

# *Fordham Urban Law Journal*

---

*Volume 40, Number 2*

2013

*Article 4*

---

## Introduction

Martin E. Connor\*

\*

Copyright ©2013 by the authors. *Fordham Urban Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ulj>

## INTRODUCTION

*Martin E. Connor\**

Contributions of huge amounts of money by wealthy individuals and corporations to American political campaigns have a long and sordid history. For example, in 1860, New York Democrats put together a Fusion slate so voters could vote against Lincoln without dividing their votes among the three Democratic opponents.<sup>1</sup> New York merchants contributed substantial funds.<sup>2</sup> Reports stated that William Astor had given \$1 million to the campaign.<sup>3</sup> This was \$27,780,000 in 2013 dollars, at a time when there was no radio or television on which to spend it.<sup>4</sup> The campaign was for New York State presidential electors only.<sup>5</sup>

In 1896, Mark Hanna was widely reported to have raised and contributed \$3.5 million to elect William McKinley to the Presidency.<sup>6</sup> This was equivalent to \$94,605,000 in current day dollars.<sup>7</sup> That amount was solely for the national effort.<sup>8</sup> State party committees at the time bore the major burden of raising and spending for the Presidential campaign.<sup>9</sup> Where did the money come from? All banks and large corporations were assessed a percentage of their profits.<sup>10</sup>

---

\* B.A. (Politics) 1968, J.D. 1970, The Catholic University of America. Election attorney since 1972. NYS Senator, 1978–2008 (Minority Leader, 1995–2002).

1. See WALTER STAHR, SEWARD, LINCOLN'S INDISPENSABLE MAN 207 (Simon & Schuster, 2012).

2. See *id.*

3. See *id.*

4. See *Inflation Calculator*, DAVEMANUAL.COM, <http://www.davemanuel.com/inflation-calculator.php> (last visited Apr. 14, 2013).

5. See STAHR, *supra* note 1, at 207.

6. See WILLIAM T. HORNER, OHIO'S KINGMAKER: MARK HANNA, MAN AND MYTH 193 (Ohio Univ. Press 2010).

7. See *Inflation Calculator*, *supra* note 4.

8. See HORNER, *supra* note 6, at 193.

9. See *id.* at 201–12.

10. See *id.* at 195.

How and where was it spent? With no TV or radio, one can only imagine the payoffs that were made.

In the 1960 presidential election, it was an open secret that Joseph P. Kennedy spent millions of dollars to make his son the President.<sup>11</sup> The exact amount is uncertain since no disclosure was required. There are many stories of the bundles of hundred dollar bills used in the 1960 campaigns.<sup>12</sup> Both contributions and expenditures were commonly made in cash.<sup>13</sup>

The lack of disclosure of campaign contributions and expenditures in the first 160 years or so of our Republic does not mean there was no recognition of the potential for corruption. Indeed, succeeding to the Presidency upon the death of McKinley, Theodore Roosevelt led the successful charge to pass a ban on corporations contributing to federal campaigns.<sup>14</sup>

However, the realization that money was corrupting elections went back further than the early twentieth century. The earliest casebook on American election law of which I am aware is *A Collection of Leading Cases on the Law of Elections in the United States*.<sup>15</sup> In its 766 pages, there is but one mention of campaign contributions.<sup>16</sup> It arose in the context of a suit for a debt for rent.<sup>17</sup> In 1840, the plaintiff had erected a log cabin on Broadway in New York City at the request of the defendant.<sup>18</sup> The log cabin was intended for public and other meetings of the Whig Party and for the sale of refreshments.<sup>19</sup>

---

11. See ROBERT A. CARO, *THE PASSAGE OF POWER: THE YEARS OF LYNDON JOHNSON* 84–85 (2012).

12. See *id.* at 72.

13. See *id.* at 293.

14. See *American President: Biography of Theodore Roosevelt*, MILLER CTR., <http://www.millercenter.org/president/roosevelt/essays/biography/print> (last visited Apr. 1, 2013).

15. FREDERICK CHARLES BRIGHTLY, *A COLLECTION OF LEADING CASES ON THE LAW OF ELECTIONS IN THE UNITED STATES* (1871).

16. *Id.* at 612–15.

