The Forty-Year War on Money in Politics: Watergate, FECA, and the Future of Campaign Finance Reform

ANTHONY J. GAUGHAN*

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I. INTRODUCTION

In 1974, public outcry over the Watergate scandal prompted Congress to enact sweeping amendments to the Federal Election Campaign Act (FECA).1 Among other things, the FECA amendments established limits on contributions to candidates, imposed an overall cap on campaign expenditures, and created the Federal Election Commission (FEC) to enforce federal campaign finance law.2 In the landmark 1976 case of Buckley v. Valeo, the Supreme Court struck down the expenditure caps but upheld the other key features of the Act.3 Federal campaign finance law has been based on a model of low contribution limits and unlimited expenditures ever since.

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1 FRANK J. SORAUF, INSIDE CAMPAIGN FINANCE 2, 7–8 (1992) (observing that the 1974 amendments were “the immediate consequence of Watergate and the misdeeds of Richard Nixon’s Committee to Reelect the President”).
2 Id. at 9–10.
The United States now has forty years of experience with the post-Watergate campaign finance system. That long experience provides sufficient evidence to ask and answer a fundamental question: Are we better off today than we were before the Watergate era campaign finance reforms?

The thesis of this Article is that the answer to that question is no. In fact, in many respects, the current system is worse than that which prevailed before Watergate. And although many place the blame on the 2010 case of Citizens United v. FEC,4 which cleared the way for the rise of Super PACs,5 most of the failings in the American campaign finance system were apparent long before Citizens United.

The root of the problem is Buckley itself. The Buckley decision created a hybrid campaign finance system, a Frankenstein monster of mismatched laws, some that regulated campaign contributions and others that deregulated them. As a consequence of Buckley, the Watergate reforms not only failed to limit the influence of money in politics, they had the paradoxical effect of making fundraising more important than ever. By establishing contribution limits without a corresponding expenditure cap, federal campaign finance law forces members of Congress to spend much of their work week raising huge amounts of money in ludicrously small increments. The time and energy that officeholders devote to fundraising has fundamentally undermined the legislative process. The result is a deeply dysfunctional system that gives the United States the worst consequences of regulation and deregulation without the benefits of either.

Political and constitutional realities prevent the nation’s elected officials from addressing the problem. Although Congress could adopt deregulation on its own without court intervention, the public’s overwhelming support for campaign finance regulation6 makes legislative deregulation a political nonstarter. Conversely, the Supreme Court has barred Congress from acting on popular support for comprehensive reform of the system. The reason is the Buckley ruling prohibits Congress from establishing limits on overall campaign spending, such as those adopted years ago by most other western

4 Citizens United v. FEC, 558 U.S. 310, 365 (2010) (“No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.”).
democracies. And while a constitutional amendment overturning *Buckley* is a theoretical possibility, the immense practical challenge of amending the Constitution renders it an unrealistic option for campaign finance reform.

Accordingly, the Supreme Court occupies the only branch of government in a position to end the constitutional stalemate that has paralyzed the American campaign finance system for forty years. The most reasonable and practical long-term solution is for the Supreme Court to either permit comprehensive campaign finance regulation or, conversely, require sweeping deregulation. To resolve the deadlock, the Justices must finally provide a clear and definitive answer to the central question in American campaign finance law: does the First Amendment permit broad and all-encompassing campaign finance regulations, or does it instead require full deregulation?

This Article concludes that, contrary to the polarizing rhetoric that surrounds the national debate over campaign finance law, the historical record indicates that both reformers and their opponents offer reasonable policy alternatives to the dysfunctional system that prevails today. For example, twentieth-century political history at the federal level and ongoing experience at the state level demonstrate that a deregulated campaign finance system does not lead inevitably or necessarily to plutocracy. At the same rate, however, Canada’s experience with expenditure caps shows that robust political debate and high levels of incumbent turnover are possible even within a comprehensively regulated campaign finance environment. The bottom line is either approach—comprehensive regulation or sweeping deregulation—is preferable to the hybrid campaign finance system that governs American elections today.

II. A THIRD-RATE BURGLARY

The modern history of American campaign finance law began in the early morning darkness of June 17, 1972. Shortly after midnight, five burglars broke into the Democratic National Committee (DNC) headquarters at the Watergate

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9 On the central role of the Supreme Court in determining the future of campaign finance reform, see Hasen, *Plutocrats United*, supra note 8, at 176–89.
Office Complex. The burglary was foiled by an alert security guard who discovered evidence of the break-in while the burglars were still inside the building. When metropolitan police officers arrived at the Watergate and entered the DNC offices, the burglars surrendered without incident.

But as the arresting officers later testified, the police immediately recognized that this was “a little bigger than the average burglary.” Indeed, there was nothing ordinary about the Watergate burglars. They wore business suits and blue latex surgical gloves. Even more intriguing was what they carried with them: electronic eavesdropping devices, cameras, a walkie-talkie, burglary tools, and a police radio scanner. But the most important and revealing clue was money. Police found $1,700 in cash on the burglars and another $3,500 in cash in the burglars’ rooms at the Watergate Hotel. A large portion of the cash was in the form of $100 bills with serial numbers in sequential order.

Justice Department investigators and Washington reporters recognized that the key to solving the riddle of Watergate was to “follow the money.” Although the Nixon Administration downplayed Watergate’s significance by ridiculing it as a “third-rate burglary,” the FBI traced the cash to a Miami bank account that the President’s campaign committee had used to launder thousands of dollars in secret and illegal contributions. The money thus directly tied the President’s reelection campaign to the Watergate burglary.

The Watergate investigation reached the Oval Office in the spring of 1973. After the Senate established a special committee to investigate election

11 Id., supra note 10, at 132–33.
12 Id. at 135–36.
13 Lukas, supra note 10, at 287.
14 Id.
16 Lukas, supra note 10, at 287.
20 Herbert E. Alexander, Financing the 1972 Election 460–61 (1976); Emery, supra note 10, at 111–12, 188.
21 Emery, supra note 10, at 188.
practices during the 1972 campaign, John Dean, the White House Counsel, and Jeb Stuart Magruder, the deputy director of the President’s reelection campaign, began to cooperate with government investigators.\footnote{\textit{Olson}, supra note 15, at 77.} Dean revealed that the President and his top aides had participated in an illicit effort to conceal the burglars’ ties to the Administration.\footnote{\textit{SuSkman}, supra note 15, at 228–30.} Later that summer, White House staffer Alexander Butterfield disclosed to Senate investigators the existence of an Oval Office audiotaping system.\footnote{\textit{Emery, supra} note 10, at 367–69.} The investigation triggered a constitutional crisis when President Nixon defied congressional and judicial subpoenas by refusing to turn over Watergate-related audiotapes.\footnote{\textit{Stanley I. Kutler, The Wars of Watergate: The Last Crisis of Richard Nixon} 388–90, 510, 513–14 (1990).} He claimed that the doctrine of executive privilege empowered him to withhold the tapes from disclosure to Congress or the courts.\footnote{\textit{Theodore H. White, Breach of Faith: The Fall of Richard Nixon} 3–5, 255–57 (1975).}

The Watergate scandal reached a dramatic climax in July 1974 when the Supreme Court ruled against the President.\footnote{United States v. Nixon, 418 U.S. 683, 702 (1974).} Nixon knew the ruling spelled his political doom because the tapes contained evidence of his personal involvement in the cover-up.\footnote{\textit{Olson, supra} note 15, at 134.} Faced with the certainty of impeachment in the House and conviction in the Senate, Nixon resigned the presidency on August 9, 1974.\footnote{\textit{Bob Woodward & Carl Bernstein, The Final Days} 451 (1976).}

Watergate remains today the most famous and momentous political scandal in American history. It ended a presidency and shook the United States government to its foundations. But Watergate also represents a key turning point in campaign finance law. Forty years after Nixon’s resignation, the admonition to “follow the money” is useful for anyone seeking to understand Watergate’s impact on American election law.

The Watergate scandal shined a light on dark secrets of the American campaign finance system.\footnote{\textit{Dean, supra} note 17, at 5–6; \textit{Lukas, supra} note 10, at 212; \textit{Olson, supra} note 15, at 45; \textit{SuSkman, supra} note 15, at 9.} In 1972, the Nixon campaign spent what at the time was an unprecedented amount of $67 million,\footnote{\textit{Id.} at 49–54; \textit{Emery, supra} note 10, at 109.} much of which the Administration failed to disclose publicly.\footnote{\textit{Id.} at 49–54; \textit{Emery, supra} note 10, at 109.} Watergate investigators discovered that Nixon’s secret donations included $850,000 in illegal corporate campaign contributions.\footnote{\textit{Alexander, supra} note 20, at 78–79.} The companies that made the illegal contributions included some of the most prominent corporations in the country, such as American Airlines, Anheuser-Busch, 3M, Chrysler, Disney,
DuPont, Goodyear Tire, and Gulf Oil, among others. Watergate investigators learned that many corporations felt pressured by the Administration to make campaign contributions. George Spater, chairman of American Airlines, explained that his company gave to the Nixon campaign “in fear of what could happen if [donations] were not given.”

When Nixon’s crimes came to light, the Watergate scandal crystallized in the public mind the notion that campaign contributions were inherently corrupting. Former Delaware Senator John J. Williams reflected the public mood when he asserted that “the reprehensible, clandestine political acts connected with Watergate were financed and made possible by an excess of campaign donations, many of them secretly and illicitly obtained.” Likewise, during testimony before the Senate, Jeb Stuart Magruder blamed the presence of “[t]oo much money” in the Nixon campaign coffers as the ultimate cause of the Watergate break-in.

Even Richard Nixon himself recognized that Watergate had added critical momentum to the cause of campaign finance reform. In May 1973, as the Watergate scandal began to consume his Administration, Nixon expressed shock at the “recent disclosures of widespread abuses” during the 1972 election. The President called for the creation of a nonpartisan commission to “examine the costs and financing of campaigns” and to find “ways in which the costs can be kept down and improper influence or influence-seeking through large campaign contributions can be ended.” Nixon declared that “sweeping” campaign finance reform was necessary “to restore the faith of the American people in the integrity of their political process.”

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36 120 CONG. REC. 26196 (1974) (extension of remarks of Hon. William J. Green (quoting George Spater)).
38 120 CONG. REC. 9270 (statement of Sen. John J. Williams).
39 Id. at 34387 (statement of Sen. Hubert Humphrey (quoting Jeb Stuart Magruder)).
42 Id. at 535–36.
Needless to say, Nixon’s belated endorsement of reform lacked even a trace of sincerity. During his presidency, he blocked efforts to make significant changes in the campaign finance system. But President Nixon aided the cause of reform in one crucial respect: his fundraising practices created such intense public outrage that the stage was set for a new era in American campaign finance law.

III. The War on Money in Politics Begins

As the Watergate scandal brought down Nixon’s presidency, Congress took up the issue of how to reform federal campaign finance law. The Watergate era reform proposals were not the first to come before Congress. Throughout the twentieth century, reformers had attempted to reduce the influence of money on political campaigns, but they had little to show for their efforts.

The laws looked strict on paper. In 1907, Congress banned corporate contributions to candidates in federal elections. In 1910, Congress enacted the Federal Corrupt Practices Act (FCPA), which required the national party committees and multistate committees to disclose the campaign contributions they received and the expenditures they made in House elections. In subsequent amendments to the FCPA, Congress established expenditure caps on Senate and House campaigns as well as on the national parties, imposed contribution limits on individual donations to federal candidates and political committees, increased disclosure requirements, and prohibited corporations and labor unions from engaging in independent political expenditures in federal elections.

