

Preface

AMERICAN DEMOCRACY RAISES THE STRANGEST QUESTIONS. Why does it cost nearly a billion dollars to mount a successful presidential election campaign? Why are corporations considered citizens and entitled to unlimited political spending? Will unaccountable organizations such as superPACs and dark money groups become more influential than political parties? How have citizens been forced into the role of consumers in a political marketplace? Indeed, how did democracy become a market?

For those who fought throughout our nation's history for political equality and popular sovereignty, these questions would prove fantastical or maddening. Civil rights movements occupied the better part of the last two centuries, as white males without property, women, and African Americans struggled to become equal citizens. It took several constitutional amendments to prevent political power from being officially conditioned upon property ownership, sex, and race. Today, however, political power is increasingly conditioned upon wealth—not exactly a satisfactory conclusion to centuries of progressive political reforms.¹ Foreign observers reinforce the point, marveling at how American democracy decides all manner of political issues through commerce, not civics, and wondering if commerce will someday become the new civics everywhere. After all, it would not be the first time that an American innovation spread across the globe.

These questions and concerns arise from money in politics. Political parties, political campaigns, and elections must be financed by one source or another. And in today's world, interest groups, lobbyists, and political ads in the mass media also receive tremendous financial backing. The sources, amounts, and implications of all those funds are addressed by an area of law called political finance or, more commonly, campaign finance. In the exercise of this responsibility, campaign finance law acquires profound power over the character of American democracy, shaping its opportuni-

ties for popular participation, modes of collaboration and competition, levers of control, and, ultimately, its loyalties.

Most Americans have heard of campaign finance reform, a social movement and grouping of laws that have attempted to diminish the role of money in politics. Despite its popularity among the general public and legislators, anyone observing U.S. politics and elections knows that campaign finance reform has been largely defeated. And so Americans have reluctantly become familiar with questions about the rising cost of elections, the political power of corporations and interest groups, and the diminishing role of ordinary citizens. Some are even developing a fatalistic sense that the problem of money in politics is too big to solve and that it is now pointless to ask principled questions about democratic integrity.

This book is based on the belief that such questions are essential, not pointless, and that a particular set of answers will motivate change. The following chapters discuss why money in politics is the defining issue of our time, how campaign finance reform has been defeated, how wealth has become a means of political exclusion, why this state of affairs corrupts capitalism just as much as democracy, and what sorts of principles could solve the problem. Of course there are many perspectives on each of these fronts. The tremendous number of relevant historical events, political practices, journalistic reports, legislative provisions, judicial decisions, academic studies, and political theories ensure an endless supply of arguments. Still, one current runs through all these components. I have followed this current long enough to conclude that it reveals the essence of the problem. Along the way, a possibility has etched itself into my mind. Perhaps the problem of money in politics has proved insurmountable only because it has yet to be seen for what it is: a series of conflicts between capitalism and democracy for control of the political sphere. To be clear, those who use financial means to control politics do not always seek to reduce the role of government and increase the role of the market; they often seek to reshape (or even increase the role of) government for their own purposes. Either way, however, money in politics co-opts the political sphere by substituting economic forms of empowerment and accountability for democratic ones.

This book exposes the problem's essence, lays out its implications, and offers it up for contemplation by a critical mass of citizens. This task

could encompass many different areas of campaign finance law, including legislative debate, legislation, and judicial opinions. Each is bustling at local, state, and federal levels, where elections pose familiar concerns over money in politics. The problem is not even limited to the election of politicians, whether city council members, state legislators, governors, members of Congress, or the president. It extends to the election of judges as well, a common practice in the states. Although all of these areas deserve attention, they are not equally important for purposes of revealing the problem's essence and ultimate cause. This book makes a more focused inquiry, one shaped by the power dynamics in play.

The U.S. Constitution trumps inconsistent federal and state laws.² This legal hierarchy has determined the fate of campaign finance provisions at all levels. It even shapes the possibility of future reform, as lawmakers are hesitant to put the legislative process in motion only to see its creations dismembered on the constitutional chopping block. The judiciary wields an axe forged by the authority to invalidate legislation on the grounds of its unconstitutionality. As the nation's highest court, the U.S. Supreme Court has the last word in this process of judicial review. The Court has used its power to "say what the law is" viciously enough to refute the Federalist Papers' view: the judiciary is not "the least dangerous" branch.³

Initially just a concession to the facts of political life, this focus on constitutional interpretation soon rewards us with a view of the justifications for a democracy ruled by the market. Those of us with burning questions about democratic integrity will find a great many answers, but we will also discover unforeseen challenges. The situation is not merely one of expensive campaigns, officeholders beholden to big donors and spenders, interest-group competition, corporate political power, and a diminishing role for ordinary citizens. It is one in which such threats to democratic integrity are supported and even amplified by constitutional rights. Therefore, the question is not so simple as how to restore democratic integrity (and of course that question is hardly simple). The question, first and foremost, is how democratic corruption was sewn into the Constitution and how to unstitch those threads. Until this part of the problem has been addressed, democratic integrity will remain an unlawful endeavor. At present, those of us concerned with money in politics do not part from

the desirable position of those seeking to correct a recognized problem. We begin instead from the position of constitutional dissidents, members of a legal counterculture.

Because democratic integrity is in a position far worse than commonly acknowledged, its prospects are immeasurably greater. As Chapter 1 describes the problem of money in politics and Chapters 2 to 4 locate its cause in the Supreme Court, we will experience a well-known paradox: sometimes things have to get worse before they can get better. The present level of money in politics and the violence done to the Constitution's values are bad enough to provoke the sort of clarity generally reserved for moments of crisis. Chapters 5 and 6 reinforce the point, exposing the theoretical weaknesses of the Court's approach to campaign finance reform and the practical effect of that approach—the creation of a market for political goods. Chapter 7 rounds out the book's deep, conceptual approach by explaining how the corruption of democracy leads to the corruption of capitalism and offering a path to restoring the integrity of both systems.

While the great majority of this material is new, some of it has been repurposed from articles I have published in law journals. These sources provide additional information on the cases I discuss and the implications of my approach for concerns as varied as constitutional law, democratic theory, human rights, and international law: “The Separation of Business and State,” *California Law Review* 95 (2007): 2353; “Citizens United as Neoliberal Jurisprudence: The Resurgence of Economic Theory,” *Virginia Journal of Social Policy and the Law* 18 (2011): 395; “The Democracy to Which We Are Entitled: Human Rights and the Problem of Money in Politics,” *Harvard Human Rights Journal* 26 (2013): 39; and “Consumer Sovereignty Trumps Popular Sovereignty: The Economic Explanation for *Arizona Free Enterprise v. Bennett*,” *Indiana Law Review* 46 (2013): 603. I wish to recognize these journals and their capable staffs.

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