws in the 1966 case of *Mills v. Alabama*. The Alabama Supreme Court had upheld the conviction of a newspaper editor who had violated the state’s corrupt practices law by publishing an editorial on election day urging the people to vote for particular candidates and measures. Following decades of precedent, the state court had rejected the contention that the law violated the state constitution’s guarantee of freedom of speech and of the press on the grounds that it was a reasonable exercise of the state’s police power. Writing for the majority, Justice Black overruled the state court’s decision, and struck down that provision of the corrupt practices act as violating the First Amendment of the federal Constitution by denying the citizens of the state the ability to exercise those rights that were fundamental to their ability to participate in the electoral process.

Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes. The Constitution specifically selected the press, which includes not only newspapers, books, and magazines, but also humble leaflets and circulars, to play an important role in the discussion of public affairs. Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve . . . The Alabama Corrupt Practices Act by providing criminal penalties for publishing editorials such as the one here silences the press at a time when it can be most effective. It is difficult to conceive of a more obvious and flagrant abridgment of the constitutionally guaranteed freedom of the press.61

Even the concurring and dissenting opinions of Justices Douglas and Harlan respectively, which focused on the issue of the propriety of the

Court rendering a decision before the state court had reached a final judgment, believed the law to be unconstitutional.\textsuperscript{62} Thus, all the justices agreed that the state statute was invalid and differed only on the question of whether federalism required them to temporarily defer to the authority of the state courts. The Court’s resounding answer was that the protection of the fundamental rights of the citizens trumped any concerns about state sovereignty.

The other major component of the Warren Court’s jurisprudence that had the potential to influence judicial views of campaign finance legislation at both the state and the federal level were its decisions in regard to equality in the political process. Its position upon this issue was aptly summarized in the case of \textit{Reynolds v. Sims} (1964), which dealt with the question of whether the plan enacted by the state of Alabama to redistrict its legislature violated the Equal Protection Clause of the Fourteenth Amendment. Writing for the majority, Chief Justice Warren argued that the right to vote was arguably the most fundamental right in a democratic society as it was the primary means by which citizens could influence their government and protect their other rights.

But representative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State’s legislative bodies. Most citizens can achieve this participation only as qualified voters through the election of legislators to represent them. Full and effective participation by all citizens in state government requires, therefore, that each citizen have an equally effective voice in the election of members of his state legislature.\textsuperscript{63}

\textsuperscript{62} \textit{Mills v. Alabama}, 215-216, 218-222; Redish, 909-915.
The right of the citizens to such participation, according to the Court, was protected by the Equal Protection Clause, which required that all citizens not only be equally represented, but also have their votes counted equally with those of all other citizens who chose members of the legislature. Anything that interfered with the establishment of this standard of equality would be treated by the Court as arbitrary and invidious discrimination that would be struck down as a violation of the Equal Protection Clause.64

Based upon this standard of absolute egalitarianism, the justices both before and after Reynolds struck down state measures they believed diluted this fundamental right of the citizens. Among the more famous decisions were: Baker v. Carr (1962) and Reynolds that prohibited population disparities and the use of geographical subdivisions to create state legislative districts; Westberry v. Sanders (1964), which extended the latter principle to the establishment of federal congressional districts; Gary v. Sanders (1963), which invalidated a system of counting votes in Georgia that gave more weight to votes cast in rural counties; and Harper v. Virginia Board of Elections that banned measures, such as the poll tax, that prevented citizens from voting, and hence having their votes counted equally, solely based on their economic status.65

What precisely the impact of the Warren Court’s developing jurisprudence on freedom of speech and equality would be on campaign fi-

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64 Reynolds v. Sims, 555-568, 575-578, 584; Powe, 200-204, 211-212, 216, 241-249, 265-267, 271.
nance legislation remained unclear at this time. It never had the opportunity to pass upon the constitutionality of this kind of legislation, especially the state corrupt practices acts that brought into conflict its goals of promoting equality and freedom of speech (*Mills* concerned solely a specific provision of such a law, not the entire law and its underlying principles). On the one hand, it seemed that the Court was amply prepared to support the goal of the reform liberals to create a more just and fair representative process by equalizing the resources available to the citizens, and diminishing the influence of money. This would be a logical extension of the principle developed in its equal protection clause cases: one man, one vote, *one dollar*. On the other hand, however, the achievement of this goal would require it to abandon both its suspicion of governmental power and its unwillingness to uphold significant restrictions upon the right to free speech that it believed hampered the public discussion of political affairs that was vital to the democratic process.

Hence, in addressing any case relating to campaign finance both the federal and state courts would now be faced with the problem of how to reconcile, if possible, the reform and pluralist strains of liberalism. According to the Warren Court, each made an important contribution to a representative government created by the consent of the people. Reform liberalism suggested the need for the adoption of community standards that would ensure government by consent by equalizing relative political power to ensure the citizens were properly represented and able to influence the political process through their ballots. The achievement of such a state could mean among other things severely restricting the use of money in elections, and the use of particular liberties. While pluralist liberalism’s emphasis on freedom from governmental restraints was es-
sential to preventing governmental intervention with the free discussion of public affairs, and the right to criticize one’s representatives that allowed the people to best express their preferences.