The reforms failed in virtually every respect. As the historian Lewis Gould pointedly noted of the FCPA, “So many loopholes existed in the law that it soon became a mere formality to which few politicians paid more than...

44 MARIAN CURRENDER, MONEY IN THE HOUSE: CAMPAIGN FUNDS AND CONGRESSIONAL PARTY POLITICS 20 (2009); Mutch, supra note 34, at 137–38; Zelizer, supra note 37, at 99.
45 LA RAJA, supra note 43, at 45.
46 Id. at 50–51; Mutch, supra note 34, at 48–51.
49 Hasen, supra note 43, at 348.
appropriate lip service.” 50 Indeed, from 1910 to 1974 federal campaign finance law was honored more in the breach than in the observation. 51 No agency had responsibility for regulating federal campaign finance laws. 52 Although federal law required members to report campaign receipts and expenditures, Congress collected the information in haphazard fashion and concealed it from public view. 53 As a result, candidates routinely failed to file disclosure reports and party and candidate committees perennially ignored expenditure limits. 54 Donations far in excess of federal contribution limits were commonplace. Even when donors and candidates complied with the FCPA’s technical requirements, loopholes in the law made it easy to circumvent the contribution limits by donating to multiple committees that supported the same candidate. 56 A 1941 Justice Department investigation concluded that federal campaign finance law was “fatally defective” and “unenforceable.” 57 The situation was no different a quarter century later. In 1967, President Lyndon Johnson bluntly observed that campaign finance laws were “[m]ore loophole than law, they invite evasion and circumvention.” 58

Accordingly, on the eve of Watergate, pressure began to build for Congress to take action. 59 In 1971, Congress repealed the FCPA and enacted in its place the Federal Election Campaign Act. 60 FECA eliminated the FCPA’s contribution and expenditure limits, replacing them with caps on media expenditures, enhanced public disclosure of fundraising and campaign

51 La Raja, supra note 43, at 54; Sorauf, supra note 1, at 5–6; Corrado, supra note 47, at 15.
52 La Raja, supra note 43, at 54–55.
53 Id. at 54–55, 66; see also The American Congress: The Building of Democracy 313 (Julian E. Zelizer ed., 2004); Sorauf, supra note 1, at 6.
54 Corrado, supra note 47, at 15–17.
55 Herbert E. Alexander, Financing Politics: Money, Elections, and Political Reform 49 (2d ed. 1980); Sorauf, supra note 1, at 3–4; Corrado, supra note 47, at 15–17.
56 Robin Kolodny, Pursuing Majorities: Congressional Campaign Committees in American Politics 127 (1998); La Raja, supra note 43, at 61, 130; Corrado, supra note 47, at 15.
58 Steven M. Gillon, “That’s Not What We Meant To Do”: Reform And Its Unintended Consequences in Twentieth-Century America 201 (2000) (quoting President Lyndon Johnson).
60 La Raja, supra note 43, at 72–75; Sorauf, supra note 1, at 7–9; Corrado, supra note 47, at 20–22.
spending, and limits on the amounts that candidates could contribute to their own campaigns.\textsuperscript{61}

But the 1971 version of FECA never got off the ground. Candidates and parties flouted the new law before it even went into effect. For example, during the five weeks between the FCPA’s expiration on February 29, 1972 and FECA’s effective date of April 7, 1972, the Nixon Administration raised $11.4 million in secret contributions.\textsuperscript{62} After its implementation date, FECA did nothing to contain campaign costs as presidential election spending rose from $44 million in 1968 to $103 million in 1972.\textsuperscript{63}

Although FECA lacked teeth, the events of 1972 fundamentally transformed the political dynamics of the campaign finance debate.\textsuperscript{64} During the ’72 campaign, Nixon enjoyed a huge financial advantage over his Democratic challenger, George McGovern.\textsuperscript{65} The Nixon-McGovern race culminated a decade in which Democrats experienced growing fundraising problems even as they won Congressional elections.\textsuperscript{66} The Vietnam War and the civil rights movement\textsuperscript{67} profoundly divided the Democratic Party, with its divisions put on full display during the Party’s chaotic 1968 convention in Chicago.\textsuperscript{68} Those internal divisions undermined Democratic fundraising so severely that the national party was $9 million in debt even as Democrats maintained large majorities in the House and Senate.\textsuperscript{69} The possibility that Republicans could use their fundraising advantage to take control of Congress persuaded Democrats to support restrictions on the flow of campaign money.\textsuperscript{70}

The Watergate scandal thus broke at an ideal time for reformers. Public outrage at Nixon’s crimes generated enormous pressure on Republicans to accept comprehensive reform of the system.\textsuperscript{71} Newspapers throughout the country rallied to the cause of reform. Citing Watergate’s “sordid” revelations, the \textit{New York Times} declared, “Now is the time for a full and fundamental cleansing of the nation’s outmoded, corrupt system of financing public

\textsuperscript{61}La Raja, supra note 43, at 72–75; Mutch, supra note 34, at 130–31; Corrado, supra note 47, at 20–22.

\textsuperscript{62}Alexander, supra note 20, at 459.

\textsuperscript{63}Corrado, supra note 47, at 21–22.


\textsuperscript{65}Alexander, supra note 20, at 78–79.

\textsuperscript{66}La Raja, supra note 43, at 66–75.

\textsuperscript{67}David Farber, \textit{Chicago ’68}, at 94 (1988); La Raja, supra note 43, at 72.


\textsuperscript{70}La Raja, supra note 43, at 66–75; Sorauf, supra note 1, at 7.

\textsuperscript{71}La Raja, supra note 43, at 75.
elections with private money.” The Philadelphia Inquirer called for a “revolution” in campaign finance law to end “the need for money, in huge quantity, that corrupted the 1972 electoral process beyond the grimmest, most cynical limits of previous imagination.”

The reform groundswell finally forced Congress to act. In 1973 and 1974 Congress debated amendments to FECA that would revolutionize federal election law. The proposed amendments included limits on contributions to candidates, an expenditure cap on congressional and presidential elections, public financing of congressional and presidential campaigns, and the creation of the Federal Election Commission to enforce the new laws.

Supporters of the FECA amendments argued that they would reduce corruption and restore public confidence in government. Senator Joe Biden warned that the “high cost of running, places even the most innocent candidate in the position of being in the pocket” of campaign contributors. Emphasizing the importance of driving money out of politics, Senator Hubert Humphrey declared, “Big money, large private contributions, and the amount of money a politician can raise should not be permitted to continue as a key to election day success.” Senator Ted Kennedy asserted that campaign finance reform was “the most positive contribution Congress can make to end the crisis over Watergate, and restore the people’s shattered confidence in the integrity of their Government.” Others advocated reform in order to promote a more diverse Congress. “[W]e will never have a Congress that truly reflects the diversity of the American electorate as long as money dominates political campaigns,” insisted Representative Bella Abzug. “Congress will remain—as it is—a predominantly segregated club of white-skinned, upper-middle-class males as long as qualified candidates are precluded from seeking elective office solely because they lack personal wealth or access to the wealth of others.”

The reformers also emphasized the adverse impact fundraising had on the day-to-day activities of elected officials. Senator Humphrey declared that “[i]t is time we stopped making candidates for Federal office spend so much of their time, energy and ultimately their credibility, on the telephone calling friends or committees, meeting with people, and oftentimes begging for money.” Humphrey lamented that “[s]crounging for funds to bring your case to the electorate is a demeaning experience,” one that he viewed as “the most

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72 Editorial, The Time is Now, N.Y. TIMES, Mar. 27, 1974, at 42.
73 120 CONG. REC. 26195 (1974).
74 LA RAJA, supra note 43, at 75–77.
75 Id.
77 120 CONG. REC. 8453 (statement of Sen. Hubert Humphrey).
78 Id. at 8209 (statement of Sen. Ted Kennedy).
79 Id. at 27510 (statement of Rep. Bella Abzug).
80 Id.
81 Id. at 8453 (statement of Sen. Hubert Humphrey).
demanding, disgusting, depressing and disenchanting part of politics.\textsuperscript{82} He concluded that the FECA amendments bill “gives us our best chance ever of cleaning up our politics.”\textsuperscript{83}

The drumbeat for reform did not receive universal acclaim. Critics in Congress and academia warned that the proposed amendments violated the First Amendment and would deny Congressional challengers access to sufficient campaign funds. For example, Yale Law Professor Ralph K. Winter argued that the proposed expenditure cap “sets a maximum on the political activities in which American citizens can engage.”\textsuperscript{84} He also condemned contribution limits as “an explicit restriction on political freedom” that “establishes a dangerous precedent” of government regulation of freedom of speech and association.\textsuperscript{85} Winter concluded that “[t]here is no room for price controls in the marketplace of ideas.”\textsuperscript{86} The leading Senate opponent of the 1974 amendments was Senator James Buckley of New York.\textsuperscript{87} The Republican senator described the amendments as an act of “cynicism” that should be retitled the “Incumbent Protection Act of 1974.”\textsuperscript{88} Buckley warned of the practical effects of the proposed restrictions, asserting that “[t]he artificially low spending limits are demonstrably inadequate and will keep challengers from getting off the ground in House, Senate and, yes, Presidential races.”\textsuperscript{89} Buckley predicted that the Supreme Court would strike down both the proposed expenditure caps and the contribution limits on First Amendment grounds.\textsuperscript{90}

Crucially, however, the public supported the reform proposals. A 1973 Harris Poll found that nearly 90% of Americans believed campaign spending was excessive and about 70% supported contribution limits.\textsuperscript{91} Most striking of all, a September 1973 Gallup Poll found that 65% of Americans supported public financing of federal campaigns and a complete ban on private contributions.\textsuperscript{92}

The steady drumbeat of new revelations about Nixon’s fundraising practices made support for reform irresistible in Congress.\textsuperscript{93} On August 8, 1972, Congress passed the FECA amendments.\textsuperscript{94} 

\textsuperscript{82} Id.
\textsuperscript{83} Id. 120 Cong. Rec. 8453 (statement of Sen. Hubert Humphrey).
\textsuperscript{84} RALPH K. WINTER JR., WATERGATE AND THE LAW: POLITICAL CAMPAIGNS AND PRESIDENTIAL POWER 27 (1974).
\textsuperscript{85} Id.
\textsuperscript{86} Id.
\textsuperscript{87} Hasen, \textit{supra} note 43, at 355.
\textsuperscript{88} Id. 120 Cong. Rec. 8201, 34384 (statement of Sen. James Buckley).
\textsuperscript{89} Id. at 34384.
\textsuperscript{90} Id. at 34385.
\textsuperscript{93} SORAUF, \textit{supra} note 1, at 8.
1974—one day before Nixon resigned the presidency—the House approved the FECA amendments by a vote of 355 to 48.94 Two months later, the Senate passed the FECA amendments by a margin of forty-four votes.95 On October 15, a reluctant President Gerald Ford signed into law sweeping amendments to the Federal Election Campaign Act of 1971.96

The 1974 FECA amendments transformed American campaign finance law. They established a per election limit of $1,000 on contributions to federal candidates; imposed a total aggregate biennial limit of $25,000 in total contributions by a single donor to all federal candidates and committees; limited total campaign expenditures by presidential and congressional candidates; restricted independent campaign expenditures to $1,000 per individual; mandated public disclosure of campaign contributions; created a presidential public financing system; and established the Federal Election Commission to enforce federal election law.97

