

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

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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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¹FRANK 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.

³*Buckley v. Valeo*, 424 U.S. 1, 143 (1976) (per curiam).

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.”).

⁵ See generally R. SAM GARRETT, CONG. RESEARCH SERV., R42042, SUPER PACS IN FEDERAL ELECTIONS: OVERVIEW AND ISSUES FOR CONGRESS 3 (2013) (providing background on super PACs).

⁶ Sarah Dutton et al., *Poll: Americans Say Money Has Too Much Influence in Campaigns*, CBS NEWS (June 2, 2015), <http://www.cbsnews.com/news/poll-americans-say-money-has-too-much-influence-in-campaigns/> [<https://perma.cc/3CWW-V5VU>] (finding that 84% of Americans think money has too much influence on political campaigns); Greg Stohr, *Bloomberg Poll: Americans Want Supreme Court to Turn off Political Spending Spigot*, BLOOMBERG (Sept. 28, 2015), <http://www.bloomberg.com/politics/articles/2015-09-28/bloomberg-poll-americans-want-supreme-court-to-turn-off-political-spending-spigot> [<https://perma.cc/HGC7-TLXC>] (finding that 78% of Americans oppose the Supreme Court's *Citizens United* ruling).

democracies.⁷ 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.⁸

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.⁹ 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

⁷See D.R. Piccio, *Northern, Western and Southern Europe*, in FUNDING OF POLITICAL PARTIES AND ELECTION CAMPAIGNS 207, 208–09 (Elin Falguera et al. eds., 2014).

⁸See, e.g., RICHARD L. HASEN, PLUTOCRATS UNITED: CAMPAIGN MONEY, THE SUPREME COURT, AND THE DISTORTION OF AMERICAN ELECTIONS 166 (2016) [hereinafter HASEN, PLUTOCRATS UNITED]; Richard L. Hasen, *Three Wrong Progressive Approaches (and One Right One) to Campaign Finance Reform*, 8 HARV. L. & POL'Y REV. 21, 29 (2014); Eric Posner, *The U.S. Constitution Is Impossible to Amend*, SLATE (May 5, 2014), http://www.slate.com/articles/news_and_politics/view_from_chicago/2014/05/amending_the_constitution_is_much_too_hard_blame_the_founders.html [<https://perma.cc/UMJ9-E2P7>].

⁹On 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.¹⁰ The burglary was foiled by an alert security guard who discovered evidence of the break-in while the burglars were still inside the building.¹¹ When metropolitan police officers arrived at the Watergate and entered the DNC offices, the burglars surrendered without incident.¹²

But as the arresting officers later testified, the police immediately recognized that this was “a little bigger than the average burglary.”¹³ Indeed, there was nothing ordinary about the Watergate burglars. They wore business suits and blue latex surgical gloves.¹⁴ Even more intriguing was what they carried with them: electronic eavesdropping devices, cameras, a walkie-talkie, burglary tools, and a police radio scanner.¹⁵ 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.¹⁶ A large portion of the cash was in the form of \$100 bills with serial numbers in sequential order.¹⁷

Justice Department investigators and Washington reporters recognized that the key to solving the riddle of Watergate was to “follow the money.”¹⁸ Although the Nixon Administration downplayed Watergate’s significance by ridiculing it as a “third-rate burglary,”¹⁹ 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.²⁰ The money thus directly tied the President’s reelection campaign to the Watergate burglary.²¹

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

¹⁰ FRED EMERY, *WATERGATE: THE CORRUPTION OF AMERICAN POLITICS AND THE FALL OF RICHARD NIXON* 132–37 (1994); J. ANTHONY LUKAS, *NIGHTMARE: THE UNDERSIDE OF THE NIXON YEARS* 279 (1977).

¹¹ EMERY, *supra* note 10, at 132–33.

¹² *Id.* at 135–36.

¹³ LUKAS, *supra* note 10, at 287.

¹⁴ *Id.*

¹⁵ *Id.*; KEITH W. OLSON, *WATERGATE: THE PRESIDENTIAL SCANDAL THAT SHOOK AMERICA* 45 (2003); BARRY SUSSMAN, *THE GREAT COVER-UP: NIXON AND THE SCANDAL OF WATERGATE* 9 (2010).

¹⁶ LUKAS, *supra* note 10, at 287.

¹⁷ JOHN W. DEAN, *THE NIXON DEFENSE: WHAT HE KNEW AND WHEN HE KNEW IT* 5 (2014); EMERY, *supra* note 10, at 148; LUKAS, *supra* note 10, at 287; OLSON, *supra* note 15, at 45; SUSSMAN, *supra* note 15, at 11, 60.

¹⁸ On the phrase “follow the money,” see RALPH KEYES, *THE QUOTE VERIFIER: WHO SAID WHAT, WHERE, AND WHEN* 65–66 (2006), and BOB WOODWARD, *THE SECRET MAN: THE STORY OF WATERGATE’S DEEP THROAT* 70–71 (2005).

¹⁹ *Watergate and the White House: The ‘Third-Rate Burglary’ that Toppled a President*, U.S. NEWS & WORLD REP. (Aug. 8, 2014), <http://www.usnews.com/news/articles/2014/08/08/watergate-and-the-white-house-the-third-rate-burglary-that-toppled-a-president> [https://perma.cc/V8C6-DY7V].