The Judicial Revolution of the 1970s

A full discussion of the new constitutional era that emerged in the 1970s and the response of the Supreme Court to the dilemma presented by the Warren Court’s jurisprudence is beyond the scope of this study. A glimpse into its impact on the jurisprudence of the state and federal courts can be seen, however, through a series of cases that arose in Massachusetts concerning the right of corporations to make expenditures in support of or in opposition to ballot initiatives. At this time, state law allowed corporations to make contributions or expenditures in elections if a referenda question “materially” affected their property or business interests. In 1972, the legislature amended this provision by stipulating that no question presented “to the voters concerning the taxation of income, property, or individual transactions shall be deemed to materially affect the property, business or assets of the corporation.”

In First National Bank v. Attorney General I (1972), the Massachusetts Supreme Court ruled that the amendment to the law was an unconstitutional infringement upon the corporations’ right to freedom of speech and of the press. “Although a corporation’s expression on political issues is subject to some restraint, we hold that in the absence of a compelling State [sic] interest showing that any amount of corporate expression, however small, on election questions results in undue influence

66 First National Bank I, 573.
over the electoral process, corporations may not be totally prohibited from expressing their views on issues that materially affect them.”67 In its view, the sole purpose of the legislature in passing the statute had been to exclude corporations from the debate over the upcoming referendum concerning the implementation of a graduated income tax on both individuals and other entities, such as businesses. Without such a provision, corporations would have had the right to participate under Massachusetts law in the election as a change in the tax structure would materially affect their property and business interests.68

A few years later, the state legislature again sought to modify the statute regulating corporate participation in referendum elections. This time the revised law stated that no question “submitted to the voters solely concerning the taxation of the income, property, or transactions of individuals shall be deemed materially to affect the property, business, or assets of the corporations.”69 In First National Bank v. Attorney General II (1977), the Massachusetts Supreme Court rejected the contention that this amendment to the law violated the corporation’s right to freedom of speech under the federal and state constitutions. “It seems clear to [us] that a corporation does not have the same First Amendment rights to free speech as those of a natural person, but whether its rights are designated ‘liberty’ rights or ‘property’ rights, a corporation’s property and business interests are entitled to Fourteenth Amendment protection.”70 As the corporation’s speech and other activities were entitled to constitu-

67 First National Bank I 590.
68 First National Bank I 570, 574-591.
70 First National Bank II 784.
tional protection only to the extent they related directly to their business interests, the legislature was justified in passing a law to exclude them from participating in a referendum election that concerned individuals and that had no material impact on their property. Furthermore, the court argued that corporations could still participate in such elections through the distribution of in house publications, statements to the press, or any other method that did not involve the expenditure of corporate funds.\footnote{First National Bank II, 775-780, 782, 785-789, 792-793.}

While in the past the decision of a state supreme court on the constitutionality of a campaign finance law would have been final, the expanded influence and role of the federal courts in defending the liberties of the citizens in the latter part of the twentieth century now provided a venue in which the opinions of these highest courts could be challenged. Consequently, the losers in the Massachusetts case, the corporations, subsequently appealed the ruling against them to the United States Supreme Court, which overturned the judgment of the state court in the case of \textit{First National Bank v. Bellotti} (1978).

Writing for the majority, Justice Powell rejected the reasoning of the state court that the liberty granted to corporations differed from that given to natural persons. He further noted that the kind of speech at stake in this case, that pertaining to the discussion of political and public affairs, was precisely the kind that the First Amendment and the Due Process Clause had been designed to protect.

\textit{It is the type of speech indispensable to decisionmaking in a democracy, and this no less true because the speech comes from a corporation rather than an individual. The inherent worth of the speech in terms of its ca-}
Having determined that corporate speech was accorded the full protection of the First Amendment, Justice Powell then turned to an examination of whether the state had a compelling reason to interfere with these fundamental rights that would compel the Court to uphold the statute. Massachusetts had argued that the law was justified on two grounds: 1) the necessity of preventing the corruption of the electoral process, and 2) protecting the rights of shareholders who disagreed with the views of management on political and social issues. Neither reason was convincing to the Court, which dismissed the first by noting that unlike in partisan elections no evidence existed that the expenditure of corporate funds on statewide ballot initiative elections resulted in corruption. And the second was rejected on the grounds that the statute seemed to protect shareholders’ rights only in the context of referendum elections. It failed, for instance, to prevent corporations from forcing their views on them when they engaged in lobbying. Thus, the Court ruled that the law was an unconstitutional infringement of the corporation’s First Amendment rights and therefore void.\footnote{First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978), 776-780, 784-785, 787-795}

Joining an opinion by Justice White, Justice Brennan dissented from the majority opinion arguing that the First Amendment had been intended to promote and to protect public discussion about political af-

fairs solely among individual citizens. It had never been intended that a similar level of protection would be accorded to efforts by corporations to influence the political and the electoral process.

