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SYMPOSIUM ARTICLES & ESSAYS

FOREWORD: THE STATE OF THE REPUBLICAN FORM OF GOVERNMENT IN MONTANA

Anthony Johnstone*

INTRODUCTION

This Symposium Volume,[1] and the 2012 Browning Symposium it records, explores how the states might renew their distinctive forms of republicanism within constraints, new and old, imposed by the federal government in general and the Supreme Court in particular.[2] It takes its title from the Guarantee Clause, by which the United States "guarantee[s] to every State in this Union a Republican Form of Government."[3] More than any other phrase in the Constitution, these words set out the basic role of the federal government in safeguarding the processes of representative democracy in the states.

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* Assistant Professor, The University of Montana School of Law. The author served as counsel for the State of Montana in *American Tradition Partnership, Inc. v. Bullock*. Thanks to Mackenzie Bloom and Hannah Tokerud for organizing an excellent symposium on a critical issue, to Richard Hasen, William Marshall, and Richard Pildes for insightful comments and encouragement, to Joshua vanSwearingen for research assistance, to Amy McNulty, Mac Morris, and Professor Larry Howell for helpful editing, and to my family for their support. I dedicate this Foreword to William Harber, a proponent of the Corrupt Practices Act of 1912, and my great-great grandfather.

1. Symposium, *Election Law: The State of the Republican Form of Government in the States*, 74 Mont. L. Rev. (2013) (through election law-related articles, essays, comments, and notes, portions of both the winter and summer issues of the volume record the Hon. James R. Browning Symposium held at The University of Montana School of Law, Missoula, Mont., on Sept. 27–28, 2012).

2. For the purposes of this foreword, "republicanism" means nothing more, and nothing less, than "a Government in which the scheme of representation takes place," consistent with any reasonable reading of the balance of the Constitution. James Madison, *The Federalist 10*, in *The Federalist 129* 133 (Benjamin Fletcher Wright ed., Belknap Press of Harvard U. Press 1961).

3. U.S. Const. art. IV, § 4.

Fifty years ago, the Supreme Court famously disclaimed the Guarantee Clause as a basis for federal regulation of state politics in *Baker v. Carr*.[4] Ever since, a student of constitutional law might fairly think the Clause to be irrelevant, and outside academic commentary its text is rarely cited. Its principle, however, remains active in constitutional doctrine. As Justice Frankfurter observed, *Baker* presented "a Guarantee Clause claim masquerading under a different label,"[5] the Equal Protection Clause.[6] Through that masquerade the federal courts entered the "political thicket."[7] Under the Fourteenth and Fifteenth Amendments, the rest of the federal government soon followed the Court into the thicket with the Voting Rights Act of 1965.[8] These events, and the federal campaign finance reforms of the early 1970s,[9] gave rise to the modern field of election law.[10]

The key insight of election law is that questions about the republican form of government pervade constitutional law. At least, the student of election law would point out to the student of constitutional law, the Constitution itself has refined the republican guarantee by extending the "public" of the republic to include all races,[11] women,[12] the poor,[13] young adults,[14] and the people directly in choosing senators.[15] Congress implemented the guarantee through legislation enforcing these amendments, thereby enabling the President to further shape the guarantee in the states.[16] More than this, a student of election law finds the Supreme Court engaging in a bit of misdirection when it disclaims any interpretation or implementation of "a Republican Form of Government." To the contrary, the Court has imported particular understandings of republicanism into its interpretation of the First

4. *Baker v. Carr*, 369 U.S. 186, 209 (1962) (holding that legislative apportionment presents a justiciable issue under the Equal Protection Clause).

5. *Id.* at 298 (Frankfurter, J., dissenting).

6. U.S. Const. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

7. *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (Frankfurter, J., for the Court) (holding that legislative apportionment presents a nonjusticiable political question).

8. *See* Voting Rights Act of 1965, 42 U.S.C. §§ 1973 et seq.

9. Federal Election Campaign Act, 2 U.S.C. §§ 431 et seq.

10. *See* Daniel H. Lowenstein, *Election Law as a Subject—A Subjective Account*, 32 Loy. L.A. L. Rev. 1199, 1201 (1999). *But see id.* at 1202 ("[I]t is not true that there was no body of election law to speak of before the 1960s. . . . Rather, what began to happen in 1962 was that a substantial body of election law arose that could interest contemporary law school professors.").

11. U.S. Const. amend. XV.

12. U.S. Const. amend. XIX.

13. U.S. Const. amend. XXIV.

14. U.S. Const. amend. XXVI.

15. U.S. Const. amend. XVII; *see also* U.S. Const. amend. XXIII ("The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct: A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State.").

16. *See e.g.* Voting Rights Act of 1965, 42 U.S.C. §§ 1973 et seq.

and Fourteenth Amendments, and of our federalism. Notwithstanding "the lack of criteria by which a court could determine which form of government was republican,"[17] the Court's varied conceptions of the republican guarantee continues to masquerade under the various constitutional sources of election law doctrine.

As debates over the meaning of republicanism migrate into the doctrine developed under other federal constitutional provisions, the Guarantee Clause itself, and with it any conception of a distinction between the states and the union in the constitutional regulation of politics, fades from view. Whatever remains of a distinct constitutional sphere of state republicanism, and the distinct practical operation of state politics, is increasingly subsumed into high-profile federal controversies involving the Federal Election Commission,[18] Senator McConnell and the McCain-Feingold Law,[19] and the competing presidential electors for George W. Bush and Albert Gore, Jr.[20] This trend culminated last year in *American Tradition Partnership, Inc. v. Bullock*,[21] when the Court summarily reversed the Montana Supreme Court's holding that distinct state interests supporting Montana's Corrupt Practices Act of 1912 satisfied the free speech scrutiny required by *Citizens United v. Federal Election Commission*.[22] Thus, a Court that 50 years ago at least wrestled with the meaning of state republicanism under the Guarantee Clause in *Baker* now holds, "[t]here can be no serious doubt" that the United States Congress that enacted the federal Bipartisan Campaign Reform Act of 2002, and the people of Montana who initiated and approved the state Corrupt Practices Act of 1912, are identically situated for constitutional purposes.[23]

The consequences, intended and unintended, of these latest cases are no less dramatic than those of the earliest reapportionment cases. This Volume marks an opportunity to reassess the impact of these recent federal interventions on the republican form of government in the states. As the varied contributions demonstrate, it also marks an opportunity to reassert a

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17. *Baker*, 369 U.S. at 222.

18. *See e.g. Citizens United v. Fed. Election Commn.*, 130 S. Ct. 876 (2010); *but see id.* at 952 (Stevens, J., dissenting) ("The Court enlists the Framers in its defense without seriously grappling with their understandings of corporations or the free speech right, or with the republican principles that underlay those understandings.").

19. *McConnell v. Fed. Election Commn.*, 540 U.S. 93, 93 (2003).

20. *Bush v. Gore*, 531 U.S. 98, 100 (2000); *but see id.* at 141 (Stevens, J., dissenting) (citing the Guarantee Clause as a defense to the Court's "disrupt[ing] a State's republican regime," including a judiciary that would construe the legislature's enactments); *see also id.* at 112 (Rehnquist, C.J., dissenting) (arguing Article II, § 1, cl. 2 "imposes a duty or confers a power on a particular branch of a State's government" beyond "the requirement that the government be republican in character").

21. *Am. Tradition Partn., Inc. v. Bullock*, 132 S. Ct. 2490 (2012).

22. *Citizens United*, 130 S. Ct. 876, 899–900.

23. *Am. Tradition Partn., Inc.*, 132 S. Ct. at 2491.

role for the states in reforming republicanism in the wake of *Citizens United* and related developments. Lawrence Lessig's *Keynote Address: On What Being a (small r) Republican Means*[24] sets the stage. It recalls Montana's victory over corporate political corruption in the enactment of the Corrupt Practices Act 100 years ago, and it asks "What should we have learned from 1912, and what have we forgotten?"[25] One answer Professor Lessig offers is the revolutionary but dormant constitutional power of states to call an Article V convention for the purpose of proposing amendments to the Constitution, or at least threaten to do so in order to force Congress's hand.[26]

States also can exert more indirect leverage on national politics. Edward Foley's *The Separation of Electoral Powers*[27] suggests a radically new approach to political reform that is rooted in the principle of separation of powers.[28] Such an innovation as he proposes is practicable, if at all, only in flexible state constitutional systems. By entrenching nonpartisan administration of all elections, state and federal, it promises a traditional republican cure for the national partisan disease. Beyond election administration, states also hold most of the levers of basic corporate law. Ciara Torres-Spelliscy's *Taking Opt-In Rights Seriously*[29] explores how states might help improve what the Court in *Citizens United* optimistically referred to as "the procedures of corporate democracy" for corporate campaign spending.[30] While the federal Securities and Exchange Commission and Congress debate the rights of shareholders to disclosure of, or consent to, corporate campaign spending, states are taking the lead in giving shareholders the same opt-in rights the Supreme Court recently suggested for union members.[31] Richard Hasen reconceives another political policy experiment in the states' laboratories of democracy, asking whether there is *A Constitutional Right to Lie in Campaigns and Elections?*.[32] After the Supreme Court's fractured decision in *United States v. Alvarez*,[33] Professor Hasen's typology of false campaign speech regulations shows how the diversity of

24. Lawrence Lessig, *Keynote Address: On What Being a (small r) Republican Means*, 74 Mont. L. Rev. 37 (2013) (Symposium, The University of Montana School of Law, Sept. 27–28, 2012).

25. *Id.* at 38.

26. *Id.* at 50.

27. Edward B. Foley, *The Separation of Electoral Powers*, 74 Mont. L. Rev. 139 (2013) (Symposium Panelist).

28. *Id.* at 146.

29. Ciara Torres-Spelliscy, *Taking Opt-In Rights Seriously: What* Knox v. SEIU *Could Mean for Post-*Citizens United *Shareholder Rights*, 74 Mont. L. Rev. 101 (2013) (Symposium Panelist).

30. *Id.*

31. *Id.*

32. Richard L. Hasen, *A Constitutional Right to Lie in Campaigns and Elections?*, 74 Mont. L. Rev. 53 (2013) (Symposium Panelist).

