"Because I know that many have written about this, I am afraid, by writing about it again, that I shall be thought presumptuous, all the more so for departing, in my discussion of this material, from the orders of others. But my intention being to write something of use to those who understand, it appears to me to be more proper to go to the real truth of the matter rather than to its imagination. Many have imagined republics and principalities that have never been seen or known to exist in reality; but since how we live is so far removed from how we ought to live, he who abandons what is for what ought to be done, will learn to bring about his own ruin rather than his preservation."

Niccolo Machiavelli, *The Prince*

1

Introduction

This is a book about campaign finance laws as they are — what the fifty state laws say, what they are trying to do, and how they work out over time in the real world of politics. It is also, by implication, a book about the laws as they might be.

As we were writing this book, the nation was in the throes of one of its periodic debates over campaign finance reform. The national debate was proceeding, as it usually does, as if the only experience worth considering were with the one set of laws that apply directly to federal elections. This self-limitation rested more on pride, or on a lack of good information, than on good sense. The fifty very different state laws operate in jurisdictions which share basically similar constitutional frameworks. Understanding them is bound to enrich the vision of those on any level who might be thinking about changing whatever they now have.

The contemporary debate, at both the state and national levels, seems to be driven, at its extremes, by two fundamentally different attitudes about the relationship between money and elections. Neither pole represents the law as it is, but both are gaining ground in the discussion about what the law should be in the future. On one side, money is seen as the root of all evil — the means by which politics is corrupted and democracy stolen from the control of the voters. For people on this side of the argument, an ideal political world would be one in which there would be no private money in elections at all. Elections would be seen as a public good, to be financed solely, or primarily, through public funds.

At the other pole are those who see any restriction on political money as a fundamental threat to their liberty. One of the key purposes of an election, these people say, is to let voters decide whether to throw out their representatives. Since any serious challenge to an incumbent requires communication, and communication — whoever pays for it — costs money, the people on this side consider it dangerous to let public officials, through their control over money, limit how, or how much, they themselves can be criticized. Hence, for the people who take this position, the ideal campaign finance regime would be one in which there would be almost no regulation at all. Let there be complete disclosure, and then let the voters decide.

These two positions both seem to us to contain valuable insights. And yet, both rest on untested assumptions about how to achieve their own stated ends. Unfortunately, and by necessity, the only way to test an untried assumption is through a process of analogy and inference. Laws currently on the books regulate how private money is raised and spent, even in systems with some public funding. As such, these laws fit neither of the two polar positions. Nevertheless, they give us enough evidence for making inferences about the pure-form assumptions, as well as for judging the laws as they are.

The Machiavelli passage at the start of this book is not reproduced for adornment. People who would like to change campaign finance law would be well advised to reread it. They are trying to change the behavior of political professionals, whose need to survive amidst ever-changing technologies of communications and campaigning teaches them to adapt as they pursue their own interests. Any proposal that fails to come to grips, over the long term, with the way these professionals "exist in reality" will be more likely to bring about the destruction of the ends the proposal seeks to achieve than their fulfillment.

Campaign finance law — to mix Madison with Machiavelli — begins from the notion that human beings are not angels.[1] Its first motivational premise is that without law, some politicians will veer from the public good to serve their own interests. They will use, or might use, the power of their offices to raise the contributions they feel they need in order to campaign, and then do favors for their contributors when it is time to make policy. The second motivational premise is that *with* law, the situation can be improved. This is not the place to consider all of the assumptions about self-interest that go into the first premise. They are frequently overstated, but that is not relevant to the immediate point. The

second premise, however, about the utility of regulation, needs to be scrutinized.

In general, laws alter behavior in two ways: by articulating public standards of right and wrong, to guide those who are open to moral suasion; and by altering the self-interested calculations of those for whom moral suasion is not enough. While logically distinct, the two mechanisms intertwine. Many people might be willing to limit their behavior, but only if others do so, too. They will abide by fair rules but do not want to be played for suckers. An election is not like a sporting event or a commercial law suit. If one candidate wins by bending the rules, there is no way for the loser to call for a replay, or to sue to be "made whole." In campaign finance law, as with other regulations, most people try to abide by the law, but the law they will accept is the law as they think others will understand and enforce it in practice. They use this practical rule of thumb because they are intent primarily on pursuing their own goals, which are not the same as those of the law's strongest sponsors. They generally act legally, but they will stretch the law's boundaries — sometimes beyond recognition. In the process, their actions show how elusive were the sponsors' original ends, and how often these ends were in conflict.