17. *Id.*

18. See *Jackson v. Walker*, 5 Hill 27, 27 (N.Y. Sup. Ct. 1843), *aff'd*, 7 Hill 387 (N.Y. 1844). The 1844 affirmance was by an 11-11 split in the Court for the Correction of Errors, New York's highest court made up of the Chancellor and all the State Senators. See *About the Court*, APP. DIVISION SECOND JUDICIAL DEP'T, <http://www.courts.state.ny.us/courts/ad2/aboutthecourt.shtml> (last visited Apr. 19, 2013).

19. See *Jackson*, 5 Hill 27.

In August of 1840, the plaintiff announced that he would be taking down the log cabin because he was losing money.<sup>20</sup> It cost the plaintiff \$1,600 or \$1,800 to build the cabin.<sup>21</sup> A subscription was opened and \$200 was raised.<sup>22</sup> The defendant told the plaintiff that he wanted the cabin to be kept open until after the election and that he “would not permit the whig flag across Broadway to be struck.”<sup>23</sup> He promised to raise the balance of \$1,000 or pay it out of his own pocket.<sup>24</sup> The plaintiff kept the log cabin open until after the election.<sup>25</sup> The plaintiff sued the defendant in New York City Superior Court for the promised amount.<sup>26</sup> The defendant alleged that the contribution of \$1,000 for a campaign headquarters was illegal and thus his promise of payment for such was unenforceable.<sup>27</sup> After the trial judge denied the defendant’s motion to find the contract illegal, the jury found in favor of the plaintiff.<sup>28</sup> On appeal to the Supreme Court of New York, the judgment was reversed on the grounds that a contribution for a campaign headquarters was illegal under an 1829 statute.<sup>29</sup>

In an effort to ensure the “purity of elections,” the New York Legislature had enacted a statute making it unlawful (a misdemeanor) for any candidate or any other person to pay for, or contribute any money for any “purpose intended to promote an election of any particular person or ticket, except for defraying the expenses of printing, and the circulation of votes, handbills and other papers, previous to any election.”<sup>30</sup> Interestingly enough, this statute more or less banned campaign expenditures toward any sort of “get out the vote” operations. Since the purpose of keeping the log cabin open was clearly to promote the election of “Gen. Harrison” for

---

20. *See id.* at 28.

21. *See id.*

22. *See id.*

23. *See id.*

24. *See id.*

25. *See id.*

26. *See id.*

27. *See id.* at 28, 31–32.

28. *See id.* at 28.

29. *See id.* at 31–32.

30. Act of May 5, 1829, ch. 373, § 1(5), 1829 N.Y. Laws 565–66. Political parties, or factions, printed the actual ballot marked for their candidates and the voters took them into polling places and deposited them into the ballot boxes.

President and the Whig ticket in general, the expenditure was illegal and the promised payment was unenforceable.<sup>31</sup>

The court rejected the contention that the statute was intended only to forbid the contribution of money for corrupt purposes.<sup>32</sup> The court stated that “[t]he legislature evidently thought that the most effectual way ‘to preserve the purity of election,’ was to keep them free from the contaminating influence of money.”<sup>33</sup> It should be noted that the court also commented that “[t]here can be little doubt that large sums of money are expended upon elections for other purposes; but the statute says, ‘it shall not be lawful’ to do so, and the enactment should either be enforced or repealed.”<sup>34</sup>

While the statute in question seems shocking to us in its lack of concern for free speech, it must be remembered that the Fourteenth Amendment had not yet been passed<sup>35</sup> and that the First Amendment then applied only to the federal government.<sup>36</sup> Obviously, New York State’s constitutional guarantee of free speech<sup>37</sup> was not seen to cover campaign contributions and expenditures.

Modern day reformers are prone to advance proposals to define exactly what constitutes the legitimate use of campaign funds, and many states have already done so. Aside from concerns about candidates’ use of contribution funds for expenditures that are clearly personal, some laws on expenditures obviously impede legitimate political strategies employed by candidates. Local conditions can make gestures like sending flowers, perhaps to important constituents who are hospitalized or to the funerals of those that have passed away, a wise and necessary political expenditure—and one a candidate should be no more expected to pay from her personal funds than a businessman who makes such gestures to purely business acquaintances.

Does anyone who has ever examined the 1960 presidential campaign doubt that John F. Kennedy chose wisely when he engaged his brother Robert as his campaign manager? Of course, no one knows how the manager’s expenses were paid since that was in the

---

31. *See generally Jackson*, 5 Hill at 31.