As it turned out, however, the most important campaign finance development of the Watergate era did not come in Congress. It came in the Supreme Court. Before the 1974 amendments could be implemented, a diverse group of plaintiffs, including Senator Buckley, former Democratic Senator Eugene McCarthy, and the American Civil Liberties Union,98 brought a constitutional challenge in a January 1975 lawsuit in the United States District Court for the District of Columbia.99 Although they spanned the ideological spectrum, the plaintiffs shared a common fear that FECA could be used to silence political dissent. As Buckley later explained, “What we had in common was a concern that the restrictions imposed by the new law would squeeze independent voices out of the political process by making it even more difficult than it already was to raise effective challenges to the political status quo.”100

Although Buckley opposed the new version of FECA, he persuaded his colleagues to include in the 1974 bill a provision for expedited judicial review

94 120 CONG. REC. 27513–14.
95 Id. at 34392. The final vote was 60 in favor, 16 opposed, 2 votes paired, and 23 senators did not vote. Id. The House voted on the conference report two days later. See id. at 35148–49. The final vote was 365 ayes, 24 noes, 1 vote “present,” and 44 representatives did not vote. Id.
100 Hasen, supra note 43, at 356 (quoting Senator James Buckley).
of the new law’s constitutionality.\(^{101}\) Ironically, however, the complexity of the new procedures caused confusion, leading to several months of delay while the federal courts determined the proper procedure for hearing the lawsuit.\(^{102}\) When the case finally reached an en banc panel of the United States Court of Appeals for the District of Columbia Circuit, a narrow majority of the judges upheld the most important provisions of the amendments, including the expenditure caps.\(^{103}\) The majority held that “given the power of money and its various uses, and abuses, in the context of campaigns, there is a compelling interest in its regulation notwithstanding incidental limitations on freedom of speech and political association.”\(^{104}\)

The D.C. Circuit’s ruling, however, represented little more than a placeholder. As a result of the expedited review process, the Supreme Court would rule on the FECA amendments just five months later. As Professor Richard Hasen has noted, “[T]he Court felt pressure to decide the case before the 1976 presidential election season.”\(^{105}\)

In January 1976, the Supreme Court handed down its decision in the case of *Buckley v. Valeo*.\(^{106}\) In a complicated and sprawling 294-page\(^{107}\) per curiam opinion, the Justices upheld FECA’s limits on contributions to candidates.\(^{108}\) The lessons of Watergate shaped the Court’s approach to FECA. In *Buckley*, the Justices acknowledged the potentially corrupting influence of campaign contributions, warning in particular of large contributions “given to secure a political *quid pro quo* from current and potential office holders.”\(^{109}\) Although the Court did not mention Nixon by name, the Justices emphasized that “the deeply disturbing examples surfacing after the 1972 election” demonstrated that the threat of corruption from campaign contributions “is not an illusory one.”\(^{110}\)

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\(^{104}\) *Id*. at 860.


\(^{108}\) *Buckley*, 424 U.S. at 20–21, 29, 143–44.

\(^{109}\) *Id*. at 26–27.

\(^{110}\) *Id*. at 27.
Having recognized the government’s compelling interest in preventing campaign corruption and the appearance of corruption, a majority of the Court concluded that FECA’s $1,000 contribution limit was a reasonable policy response. The majority contended that the $1,000 limit did not “undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues by individual citizens, associations, the institutional press, candidates, and political parties.”

Besides upholding contribution limits, the Court affirmed the creation of the FEC, the Act’s public financing provisions, and its disclosure requirements.

Momentously, however, the Buckley Court also struck down the caps on overall expenditures by candidates, parties, private individuals, and outside groups. The Court held that the restrictions on total spending violated the First Amendment rights of freedom of speech and association. The majority opinion warned that “a primary effect of these expenditure limitations is to restrict the quantity of campaign speech by individuals, groups, and candidates.” Such restrictions, the Justices held, “limit political expression ‘at the core of our electoral process and of the First Amendment freedoms.’”

The Court adamantly rejected the notion that the Constitution permitted Congress to level the playing field for all speakers, insisting that “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.” The expenditure caps, the Court concluded, impaired “the ability of candidates, citizens, and associations to engage in protected political expression, restrictions that the First Amendment cannot tolerate.”

The Buckley decision thus created a hybrid campaign finance model that consisted of low limits on contributions to federal candidates and parties but no overall limits on total election spending. The troubling practical implications of the Court’s reasoning were immediately apparent to two key dissenters in the Buckley case: Justice Byron White and Chief Justice Warren Burger. Although they took polar opposite positions on what was wrong with

111 See id. at 26–27.
112 Id. at 29.
113 Id.
114 It also ruled that the Commission’s members must be appointed consistent with Article II, Section 2 of the Constitution and could not be appointed by Congress, as originally provided for in the 1974 amendments. See Buckley, 424 U.S. at 113, 143.
115 Id. at 143.
116 Id. at 51, 54, 58–59, 143–44.
117 Id. at 54–58.
118 Id. at 39.
119 Id. (quoting Williams v. Rhodes, 393 U.S. 23, 32 (1968)).
120 Buckley, 424 U.S. at 48–49.
121 Id. at 58–59.
122 In response to Buckley, Congress further amended FECA in 1976 to extend contribution limits to political parties. See Corrado, supra note 47, at 27–28.
the majority’s opinion—Justice White argued for affirming FECA’s expenditure limits whereas Justice Burger advocated invalidating FECA’s contribution limits123—the two Justices agreed that the "Buckley" ruling created an unworkable campaign finance system.

In his dissent, Justice White sharply criticized the majority for striking down FECA’s expenditure limits, a ruling he believed was founded on the erroneous presumption that “a candidate has a constitutional right to spend unlimited amounts of money, mostly that of other people, in order to be elected.”124 In contrast to the majority, White saw the goal of leveling the campaign finance playing field as constitutionally permissible.125 He contended that expenditure caps offered a “commonsense” solution to the problem of well-funded candidates gaining an “overpowering advantage” over their rivals “by reason of a huge campaign war chest.”126 He also viewed the importance of maintaining public confidence in the government’s integrity as compelling justification for the expenditure caps.127

In particular, White chastised the majority for invalidating the expenditure caps without any empirical data regarding the real world consequences of FECA’s restrictions on campaign expenditures.128 The Court, he insisted, should have deferred to “the considered judgment of Congress” that FECA’s expenditure limits would not impair candidates’ ability to communicate with voters.129 Congress’s judgment impressed White as fundamentally sound. “At least so long as the ceiling placed upon the candidates is not plainly too low,” he reasoned, FECA would promote what White viewed as the constitutionally permissible goal of ensuring that election outcomes were not determined by “the difference in the amounts of money that candidates have to spend.”130

White brought a unique personal perspective to the case. Prior to joining the Supreme Court, he worked on many political campaigns, including serving as Colorado state chair for John Kennedy’s 1960 presidential campaign.131 Informed by that experience, White warned of the pernicious impact the "Buckley" majority’s low contribution limits/no expenditure caps model would have on the daily life of federal candidates and officeholders. He noted that one of the central purposes of FECA’s expenditure caps was to “ease the candidate’s understandable obsession with fundraising, and so free him and his

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123 Buckley, 424 U.S. at 259 (White, J., concurring in part and dissenting in part); id. at 235 (Burger, C.J., concurring in part and dissenting in part).
124 Id. at 266 (White, J., concurring in part and dissenting in part).
125 Id. at 265–66.
126 Id.
127 Id. at 265 (“It is critical to obviate or dispel the impression that federal elections are purely and simply a function of money . . . .”).
128 Id. at 261–64.
129 Buckley, 424 U.S. at 263, 265 (White, J., concurring in part and dissenting in part).
130 Id. at 265–66.
staff to communicate in more places and ways unconnected with the fundraising function.” However, White warned, the majority’s invalidation of the spending caps would force candidates back onto the fundraising “treadmill” and leave them with no choice but to undertake “the endless job of raising increasingly large sums of money.”

In his dissent, Chief Justice Burger took the exact opposite position, contending that the Court should have invalidated both the contribution and expenditure limits. But Burger shared White’s concern that Buckley’s split decision on contribution limits and expenditure caps created a dysfunctional and unworkable system. As Burger explained, “[T]he Court’s result does violence to the intent of Congress in this comprehensive scheme of campaign finance.” The Chief Justice was sharply critical of the majority’s indecisive, halfway ruling: “By dissecting the Act bit by bit, and casting off vital parts, the Court fails to recognize that the whole of this Act is greater than the sum of its parts.” The FECA that emerged from the Buckley decision bore no resemblance to the regulatory scheme Congress attempted to establish. “Congress intended to regulate all aspects of federal campaign finances, but what remains after today’s holding leaves no more than a shadow of what Congress contemplated,” Burger concluded. “I question whether the residue leaves a workable program.”

As Justice White warned, the Buckley decision’s most important feature was the fact that the Justices lacked empirical data on FECA’s real world effects. Although passed in October 1974, the FECA amendments did not go into effect until the 1976 election, after the Buckley ruling. Accordingly, as Laurence Tribe observed in 1978, the Supreme Court in Buckley found itself “working in a factual vacuum” and “was forced to indulge in more than a little empirical speculation about such issues as the circumvention of expenditure limits and the impact of those limits on campaign speech.” Nor did the Supreme Court’s Justices have political experiences of their own to rely on, with the notable exception of Justice White, who dissented from the majority’s ruling. In a 1976 law review article, Professor Daniel Polsby pointed out the revealing fact that the D.C. Circuit Court of Appeals, which affirmed the expenditure limits, was “unusually well endowed with members whose careers had given them first-hand experience in political campaigns.” In contrast,
Polsby observed, the Supreme Court Justices who invalidated FECA’s expenditure limits lacked “comparable political credentials” in their pre-Court biographies.\textsuperscript{142}

The next forty years would provide the empirical data that the Supreme Court lacked in \textit{Buckley}. Although the Supreme Court’s decision in \textit{Buckley} has been sharply criticized,\textsuperscript{143} it proved remarkably enduring. Subsequent cases would modify \textit{Buckley}, but none overturned its central holdings regarding contribution and expenditure limits. For example, in the 2010 case of \textit{Citizens United v. FEC}, the Supreme Court cleared the way for independent expenditure groups organized as political action committees (PACs) to receive unlimited contributions from donors.\textsuperscript{144} Although the \textit{Citizens United} decision created a storm of controversy,\textsuperscript{145} it did not change the two key features of the post-Watergate campaign finance model that FECA and \textit{Buckley} established: low contribution limits on candidates and parties but no overall expenditure caps.

The system that \textit{Buckley} created soon proved to be deeply dysfunctional. As the distinguished political scientist Frank Sorauf observed on the tenth anniversary of the \textit{Buckley} decision, “In their obsession with corruption of officials and their unconcern for the well-being of the electoral process” the Justices “framed a jurisprudence that was strangely, even quaintly, at odds with contemporary political realities.”\textsuperscript{146} The \textit{Buckley} Justices’ most serious failing, Sorauf noted, was the fact that “they never grasped the idea of a flow of money, which if stopped at one outlet would build up pressure at others.”\textsuperscript{147} Indeed, the last forty years of federal elections have demonstrated just how

\textsuperscript{142}Id.


\textsuperscript{144}On \textit{Citizens United} and Super PACs, see generally GARRETT, supra note 5; ZEPHYR TEOCHOUT, CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN’S SNUFF BOX TO CITIZENS UNITED 227–45 (2014); Richard Briffault, \textit{Super PACs}, 96 MINN. L. REV. 1644 (2012); and Richard L. Hasen, \textit{Super PAC Contributions, Corruption, and the Proxy War over Coordination}, 9 DUKE J. CONST. L. & PUB. POL’Y 1 (2014).


\textsuperscript{146}Sorauf, supra note 101, at 119.

\textsuperscript{147}Id.
profoundly the Supreme Court misunderstood the practical implications of its decision in *Buckley*.