Any communication of ideas, and consequently any expenditure of funds which makes the communication of ideas possible, it can be argued, furthers the purposes of the First Amendment. This proposition does not establish, however, that the right of the general public to receive communications financed by means of corporate expenditures is of the same dimension as that to hear other forms of expression. In the first place . . . corporate expenditures designed to further political causes lack the connection with individual self-expression which is one of the principal justifications for the constitutional protection of speech provided by the First Amendment. Ideas which are not the product of individual choice are entitled to less First Amendment protection. Secondly, the restriction of corporate speech concerned with political matters impinges much less severely upon the availability of ideas to the general public than do restrictions upon individual speech. Even the complete curtailment of corporate communications concerning political or ideological questions not integral to day-to-day business functions would leave individuals . . . free to communicate their thoughts. Moreover, it is unlikely that any significant communication would be lost by such a prohibition.

Furthermore, the state had demonstrated in the dissenters’ view that it had compelling reasons to pass such a law. Namely, the necessity of preventing these artificial entities from using their massive wealth to unduly influence the electoral process and to force their political and social views upon their shareholders. If corporations wished to participate in referendum elections not pertaining directly to their material business interests,

74 Justices Douglas and Black had retired from the Court by the time that questions pertaining to the relationship between the First Amendment, campaign donations, and party activity began to become a significant part of the Court’s agenda. Justice Brennan, who been a central figure in the development of the Warren Court’s jurisprudence particularly in the area of freedom of speech, remained on the bench at this time. Hence, it was decided to examine whether his opinions on the First Amendment were consistent with the positions he took on questions pertaining to limits on campaign contributions.
they could still do so by relying upon individuals associated with the company.\footnote{First National Bank v. Bellotti 805-816, 819-821.}

It is interesting to note that in this case, the liberal justices abandoned their earlier willingness seen in the cases pertaining to labor unions to uphold a broad interpretation of the First Amendment similar to that put forth by Justice Bradley in the late nineteenth century. Unlike their conservative colleagues, they refused to accept the idea that corporate speech was just as valuable and worthy of protection as speech by individuals or other organizations. The differing conclusions reached by the liberal justices in these cases during the latter part of the twentieth century can perhaps be explained by their belief that there were fundamental differences between corporations and labor unions as the latter had long argued. “[C]orporations are state-created entities deriving funds from widespread ownership and business interests; they are not associations of individuals formed to promote common group interests through social, educational, political and other means.”\footnote{Brief for Appellee in the case of United States vs. UAW-CIO 352 U.S. 567 (1957), 12.} Thus in the view of the justices, labor unions were not economic organizations designed to amass wealth, but rather another means by which citizens joined together to collectively express their views upon the issues of the day. Echoing the reasoning of the state courts in Gansley and other decisions pertaining to corporate funds in the nineteenth century, these justices continued to believe that artificial entities designed to achieve economic purposes, i.e. corporations, had a very limited right to participate in politics.
Thus for the liberal justices, the right to equally participate in the electoral process and to speak freely belonged solely to individuals or organizations they created to represent themselves in the electoral process. It did not belong to those who like corporations had the potential to transform their economic power into excessive political influence to the determent of the citizens. Hence, their solution to the dilemma posed by the Warren Court’s jurisprudence was to exclude the “powerful” from the protections offered by the First Amendment and the Equal Protection Clause of the Fourteenth Amendment in favor of empowering the citizens who they believed would otherwise be marginalized and unable to influence their own government through the electoral process. Arguably therefore, these justices ultimately came to favor the agenda of the reform liberals as they sought to have the state control who could participate and under what circumstances in elections rather than leaving those choices to be determined by the actions and preferences of individuals and others operating within the confines of the political system.

**Conclusion**

In the 1960s and 1970s, the changes in electoral law that had been precipitated by the constitutional revolution of 1937 reached their culmination when the Supreme Court’s understanding of the courts and the bills of rights as the primary guardians of the citizens’ liberties was made applicable to the state legislatures and courts. This new constitutional era differed from the previous one in at least three important ways that would shape the new statutes passed in the wake of the Watergate scandal to regulate the use of money in politics. First, the federal courts
and the state courts, which increasingly operated under the direction of the former, were now seeking to limit, not expand as in the late nineteenth and early twentieth centuries, the power of their respective governments by enforcing the limitations of the national and state bills of rights. They were especially concerned it seems to protect the First Amendment rights of individuals, and to a certain extent that of other organizations as seen above, to freedom of speech and of the press that were critical to their ability to participate in the electoral process.78

Second, the decisions of the courts were no longer based primarily upon common law doctrines, but instead on the state and federal constitutions as they were no longer willing to trust the political system to protect the people’s liberties.79 The former practice had made rights malleable by allowing the state legislatures, the people, and the courts to engage in an ongoing debate over how best to preserve, or to implement, them as they had done in the early twentieth century when considering new regulations to control money in politics. As courts came to increasingly base their rulings on constitutional provisions, the second generation of reform liberals found it much more difficult to implement statutes that eliminated corruption, i.e. inequality of resources and opportunities to participate in the political process that affected the political power of the citizens, as rights had static definitions. Their only options were to either to design laws that accorded with judicial understandings of these liberties and respected the limitations placed upon

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79 *Dinan*, 128, 136-138, 141, 143, 150.
their ability to regulate them, or engage in the difficult task of convincing
the Court to alter its existing interpretation of the Constitution.

