

# THE STATE OF DEMOCRACY IN NORTH DAKOTA

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## ABSTRACT

This article provides a brief assessment of the state of democracy in North Dakota, using it as a case study to make some broader claims about politics in America. The overall thesis is that while North Dakota has some attributes that lend itself to promoting its image as populist, the reality is that democracy is far from secure in the Peace Garden State. Instead, the largely unregulated, free-for-all political environment has yielded a state where its outputs have produced a political process that is often corrupt, or at least malfunctions, in serious ways. Thus, North Dakota is emblematic of some larger trends in American politics. In order to make this claim, this article will do several things.

First, the article will offer a brief introduction to the political history and structure of North Dakota politics. The goal will then eventually be to focus on two major facets of North Dakota politics—its use of initiative and referendum and its failure to regulate the use of money in politics. Second, both of these features of North Dakota politics will be examined to reveal how they have damaged the state’s political system and how such damage is a microcosm of broader problems with ballot initiatives and unregulated money in politics.

I.	INTRODUCTION.....	372
II.	BRIEF HISTORY OF NORTH DAKOTA POLITICS AND POLITICAL REGULATION .....	374
III.	DIRECT DEMOCRACY AND BALLOT INITIATIVES .....	379
	A. THE PROGRESSIVE SOLUTION: THE THREAT TO MINORITY RIGHTS .....	381
	1. <i>Minority Rights Generally Lose</i> .....	381
	2. <i>Money Spent for Initiatives and Referenda Cannot be     Limited</i> .....	384

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3.	<i>Money Spent On Initiatives and Referenda Circumvent Populism</i> .....	385
4.	<i>Big Money Distorts Deliberation</i> .....	385
5.	<i>Initiative and Referendum Has Little Impact On Breaking Up Special Interests</i> .....	386
6.	<i>Courts Do Not Always Defer to Ballot Measures</i> .....	387
7.	<i>Summary</i> .....	387
IV.	MONEY AND POLITICS .....	387
A.	DEREGULATE BUT DISCLOSE.....	389
B.	DISCLOSURE IS NOT ENOUGH.....	397
C.	DEMOCRACY AND CAPITALISM: WHY MONEY NEEDS TO BE LIMITED .....	405
V.	CONCLUSION .....	413
I.	INTRODUCTION	

North Dakota is a political enigma. It is home to direct democracy through initiative and referendum, but it is also a state ranked with a failing grade in political accountability and integrity.<sup>1</sup> It has used ballot initiatives to further many government reforms, but it has a record of targeting individual rights. It is a state with unique “socialist” institutions, such as the nation’s only state-owned bank<sup>2</sup> and mill,<sup>3</sup> yet it is also a state gripped with free market frontier frenzy on the Bakken reserve when it comes to regulating the hydraulic fracturing technology and practices implemented to

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1. See State Integrity Investigation, CTR. FOR PUBLIC INTEGRITY (Dec. 23, 2013), <http://www.publicintegrity.org/2012/03/19/8423/grading-nation-how-accountable-your-state>.

2. In 1919, the North Dakota state legislature established the Bank of North Dakota (the “Bank”) to establish state ownership of the various marketing and credit agencies, and to protect local farmers from the predatory lenders and financing. The Bank was created in an effort to promote agriculture, commerce and industry throughout the state and is, now, an institution claiming more than \$270 million in capital. Moreover, the Bank became the first financial institution to issue federally insured student loans in 1967. See Bank of N.D., BANK OF NORTH DAKOTA, available at [http://banknd.nd.gov/about\\_BND/history\\_of\\_BND.html](http://banknd.nd.gov/about_BND/history_of_BND.html) (last visited Apr. 21, 2014).

3. The North Dakota Mill and Elevator Association began operating October 22, 1922 as a value-added market for wheat produced in North Dakota, which now adds value to twenty three million bushels of North Dakota spring and durum wheat annually by selling wheat products to various bakery, pasta customers, and food service suppliers—providing the state with an annual payroll of \$7 million. History, NORTH DAKOTA MILL, available at <https://www.ndmill.com/history.cfm> (last visited Jan. 1, 2014).

extract oil and natural gas from one of the nation's largest oil basins.<sup>4</sup> It is the only state in the country that does not require citizens to register to vote, yielding one of the highest voter turnout rates in the country, but it also largely does not regulate political spending. Consequentially, it is hard to label North Dakota as either a sterling example of democracy or a representation of what ails much of contemporary American democracy.

Two events best capture the enigma of North Dakota politics. First is the legislative resolution in 2013 that will send to the voters a constitutional amendment defining personhood, effectively aimed at ending abortion and reproductive rights of women. Should it be adopted, it will, on one hand, represent democracy in action—the people acting on their own to legislate. However, should it pass, it will also represent the use of majority rule to infringe upon individual rights. Conversely, the right of individuals and most entities to make unlimited political contributions is either expression of a real marketplace of political ideas or it is a sign of the power of money to corrupt politics.

This article provides a brief assessment of the state of democracy in North Dakota, using it as a case study to make some broader claims about politics in America. The overall thesis is that while North Dakota has some attributes that lend itself to promoting its image as populist, the reality is that democracy is far from secure in the Peace Garden State. Instead, the largely unregulated, free-for-all political environment has yielded a state where its outputs have produced a political process that is often corrupt, or at least malfunctions, in serious ways. Thus, North Dakota is emblematic of some larger trends in American politics. In order to make this claim, this article will do several things.

First, the article will offer a brief introduction to the political history and structure of North Dakota politics. The goal will then eventually be to focus on two major facets of North Dakota politics—its use of initiative and referendum and its failure to regulate the use of money in politics. Second, both of these features of North Dakota politics will be examined to reveal how they have damaged the state's political system and how such damage is a microcosm of broader problems with ballot initiatives and unregulated money in politics.

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4. According to various studies, it is estimated that the Bakken formation could contain as much as 503 billion barrels of original oil in place (“OOP”)—placing the Bakken formation as one of the largest oil basins in the world. See Leonardo Maugeri, *Oil: The Next Revolution*, BELFER CTR. FOR SCI. & INT’L AFFAIRS, June 2012, at 47.

## II. BRIEF HISTORY OF NORTH DAKOTA POLITICS AND POLITICAL REGULATION

David B. Danborn describes North Dakota as a state full of aspirations that were never realized.<sup>5</sup> Instead the state has constantly been gripped by a sense of inferiority or a colonial status: “dominated economically, socially, culturally, and politically by outsiders.”<sup>6</sup> It is also a state often seen as an outsider, isolated by weather and geography from the rest of the Midwest.<sup>7</sup> The importance of this description is that this sense of isolation and being an outsider has meant that the people of North Dakota generally pull together and are “tolerant and sensitive to one another;” they remain contemptuous of outsiders, including that of its own Native-American population.<sup>8</sup> But this sense of community born of its isolation has politically meant that North Dakota often looks nonpartisan and non-ideological,<sup>9</sup> especially after the early experiences of farmer populism, progressivism, and perhaps, socialism and the Non-Partisan League were extinguished from the state, leaving it to this day with a culture largely conservative.<sup>10</sup> North Dakota politics also are characterized by its sense of community tied to family and church, and by a commitment to “civil pride and sense of civic responsibility.”<sup>11</sup> As a result, one can describe contemporary North Dakota politics as both a mixture of libertarianism and communitarianism, strongly conservative, but with vestiges of populism that still reside within the state.

North Dakota’s political history and culture have produced a unique regulatory framework when it comes to its government and campaigns and elections. In many ways the regulatory framework is libertarian, displaying little effort to control or regulate campaigns and elections or the political process in general. For example, North Dakota is the only state in the country that does not require its citizens to register to vote;<sup>12</sup> they merely

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5. David B. Danborn, *North Dakota: The Most Midwestern State*, in HEARTLAND: COMPARATIVE HISTORIES OF MIDWESTERN STATES 107 (James H. Madison ed., 1990).

6. *Id.* at 109.

7. *Id.* at 110, 118. See also Thomas W. Howard, *Preface*, to THOMAS W. HOWARD, THE NORTH DAKOTA POLITICAL TRADITION, vii, viii (1981), for a similar description.

8. Danborn, *supra* note 5, at 111.

9. *Id.*

10. *Id.* at 113-14. See also Larry Remele, *Power to the People: The Nonpartisan League*, in THE NORTH DAKOTA POLITICAL TRADITION 66 (Thomas W. Howard ed., 1981) for a discussion of the Nonpartisan League and the early radicalism of North Dakota politics including during the Progressive Era; D. Jerome Tweton, *The Anti-League Movement: The IVA*, in THE NORTH DAKOTA POLITICAL TRADITION 93 (Thomas W. Howard ed., 1981) documents the conservative legacy remaining after the purging in the 1920s and 1930s the Nonpartisan League from the state.

11. Danborn, *supra* note 5, at 122-23.

12. See N.D. CENT. CODE § 16.1-01-04 (2009).

need to be residents of the state, with the rules of residency prescribed by law that make it difficult to lose voter eligibility.<sup>13</sup> In 2012, this yielded a voter turnout of 60.5% in the presidential election;<sup>14</sup> a respectable turnout above the national state average of 58.2% but below the national leader Minnesota with a 75.7% turnout.<sup>15</sup> As of August 1, 2013, North Dakota now requires voters to present identification before casting a ballot, unless the poll worker can vouch for the voter's identity and address.<sup>16</sup> How such a law will eventually affect the voter turnout in the state is yet to be seen, but it does demonstrate that North Dakota politics is engrossed by fears of voter fraud that are seen across the country.<sup>17</sup>

Second, North Dakota largely does very little to regulate political expenditures and contributions. In 1981, North Dakota adopted a new election code modeled, in many ways, on federal law. But that law, for the most part, was not debated or even challenged in court, leaving it with a parse history regarding what its key provisions meant.<sup>18</sup> Limits on political expenditures are largely unconstitutional, so it is not a surprise that they are permitted in North Dakota. In fact, North Dakota, like many states, bans direct corporate contributions to candidates.<sup>19</sup> But long before *Citizens United v. Federal Election Commission*, corporate contributions were permitted in North Dakota so long as they were done through a separate segregated fund under control of the corporation.<sup>20</sup> There is no public financing for any elections in North Dakota. In addition, there are no contribution limits of any kind in the state, at least since the 1995 revisions of the North Dakota Century Code ("Century Code"). Moreover, the Century Code contains no statutory provisions with respect to the organization and formation of a PAC. In effect, except for direct corporate contributions to candidates, almost anyone or any entity can make unlimited political contributions to any state candidates in North Dakota. In light of *Citizens United*, it is also questionable regarding whether any restrictions on

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13. See N.D. CENT. CODE § 54-01-26 (2008). In effect, this statute requires one to intentionally renounce residency, and it is not lost automatically as a result of marriage or as stated in N.D. CENT. CODE §16.1-01-04, by relocation or attendance at school.

14. Michael McDonald, *2012 General Election Turnout Rates*, [http://elections.gmu.edu/Turnout\\_2012G.html](http://elections.gmu.edu/Turnout_2012G.html) (last visited May 30, 2014).

15. *Id.*

16. N.D. CENT. CODE § 16.1-05-07 (2009).

17. See generally LORRAINE C. MINNITE, *THE MYTH OF VOTER FRAUD* (2010).

18. Bruce A. Schoenwald, *A Conundrum in a Quagmire: Unraveling North Dakota's Campaign Finance Law*, 82 N.D. L. REV. 1, 4 (2006).

19. N.D. CENT. CODE § 16.1-08.1-03.3(1) (2013).

20. N.D. CENT. CODE § 16.1-08.1-03.3(2). See also Schoenwald, *supra* note 18, at 1, 4.

expenditures from corporate treasuries—and the requirement that they come from separate segregated funds—are constitutional.<sup>21</sup>

The largely laissez-faire regulatory environment towards politics extends to disclosure and regulation of lobbying and lobbyists. In terms of political contributions, there is no requirement to disclose unless the contributions exceed \$200 in the aggregate during a reporting period.<sup>22</sup> For lobbyists, the state largely does not regulate them or provide the public with much information regarding their activity.<sup>23</sup> The laws regarding lobbying were adopted in 1975 and have not been changed much since then, despite the growth of the number of lobbyists in the state,<sup>24</sup> and the trend nationwide toward more lobbyist restrictions.<sup>25</sup> In North Dakota, the laws regarding when lobbyists are required to register, or the restrictions on them giving gifts to legislators, are also lax.<sup>26</sup> In fact, lobbyists only need to disclose expenditures of sixty dollars or more per legislator,<sup>27</sup> amounts higher than neighboring Minnesota.<sup>28</sup> Additionally, if a lobbyist offers a gift to a legislator, he needs to give her the opportunity to purchase it.<sup>29</sup> This is hardly much of a restriction, especially compared to the restrictions many other states place on such behavior.<sup>30</sup> When it comes to prosecution or enforcement of election law violations, North Dakota's laws are largely ineffective.<sup>31</sup> This is true for several reasons. First, the laws are enforced by partisan officials who are subject to political pressures and influences—especially with respect to prosecuting these election law violations.<sup>32</sup> Second, because there are no provisions for advisory opinions, parties are left often times in the dark regarding what the law requires.<sup>33</sup> Third, North

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21. Nathan R. Martindale, Comment, *Citizens Divided: Balancing the First Amendment Right to Free Speech and the Role of Private Corporations in Our Nation's Elections*, 86 N.D. L. REV. 619, 632 (2010).