**IV. BUCKLEY’S GHOST: THE FAILURE OF THE POST-WATERGATE CAMPAIGN FINANCE REFORMS**

The dysfunctional nature of America’s post-Watergate campaign finance system manifests itself in three principal ways. First, the foremost goal of the 1974 FECA amendments was to reduce the influence of money in politics, but *Buckley*’s invalidation of the expenditure caps ensured that campaign costs would soar. Second, the pernicious interaction of FECA’s low contribution limits with *Buckley*’s prohibition on expenditure caps forced members of Congress to focus on fundraising rather than legislating. Third, and finally, FECA’s low contribution limits utterly failed to arrest the public’s lack of confidence in the government’s integrity. The ironic result was FECA and *Buckley* created a system even worse than the pre-Watergate campaign finance system.

**A. Why Buckley, Not Citizens United, Created the Era of Skyrocketing Campaign Costs**

The overriding goal of the Watergate reforms was to reduce the role of money in American election campaigns.\(^{148}\) Congressional election spending, which had begun to grow in the 1960s, reached a then-record total of $98 million in campaign expenditures in 1972.\(^{149}\) Campaign finance reformers argued that contribution and expenditure limits would end the money chase.\(^{150}\) As Senator Hubert Humphrey explained during the Senate debate on the FECA amendments, the reforms were intended to free politicians from having to “spend so much of their time, energy and ultimately their credibility . . . begging for money.”\(^{151}\)

But the 1974 amendments never got the opportunity to stem the tide of money in politics. By striking down expenditure caps, the Supreme Court’s *Buckley* decision guaranteed that the money floodgates would remain open in American election campaigns. Justice White predicted precisely that development in his dissenting opinion in *Buckley*. He warned that “[w]ithout limits on total expenditures, campaign costs will inevitably and endlessly escalate.”\(^{152}\)

Just as White anticipated, federal campaign costs soared in the elections immediately following the *Buckley* decision. Total expenditures for House

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\(^{148}\) Polsby & Wildavsky, supra note 39, at 54.

\(^{149}\) Alexander, supra note 20, at 78.


\(^{151}\) Id. (statement of Sen. Hubert Humphrey).

\(^{152}\) Buckley v. Valeo, 424 U.S. 1, 264 (1976) (White, J., concurring in part and dissenting in part) (per curiam).
candidates shot up from $44 million in 1974 to $86 million in 1978 to $174 million in 1982.\textsuperscript{153} Senate spending increased just as fast. Total expenditures for Senate candidates rose from $28 million in 1974 to $64 million in 1978 to $114 million in 1982.\textsuperscript{154} The increase in federal election spending far exceeded the rate of inflation.\textsuperscript{155} In just the two years between the 1976 and 1978 elections, the cost of House and Senate races increased by 44% and 70%, respectively.\textsuperscript{156} Overall, average campaign expenditures by House candidates nearly tripled between 1974 and 1984.\textsuperscript{157} The number of expensive races also grew exponentially. In 1974, only ten House candidates spent $200,000 or more on their campaigns; by 1980, 205 House candidates spent more than $200,000.\textsuperscript{158} In 1982, sixty-seven House candidates spent more than half a million dollars each on their campaigns.\textsuperscript{159}

Ironically, the burden fell particularly heavily on challengers.\textsuperscript{160} FECA’s critics had claimed that expenditure caps would harm challengers,\textsuperscript{161} but instead the reverse proved true. In the absence of expenditure limits, incumbents possessed a huge and growing fundraising advantage.\textsuperscript{162} In 1980, the average cost of a successful challenge to a House incumbent was 242% more than it was in 1974.\textsuperscript{163} Similarly, in 1980 it cost on average $353,000 to defeat a Republican House incumbent and $341,000 to defeat a Democratic House incumbent.\textsuperscript{164} By 1990, the average House incumbent spent approximately four times as much as the average challenger.\textsuperscript{165}

Congressional campaign costs continued to soar in the 1990s and 2000s. In the 1990 midterm elections, House and Senate candidates spent a combined total of $446 million.\textsuperscript{166} In 1996, congressional campaign expenditures


\textsuperscript{154} Id. at 282.


\textsuperscript{156} ORNSTEIN ET AL., supra note 155, at 56–57.

\textsuperscript{157} CURRINDER, supra note 44, at 23.

\textsuperscript{158} ORNSTEIN ET AL., supra note 155, at 57.

\textsuperscript{159} Malbin & Skladony, supra note 153, at 281.


\textsuperscript{161} See Senator Buckley’s comments, 120 CONG. REC. 8201 (1974), and WINTER, supra note 84, at 22–28.


\textsuperscript{163} ORNSTEIN ET AL., supra note 155, at 56.

\textsuperscript{164} Malbin & Skladony, supra note 153, at 284.

\textsuperscript{165} SORAUF, supra note 1, at 67.

reached $765 million. Inflation did not account for the difference. Campaign costs in Senate and House elections rose at twice the rate of inflation between 1974 and 1998. The 2000s saw an even faster increase. Controlling for inflation, the average cost of a victorious candidate’s campaign in House elections rose from $360,000 in 1986 (in 2012 dollars) to $1.6 million in 2012, and in Senate elections rose from $6.4 million in 1986 (in 2012 dollars) to $10.4 million in 2012.

Presidential races saw an even more dramatic increase in costs. The 1976 election—the first post-Buckley presidential campaign—cost $160 million, which broke the 1972 record. The increase resulted in part from FECA’s public financing program for presidential candidates. But the growth in private expenditures in presidential elections also grew at an accelerating rate, from $275 million in 1980 to $1.8 billion in 2008. The increase far exceeded inflation. In real dollar terms, presidential campaign costs in 2008 were about four times higher than in 1972, the year of the Watergate break-in.

Most remarkable of all, the figures above tell only part of the story. If spending by PACs, party committees, Section 527 groups, and Section 501(c)(4) groups are added to spending by presidential and congressional

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168 Corrado, supra note 162, at 79.

169 For overall congressional spending, see Election Overview, OPENSECRETS.ORG, https://www.opensecrets.org/overview/index.php [https://perma.cc/5GX6-Z7T3].


172 Id.

173 Id.


176 See generally ERIKA LUNDER, CONG. RESEARCH SERV., RS21716, POLITICAL ORGANIZATIONS UNDER SECTION 527 OF THE INTERNAL REVENUE CODE (2005) (describing the organizations and their reporting requirements under Section 527); Corrado, supra note 47, at 34–35 (describing the Section 527 exemption).

candidate committees, the total amount of federal election spending in 2008
reached almost $6 billion.178

The accelerating cost of campaigns did not happen by accident. Buckley’s
low contribution limits/no expenditure caps model went into effect at the exact
moment that television advertising became extremely expensive.179 The
increase began in the 1960s as the percentage of American homes with
television sets rose from 34% in 1952 to 92% in 1964.180 Television’s
ubiquitous nature made it a mandatory advertising medium for federal
candidates as early as the 1960s.181 Election costs increased accordingly.182 In
a span of just four years, American campaign spending rose from $300 million
in 1968 to $425 million in 1972.183

The increase in media costs in the 1960s and 1970s was just the tip of the
iceberg. The cost of television advertising soared in the decades that followed.
The history of television Super Bowl advertisements tells the story.184 In 2013
dollars, the cost of a thirty-second television advertisement during Super Bowl
I in 1967 was $293,000; in 1985, that figure rose to $1.1 million; in 1999, it
rose to $2.2 million; and by 2013, the cost of a thirty-second television
advertisement during the Super Bowl was $3.8 million.185 Super Bowl
advertising costs continue to grow at an accelerating rate. For instance,
between 2006 and 2015, Super Bowl advertisement prices increased by
76%.186 In 2016, the cost of a thirty-second Super Bowl advertisement reached
$5 million.187 And it’s not just special events like the Super Bowl that are

178 DANIEL HAYS LOWENSTEIN ET AL., ELECTION LAW 642 (5th ed. 2012); Magleby, supra note 174, at 19.
180 SORAUF, supra note 1, at 3; see also STEPHEN ANSOLABEHERE ET AL., THE MEDIA GAME: AMERICAN POLITICS IN THE TELEVISION AGE 1–8 (Bruce Nichols ed., 1993).
181 GOULD, supra note 50, at 177; SORAUF, supra note 1, at 3.
182 UROFSKY, supra note 160, at 63.
183 ALEXANDER, supra note 55, at 11.
expensive. A thirty-second television advertisement during a primetime regular season game in 2011 cost $425,000. Moreover, those numbers do not include the cost of producing the commercial itself.

The result is relentlessly increasing media costs for commercial and political advertisers alike. Indeed, annual outlays of billions of dollars are a commonplace feature of the American commercial advertising landscape. Thus, while the billions spent on federal election campaigns outpaces reformers and the general public alike, campaign spending represents only a fraction of the $180 billion that U.S. businesses spend annually in commercial advertising. Buckley’s invalidation of the expenditure caps forced candidates to face the same spiraling advertising costs that corporate America has since the 1960s. And FECA’s low contribution limits required candidates to raise the millions necessary to pay for television advertisements in woefully inadequate increments. Candidates have been on a fundraising treadmill ever since, just as Justice White predicted.

In recent years, Buckley’s central role in promoting skyrocketing campaign costs has been overshadowed by the controversy over the 2010 Citizens United case. Supporters of comprehensive campaign finance regulation, such as 2016 presidential candidate Bernie Sanders, claim that Citizens United is the

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191 In 2011, for example, the automotive industry spent nearly $14 billion on advertisements. Janet Fowler, 7 Companies with Big Advertising Budgets, INVESTOPEDIA (June 18, 2012), http://www.investopedia.com/financial-edge/0612/7-companies-with-big-advertising-budgets.aspx [https://perma.cc/7QJ5-NH5R].


193 UROFSKY, supra note 160, at 63.

cause of America’s billion dollar federal election campaigns. Not surprisingly, therefore, public anger at election costs tends to focus on the notion that reversing *Citizens United* would stop the cycle of escalating campaign costs. For example, a 2015 Bloomberg poll found that 78% of Americans support overturning *Citizens United* in order to reduce the influence of money in politics.

But as the FEC data clearly demonstrates, the surge in campaign expenditures began long before *Citizens United*. Federal election spending took off in the 1960s, accelerated after *Buckley*, and reached the multi-billion-dollar level in the early 2000s. The 2000 election cost $3.8 billion, the 2004 election cost $4.5 billion, and the 2008 election cost just under $6 billion. Crucially, each of those multi-billion dollar elections occurred before the Supreme Court’s January 2010 *Citizens United* decision.

Moreover, although campaign costs have continued to increase since the *Citizens United* decision, they have not increased at a rate faster than the pre-*Citizens United* increases. For instance, in the 2012 presidential and congressional elections total spending reached an all-time record of $7 billion. But that was completely in line with the relentless increase in federal campaign spending in the three presidential elections that preceded *Citizens United*. Indeed, during the 2000 to 2012 time period, total spending in federal elections increased by about $1 billion every four years: from $3.8 billion in 2000 to $4.5 billion in 2004 to $5.9 billion in 2008 to $7 billion in 2012. Hence, although the $1.1 billion increase in 2012 from 2008 was greater than the $700 million increase between 2000 and 2004, it was less than the $1.4 billion increase from 2004 to 2008, and well within the average rate of increase for the 2000 to 2012 time period.

In other words, the historical trend lines strongly suggest that total spending in the 2012 campaign would likely have reached $7 billion regardless of how the Supreme Court ruled in *Citizens United*. As the FEC data shows, billion-dollar quadrennial increases in presidential election year spending were already a routine feature of the American political landscape before the *Citizens United* decision.