And third, although the Supreme Court has assumed
responsibility for determining whether campaign finance, and electoral
laws more generally, violated the liberties of the citizens, it has not suc-
cessfully reconciled the tension that developed between pluralist and re-
form liberalism under the Warren Court. The state courts in the late
nineteenth and early twentieth centuries did not have to contend with
this problem as they unequivocally chose to support the arguments ad-
vanced by the state legislatures and reform liberals. This allowed for the
development of relatively clear doctrines to govern the actions of legisla-
tures and their own decisions. In contrast, the modern era has been
characterized by the failure of the Court to adequately delineate the
limits of the regulatory authority of the legislatures as it struggles to re-
solve the tension between pluralist liberalism’s demand for minimal
government regulation with reform liberalism’s desire to create a “better”
electoral process through governmental regulation. At times the Court
has favored freedom of speech as in First National Bank and Buckley v.
Valeo (1976) by striking down campaign finance laws; while in other in-
stances, such as McConnell v. FEC (2002), granting the government
broad power to control the use of money in elections even if it interferes
with fundamental rights. It is this continuing struggle both within the
Court and in the broader political system between opponents and propo-
nents of regulation that defines the campaign finance debate today. Par-
ticularly, the question of to what extent legislative power should be used,
if at all, to protect the rights of the citizens in order to fulfill republican
liberalism’s promise of a government by consent.
5 Money, Politics, and Democracy

From the early days of Massachusetts Bay to the triumphs of prohibitions and beyond, one American reaction to the discovery of evil in the Church or State has always been to proclaim, “There ought to be a law against it.”

The debate over campaign finance from its early days in the nineteenth century to the present has centered around the issue of what is required to fulfill the principle of government by consent that is part of republican liberalism. Pluralist and reform liberals have proposed radically different answers to this question based upon their particular understandings of government, rights, and the character of the people and society.

For pluralist liberalism, government by consent has meant, as Madison argued, the freedom of the people in elections to act upon their own preferences, whether they be selfish or patriotic, in deciding which candidates and parties they will support. It views the electoral process as the means by which the people can gain information about their government and those seeking public office by engaging in a public debate with others over the merits and demerits of particular policies and candidates. The proper role of the state, in its view, is to restrain those individuals who harm the right of others to express their preferences by engaging in illegal activities, such as fraud or intimidation.

Until the latter part of the nineteenth century, it was this understanding of consent that governed the actions of the states and the federal government taken to regulate the elections. The latter could do little

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more than pass statutes regulating the worst abuses in elections such as bribery and fraud due to the constitutional restraints upon its powers. While the states had broader authority to control the electoral process, they too chose only to pass statutes to control outright criminal activities, and gave the parties broad latitude to conduct political campaigns as they believed appropriate. Although never explicitly stated, the reticence of the states to impose stricter controls on campaigns may have been due to the accepted understanding of the time that parties were private associations through which the citizens expressed their political views, and debated the conduct of the government and their representatives. To interfere with these organizations therefore meant violating the natural right of the citizens to inquire about politics and society enshrined in the state and federal Bill of Rights in the form of the rights to freedom of speech, of the press, and of association, and more fundamentally their duty to elect members of the federal and state governments.

Reform liberalism also views elections as the primary means by which the people can gain information and engage in debate with their fellow citizens about governmental policy and the worthiness of the candidates seeking their suffrages. Where they differ from their pluralist counterparts is in their belief that this discussion, and more importantly the decisions that emerge from it, must conform and be guided by a socially developed and enforced code of conduct to ensure that the outcomes are beneficial to all and the state itself. It is the responsibility of the state therefore to not only prevent criminal practices, such as bribery, but also to determine what activities will be permitted in elections based upon whether they help citizens fulfill their duty to select the best, or most representative, government possible.
This understanding of government by consent first began to manifest itself and challenge the pluralist one after the Civil War when various groups of reformers began to criticize the changing character of the American polity and its people as it developed into a modern and industrialized nation. The most important of these were Progressives whose objective in creating an electoral code of conduct was to restore the civic virtue and political morality of the citizens required to make proper political decisions, which had been corrupted by the industrialization and urbanization of the nation. The first campaign finance laws were an integral part of this project as they were designed to redeem the people from their “bondage” to the “sinful” influence of money and political parties that had led them to favor selfish and partisan motives rather than the national interest in making political decisions. By eliminating these “evil” influences, these reform liberals hoped to make elections dispassionate events in which a rational, virtuous, and moral people acquired knowledge about the issues and candidates, debated their merits, and reached a consensus as to which candidates or policies would best serve the advancement of the democratic ideal. And this in turn would improve the quality of the national and state governments as the men elected would be motivated solely by their desire to serve the people and the nation rather than the selfish and petty interests of the corporations and party bosses.

Although the political science literature traditionally portrays the courts in this era as hostile to the regulation of economic or private power, state judges in the period from the 1890s to the 1920s showed great deference to the judgment of the legislatures concerning the necessity of these laws by upholding them as a legitimate exercise of their po-
lice power. They with few exceptions accepted the arguments of the state legislatures, often based upon those of the reform liberals, of the necessity of restoring the virtue and morality of the people by reducing the importance of money and party bosses in elections.