This book argues that many of the problems the country has been experiencing with campaign finance law stem from a lack of clarity about purpose, a lack of honesty about trade-offs, excessive ambitiousness on the part of reformers, persistent mismatches between means and ends, and an almost naive unwillingness to design laws with an eye toward how they will be received and used by political professionals. Successes are not usually given due credit because they fail to achieve unrealistic goals; the goals themselves, when unrealistic, breed their own failures.

Of course, campaign finance law is not the only policy arena in which laws use uncertain means to pursue unclear ends. Rarely does every part of a legislative majority want exactly the same things, for exactly the same reasons; and the more complex a bill, the more likely the problem. Future disputes over budgets and administrative actions inevitably reflect the original ambivalence.[2] The problem is not confined to campaign finance reform. Nevertheless, campaign finance law bears an additional burden. In this area, new ideas become law after the public is aroused to be suspicious of politicians. But passing a law is only the first step of a long process. The new laws typically involve complex assump-

tions about means and ends. They call for multiple, and highly complicated, sequences of steps that would be tough to carry out under the best of circumstances. Some of these steps will conflict with deeply held principles, such as those underlying the freedoms of speech and association. Moreover, the administrative resources for implementing the law will have to be allocated by elected officials whose interests the laws will directly affect — and perhaps contravene. Thus, new laws passed in the midst of harsh rhetoric about the villainy of politicians seem to rest for their implementation on an unexamined faith in the power of virtue — whether that of a public expected to exercise its civic watchfulness, through disclosure, so as to rein in undesirable activities, or that of public officials who are expected to support implementation when the public is not looking. Either way, the formula seems almost to beg for a Machiavellian critique of its internal logic.

We make these observations, and have written the book that flows from them, with a sense of urgency. For more than two decades, campaign finance regulation has been based on the assumption of a candidate-centered system for financing elections and conducting election campaigns. During the 1996 election campaign, it became obvious to everyone just how fallacious that premise has become. The point was well stated in the opening paragraph of a 1997 report issued by a Task Force on Campaign Finance Reform sponsored by the University of Southern California's Citizens' Research Foundation:

> For the last generation or more, candidates have controlled their own campaigns as long as they could raise the money necessary to pay for them. . . . However, the candidate-centered campaign no longer occupies center stage. . . . In 1996, the campaigns exploded well beyond what we used to think of as their boundaries — at least the boundaries the authors of the Federal Election Campaign Act of 1974 assumed and within which regulation [since then] has gone forward.[3]

Almost all knowledgeable observers seem to agree on this point: The old regulations failed to contain campaign activities within their old confines. And yet, many supposedly new proposals on the agenda — even ones labeled "radical" by their supporters — seem largely to be refinements of the old set of assumptions. We were not willing to begin from such assumptions; at the very least, they need a fresh look. Fortunately for the sake of an analyst, most states have enacted major revi-

sions to their campaign finance laws over the same years as Congress has deadlocked. The more ambitious of these laws are even being promoted as models for others to follow. We decided, therefore, to take a look at state campaign finance law to see what new approaches — or perhaps what new lessons about old approaches — we might discover.

The attitude we took into the study is symbolized by the book's title: The Day *After* Reform. Changing an election system requires something more than just rewriting a statute. It means putting a *system* in place that will continue to perform as intended long after its sponsors have claimed credit and turned their attention elsewhere. After the flush of a legislative victory, the political climate that supported reform typically becomes a thing of the past. The public's attention wanes, support for the relevant administrative agency flags, and the large organizations that have a stake in maintaining their political influence search for ways to adapt to — or get around — the new regulations.