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196 Stohr, supra note 6.
197 Magleby, supra note 174, at 19.
198 Id.; LOWENSTEIN ET AL., supra note 178, at 642; *Election Overview*, supra note 169.
200 Magleby, supra note 174, at 19; *FEC Summarizes*, supra note 199.
201 Magleby, supra note 174, at 19; *FEC Summarizes*, supra note 199.
202 Magleby, supra note 174, at 19; *FEC Summarizes*, supra note 199.
Nor did Citizens United begin the era of massive outlays in independent expenditures. Although it is true that 2012 saw independent expenditures reach a record amount of $1.2 billion, the reality is outside groups were already spending hundreds of millions of dollars before Citizens United. In 2004, Section 527 committees and Section 501(c) organizations spent a total of $484 million in the 2004 presidential and congressional elections and $454 million in the 2008 elections. In addition, PACs spent $135 million in independent expenditures in 2008, double the amount they spent in 2004. Citizens United created new and more powerful campaign finance vehicles for donors to use, but hundreds of millions of dollars in independent expenditures were already an entrenched part of federal election campaigns.

Thus, when America’s skyrocketing campaign costs are viewed in historical context, it seems likely that the long-term significance of Citizens United will pale in comparison to the importance of the Buckley decision. The fact is Buckley, not Citizens United, gave rise to the modern era of multi-billion-dollar federal election campaigns.

But Buckley’s ramifications are not confined to relentlessly soaring campaign costs. The interaction of FECA’s low contribution limits with Buckley’s invalidation of expenditure caps has also had a profoundly adverse impact on the daily business of Congress.

B. How Buckley and FECA Warped the Legislative Process

Instead of reducing the influence of money in politics, the Watergate reforms had the paradoxical consequence of increasing the amount of time that politicians needed to spend raising money. Here again, Justice White anticipated the toxic consequences of combining FECA’s contribution limits with Buckley’s ban on expenditure caps. In his Buckley dissent, White warned that without expenditure caps “[p]ressure to raise funds will constantly build.”

White’s prediction proved all too accurate. FECA’s low contribution limits, which Buckley upheld, placed federal candidates on a grueling fundraising treadmill in which they must constantly raise millions of dollars in small increments. As fundraising monopolized elected officials’ time and energy, it also distracted them from their core legislative duties. Members

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203 FEC Summarizes, supra note 199.
205 Id. at 263.
207 White himself used the “treadmill” metaphor to describe the practical impact of the majority’s ruling. See id. at 265.
of Congress found themselves with far less time to develop public policy expertise and to master the legislative process. Inevitably, fundraising skills became the chief asset for any member who aspired to serve in the congressional leadership.

To be sure, long before FECA, money played a prominent role in campaigns. As the Gilded Age political operative Mark Hanna famously declared, “There are two things that are important in politics. The first is money, and I can’t remember what the second one is.” The influence of money in American elections dates as far back as the colonial era. For instance, in the 1755 election for the Virginia House of Burgesses, novice candidate George Washington broke with local custom by declining to incur the expense of “treat[ing]” the voters with alcohol. Washington’s fiscal restraint did not impress the electorate and they handed him in return a surprising defeat. He would not make the same mistake again. In the 1758 election, Washington spared no expense, purchasing 160 gallons of alcohol for the voters. Washington’s generous campaign expenditure impressed the voters and he went on to win the first election victory of his long political career.

But during the first 200 years of American political history, candidates did not face the challenge of raising large amounts of money in small increments. Prior to the 1974 FECA amendments, federal candidates and officeholders relied on large contributions that could be quickly and efficiently solicited from a small number of donors. William McKinley’s 1896 presidential campaign served as an early example. McKinley raised $3.5 million in contributions from corporations and wealthy individuals, a record total at the time. The practice of soliciting large contributions from the rich and

209 See id.
212 DENNIS J. POGUE, FOUNDERING SPIRITS: GEORGE WASHINGTON AND THE BEGINNINGS OF THE AMERICAN WHISKEY INDUSTRY 16 (Judy Rogers ed., 2011); WILLARD STERNE RANDALL, GEORGE WASHINGTON 184 (1997) (explaining that Washington lost in 1755 because “he had no organization and had spent no money”).
213 2 DOUGLAS SOUTHALL FREEMAN, GEORGE WASHINGTON 320–21 (1948).
214 Id. at 320.
215 See CLIFFORD W. BROWN, JR. ET AL., SERIOUS MONEY: FUNDRAISING AND CONTRIBUTING IN PRESIDENTIAL NOMINATION CAMPAIGNS 19 (1995) (“Prior to the 1974 FECA amendments, the campaigns of the major candidates all received much, and in many cases most, of their revenues from very large contributions.”); see also BIRNBAUM, supra note 210, at 32; D.W. BROGAN, POLITICS IN AMERICA 255, 259 (1954).
powerful continued for the first seven decades of the twentieth century. Before the 1970s, federal candidates and the national parties relied on corporations, labor unions, special interest groups, and wealthy families to fund political campaigns.217 For instance, in the mid-twentieth century, large donors made up about 70% of campaign donations to the Democrats and 74% of donations to the Republicans.218 With large contributors responsible for the bulk of federal campaign contributions, fundraising in the pre-FECA era was highly efficient.219 A prime example was the Democratic Party’s annual congressional fundraising dinner, which generated a substantial portion of all the campaign funds used by Democratic House and Senate candidates during each election cycle.220

The efficiency of the pre-FECA fundraising system did not come without a price. The pervasive dependence of candidates and parties on large campaign contributors gave the donors special access to—and influence with—federal officeholders.221 Campaign contributors often had vested interests in pending or potential legislation.222 As a 1960 study by the political scientist Donald R. Matthews found, the typical U.S. Senator’s campaign fund relied on “a few large contributions from individuals and groups with a vital interest in” the Senator’s “behavior in office.”223 In return, grateful senators paid special attention to “requests for favors” from large campaign contributors.224 Many donors saw campaign contributions as a defensive act, rather than one intended to secure special legislation in their favor. Writing in 1954, D.W. Brogan observed that wealthy campaign contributors were typically motivated by the fear of “hostile legislative action or hostile executive discretion.”225

From a legislative perspective, the practice of quickly raising large amounts of money from a handful of wealthy political supporters had one crucial advantage: it permitted Congress to focus on legislative business rather than constant fundraising. Prior to the 1970s, senators usually did not raise money until the final two years of their six-year terms.226 Even most freshman members of the House saw no need to raise money in non-election years.227 Consequently, after the November election, the new Congress turned its

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217 Birnbaum, supra note 210, at 32; La Raja, supra note 43, at 127–41.
218 Alexander, supra note 55, at 48.
219 See id.; cf. Corrado, supra note 162, at 88.
220 Koledny, supra note 56, at 90.
221 Brown et al., supra note 215, at 45–49.
222 See Brogan, supra note 215, at 259.
224 Id. at 73.
225 Brogan, supra note 215, at 259.
227 See Corrado, supra note 162, at 77.
attention to legislation. With no need for members to hurry home for weekend fundraisers, a five-day Congressional workweek was standard in the mid-twentieth century.

The short fundraising season freed members to focus on legislation and public policy. In his 1960 study of the Senate, Donald Matthews described how the Senate’s culture expected members to devote their time to “highly detailed, dull, and politically unrewarding” legislative business. Members who failed to assume sufficient legislative responsibilities incurred the disdain of their peers. The political scientist Richard Fenno, Jr., found a similar culture in the House of Representatives in a 1962 study. Fenno wrote that House members were expected to develop subject matter expertise in specialized legislative areas and above all were expected to make “hard work” a priority in mastering policy details and the legislative process. House Speaker Sam Rayburn set the example himself, working in his Capitol Hill office six days a week.

Equally important, in the pre-FECA era, members of Congress had time to get to know their colleagues, including members of the other party. Personal relationships cannot be easily quantified and thus they tend to be ignored or underrated by scholars, but they are essential to legislative leadership. For example, in the 1950s House Speaker Sam Rayburn and Senate Majority Leader Lyndon Baines Johnson, both Democrats, met President Dwight Eisenhower, a Republican, at the White House on a regular basis for an end-of-the-day cocktail. Johnson and Rayburn also cultivated strong personal ties with their colleagues on Capitol Hill. One of the most effective legislative leaders in history, Johnson devoted his evenings and weekends to socializing with fellow senators, ranging from the arch-segregationist Richard Russell to the liberal progressive Hubert Humphrey. Rayburn likewise used his free time to build a personal connection with rank-and-file House members.

228 Norman J. Ornstein & Thomas E. Mann, Conclusion: The Permanent Campaign and the Future of American Democracy, in PERMANENT CAMPAIGN, supra note 162, at 219, 221–22.
229 Gould, supra note 50, at 187.
230 Matthews, supra note 223, at 94.
231 Id. at 94–95.
233 See id.
235 Ross K. Baker, Friend and Foe in the U.S. Senate 105 (1980) (“[T]here was a much greater inclination earlier in this century and before for federal officials to participate in events which were much more purely social.”); Gould, supra note 50, at 187.
236 Hardeman & Bacon, supra note 234, at 392.
238 Hardeman & Bacon, supra note 234, at 413.
But the introduction of FECA’s contributions limits in 1974, coupled with Buckley’s invalidation of expenditure caps, ushered in the era of the “permanent campaign.”\textsuperscript{239} A culture of constant fundraising took hold on Capitol Hill. As the historian Lewis Gould has observed, the “hectic atmosphere of perpetual campaigning” eroded “the older values of collegiality and comity” on Capitol Hill “to the point of virtual disappearance.”\textsuperscript{240}

The 1974 FECA amendments brought an end to the age of quickly raising large sums of campaign money. FECA’s contribution limits\textsuperscript{241} gave rise to a drastically changed fundraising environment.\textsuperscript{242} As one Democratic fundraiser admitted in 1987, “Used to be, you’d get a dozen people in the room and come up with half a million dollars for sure. Now if you get $25,000 you’re doing great.”\textsuperscript{243} Likewise, the historian Ross Baker noted that “[w]here it was once sufficient to attend an annual Jefferson-Jackson Day dinner or a Lincoln Day dinner to fatten the coffers of the party,” the era of “decentralized fundraising” required far greater investments of time and energy.\textsuperscript{244}

As campaign costs ballooned in the late twentieth century, federal officeholders faced the daunting task of raising more money than ever before in smaller increments than ever before.\textsuperscript{245} From 1976 to 2002, years during which the cost of election campaigns soared, FECA imposed a $1,000 contribution limit on individual donations to federal candidates.\textsuperscript{246} The inevitable consequence was federal candidates had no choice but to constantly search for new donors.\textsuperscript{247} Even when the Bipartisan Campaign Finance Reform Act of 2003 (BCRA) raised the contribution limit to $2,000 and indexed it to inflation,\textsuperscript{248} the maximum permitted individual contribution remained a tiny amount relative to the millions needed to mount a federal election campaign. Federal officeholders had no choice but to devote much of

\textsuperscript{239} The term “permanent campaign” was coined by former Clinton Administration adviser Sidney Blumenthal. Hugh Heclo, Campaigning and Governing: A Conspectus, in PERMANENT CAMPAIGN, supra note 162, at 1, 1–2; see also Corrado, supra note 162, at 75, 104.

\textsuperscript{240} Gould, supra note 50, at 278.

\textsuperscript{241} See Buckley v. Valeo, 424 U.S. 1, 7, 12–13, 35 (1976) (per curiam).

\textsuperscript{242} See Brown et al., supra note 215, at 24 (“It is difficult to overstate the impact of the $1,000 limit on the fundraising culture, and especially on personal-network fundraising. Before the FECA framework was established, the principal source of money for most candidates in both parties was the personally solicited contributor of truly large amounts, but the $1,000 limit changed all this.”).