What differentiated the state courts in this era was how they answered particular questions pertaining to the different kinds of laws. Their answers to them often determined the scope of legislative power over the electoral process. This was especially true for primary and corrupt practices acts. For the former, the state courts were divided, especially after the turn of the twentieth century, over whether such elections fell within the purview of the state constitutions or not, and hence if the legislature’s power to regulate such contests was subject to constitutional restrictions. While in the case of corrupt practices acts, the central question for the courts became not whether money was property as they viewed these statutes as political ones designed to correct certain abuses in the electoral process. Instead, it was whether the legislature was simply regulating the rights of the citizens to freedom of speech, of the press, and of association, or actually destroying them by silencing a whole class of citizens. The latter was unacceptable in the view of state judges, and laws were struck down on a few occasions for being too extreme. Even with these restrictions, the power given by the courts to the state legislatures to regulate elections in the early twentieth was very broad to enable them to fulfill their duty of protecting the liberties of the citizens.

The Progressive understanding of government by consent supported by nineteenth century and early twentieth century reform liberals and state judges was eventually displaced by that of a second generation of reform liberals that emerged in the 1960s. They too sought to establish
a code of electoral conduct, but its objectives were informed by a very different understanding of corruption. To them, the problem with the use of money in elections was not per se the motives that drove the citizens to make their decisions. Rather, it was the inequalities in resources and opportunities for participation in politics that prevented citizens from being able to influence government policy and legislators to the same extent as the wealthy and organized interests. Campaign finance laws were meant to address this imbalance of power in part by preventing the latter from transforming their economic resources into excessive political influence. These statutes were also meant to ensure that the citizens acquired all the information required for them to make an informed decision about governmental policies and who their representatives would be by providing them with equal resources and opportunities to participate in the political process. By giving all the people the ability to express their views and engage in the great debate called politics, the second generation of reform liberals sought to create a government that was just and fair, i.e. one that would be truly representative of the citizens, and able to address their needs and interests.

However, unlike in the late nineteenth and early twentieth centuries, the state courts were far less willing to show deference to the judgment of the state legislatures. They now began to strike down entire statutes, or portions of them, on the basis of the state and federal constitutions, and more importantly precedents established by the national courts, particularly the Supreme Court. Although this shift in responsibility for protecting the rights of the citizens from the state courts and legislatures to the federal courts began with the constitutional revolution of 1937 when the focus of the Court’s electoral jurisprudence began to
shift from questions pertaining to federalism, state power, and race to those pertaining in part to freedom of speech in the electoral arena, it reached its culmination only during the era of the Warren Court in the 1960s. The doctrines developed by the Court during that decade in regard to freedom of speech and equality in the political process would become especially important in shaping the subsequent development of campaign finance policy. They would serve first of all to frustrate the second generation of reform liberals’ desire to equalize the relative political power of the citizens by providing especial protection for certain liberties including freedom of speech. And secondly, they would increasingly come into conflict with each other as the Court grappled more directly with the issue of campaign finance in the 1970s with the central issue becoming, especially for the more liberal justices, which activities and individuals or groups deserved to be protected by the Constitution.

The broad differences that exist between how pluralist and reform liberalism conceptualize the idea of government by consent, particularly their views of the state’s role in regulating the electoral process, makes it impossible to reconcile them to create a single, widely accepted understanding of this tenet of republican liberalism. One is therefore left with the question of which interpretation, if any, of this principle that has been proposed in the course of the century long debate over campaign finance truly fulfills it.

**The Art and Science of Politics**

The understandings of the American political system that the founders, Progressives, and modern liberals derived from republican,
pluralist, and reform liberalism are all examples of what Michael Oakeshott calls the politics of rationalism. This refers to the desire to create a regime not based upon custom or tradition, but instead on the basis of abstract principles arrived at through human reasoning.\textsuperscript{2} What makes the founders’ conception of government and of the electoral process grounded in republican and pluralist liberalism more acceptable than those of the Progressives and modern liberals is that they did not seek to transform human nature and society in utopian ways. Rather, they enacted what Martin Diamond has called a revolution of sober expectations by creating a regime that sought to give equal political rights to all, and that allowed human ambitions, interests, and passions to flourish.

In his essay “Rationalism in Politics,” Oakeshott describes a rationalist as an individual characterized by three habits of thought or action. First, he rejects any reliance upon authority, tradition, or experience, and instead depends in each situation on reason to be the infallible guide that directs his actions and forms his beliefs. Second, his mind has been trained to be a “finely-tempered, neutral instrument” that questions and evaluates everything using reason, including deeply held customs and beliefs, to determine their worth and truth as well as the appropriateness of his actions. And third, he believes that all men are intellectually equal, i.e. they are all capable of using their reason appropriately, and hence cannot fail to reach the same opinions and conclusions as himself.\textsuperscript{3}

\textsuperscript{3} Oakeshott, 1-3.
In politics, the rationalist therefore finds no value in existing traditions or political, social, and economic institutions. Rather, he considers it his duty to question the validity of these arrangements using his reason, and to replace them as necessary with ideologies and governing structures that better suit the circumstances and desires of society at that particular moment. This is what Oakeshott calls the politics of the felt need, which treats political life as a series of problems that the rationalist is to resolve through the application of his reason unhindered by any past decisions, customs, or institutions.