No campaign finance reform, however attractive, can ever work like a magic bullet. The proposals all have many provisions; the provisions aim at more than one goal; and the paths to those goals go through many intermediate steps. Even if all of the assumptions make sense, a failure at any one of the intermediate steps will mean a breakdown. Metaphorically, therefore, instead of a magic bullet, we suggest thinking about links in a chain, any one of which might snap. In the chapters that follow, we break each major strand of campaign finance reform (disclosure, contribution limits, spending limits, public financing) into its own such chain. Our purpose is to ask what it would take for a political community to achieve the results that a law's original sponsors say that they want. We also thought it important to recognize that the same legal change might work differently when applied to different electoral offices or districts, each having its own election dynamics. And to make matters more complicated, the same legal change will not have the same effects over time, as changes in the political environment will combine with adaptations on the part of the organizations affected by reform to influence the way a law works out in context.

To present our analysis, we begin this book in Chapter 2 with a review of state laws and their administration. State laws have become more complex over the past two decades, using ever more complex means to reach increasingly ambitious ends. Yet, the meager resources given to state agencies to implement these laws have remained stagnant, and bear no relationship to the legal tasks the agencies are asked to per-

form. The implications of these facts are traced over the next several chapters, on disclosure, public financing, interest groups, political parties, and competition. The third and fourth chapters discuss the many steps and potential pitfalls between a law on the books and a program that works. Chapter 3 is about what should be the simplest of campaign finance objectives, public disclosure. Chapter 4 concentrates on the simpler stages in a far more complicated set of programs of public funding for political parties and candidates. The three succeeding chapters look at some of the most ambitious objectives in campaign finance law —equalizing political power, limiting campaign spending, and promoting competition. The first two of these are the main themes of the chapters on interest groups (Chapter 5) and political parties (Chapter 6); competition is the subject of Chapter 7. The final chapter summarizes our findings and presents some ideas for a new and more sober approach toward campaign finance regulation.

Our material draws on four major types of information. To summarize trends in state campaign finance law, we developed a database summarizing the laws of all fifty states from 1970 to the present, based on several sources, including the statutes themselves.[4] For administrative resources, we conducted a survey of the fifty state agencies responsible for campaign finance law. The rest of the book adds two other kinds of sources. One is a series of databases we built that combine election results with candidate-level campaign finance information for all legislative candidates in selected states and years. (We used agency reports for data about other candidates and activities.) The other is a series of transcribed interviews we did with dozens of active legislators, lobbyists, political party officials, election administration officials, and journalists in visits to several state capitals. The states we visited did *not* reflect the full range of campaign finance experience. Because we wanted to concentrate on how organizations adapted to legislative change, we focused on states with ambitious regulatory frameworks. These are the situations that best permit us to extrapolate what we found to the likely campaign environment of the future.

Endnotes

1. Alexander Hamilton, James Madison, and John Jay, *The Federalist*, no. 51 (Madison) (New York: Mentor, 1961), p. 322.
2. For an analysis of how the flow of legislative politics in the United States often leads either to vague laws or to laws whose separate sections pursue

conflicting goals, see Robert T. Nakamura and Frank Smallwood, *The Politics of Policy Implementation* (New York: St. Martin's Press, 1980), chap. 3, esp. pp. 38-39. Also see James Q. Wilson, *Bureaucracy: What Government Agencies Do and Why They Do It* (New York: Basic Books, 1989), pp. 246-48.

3. Citizens' Research Foundation, *New Realities, New Thinking: Report of the Task Force on Campaign Finance Reform* (Los Angeles, CA: Citizens' Research Foundation, University of Southern California, 1997), p. 1. One of this book's authors, Michael Malbin, was also one of the nine scholars on the task force.

4. The major sources included the 1979, 1984-85, 1988-89, and 1993 editions of *The COGEL Blue Book* (Lexington, KY: The Council of State Governments); various editions of *Campaign Finance Law . . . A Summary of State Campaign Finance Laws with Quick Reference Charts*, published by the U.S. Federal Election Commission's National Clearinghouse on Election Administration; Herbert E. Alexander, Eugene R. Goss, and Jeffrey A. Schwartz, *Public Financing of State Elections* (Los Angeles, CA: Citizens' Research Foundation, University of Southern California, 1992); and copies of state statutes obtained directly from state agencies. For a survey published as we were starting our work, see Frederick M. Herrmann and Ronald D. Michaelson, "Financing State and Local Elections: Recent Developments," in *The Book of the States, 1994-95* (Lexington, KY: The Council of State Governments, 1994).