22. This period is usually calendar year. See, e.g., N.D. CENT. CODE § 16.1-08.1-03 (2013).

23. Levi D. Andrist & Joel Gilbertson, *Lawyering and Lobbying: the Discipline of Public Policy Advocacy*, 87 N.D. L. REV. 59, 61 (2011).

24. *Id.* at 62.

25. See generally Jessica A. Levinson, *Timing Is Everything: A New Model for Countering Corruption Without Silencing Speech in Elections*, 55 ST. LOUIS U. L.J. 853 (2011).

26. Andrist & Gilbertson, *supra* note 23, at 63-64.

27. N.D. CENT. CODE § 54-05.1-03(2) (2013).

28. Andrist & Gilbertson, *supra* note 23, at 69-70.

29. N.D. CENT. CODE § 54-05.1-05(1)(2) (2013).

30. See *Ethics: Legislator Gift Restrictions Overview*, NAT'L COUNCIL OF STATE LEGISLATURES, <http://www.ncsl.org/research/ethics/50-state-table-gift-laws.aspx> (last visited on Dec. 3, 2013).

31. See generally Allen Dickerson & Zac Morgan, *Campaign Finance Advisory Opinions at the State Level*, 40 FORDHAM URB. L.J. 773 (2012).

32. *Id.* at 785.

33. *Id.* at 784.

Dakota does little to audit campaign finance reports.<sup>34</sup> As a result, few enforcement actions for violations are ever brought.<sup>35</sup>

What is the result of this largely unregulated environment? While North Dakota may come out on top in some surveys for financial management,<sup>36</sup> it certainly ranks low when it comes to political management. For example, North Dakota has one of the highest per capita state conviction rates for corruption.<sup>37</sup> Additionally, a survey jointly undertaken by Center of Public Integrity and several other groups awarded North Dakota an “F” on its Corruption Risk Report Card, placing it forty-third in the nation.<sup>38</sup> The State received failing grades for political financing, legislative accountability, lobbyist disclosure, and ethics enforcement.<sup>39</sup>

North Dakota politics are largely driven by consensus—at least consensus among business and political elites operating in close proximity to one another. For example, the Consensus Council is “a private, nonprofit corporation which was founded in 1990 by a partnership of North Dakota’s private and public leaders.”<sup>40</sup> While noble in theory, such a council gives business leaders unique access to policy makers, allowing them opportunities for special influence and the ability to help define and set the legislative agenda. In addition, the Center for Responsive Politics notes how several industries in North Dakota, such as agriculture and energy, are major political contributors in the state.<sup>41</sup> While this data is for federal elections, the presumption is that state elections are equally dominated by industry money. However, no study on the relationship between money and politics has been done in North Dakota, partially because the lax disclosure laws would make such a study difficult. One is thus left with conjecture on this topic.

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34. Todd Lochner, *Surveying the Landscape of State Campaign Finance Enforcement: A Preliminary Analysis*, 4 ELECTION L.J. 329, 338 (2005).

35. *Id.* at 345.

36. *The Best and Worst Run States In America: A Survey of All Fifty*, 24/7 WALL ST, <http://247wallst.com/investing/2010/10/04/the-best-and-worst-run-states-in-america-a-survey-of-all-fifty/> (last visited on Nov. 17, 2013).

37. See generally Anthony J. Gaughan, *The Futility of Contribution Limits in the Age of Super Pacs*, 60 DRAKE L. REV. 755 (2012) (noting how North Dakota ranks in the top ten of states for convicted officials per capita).

38. State Integrity, *N.D. Corruption Risk Report Card*, [http://www.stateintegrity.org/north\\_dakota](http://www.stateintegrity.org/north_dakota) (last visited Nov. 17, 2013).

39. *Id.*

40. Bruce T. Levi & Larry Spears, *Public Policy Consensus Building: Connecting to Change for Capturing the Future*, 70 N.D. L. REV. 311, 315 (1994).

41. *North Dakota Leading Industries*, CTR. FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/states/indus.php?cycle=2012&state=ND> (last visited Nov. 17, 2013).

Finally, the largely hands off regulatory environment is joined by the state's use of initiative and referendum. North Dakota adopted initiative and referendum in 1914.<sup>42</sup> According to the Secretary of State, from 1889 until 2010 there have been a total of 486 measures placed on the ballot for voters to consider. These include matters referred to the people by the legislature or Constitutional Convention (233). There have also been 45 citizen-initiated constitutional measures and 134 statutory measures.<sup>43</sup> From 1918, when the first instances of initiative or referendum were placed before voters, through 1998, there were a total of 166 ballot propositions, of which forty-five percent have passed.<sup>44</sup>

However, while the use of initiative and referendum has perhaps produced some good results, it has also been used to target individual rights. A 1972 pro-choice law allowing for physicians to terminate some pregnancies failed. In 2004, an anti-gay marriage constitutional initiative was adopted by voters. In 2000, a constitutional initiative was adopted by voters declaring “[h]unting, trapping, and fishing and the taking of game and fish are a valued part of our heritage and will be preserved for the people and managed by law and regulation for the public good.”<sup>45</sup> This type of legislation, also adopted in states such as Minnesota, is less about the right to hunt and fish and were often adopted in reaction to Native-American Indian treaty rights.<sup>46</sup> In November, 2014, there will be a “personhood” amendment on the ballot declaring “[t]he inalienable right to life of every human being at any stage of development must be recognized and protected.”<sup>47</sup> Personhood amendments generally are aimed at limiting abortion rights.<sup>48</sup> The new state requirement mandating identification to vote<sup>49</sup> also targets individual and perhaps minority rights.<sup>50</sup> Thus, while in

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42. SEC'Y OF STATE, N.D. BLUEBOOK 504 (2011-2013).

43. *Id.* at 508.

44. *North Dakota Statewide Initiative Usage*, INITIATIVE AND REFERENDUM INST., available at <http://www.iandrinstute.org/New%20IRI%20Website%20Info/1&R%20Research%20and%20History/1&R%20at%20the%20Statewide%20Level/Usage%20history/North%20Dakota.pdf> (last visited on Dec. 2, 2013).

45. N.D. CONST. art. XI, § 27.

46. Mary Jane Morrison, *Amending the Minnesota Constitution in Context: The Two Proposals in 2012*, 34 *HAMLIN J. PUB. L. & POL'Y* 115, 137 (2013).

47. *Measures on the November 4, 2014 Ballot*, N.D. SEC'Y OF STATE, available at <https://vip.sos.nd.gov/PortalListDetails.aspx?ptlPKID=4&ptIPKID=1#content-start> (last visited on Dec. 2, 2013).

48. Mark Strasser, *The Next Battleground? Personhood, Privacy, and Assisted Reproductive Technologies*, 65 *OK L.REV.* 177, 177-78 (2013).

49. N.D. CENT. CODE § 16.1-05-07 (2009).

50. See generally David Schultz, *Less than Fundamental: The Myth of Voter Fraud and the Coming of the Second Great Disenfranchisement*, 34 *WM. MITCHELL L. REV.* 484 (2008).

general less than half of all ballot measures pass in North Dakota, those targeting rights seem to have nearly a one hundred percent passage rate.

This prairie populism and letting voters legislate with minimal regulation is yet another sign of the largely deregulatory approach to state politics. In effect, along minimal regulation of the election and lobbying process, North Dakota places little regulation on the people directly on voting on legislation. Thus, one can summarize the state of North Dakota democracy as essentially unregulated and wide open. It is the land of limited regulation of money in politics, lobbying, disclosure, and the power of the people to self-legislate. Is this democracy at its finest? Not necessarily. The wide-open use of ballot initiatives and the unregulated use of money in politics in North Dakota are emblematic of two of the worst features of American politics.

### III. DIRECT DEMOCRACY AND BALLOT INITIATIVES

North Dakota adopted initiative and referendum in 1914. It did so during the Progressive Era of politics encompassing a period of American history from the end of Reconstruction to the end of World War I.<sup>51</sup> The era was marked by several characteristics, including a significant growth of corporate influence and power as well as by the concentration of wealth in the United States.<sup>52</sup> For some, this concentration of wealth led to concerns among many that the ideals, and perhaps reality of American democracy, were in danger of being lost.<sup>53</sup>

The threat to American democracy was especially manifested in how this concentration in wealth and power was a corrupting influence, affecting the purity and morality of its political institutions.<sup>54</sup> Thus, the capacity of legislatures across the country to act and represent the people was threatened because of the plutocratic control and domination of them by big business.<sup>55</sup> It was out of a fear that the entrenched power of special interests, such as business interests, had infected politics and resulted in the incapacity of legislatures to act to serve the majority that Progressive politics was born.<sup>56</sup>

Progressive politics held government and big business in contempt, seeing them as teaming together to be the enemy of the people.<sup>57</sup>

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51. *See generally* ROBERT H. WIEBE, *THE SEARCH FOR ORDER: 1877-1920* (1967).

52. *Id.* at 13.

53. RICHARD HOFSTADTER, *THE AGE OF REFORM: FROM BRYAN TO F.D.R.* 5-6 (1955).

54. *Id.*

55. *Id.* at 238.

56. *Id.* at 257.

57. *Id.*; *see also* WIEBE, *supra* note 51, at 5.

Progressives sought to restructure American political institutions<sup>58</sup> and to wrestle power back to serve the people.<sup>59</sup> The solution to doing this resided in initiative, referendum, and recall.<sup>60</sup> William Munro of the National Municipal League, one of the prime supporters of these three reforms, described the Progressive animus behind these reforms as lying in public loss of hope in the ability of legislators to act:

But a large section of the electorate has come to the conclusion that these channels do not afford adequate facilities for the assertion of popular sovereignty. [I]t can scarcely be urged that the old machinery of democracy is fulfilling its professed ends to the satisfaction of all. Popular distrust of the present system of law-making is undeniably widespread and deep. But it is not based on the idea that the representatives of the people are incompetent to do their duty. Rather it arises from the notion that they are prevented from doing it. And these preventing influences, in the popular mind, are various organized interests—political machines and economic corporations—whose wishes do not usually run parallel those of the electorate.<sup>61</sup>

According to Munro, the existing channels of legislation do not represent the “majority of the electorate;”<sup>62</sup> initiative and referendum will be a form of direct democracy, allowing the people to bypass legislators and special interests.<sup>63</sup> Similarly, Teddy Roosevelt contended in the same volume that initiative and referendum are “devices for giving better and more immediate effect to the popular will.”<sup>64</sup> Additionally, then governor and soon to be President Woodrow Wilson also wrote in that volume that Progressive politics was rooted in the need to address the concentrations of wealth damaging American political institutions,<sup>65</sup> and that initiative and referendum were tools to restore representative government for the people.<sup>66</sup> Moreover, Progressives saw in direct democracy tools to educate voters.<sup>67</sup>

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58. WIEBE, *supra* note 54, at 181.

59. HOFSTADTER, *supra* note 53, at 257-59.

60. *Id.* at 261.

61. WILLIAM BENNETT MUNRO, *THE INITIATIVE, REFERENDUM, AND RECALL* 16-17 (1913).

62. *Id.* at 20.

63. *Id.*

64. Roosevelt, *Nationalism and Popular Will*, in MUNRO, *supra* note 61, at 52, 64.

65. *Id.* at 69, 85.

66. *Id.* at 87.

67. MUNRO, *supra* note 61, at 21, 24.

Thus, the goal of initiative and referendum was to restore American representative democracy. It would do that by placing legislative power in the hands of the people, granting to majorities the powers to make the laws for themselves as a way of circumventing the corruption alliance of concentrated wealth and elected officials. In juxtaposition to Madisonian democracy, which sought to limit the threat of majority faction by creating a complex political machinery with representative government, Progressives placed faith in direct democracy as a way to bypass the evils of representative government and restore power to the majority.

#### A. THE PROGRESSIVE SOLUTION: THE THREAT TO MINORITY RIGHTS

In some cases, initiative and referendum might be legitimate expressions of majority rule. In many cases, it is not. Depending on one's political views, direct democracy has produced many important recent reforms including medical marijuana and the decriminalization of that drug,<sup>68</sup> physician-assisted suicide,<sup>69</sup> and important or political reform initiatives.<sup>70</sup> Progressive Era politics may be noble in its goals to break the entrenched corruption and state politics at the close of the nineteenth and rise of the twentieth century by seeking a direct majority appeal to the people. Yet, Progressives forgot or ignored the essential insights of the constitutional framers who saw in majoritarianism a threat to minority and individual rights.

##### 1. *Minority Rights Generally Lose*

Generally, minority rights lose in ballot initiatives. This is the case in North Dakota with several recent or proposed amendments having targeted reproductive rights, voting rights, or gay-lesbian rights. Ballot initiatives still target minority rights, despite the fact that in the 2012 elections, same-sex marriage was voted into law in Maine, Maryland, and Washington. Moreover, an effort in Minnesota to constitutionally prohibit same-sex marriage was also rejected by the voters in the same year. These four victories for supporters of gay rights come after thirty-one states had

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68. California Proposition 215 in 1996 added § 11362.5 to the Cal. Health & Safety Code legalizing the use of marijuana for medical purposes.