The conduct of affairs for the rationalist is a matter of solving problems, and in this no man can hope to be successful whose reason has become inflexible by surrender to habit or is clouded by the fumes of tradition. In this activity the character which the Rationalist [sic] claims for himself is the character of the engineer, whose mind (it is supposed) is controlled throughout by the appropriate technique and whose first step is to dismiss from his attention everything not directly related to his specific intentions. This assimilation of politics to engineering is indeed, what may be called the myth of rationalist politics.4

Furthermore, the rationalist is confident that reason will always be able to find an answer to a problem even if he cannot, and that it will be the perfect one that suits all circumstances. This is referred to as the politics of perfection by Oakeshott, and naturally leads in his opinion to the politics of uniformity, which holds that whatever solution is adopted will be equally applicable to all members of society. There is no need for a variety of answers as all individuals share the same rational preferences and opinions.5 Thus, rationalism in short conceives of political activity “as

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4 Oakeshott, 4.
5 Oakeshott, 3-7, 22-23.
the imposition of a uniform condition of perfection upon human conduct.”6

For Oakeshott, the fundamental flaw of rationalist politics is that it forgets that all arts and sciences depend upon the use of both practical and technical knowledge, especially politics which takes human beings as its material. The latter is knowledge that can be distilled into precise maxims or rules that can be learned, remembered, and applied; while the former refers to knowledge that is derived from tradition or the actual practice of an art or science. It is an imprecise knowledge that cannot be formulated into specific guidelines and learned, but rather must be imparted and acquired by an individual through the actual performance of the activity and by an apprenticeship in which he observes one who is familiar with it. Together, the two kinds of knowledge tell an individual not merely what to do to complete a particular task, but more importantly how to perform those actions.7

Rationalism is based upon an outright rejection of practical knowledge as either negligible or false knowledge since it is based upon custom, and hence is uncertain or a matter of opinion. For the rationalist, the only true knowledge is that of technique which tells an individual all he must know, and is better learned by those whose minds are empty or have been purged of all previous beliefs. The problem with this theory, as Oakeshott argues, is that no individual can ever begin learning an activity from a point of ignorance as he always will be influenced by what he already knows, i.e. his practical knowledge.8

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6 Oakeshott, 6.
7 Oakeshott, 7-13, 22-23, 31-32.
8 Oakeshott, 11-13.
The variations of reform liberalism put forth by the Progressives and modern liberals are arguably classic examples of rationalism in politics. While it is true that their desire to reform the political and electoral system came from practical knowledge gained from observing how the use of money in elections was corrupting the republic by promoting selfish desires or inequality, the principles that underlay their vision of democracy described in the first chapter and that were used to justify the restrictions of the use of money in elections, were all arguably derived solely from reason.

For the Progressives, the problem was how to restore moral order in the electoral process to allow the right men to be elected so that the nation could be guided toward the fulfillment of the vaguely defined goal known as the democratic moral idea. The campaign finance laws they advocated as a solution to this problem were premised upon their rationalist beliefs that all men were intellectually equal, and had the capacity to be moral, virtuous, and rational citizens who acted in the best interest of the republic. They believed that by using these statutes to suppress the selfish aspects of human nature that had degraded the republic, it would be possible to teach, or in the worst case force, the people to act upon their highest motivations in making political decisions.

Rawls’ principles of justice that underlie his constitutional order are formed in a setting devoid of any external influences, and hence are solely the product of abstract human reasoning. Implementing them requires in part that the glaring discrepancies in power and wealth that prevent the citizens being able to equally influence their own government be eliminated through the passage of campaign finance laws. Although Rawls and modern reform liberals advocate such statutes for different
reasons than the Progressives, they too rely upon a rationalist vision of human nature. They presume that all men are intellectually equal and rational, and will therefore seek to participate in the electoral process if given a chance. And furthermore, that the behavior of the citizens can be shaped to allow them to act and to make decisions that accord with the higher purposes of government and society even if this requires the suppression of human passions and interests.

Perhaps the most significant problem with the reform liberals reliance upon technical knowledge and reason and neglect of practical knowledge is that it leads them to advocate the creation of regimes that ignore the realities of human nature. Both Rawls and the Progressives, for example, assume that it is possible for the citizens either to empty their minds of all preconceptions, ambitions, and interests, or ignore them in making political or electoral decisions. But, is it not inevitable that practical knowledge, especially people’s beliefs, prejudices, partisan inclinations, and numerous other factors, will influence these decisions as is well documented in the literature related to voting?9

Furthermore, such knowledge if it can be repressed would require the state to eliminate the diversity of opinion that is an integral part of human nature. “The latent causes of faction are thus sown in the nature of man; and we see them everywhere brought into different degrees of

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activity, according to the different circumstances of civil society.”¹⁰ In fact, one of the understated and perhaps most disturbing implications of these two conceptions of reform liberalism is that they would require an extremely intrusive state to maintain what they believe to be equality and justice, and to reshape the nature of the citizens to teach them to make what they consider to be proper decisions, i.e. those that accord with reason. In all probability, they would be laws similar to Colorado’s public funding law of 1909 and Wisconsin’s corrupt practices act of 1916, discussed in chapter three, to control who could participate in elections, what activities were permissible, and to limit to the extent feasible the use of private money.

A state with these kinds of statutes seems more like a totalitarian one rather than a democratic one as such laws impose significant restrictions on the liberty required for citizen participation in the political process. Perhaps most importantly, they interfere with the “natural” right of the citizens to inquiry about society and politics by requiring them to exercise their rights of freedom of speech, of the press, and of association in predetermined ways or to ask only certain kinds of questions. In short, they allow the government to shape the views of the people by restricting the information available to them rather than allowing the citizens to freely consider the issues and reach their own conclusions about politics and society.