\textsuperscript{243} Id. at 19 (quoting Democratic fundraiser, Carol Hassamen).

\textsuperscript{244} Baker, supra note 235, at 283 n.10.

\textsuperscript{245} Brown et al., supra note 215, at 19.

\textsuperscript{246} Corrado, supra note 47, at 23.

\textsuperscript{247} Brown et al., supra note 215, at 19.

their workdays to fundraising,249 even in non-election years.250 By 1998, incumbent federal officeholders raised on average about 40% of their total campaign funds during off-years,251 and the off-year fundraising typically exceeded the total amount raised by congressional challengers.252 As the historian Lewis Gould noted, by the 1980s “[t]he average senator was caught in a never-ending round of asking for money, lining up donors, and providing favors for well-heeled constituents.”253 By the end of the 1990s, House incumbents typically raised $7,000 per week throughout their two-year terms.254 And by 2014, the typical senator raised on average $10,000 per day every day of the senator’s six-year term.255

Correspondingly, the amount of time Congress devoted to legislative business steadily shrunk. The average length of the House’s two-year session declined from 323 days in the 1970s to 250 days in 2008.256 Likewise, the Senate workweek began to contract in the 1970s to enable members to return home on fundraising trips.257 By the late 1980s, the Congressional workweek began on Tuesday and ended early on Fridays.258 As Senator Bob Byrd of West Virginia observed in 1987, senators wanted Mondays off and short days on Fridays because “[t]hey have to go raise the money and they don’t want any roll-call votes.”259 Byrd warned that such short weeks threatened the Senate’s ability to function, and he lamented that senators had become “full-time fundraisers, instead of full-time legislators.”260 But Byrd’s warnings had no effect. By 2013, 78% of members of Congress spent at least forty weekends each year in their home districts.261 When they don’t spend the weekend in their home districts, members also routinely travel to resorts or major cities to attend fundraisers.262

249 See Gould, supra note 50, at 277.
250 See Corrado, supra note 162, at 75–77, 87.
251 Id. at 82.
252 Id. at 83.
253 Gould, supra note 50, at 277.
254 Corrado, supra note 162, at 80; see also Richard L. Hall, Participation in Congress 231 (1996).
256 Currinder, supra note 44, at 206; see also Lessig, supra note 208, at 140–41.
257 See Gould, supra note 50, at 258; see also Corrado, supra note 162, at 76–78.
258 Corrado, supra note 162, at 77.
259 Id. (quoting Senator Robert Byrd).
260 Id. at 103 (quoting Senator Robert Byrd).
262 Corrado, supra note 162, at 76.
Even when Congress is in session, fundraising consumes much of the congressional workday. For example, in 2013 the Democratic Congressional Campaign Committee directed that new members of Congress should spend four to six hours per day every day raising campaign money.263 Similarly, in a 2016 CBS 60 Minutes interview, Florida Representative David Jolly revealed that the House Republican caucus requires members to raise $18,000 a day in campaign contributions.264 Congressional leaders manage the House floor schedule to maximize the time available for members to solicit campaign contributions and attend fundraisers.265 In addition, the national parties maintain phone banks in office buildings within walking distance of the Capitol Building for members to make fundraising calls during the workday.266

The relentless demands of raising massive amounts of money in small contributions have deeply undermined the legislative process.267 As the political scientist James Curry explains, “members of Congress are overwhelmed by the tremendous demands on their limited time and resources.”268 Members no longer have the time to master public policy issues in depth or regularly attend committee meetings.269 Not surprisingly, therefore, the typical member of Congress has become dependent on lobbyists and congressional leaders for information on the legislation pending before Congress.270 Curry concludes that the lack of information possessed by rank-and-file members of Congress undermines their ability to “participate meaningfully and independently in policymaking.”271

It is critical to note that the advent of the “permanent campaign” long predated the 2010 Citizens United decision. By the 1980s and 1990s, it was clear that the all-consuming nature of raising vast amounts of money in small contributions have deeply undermined the legislative process.267 As the political scientist James Curry explains, “members of Congress are overwhelmed by the tremendous demands on their limited time and resources.”268 Members no longer have the time to master public policy issues in depth or regularly attend committee meetings.269 Not surprisingly, therefore, the typical member of Congress has become dependent on lobbyists and congressional leaders for information on the legislation pending before Congress.270 Curry concludes that the lack of information possessed by rank-and-file members of Congress undermines their ability to “participate meaningfully and independently in policymaking.”271


265 Currinder, supra note 44, at 8.

266 Id. at 11 n.2.

267 See Gould, supra note 50, at 258; see also Corrado, supra note 162, at 104.


269 See Currinder, supra note 44, at 8 (explaining that members must “devote time and energy to cultivating relationships with potential donors. As a result, members have less time to spend on policy. Most committee hearings are poorly attended and floor debates often feature just a handful of members.”); see also Lessig, supra note 208, at 142 (“[W]e can say with confidence that the fund-raising distracts Congress from its work . . . .”); Jonathan Shaw, A Radical Fix for the Republic, HARV. MAG., July–Aug. 2012, at 22 (“Members of Congress now spend between 30 and 70 percent of their time raising money rather than deliberating as they were elected to do.”).

270 Curry, supra note 268, at 27.

271 Id. at 203.
increments left little time for members to develop deep knowledge of the substantive policy issues before Congress.²⁷² Years before Citizens United, leading political scientists warned that fundraising had undermined Congress’s ability to legislate in competent and effective fashion.²⁷³ In 2000, the political scientist Anthony Corrado concluded that the excessive amount of time devoted to raising money meant that members of Congress were “spending less time learning legislative practice, understanding the details of major policy debates, or becoming acquainted with their professional colleagues.”²⁷⁴

Moreover, although FECA prevented wealthy donors from making large contributions to candidates and parties, it did not eliminate candidate and party dependence on powerful and influential fundraisers.²⁷⁵ In 1974, Congresswoman Bella Abzug contended that the FECA amendments would reduce the influence of wealthy white men.²⁷⁶ But a 1995 study found that “contributors of serious money [to presidential campaigns] are effectively just as wealthy, well-educated, white, and male today as they were before the reform rules were implemented.”²⁷⁷ Similarly, a 2016 Brennan Center study found that wealthy white men dominate the ranks of campaign contributors.²⁷⁸ Indeed, one of the great ironies of FECA’s low contribution limits is that they have placed federal officeholders on a constant and unending search for new donors.²⁷⁹ In turn, the need to solicit a huge number of small contributions from as many donors as possible has given wealthy special interests just as much access to federal officeholders as during the pre-FECA era.²⁸⁰

FECA’s emphasis on small contributions has also enhanced the influence of a particular type of donor: the well-connected individual with extensive fundraising contacts.²⁸¹ FECA gave rise to the practice of bundling, whereby a single person or group solicits contributions from hundreds of donors.²⁸² Although the solicited donations remain subject to FECA’s contribution limits, a bundler with enough wealthy friends can facilitate hundreds of thousands of

²⁷² See CURRINDER, supra note 44, at 206; GOULD, supra note 50, at 258; TREN'T LOTT ET AL., CRISIS POINT 27, 29, 234–35 (2016); Corrado, supra note 162, at 104.
²⁷³ For a classic study of the adverse consequences of fundraising, see SORauf, supra note 1, at 72–73.
²⁷⁴ Corrado, supra note 162, at 104.
²⁷⁷ BROWN ET AL., supra note 215, at 28.
²⁷⁸ See A Civil Rights Perspective on Money in Politics, BRENNAN CTR. FOR JUST. (June 9, 2016), https://www.brennancenter.org/print/15624 [https://perma.cc/3CBZ-NZVP].
²⁸⁰ See Corrado, supra note 162, at 104.
dollars in contributions to a single federal candidate. In the era of low contribution limits, bundlers have become indispensable to federal campaigns. President George W. Bush’s campaign awarded honorary designations to bundlers who solicited money above certain thresholds. Bush supporters who bundled $100,000 in contributions received special recognition by the campaign as “Pioneer” fundraisers and those who solicited $200,000 or more in contributions earned the title of “Ranger” fundraisers.

Fundraising’s critical importance in modern election campaigns, an ironic and unintended consequence of FECA’s low contribution limits, has transformed the congressional leadership ranks. Where seniority and legislative expertise once were required to hold a leadership position, fundraising proficiency has become the single most important credential. As a direct consequence of FECA’s low contribution limits, fundraising skills eclipsed legislative knowledge and policy expertise as prerequisites for serving in the congressional leadership. The post-Watergate reforms thus shifted the center of gravity in Congress from members with seniority and legislative expertise to members with fundraising skills.

Fundraising remains a central duty of congressional leaders even after they assume leadership positions. House and Senate caucus rules require party leaders to establish personal “leadership PACs” to raise money on behalf of colleagues and party committees. For example, after Nancy Pelosi became House Speaker in 2007, House Democratic caucus rules required her to contribute $800,000 to the Democratic Congressional Campaign Committee and generate $25 million in additional contributions to the Party’s candidates. But the reality is all members bear heavy fundraising burdens. After Republicans took control of Congress in 1994, House Speaker Newt Gingrich established fundraising requirements for rank-and-file members of the House Republican caucus, not just party leaders. Congressional Democratic leaders later adopted the same requirements for their caucus members. In addition, both parties base committee assignments

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283 Id.; see also BIRNBAUM, supra note 210, at 42.
284 BIRNBAUM, supra note 210, at 50.
285 CHILTON, supra note 210, at 50.
286 See BAKER, supra note 235, at 233; CURRINDER, supra note 44, at 6, 8–9, 13–38; Corrado, supra note 162, at 99–100, 104.
287 Id.
289 See CURRINDER, supra note 44, at 6, 16, 61–90; Corrado, supra note 162, at 97.
290 See LA RAJA, supra note 43, at 215; Corrado, supra note 162, at 99–100.
291 See CURRINDER, supra note 44, at 7, 97–99.
292 Id. at 36–37.
293 See id. at 51–59, 123–50; SOARAUF, supra note 1, at 188.
294 CURRINDER, supra note 44, at 149.
295 Id. at 7–8, 36–37; LA RAJA, supra note 43, at 215.
on members’ fundraising success.296 The ultimate irony, therefore, is that FECA’s focus on low contribution limits has paradoxically made fundraising the principal focus of the day-to-day activities of Congress.297

Although raising money has become a preeminent job requirement for federal officeholders, most politicians view the grueling task of constant fundraising as one of the most distasteful parts of running for office.298 The demeaning and exhausting demands of fundraising have driven experienced officeholders to resign and have deterred talented candidates from running for office in the first place.299 For example, the unrelenting demands of fundraising drove eight-term Congressman Steve Israel of New York to announce his retirement in January 2016.300 “I don’t think I can spend another day in another call room making another call begging for money,” Israel declared.301 “I always knew the system was dysfunctional. Now it is beyond broken.”302

That is a far cry from what Congress intended when it passed the ’74 amendments. Instead of curbing the influence of money in politics, FECA’s contribution limits ushered in a new era of nonstop fundraising by federal officeholders. The irony was not lost on James Buckley, the plaintiff in Buckley v. Valeo. In 2006 he wryly observed, “The 1974 amendments were supposed to de-emphasize the role of money in federal elections. Instead, by severely limiting the size of individual contributions, today’s law has made the search for money a candidate’s central preoccupation.”303 Buckley himself was partially responsible for that development. When the Supreme Court upheld his challenge to FECA’s expenditure caps, it guaranteed that the money chase would dominate presidential and congressional campaigns for decades to come.