69. Measure 16 of 1994 established Oregon's Death with Dignity Act. OR. REV. STAT. §§ 127.800-.995 (1995).

70. For example, in 1974 California voters enacted Proposition 9, enacting the Political Reform Act and creating the Fair Political Practices Commission.

already limited, via ballot initiatives, the rights of same-sex couples to marry.<sup>71</sup>

Derrick Bell argues that while ballot initiatives for whites may be an expression of democracy at its finest, for the poor and people of color referenda can be perceived as a threat to their rights.<sup>72</sup> Use of initiative and referenda, while often seemingly neutral on their face, discriminate against specific groups.<sup>70</sup> Bell contends that while the judiciary will police direct democracy when the balance between majority rule and minority rights has been tipped too much against the latter, he asserts that the judiciary has generally not taken an aggressive enough action to look beyond apparent neutral processes to guard against abuses.<sup>73</sup> Bell's conclusion is that the initiative and referendum process is structurally biased against minority rights, and therefore, should be eliminated in light of the warnings of majoritarian tyranny that James Madison cautioned.<sup>74</sup>

Thomas Cronin notes in *Direct Democracy: The Politics of Initiative, Referendum, and Recall* that minority rights are often targets of initiatives and referenda.<sup>75</sup> While it is no doubt the case that some ballot measures have supported minority rights, the truth is that more often than not ballot measures have become another measure for special interest groups to push their agenda—often at the expense of individual rights. For Cronin, it is unlikely that debates on the rights of unpopular or minority groups, or other politically salient issues, can be adequately undertaken in a media campaign where dollars buy sound bites.<sup>76</sup> Deliberation of public policy, however, requires more than that.

Numerous studies examining ballot initiatives have documented their hostility to minority rights.<sup>77</sup> David B. Magleby reviewed ballot measures between 1898 and 1978 and found that only 33% of them were supported

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71. Nicole Neroulias, *Gay Marriage Foes to Fight Expected Washington State Law*, REUTERS (Feb. 2, 2012, 11:07 PM), available at <http://www.reuters.com/article/2012/02/03/us-gay-marriage-washington-idUSTRE81204O20120203>.

72. See generally Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1 (1978-1979).

73. *Id.* at 7-9 (criticizing the approach the Court took in *Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976), and *James v. Valtierra*, 402 U.S. 137 (1971), where it respectively upheld laws requiring public approval for zoning changes to build a high rise apartment building and before a state public body could create a federally financed public housing project).

74. *Id.* at 28-29.

75. THOMAS CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL* 90-99 (1999).

76. *Id.* at 116-23.

77. David B. Magleby, *Let the Voters Decide? An Assessment of the Initiative and Referendum Process*, 66 U. COLO. L. REV. 13, 26-27 (1995). See also DANIEL C. LEWIS, *DIRECT DEMOCRACY AND MINORITY RIGHTS: A CRITICAL ASSESSMENT OF THE TYRANNY OF THE MAJORITY IN THE AMERICAN STATES* (2012).

by the voters.<sup>78</sup> Magleby does not, however, indicate what percentage of ballot measures targeting minority rights are successful. Instead, one of the most comprehensive studies regarding the hostility of direct democracy to minority rights was undertaken by Barbara Gamble.<sup>79</sup> Gamble examined local and state ballot measures related to AIDS testing, gay rights, language, school desegregation, and housing/public accommodations desegregation from 1960 to 1993. She found that 78% of the seventy-four civil rights measures in her study defeated minority interests.<sup>80</sup>

Additionally, Sylvia Vargas updated and corroborated the Gamble study, examining ballot initiatives from 1960 to 1998.<sup>81</sup> According to Vargas, “In the eighty-two initiatives and referendums surveyed in this Article, majorities voted to repeal, limit, or prevent any minority gains in their civil rights over 80% of the time.”<sup>82</sup> Conversely, in efforts to extend civil rights protections, the success rate was barely one in six.<sup>83</sup>

Gays, lesbians, and other minority groups generally lose in ballot initiatives.<sup>84</sup> For example, in 1977, St Paul, Minnesota adopted anti-gay discrimination legislation, only to see voters repeal it in a 1978 ballot initiative.<sup>85</sup> In addition to the thirty-one state initiatives since 2004 that have successfully targeted gay rights, Donald P. Haider-Markel and Kenneth J. Meier looked at the passage rights of ballot initiatives seeking to limit or extend rights to gays and lesbians.<sup>86</sup> They found that 77% of the time efforts to repeal the rights of gays and lesbians were successful whereas only 16% of the efforts to extend rights were adopted.<sup>87</sup> This anti-gay hostility did not stop after 1996 when the Supreme Court ruled in *Romer v. Evans* that a Colorado ballot initiative rescinding local gay rights laws was unconstitutional because the law singled out a specific group and

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78. Magleby, *supra* note 77, at 26-27.

79. Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 AM. J. POL. SCI. 245, 246 (1997).

80. *Id.*

81. *Id.*

82. Sylvia R. Lazos Vargas, *Judicial Review of Initiatives and Referenda in Which Majorities Vote on Minorities' Democratic Citizenship*, 60 OHIO ST. L.J. 399, 425 (1999).

83. *Id.*

84. See generally AMY L. STONE, *GAY RIGHTS AT THE BALLOT BOX* (2012) (arguing that in general anti-gay interests have been successful in using initiative and referendum to the detriment of gay rights); CRONIN, *supra* note 75, at 94-95.

85. CRONIN, *supra* note 75, at 95.

86. Donald P. Haider-Markel & Kenneth J. Meier, *Legislative Victory, Electoral Uncertainty: Explaining Outcomes in the Battles Over Lesbian and Gay Civil Rights* (unpublished manuscript) (presented at the 1995 annual meeting of the Midwest Political Science Association).

87. *Id.* at 682-85.

imposed upon them a “broad and undifferentiated disability on a single named group.”<sup>88</sup>

Overall, minority rights are held hostage to ballot initiatives, and they should not be. In *Reitman v. Mulkey*,<sup>82</sup> the Supreme Court invalidated a California ballot initiative that sought to repeal recently adopted legislation aimed at addressing racial discrimination in the real estate market. The Court ruled that the ballot measure had an “ultimate effect” in furthering state discrimination, thereby violating the Equal Protection clause.<sup>89</sup> Ballot initiatives may be letting the people decide, but the people have no right to commandeer the government to discriminate.

## 2. *Money Spent for Initiatives and Referenda Cannot be Limited*

In its 1978 decision *First National Bank v. Bellotti*,<sup>90</sup> the United State Supreme Court declared that money on ballot initiatives was core political speech. *Bellotti*, along with other decisions such as *Federal Elections Commission v. Massachusetts Citizens Concerned for Life*,<sup>91</sup> *Federal Election Commission v. National Right to Work Committee*,<sup>92</sup> *California Medical Association v. Federal Election Commission*,<sup>93</sup> and *Federal Election Commission v. National Conservative Political Action Committee*,<sup>94</sup> collectively stand for the proposition that limits on the amount of money spent or contributed to support ballot initiatives were unconstitutional. More importantly, the Court stated in *Bellotti* that limits on corporate spending for issue advocacy violated the First Amendment.<sup>95</sup>

The importance of *Bellotti* for ballot initiatives is that when the people get to vote, the state cannot limit the amount of money spent by any party, including corporations. Hence, use of initiative and referendum opens an enormous hole in our existing campaign finance laws, permitting corporations and any other parties to spend unlimited amounts of money to influence the outcome. The result is less a ballot proposition being a statement about populism and direct democracy and more one potentially

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88. 517 U.S. 620, 632 (1996). See also William E. Adams, Jr., *Can We Relax Now? An Essay About Ballot Measures & Lesbian, Gay, and Bisexual Rights After Romer v. Evans*, 2 NAT'L J. SEXUAL ORIENTATION L. 188, 190 (1996).

<sup>82</sup> 387 U.S. 369 (1967).

89. *Id.* at 373.

90. 435 U.S. 765 (1978).

91. 479 U.S. 238 (1986).

92. 459 U.S. 197 (1982).

93. 453 U.S. 182 (1981).

94. 470 U.S. 480 (1985).

95. 435 U.S. at 784.

about the ability to use resources and interests to push a favored corporate agenda.

### 3. *Money Spent On Initiatives and Referenda Circumvent Populism*

Thomas Cronin indicates in his book, *Direct Democracy*, that money has a decisive influence on the outcome of ballot measures. For example, he notes that corporate-backed sponsors win 80% of the ballot initiatives and that when big money opposes a poorly funded ballot measure, “the evidence suggests that the wealthier side has about a seventy-five percent or better chance of defeating it.”<sup>96</sup> In addition, evidence demonstrates strong correlations between the amount of money spent and the number of votes cast, and that while money cannot guarantee victory, the amount of money spent is decisive in defeating a ballot proposition.<sup>97</sup>

Overall, the evidence suggests that a popular ballot measure is more often than not defeated by corporate and special interest money. University of Michigan Public Policy Professor Elisabeth R. Gerber reaches a similar conclusion that the role of money is that of defeating, but not passing, ballot measures.<sup>98</sup> Thus, she sees ballot initiatives both as targeting minority rights<sup>99</sup> while at the same time undermining majoritarian preferences because of the ability of wealthy individuals to use money to thwart popular preferences.

### 4. *Big Money Distorts Deliberation*

What big money buys in debates on ballot measures is media exposure. According to several studies, media exposure is the single most important factor influencing and swaying voter decisions.<sup>100</sup> Given the cost of the media, for the most part, the public will be asked to make critical public policy decisions based upon fifteen second sound bites financed by interests that have the most money to spend on the media. Clearly our constitutional framers, and the original supporters of initiative and referendum, did not envision policy making premised upon sound bites and the cash nexus, yet the evidence, as Cronin and Gerber indicate, suggests that this is exactly what has happened in various states. Moreover, consider the structural differences between legislative deliberations and ballot initiatives.

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96. CRONIN, *supra* note 75, at 109.

97. *Id.* at 110-13.

98. *Id.* at 142-43.

99. *Id.*

100. CRONIN, *supra* note 75, at 116-23.

Legislators are able to compromise, bargain, negotiate, and can find ways to take potentially incompatible propositions in legislation and make them work together. Voters are given ballot initiatives as all-or-nothing propositions, and cannot vote for part of it.<sup>101</sup> Ballot propositions generally must adhere to a single subject,<sup>102</sup> yielding problems of compromise. Additionally, voters may be asked to vote on contradictory propositions<sup>103</sup> again without the ability of legislators to forge compromises or affect tradeoffs to render them compatible. Thus, the deliberative nature of representation that Madison and the constitutional framers desired may often be missing in ballot initiatives. The result is the creation of faulty legislation that too may fail to adequately capture public sentiment on any of the propositions they are asked to render decisions upon.

##### 5. *Initiative and Referendum Has Little Impact On Breaking Up Special Interests*

Advocates of initiative and referendum claimed that letting the voters decide would help break the hold that special interests had upon legislatures. It would do that in part by mobilizing citizens to outvote citizens. Only part of this Progressive hope has been realized. While some contend that ballot initiatives do not increase voter turnout,<sup>104</sup> more recent evidence contradicts that and finds that their placement does, in fact, mobilize more to participate.<sup>105</sup> However, research also indicates that interest groups have become effective in using direct democracy to further their causes, thus questioning a central tenet of initiative and referendum advocates—that their use breaks entrenched interests.<sup>106</sup>

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101. See Chris Chambers Goodman, *(M)ad Men: Using Persuasion Factors in Media Advertisements to Prevent a "Tyranny of the Majority" on Ballot Propositions*, 32 HASTINGS COMM. & ENT. L.J. 247, 249 (2010).

102. See generally Daniel H. Lowenstein, *California Initiatives and the Single-Subject Rule*, 30 UCLA L. REV. 936 (1983); Daniel H. Lowenstein, *Initiatives and the New Single Subject Rule*, 1 ELECTION. L. J. 35 (2002); John G. Matsusaka & Richard L. Hasen, *Aggressive Enforcement of the Single Subject Rule*, 9 ELECTION L. J., 399 (2010) (discussing the single-subject rule).

103. Michael D. Gilbert & Joshua M. Levine, *Less Can Be More: Conflicting Ballot Proposals and the Highest Vote Rule*, 38 J. LEGAL STUD., 383, 394 (2009).

104. CRONIN, *supra* note 75, at 226-27.

105. Daniel A. Smith & Caroline Tolbert, *The Instrumental and Educative Effects of Ballot Measures: Research on Direct Democracy in the American States*, 7 ST. POL. & POL'Y Q. 416, 430-31 (2007).

106. *Id.* at 432.

### 6. *Courts Do Not Always Defer to Ballot Measures*

Another way in which the spirit of populism is frustrated by initiative and referendum is in the lack of deference the courts often have towards ballot measures.<sup>107</sup> In general, courts will defer to the will of legislatures so long as there is a rational basis to the policy adopted and there is some legislative finding of fact to support the policy. However, in the case of ballot measures, there is often very little, if any, finding of fact or legislative hearings to support the initiative or referendum.<sup>108</sup> Therefore, the courts are unwilling to afford the same deference to initiative and referendum as they would to acts of a state legislature.<sup>109</sup> Thus, any expression of populism that appears to occur as a result of ballot measures disappears once they face judicial review and challenges.