32. *See id.*

33. *Id.*

34. *Id.*

35. Even after passage of the Fourteenth Amendment, the First Amendment was not applied to New York until 1925. *See Gitlow v. New York*, 268 U.S. 652 (1925).

36. *See Barron v. Baltimore*, 32 U.S. 243 (1833).

37. N.Y. CONST. OF 1821, art.VII, § 8.

2012]

*INTRODUCTION*

591

“cash and carry” era. In my opinion, campaign finance restrictions against employing relatives are overreaching. A relative just might be the best person for the job. However, that does not mean funneling campaign funds to a relative for “no-show” employment should be tolerated.

In my first foray into politics, following my graduation from law school and move to New York, I joined a local “Reform” Democratic club in 1971. The club had no relationship to the official Democratic Party organization; indeed, it usually opposed the regular party’s candidates. The major issue for the club’s members was opposition to the Vietnam War. Dues were \$5.00 per year (\$7.00 a couple). The annual fundraiser that year was \$10.00 per person. At club meetings, we passed around a hat to raise money for planned activities.

In 1972, the club’s major mission was to support George McGovern for President and to oppose our incumbent Representative who supported the war effort. The geographic area where the club worked consisted of eighteen election districts—about thirty-two city blocks. Club members knocked on doors and handed out literature the club printed urging support for the candidates. I spent about \$140 on canvas cards—index cards containing the names and addresses of each voter. The late David Levine, a local caricaturist of note, donated a limited edition of a caricature print he did of McGovern for us. We sold about fifty of them for a twenty-five dollar contribution to our local McGovern “committee.”

The only “official” contact we had with the McGovern campaign occurred weekly when one member would go to the NYC McGovern headquarters and get as many “Vote for McGovern” lapel buttons as he could talk out of them. On Saturdays at the main street corner in the neighborhood, we set up a table, handed out the literature we had printed and sold the buttons for a quarter a piece. A few affluent types would put a dollar in the can. One Saturday, our “button haul” was \$275. All the money we raised went to printing more literature and two mailings (one before the primary and one before the General Election). For the mailings, we sat around tables and hand-addressed a piece to each voter.

We kept no record of who threw money into the effort. Everyone was a volunteer; no one stole any of the money. We helped elect our McGovern delegates to the National Convention and paid for some of them to go to Miami. While McGovern was badly beaten in most places in the country in the general election, he won our little neighborhood by a thirteen to one margin.

No one in our grassroots effort was seeking any favor from a President McGovern. No one important in his campaign knew any of us. We probably raised and spent about \$4,500 (about \$24,700 in 2013 dollars). We did not have to file any forms then or make any disclosures. Today, we would be in big trouble unless we had a lawyer and kept track of those quarters, filed reports, placed a fair market value on those prints, and kept detailed records. In order to prevent corruption, a totally voluntary grassroots effort like I have described is no longer possible.

Two major devices embraced by the post-Watergate reforms in federal and state laws are disclosure and limits on contributions.<sup>38</sup> In more recent years, disclosure requirements have been expanded to include identification of a contributor's employer.<sup>39</sup> The rationale for this requirement is that the public has a right to know the economic interests who are supporting the candidate.<sup>40</sup>

While one can reasonably conclude that contributors who are CEOs or top management of a business are supporting a candidate because they believe she has been, or will be, sympathetic to their business's economic interest, the same cannot necessarily be said about the motivations of every employee who makes a contribution. It may be that lower level employees have contributed to the candidate's campaign because they agree with the candidate on other issues more important to them than whether the company they work for gets a particular tax break. Perhaps they are avid sportsmen, committed feminists, a second cousin or former classmate of the candidate, committed political party members, neighbors of the candidate concerned foremost about a community issue, or someone who identifies ethnically with the candidate. The list of possible reasons for someone making a contribution is diverse and could go on forever.

Disclosing the employers of contributors who happen to work for a very large company employing thousands invariably causes the press to write stories such "XYZ Corporation Contributes Big Bucks to Candidate." Unfortunately, that is the information that will reach most voters even though it is merely an inference that may not be justified by the actual facts.