296 See Currinder, supra note 44, at 8, 37 (stating that members of Congress have “an almost constant focus on fundraising”).
297 See id. at 8.
299 See Sorauf, supra note 1, at 188; Wallison & Gora, supra note 275, at 12–13; Corrado, supra note 162, at 103.
301 Id. (quoting Representative Steve Israel).
302 Id. (quoting Representative Steve Israel).
303 James L. Buckley, Gleanings from an Unplanned Life 150 (2006).
C. Why FECA Failed to Restore Public Confidence in the Government’s Integrity

When Congress debated amending FECA in 1974, supporters returned time and again to the central point that the reforms would restore public confidence in the government after the trauma of Watergate. Congressman Spark Matsunaga of Hawaii described the FECA amendments as “our best and most constructive response to the terrible abuses of Watergate,” and he promised that the “amendments will help restore the faith of the American people in their Government.”

Whether FECA’s expenditure caps would have enhanced public confidence in the government’s integrity is unknowable. What is clear is that FECA’s low contribution limits have not achieved that goal. For example, annual surveys by the Pew Research Center in the 1990s and 2000s consistently found that about 50% of Americans believed that political corruption was getting worse, whereas only 10% believed political corruption was declining. Another study found that the percentage of Americans who believe that special interests dominate the government doubled between the 1960s and the 1990s. Even more striking, a 2008 Gallup Poll found that Americans’ level of trust in government was at the lowest level since Watergate and soon thereafter, the American National Election Studies (ANES) found that the percentage of Americans who believed government corruption was widespread doubled from 32% in 1970 to 64% in 2012.

The historical polling data is particularly important because it demonstrates that the public’s cynical view of the government’s integrity long predates the 2010 Citizens United decision. Indeed, a 2004 study by Nathaniel Persily and Kelli Lammie found that “trends in general attitudes of corruption seem unrelated to anything happening in the campaign finance system.”

\[304\] 120 CONG. REC. 35148 (1974) (statement of Rep. Spark Matsunaga); see also id. at 34387 (statement of Sen. Hubert Humphrey asserting that FECA would “restore the faith of the people in their Government”).


\[306\] Gary Orren, Fall from Grace: The Public’s Loss of Faith in Government, in WHY PEOPLE DON’T TRUST GOVERNMENT 77, 81 (Joseph S. Nye, Jr. et al. eds., 1997).

\[307\] Mark E. Warren, Is Low Trust in Democratic Institutions a Problem of Corruption?, in CORRUPTION AND AMERICAN POLITICS, supra note 305, at 37, 37.


Likewise, a study by David Primo found that campaign finance laws did little to improve public confidence in the government’s integrity.\textsuperscript{310} Instead, there is reason to believe that rampant partisanship and ideological polarization have played a far larger role in shaping the public’s perception of widespread government corruption. A study by the political scientists Marc Hetherington and Thomas Rudolph found that Americans have become so polarized that they view the federal government with distrust whenever their preferred party is out of power.\textsuperscript{311} For example, during Ronald Reagan’s presidency, less than half of Democrats trusted the government; during Bill Clinton’s presidency, less than one third of Republicans expressed trust in the government.\textsuperscript{312} The problem is getting worse. Hetherington and Rudolph found that during Barack Obama’s presidency, fewer than 10\% of Republicans expressed trust in the government.\textsuperscript{313} The result, they warn, is that Americans have “vanishingly low trust in government when their party is out of power.”\textsuperscript{314}

Indeed, even if Buckley had upheld FECA’s expenditure caps, it seems reasonable to conclude that the political assassinations of the 1960s, the Vietnam War, and the Watergate scandal undermined public confidence in government and other institutions far more than FECA could ever ameliorate. As Gary Orren observed in a 1997 study of public opinion, “Americans have lost faith in banks, corporations, labor unions, lawyers, doctors, universities, public schools, and the media.”\textsuperscript{315} And that was before the 1999 Clinton impeachment, the deadlocked 2000 presidential election, the September 11 terrorist attacks, the Iraq War, the financial crisis of 2008, and the extreme polarization of the 2010s. In short, long-term historical trends have undermined public confidence in government institutions far beyond campaign finance reform’s ability to remedy the problem.

V. CONCLUSION: THE FUTURE OF CAMPAIGN FINANCE LAW?

So what should we do?
The answer to that question rests with the Supreme Court. The Court created our campaign finance dysfunction and only it can fix it. Accordingly, the next time the Justices have an opportunity to revisit Buckley and Citizens United, the Supreme Court must once and for all decide a key constitutional question: Does the First Amendment permit comprehensive campaign finance regulations, or does it instead require sweeping deregulation?

The Justices need to give us a definitive answer to that question. To do so, they have two options. The first is to follow Chief Justice Burger’s lead and embrace deregulation wholeheartedly by extending the Citizens United decision to candidates and parties, not just Super PACs. The Justices could do so by striking down contribution limits as an impermissible violation of freedom of speech and association. The Court would thus make clear that the First Amendment takes precedence over efforts to fight campaign corruption or promote egalitarianism.

The second option is to take the exact opposite approach by reversing both Citizens United and Buckley’s ban on expenditure limits. The Justices could overturn those decisions by ruling that the Constitution permits Congress to not only impose contribution limits on Super PACs but also to establish an overall cap on federal campaign spending. Following Justice White’s lead, the Court would thus make clear that principles of egalitarian democracy and the battle against corruption justify significant limits on the First Amendment.

Although they involve diametrically opposed views of the Constitution, both approaches have merit.

Deregulation of campaign finance law is far from a radical idea. Several states place no limits on the amount donors may contribute to gubernatorial and legislative candidates, including blue states like Oregon, red states like


317 See, e.g., Hasen, Plutocrats United, supra note 8, at 176–89. See generally Robert C. Post, Citizens Divided: Campaign Finance Reform and the Constitution (2014).

Alabama, and purple states like Iowa. The fact that a deregulated model does not lead to a particular ideological or partisan outcome is telling. It suggests that unlimited contributions may have less impact on election outcomes than the conventional wisdom that money buys elections would suggest.

Indeed, if contribution limits had a substantial impact on elections, one would expect to see a divergence between federal and state election outcomes in deregulated states. The presence of contribution limits in federal elections and the corresponding absence of them in the state elections would presumably lead to significant differences in state and federal outcomes in deregulated states like Oregon, Alabama, and Iowa. But that does not seem to be the case. Instead, there is a striking similarity in federal and state outcomes in deregulated states. The natural partisan preferences and ideological inclinations of voters in deregulated states shine through in both the state elections, which lack contribution limits, and the federal elections, which impose strict contribution limits.

For example, Oregon is a strongly Democratic state in which liberal and progressive politicians have thrived in both no-limit state elections and strict-limit federal elections. Democrats have won every Oregon governor’s race since 1986. In legislative elections, Democrats hold large majorities in the state senate and state house. In federal elections, both of Oregon’s U.S. Senators are Democrats, and Democrats also hold four of Oregon’s five U.S. House seats. Democratic presidential candidates have won Oregon in every election since 1988.

Alabama, in contrast, is a strongly Republican state in which conservative politicians have thrived in both no-limit state elections and strict-limit federal elections.


321 ALMANAC 2016, supra note 319, at 1496–98.

322 Id. at 1498; see also Michael Barone & Grant Ujifusa, ALMANAC OF AMERICAN POLITICS 1990, at 1007 (Eleanor D. Evans ed., 1989) [hereinafter ALMANAC 1990].

323 ALMANAC 2016, supra note 319, at 1495.

324 Id. at 1496, 1498, 1502.

325 See id. at 1495.
elections. Republicans have held Alabama’s governor’s office since 2003. In legislative elections, Alabama Republicans have controlled the state senate and the state house since 2011. In federal elections, both of Alabama’s U.S. Senators are Republicans, and Republicans also hold six of Alabama’s seven U.S. House seats. Republican presidential candidates have won Alabama in every election since 1980.

Iowa represents a middle path between conservative Alabama and liberal Oregon. Since 1994, Iowa Republicans have won three governor’s races, and Iowa Democrats have won three governor’s races. Iowa Republicans control the State House and Iowa Democrats control the State Senate. In federal elections, Republicans hold both U.S. Senate seats and three of Iowa’s seven U.S. House seats. Yet, in presidential elections, Democrats have won Iowa in every election but one since 1988. By any measure, Iowa is a middle of the road state in both no-limit state elections and strict-limit federal elections.

The critical point is deregulation does not dictate any particular set of partisan or ideological outcomes. Nor is there any indication that the states that have pursued deregulation are any more corrupt than those that impose strict contribution limits in state elections. Alabama has fared poorly in rankings of corruption in state government, whereas Oregon and Iowa have fared

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326 Id. at 27–29.
327 Id. at 27; see also MICHAEL BARONE & RICHARD E. COHEN, THE ALMANAC OF AMERICAN POLITICS 2010, at 39 (Jackie Kosczuk ed., 2009) [hereinafter ALMANAC 2010].
328 ALMANAC 2016, supra note 319, at 28.
329 Id. at 29, 32, 36.
330 Id. at 29.
331 Id. at 695; see also ALMANAC 2010, supra note 327, at 573. In contrast, between 1968 and 1998, Republicans won every governor’s race in Iowa. See ALMANAC 2016, supra note 319, at 695.
332 ALMANAC 2016, supra note 319, at 695.
333 Id. at 699, 701, 706.
335 See ALMANAC 2016, supra note 319, at 695 (explaining that since the 1980s, Iowa’s election results “indicate a sort of steady moderation”).
comparatively well. For example, Oregon and Iowa have among the lowest rates of convicted public officials. After examining the corruption data, Peter Wallison and Joel Gora concluded that “there is no evident or prevalent pattern of corruption in . . . no-limit states.” The bottom line is the underlying political culture of any given state is a far better predictor of election outcomes than the state’s campaign finance laws.

Federal election history also belies the notion that plutocracy is the inevitable result of a deregulated campaign finance system. As discussed in Part III, in the forty years preceding FECA’s effective date—April 7, 1972—there was no FEC, and the federal regulations governing contribution limits, expenditure caps, and disclosure were essentially toothless. In the 1940s, the political scientist Louise Overacker described federal campaign finance law as “farcical” because its loopholes were “as wide as a barn door.” Similarly, in the 1960s, Congressman James Wright of Texas warned that federal campaign finance law was “intentionally evaded by almost every candidate.”

Yet, the Wild West era of campaign finance did not lead to the super rich dominating American public policy. Instead, ironically, the largely unregulated campaign finance era of 1932 to 1972 was the most progressive era in American history. It gave the country FDR’s New Deal, Social Security, Truman’s Fair Deal, the Great Society, Medicare, etc. After examining the corruption data, Wallison & Gora, supra note 275, at 44.


On the Great Society, see id. at 562–92.

Medicaid,\textsuperscript{348} the Civil Rights Acts,\textsuperscript{349} and the highest tax rates\textsuperscript{350} in American history.