### 7. *Summary*

Overall, there is good evidence that ballot initiatives, such as those found in North Dakota, can often target or threaten individual and minority rights. They may undermine the basic protection of rights that the Constitution and the Bill of Rights are supposed to afford. Moreover, their use provides for unrestricted use of money to affect political influence. Thus, one can make the argument that the use of initiative and referendum highlights—or shares—many of the problems found with its use across the country.

## IV. MONEY AND POLITICS

What role should private money have in the financing of elections in the United States? No one is going to deny that elections are expensive. Media time is costly as are “get out the vote” campaigns, voter registrations, and a host of other activities that demand significant resources.<sup>110</sup> Some will argue that we expend too little on elections already,

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107. See Cody Hoesly, *Reforming Direct Democracy: Lessons from Oregon*, 93 CAL. L. REV. 1191, 1234-35 (2005) (noting the decreased deference state courts were giving in Oregon to ballot measures); see also Michael D. Gilbert, *Does Law Matter? Theory and Evidence from Single Subject Adjudication*, 40 J. LEGAL STUD. 333, 338-40 (2011).

108. See generally Mihui Pak, *The Counter-Majoritarian Difficulty in Focus: Judicial Review of Initiatives*, 32 COLUM. J.L. & SOC. PROBS. 237, 249-50 (1999) (discussing the problems regarding standards of review the courts should take toward ballot initiatives).

109. CRONIN, *supra* note 75, at 219-20. See also MATHEW MANWELLER, *THE PEOPLE VS. THE COURTS: JUDICIAL REVIEW AND DIRECT DEMOCRACY IN THE AMERICAN LEGAL SYSTEM* 8, 218 (2005) (finding that the courts treat ballot initiatives differently from ordinary legislation and that they are less likely to defer to and uphold the former compared to the latter); KENNETH MILLER, *DIRECT DEMOCRACY AND THE COURTS* 89-90, 91-94, 122, 219 (2009).

110. In 2012, the average cost of winning a U.S. Senate race was approximately \$10,351,556 and \$1,596,953 in the U.S. House of Representatives. *Vital Statistics on Congress*, BROOKINGS

especially when compared to how much as a society we spend on our pets for example.<sup>111</sup> Others might assert that money needs to be raised and spent, especially by challengers, to offset incumbent advantages.<sup>112</sup> These and other points are well taken, but they fundamentally miss the mark.

The question is not necessarily how much we spend on elections, but instead on whether the current system of financing elections is incompatible with the values of American democracy. Should money influence political choices and outcomes? Can we reconcile American democracy with free market capitalism in a way that allows the conversion of economic resources into political influence? This is really the basic cluster of questions that neither Congress, state legislatures, nor the Supreme Court have addressed. Nor is this a question that most election law scholars seem to be asking. They have failed to get to the deeper question of looking at whether the theories or democratic values that give meaning to the Constitution, and which should give definition to election law, are supported or undermined by the economic values that seem to be at the basis of how the United States currently finances its political process.

Asking this question is no different than raising other, more fundamental, questions about values and institutions in American society. For example, some would assert that the way health care is allocated in the United States is fundamentally at odds with the way it should be allocated. By that, health care should be allocated on the basis of medical need or illness, not the ability to pay.<sup>113</sup> Yet, the United States is a pay-for-access and a profit-based system denying millions access to health care. It is a system more costly, with lower access, and less equitable outcomes overall than many other health care delivery systems found elsewhere in the world.<sup>114</sup> Even with reforms found in the Affordable Care Act, many of these problems may not be solved because the market system for delivering

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INSTITUTE, *available at* <http://www.brookings.edu/research/reports/2013/07/vital-statistics-congress-campaign-finance-mann-ornstein>.

111. *See, e.g.*, BRADLEY A. SMITH, UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM 42 (2003).

112. *See, e.g.*, Gary C. Jacobson, *The Effects of Campaign Spending on Congressional Campaigns*, 72 AM. POL. SCI. REV. 469 (1978), and THE POLITICS OF CONGRESSIONAL ELECTIONS (2004).

113. KIP SULLIVAN, THE HEALTH CARE MESS: HOW WE GOT INTO IT AND HOW WE'LL GET OUT OF IT 85-86 (2006); MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1984).

114. ORG. FOR ECON. COOPERATION AND DEV., OECD HEALTH DATA 2012: HOW DOES THE UNITED STATES COMPARE, *available at* <http://www.oecd.org/health/health-systems/BriefingNoteUSA2012.pdf> (site last visited on March 26, 2013); Atule Gawande, *The Cost Conundrum: What a Texas Town Can Teach Us about Health Care*, THE NEW YORKER, *available at* [http://www.newyorker.com/reporting/2009/06/01/090601fa\\_fact\\_gawande](http://www.newyorker.com/reporting/2009/06/01/090601fa_fact_gawande) (last viewed on March 26, 2013).

health care in the United States is incompatible with the basic values of what a health care system is supposed to secure—affordable, quality health care available for all who need it. The debate that does not take place in the United States is whether the market is the correct or appropriate institution to allocate health care. This is the question that needs to be asked about political influence in the United States.

Is the economic market the correct way to allocate political power or influence in the United States? Should dollars equate to political influence? And if so, how does such a conversion affect American democratic values? There are really two basic answers to this question. The first assents to the legitimacy of money's role in allocating political influence in American politics. For the most part, this perspective would urge some form of deregulation of money, arguing for a dismantling of all contribution limits to go along with the current lack of expenditure limits. That position, at least until recently, has been one of asserting no limits and full disclosure.

It is similar to the legal environment that currently exists in North Dakota. Yet as we shall see, that position, once held by former FEC commissioner Brad Smith and others, has now evolved and he, along with James Bopp, and Justice Clarence Thomas, now even contest the legitimacy of disclosure rules. These individuals seem ready to embrace the idea that money is constitutionally protected speech. They seem to believe that there is no problem in letting economic wealth and resources be converted over into a factor allowing political power or influence in American politics. They believe that such a use of money need not be disclosed and can be done in a clandestine fashion. This is a position closer to where North Dakota is today—unregulated money but limited disclosure. Yet a competing perspective, partially held by former Justice Stevens, argues that money is property, not speech, and as a result, contribution and expenditure limits are constitutional.<sup>115</sup> While Stevens may not have gone so far as to assert that money should not be converted into political influence, there is a broader argument that can build upon the “money is not speech” argument to assert that American democratic theory needs to significantly confine the ability to convert economic resources into political influence.

#### A. DEREGULATE BUT DISCLOSE

For the most part, *Buckley* established disclosure as part of what Bruce Ackerman and Ian Ayres call the old paradigm for campaign finance reform.<sup>116</sup> They argue that the prevailing paradigm supporting disclosure

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115. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 398 (2000) (Stevens, J., concurring).

116. *BRUCE ACKERMAN AND IAN AYRES, VOTING WITH DOLLARS 3* (2002).

saw money in the political process as similar to pollution—it is best to limit both and also restrict where either of them can be dumped.<sup>117</sup> However, they argue that the full disclosure or publicity route has proved to be unsuccessful or otherwise plagued by constitutional infirmities,<sup>118</sup> thereby leading Ackerman and Ayres to reject disclosure and opt instead for what they describe as a new paradigm for campaign finance reform that relies upon market analogies.<sup>119</sup> They called their proposal the “secret donation booth.”<sup>120</sup> Under this regime, contributions to candidates would be anonymous,<sup>121</sup> thereby eliminating the incentives to engage in *quid pro quo* activity. While Ackerman and Ayres appear to be unique in rejecting disclosure for anonymity, they are correct in their assertion that the prevailing *Buckley* paradigm does support it.<sup>122</sup>

But, why “disclosure-only?” By disclosure-only, it is meant to allow donors to contribute any amount they want to whomever they want, subject only to the disclosure of the donation. The case for disclosure only can be articulated on at least two grounds. First, such a regime is the best or most acceptable way to regulate the role of money. Second, it is advocated in lieu of other campaign finance mechanisms because other more extensive regimes are unconstitutional or because disclosure is offered as a Trojan horse in lieu of real regulation.

Generally, disclosure-only is advocated by its proponents because they do not believe that other forms of regulation are constitutional. For example, Martin Redish believes that money given in a political context is protected speech and that the use of money for this purpose is a speech-act deserving of constitutional protection.<sup>123</sup> While Redish’s *Money Talks* is silent on the issue of disclosure, presumably he would advocate it in some circumstances, yet his solution to the corruption and unequal flow of money in the political system would be to address the root problem of economic inequalities that exist. Redistributive policies that alter economic power in society are thus a preferred solution.<sup>124</sup>

Bradley Smith seemed at one time to be the most forceful advocate of the disclosure-only regime. Smith’s support for the disclosure-only position was grounded by three definitive reasons. First, money used for

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117. *Id.* at 3.

118. *Id.* at 4-5.

119. *Id.* at 18, 21 (praising reforms that embrace “market signals”).

120. *Id.* at 3.

121. *Id.* at 6.

122. *Id.* at 4, n.1-2 (discussing supporters of disclosure-only proposals).

123. *Id.* at 126.

124. *Id.* at 234.

political purposes is protected speech.<sup>125</sup> Second, most campaign finance reform regulations are difficult to administer.<sup>126</sup> Third, disclosure works.<sup>127</sup>

For Smith, he appears to accept the *Buckley* argument that the only acceptable justification for the regulation of money in politics is to address the problem of corruption or its appearance.<sup>128</sup> Yet, unlike the Court which endorsed contribution limits in *Buckley*, Smith sides with Chief Justice Burger's concurrence<sup>129</sup> in that the least restrictive means to addressing *quid pro quo* corruption is disclosure.<sup>130</sup> Disclosure would thereby render any other form of regulation unconstitutional because it is not narrowly-tailored to secure this compelling interest.<sup>131</sup> Moreover, Smith insists that disclosure does work. For example, Smith cites the 1971 Federal Election Campaign Act laws as an example of how disclosure brought to light the Watergate abuses and the eventual resignation of Richard Nixon as evidence that disclosure can root out corruption.<sup>132</sup> Elsewhere, he argues that disclosure can bring corruption and conflicts of interest to light.<sup>133</sup> Overall, a disclosure-only regime seems capable of serving the compelling government interests that the *Buckley* Court identified.

However, Smith's endorsement of disclosure-only seems half-hearted at best. For example, he appears to view it as a form of regulation that could be too cumbersome and interfere with First Amendment rights.<sup>134</sup> Second, he cites *McIntyre v. Ohio*<sup>135</sup> to argue that there are limits on what can be disclosed, suggesting that this case places some outer limits on publicity in the name of protecting privacy.<sup>136</sup> Third, he even suggests that there may not be strong enough of a governmental justification to compel disclosure and that it may in fact burden grassroots political activity.<sup>137</sup>

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125. BRADLEY A. SMITH, UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM 193 (2001).

126. *Id.* at 91.

127. *Id.* at 32.

128. *Id.* at 203-04.

129. *See Buckley v. Valeo*, 424 U.S. 1, 235-56 (1976) (Burger, J., concurring in part and dissenting in part).

130. SMITH, *supra* note 125, at 130.

131. *Id.* at 135.

132. *Id.* at 32.

133. *Id.* at 175.

134. *Id.* at 91.

135. 514 U.S. 334 (1995)

136. SMITH, *supra* note 125, at 222. *See also* Richard L. Hasen, *The Surprisingly Easy Case for Disclosure of Contributions and Expenditures Funding Sham Advocacy*, 3 ELEC. L. J. 251 (2004), for a discussion of the status of *McIntyre v. Ohio* in the face of the recent *McConnell v. Fed. Election Comm'n* ruling upholding, with limited comment, various disclosure provisions in BCRA.

137. SMITH, *supra* note 125, at 224-25.

Fourth, Smith contends that bribery laws are already in place to address corruption, thereby questioning the need for disclosure. Finally, Smith even concedes that disclosure might not be able to address certain problems such as issue advocacy.<sup>138</sup> Overall, by the time one finishes reading *Unfree Speech*, it is unclear whether Smith really supports disclosure as the ideal form of regulation—whether he supports it because it works, whether he thinks it is actually unconstitutional, or that he thinks it is the only form of regulation that passes constitutional muster. Instead, disclosure appears to be a bone thrown to advocates for more forceful reform, hoping that endorsing it will be sufficient to deflect demands for other changes.

In addition to Smith, Kathleen Sullivan,<sup>139</sup> Larry Sabato and Glenn Simpson,<sup>140</sup> and Todd Lochner and Bruce Cain<sup>141</sup> also endorse disclosure-only as their preferred campaign finance reform solutions. For example, Sabato and Simpson document the history of campaign finance reforms in the United States, indicating that disclosure has been a preferred solution dating back to 1907<sup>142</sup> and that it was the central principle of the Federal Election Campaign Act and the post-Watergate reforms.<sup>143</sup> After an exhaustive analysis of then recent money abuses in American politics, Sabato and Simpson conclude that new reforms are needed. The regime they call for is described by them as “deregulation plus.”<sup>144</sup> Deregulation plus is essentially a disclosure-only regime where all contribution limits would be abolished,<sup>145</sup> and where the fear of public backlash following disclosure would serve as a deterrent to groups that do not disclose.<sup>146</sup>

In support of their deregulation plus regime, Sabato and Simpson draw an analogy between spending on campaigns and elections to that of trading in stocks on Wall Street:

Consider the American stock markets. Most government oversight of them simply makes sure that publicly traded companies accurately disclose vital information about their finances. The

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138. *Id.* at 221.