33. *U.S. v. Alvarez*, 132 S. Ct. 2537 (2012).

regulatory regimes at the state level can help courts and commentators clarify otherwise obscure constitutional lines.[34]

Any proposal to reform national politics must account for state politics, but state politics is not merely a means to a national political end. Nearly all elected officials in the United States serve at the state and local level, including judges, prosecutors, and election officials who have no federal counterparts. As William Marshall observes in *The Constitutionality of Campaign Finance Regulation: Should Differences in a State's Political History and Culture Matter?*,[35] each state has a distinct political culture, and "some of the differences in political culture between the states may express very different views of democratic theory. . . . indeed, each state appears to express its own theory of democracy."[36] Montana's case for a more contextual constitutional analysis of state campaign finance systems did not succeed in defending the 1912 Corrupt Practices Act before the United States Supreme Court, due in part to the Court's lack of engagement with the realities of state politics Marshall describes.[37] Although Professor Marshall worries that a flood of outside money into state campaigns means "[t]he uniqueness of a state's political culture and therefore the need to preserve it, . . . may be rapidly becoming a relic of the past,"[38] his defense of a distinct state form of politics is an argument worth having at a time when the national political culture offers less and less worth preserving. Edwin Bender finds that at least in empirical terms, this argument is just beginning, not ending, in his *Evidencing a Republican Form of Government*.[39] Bender, whose National Institute on Money in State Politics continues to break new ground in "following the money," explains how much we can learn, and how much more there is yet to learn, from state campaign finance data.[40] Together, Marshall's cultural analysis and Bender's empirical analysis point to a fruitful research agenda addressing the diversity of republican forms of government in the states.

This foreword contributes to these discussions by situating Montana's experience in broader themes of federal intervention in state republicanism. It serves as an epilogue to match Jeff Wiltse's prologue reexamining[41] the

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34. Hasen, *supra* n. 32.

35. William P. Marshall, *The Constitutionality of Campaign Finance Regulation: Should Differences in a State's Political History and Culture Matter?*, 74 Mont. L. Rev. 79 (2013) (Symposium Panelist).

36. *Id.* at 86.

37. *Id.* at 81.

38. *Id.* at 100.

39. Edwin Bender, *Evidencing a Republican Form of Government: The Influence of Campaign Money on State-Level Elections*, 74 Mont. L. Rev. 165 (2013) (Symposium Panelist).

40. *Id.*

41. Jeff Wiltse, *The Origins of Montana's Corrupt Practices Act: A More Complete History*, 73 Mont. L. Rev. 299 (2012) (Symposium Panelist).

election in 1912 that gave birth to the Corrupt Practices Act, by examining the aftermath of the U.S. Supreme Court's burial of that law 100 years later. The foreword has two parts. Part I considers the recent federal constitutional challenges that dismantled elements of the republican form of government that prevailed in Montana for the past century. The Supreme Court's curt decision in *American Tradition Partnership* represents a nationalizing approach toward state campaign finance, both because it does not distinguish between state and federal regulation of politics, and because it facilitates the increased influence of national political forces that can overwhelm state campaigns.[42] That trend is evident in subsequent litigation in *Lair v. Murry*[43] and similar cases that continued the federal judicial deregulation of Montana politics with an unusually disruptive effect on the 2012 election.[44] Not until these federal challenges abated, temporarily, did the state courts have the opportunity to consider the concrete interests of Montanans and the voters have their say.[45]

Part II considers Montana's response to the federal constitutional challenges. That response began even before the final resolution of *American Tradition Partnership* with the proposal of I-166, an initiative rebuking *Citizens United* and proposing "a level playing field in campaign spending" that included prohibitions on corporate campaign expenditures.[46] Montana voters enacted that initiative by the same 3-to-1 margin that supported the Corrupt Practices Act a century before, but by the election the Supreme Court's decision had mooted the initiative's policy against corporate campaign spending. What remains is the voters' overwhelming support for the principle of a "level playing field." While the Supreme Court ruled out the most direct means of ensuring equality in campaign finance by "leveling down" corporate and other expenditures, there are several policy reforms Montana lawmakers can consider to fulfill the principle of greater political equality within the constraints imposed by the current federal constitutional regime.[47] These include ensuring all campaign actors play by the same rules of accountability,[48] strengthening the enforcement of those rules,[49] and "leveling up" citizen participation in campaign finance.[50] Although the anti-corporate policy of I-166 is a lost legislative opportunity to implement more practical reforms, its pro-equality democratic principle presents a new

42. *See* Part I.A, *infra.*
43. *See* Part I.B, *infra*.
44. *See id.*
45. *See* Part I.C, *infra.*
46. *See* Part II.A, *infra.*
47. *See* Part II.B, *infra*.
48. *See* Part II.B.1, *infra.*
49. *See* Part II.B.2, *infra.*
50. *See* Part II.B.3, *infra.*

political opportunity for the people to reclaim their role in reforming republicanism in Montana.

I. The Federal Challenges: Nationalizing Montana's Form of Government

Montana's political history is closely tied to the Supreme Court's interventions in both the earlier *Baker* era of reapportionment and the current *Citizens United* era of campaign finance deregulation. In Montana as much as anywhere else, the reapportionment cases transformed state politics when a three-judge district court invalidated the Montana Legislature under *Reynolds v. Sims*[51] and ordered "[a]n appropriate reapportionment" of the Montana House and Senate.[52] As Professors Larry Elison and Fritz Snyder explain, the resulting shift of political power from "rangeland counties in south central and southeastern Montana" to "western timber and mining counties," and "from rural to urban counties in each of the state's regions," predictably "diminished the representation of ranchers and farmers in the legislature, increased the representation of the professions, and left traditionally conservative rural areas increasingly opposed to any change."[53] When Montana's 1889 Statehood Constitution also went the way of the old legislature, this shift in political power was entrenched in constitutional text. "A new activism surfaced in Montana," which led the reapportioned legislature to approve a 1970 referendum on calling a constitutional convention, which in turn led to the 1972 Constitutional Convention and ratification of a new Montana Constitution.[54] The narrow margin of ratification (less than three thousand votes and only a plurality of total votes cast[55]) suggests that federal constitutional intervention of reapportionment led to the state legislature's support of a convention and therefore was a necessary precondition of the new Constitution.

Over the past year, a series of cases prompted directly and indirectly by *Citizens United* has led to the most significant federal constitutional intervention in Montana politics since reapportionment in the 1960s. Beginning with the invalidation of the 1912 Corrupt Practices Act's prohibition on corporate independent expenditures,[56] federal courts have since invali-

51. *Reynolds v. Sims*, 377 U.S. 533 (1964).

52. *Herweg v. Thirty Ninth Leg. Assem. of Mont.*, 246 F. Supp. 454, 458–459 (D. Mont. 1965).

53. Larry M. Elison & Fritz Snyder, *The Montana State Constitution: A Reference Guide* 8 (Greenwood 2001).

54. *Id. See generally id.* at 8–15. In the post-*Reynolds* reapportionment period between 1965 and 1974, sixteen states proposed new constitutions, and voters ratified them in seven states. *Id.* at 16.

55. *Id.* at 15. *See also Cashmore v. Anderson*, 500 P.2d 921 (Mont. 1972).

56. *Am. Tradition Partn., Inc.*, 132 S. Ct. at 2491.

dated: a 1935 prohibition on partisan judicial endorsements;[57] a prohibition on private official religious or corporate commands to vote in a certain way;[58] a requirement that campaign materials report the context of any candidate's voting record;[59] a statutory cause of action for political civil libel;[60] and a prohibition on corporate contributions to independent expenditure political committees.[61] There remain pending on appeal challenges to the 1912 Act's prohibition on corporate contributions to candidates[62] and a 1994 initiative's limits on contributions to individuals and political parties.[63] A federal district court denied an election-eve challenge to Montana's political committee registration requirements,[64] and a state district court sharply rejected a challenge brought by American Tradition Partnership to Montana's political committee disclosure requirements.[65]

Like the voting rights cases of five decades ago, the campaign finance cases that define this new revolution sound in First and Fourteenth Amendment guarantees. Like the *Baker* era, the *Citizens United* era also fundamentally redefines what the republican form of government means in Montana, with both predictable and unpredictable consequences for the State's political system. As one could have predicted a power shift from east to west, and from rural to urban areas within Montana following the reapportionment cases, one can now predict an even broader power shift from inside to outside Montana, and from state and local candidates' campaigns to national political consultants and corporate and union executives. Both the reapportionment and the campaign finance cases dismantled long-settled republican structures, but unlike the earlier cases the current cases also risk empowering factions, facilitating an invasion of out-of-state influences,

57. *Sanders Co. Republican Central Comm. v. Bullock*, 698 F.3d 741, 748–749 (9th Cir. 2012) (concluding, on appeal at preliminary injunction stage, that Mont. Code. Ann. § 13–35–231 "is unconstitutional on its face" as a violation of free speech).

58. *Zastrow v. Bullock*, No. CV-12-18-BLG-RFC, 2012 WL 3066362 (D. Mont. July 27, 2012) (reciting Secretary of State's stipulation that Mont. Code Ann. § 13–35–218(2) is unconstitutional).

59. *Lair v. Murry*, 871 F. Supp. 2d 1058, 1122–1123 (D. Mont. May 16, 2012) (enjoining Mont. Code Ann. § 13–35–225(a) as unconstitutionally vague).

60. *Id.* at 1123–1124 (enjoining Mont. Code Ann. § 13–37–131 as unconstitutionally vague).

61. *Id.* at 1131 (enjoining Mont. Code Ann. §§ 13–35–227(1) & (2) as applied to independent expenditure committees).

62. *Id.* at 1130 (rejecting challenge to Mont. Code Ann. § 13–35–227 as applied to corporate contributions).

63. *See Lair v. Bullock*, 697 F.3d 1200, 1202 (9th Cir. 2012) (staying district court's injunction of contribution limits issued less than five weeks before the general election, holding the state is likely to succeed on pending appeal).

64. *See Natl. Assn. for Gun Rights v. Murry*, No. CV 12-95-H-DLC (D. Mont. Oct. 29, 2012).

65. *See W. Tradition Partn. v. Gallik*, No. BDV-2010-1120, 2011 Mont. Dist. LEXIS 83 (Mont. 1st Dist. Dec. 14, 2011) (denying plaintiffs summary judgment on constitutional challenge to disclosure requirements); *W. Tradition Partn. v. Murray*, No. BDV-2010-1120 (Mont. 1st Dist. Dec. 10, 2012) (granting defendants' motion for sanctions, including dismissal of plaintiffs' claims) (formerly *W. Tradition Partn. v. Gallik*).

centralizing local political campaigns in far-off power corridors like Washington D.C., and bypassing rather than expanding democratic deliberation about republican principles.[66] Not only has the Guarantee Clause principle of distinct state forms of government disappeared from the federal constitutional regulation of state politics, but that regulation's convergence toward a one-size-fits-all national political regime threatens the continuation of meaningfully distinct republican forms of government in the states.