---

38. See *Buckley v. Valeo*, 424 U.S. 1, 28 (1976); see also Richard Briffault, *Citizens United: Democracy Realized—or Defeated?*, 96 MINN. L. REV. 1644, 1682 (2012).

39. See, e.g., 2 U.S.C. § 431(13) (2012).

40. *Buckley*, 424 U.S. at 3.

2012]

## INTRODUCTION

593

I believe that contributing to a political campaign within legally mandated limits is part of a citizen's First Amendment rights. The more people who see making a contribution as part of their participation in the political process, the better off our democracy will be. I have always been wary of anything that I viewed as discouraging persons from participating in the public forum, including by making a financial commitment to a campaign.

Some years ago on the New York State Senate floor I expressed my concern with a colleague's proposed "campaign finance reform" bill, which I supported, because it would have required disclosure of employment information (the bill had no chance of passing in that body then, or possibly now!). My concern was, and is, the possible retaliation by the employer should a person contribute to a campaign for a candidate the employer opposes.

Perhaps the most expansive protection of employees in the country is found in the New York City Human Rights Law. It forbids discrimination in employment (refusal to hire or discharge) "because of the actual or perceived age, race, creed, color, national origin, gender, disability, marital status, partnership status, sexual orientation or alienage or citizenship status of any person"<sup>41</sup> as well as because of "actual or perceived status of said individual as a victim of domestic violence, or as a victim of sex offenses or stalking."<sup>42</sup> While federal and New York State election laws guard against the nineteenth century practice of employers marching their employees off to vote in lockstep, nothing I am aware of prevents an employer from discharging an employee because they do not like the contributions she has made to candidates.

Perhaps requiring too much regulation and/or disclosure prevents true grassroots political activity and deters ordinary citizens from contributing to campaigns. This consideration has not often been given a fair hearing in the rush for reform.

In *The Public's Right to Know Versus Compelled Speech*, Dick Carpenter and Jeff Milyo have presented much food for thought concerning the advisability of requiring disclosure of contributors in non-candidate elections.<sup>43</sup> Is the danger of corruption really present

---

41. N.Y.C. ADMIN. CODE § 8-107(1)(a) (2012).

42. N.Y.C. ADMIN. CODE § 8-107.1(2).

43. Dick Carpenter & Jeffrey Milyo, *The Public's Right to Know Versus Compelled Speech: What Does Social Science Research Tell Us About the Benefits and Costs of Campaign Finance Disclosure in Non-Candidate Elections?*, 40 FORDHAM URB. L.J. 603 (2012).



in such elections? Or, is the concern that the public ought to know who is trying to influence their opinions? If the latter policy is the reason, does it ignore the fact that the arguments advanced, no matter the source, ought to be the persuasive determinant with the voters? The authors' survey of social science research certainly calls into question the rationale for mandating disclosure in non-candidate elections.

There seems to be a grave concern about anonymous messages in campaigns. I have always viscerally felt them unfair. But upon reflection, it occurs to me that the 100,000 colonists who bought and read *Common Sense* did not know, nor did they need to know, that its author was Thomas Paine. Of course, there was a far better reason than for anonymity because the author's life and liberty were at risk. Certainly, the voters persuaded by *The Federalist* to vote for ratification of the Constitution were not apprised of the identity of *Publius* or who paid to have the articles published. Only a very few insiders knew the true authors were Hamilton, Madison, and Jay when the votes were cast. The cogency of the arguments carried the day.

Thwarting participation in issues elections by grassroots action of citizens should be avoided at all costs. Expenditure limits that trigger disclosure and filing requirements, require legal advice, and threaten severe penalties for violations should be at high enough amounts to permit a robust participation by ordinary citizens in grassroots organizations.

The real dilemma is the fear that big money and the limited attention span of voters—resulting in their responding to slick and simplistic two-minute advertisements—will carry the day, regardless of the inherent merits of the pro and con arguments. If that is so, then our democracy is truly not functioning as intended. Perhaps the answer lies in education rather than substituting another shorthand, notwithstanding the merits of the argument, factor: “who’s paying for it?”

Amy Loprest and Bethany Perskie's article *Empowering Small Donors* sets forth an explanation of how New York City's highly successful multiple match public finance program has worked to focus candidates' attention on raising funds in relatively small amounts

2012]

## INTRODUCTION

595

from just “plain folks” in New York City’s neighborhoods.<sup>44</sup> They also explain the challenges facing the program arising from recent Supreme Court decisions.