139. See generally Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663 (1997).

140. See generally LARRY J. SABATO & GLENN R. SIMPSON, *DIRTY LITTLE SECRETS: THE PERSISTENCE OF CORRUPTION IN AMERICAN POLITICS* (1996).

141. Todd Lochner & Bruce E. Cain, *The Enforcement Blues: Formal and Information Sanctions for Campaign Finance Violations*, 52 ADMIN. L. REV. 629 (2000) [hereinafter Lochner & Cain 2000]; Todd Lochner & Bruce E. Cain, *Equity and Efficacy in the Enforcement of Campaign Finance Laws*, 77 TEX. L. REV. 1891 (1999) [hereinafter Lochner & Cain 1999].

142. SABATO & SIMPSON, *supra* note 140, at 11-12.

143. *Id.* at 32, 54.

144. *Id.* at 330.

145. *Id.* at 334.

146. *Id.* at 330.

philosophy here is that buyers, given, the information they need, are intelligent enough to look out for themselves. There will be winners and losers, of course . . . but it is not the government's role to guarantee anyone's success . . . The notion that people are smart enough, and indeed have the duty, to think and choose for themselves, also underlies our basic democratic government. There is no reason why the same principle cannot be successfully applied to a free market for campaign finance. In this scenario, disclosure laws would be broadened and strengthened, and penalties for failure to disclose would be ratcheted up, while rules on other aspects—such as sources of funds and sizes of contributions—could be greatly loosened or even abandoned altogether.<sup>147</sup>

For Sabato and Simpson, a broadened disclosure regime is preferred for several reasons. First, restrictions on spending implicate First Amendment values.<sup>148</sup> Second, public financing will not be able to address the problems associated with spending by third party groups.<sup>149</sup> Third, all the current loopholes in the system have effectively created a system without any spending or contribution limits.<sup>150</sup> Fourth, broadened disclosure would bring to light the activities of many groups presently hidden.<sup>151</sup> Fifth, as noted above, well-informed citizens can make their own judgments regarding what they think the contributions and spending patterns mean to them and therefore judge accordingly.<sup>152</sup>

Sabato and Simpson acknowledge two possible objections to their deregulation plus regime. First, what if groups opt not to disclose? This is where the fear of backlash comes in. That is, the remedy for groups seeking to remain clandestine is that there would be a public backlash against them or the candidates they support if they are caught.<sup>153</sup> Second, Sabato and Simpson worry that a broadened disclosure regime would bring too many “politically active but politically inconsequential players into the federal regulatory framework.”<sup>154</sup> Their solution is to set a high disclosure requirement of between \$25,000 to \$50,000 in total expenditures per

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147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at 330.

152. *Id.*

153. *Id.*

154. *Id.* at 332.

election cycle.<sup>155</sup> Below this threshold, there would not be a requirement to disclose.

Kathleen Sullivan has also pressed the case for a disclosure-only regime in a pair of articles. Sullivan contends that there are three types of campaign finance reforms currently being advocated: (1) new limits on political contributions, (2) public financing, and (3) restrictions on expenditures.<sup>156</sup> In part, her argument is that all three of these proposals would run into a variety of constitution problems, but more importantly, Sullivan attacks what she calls the political theory of campaign finance reform by examining the “supposed seven deadly sins of political money.”<sup>157</sup> Sullivan argues that efforts to regulate these seven sins: political inequality in voting, distortion, political inequality in representation, carpet-bagging, diversion of legislative and executive energies, quality of debate, and lack of debate,<sup>158</sup> generally face constitutional problems or that the sins alleged are “empirical problems” that have not yet been adequately demonstrated or clarified to support the restrictions imposed.<sup>159</sup>

In lieu of the three reform strategies noted above, Sullivan endorses Chief Justice Burger’s opinion in *Buckley*<sup>160</sup> and Justice Thomas’s views<sup>161</sup> in *Colorado Republican Federal Campaign Committee v. Federal Election Commission*<sup>162</sup> that contributions and expenditures should be treated the same and left unregulated.<sup>163</sup> In its place, she asserts that political money will not proliferate indefinitely, so long as “the identity of contributors is

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155. *Id.*

156. Sullivan, *supra* note 139, at 667.

157. *Id.* at 671.

158. One can, however, also argue that Sullivan’s choice of the sins to be remedied by campaign finance reform miss the real targets of reform. By that, ensuring that races are more competitive, or that the challengers have adequate resources to mount effective races against incumbents, are perhaps more crucial issues and concerns than the seven sins that Sullivan directs her arguments against.

159. Sullivan, *supra* note 139, at 687.

160. *See Buckley v. Valeo*, 424 U.S. 1, 235-56 (1976) (Burger, J., concurring in part and dissenting in part).

161. Sullivan, *supra* note 139, at 666; *see also* Sullivan’s *Against Campaign Finance Reform*, *infra* note 166, at 313.

162. 518 U.S. 604, 638 (1996)

Whether an individual donates money to a candidate or group who will use it to promote the candidate or whether the individual spends the money to promote the candidate himself, the individual seeks to engage in political expression and to associate with likeminded persons. A contribution is simply an indirect expenditure.

*Id.*

163. Kathleen M. Sullivan, *Against Campaign Finance Reform*, 1998 UTAH L. REV. 311, 313 (1998) [hereinafter Sullivan’s *Against Campaign Finance Reform*].

required to be vigorously and frequently disclosed.”<sup>164</sup> Instead, deregulating contributions accompanied by increased disclosure will have three salutatory effects. First, with more money in the system, the value of any one contribution would decrease because politicians would have more potential donors to seek out and therefore feel less indebted to any one contributor. To paraphrase Sullivan’s language, with more *quids* in the system, politicians have “less reason to commit to any particular *quo*.”<sup>165</sup> Second, deregulating contributions would decrease the value of subterfuge whereby groups presently resort to independent expenditures and soft money contributions to parties.<sup>166</sup> Finally, disclosure would subject candidates to voter retaliation if exposed as taking too large of contributions from some individuals or groups.<sup>167</sup> Proof, for Sullivan, that voter retaliation works can be found in the 1996 presidential race where disclosure of Democratic fund-raising scandals had a temporary impact on President Clinton’s poll numbers.<sup>168</sup> Overall, Sullivan describes an enforced disclosure regime as the preferred alternative to either a purely laissez-faire or more extensively regulated system with contribution and expenditure limits and public financing.

Todd Lochner and Bruce Cain also press the case for disclosure-only, but do so as a result of their claims that other systems of campaign finance regulation—such as contribution limits—faces numerous enforcement problems. They base their claims both upon empirical studies of the Federal Election Commission (“FEC”) and the California Fair Political Practices Commission (“FPPC”).<sup>169</sup> In examining the enforcement practices of both, significant time delays in enforcement question whether the use of formal sanctions by either deters illegal campaign practices.<sup>170</sup> Similarly, they also question whether informal sanctions—the fear of public exposure—will be a sufficient deterrent.<sup>171</sup> This deterrence would work only if voters take the time to research violations, and if the press sufficiently and adequately covers the violations.<sup>172</sup> While there is some evidence that press coverage of illegal activity does have an impact upon

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164. Sullivan, *supra* note 139, at 688.

165. *Id.* at 689-90.

166. *Id.*

167. *Id.*

168. *Id.*

169. Lochner & Cain 2000, *supra* note 141, at 630; Lochner & Cain 1999, *supra* note 141, at 1892.

170. Lochner & Cain 2000, *supra* note 141, at 649.

171. *Id.* at 653-54.

172. *Id.*

candidates, these studies overwhelmingly conclude that the deterrent value is weak.<sup>173</sup>

Instead of contribution or other limits, Lochner and Cain argue that a disclosure-only regime might be easier to enforce. These types of regimes do not confront many of the difficult legal questions that other regulations face.<sup>174</sup> Thus, for Lochner and Cain, disclosure-only is opted for, even though the authors do not endorse it as necessarily the best system for regulating money in the political process.<sup>175</sup> Like Sabato and Simpson, they draw upon the market analogy and view politics as a free market.<sup>176</sup> According to Lochner and Cain:

If politics is indeed a market, then let the market solve the problem. Consider abolishing expenditure and contribution limits and instead emphasize transparency based on immediate internet disclosure. If voters actually care about where a candidate's money comes from, or how much money is spent, let them vote based upon such distaste.<sup>177</sup>

Thus, despite their admonitions that voters do not spend much time gathering information on candidates, and despite their criticism of the deterrence model, in the end Lochner and Cain resort to both in defense of their disclosure-only regime.

The chorus of support for deregulate-but-disclose does not stop here. John Samples argues against campaign finance limits, contending that there is little evidence that money corrupts the political process or that it affects decisions on who runs or does not run for office.<sup>178</sup> James Bopp, a frequent litigator and critic of campaign finance reform laws that limit donations, argued at one point in favor of donate but disclose<sup>179</sup> before taking his current position against even disclosure.<sup>180</sup>

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173. *Id.* at 654.

174. *Id.* at 649.

175. *Id.*

176. Lochner & Cain 1999, *supra* note 141 at 1935.

177. *Id.*

178. See generally JOHN SAMPLES, THE FALLACY OF CAMPAIGN FINANCE REFORM (2006); John Samples, *Against Deference*, 12 NEXUS 21, 23 (2007).

179. James Bopp, Jr., & Kaylan Lytle Phillips, *The Limits of Citizens United v. Federal Election Commission: Analytical and Practical Reasons Why the Sky Is Not Falling*, 46 U.S.F. L. REV. 281 (2012); James Bopp, Jr., & Joseph E. LaRue, *The Game Changer: Citizens United's Impact on Campaign Finance Law in General and Corporate Political Speech in Particular*, 9 FIRST AMEND. L. REV. 251 (2010-11).

180. James Bopp Jr. & Jared Haynie, *The Tyranny of "Reform and Transparency": A Plea to the Supreme Court to Revisit and Overturn Citizens United's "Disclaimer and Disclosure" Holding*, 16 NEXUS: CHAP. J. L. & POL'Y 3 (2010-11).

Overall, in defending disclosure-only, several claims from its advocates can be gleaned. First, disclosure-only regimes will more readily discourage the proliferation of money than will other regimes. Second, disclosure-only regimes will deter large contributions or contributors because of fear of voter backlash. Third, disclosure-only regimes are better able to address the problems associated with spending by third parties than other types of regimes. Fourth, disclosure-only regimes will produce more money in the political system, resulting in less *quid pro quos*. Fifth, disclosure-only regimes will discourage subterfuge. Sixth, disclosure-only regimes will equalize spending and competition. Seventh, disclosure-only regimes are easier to enforce and implement.

#### B. DISCLOSURE IS NOT ENOUGH

There are three major problems with the disclosure-only arguments. One is conceptual, the second empirical, and the third is a structural democratic one. Conceptually, the case for disclosure-only lacks development or rests upon numerous faulty assumptions.

First, in arguing for disclosure-only, what is left unclear in many of its advocates' arguments is what it means to have disclosure and what it means to say that it works.<sup>181</sup> For example, what would have to be disclosed to qualify as a disclosure-only regime? Would it be disclosure of all contributions—including expenditures? With that said, what does it mean to “disclose all contributions?” Is it contributions made down to one cent? Is it contributions from individuals, corporations, unions, PACS, conduit funds?<sup>182</sup> Does it also include contributions to PACS? If so, what do we wish to know? Is it simply dollar amounts or do we also wish to know names, addresses, and employers? In the case of Sabato and Simpson, at least they are clear in terms of exempting some groups and individuals from disclosure if they fall below a certain threshold. However, while such a threshold might minimize excessive regulatory entanglement, and perhaps comply with the constitutional requirements of *NAACP v. Alabama*,<sup>183</sup>

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181. See Richard Briffault, *Updating Disclosure for the New Era of Independent Spending*, 27 J.L. & POL. 683 (2012); Richard Briffault, *Campaign Finance Disclosure 2.0*, 9 ELECTION L.J. 273, 275 (2010); Richard L. Hasen, *Chill Out: A Qualified Defense of Campaign Finance Disclosure Laws in the Internet Age*, 27 J.L. & POL. 557 (2012), for thoughtful discussions on what disclosure actually means in the age of the Internet.

182. WIS. STAT. § 11.01(5m) (2003) (“‘Conduit’ means an individual who or an organization which receives a contribution of money and transfers the contribution to another individual or organization without exercising discretion as to the amount which is transferred and the individual to whom or organization to which the transfer is made.”). WISC. STAT. § 11.06(11) mandates the public disclosure and reporting of conduit funds.

183. 357 U.S. 449 (1958) (holding that a state law requiring a private association to publicize the names of its members violated the First Amendment right to freedom of association).