A. American Tradition Partnership, Inc. v. Bullock

Exhibit A in the nationalization of the republican form of government in the states is *American Tradition Partnership, Inc. v. Bullock*. In 1912, three-quarters of Montanans enacted by initiative the Corrupt Practices Act, a law that prohibited certain business corporations from "pay[ing] or contribut[ing] in order to aid, promote or prevent the nomination or election of any person."[67] Montanans passed the law in reaction to a well-documented history of the "naked corporate manipulation of the very government."[68] The law reinforced developing corporate doctrine in Montana, which held that expenditures made "for strictly political purposes" were *ultra vires* when "[t]he stockholders of the company . . . were not unanimous in their political beliefs."[69] Over the years the legislature refined the corporate expenditure prohibition to provide for expenditures of accountable contributions voluntarily solicited within the corporation and maintained in a separate, segregated fund.[70] Meanwhile, the state Commissioner of Political Practices minimized the administrative burden of establishing and maintaining such a fund with a simple two-page registration form, identical to the paperwork now required for disclosure of corporate campaign expenditures.[71]

When three plaintiffs—an association that remained active in politics and complied with the law for over a decade,[72] a sole proprietorship that mistakenly sought tax benefits through channeling its proprietor's political

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66. *See* Part I.C, *infra*.

67. 1913 Mont. Laws 604; Montana Secretary of State, *Statutory Initiative and Referendum Issues Since Adoption of Constitutional Amendment, Article V, Section I, Permitting the Referendum and Initiative*, http://sos.mt.gov/Elections/archives/2010s/2010/initandref2010tbl.pdf (accessed Dec. 23, 2012).

68. *W. Tradition Partn., Inc. v. Atty. Gen. of Mont.*, 271 P.3d 1, 9 (Mont. 2011), *cert. granted, judgment rev'd sub nom. Am. Tradition Partn., Inc. v. Bullock*, 132 S. Ct. 2490 (2012); *see also* Wiltse, *supra* n. 41.

69. *McConnell v. Combination Mining & Milling*, 76 P. 194, 198 (Mont. 1904), *modified on other grounds*, 79 P. 248 (Mont. 1905).

70. *See* Mont. Code Ann. § 13–35–227(3) (2011); *cf.* 1979 Mont. Laws 1011, ch. 404.

71. *See* Admin. R. Mont. 44.10.327, 44.10.405 (statement of organization), 44.10.531(4) (independent expenditure reporting) (2012); *cf.* Form C-2, available at http://politicalpractices.mt.gov/content/pdf/5cfp/fillC-2COMPLETE2012-6rev (accessed Dec. 23, 2012).

72. *W. Tradition Partn., Inc.*, 271 P.3d at 6–7 (describing Montana Shooting Sports Foundation).

spending,[73] and a now-dormant lead plaintiff incorporated out-of-state "to solicit and anonymously spend the funds of other corporations, individuals and entities to influence the outcome of Montana elections"[74]—challenged the law under *Citizens United*, the State Supreme Court took account of Montana's distinct form of republicanism to uphold the law. The Court noted how "[i]ssues of corporate influence, sparse population, dependence upon agriculture and extractive resource development, location as a transportation corridor, and low campaign costs make Montana especially vulnerable to continued efforts of corporate control to the detriment of democracy and the republican form of government."[75] On petition for certiorari, 22 states defended the states as distinct spheres of republicanism, noting "the special problems attendant on protecting the democratic character of state and local elections and institutions."[76]

The U.S. Supreme Court addressed none of these issues in summarily reversing the Montana Supreme Court without review of the record in a divided opinion. "There can be no serious doubt," the Court held, that "the holding of *Citizens United* applies to the Montana state law."[77] The decision appears to be the first time in decades that a divided Court summarily reversed a state court to invalidate a state law on constitutional grounds.[78] It is part of a trend of increasingly common summary dispositions that Alex Hemmer criticizes as "a form of judicial carelessness in which summary disposition is used not simply to manage and oversee lower courts' dockets, but—contrary to tradition and reason—to make new law."[79] While the *Citizens United* majority thought the law to be settled by its examination of federal campaign finance law, four justices dissented. They claimed "Montana's experience, like considerable experience elsewhere since the Court's

73. *Id.* (describing Champion Painting).

74. *Id.* at 7 (describing Western Tradition Partnership, Inc.).

75. *Id.* at 11.

76. Br. for the States of New York et al. as Amici Curiae in Support of Respt., *Am. Tradition Partnership, Inc. v. Bullock*, 2012 WL 1853624 at **1–2 (No. 11-1179, 132 S. Ct. 2490 (2012)).

77. *Am. Tradition Partn., Inc.*, 132 S. Ct. at 2491; *see also* Br. for the States of New York et al., *supra* n. 76.

78. *See Ashland Oil, Inc. v. Caryl*, 497 U.S. 916 (1990) (per curiam) (holding state tax law unconstitutional under retroactive effect of prior decision); *El Vocero de P.R. v. P.R.*, 508 U.S. 147 (1993) (per curiam) (holding state rule of criminal procedure unconstitutional under First Amendment); *cf. Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012) (per curiam) (holding state statute preempted by Federal Arbitration Act). One commentator found the last time such a narrowly divided Court summarily reversed a state court with so little reasoning was in 1966. Steve Vladeck, Prawfsblawg, *The Math of 5-4 Summary Reversals (or, What I Don't Get About Bullock)*, Comment by Samuel Feldman, http://prawfsblawg.blogs.com/prawfsblawg/2012/06/the-math-of-5-4-summary-reversals.html (June 27, 2012, 3:27 p.m.) (citing *Riggan v. Va.*, 384 U.S. 152 (1966)).

79. Alex Hemmer, *Courts as Managers:* American Tradition Partnership v. Bullock *and Summary Disposition at the Roberts Court*, 122 Yale L.J. Online 209, 210 (2013), http://yalelawjournal.org/2013/1/23/hemmer.html.

decision in *Citizens United*, casts grave doubt on the Court's supposition," crucial to its prior holding, "that independent expenditures do not corrupt or appear to do so."[80] Yet the majority avoided any examination of the record in Montana or elsewhere and missed an opportunity "to check their understanding of the law against the best arguments of the bar and the bench," as Hemmer argues, "that the law is less settled than a majority believes."[81] Absent that examination, *Citizens United* is settled law as to the states for little more reason than because the Court said so.

The Supreme Court's refusal to consider *American Tradition Partnership* was, regardless of result, a missed opportunity to clarify the basis for the Court's turn in *Citizens United*. To paraphrase the dissent in *Citizens United*, the real issue in *American Tradition Partnership* concerned "how, not if"[82] *Citizens United* applies to state law. It was, after all, the Federal Election Commission, not the Montana Commissioner of Political Practices, that "adopted 568 pages of regulations, 1,278 pages of explanations and justifications for those regulations, and 1,771 advisory opinions since 1975."[83] It was federal law, not a Montana initiative, that "force[d] speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day."[84] It was the federal Supreme Court, and then only a bare majority of it, whose understanding of the republican form of government prevailed over that of a supermajority of Montanans. Even if the law violated citizens' political rights, or otherwise reflected an obsolete or incomplete conception of republicanism, neither the Court nor the plaintiffs could explain why Montanans themselves—surely with the active engagement of well-funded outside interests like American Tradition Partnership's financiers—could not remedy the law's defects through ordinary state politics.

B. Lair v. Murry

A volley of challenges that followed *American Tradition Partnership* illustrates how that case's sweeping style has influenced lower courts at least as much as its minimal substance. The most significant of these cases is *Lair v. Murry*, a wide-ranging challenge to five different state campaign-finance statutes brought by American Tradition Partnership, registered and party political committees, businesses, campaign donors, and candidates.[85]

80. *See Am. Tradition Partn., Inc.*, 132 S. Ct. at 2491–2492 (Breyer, J., dissenting).
81. Hemmer, *supra* n. 79, at 224.
82. *See Citizens United*, 130 S. Ct. at 929 (Stevens, J., dissenting).
83. *Id.* at 895 (majority).
84. *Id.* at 889.
85. *Lair v. Murry*, ___ F. Supp. 2d ___, 2012 WL 4815411 (D. Mont. Oct. 10, 2012).

The challenged laws include a requirement that campaign materials report the context of any candidate's voting record,[86] a statutory cause of action for political civil libel,[87] a prohibition on corporate contributions to independent expenditure political committees,[88] the 1912 Corrupt Practices Act's prohibition on corporate contributions to candidates,[89] and limits on contributions to individuals and political parties.[90] The constitutional merits of many of the underlying claims are close, at least under the current constitutional regime, and reasonable judges may differ as those claims work their way through appeal. The manner in which the case was brought and resolved, however, exemplifies how the broad nationalizing approach of *American Tradition Partnership* can disrupt a state's realization of its own republican form of government.

The laws at issue in *Lair*, like many of the laws at issue in the post-*Citizens United* challenges to state laws, sat on the books for decades without challenge. What seems to have prompted most of these claims is not a direct relationship to specific claims vindicated in *American Tradition Partnership* but rather the Court's deregulatory approach to campaign-finance law in general. The plaintiffs brought a pre-enforcement facial challenge to a wide array of laws that provided neither a record of the laws' actual effects in operation nor any opportunity for state executive or judicial officials to construe the laws in ways consistent with both constitutional doctrine and Montana's republican principles. In considering vagueness challenges, the Court declined to reach such narrowing constructions, and instead it rejected the State's suggested readings even when it might have saved some or all of the statutes at issue.[91]

Beyond this, despite the plaintiffs' argument that part of at least one of the statutes at issue could be severed, the Court applied a strict nonseverability standard derived from unrelated federal case law that appears to conflict with the more forgiving state standard that would reasonably apply to an inquiry into the Montana legislature's intent.[92] Under Montana law,

86. *Lair v. Murry*, 871 F. Supp. 2d at 1062 (May 16, 2012) (enjoining Mont. Code Ann. § 13–35–225(3)(a) as unconstitutionally vague).

87. *Id.* at 1065 (enjoining Mont. Code Ann. § 13–37–131 as unconstitutionally vague).

88. *Id.* at 1068 (enjoining Mont. Code Ann. §§ 13–35–227(1), (2) as applied to independent expenditure committees).

89. *Id.* at 1070 (rejecting challenge to Mont. Code Ann. § 13–35–227 as applied to corporate contributions).

90. *See Lair v. Bullock*, 697 F.3d at 1203 (staying district court's injunction of contribution limits issued less than five weeks before the general election, holding the state is likely to succeed on pending appeal).