The crucial point is the golden age of progressive reform thus occurred at a time when wealthy donors could effectively make secret and unlimited campaign contributions. As Yale Law Professor Ralph Winter observed in 1974 during the debate over the FECA amendments, “The allegations that money [in political campaigns] blocks social change quite simply ignore history. During the last forty years, an immense amount of social and regulatory legislation has been enacted. This alone would refute the assertion that campaign money is a barrier to change.”\textsuperscript{351}

Nixon’s presidency itself demonstrated the complicated relationship between the influence of wealthy donors and the policies pursued by the officeholders the donors support. Nixon took million-dollar contributions from wealthy supporters and illegal contributions from corporations.\textsuperscript{352} Yet, as president, Nixon imposed wage and price controls, signed the Clean Air Act, and created the Environmental Protection Agency, the Occupational Safety and Health Administration, and the Consumer Products Safety Commission.\textsuperscript{353}

The Nixon example demonstrates a problem for campaign contributors that the wealthy industrialist Henry Clay Frick identified more than a century ago. Corporations and wealthy individuals, including Frick, heavily supported President Theodore Roosevelt’s 1904 election campaign.\textsuperscript{354} Frick personally contributed $100,000 to the President’s campaign and corporations and insurance companies donated more than $1.5 million to Roosevelt.\textsuperscript{355} But after his election, Roosevelt embraced sweeping progressive reforms, infuriating his

\textsuperscript{348} On Medicaid, see generally DAVID G. SMITH & JUDITH D. MOORE, MEDICAID POLITICS AND POLICY (2010).


\textsuperscript{351} WINTER, supra note 84, at 10.

\textsuperscript{352} MUTCH, supra note 34, at 133–35.


\textsuperscript{355} MILLER, supra note 354, at 440.
campaign contributors. In frustration, Frick angrily declared, “We bought the son of a bitch ... and then he did not stay bought.”

Similarly, in the 1960s and early 1970s, a wide range of scholars who studied the impact of campaign contributions during the unregulated pre-1972 era found that the influence of contributions on public policy was greatly overstated. As Alexander Heard observed in 1960, “[I]t has been repeatedly demonstrated that he who pays the piper does not always call the tune, at least not in politics. Politicians prize votes more than dollars.” Similarly, in 1968 Nelson W. Polsby and Aaron Wildavsky found that while wealthy campaign contributors had enhanced access to officeholders, the impact on policy was modest at best.

The evidence also failed to show that contributions determined who won election campaigns during the pre-FECA era. In assessing the forty-four years of presidential elections between 1932 and 1976, Wildavsky and Polsby found no evidence that money bought election victories. They noted that while Republicans outraised Democrats in every presidential election between 1932 and 1976, Democrats won eight of the twelve elections held during those years. Wildavsky and Polsby concluded that “with the possible exception of 1968, there does not seem to have been a single presidential election in this century that any competent observer believes would have turned out differently if the losing candidate had spent more money than the winner.”

On the other hand, a completely regulated system is not a radical idea either. As Professor Richard Hasen has argued, the case for campaign finance reform is not limited to the election impact of campaign contributions. As Hasen explains, “[T]he retort that money does not buy elections ignores the access argument... The money buys access, giving the contributor a greater chance of gaining the ear of the politician to make an argument in

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359 Polsby & Wildavsky, supra note 39, at 54–71.
360 Alexander, supra note 171, at 11 (“In 1980, although money was essential to nurture the campaigns, and was an important factor in the election equation, it did not determine many outcomes... If primary and caucus results are the measure, the party nominations reflected the popular will.”).
361 Polsby & Wildavsky, supra note 39, at 56 (“The most obvious and most important conclusion in our view is that even in the era when the parties were free to spend whatever they could raise and were not subjected to the limitations of the public finance law, money did not buy election victories.”).
362 Id.
363 Id.
favor of the contributor’s position on legislation.” Reformers also contend that campaign finance deregulation undermines egalitarian principles of democracy by giving wealthy donors a larger voice in election campaigns than the poor and the middle class.

Moreover, there is no doubt that the American public would support sweeping and restrictive campaign finance regulations. A September 2015 poll found that nearly eight in ten Americans support overturning Citizens United, and almost 90% of Americans want new restrictions placed on the ability of the rich to influence election campaigns.

It’s not just the general public that wants greater regulation of campaign finance. Campaign contributors themselves are deeply critical of the system and strongly support comprehensive regulation. In the late 1990s, a group of political scientists conducted The Congressional Donors Survey to examine in detail the fundraising process from the perspective of campaign contributors. The survey found that 80% of donors reported being regularly pressured by officeholders to contribute money. Moreover, 57% of donors agreed that “[d]onors regularly pressure officials for favors.” The survey found broad support among donors for greater regulation of campaign finance. An astounding 74% of donors supported expenditure caps for congressional campaigns and 63% supported limits on television advertising by congressional candidates. The survey’s authors concluded, “It is striking that donors who make significant contributions to congressional candidates, as well as other types of candidates, party committees, and PACs are so critical of the campaign finance system.”

The Buckley decision prevented Congress and the country from finding out whether FECA’s expenditure caps would have created a better campaign finance system. However, our neighbor Canada provides an example of what might have happened in the United States if the Buckley ruling had come

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365 Hasen, Campaign Finance, supra note 364, at 1645.
366 Whether campaign reforms would actually restore public confidence is a different question. See Persily & Lammie, supra note 309, at 121, 138.
367 Stohr, supra note 6.
368 Peter L. Francia et al., The Financiers of Congressional Elections 156 (2003).
369 Id. at 15–17, 165–89.
370 Id. at 141; see also Jennifer Mueller, The Unwilling Donor, 90 Wash. L. Rev. 1783, 1814–19 (2015).
371 Francia et al., supra note 368, at 141.
372 Id. at 147.
373 Id. at 143.
374 Sorauf, supra note 1, at 238 (“What was intended to be a closed system in which the major flows of money into and out of campaigns were fully controlled emerged as an open system of uncontrolled outlets when the Court struck down all limits on direct spending in the campaign by candidates, PACs, and individuals. A tightly constrained regulatory system became a more relaxed, open-ended one.”); Sorauf, supra note 101, at 119.
out differently.\footnote{375 On the Canadian consensus in favor of comprehensive regulation of campaign finance, see Lisa Young, Shaping the Battlefield: Partisan Self-Interest and Election Finance Reform in Canada, 2003–2014, in The Deregulatory Moment? A Comparative Perspective on Changing Campaign Finance Laws 107, 122 (Robert G. Boatright ed., 2015). In Canada, “the deregulatory discourse . . . has been largely lacking. Ideological contestation has been focused on the state’s appropriate role in subsidizing election expenses and parties’ incomes, not on the appropriateness of state regulation of election expenses and contributions.” Id.} Canada’s experience with comprehensive campaign regulation suggests that FECA’s expenditure caps might very well have worked. Indeed, contrary to the claims of Senator Buckley and other reform opponents, Canadian campaign finance law indicates that expenditure caps do not give incumbents an unfair advantage over challengers.


Four decades later, expenditure limits in Parliamentary elections remain in place today, as well as contribution limits, which Parliament added in 2003.\footnote{382 Young, supra note 375, at 110–14.} Under Canadian law, House of Commons candidates must abide by strict expenditure limits, the precise amount of which depends on the length of the
election period and the population of the riding, the Canadian equivalent of a congressional district. In the October 2015 federal elections, the expenditure limit for federal candidates ranged from a low of $170,000 for a riding in rural Prince Edward Island to a high of $279,000 for a riding in Kootenay, British Columbia. Although the average riding expense limit rose from $91,000 in the 2011 election to $219,000 in the 2015 election, it remained a fraction of the millions of dollars American Congressional candidates routinely spend every two years. Moreover, to further ease the fundraising burden on candidates, Canada provides generous publicly funded reimbursements of up to 60% of candidate expenditures.

The Canadian Election Expenses Act also imposes strict expenditure limits on political parties. The expenditure limit for each registered political party is determined by the length of the election period and the total number of ridings in which the party fields endorsed candidates. Some parties only compete in a few ridings while others compete in all 338 of Canada’s ridings. In 2015, the expenditure limit for the national parties that endorsed candidates in all 338 ridings was $54 million per party, with lower limits for parties competing in fewer ridings. Like candidates, political parties are eligible for publicly funded reimbursements of up to 50% of their campaign expenses.

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385 Id.
388 See The Electoral System of Canada, supra note 386 (describing the reimbursements for political parties).
391 See The Electoral System of Canada, supra note 386.
Crucially, Canada imposes strict expenditure limits not only on parties and candidates, but also on outside groups. Outside groups may air television advertisements before a federal election is officially called, and there are no spending limits on pre-election advertising. But once an election is called, Canadian law makes it illegal for outside groups not registered as a “third party” to air political ads during election campaigns. Under Canadian law, the term “third party” refers to outside groups that do not run candidates of their own, but nevertheless seek to engage in political advocacy during elections. Canada imposes severe restrictions on such groups. In the 2015 election, 115 outside groups registered as third parties, many with names that echo American Super PACs, such as “We Love Canada,” “Votes for Honest Politicians,” and “Stand up for Canada.” The Canadian expenditure caps on outside groups are draconian. In the 2015 election, election advertising expenses by registered third parties were capped at $8,788 per electoral district, or $439,410 nationally. The caps are so low they essentially mean that there are no Super PAC-type ads during Canadian elections.

Moreover, in a striking departure from the U.S. Supreme Court’s Buckley ruling, the Canadian Supreme Court has repeatedly upheld the expenditure caps. As Professor Daniel Tokaji notes, “The contrast between the


394 Id.


396 Id.


American and Canadian approaches to campaign finance regulation could not be more pronounced. Canada’s Supreme Court has embraced the egalitarian rationale for spending limits as decisively as the U.S. Supreme Court has rejected it. Yet, despite the expenditure limits, Canadians have fiercely competitive elections. Since Canada adopted expenditure caps, Canadian elections have seen far more incumbent turnover than American elections. For example, in the October 2015 general election, the Liberal Party went from third-place with only thirty-six seats in the House of Commons to 184 seats, an increase of 148 seats in the 338-seat parliamentary body. The Conservative Party dropped from 159 seats to ninety-nine seats, a decline of sixty seats. The New Democratic Party also declined sharply, falling from ninety-five seats to forty-four, a fifty-one seat loss.

The 2015 election was not unique. Canadians also saw high levels of election turnover in 2011, 2006, 1993, and 1984. For example, in 2011, the Conservative Party gained twenty-three seats in the 308-seat House (the legislative body grew by thirty seats in 2015), the Liberal Party and the Bloc Quebecois both lost forty-three seats, and the New Democratic Party gained sixty-seven seats. Most remarkable of all, in 1993 the governing Conservatives were reduced from 169 seats in Parliament to two seats in a single election. In contrast, the United States Congress during the same time period consistently experienced reelection rates of 90% or more.

Thus, in sharp contrast to American congressional elections, incumbents are not safe in Canadian politics despite onerous campaign finance restrictions.

403 Id.
404 Id.
408 LOWENSTEIN ET AL., supra note 178, at 146.
that our Supreme Court has thus far never permitted Congress to establish in this country. As the Canadian experience demonstrates, competitive elections and high levels of incumbent turnover are possible even in a highly regulated campaign finance environment.

The bottom line is both regulation and deregulation can work. But what doesn’t work is the Supreme Court’s forty-year effort to have it both ways. Ultimately, the Supreme Court must either end the war on money in politics or give reformers the tools necessary to win that war. For the long-term health of our democracy, the Court cannot have it both ways any longer. It must choose once and for all a coherent and consistent campaign finance course for the nation to follow.

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409 Importantly, Canada also has an independent redistricting process that promotes competition in Parliamentary elections. See John C. Courtney, Elections 53–71 (2004).

410 On the United States–Canada comparison, see generally Tokaji, supra note 400, and Young, supra note 375.

411 A 2014 study by the International Institute for Democracy and Electoral Assistance found that the United States and Finland are the only countries in the world with contribution limits but no expenditure limits. See Paul Waldman, How Our Campaign Finance System Compares to Other Countries, Am. Prospect (Apr. 4, 2014), http://prospect.org/article/how-our-campaign-finance-system-compares-other-countries [https://perma.cc/8PU5-KNQX]; see also Nassmacher, supra note 398, at 255–87.