*Watchtower Bible and Tract Society of New York v. Village of Stratton*,<sup>184</sup> and *McIntyre v. Ohio*, Sabato and Simpson ignore an unintended effect of their threshold—the fact that many small groups have huge impacts in local federal races and there would be an incentive to proliferate lots of small groups to avoid disclosure. Why would groups still wish to avoid disclosure? If the identity of groups or contributors is a signal regarding where a candidate stands on issues, such as in the case of candidates who receive money from the National Rifle Association or from Emily’s List, then many candidates or groups might wish to obscure the source of their money.<sup>185</sup>

Moreover, Sabato and Simpson and Sullivan rely upon disclosure as a deterrent effect, although the nature of the deterrence for them is very different. For Sabato and Simpson, deterrence comes into play as a way to encourage groups and individuals to disclose for fear of public backlash if they do not, but are nonetheless caught.<sup>186</sup> For Sullivan, deterrence comes into play as a way to discourage candidates from taking too large of contributions from big donors, less voter backlash.<sup>187</sup> Now assuming in the first case that groups can be detected if they try to hide from disclosing, there are several problems with the voter backlash thesis. First, while both Sabato/Simpson and Sullivan contend that deregulating contributions will remove the disincentive for groups to give independently or seek subterfuge, they—and especially Sullivan—also stipulate that fear of voter backlash will discourage contributions. Does not this fear of backlash create an incentive for subterfuge?

Yet, even if fear of backlash does not discourage clandestine activity, there are real questions regarding the efficacy of deterrence. Within the field of criminal justice, while deterrence is often articulated as a goal of punishment, proof of its efficacy is questionable.<sup>188</sup> A deterrence theory in criminal justice assumes, among other things: (1) potential offenders who

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184. 536 U.S. 150 (2002).

185. See *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (stating that knowledge of a candidate’s contributions “allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches” and that the “sources of a candidate’s financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.”).

186. SABATO & SIMPSON, *supra* note 140, at 334.

187. Sullivan, *supra* note 139, at 689.

188. See SAMUEL WALKER, SENSE AND NONSENSE ABOUT CRIME AND DRUGS, 100 (2001); DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY, 59-60 (2001); FRANKLIN E. ZIMRING, GORDON HAWKINS, & SAM KAMIN, PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOUR-RE OUT IN CALIFORNIA, 94-5, 103-5 (2001) (indicating that the California three strikes and you’re out policy rested upon the concept of deterrence and that the evidence indicates that the three strikes laws did not deter).

are aware of the punishment; (2) offenders weigh the punishment against the benefit of committing the crime; (3) offenders believe that they will be caught, and; (4) that the society-defined punishment is actually perceived as punishment to the offenders.<sup>189</sup> The same logic applies to the backlash thesis advocated by both Sabato/Simpson and Sullivan in that one needs to assume that voters are rational, paying attention to campaign contributions, weighing contributions when making electoral choices, and that they will punish candidates because they are taking contributions from donors whom they do not approve. It is not clear that this model works in the real world.

Even Kathleen Sullivan seems to acknowledge that the backlash is of limited value, noting that revelations of Democratic Party fundraising only had a temporary impact on Clinton's polling numbers and that he did win the election. Clinton and the Democrats did the crime but did not have to do time because the backlash was muted. So much for deterrence.

There are other problems in defining what disclosure means among its advocates. In terms of expenditures, does disclosure include real time disclosure, or does it include a statement indicating the source of the contributions? Moreover, if one is to have disclosure-only, how should it occur? Should it be online or in paper form? Should it be updated daily, weekly, or monthly? All of these are issues left unresolved or explained in terms of constructing a disclosure-only policy.

Dennis Thompson also points out that a disclosure-only regime would never be satisfactory because it would fail to reveal the tacit promises, agreements, or understandings embedded in the very essence of political contributions.<sup>190</sup> Disclosure-only, more importantly, would fail to address many of the critical problems that money creates in campaign and elections, such as allowing for the personal conversion of wealth into political influence. It would be, in many ways, a post-facto remedy at best. As Bradley Smith's Watergate example demonstrates, disclosure did not prevent the Nixon fundraising abuses; it only caught them several years later after the election had occurred.<sup>191</sup> Disclosure-only is not prophylactic; it is a post-abuse remedy, which often does little to punish the wrongdoer.

Disclosure-only also presupposes that citizens are informed, aware, and capable of digesting and understanding campaign finance reform information. This is certainly true in the Sabato and Simpson model where they draw parallels between political campaigns and Wall Street, or Lochner and Cain in describing elections to be like a marketplace. None of

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189. WALKER, *supra* note 188, at 100.

190. DENNIS F. THOMPSON, JUST ELECTIONS: CREATING A FAIR ELECTORAL PROCESS IN THE UNITED STATES 110 (2002).

191. *See generally* SMITH, *supra* note 125.

these assumptions are likely to take place on a sufficient scale. Specifically, the disclosure-only policy seems to assume rational, informed voters who will seek out campaign finance information, weigh it in comparison to other knowledge they have about candidates, and then express an informed preference based upon all this. However, even Lochner and Cain acknowledge this depiction of voters is unrealistic,<sup>192</sup> and such a model of behavior is unlikely to occur except among a few, with many instead perhaps voting more out of concern regarding the economy, war and peace, or other issues more salient.

As Elizabeth Garrett points out,<sup>193</sup> disclosure has its limits. Voters have limited time, knowledge, and expertise.<sup>194</sup> They face many complex choices. They do not act as the fully informed market participants that Smith, Sullivan, and Sabato and Simpson envision. Instead, voters use a variety of cues when making voting choices, such as who gives the candidate money or the party of the candidate, and they also need information packaged in a way that is digestible and useable to them if disclosure-only is to work.<sup>195</sup> Yet, none of the advocates of the disclosure-only regime have paid any attention to these issues. None of this is to say to the source of political money is unimportant to voters. Instead, how campaigns are financed is a process issue different from the content of issues that people consider when making voting choices. Conflating the two is a mistake, demonstrating a misunderstanding regarding between how elections are run and the factors that influence electoral choice.

Sabato and Simpson's analogy of comparing elections and voters to the stock market and investors is inapt on several grounds.<sup>196</sup> First, presumably investors are more informed about financial matters than would be general voters simply by the fact that investors might tend to be better educated than many voters. Second, however, the recent Wall Street scandals involving Enron, WorldCom, and a host of other companies demonstrate that even investors are not well informed. There are many abuses in the financial markets, some of which could be attributed to a lack of disclosure (but also many of them sourced in illegal behavior that included lying and possible abuse of market positions). If Sabato and Simpson's call to make

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192. Lochner & Cain 2000, *supra* note 141, at 648.

193. See generally Elizabeth Garrett, *Voting with Cues*, 37 U. RICH. L. REV 1011 (2003).

194. MICHAEL X. DELLI CARPINI & SCOTT KEETER, WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS 271 (1996) (noting the lack of knowledge Americans have about politics and specifically discussing how this lack of knowledge and expertise affects political engagement and motivation).

195. *Id.* at 44-5 (discussing the use of cues among voters as surrogates for more substantive political knowledge).

196. SABATO & SIMPSON, *supra* note 140, at 330.

the Federal Election Commission act more like the Securities and Exchange Commission (“SEC”) in policing disclosure, the passage of Sarbanes-Oxley<sup>197</sup> and other Wall Street reforms demonstrate a demand for strengthened regulatory behavior on the part of the SEC beyond simply mandating more disclosure.

Third, Wall Street regulation has never been simply a disclosure-only regime. The existence of antitrust laws and the enforcement activity by the Federal Trade Commission, among other agencies, is proof that simple disclosure of business practices is not enough to protect either investors or consumers.<sup>198</sup> Finally, unlike playing the stock market, which produces private goods, voting has an external effect such that one person’s choice on whom to vote for will have an impact on others in terms of what candidates are elected. Put simply, there are numerous individual and collective benefits attached to voting choices and the regulation of campaigns that may distinguish the regulation of elections and voters from that of the stock market and investors.

In making the case that disclosure-only is the best possible solution, Sabato and Simpson state that it has been used since 1907—and especially since Watergate—as a guiding principle to regulate money in politics. Instead of viewing history as vindication of disclosure-only, the failure of it to clean up campaigns and elections over the last 100 years should be proof that more than disclosure-only is needed. Thus, disclosure-only fails for lack of conceptual clarity, exaggerated conceptions of voter rationality, and misplaced use of both the marketplace and deterrence analogies. Moreover, as some have argued, from an empirical point of view, disclosure only regimes failure to demonstrate any superiority in terms of discouraging the proliferation of money, deterring large contributions or contributors because of fear of voter backlash, addressing third party money, or discouraging subterfuge. If the goal of donate-but-discourage, or allow for donations but still discourage them through disclosure or other mechanisms, is to address the goals of preventing corruption or its appearance or producing elections

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197. Pub. Co. Accounting Reform and Investor Prot. Act, 18 U.S.C. § 1350 *et seq* (2002).

198. Drawing analogies of the political to the economic marketplace seem to be at odds with several arguments to segment or bracket the two. *See Fed. Election Comm’n v. Mass. Citizens for Life, Inc.* 479 U.S. 238, 257 (1986) (stating that “[d]irect corporate spending on political activity raises the prospect that resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace.”). *Id.* at 268 (Rehnquist, C.J., concurring and dissenting in part) (stating that “I do not dispute that the threat from corporate political activity will vary depending on the particular characteristics of a given corporation; it is obvious that large and successful corporations with resources to fund a political war chest constitute a more potent threat to the political process than less successful business corporations or nonprofit corporations.”).

less dependent upon money, then these types of regimes fail miserably to live up to their promise.<sup>199</sup>

Yet the deregulate-yet-disclose or disclosure-only position once held by many is either no longer their position or their original argument was merely a Trojan Horse to contend against contribution limits until such time as they could then dismantle them and then go after disclosure. Bradley Smith now contends that many disclosure laws violate a right to privacy and hurt public discourse.<sup>200</sup> William McGeeveran similarly worries about disclosure and privacy rights.<sup>201</sup> John Samples also opposes disclosure and too finds that it hurts deliberation.<sup>202</sup> Bopp sees in disclosure the handwork of tyranny and tyrants.<sup>203</sup> Bopp even argues that disclosure chills speech and seems bent on offering evidence of this on the election law listserv and elsewhere, although he does seem to support disclosure for candidate contributions, for now.

Because public disclosure of a person's political activity and/or political viewpoints can lead to harassment and that, as a result, lack of anonymity chills speech, the government needs a compelling justification to require disclosure. I agree that one of those instances where disclosure is justified is contributions to candidates.<sup>204</sup>

Cleta Mitchell goes so far as to argue that disclosure is incompatible with the First Amendment.<sup>205</sup> Even Clarence Thomas, in *Doe v. Reed* seems skeptical of disclosure laws because of concerns about harassment,<sup>206</sup> and privacy. Jim Bopp states his stance well: “[b]lack, gays and leftist[s] were harassed yesterday; conservatives and Christians are harassed today. And no one is safe from the thugs and bullies tomorrow.”<sup>207</sup> Bopp, Samples,

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199. See generally David Schultz, *Disclosure Is Not Enough: Empirical Lessons from State Experiences*, 4 ELECTION L.J. 349 (2005).

200. Bradley A. Smith, *In Defense of Political Anonymity*, CITY J., Winter 2010, at 74, 75, 78.

201. See generally William McGeeveran, *Mrs. McIntyre's Persona: Bringing Privacy Theory to Election Law*, 19 WM. & MARY BILL RTS. J. 859 (2011).

202. John Samples, *The DISCLOSE Act, Deliberation, and the First Amendment*, CATO INST. (June 28, 2010), <http://www.cato.org/pubs/pas/pa664.pdf>.

203. See generally James Bopp, Jr. & Jared Haynie, *The Tyranny of "Reform and Transparency": A Plea to the Supreme Court to Revisit and Overturn Citizens United's "Disclaimer and Disclosure" Holding*, 16 NEXUS CHAP. J.L. & POL'Y 3 (2011).

204. *Id.*; see also James Bopp, Jr., *Election Law Listserv*, Jan. 19, 2013, available at <https://mail.google.com/mail/u/1/?shva=1#inbox/13c4aaf04af1be52> (site last viewed on Jan. 21, 2013) (on hand with the author) (hereinafter "Bopp Election Listserv").

205. See generally Cleta Mitchell, *Donor Disclosure: Undermining the First Amendment*, 96 MINN. L. REV. 1755 (2012).

206. 561, U.S. 186, 130 S.Ct. 2811, 2844-45 (2010) (Thomas, J. dissenting).

207. Bopp Election Listserv, *supra* note 204, at 565.

and the others who first argued against contribution limits and now disclosure, do so frankly because such policy positions seemingly hurt the interests and parties they espouse.

Of course in some cases, privacy and anonymity may be in order. In the case of *NAACP v. Alabama*,<sup>208</sup> there was clear evidence of harassment and intimidation that included “economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility.”<sup>209</sup> This case also took place at a time when the civil rights movement was growing, and lynching, cross burnings, and other acts of intimidation were taking place across the south. There were also documented instances of persecution cited by the Court in *Brown v. Socialist Workers 1974 Campaign Committee*.<sup>210</sup> The evidence in both cases was enough for the Court to reject attempts to force disclosure of membership and contributor lists. Yet, as Hasen points out, there is scant evidence of donor intimidation or harassment, despite the best efforts by some to find it or trump on instances.<sup>211</sup> Even Kathleen Sullivan, a supporter of disclosure only laws, concedes that disclosure of donors does little to impede their activity. Part of the problem is in defining harassment, intimidation, or chilling of speech. As Smith and his co-authors ask in their election law book: are instances of leaflets being torn, swearing, pushing over a table, and perhaps even some pushing and shoving demonstrators or others atypical and evidence of intimidation?<sup>212</sup> Is being mooned a form of intimidation or chilling?<sup>213</sup> It is not so clear that these are such instances of that or that this is not what should be expected in the world of politics. Politics is about passion and advocacy, and to some extent, people should expect that articulating positions will elicit responses. This, after all, is the purpose of advocating positions and communicating in general—getting a response.