91. *Lair v. Murry*, 871 F. Supp. 2d at 1063–1065 (May 16, 2012) (enjoining Mont. Code Ann. §§ 13–35–225(3)(a) & 13–37–131 as unconstitutionally vague).

92. *See Lair v. Murry*, ___ F. Supp. 2d ___, 2012 WL 4815411 (Oct. 10, 2012) (citing *Randall v. Sorrell*, 538 U.S. 230, 262 (2006)); *see also Lair v. Murry*, 871 F. Supp. 2d at 1065 (May 16, 2012)

"[i]f, when an unconstitutional portion of an act is eliminated, the remainder is complete in itself and capable of being executed in accordance with the apparent legislative intent, it must be sustained."[93] In the absence of a severability clause, Montana law requires a court to "determine whether the unconstitutional provisions are necessary for the integrity of the law or were an inducement for its enactment."[94] For example, the court struck down an uncontroversial requirement that election materials simply cite the particular votes they discuss along with an arguably vaguer requirement to disclose "contrasting votes . . . if closely related in time."[95] Instead of looking to Montana law of severability to resolve a question about the Montana legislature's intent in enacting the Montana law, the *Lair* court repeatedly relied on the Supreme Court's severability standard in *Randall v. Sorrell*,[96] a case involving the severability of *Vermont's* campaign contribution limits under Vermont severability law. In effect the *Lair* court answered a question about the Montana legislature's intent behind the Montana law with what three U.S. Supreme Court justices thought was the Vermont legislature's intent in enacting a different Vermont law.[97]

The court's most sweeping and disruptive ruling invalidated all statewide campaign-contribution limits, originally enacted by initiative. It did so in a case whose only plaintiff candidate did not finish two out of three legislative races for which he had filed, on a record concerning exclusively legislative and other districted offices, without analysis of Montana's severability standard[98] in the middle of ongoing statewide political campaigns, just one month before the general election.[99] The court also rejected the Ninth Circuit's constitutional validation of the same law nine years before,[100] instead holding that the narrow plurality opinion of *Randall*

(citing *Randall*, 538 U.S. at 262); *Bd. of Nat. Resources of Wash. v. Brown*, 992 F.2d 937, 948 (9th Cir. 1993).

93. *Mont. Auto. Assn. v. Greely*, 632 P.2d 300, 311 (Mont. 1981).

94. *Finke v. State ex rel. McGrath*, 65 P.3d 576, 581 (Mont. 2003).

95. *Lair v. Murry*, 871 F. Supp. 2d at 1062–1064 (May 16, 2012) (citing Mont. Code Ann. § 13–35–225(3)(a)) The vote reporting act did not contain a severability clause. *See* 2003 Mont. Laws 1568–1569, ch. 419. The State had conceded the provision's nonseverability.

96. *Randall*, 538 U.S. 230.

97. *See Lair v. Murry*, ___ F. Supp. 2d ___, 2012 WL 4815411 (Oct. 10, 2012) (citing *Randall*, 538 U.S. at 262 (citing Vt. Stat. Ann., Tit. 1, § 215 (2003))).

98. The contribution limit act, originally enacted by initiative, did contain a severability clause. *See* Const. Initiative No. 118, § 4, 1995 Mont. Laws 3717.

99. *See Lair v. Murry*, ___ F. Supp. 2d ___, 2012 WL 4815411 (Oct. 10, 2012).

100. *See Mont. Right to Life Assn. v. Eddleman*, 343 F.3d 1085, 1098 (9th Cir. 2003), *cert. denied*, 543 U.S. 812 (2004) ("The voters of Montana are entitled to considerable deference when it comes to campaign finance reform initiatives designed to preserve the integrity of their electoral process. . . . We hold that Montana's interest in purging corruption and the appearance of corruption from its electoral system is sufficiently important to withstand constitutional scrutiny, and that M.C.A. §§ 13-37-216 and -218 are closely tailored to achieving those ends. We therefore affirm the district court and hold that these statutes are constitutional and do not violate the First Amendment.").

"paints a new gloss on the law."[101] Although the court did not cite *Citizens United* or *American Tradition Partnership*, those cases painted an even newer gloss on the court's approach to the case: broad nationalizing strokes obscuring the State's underlying political process and substance. As the court explained, its decision was not about what is "good policy and good for Montana voters," but "about following the law that the U.S. Supreme Court set out."[102] Indeed, that a court's approach to the republican form of government in Montana should be so disengaged from what Montana voters themselves decided is good for them shows just how deeply the courts' constitutional doctrine has obscured the Constitution's underlying republican principles.

C. State Court Responses

The response to *Lair* shows one way to reclaim those obscured republican principles by putting state republicanism into practice in Montana's own voice through its elected judiciary. Less than a week after the federal district court issued its opinion and order, the Ninth Circuit stayed the order pending appeal and concluded "the state is *likely* to succeed in its appeal."[103] The appellate court's recognition that states possess distinct political systems, reflected in its concern about the irreversible "disruption in equilibrium" that federal intervention in the election may cause,[104] stands in contrast to the district court's disregard of state political culture and process. "The people comprising the State of Montana have a deep interest in fair elections," the appeals court held,[105] and thus promoted the State's deeply rooted practice of the republican form of government over a small faction's late and abstract claims of liberty.

Between the district court's order and the Ninth Circuit's stay, a national political action committee used a state political party as a conduit for a $500,000 contribution to a gubernatorial candidate,[106] more than twenty times the party contribution limit and nearly half of the candidate's total fundraising to that date.[107] The opposing candidate brought a campaign practices complaint and, in the interim, sued alleging that the reinstated contribution limits required the return of the excess contribution. The defense tried and failed to make a federal case of it, first by removal to federal

101. *See Lair v. Murry*, ___ F. Supp. 2d ___, 2012 WL 4815411 (Oct. 10, 2012).

102. *Id.*

103. *Lair v. Bullock*, 697 F.3d at 1202 (emphasis added).

104. *Id.* at 1215.

105. *Id.*

106. State Bureau, *Republican Governors Association source of Hill's $500k donation*, Missoulian (Oct. 25, 2012).

107. *Bullock v. Hill*, No. CDV-2012-904 (Mont. 1st Dist. Oct. 31, 2012).

court,[108] then by intervention and contempt motions before the district court in *Lair*,[109] and finally by intervention in the Ninth Circuit.[110] All of the federal courts left the case with the state court.

The state court found after a hearing that "such a [large] contribution would likely affect the outcome of the election."[111] Under some views of the First Amendment, that finding would be fatal to a claim to enforce a contribution limit, since it does not sound in any theory of corruption or other sufficient interest recognized by the Supreme Court. To the contrary, it suggests that the law disrupts some baseline level of liberty by depriving voters of the maximum possible amount of campaign speech. Indeed, the court understood that most of the contribution at issue had already been spent for pending television ads and found that such ads were "the most effective . . . medium for political advertising."[112] But knowing this, the state court enjoined what it called "[t]he sudden and extraordinary influx of campaign cash" that "throw[s] a previously stable system into chaos."[113] This conclusion suggests a conception of citizens as having an interest in implementing their own republican form of government, and seeing it enforced faithfully, that is paramount to their interest as voters in receiving the maximum amount of core political speech. It recognizes, as Daniel Tokaji has put it, "that election laws protect collective as well as individual interests."[114]

The post-*Lair* litigation is a small window, opened by the prudent hesitation of federal courts to intervene in a state law matter, into how states might guarantee for themselves their republican forms of government with due consideration of constitutional implications. It is not the only window. Another state court rejected American Tradition Partnership's facial challenge to political committee disclosure requirements[115] and further ordered the release of the group's bank records reflecting its donors on state constitutional grounds, holding that "[t]here is certainly a substantial relation be-

108. *Bullock v. Hill*, No. CV 12-97-H-DLC, 2012 WL 5287154 (D. Mont. Oct. 24, 2012) ("Interpretation of the statute is a matter of state law and the state court is better suited to engage in that exercise.").

109. *Lair v. Murry*, No. 12-12-H-CCL (D. Mont. Oct. 26, 2012) ("Mr. Hill and his campaign moved to intervene in this case. . . . Mr. Hill and his campaign still may have a remedy in state court. . . . Surely, the Montana Courts will protect the rights of the parties.").

110. *Lair v. Bullock*, No. 12-35809 (9th Cir. Oct. 30, 2012) ("The fact that movants are faced with a state court order enforcing the Montana law is not a 'compelling showing'" supporting intervention.).

111. *Bullock v. Hill*, No. CDV-2012-904 (Mont. 1st Dist. Oct. 31, 2012) (finding 30).

112. *Id.* (finding 21).

113. *Id.* (conclusion 34) (citing *Lair v. Bullock*, 697 F.3d 1200).

114. Daniel P. Tokaji, *Public Rights and Private Rights of Action: The Enforcement of Federal Election Laws*, 44 Ind. L. Rev. 113, 156 (2010).

115. *W. Tradition Partn. v. Gallik*, No. BDV-2010-1120, 2011 Mont. Dist. LEXIS 83 (Dec. 14, 2011).

tween disclosure of this financial information and Montana's stated constitutional interest in its citizens' right to know."[116] The court eventually dismissed the constitutional challenge and entered findings supporting a civil penalty against the group, holding that "the 'officers' and 'members' of [Western Tradition Partnership—the group's prior name] used the corporate form as subterfuge to avoid compliance with State disclosure and disclaimer laws during the Montana election cycle."[117] Unfortunately, given the lack of enforcement resources to pursue that information during the relevant election cycles,[118] those disclosures came as many as four years too late to inform voters and became public through the work of investigative journalists rather than the State itself.[119]

The Montana Commissioner of Political Practices has taken that same case as an opportunity to adapt the enforcement of state disclosure laws to evolving campaign practices. Where lack of an enforcement history proved a disadvantage in defending some campaign regulations that had not been narrowed through interpretation, the opposite is true for state disclosure laws. In Montana and elsewhere, the challengers to disclosure laws rely on the Supreme Court's idiomatic narrowing of disclosure triggers in *Buckley v. Valeo*[120] and subsequent cases to impose a federal reading of "major purpose" or "express advocacy" standards on state laws that have their own distinct histories and purposes.[121] Such a reading would force the dysfunctional federal disclosure regime on states that deliberately took different and more workable approaches to campaign finance transparency.