In my opinion, the program has generally been a resounding success. The obvious failure of the program with respect to the last three mayoral campaigns due to the outlandish campaign spending by one of the wealthiest men in the world has caused many to doubt the effectiveness of the system. The authors cite how close Michael Bloomberg’s victories were. But, political campaigns are not horseshoes and close doesn’t count. Democrats Mark Green and Bill Thompson losing by “only” 35,000 and 50,000 votes, respectively, to a candidate running on the Republican line in a City with 2.5 million more Democrats than Republicans shows that Green and Thompson were not really competitive in persuading voters with the resources the program provided.

As the authors discuss, the Supreme Court outlawed the “bonus” provision that awarded Green and Thompson additional matching funds in response to Bloomberg’s astronomical spending. The New York City Campaign Finance Board’s only remaining response to someone spending over \$100 million in a mayor’s race is to remove the cap on expenditures for the financial underdog. That response is of limited comfort, however, since the additional funds must be raised at a contribution limit of \$4,950 per person before they may be spent. There is no use in pretending there is a solution to the problems created by an out-sized self-funder. *Buckley v. Valeo*<sup>45</sup> has precluded a real solution and its progeny have only made things worse.

The big success of the New York City Campaign Finance program is the number of small donors that have been brought into play and now realize that their small contributions count. As the authors note, the program’s intersection with term limits have produced many competitive campaigns and encouraged many more candidates to compete. This big win for democracy is counterbalanced, in my opinion, by the fact that an expenditure limit of \$168,000 for a City Council campaign is insufficient to overcome the inherent advantages of incumbency in the absence of scandal or gross incompetence by the incumbent.

---

44. Amy Loprest & Bethany Perskie, *Empowering Small Donors: New York City’s Multiple Match Public Financing as a Model for a Post-Citizens United World*, 40 FORDHAM URB. L.J. 639 (2012).

45. 424 U.S. 1 (1976).

One feature that strikes me about the New York City Campaign Finance program is the fact that the spending limit for Mayor is \$6,426,000 and only \$4,018,000 for the other two citywide offices (Comptroller and Public Advocate). Is this difference really justified by a neutral rationale when candidates for all three offices must appeal to the same number of voters? Of course, Mayor is a more powerful and important office. But, I know of no discounts available for radio and television advertisements, postage or printing for the two lesser offices. If there were any, the Campaign Finance Board would undoubtedly find them to be in violation of its requirement that such costs be at “fair market value.” Why should a candidate for Mayor get to spend \$2.41 million dollars more, \$1.324 million of it in public money?

In the era of required disclosure of campaign contributors by candidates, the widespread exception that has long existed for “independent expenditure” campaigns, both in federal and state regulatory schemes is starting to come to a close. A couple of decades ago, the rules for whether such an effort was truly independent of the candidate’s campaign were rather clear-cut and easy to enforce. For example, the Federal Election Commission rules governing such efforts provided, in addition to the obvious instance of direct coordination (i.e. the candidate or her campaign requested and/or directed the effort), that the use of common consultants, lawyers, pollsters were clear indications of coordination and, therefore, lack of independence.<sup>46</sup> Furthermore, the copying of the candidate’s campaign literature by the independent campaign for its own use was deemed to be coordination.<sup>47</sup>

In my experience, thirty years ago, one of the big obstacles facing an independent campaign was designing appealing advertisements and literature without having access to photographs and/or video of the candidate. The advent of the internet solved that problem as well as obviating the need for the independent campaign conducting its own polling. Any serious political campaign today has a website featuring numerous attractive high-definition photos of the candidate and video segments. They are in the public domain and are available for downloading by the independent campaign’s advertisement crafters without any knowledge or coordination with the candidate’s campaign.

---

46. See 2 U.S.C. § 441a (2006); 11 C.F.R. § 109.21 (2012).

47. 2 U.S.C. § 441a(a)(7)–(8) (2006).

2012]

## INTRODUCTION

597

Even the expense of poll-testing messages and targeting voters independently has been lifted from independent expenditure campaigns. A careful scrutiny of the candidate's website will reveal messages and voter targets that her campaign has already tested by polling.