The founders also eschewed any reliance on practical knowledge, especially that derived from the older political traditions associated with

European government, and sought to create a regime based upon a new science of politics that derived its abstract principles from nature through the use of human reason. However, in contrast to the Progressives and modern liberals, the purpose of this regime was the modest one of creating a state that guaranteed all men equal political or civil liberty, and at the same time accepted that it was impossible to change their depraved nature, particularly the fact that they acted most commonly out of passion and self-interest. Any attempt to change human nature in their view would destroy the very liberty that they were seeking to preserve.11

Another important distinction between the founders’ conception of liberalism and those put forth by the Progressives and modern liberals is that the former was founded as previously noted upon a system of negative liberties. Rights were understood to be restraints upon the power of the government instead of a series of obligations and duties that the government and the citizens had to each other as part of fulfilling the overarching purpose of the regime. Furthermore, the founders made no effort to coerce the citizens into accepting particular social and political beliefs. These two features of the regime left the people free to think and to chose what principles and leaders they wanted to support, and made possible the formation of those secondary associations, civil and political ones, that Alexis de Tocqueville in the nineteenth century and Michael Oake-

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shott in the twentieth century believed were essential to the maintenance of republican government. In their opinion, these associations prevented the state from becoming despotic by diffusing its power throughout society, and teaching citizens how to rely upon each other to oppose intrusions by the state into their freedoms as well as improving their ability to contemplate for themselves the affairs of the state.¹²

Thus, what sets the conception of government of the founders grounded upon pluralist and republic liberalism above those proposed by the Progressives and modern liberals is that it sought to allow human proclivities to flourish within a scheme of ordered liberty. This not only guarded against the abuse of governmental power, but also allowed the parties to draw the citizens into the political process by appealing to their self-interest. As Richard Bensel’s work discussed in chapter two makes clear, political parties encouraged participation in politics not only by simplifying the choices the people had to make in elections, educating them about the issues and candidates, and making an effort to show how their private interest was connected to the public one, but also using what now are considered controversial tactics. These include rewarding the citizens for their support, obstructing those who wished to vote, or raising campaign funds in secret from special interests.¹³ All of these


practices in the nineteenth century, however, were arguably viewed by citizens as a normal and acceptable part of the electoral process.

It was the elites of the latter part of the nineteenth century who came to view them as illegitimate as they did not foster the kind of deliberation they believed essential to republican government. Nor did they think, unlike the founders, that the restraints and mechanisms of the Constitution would be able to constrain the ambitions of the citizens and politicians nor redirect them to the benefit of the public. Thus while the founders’ governmental system may not in the end have promoted public deliberation, it was able to promote citizen participation by leaving sufficient liberty for the people to be drawn into the political process in various ways, and consequently to become to a certain extent engaged in the inquiry about politics and society that was essential to the maintenance of a democratic system.

**Implications for Campaign Finance**

Hence, it is the understanding of the electoral process grounded in pluralist liberalism that best fulfills the requirement of republican liberalism that government be based upon the consent of the people. It provides the citizens with the maximum amount of liberty possible to debate the merits and demerits of the candidates and issues; to criticize the conduct of the government and their representatives; and above all else to make whatever decisions they please using this information regardless of whether they are in the view of the reformers made from proper mo-

tives, rational and disinterested ones, or improper motives, self-inter-
ested and partisan ones.\footnote{Daniel R. Ortiz, “The Democratic Paradox of Campaign Finance Reform,” 50 Stanford Law Review 893 (Feb. 1998): 901-905, 913-914.} It also recognizes that money in the political process is good for democracy, not inherently corrupting, as it provides the resources that make it possible for the parties, candidates, and citi-
zens to communicate with each other. Finally, pluralist liberalism ac-
cepts that there will inevitably be inequalities in who is able to speak and more generally participate in the electoral process, but does not view it as a source of concern. As Oakeshott argues, most people have “nothing to say; the lives of most men do not revolve around a felt necessity to speak.”\footnote{Oakeshott, 43.} And one might add no inclination to run for public office.

Thus, the electoral process should not be based upon the unreal-
istic expectations found in reform liberalism that all citizens desire to participate in the electoral process, will abide by the code of conduct es-
tablished by the state, and are capable of engaging in rational debate with each other without the assistance of mediating institutions. Rather it should be understood that these kinds of institutions, especially political parties, are precisely those that encourage citizens to become in-
volved in elections by giving them the ability to express their preferences in regard to particular policies or candidates whether it be by simply be-
coming a member of them or supporting them with their votes and dol-
lars.

Based on these premises, this work concludes like past scholars, such as Louise Overacker and James Pollock, that the best campaign fi-
nance regulatory regime will be one that places its emphasis upon pub-
licity laws as a means of controlling the use of money in elections. However, unlike them, it believes that these kinds of statutes combined with those prohibiting bribery, fraud, and other well-recognized electoral crimes are sufficient to regulate money in the electoral and political process.\textsuperscript{16} Such a system leaves the citizens, parties, and candidates free to speak, to spend money, and to join associations to influence the decisions of their fellow citizens or to proclaim their belief in particular principles, policies, or candidates. At the same time, it provides accountability for how money is used in the electoral process by making possible the enforcement of the criminal laws, and allowing voters to know who is seeking their votes directly through campaigning or indirectly through campaign contributions.