States successfully defended these challenges by emphasizing their laws' independence from the Supreme Court's accreted interpretations of federal campaign finance law. For example, Maine established in the First Circuit that, for purposes of a state disclosure law, "this so-called 'major purpose' test, like the other narrowing constructions adopted in *Buckley*, is [no]thing more than an artifact of the Court's construction of a federal stat-

116. *W. Tradition Partn. v. Murray*, No. BDV-2010-1120 (Mont. 1st Dist. Nov. 1, 2012) (Order on Motion for Protective Order); *see also* Mont. Const. art. II, § 9 ("No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.").

117. *W. Tradition Partn. v. Murray*, No. BDV-2010-1120 (Mont. 1st Dist. Jan. 4, 2013) (Order).

118. *See generally* Part II.B.2, *infra.*

119. *See* Kim Barker & Emma Schwartz, *Check 'Em Out: Donations to Dark Money Group Revealed*, Propublica & Frontline (Nov. 8, 2012), http://www.pbs.org/wgbh/pages/frontline/government-elections-politics/big-sky-big-money/check-em-out-donations-to-dark-money-group-revealed/ (accessed Feb. 5, 2013).

120. *Buckley v. Valeo*, 424 U.S. 1, 79–80 (1976).

121. *W. Tradition Partn. v. Gallik*, No. BDV-2010-1120, 2011 Mont. Dist. LEXIS 83 at **13–20 (Dec. 14, 2011).

ute."[122] Washington clarified in the Ninth Circuit that, for similar purposes, "the distinction between express and issue advocacy that was established by the narrowly construed [federal] statutory definitions" does "not translate into the disclosure context."[123]

Combined with its practical application of state disclosure law suggested by these cases, the Montana court's finding of corporate "subterfuge" sets the stage for more effective enforcement against 501(c)(4) organizations like American Tradition Partnership than federal agencies like the Internal Revenue Service and Federal Election Commission have been able to accomplish. In the *Citizens United* era it is the states, not the federal government, that are leading the way in developing and enforcing rules that better account for campaign finance as it is practiced today.

II. The State's Response: Reforming Montana Republicanism

Federal and state litigation over Montana's old campaign finance regime will burn out in time. Many of the laws that fueled litigation have been declared invalid, or upheld and clarified. In the near term, at least, the Supreme Court is unlikely to spark a new round of constitutional challenges such as those that followed *Citizens United*.[124] The last major constitutional challenge outstanding after *American Tradition Partnership* is the challenge to Montana's contribution limit levels. According to the Ninth Circuit in its grant of a stay pending appeal, this challenge is likely to be rejected upon merits review by that court.[125] Even if the case were to reach the Supreme Court, it could be mooted in the meantime with modest increases in the limit levels.[126] The next stage in the development of Montana's campaign finance regime moves out of the courts and into the initiative and legislative processes. There, *American Tradition Partnership* and related cases have drawn a principled popular defense of Montana's tradi-

122. *Natl. Org. for Marriage v. McKee*, 649 F.3d 34, 59 (1st Cir. 2011), *cert. denied*, 132 S. Ct. 1635 (2012); *see also Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1009–1010 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 1477 (2011) (*Buckley* "does not indicate that an entity must have that major purpose to be deemed constitutionally a political committee."); *see generally Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 486 (7th Cir. 2012), *petition for reh'g en banc denied*, (7th Cir. Nov. 6, 2012).

123. *Brumsickle*, 624 F.3d at 1016.

124. *See U.S. v. Danielczyk*, 683 F.3d 611 (4th Cir. 2012) (concerning whether the ban on campaign contributions by corporations in the Federal Election Campaign Act violates the First Amendment), *cert. denied*, No. 12-579, 2013 WL 656067 (Feb. 25, 2013); *but see McCutcheon v. Fed. Election Commn.*, No. 12cv1034, 2012 WL 4466482 (D.C. Cir. Sept. 28, 2012), *prob. juris. noted* (No. 12-536, Feb. 19, 2013) (concerning whether the federal biennial limit on contributions to non-candidate committees is unconstitutional).

125. *See Lair v. Bullock*, 697 F.3d at 1202 (holding the state is likely to succeed on pending appeal).

126. *See* Part II.B.3, *infra.*

tional republican values through the initiative process, along with an opportunity for more practical policy responses in the legislature.

A. *The Principled Response: I-166*

Montana's response to *American Tradition Partnership* and subsequent challenges began with the popular approval of ballot issue I-166, the "Prohibition on Corporate Contributions and Expenditures in Montana Elections Act,"[127] by the same overwhelming 3-to-1 margin that enacted the Corrupt Practices Act a century before.[128] The initiative rebukes *Citizens United* and *Montana Chamber of Commerce v. Argenbright*,[129] an earlier case that invalidated Montana's popularly initiated ban on corporate expenditures in ballot issue campaigns, for "equat[ing] the political speech rights of corporations with those of human beings."[130] Relying on the natural experiment that existed between *Montana Chamber of Commerce* and *American Tradition Partnership*, when corporate ballot issue campaign expenditures were unlimited and corporate candidate campaign expenditures were prohibited, the initiative finds that "corporate independent spending on Montana ballot issues has far exceeded spending from other sources"[131] and suggests "unlimited corporate money into candidate elections would irrevocably change the dynamic of local Montana political office races."[132] Given this, the initiative's primary concern is "with the infusion of unlimited corporate money in support of or opposition to a targeted candidate, the average citizen candidate in Montana would be unable to compete against the corporate-sponsored candidate, and Montana citizens, who for over 100 years have made their modest election contributions meaningfully count, would be effectively shut out of the process."[133]

To address this problem, I-166 establishes as "policy of the state of Montana that each elected and appointed official in Montana, whether act-

127. Mont. Code Ann. §§ 13–35–501 et seq.

128. *Compare* Montana Secretary of State, *Statutory Initiative and Referendum Issues Since Adoption of Constitutional Amendment, Article V, Section I, Permitting the Referendum and Initiative*, http://sos.mt.gov/Elections/archives/2010s/2010/initandref2010tbl.pdf (accessed Dec. 23, 2012) (44,337 (76%) For, 13,645 (24%) Against) *with* Montana Secretary of State, *2012 Statewide General Election Canvass*, http://sos.mt.gov/Elections/2012/2012_General_Canvass.pdf (accessed Feb. 3, 2013) (343,549 (75%) For, 116,554 (25%) Against).

129. *Mont. Chamber of Commerce v. Argenbright*, 226 F.3d 1049 (9th Cir. 2000) (invalidating Initiative No. 125 (1996)); *see also First Natl. Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (holding unconstitutional restrictions on corporate expenditures in a ballot issue campaign).

130. Mont. Code Ann. § 13–35–502(2).

131. Mont. Code Ann. § 13–35–502(4)(b); *see also W. Tradition Partn., Inc.*, 271 P.3d at 10 ("Evidence presented in the District Court showed that in recent years in Montana, corporate independent spending on ballot issues has far exceeded spending from other sources.").

132. Mont. Code Ann. § 13–35–502(4)(d).

133. Mont. Code Ann. § 13–35–502(4)(e).

ing on a state or federal level, advance the philosophy that corporations are not human beings with constitutional rights."[134] It charges Montana's elected and appointed officials with prohibiting, "whenever possible," corporate contributions and expenditures in ballot issue and candidate campaigns.[135] According to the law, "the people of Montana regard the immense aggregation of wealth that is accumulated by corporations using advantages provided by the government to be corrosive and distorting when used to advance the political interests of corporations."[136] Beyond this, Montana officials must "promote actions that accomplish a level playing field in election spending."[137] That "level playing field," which "allows all individuals, regardless of wealth, to express their views to one another and their government," is to be accomplished by "limits on overall campaign expenditures and limits on large contributions to or expenditures for the benefit of any campaign by any source, including corporations, individuals, or political committees."[138] Where the U.S. Supreme Court's decisions stand in the way, I-166 requires Montana's congressional delegation to propose and "work diligently to bring . . . to a vote and passage" a resolution proposing a constitutional amendment to overturn *Citizens United* and allow Montanans to achieve "a level playing field in election spending," and then it requires the Montana legislature to ratify that amendment if and when it passes Congress.[139]

As a policy matter, I-166 faces monumental hurdles on the way to achieve any practical legal effect. Its central policy already is reflected in Montana law,[140] but *Citizens United* and *American Tradition Partnership* preclude that law from restricting independent corporate campaign expenditures. Clearing a path for the policy through the constitutional amendment process must account for the fact that even at the time of *Citizens United* approximately half the states adopted the contrary policy of allowing unlimited corporate campaign expenditures.[141] Fourteen of those 26 states would need to join the remaining 24 states to meet the 38-state "three fourths" ratification requirement of Article V.[142] And before ratification, two-thirds of each house of Congress must propose the amendment, a level of consensus that has not existed around campaign finance reform for decades, even

134. Mont. Code Ann. § 13–35–503(1).

135. *Id.*

136. Mont. Code Ann. § 13–35–503(2)(c).

137. Mont. Code Ann. § 13–35–503(1).

138. Mont. Code Ann. §§ 13–35–503(2)(d) to (e).

139. Mont. Code Ann. § 13–35–504 ("Promotion of policy by elected or appointed officials.").

140. *See e.g.* Mont. Code Ann. § 13–35–227(1) ("A corporation may not make a contribution or an expenditure in connection with a candidate or a political committee that supports or opposes a candidate or a political party.").

141. *Citizens United*, 130 S. Ct. at 908.

142. U.S. Const. art. V.

when Congress enacted the corporate electioneering prohibition of the Bipartisan Campaign Reform Act of 2002 at issue in *Citizens United*.[143] These obstacles suggest why Lawrence Lessig has urged the alternative but still unlikely approach of bypassing Congress with a 34-state call for a constitutional convention for proposing amendments,[144] an avenue not suggested by I-166.

Beyond these procedural hurdles, substantive questions complicate the policies proposed by I-166. Contrary to the initiative's premise that "corporate personhood" is the primary evil to be remedied, the Court in *Citizens United* did not rely on any equivalence between corporations and human beings. In fact the Court acknowledged that corporations and other associations "are not 'natural persons.'"[145] Nor does the "corporate personhood" critique in its most basic form consider how individuals exercise their constitutional rights or political participation through a variety of organizational forms, or resolve longstanding practical questions as to how and why to draw the line at what kind of corporations.[146] Indeed, current campaign finance law depends on corporate personhood as the object of political committee registration and disclosure requirements.[147] Does I-166 concern media corporations, nonprofit advocacy corporations or corporations with only a few shareholders and intend to exempt unincorporated business associations like partnerships? It does not say. The original Corrupt Practices Act of 1912 was more discerning in its concern for corporations and interests "carrying on the business" of industries such as banking, insurance, railroad, public utilities, "or any company having the right to take or condemn land."[148] Yet, as the Montana Supreme Court conceded, that more targeted law did not hinder "corporate domination" by the Anaconda Company's "controlling ownership of all but one of Montana's major newspapers until 1959."[149] There may be a larger debate to be had here about the role of monopolies and mass media in politics,[150] but I-166 does not engage it.