In response to the explosion in the amount of money that has been injected into the political landscape at every level in recent years, efforts have been taken at every level of government to require disclosure of independent expenditures, the identity of contributors, and the amounts they contributed. Certainly, it is generally accepted that the public ought to know who are the persons placing such a heavy weight on the scales in a political contest.

Disclosure of contributors to independent campaigns is generally justified under the same rationale as candidate disclosure requirements—as an anti-corruption measure.<sup>48</sup> Of course, this is the only rationale the Supreme Court has accepted as justification for requiring disclosure. One can make the opposite argument, however, about requiring the disclosure of contributors to an independent expenditure effort. Absent disclosure and adhering to the “no coordination” requirement, a candidate may only know that an innocuously sounding committee (i.e., “Citizens for Truth” or “Better Government for New York”) is spending money on her behalf. Press reports will undoubtedly ferret out the general interests pushing the effort (e.g., “unions,” “real estate,” “sportsmen,” etc.). But, the candidate won't know who is really providing the big bucks for the effort. With disclosure, she will learn to whom she ought to be especially responsive in view of the \$100,000 he put into the independent effort. How does that fit in with the anti-corruption rationale?

In *A National Model Faces New Challenges*, Janos Marton provides an in-depth overview of legal and practical challenges looming for the New York City Public Campaign Finance system.<sup>49</sup> My current representation of parties in some of the matters he reviews precludes me from making extensive commentary. Suffice it to say that for anyone looking to make sense of the legal challenges and political landscape in New York City elections in 2013, the article is a

---

48. See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 367 (2010) (citing *Buckley*, 424 U.S. at 66; *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 196–97 (2003)).

49. Janos Marton, *A National Model Faces New Challenges: The New York City Campaign Finance System and the 2013 Elections*, 40 *FORDHAM URB. L.J.* 673 (2012).

must-read. The author does an admirable job of informing where we have been and where we might be headed with respect to campaign finance.

Professor Jocelyn Benson sets forth a number of principles that should govern efforts to reform the campaign finance systems at the federal and state levels in the aftermath of the wounds inflicted by *Citizens United* in *Saving Democracy: A Blueprint for Reform*.<sup>50</sup> Surprisingly, the first value she urges is the equality interest. She makes a compelling case, based on the theory of democracy, for a system that rejects giving the economic power of big money spenders an inordinate influence in our elections. It is surprising because, while I agree with her, the Supreme Court doesn't. The Court has rejected the "level playing field" rationale for any campaign finance regulation.<sup>51</sup> The conclusion of the article accounts for her choice.

Professor Benson discusses the historical background to provide the context for continuing efforts to advance reform, notwithstanding the obstacles that the Supreme Court has presented. I appreciate her citing Elihu Root as a leading political activist who first proposed prohibiting corporate contributions. Root is one of my favorites: Secretary of War, Secretary of State, United States Senator, winner of the 1912 Nobel Peace Prize—and the leading New York election lawyer of his day! Root was on the legal team that secured the presidency for Rutherford B. Hayes in 1876 and in 1898, he saved Theodore Roosevelt from being disqualified in his race for Governor due to a very serious residency problem.

After surveying the prospects for various reforms that have been tried throughout the country and discussing several approaches as well as the obstacles to some of them presented by Supreme Court decisions, Professor Benson offers the obvious solution for bringing about real comprehensive reform: amend the Constitution to overrule *Buckley v. Valeo* as the only way to bring about reform embracing the equality, information, participation, and anti-corruption interests she has compellingly demonstrated must be served by a reformed system. I agree with her conclusion that this is the only way to accomplish the needed reforms, and I have long believed this to be so. The Bill of Rights, however, has never been touched by an

---

50. Jocelyn Benson, *Saving Democracy: A Blueprint for Reform in the Post-Citizens United Era*, 40 FORDHAM URB. L.J. 723 (2012).

51. *Citizens United*, 558 U.S. at 349–50.

2012]

## INTRODUCTION

599

Amendment. Most Americans see the First Amendment as sacred and inviolable.

In 1972, a fellow Wall Street lawyer associate who lived in my neighborhood took me to a “petition binding.” It all seemed rather mundane and I wondered why lawyers were taking such care in assembling the designating petitions. Three days after the petitions were filed, the same friend came into my office and said, “Come on, we have to go to the Board of Elections and see if any challenges were filed against the petitions.” I didn’t understand what he was saying, but I went!