Moreover, there may be legitimate cases where disclosure does compromise or hurt deliberations. Jury deliberations are private. But, a general across the board argument for privacy or non-disclosure of donations seems overly broad and contrary to the general democratic values of transparency and public decision-making. In many cases, tyrants seek disclosure, but the essence of oppression is secrecy and operating in the shadow. There may be cases where donations up to a certain dollar amount

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208. 357 U.S. 449 (1958).

209. *Id.* at 462.

210. 459 U.S. 87 (1982).

211. Richard L. Hasen, *Chill Out: A Qualified Defense of Campaign Finance Disclosure Laws in the Internet Age*, 27 J.L. & POL. 557, 559 (2012).

212. See generally MICHAEL DIMINO, BRADLEY SMITH, AND MICHAEL SOLIMINE, VOTING RIGHTS AND ELECTION LAW 667 (2010).

213. *Doe v. Reed*, 823 F. Supp. 2d 1195 (W.D. Wash. 2011).

should be shielded from disclosure to protect people from job retaliation. However, to argue that corporations, PACs, and large donors should be protected from disclosure and prevent them from being chilled in their speech is incorrect. Moreover, to assert that these entities are weak and powerless, or discrete and insular and needing protection in the political marketplace, is disingenuous at best. There are two arguments here, both directed at addressing the structural democratic argument in favor of disclosure and in terms of building up a wall that shields the polity from being influenced by money and economic market factors.

First, Anthony Johnstone makes the case for disclosure in terms of Madisonian democracy.<sup>214</sup> He places the argument for disclosure in terms of the Republican-concern to address corruption, as manifest in James Madison's arguments in *Federalist Ten* regarding the need to combat and check factions.<sup>215</sup> This is a conception of corruption that transcends the simple notion of *quid pro quo* that dominates current justifications for contribution limits and disclosure.<sup>216</sup> The concern with factions is to root out groups who wish to oppose the public interest or the rights of others—it is an anti-democratic or anti-popular government motive. To a large extent, the difference between a faction and any other group organizing is one of purpose and intent—which includes licit and illicit intents. Disclosure furthers what Johnstone calls an anti-factional interest.<sup>217</sup> This is an interest in ascertaining information about factions so that we know their purposes. Exposing their purposes is critical to promoting a democratic government because it is part of controlling the effects of factions.

Disclosure, though, does more. It may discourage illicit actions. Is there anything unconstitutional in seeking to deter factions or groups from engaging in activities that are impermissible? No. In general, the law seeks to deter individuals and groups from engaging in anti-social and illegal behavior. To say someone is chilled from committing a crime is nonsensical. Similarly, to say that one is chilled from expending large sums of money to buy or leverage political influence also is nonsensical and it seems to presuppose that it is perfectly legitimate to leverage economic resources to achieve this purpose.

This is the real crux of the issue. Smith, Samples, and Bopp all seem to think it is legitimate to convert economic resources over into political resources and therefore want to argue that money is speech, that limits on

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214. See generally Anthony Johnstone, *A Madisonian Case for Disclosure*, 19 GEO. MASON L. REV. 413 (2012).

215. *Id.* at 415, 438, 442.

216. *Id.* at 438.

217. *Id.* at 442.

donations and expenditures are unconstitutional, and that efforts to regulate money in politics and to promote disclosure is chilling protected freedoms. In essence, the First Amendment enshrines capitalism. For the most part, the Supreme Court seems to be willing to accept this assumption that economic resources should convert over into political influence. This is the core problem that the Supreme Court has failed to address.

### C. DEMOCRACY AND CAPITALISM: WHY MONEY NEEDS TO BE LIMITED

The real question in the money and politics or “money is speech” controversy is over the legitimate or permissible relationship between democracy and capitalism. Historically many argue that there is an interconnection between the rise of capitalism, religion, and democracy.<sup>218</sup> Capitalism and democracy merged roughly at the same time in Europe during the sixteenth and seventeenth centuries. Scholars asserted that the concept of economic liberty and being free to act as the pejorative economic man in the market place reinforced and gave impetus to the individual liberty and the right to make choices in the political marketplace. Limited government protected both economic and political liberty.

In his classic *Capitalism and Freedom*,<sup>219</sup> Milton Friedman, emphasized the connection between democracy and capitalism by recognizing not only the historical connections between free markets and individual freedom, but the current and critical interrelationship between the two systems as well. When the gates of communism came crashing down in the 1990s, many argued that a prerequisite to building democracy in these former totalitarian states began with the privatization of state enterprises and the establishment of market economies.<sup>220</sup> To a large extent, the evolutions of western capitalism and democracy have been inextricably connected. To many, it is no coincidence that the American

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218. See, e.g., MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* (2010); ROGER H. TAWNEY, *RELIGION AND THE RISE OF CAPITALISM* (2013); Göran Therborn, *The Rule of Capital and the Rise of Democracy*, 103 *NEW LEFT REV.* 3 (May-June 1977); GEOFF ELEY, *FORGING DEMOCRACY: THE HISTORY OF THE LEFT IN EUROPE, 1850–2000* (2002). *Contra* HANS BLUMENBERG, *THE LEGITIMACY OF THE MODERN AGE* (1985) (challenging the Weberian thesis).

219. See generally MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* (2002).

220. See generally DANIEL YERGIN & DANIEL STANISLAW, *THE COMMANDING HEIGHTS: THE BATTLE FOR THE WORLD ECONOMY* (2002); MANFRED STEGER, *GLOBALISM: THE NEW MARKET IDEOLOGY* (2002); RAYMOND PLANT, *THE NEO-LIBERAL STATE* (2009); ANDERS ÅSLUND, *HOW CAPITALISM WAS BUILT: THE TRANSFORMATION OF CENTRAL AND EASTERN EUROPE, RUSSIA, AND CENTRAL ASIA* (2007); ANDERS ÅSLUND, *HOW UKRAINE BECAME A MARKET ECONOMY AND DEMOCRACY* (2009); David Schultz, *The Crisis of Public Administration Theory in a Post-Global World*, in *THE STATE OF PUBLIC ADMIN.: ISSUES, CHALLENGES, OPPORTUNITIES*, 453 (MENZEL & HARVEY eds., 2011).

Declaration of Independence and Adam Smith's *Wealth of Nations* were both penned in the same year. For Milton Friedman, F.A. Hayek,<sup>221</sup> and others, economic liberty and political liberty are reinforcing, and mutually necessary, in creating democracy. In other cases, the argument is that democracy requires a certain level of economic affluence and development—even if such affluence and development is not rooted in capitalism.<sup>222</sup>

There is, however, a contrary perspective that challenges the connection between markets, political freedom and democracy. Capitalism and democracy or free markets and limited government are not always reinforcing but can be in tension if not in outright conflict.<sup>223</sup> Chile, under its president General Pinochet, was the epitome of free market capitalism and totalitarianism. Similarly, China has perhaps one of the most successful capitalist systems in the world right now under the direction of an oppressive state with limited political freedom that gives lip service to communism. In the United States, however, we supposedly have blended the right combination of capitalism and democracy.

Additionally, there are a host of democratic theorists that contend that capitalism and democracy are in conflict. Robert Dahl, for example, describes this opposition as one where the political process is not autonomous and instead is controlled or limited in its autonomy by economic enterprises, market choices, and private investment decisions.<sup>224</sup> C.B. MacPherson asserts that capitalism's extractive capabilities undermine the developmental capacities of some by transferring them from one to

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221. See generally FRIEDRICH VON HAYEK, *THE ROAD TO SERFDOM* (2007).

222. See generally GIOVANNI SARTORI, *THE THEORY OF DEMOCRACY REVISITED*, part II, 405-417 (1987); J. ROLAND PENNOCK, *DEMOCRATIC POLITICAL THEORY* 218-236 (1979); ROBERT A DAHL, *POLYARCHY: PARTICIPATION AND OPPOSITION* (1971); ROBERT A. DAHL, *WHO GOVERNS? DEMOCRACY AND POWER IN AN AMERICAN CITY* (1971); ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* (1989); Samuel P. Huntington, *Will More Countries become Democratic?* 99 AM. POL. SCI. REV. 193 (1984); Seymour M. Lipset, *Some Social Requisites of Democracy: Economic Development and Political Legitimacy*, 53 AM. POL.SCI. REV. 69 (1959); Martin C. Needler, *Political Development and Socioeconomic Development: The Case of Latin America*, 62 AM. POL. SCI. REV. 62, 889 (1968); W.W. ROSTOW, *THE STAGES OF ECONOMIC GROWTH* (1971); Dankwart A. Rustow, *Modernization and Comparative Politics: Prospects in Research and Theory*, 1 COMP. POL. 37 (1968); PIPPA NORRIS, *MAKING DEMOCRATIC GOVERNANCE WORK: HOW REGIMES SHAPE PROSPERITY, WELFARE, AND PEACE* 65 (2012), for a review of the literature on the connection between levels of economic development and democracy.

223. SAMUEL BOWLES & HERBERT GINTIS, *DEMOCRACY AND CAPITALISM: PROPERTY, COMMUNITY, AND THE CONTRADICTIONS OF MODERN SOCIAL THOUGHT* (1986); NORBERTO BOBBIO, *DEMOCRACY AND DICTATORSHIP* (1989); C.B. MACPHERSON, *THE LIFE AND TIMES OF LIBERAL DEMOCRACY* (2011); C.B. MACPHERSON, *DEMOCRATIC THEORY: ESSAYS IN RETRIEVAL* (1973); CHARLES LINDBLOM, *POLITICS AND MARKETS: THE WORLD'S POLITICAL ECONOMIC SYSTEMS* (1980) (discussing how markets and democracy often conflict).

224. ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* 324-332 (1989).

another. In effect, capitalism undermines the ethical capacities of individuals necessary to engage in democratic decision making by taking away from some the economic means to act as an equal participant in the polity.<sup>225</sup> Carol Gould pushes this argument further by asserting that economic inequalities and hierarchies undermine social cooperation and the political balance between freedom and equality.<sup>226</sup> Charles Lindblom describes the market as a prison and corporate economic power as incompatible with democratic self-governance.<sup>227</sup> On the other hand, others address the failure to address corporate power in America as a threat to democracy.<sup>228</sup> The fundamental problem here is that market or economic logic has penetrated democratic theory and practice.<sup>229</sup> The question is: how is this so?

Culture is a totality as the philosopher Georg Hegel once stated.<sup>230</sup> There is the marketplace or the economy, the government, and then civil society. Daniel Bell, a famous sociologist, once wrote in the *Cultural Contradictions of Capitalism* that these three components make up a culture.<sup>231</sup> Bell contended that the three also have their own logic and values. The hallmark of Modernity is their separation.<sup>232</sup> The political theorist Michael Walzer argued that the emergence of contemporary free societies resided in how the unity of totalitarianism is broken up by the walls of pluralism.<sup>233</sup> We maintain freedom in our society by walling off issues—we separate the public from the private and the secular from the parochial for example—in order to promote freedom. We define limits to how far the government can go by creating constitutions and a bill of rights. We limit the abuses of the marketplace with government regulation, and the power of society to intrude upon privacy is maintained by marking distinctions between private morality and public neutrality and by declaring

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225. C.B. MACPHERSON, *DEMOCRATIC THEORY: ESSAYS IN RETRIEVAL* 12-14 (1977).

226. CAROL C. GOULD, *RETHINKING DEMOCRACY: FREEDOM AND SOCIAL COOPERATION IN POLITICS, ECONOMY, AND SOCIETY* (1988).

227. CHARLES LINDBLOM, *POLITICS AND MARKETS: THE WORLD'S POLITICAL-ECONOMIC SYSTEMS* 356 (1980); Charles E. Lindblom, *The Market as Prison*, 44 J. POL., 324 (1982).

228. Jane Mansbridge, *On the Importance of Getting Things Done*, POL. SCI. Q., 1 (January, 2012); Robert A. Dahl, *On Removing Certain Impediments to Democracy in the United States*, 92 POL. SCI. Q., 1 (1977); ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* (1989).

229. C.B. MACPHERSON, *THE RISE AND FALL OF ECONOMIC JUSTICE AND OTHER ESSAYS* 101-120 (1987).

230. *See generally* G.W.F. HEGEL, *PHENOMENOLOGY OF SPIRIT* (1977) (discussing in paragraphs 484-595 the ways the spirit of an era encompasses the entire culture of a country).

231. *See generally* DANIEL BELL, *THE CULTURAL CONTRADICTIONS OF CAPITALISM* (1996).

232. *Id.*

233. MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* 312-324 (1984).

that the government should not promulgate personal ethics or religious values. Freedom in modern society is maintained by maintaining walls.