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143. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002) (H.R. 2356, 107th Cong.; House Roll Call Vote No. 34, passed 240-to-189 in the House; Senate Record Vote No. 54, passed 60-to-40 in the Senate).

144. Lessig, *supra* n. 24, at 50.

145. *Citizens United*, 130 S. Ct. at 900.

146. *Id.* at 926 (Scalia, J., concurring).

147. *See* Mont. Code Ann. § 13–1–101(22) ("'Political committee' means a combination of two or more individuals or a person other than an individual who makes a contribution or expenditure."); Mont. Code Ann. § 13–1–101(20) ("'Person' means an individual, *corporation*, association, firm, partnership, cooperative, committee, club, union, or other organization or group of individuals or a candidate.") (emphasis added).

148. Initiative Act, § 25, 1913 Mont. Laws 604.

149. *W. Tradition Partn., Inc.*, 271 P.3d at 9.

150. *See e.g. Citizens United*, 130 S. Ct. at 926 (Scalia, J., concurring) ("Most of the Founders' resentment towards corporations was directed at the state-granted monopoly privileges that individually chartered corporations enjoyed.").

Nor does I-166 elaborate its underlying theory of corruption. Lawrence Lessig, not a proponent of corporate money in politics, reframes the underlying issue beyond "[w]hether or not corporations are people."[151] Instead, he recognizes Citizen United's film "is political speech, and in our tradition, political speech is restricted if and only if there is corruption."[152] I-166 also addresses "well-financed corruption involving corporate money," but it is unclear about what kind of corruption it should be understood to mean. By its own terms, *Citizens United* requires campaign finance laws to be narrowly tailored only to quid pro quo corruption, "dollars for political favors."[153] But *Citizens United* and *American Tradition Partnership* involved the right to make independent expenditures, often candidate attack ads, that do not meet this simple definition. Professor Lessig proposes a broader definition of corruption as candidates' dependence on their campaign funders rather than the people, what he calls "dependence corruption."[154] Perhaps this is closer to what I-166 means by corruption. It argues that campaign spending is "corrosive and distorting when used to advance the political interests of corporations,"[155] although this conception singles out corporate special interests to the exclusion of other potentially corrupting special interests and reprises the problems with what I-166 means by "corporations."

In addition to raising the question of corporate personhood and participation in campaign spending, I-166 proposes a broader policy prescription: "limits on overall campaign expenditures and limits on large contributions to or expenditures for the benefit of any campaign by any source, including corporations, individuals, or political committees."[156] This enlarges the scope of the initiative beyond corporations by themselves and suggests that its basic concern is not solely corporate political corruption but political equality. Notably, it is consistent with the broader principles argued by supporters of the Corrupt Practices Act, who similarly argued "it would level the playing field by affording 'all candidates for nomination or election equal means of presenting before the voter their views upon public questions.'"[157] This idea, "a level playing field . . . that allows all individuals, regardless of wealth, to express their views to one another and their

151. Lessig, *supra* n. 24, at 44.

152. *Id.*

153. *See Citizens United*, 130 S. Ct. at 910, (quoting *Fed. Election Commn. v. Natl. Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985)).

154. Lessig, *supra* n. 24, at 45; *see also* Anthony Johnstone, *A Madisonian Case for Disclosure*, 19 Geo. Mason L. Rev. 413, 449–453 (2012) (equating corruption to factionalism).

155. Mont. Code Ann. § 13–35–503(2)(c).

156. Mont. Code Ann. § 13–35–503(2)(e).

157. Wiltse, *supra* n. 41, at 325 (quoting *Senator Bourne Praises People's Power League*, Western News 4 (Oct. 17, 1911)).

government,"[158] is a core constitutional principle that motivates the First Amendment's speech, press, petition, and assembly clauses. But long before *Citizens United*, the Supreme Court deemed it irrelevant to any proper justification of restrictions on campaign spending, corporate or otherwise.[159] That does not mean the end of political quality is unattainable, but again it does rule out the means I-166 proposes.

Given the current constitutional regime, unless and until a broader movement leads to an improbable constitutional amendment, I-166 provides little direct policy guidance for public officials. This is regrettable.[160] Political symbolism has its place in direct democracy, but it has not been the mode of the most successful political reform movements in Montana. To the contrary, landmark initiatives like the 1912 Corrupt Practices Act,[161] the 1980 Lobbyist Disclosure law,[162] and the 1994 revision of campaign contribution limits[163] contained detailed policy programs and realistic means to put them into effect. While it is possible the support for I-166 came easily because voters understood it to be merely symbolic, the past record of support for campaign finance reform initiatives and the strong public reaction against *Citizens United* and *American Tradition Partnership* suggests the 2012 election may have been a lost opportunity to strengthen Montana's campaign finance laws.

B. The Practical Response: Legislative Reform

If the principle of political equality that motivated Montanans to enact I-166 is to go into practice, it will have to be through different policies than the initiative itself suggests. Absent a constitutional amendment abrogating not just *Citizens United* and *American Tradition Partnership* but also *Buckley*, the policy of I-166 that "there should be a level playing field in campaign spending that allows all individuals, regardless of wealth, to express their views to one another and their government"[164] cannot be accom-

158. Mont. Code Ann. § 13–35–503.

159. *Citizens United*, 130 S. Ct. at 904 ("*Buckley* rejected the premise that the Government has an interest 'in equalizing the relative ability of individuals and groups to influence the outcome of elections.'" (quoting *Buckley*, 424 U.S. at 48)).

160. It also is arguably unconstitutional, ironically, according to a case won by the campaign finance reform group Common Cause. *See State ex rel. Harper v. Waltermire*, 691 P.2d 826, 828 (Mont. 1984) ("The initiative power within the Montana Constitution does not include the power to enact a legislative resolution, particularly a resolution making an Article V application for a federal constitutional convention."). *See also Montanans Opposed to I-166 v. Bullock*, 285 P.3d 435, 442 (Mont. 2012) (Nelson, J., dissenting) ("[C]haritably speaking," I-166 is an improper legislative resolution, "a feel-good expression of contempt directed against the federal government and federal constitutional law.").

161. Initiative Act, 1913 Mont. Laws 593.

162. Initiative No. 85, 1981 Mont. Laws 1643.

163. Const. Initiative No. 118, 1995 Mont. Laws 3715.

164. Mont. Code Ann. § 13–35–503(2)(d).

plished through "limits on overall campaign expenditures" or limits on corporate and individual campaign expenditures.[165] There are other policy possibilities, however, and the moment for reform has not gone unnoticed in the Montana legislature. So far, dozens of bills have been proposed concerning campaign finance and related subjects, more than twice as many as were proposed four years ago.[166] As this is written, it is too early in the legislative session to tell which proposals, if any, will become law.

There are other principles involved in campaign finance besides those of I-166, of course, and at some point Montana voters may stand up for them. But, taking the political equality principles of I-166 as a guide, Montana's recent experience suggests several practical reforms that could help realize a more "level playing field in campaign spending" within the constraints of the current constitutional regime. It is clear the law cannot achieve a level playing field through a policy of leveling down corporate and other large expenditures through prohibitions and limits. It can, however, hold those who make such large expenditures accountable and provide sufficient resources to ensure that those laws are enforced. It can also level up citizen participation in campaign finance to help citizen funding displace non-citizen corporate and other funding. In Professor Lessig's terms, the laws can encourage campaign finance to be more dependent on the people and less dependent on interest group money. In short, if the point of the I-166 "level playing field" is to improve the game of republicanism as it's played in Montana, it can be accomplished by making everyone play by the same rules (accountability), giving the referee some help (enforcement), and getting more players on the field (participation).

1. Accountability

Montana's campaign finance laws are relatively simple, stable, and (until recently) rarely adjudicated. Basic definitions of campaign actors and campaign actions are broad and straightforward. A "political committee" is any organization that supports or opposes a candidate or ballot issue through a "contribution" or "expenditure," which are payments "to influence an election," subject to exemptions for volunteers, general media, and membership communications.[167] Presumptively, political committees must register and periodically report all expenditures and all contributions over $35.[168] Standing alone, this definition covers any conceivable campaign

165. Mont. Code Ann. § 13–35–503(2)(e).

166. *See* Montana Legislature, *Legislative Bills Search*, http://leg.mt.gov/css/Bills/default.asp; *select* 2013 Regular Session, *Select a Subject* Elections (accessed Feb. 3, 2013); *see id.*; *select* 2009 Regular Session.

167. Mont. Code Ann. §§ 13–1–101(7), (11), (22).

168. *See* Mont. Code Ann. § 13–37–229.

funding source and subjects it to registration and disclosure. But it sweeps too broadly to be effective for compliance or enforcement purposes, and at the margins it raises constitutional issues. It is overinclusive of small political players, including low-dollar contributions by individuals and low-dollar expenditures by relatively small grassroots organizations.[169]

Administrative rules narrow the scope of covered campaign organizations and activities. An "incidental committee" is an organization not specifically maintained or organized for the "primary purpose" of influencing elections, as determined by a multifactor test.[170] Incidental committees need only disclose "earmarked contributions" made with the express or implied direction that it be spent on behalf of a specified candidate or issue.[171] The incidental committee designation respects rights of expressive association by allowing organizations to participate incidentally in campaigns without full disclosure of their members or contributors.[172] Generally, such full disclosure would be of little use to voters because most of those contributions, by definition, would not have been intended for campaign activity.

Yet these incidental committee rules are also underinclusive and risk leaving unregulated big political players who can overwhelm a campaign with anonymous money through sham "incidental committees" that claim a primary purpose like "social welfare."[173] The "earmark" and "primary purpose" triggers for political committee reporting are easily evaded by winks and nods, allowing large donors to use "incidental committees" as conduits for undisclosed contributions. For example, national campaign organizations may receive contributions by Montana donors intended for campaign expenditures in Montana but argue there was no "earmark" and that they are only "incidental committees" because most of their money funds campaigns in other states, thereby concealing the contribution. Furthermore, an "independent expenditure" made without the "cooperation" of a candidate is limited to "expressly advocating the success or defeat of a candidate or ballot issue."[174] Both definitions are manipulable to avoid contribution limits and

169. *See Canyon Ferry Baptist Church of E. Helena v. Unsworth*, 556 F.3d 1021, 1034 (9th Cir. 2009) (holding state campaign finance registration and disclosure requirements unconstitutional as applied to "de minimis in-kind expenditures"). The author served as counsel for the State in the case.