That year, I ended up “second seating” my friend in court. It was exciting and swift action. The next year, I took a case for an insurgent and succeeded in having the county organization’s candidate for a City Council seat removed from the ballot. I was hooked. Where else could one commence a proceeding, try the case, write a brief, and argue in the Appellate Division and then in New York’s highest court, the Court of Appeals, all in a six or seven week span? About four years into doing these election law cases I asked an older election lawyer whether he thought anyone would ever pay a lawyer to do them. His definitive answer was: “No way.”

The bible for New York election lawyers in those days was the two volume *Gassman’s* treatise.<sup>52</sup> In its 975 pages and hundreds of cases cited, there is not a single mention of campaign finance or contributions. Including its final Cumulative Supplement (1985-1986) by D. Alan Wrigley, Jr., only two cases mention campaign finance and they deal only with the use of party funds in a primary.<sup>53</sup>

In 1989, a new monograph on New York election law was published.<sup>54</sup> In its 344 pages, only two of them deal with campaign finance law and then only to reprint a few sections of the New York Statute adopted in 1974.<sup>55</sup> Of course, by that time there were a number of works on federal campaign finance law. Now that election law has emerged in the last fifteen years as a “subject” in law school, new casebooks have been published and they have substantial space

---

52. *See generally* 1–2 BENJAMIN GASSMAN, ELECTION LAW DECISIONS AND PROCEDURE (2d ed. 1962).

53. *See id.* at §§ 9, 19.

54. *See generally* EDWARD I. BYER, ELECTION LAW DECISIONS AND PROCEDURE (1989).

55. *See id.* at 324–25.

dedicated to campaign finance law.<sup>56</sup> The latest monograph on New York election law has a section on campaign finance as well.<sup>57</sup>

For the thirty-one years I served in the State Senate, my law practice consisted almost exclusively of election law for the simple reason that the “season” for ballot access cases, post-election recounts, and court challenges neatly corresponded to the Senate being in recess. About half the work I did was *pro bono* for political allies or colleagues. In 2001, when the New York City Campaign Finance Board ruled that people like me could no longer volunteer our professional services for friends and allies, I was delighted. The rules now required even my closest friends running for City office to pay market rate!

Election law is no longer such a seasonal law practice. The major reason is the extensive body of campaign finance law and rules, particularly the federal law and the rules of the New York City Campaign Finance Board. Virtually every serious candidate or incumbent wants to be sure their campaigns are in compliance to avoid penalties, fines, and, even more important for them, to escape damaging publicity and prevent opponents from having negative ammunition for campaign use. The lawyers they retain naturally want to give them solid legal advice.

Allen Dickerson and Zac Morgan in *Campaign Finance Advisory Opinions at the State Level* present the case for why election officials in the states ought to have clearly defined authority to issue advisory opinions on campaign finance questions about which candidates (and/or their lawyers) may have questions.<sup>58</sup> These questions arise quite frequently in campaigns and the legal and political stakes are high.

The authors have surveyed the laws in every state and have noted the practice for each state with respect to whether it has a single enforcement authority, an agency authorized to issue advisory opinions, and whether such opinions provide a “safe harbor” for the recipient. Every campaign finance regulatory system ought to have as

---

56. See generally DANIEL HAYS LOWENSTEIN, RICHARD L. HASEN & DANIEL P. TOKAJI, *ELECTION LAW: CASES AND MATERIALS* (5th ed. 2012); SAMUEL ISSACHAROFF, PAMELA S. KARLAN, & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* (3d ed. 2007).

57. See JERRY H. GOLDFEDER, *GOLDFEDER’S MODERN ELECTION LAW* chs. 8 & 9 (3d ed. 2012).

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

2012]

*INTRODUCTION*

601

its principle goal widespread compliance. The best way to accomplish this is with an agency that assists candidates in complying with the law.

Frankly, it has always amazed me that legislators enact laws governing campaign finance or other campaign activities and do not provide for binding advisory opinions with a safe harbor provision. After all, whether any of their constituents ever become a candidate is unknown; yet, it is virtually certain that most all legislators will be candidates again. More than once I have had clients who are elected officials consult me about a problem where they may be penalized because of a statute they insist is unclear or unfair. Sometimes I can't resist saying, "You voted for this."