The danger, though, is when boundaries are crossed, such as when the market intrudes upon how we value human life, when government invades personal rights, or when private morality dictates how others should live. A society without walls of separation runs the danger of turning oppressive. Think about how governments and markets interact in at least four ways. First, they represent the two dominate ways to distribute goods and services.<sup>234</sup> Except in the case of face-to-face barter economies, free market and government distribution of goods and services provide rival ways to coordinate their production and distribution.<sup>235</sup> They do that either by decentralizing and privatizing these decisions, in the case of market mechanisms, or centralizing them, as with planned economies. Often these decisions are not dichotomized; in most societies, there is a continuum or hybrid of market-government and decentralized-centralized mechanisms that operate.

Second, public power is necessary to create free markets. Polanyi argued that free markets are not architectonic.<sup>236</sup> They did not just arise and develop on their own.<sup>237</sup> The establishment of these free markets, especially during the nineteenth century in Europe, was the product of significant uses of governmental authority and power in order to enforce the rules of free markets. Even Milton Friedman, a conservative free market economist from the United States who was best noted for his arguments in favor of privatization and minimal governmental intervention into the economy, conceded that public authority to enforce the basic rules of the market place.<sup>238</sup> Max Weber's writings on bureaucratic behavior are often read as lessons for organizational theory.<sup>239</sup> It is, however, important to remember that Weber discussed bureaucracy and authority within the context of capitalism and the role of the former in helping to sustain it.<sup>240</sup> More specifically, Weber insisted that modern bureaucracies and economic orders, specifically capitalism, are interconnected.<sup>241</sup>

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234. CHARLES LINDBLOM, *POLITICS AND MARKETS: THE WORLD'S ECONOMIC SYSTEMS* 4-10 (1977).

235. *Id.*

236. *See generally* KARL POLANYI, *THE GREAT TRANSFORMATION* (2001).

237. *Id.*

238. MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 25-7 (2002).

239. Max Weber, *Bureaucracy* in HAN GERTH & C. WRIGHT MILLS, *FROM MAX WEBER: ESSAYS IN SOCIOLOGY* 196 (1979).

240. LEWIS COSER, *MASTERS OF SOCIOLOGICAL THOUGHT: IDEAS IN HISTORICAL AND SOCIAL CONTEXT* 230-33 (1977).

241. *Id.*

Third, governmental authority is required to address and regulate market failures, such as free rider problems, (negative) externalities, information asymmetries, and monopolies.<sup>242</sup> For many economists, unregulated free markets produce problems that only government regulation can correct. These may be problems surrounding maintenance of demand,<sup>243</sup> distributional issues, or other pathologies that impede efficiency or the ability of markets to react to disequilibrium.<sup>244</sup>

Fourth, government intervention may be necessary to provide public infrastructure investment or insure profitability of private businesses.<sup>245</sup> While Adam Smith's *The Wealth of Nations* is best remembered as the first statement defending free markets and capitalism, the book also offers an important defense for government investment in basic infrastructure, like roads and canals in Smith's day and schools and telecommunications today, in order to sustain and support private investment.<sup>246</sup> Moreover, James O'Connor has argued that modern capitalist states serve two basic functions—promote legitimization or support for the regime and undertake activities that make it possible for private businesses to maintain profitability or maintain capital accumulation.<sup>247</sup>

The general point here is that markets may be great mechanisms to allocate sail boats and luxury items but not political influence and democratic values. Allocation of political power and influence should be distributed according to non-market criteria. As Daniel Bell pointed out, market logic and concepts were increasingly coming to encroach or infringe upon other parts of American culture including, for our purposes here, the polity or political process.<sup>248</sup> Others, such as Michael Sandel, have argued that the danger now is the fact that the United States is turning from a market economy to a market society where increasing all types of social intercourse are being reduced to a cash nexus.<sup>249</sup> Robert Kuttner makes a

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242. JOHN CASSIDY, *HOW MARKETS FAIL: THE LOGIC OF ECONOMIC CALAMITIES* (2009).

243. JOHN MAYNARD KEYNES, *THE GENERAL THEORY OF EMPLOYMENT, INTEREST AND MONEY* (1964).

244. *See generally* ARTHUR M. OKUN, *EQUALITY AND EFFICIENCY: THE BIG TRADEOFF* (1975).

245. *See generally* ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* (1937).

246. *Id.* at 452-58.

247. JAMES O'CONNOR, *THE FISCAL CRISIS OF THE STATE* 3-5 (2001).

248. BELL, *supra* note 231, at 430-33.

249. *See generally* MICHAEL SANDEL, *WHAT MONEY CAN'T BUY: THE MORAL LIMITS OF MARKETS* (2012).

similar point.<sup>250</sup> To a large extent, American political power is constantly subjected to a marketization of its operations.

The issue here is not one of efficacy or money. It is not whether money makes a difference in terms of who is elected or who has political influence. One could debate forever whether money buys influence, but there is significant evidence that economic inequalities have political consequences.<sup>251</sup> Specifically, political influence is associated with affluence and the American policy process seems skewed to favor class preferences, especially when one examines the relationship between class and political engagement.<sup>252</sup> Schattschneider contends that the mobilization of bias in the American political process has produced a political system favoring the more affluent.<sup>253</sup> Stated otherwise, when the policy preferences of the more affluent are different from the lower and middle classes, the former generally have their preferences reflected in policy outcomes.<sup>254</sup> The issue instead is one about justice and fairness. It is about whether money is the appropriate criteria to use to determine who has political influence or authority. It is about setting boundaries, as Walzer would argue,<sup>255</sup> demarcating distinctions between the market economy and the political system. While the field of political economy may be a legitimate academic discipline, the American political system is not a market democracy—the economic market place and the political forum or agora should be distinct. The allocative criterion for a political democracy is not the same as that for market capitalism. This is what the Bradley Smiths, John Samples, and James Bopps fail to appreciate.

Even though American democracy has grown along with capitalism, the two should not be conflated. For one, classical republican theory which tremendously influenced the American political founding and founders is characterized by fear of corruption that comes from, in part, a concern about unequal distributions of property and wealth.<sup>256</sup> Classical republican

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250. *See generally* ROBERT KUTTNER, *EVERYTHING FOR SALE: THE VIRTUES AND LIMITS OF MARKETS* (1999).

251. LAWRENCE JACOBS & DESMOND KING, *THE UNSUSTAINABLE AMERICAN STATES* (2009); DESMOND KING, ET AL., *DEMOCRATIZATION IN AMERICA: A COMPARATIVE-HISTORICAL ANALYSIS* (2009); AM. POL. SCI. ASS'N, *AMERICAN DEMOCRACY IN AN AGE OF RISING INEQUALITY* (Washington, D.C., Am. Pol. Sci. Ass'n, 2004).

252. *See generally* WARREN E. MILLER & J. MERRILL SHANKS, *THE NEW AMERICAN VOTER* (1996); MICHAEL S. LEWIS-BECK, ET AL., *THE AMERICAN VOTER REVISITED* (2008).

253. E.E. SCHATTSCHNEIDER, *THE SEMI-SOVEREIGN PEOPLE* 20-47 (1960).

254. MARTIN GILENS, *AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA* (2012).

255. Michael Walzer, *Liberalism and the Art of Separation*, 12 *POL. THEORY*, 318 (1984).

256. *See generally* J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (2003).

theorists, such as James Harrington, drew a connection between political power and wealth or property, seeking in such divisions threats to a republican form of government.<sup>257</sup> James Madison too, in *Federalist Ten*, described the “most common and durable source of factions has been the various and unequal distribution of property.”<sup>258</sup> Harrington, republican theorists in general, and James Madison would have endorsed the idea that somehow a wall must be fashioned that prevents the effects of wealth, as a faction, from adversely affecting the political process. Thus, for those originalists looking to a theory of democracy to support a jurisprudence that sustains limits on the use of money for political purposes, there is good evidence that a founding set of American values would sustain that attempt.<sup>259</sup>

Additionally, one can occasionally point to some dicta in Supreme Court decisions suggesting a broader understanding regarding a democratic theory of election law that would wall off impermissible uses of money in the political process. For example, Justice White, dissenting in *First National Bank of Boston v. Bellotti*,<sup>260</sup> declared that it was reasonable to be concerned about the use of concentrated wealth in politics.

States have provided corporations with such attributes in order to increase their economic viability and thus strengthen the economy generally. It has long been recognized however, that the special status of corporations has placed them in a position to control vast amounts of economic power which may, if not regulated, dominate not only the economy but also the very heart of our democracy, the electoral process. Although *Buckley v. Valeo* provides support for the position that the desire to equalize the financial resources available to candidates does not justify the limitation upon the expression of support which a restriction upon individual contributions entails, the interest of Massachusetts and the many other States which have restricted corporate political activity is quite different . . . . It is not one of equalizing the resources of

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257. See generally PHILLIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* (1999); J.G.A. POCOCK, *VIRTUE, COMMERCE, AND HISTORY: ESSAYS ON POLITICAL THOUGHT AND HISTORY, CHIEFLY IN THE EIGHTEENTH CENTURY* (1985).

258. HAMILTON, MADISON, & JAY, *THE FEDERALIST* 44 (GEORGE W. CAREY & JAMES MCCLELLAN eds., 1990).

259. Conversely, for advocates of pluralist democracy, they seemed largely inattentive to the role that unequal resources played in terms of group strength, mobilization, and political bias. This is largely the critique of the pluralist project. See, e.g., E.E. SCHATTSCHNEIDER, *THE SEMI-SOVEREIGN PEOPLE* 20-47 (1960); THEODORE J. LOWI, *THE END OF LIBERALISM* (1969); GRANT MCCONNELL, *PRIVATE POWER AND AMERICAN DEMOCRACY* (1966).

260. 435 U.S. 765, 809 (1978).

opposing candidates or opposing positions, but rather of preventing institutions which have been permitted to amass wealth as a result of special advantages extended by the State for certain economic purposes from using that wealth to acquire an unfair advantage in the political process, especially where, as here, the issue involved has no material connection with the business of the corporation.<sup>261</sup>

In addition to Justice White acknowledging as legitimate the need to draw boundaries between the economic and political spheres, Justice Rehnquist, in the same case, hits a similar theme in stating that “[i]t might reasonably be concluded that those properties, so beneficial in the economic sphere, pose special dangers in the political sphere.”<sup>262</sup> Finally, the majority opinion in *Federal Election Commission v. National Right to Work Committee*,<sup>263</sup> perhaps articulated it the best when it quoted the government defending a federal campaign finance law that its purpose was “to ensure that substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization should not be converted into political ‘war chests’ which could be used to incur political debts from legislators who are aided by the contributions.”<sup>264</sup>

What these comments from the Supreme Court suggest is recognition that money used for political purposes needs to be limited. Politics in general, and campaigns and elections in particular, may be expensive, but as noted earlier, that it a different assertion from the one being made here. Money may be necessary to run campaigns and elections, but their costs or funding sources should not undermine democratic values. According to Dahl, the problem of *Buckley v. Valeo* is that the Justices failed to understand how a democratic system derives its legitimacy from political equality.<sup>265</sup> Allowing the allocative criteria of the economy to substitute for equality in the political arena gives money and wealth a role that it just should not have in American democracy.

The United States Constitution, as Justice Holmes is repeatedly quoted from *Lochner v. New York*, does not embody a specific economic theory.<sup>266</sup> The same can be said about American democracy. The democratic theory at the foundation of American election law which should guide the jurisprudence in this area should treat seriously the notion that a wall of

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261. *Id.* at 809 (White, J., dissenting).

262. *Id.* at 826.

263. 459 U.S. 197, 207 (1982).

264. *Id.* at 207.

265. ROBERT A. DAHL, HOW DEMOCRATIC IS THE CONSTITUTION 152 (2003).

266. *Lochner v. New York*, 198 U.S. 45, 75 (1905).

separation needs to be erected between the economy and the polity that is no less high than the one between church and state. Neutrality, at least in the political realm, demands distinct values and criteria separating it from the economy. This implies that the use of money to affect political decisions is an illicit or illegitimate purpose that ought to be chilled, and seeking to prevent that conversion from occurring is a compelling governmental interest that should be enough to substantiate the conclusion that money is not speech.

## V. CONCLUSION

North Dakota is an example of two of the major problems in contemporary American election law. The first is that it allows for the use of ballot initiatives to make policy, and the second is that it endorses the unregulated use of money to influence campaigns and elections. In terms of the problems associated with the former, the result has been to allow for initiative and referendum to target personal freedoms. Majority rule is thus being used in ways to undermine minority rights that James Madison and perhaps other constitutional framers feared. In the second case, North Dakota allows for the conversion of personal and corporate wealth into political influence. This, perhaps, results in the state receiving an overall failing grade when it comes to political corruption, and perhaps its domination by powerful special interests.

The use of initiative and referendum, and the failure to regulate the role of money in politics, are not the only problems facing this state. North Dakota's generally laissez-faire approach to disclosure of any kind, minimal regulation of lobbyists, and its endorsement of close working relationships between public officials and interest groups belie a state that likes to bask in a populist image. Instead, such a regulatory environment does not yield democracy but instead can produce the corruption that defines North Dakota's political environment.

So what is to be done? Are there easy or simple fixes for the state, or for that matter, for other jurisdictions across the country facing similar problems? One could perhaps suggest political contribution limits to candidates and political organizations that come with better and more rapid disclosure. One could also suggest better lobbyist disclosure with limits on gifts. One might also advocate for better conflict of interest laws for public officials and even for sharp limits on the use of ballot initiatives when it comes to individual rights. All of these proposals could go a long way toward improving the state of democracy in North Dakota, and in the United States.