170. Admin. R. Mont. 44.10.327(c).

171. Admin. R. Mont. 44.10.519.

172. *See NAACP v. Ala. ex rel Patterson*, 357 U.S. 449, 460 (1958) ("Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association" and is protected against certain compelled disclosures under the freedoms of speech and assembly.).

173. *See* 26 U.S.C. § 501(c)(4).

174. Admin. R. Mont. 44.10.323(3). It is not clear that the rule by itself limits the broader statutory "expenditure" definition in general, but in an independent expenditure and election material attribution case the Commissioner has interpreted the trigger to apply only to "express advocacy." *See In re the Compl. Against W. Tradition Partn. & Coalition for Energy & the Env.*, http://politicalpractices.mt.gov/

disclosure. An "independent expenditure" might also be made with the knowledge and tacit encouragement of a candidate, or in cooperation with a third party like an advertising firm or family member, to evade contribution limits.[175] Sham "issue ads" can attack a candidate as being sympathetic to sex offenders or murderers and avoid disclosure by claiming the ad is "issue advocacy" rather than "express advocacy."

Clearer definitions, narrower than the laws but broader than the rules, could focus campaign finance regulation on the bigger political players while reducing the participation costs of smaller political players. Political committee status might exclude organizations making expenditures below a certain monetary threshold, relieving many small organizations from registration and disclosure for one-time expenditures. But political committee status might also include all organizations spending over the monetary threshold regardless of "primary purpose" to the extent their contributors do not opt out of campaign participation, extending registration and disclosure to organizations that now can serve as conduits for anonymous contributions. The definition of reportable campaign contributions and expenditures also could exclude low dollar amounts, focusing on larger contributions likely to inform voters of the significant interests behind a candidate and committee and on expenditures likely to significantly influence an election. Independent expenditures might include not only express advocacy but also electioneering communications, broadcast, or published communications that refer to a candidate within a certain pre-election period. Such a definition is available in the prohibition on anonymous election materials, which requires attribution of the funding for "[a]ll communications advocating the success or defeat of a candidate, political party, or ballot issue through any broadcasting station, newspaper, magazine, outdoor advertising facility, direct mailing, poster, handbill, bumper sticker, internet website, or other form of general political advertising."[176] That attribution rule itself could more effectively accomplish attribution of "the person who made or financed the expenditure for the communication" by clarifying its applicabil-

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content/2recentdecisions/GraybillvWTPandCoalitionforEnergyandEnvironmentDecision (Mont. Commr. of Political Pracs. Oct. 21, 2010) (Summary of Facts and Statement of Findings). There the Commissioner interpreted "express advocacy" according to the Supreme Court's definition of "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Fed. Election Commn. v. Wis. Right to Life, Inc.*, 551 U.S. 449, 469–470 (2007). While not requiring "magic words," the express advocacy standard may be more strict than necessary after *Citizens United* approved regulation of "electioneering communications" defined primarily by timing and media rather than content. *See Citizens United*, 130 S. Ct. 876.

175. *See* Admin. R. Mont. 44.10.323(3) (defining independent expenditure as "not made with the cooperation or prior consent of or in consultation with, or at the request or suggestion of, a candidate or political committee or an agent of a candidate or political committee," which may not rule out tacit coordination).

176. Mont. Code Ann. § 13–35–225(1).

ity to require attribution of each principal contributor, and not simply the anodyne name of a front group.[177] Harmonizing the expenditure and election materials definitions, now spread across two separate chapters of the Elections Code, might also reduce compliance and enforcement costs.

2. *Enforcement*

Even the best laws are dead letters without effective enforcement. The Commissioner of Political Practices is the primary enforcer of Montana campaign finance laws. The Commissioner is an independent[178] gubernatorial appointee[179] managing a crowded docket of complaints.[180] While the Commissioner can hire attorneys to bring cases and refer cases to the county attorney for fines equal to three times the amount involved in a violation,[181] only a handful of such cases have been reported. A district court also may provide injunctive relief to an injured party and recently did so in the aftermath of *Lair*.[182] The Commissioner can issue orders of noncompliance, backed by civil or criminal action.[183] Perhaps the Commissioner's most effective enforcement power is limited to candidates. The Commissioner can cause them to be removed from the ballot or can decertify the election.[184] More drastically, a candidate adjudicated to have violated any election law "[m]ust be removed from nomination or office,"[185] though there is no record of this occurring in recent memory, partly because so few violations have been adjudicated, and perhaps out of a level of deference to the will of the voters.

As the rarity of reported cases suggests, the Commissioner's office lacks sufficient resources to enforce the law effectively. The first five Commissioners requiring senate confirmation beginning in 1987 were con-

177. *See id.*; *see also* Mont. Code Ann. § 13–37–217 ("A person may not make a contribution of the person's own money or of another person's money to any other person in connection with any election in any other name than that of the person who in truth supplies the money.").

178. *See* Mont. Code Ann. § 13–37–108 (restricting commissioner from participating in, contributing to, or attending events for a political campaign).

179. *See* Mont. Code Ann. § 13–37–102 ("There is a commissioner of political practices who is appointed by the governor, subject to confirmation by a majority of the senate.").

180. *See* Montana Commissioner of Political Practices, *Status of Official Complaint Docket*, http://politicalpractices.mt.gov/2recentdecisions/docket.mcpx (accessed Feb. 5, 2013) (listing 43 active investigations in progress or pending as of Jan. 28, 2013, dating back to complaints filed in June, 2010); Montana Commissioner of Political Practices, *Campaign Finance and Practices Complaints*, http://politicalpractices.mt.gov/2recentdecisions/campaignfinance.mcpx (accessed Feb. 5, 2013) (listing 30 complaints resolved in calendar year 2012).

181. *See* Mont. Code Ann. § 13–37–128.

182. *See* Mont. Code Ann. § 13–35–108; *Bullock v. Hill*, No. CDV-2012-904 (Mont. 1st Dist. Oct. 31, 2012).

183. *See* Mont. Code Ann. § 13–37–121.

184. *See* Mont. Code Ann. §§ 13–37–126 and –127.

185. *See* Mont. Code Ann. § 13–35–106.

firmed by a combined vote of 239-to-6, but the last three have not been confirmed and therefore may lack the necessary political support to marshal enforcement resources.[186] The insufficiency of enforcement resources means the Commissioner cannot pursue the worst violators, and instead the office must spend most of its time on ministerial tasks arising from reporting and minor complaints. A 2012 study of complaints since 2000 found that just 19% of complaints accepted by the Commissioner were resolved before the election and, more troublingly, that all but one of the meritorious complaints were not resolved until after the election.[187] Improved electronic filing, raised political committee registration and reporting thresholds, more useful and accurate attribution on election materials, and clearer definitions of political activity would reduce the amount of paperwork and compliance questions the Commissioner's office must handle. A publicly searchable disclosure database that includes all reported committees and contributors, including independent expenditures, can facilitate the work of media and watchdog groups in "following the money" to focus the public's attention on issues the Commissioner's office may not identify on its own.[188]

A decreased regulatory load, however, is only a partial substitute for increased enforcement resources. If the legislature will not appropriate sufficient resources to ensure the timely and effective enforcement of the campaign finances laws it and the people have enacted, it might empower the people to pursue violations through private action.[189] One notable example of the impact of insufficient enforcement resources is the matter of over $1.2 million of undisclosed contributions to a series of ballot issue committees related to the organization Montanans in Action in 2006.[190] After a

186. Anthony Johnstone, *Montana Commissioner of Political Practices Study* (2012) (compiling public data available at http://politicalpractices.mt.gov) (on file with the author).

187. *Id.*

188. *See* Kevin McNellis, *Best Practices for Independent Spending: Part Two*, National Institute on Money in State Politics (Mar. 15, 2012) ("A comprehensive, easily searchable, and downloadable database provides the best public access to independent spending data."), available at http://www.followthemoney.org/press/PrintReportView.phtml?r=480 (accessed Feb. 5, 2013).

189. *See e.g.* Colo. Const. art. XXVIII, § 9(2)(a) ("The decision [finding a violation of campaign finance laws] may be enforced by the secretary of state, or, if the secretary of state does not file an enforcement action within thirty days of the decision, in a private cause of action by the person filing the complaint. Any private action brought under this section shall be brought within one year of the date of the violation in state district court. The prevailing party in a private enforcement action shall be entitled to reasonable attorneys fees and costs.").

190. *In re the Compls. Against Montanans In Action, Yes CI-97 Stop Overspending Montana, Citizens Right to Recall Montana, Yes I-154 Protect Our Homes Montana, and Trevis Butcher*, http://politicalpractices.mt.gov/content/2recentdecisions/MIADecision (Mont. Commr. of Political Pracs. June 26, 2009) (Summary of Facts & Statement of Findings). The author served as counsel for the State in separate election litigation involving Montanans in Action and its affiliates. *See Stop Over Spending Montana v. State ex rel. McGrath*, 139 P.3d 788 (Mont. 2006); *Citizens Right to Recall v. State ex rel.*

drawn-out investigation, in 2009 the Commissioner concluded the committee was "coordinating fundraising and the laundering of substantial sums of money from national organizations to finance expenditures by the ballot issue committees,"[191] a finding that would support a civil fine of $3.6 million.[192] Yet the committee settled in 2010 for only $75,000, in return for providing the Commissioner with largely meaningless disclosure of post office boxes as the source for much of the funding, four years after the election and campaign expenditures at issue.[193] A counterfactual worth considering is whether American Tradition Partnership would have attempted its strategy of anonymous campaign expenditures beginning in 2008,[194] culminating in its successful challenge to the Corrupt Practices Act, if the Commissioner had the resources to investigate and had penalized Montanans in Action with a multi-million dollar fine shortly after the 2006 election.

McGrath, 142 P.3d 764 (Mont. 2006); *Montanans for Justice v. State ex rel. McGrath*, 146 P.3d 759 (Mont. 2006).

191. *In re the Compls. Against Montanans In Action, Yes CI-97 Stop Overspending Montana, Citizens Right to Recall Montana, Yes I-154 Protect Our Homes Montana, and Trevis Butcher*, http://politicalpractices.mt.gov/content/2recentdecisions/MIASettlementAgreementandAttachment (Mont. Commr. of Political Pracs. Nov. 12, 2010) (Settlement Agreement and Release of All Claims).

192. *See* Mont. Code Ann. § 13–37–128(1) ("A person who intentionally or negligently violates any of the reporting provisions of this chapter . . . is liable in a civil action brought by the commissioner or a county attorney . . . for an amount up to $500 or three times the amount of the unlawful contributions or expenditures, whichever is greater.").