Other measures such as public funding, prohibitions on the participation of particular interests, such as corporations and labor unions, and general limitations on the use of money in elections are more harmful than good for a republican government, and hence should be rejected as viable options for controlling campaign funds. While they are all purportedly meant to eliminate corruption, this work has shown that they have another, decidedly anti-democratic function: to shape the electoral process in a fashion as to ensure that citizens make what the policymakers or reformers believe to be the right decisions about the future of the polity and select the right candidates as their leaders. This is ac-

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complished by discriminating against those interests that are perceived to be “corrupting” or “harmful” to democracy and favoring those that are believed to be beneficial. For the Mugwumps, Progressives, and other nineteenth century reform liberals, this meant passing civil service reform and campaign finance laws to remove the “mere politicians” from power and replace them with true statesmen; for modern reform liberals the goal is to replace legislators too indebted to the wealthy and organized interests with those willing to consider the interests of the citizens or more likely, the groups claiming to represent them; and Southern Democratic whites at the turn of the twentieth century created a system to favor themselves at the cost of blacks and poor whites. In reality therefore, these laws prevent the citizens from hearing all points of view, and deny them the right to make a truly informed and free decision about which candidates, policies, associations, and principles they wish to support.

A further defect of these statutes is that they have historically been abject failures in establishing a code of conduct in elections that will guide the decisions of the people in elections. If anything, they have contributed to a depression in citizen participation in the electoral system by eliminating opportunities for them to engage in certain activities, such as giving contributions to parties and to candidates in cases where campaigns are publicly funded. And also making it more difficult for them to give money or express their support for a party or a candidate through the Byzantine bureaucratic requirements they must know and obey to do so. Most citizens simply lack the resources, time and knowledge, required to learn and comply with these requirements. Wisconsin’s 1916 statute banning the use of money by individuals to electioneer outside of their own counties is a good example. As noted in chapter 3, the law was
so thorough that the simple act of mailing a letter expressing his support for a candidate might get a citizen unaware of it arrested. The development of such complex regulatory system makes anyone who wants to be involved in politics need a lawyer, and hence significant economic resources, if they desire to influence the political process.

Nor have campaign finance law been successfully in achieving another common goal of the reform liberals: to control the flow of money into the political system through publicity statutes and those restricting the use of campaign funds. In reality, these laws have more often than not had precisely the opposite effect: they have only succeeded in enhancing the possibility for corruption by diverting money into hidden channels. Mistakenly believing that campaign costs are too high due to their failure to consider the impact of inflation and other factors on politics, reformers have repeatedly sought to remove or to reduce the sources of money available to the parties or the candidates. This in turn has left them with the choice of losing an election due to a lack of money, discovering new sources of funding, or finding a means of circumventing the law. Historically, parties and candidates have chosen the latter two measures, which has reduced the ability of the publicity requirements to track how money is used in the political system through the constant creation of new channels into which campaign funds can flow. Perhaps the most significant consequence of these statutes is that they undermine confidence in the rule of law that is central to the functioning of a republican government through the perception that the statutes are unenforceable and that violating the law carries no consequences.

The history of limitations imposed on political campaigns by the second Hatch Act of 1940 illustrates all of these problems. Its inflexible
and unrealistic limits quickly threatened to become a liability to politicians in an era when television and other innovations were demanding the use of ever large amounts of money on campaigns. Therefore, the parties flagrantly violated the spirit of the law by creating multiple committees to raise money making it impossible to track who was giving; what funds were transferred between committees; or even how much money was really being raised and spent since not all committees complied with the publicity requirements. And the lack of enforcement arguably created cynicism among the public about campaign finance laws in general since the politicians treated them with such contempt.

Thus, the merits of a regulatory regime that relies primary on publicity to regulate the use of money in elections is in part that it rejects the lofty and impossible goals, such as elevating the moral and intellectual condition of the citizens or completely purifying politics of all corruption, that have so often characterized the goals of reform liberals. Furthermore, the history recounted in this study suggests that of all the measures attempted in the United States to regulate money in politics, this one alone might have the greatest chance of success if properly implemented. A more thorough study of the finances of the parties and candidates in the nineteenth and early twentieth centuries would be required to properly evaluate the potential impact of such a regime.

However, it seems likely that a regulatory system premised on disclosure can arguably be effective if it provides serious penalties for failing to file reports or for falsifying data, such as those that were incorporated into the 1883 British Corrupt Practices Act. These included jail, fines, and most importantly, the possibility of the election being nullified and the candidate being barred from ever holding office or voting again.
Whether citizens use the information revealed by publicity in deciding who to support will be up to them. After all, the ultimate purpose of a disclosure regime is to ensure that the government is truly formed by the consent of the people thorough an electoral process that is fair and honest to the greatest possible, and within which all have an equal opportunity to participate by expressing their preferences, whether it be by making a contribution, spending money, speaking to influence one’s fellow citizens, or simply joining an association of like-minded citizens, regardless of their personal motivations.
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