193. *In re the Compls. Against Montanans In Action, Yes CI-97 Stop Overspending Montana, Citizens Right to Recall Montana, Yes I-154 Protect Our Homes Montana, and Trevis Butcher*, http://politicalpractices.mt.gov/content/2recentdecisions/MIASettlementAgreementandAttachment (Mont. Commr. of Political Pracs. Nov. 12, 2010) (Settlement Agreement and Release of All Claims). The Commissioner concluded based on his investigation that "[f]ront and center in that coordination was Americans for Limited Government and other affiliated groups financed by New York real estate developer Howard Rich," though the most frequent contributor was disclosed only as "America at its Best," care of a post office box in Kalispell, Montana. *Id.*

194. Under its former title Western Tradition Partnership, the organization promised its donors anonymity in its 2010 fundraising appeal:

> There's no limit to how much you can give. As you know, Montana has very strict limits on contributions to candidates, but there is no limit to how much you can give to this program. You can give whatever you're comfortable with and make as big of an impact as you wish.
>
> Finally, we're not required to report the name or the amount of any contribution that we receive. So, if you decide to support this program, no politician, no bureaucrat, and no radical environmentalist will ever know you helped make this program possible. *The only thing we plan on reporting is our success to contributors like you who can see the benefits of a program like this. You can just sit back on election night and see what a difference you've made.*

W. Tradition Partn., Inc., 271 P.3d at 7 (quoting Western Tradition Partnership, *2010 Election Year Program Executive Briefing* (emphasis added)).

3. Participation

After *American Tradition Partnership*, any attempt to "level the playing field" consistent with the principles of I-166 cannot rely on leveling down corporate campaign spending. Instead, reform efforts according to those principles must ensure that corporate and other special-interest campaign spenders play by the same rules of accountability that apply to everyone else. That includes clarifying campaign-finance registration and reporting laws to require accountability from all political actors that seek significant influence in elections, whether they are individuals or organizations, and, at least for independent expenditures, whether or not those organizations are business corporations. It also includes effective enforcement. Yet in a regime of unlimited campaign expenditures, where leveling down non-citizen campaign spending is not an option, getting to a "level playing field" also requires leveling up citizen participation in campaign finance.[195]

One way to accomplish this goal of citizen-funded campaigns is by raising the money directly from all or most Montanans through public funding or tax incentives, rather than from just some Montanans through the current system. In 2012, Montana state candidates raised approximately $10 million in campaign contributions (half of which was raised by candidates for governor), parties raised about $3 million, and ballot measure committees raised less than $500,000.[196] This amount does not include independent expenditures.[197] In 2012, approximately 500,000 Montanans voted,[198] but only 32,576 individuals (some from outside Montana) contributed in reportable amounts to candidate campaigns.[199] It would take a relatively small public investment to scale up to nearly full participation by Montana citizens and nearly full candidate dependence on Montana citizen contributions, or in other words, independence from non-citizen contributors. For approximately $10 per voter each year, Montana voters could fully fund candidate campaigns in each biennial election cycle through a "democracy voucher" or another tax credit plan similar to what Professor

195. This terminology was introduced in this context by Joel L. Fleishman & Pope McCorkle, *Level-Up Rather Than Level-Down: Towards a New Theory of Campaign Finance Reform*, 1 J.L. & Pol. 227 (1983).

196. National Institute on Money in State Politics, *2012 Montana State Overview*, http://www.followthemoney.org/database/state_overview.phtml?s=MT&y=2012 (accessed Feb. 5, 2013).

197. Neither the National Institute on Money in State Politics nor the Commissioner of Political Practices publishes a total of independent expenditures or information sufficient to readily calculate a total.

198. *See* Montana Secretary of State, *Montana Voter Turnout*, http://sos.mt.gov/Elections/Voter_Turnout/index.asp (accessed Feb. 5, 2013).

199. *Supra* n. 196.

Lessig proposes.[200] This may be a worthwhile investment in helping Montanans choose public officials who should be spending taxpayer money on behalf of the voters rather than big players in political campaigns.

Short of such public investments, Montana law could encourage more citizen participation through small individual contributions by deregulating them. For example, raising individual contribution disclosure thresholds above the current $35 might encourage more funding from the thousands of additional donors who contribute below the threshold.[201] The informational value of relatively small contributions is low and may deter Montanans from giving to candidates they support in a world where campaign contributions are easily accessible online. The disclosure threshold in the original 1975 revision to the campaign finance laws was $25,[202] and was raised to $35 in 1987.[203] Adjusted for inflation, the original 1975 threshold would amount to more than $100 today.[204] A moderately high threshold for political committee registration might also encourage collective participation at the grassroots level.[205] The 1912 Corrupt Practices Act required reporting for independent expenditures exceeding $50,[206] which amounts to more than $1,000 today.[207]

Lastly, unless other reforms succeed in increasing participation of small donors significantly, moderately increased individual contribution limits might be necessary to "level the playing field" between citizen contributions and non-citizen (including corporate) independent expenditures. In 2012, the average winning house candidate raised approximately $10,000 under a $320 per-cycle contribution limit (primary and general election limits combined); the average winning statewide candidate raised approximately $100,000 under a $620 per-cycle contribution limit; and the winning candidate for governor raised nearly $2 million under a $1,260 per-cycle contribution limit.[208] Although the constitutional case made in *Lair* to in-

200. Lessig, *supra* n. 24, at 43; *see also* Bender, *supra* n. 39, at 178 (discussing a matching-fund system and arguing, "[w]ith a match on $50 donations, candidates would have an incentive to reach out to more small-dollar donors for support, thus increasing their support base and potentially their support at the polls").

201. Bender, *supra* n. 39, at 179.

202. 1975 Mont. Laws 1254.

203. 1987 Mont. Laws 43.

204. U.S. Bureau of Labor Statistics, *CPI Inflation Calculator*, http://www.bls.gov/cpi/cpicalc.htm (accessed Feb. 5, 2013).

205. *Cf. Canyon Ferry Rd. Baptist Church of E. Helena, Inc.*, 556 F.3d 1021 (holding Montana's "in-kind" expenditure definition must have a constitutional *de minimis* exemption for small expenditures).

206. Initiative Act, § 12, 1913 Mont. Laws 600.

207. U.S. Bureau of Labor Statistics, *CPI Inflation Calculator*, http://www.bls.gov/cpi/cpicalc.htm (accessed Feb. 5, 2013).

208. National Institute on Money in State Politics, *2012 Montana State Overview: Candidates*, http://www.followthemoney.org/database/StateGlance/state_candidates.phtml?s=MT&y=2012 (accessed Feb.

validate the contribution limits on their face is relatively weak,[209] there may be a stronger policy case to raise them. The original contribution limits enacted in 1975 would amount to more than $1,000 for legislative candidates, $3,200 for statewide candidates, and $6,400 for candidates for governor.[210] These limits are substantially higher and reasonably could be claimed to permit corruption or the appearance of corruption, particularly for a legislative candidate who could finance a campaign with only a handful of large contributions. But it is worth considering whether there is a middle ground that still requires a wide base of citizen funding and also allows a candidate sufficient funds to respond to independent campaign expenditures funded by non-citizen sources.

Conclusion

For most of the past century, Montanans conducted their politics according to a distinct form of republicanism informed by the State's history, culture, and, most importantly, its people acting through the democratic process. As Jeff Wiltse concludes, "the reforms implemented 100 years ago—including the Corrupt Practices Act—are now woven into the fabric of the state's unique political culture, a culture characterized by face-to-face campaigning, weak party loyalty, skepticism of outside interests, and grassroots activism."[211] That politics, like all politics, is imperfect. But it is at least *Montana* politics, and the state government those politics sustain is without doubt a *republican* form of government. In striking down the Corrupt Practices Act, *American Tradition Partnership* ended the era that cultivated this politics over a century. It and the cases that followed brought the new national politics of *Citizens United* to the states. Through its courts and under its Constitution, the United States guaranteed that Montana would have a different form of government now. That government may still be republican, but its politics certainly will be less Montanan.

No sooner had the Supreme Court buried the Corrupt Practices Act than the People of Montana attempted to resurrect it with I-166. After *American Tradition Partnership*, I-166 is a lost opportunity as a matter of policy, yet it presents a new opportunity as a matter of principle. It reminds the State that after a century the people of Montana still believe in the principle of political equality that motivated the Corrupt Practices Act of 1912

5, 2013); Mont. Code Ann. § 13–37–216; Montana Commissioner of Political Practices, *Political Campaign Contribution Limits Summary* (Oct. 2011), http://politicalpractices.mt.gov/content/5campaignfinance/ContributionLimitSummaryfor2012ElectionCycle (accessed Feb. 5, 2013).

209. *See* Part I.B, *supra.*

210. 1975 Mont. Laws 1265, ch. 481, § 1; U.S. Bureau of Labor Statistics, *CPI Inflation Calculator*, http://www.bls.gov/cpi/cpicalc.htm (accessed Feb. 5, 2013).

211. Wiltse, *supra* n. 41, at 337.

and directs its lawmakers that the principle be put into practice in some way. That way cannot be the backward-looking policy of leveling down corporate and other independent expenditures, though the law can require those players to play by the same rules of accountability as candidates and individuals and can ensure those rules are enforced effectively. Another way might be a forward-looking policy of leveling up citizen participation in campaign finance through small-donor deregulation and, perhaps, tax incentives or increased individual contribution limits. I-166 cannot be a roadmap for campaign finance reform in Montana, but it can be a banner for those who lead the way there.

If Montana law does not change, Montana politics will. The next election will look even more like national politics than the last. More mailboxes will fill with unseemly attack mailers, some of them traceable only to other mailboxes. More secret donors, many from out-of-state and some incorporated, will launder big contributions of dark money through groups with misleading names in furtherance of hidden agendas. More campaign finance complaints will be filed that may or may not be resolved before the election, and the violators with enough money at stake will delay compliance for years, if they comply at all. More than nine-out-of-ten voters will not contribute to a candidate or political committee to counter the mailers, the dark money, and the campaign finance scofflaws because it is not worth the trouble. And, given this, candidates and elected officials will pay less attention to citizens than they should in any republican form of government. Despite its legal victories, however, American Tradition Partnership likely will not be the one behind the mailers, in front of the secret donors, or on the case captions. Its lone employee reportedly resigned after the election to take a new job—with Congress.[212]

212. *See* Associated Press, *Secretive Conservative Group Appears Ready to Vanish*, Billings Gazette (Jan. 22, 2013).