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.²² Dean revealed that the President and his top aides had participated in an illicit effort to conceal the burglars' ties to the Administration.²³ Later that summer, White House staffer Alexander Butterfield disclosed to Senate investigators the existence of an Oval Office audiotaping system.²⁴ The investigation triggered a constitutional crisis when President Nixon defied congressional and judicial subpoenas by refusing to turn over Watergate-related audiotapes.²⁵ He claimed that the doctrine of executive privilege empowered him to withhold the tapes from disclosure to Congress or the courts.²⁶

The Watergate scandal reached a dramatic climax in July 1974 when the Supreme Court ruled against the President.²⁷ Nixon knew the ruling spelled his political doom because the tapes contained evidence of his personal involvement in the cover-up.²⁸ Faced with the certainty of impeachment in the House and conviction in the Senate, Nixon resigned the presidency on August 9, 1974.²⁹

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.³⁰ In 1972, the Nixon campaign spent what at the time was an unprecedented amount of \$67 million,³¹ much of which the Administration failed to disclose publicly.³² Watergate investigators discovered that Nixon's secret donations included \$850,000 in illegal corporate campaign contributions.³³ 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,

²² OLSON, *supra* note 15, at 77.

²³ SUSSMAN, *supra* note 15, at 228–30.

²⁴ EMERY, *supra* note 10, at 367–69.

²⁵ STANLEY I. KUTLER, *THE WARS OF WATERGATE: THE LAST CRISIS OF RICHARD NIXON* 388–90, 510, 513–14 (1990).

²⁶ THEODORE H. WHITE, *BREACH OF FAITH: THE FALL OF RICHARD NIXON* 3–5, 255–57 (1975).

²⁷ *United States v. Nixon*, 418 U.S. 683, 702 (1974).

²⁸ OLSON, *supra* note 15, at 134.

²⁹ BOB WOODWARD & CARL BERNSTEIN, *THE FINAL DAYS* 451 (1976).

³⁰ DEAN, *supra* note 17, at 5–6; LUKAS, *supra* note 10, at 212; OLSON, *supra* note 15, at 45; SUSSMAN, *supra* note 15, at 9.

³¹ ALEXANDER, *supra* note 20, at 78–79.

³² *Id.* at 49–54; EMERY, *supra* note 10, at 109.

³³ ALEXANDER, *supra* note 20, at 513; EMERY, *supra* note 10, at 110.

DuPont, Goodyear Tire, and Gulf Oil, among others.³⁴ Watergate investigators learned that many corporations felt pressured by the Administration to make campaign contributions.³⁵ 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.”³⁶

When Nixon’s crimes came to light, the Watergate scandal crystallized in the public mind the notion that campaign contributions were inherently corrupting.³⁷ 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.”³⁸ 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.³⁹

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.⁴⁰ 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.”⁴¹ Nixon declared that “sweeping” campaign finance reform was necessary “to restore the faith of the American people in the integrity of their political process.”⁴²

³⁴ ALEXANDER, *supra* note 20, at 513–30; 2 CONG. QUARTERLY INC., WATERGATE: CHRONOLOGY OF A CRISIS 187, 294 (1974); ROBERT E. MUTCH, BUYING THE VOTE: A HISTORY OF CAMPAIGN FINANCE REFORM 134–35 (2014).

³⁵ Michael J. Malbin, *Looking Back at the Future of Campaign Finance Reform: Interest Groups and American Elections*, in MONEY AND POLITICS IN THE UNITED STATES: FINANCING ELECTIONS IN THE 1980S, 232, 245–46 (Michael J. Malbin ed., 1984) [hereinafter MONEY AND POLITICS IN THE UNITED STATES].

³⁶ 120 CONG. REC. 26196 (1974) (extension of remarks of Hon. William J. Green (quoting George Spater)).

³⁷ MUTCH, *supra* note 34, at 137–38; Julian E. Zelizer, *Seeds of Cynicism: The Struggle over Campaign Finance, 1956–1974*, in MONEY AND POLITICS 79, 99 (Paula Baker ed., 2002).

³⁸ 120 CONG. REC. 9270 (statement of Sen. John J. Williams).

³⁹ *Id.* at 34387 (statement of Sen. Hubert Humphrey (quoting Jeb Stuart Magruder)). Two prominent political scientists agreed with Magruder’s assessment. See NELSON W. POLSBY & AARON WILDAVSKY, PRESIDENTIAL ELECTIONS: STRATEGIES OF AMERICAN ELECTORAL POLITICS 57 (6th ed. 1984).

⁴⁰ Special Message to the Congress Proposing Establishment of a Nonpartisan Commission on Federal Election Reform, 1973 PUB. PAPERS 536 (May 16, 1973).

⁴¹ Remarks About Proposed Legislation to Establish a Nonpartisan Commission on Federal Election Reform, 1973 PUB. PAPERS 533 (May 16, 1973).

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.⁴³ 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.⁴⁴

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.⁴⁵

The laws looked strict on paper. In 1907, Congress banned corporate contributions to candidates in federal elections.⁴⁶ 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.⁴⁷ 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.⁴⁸

The reforms failed in virtually every respect.⁴⁹ 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

⁴³ RAYMOND J. LA RAJA, *SMALL CHANGE: MONEY, POLITICAL PARTIES, AND CAMPAIGN FINANCE REFORM* 76 (2008); Richard L. Hasen, *The Nine Lives of Buckley v. Valeo*, in *FIRST AMENDMENT STORIES* 345, 349–53 (Richard W. Garnett & Andrew Koppelman eds., 2012).

⁴⁴ MARIAN CURRINDER, *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.

⁴⁷ LA RAJA, *supra* note 43, at 52; Anthony Corrado, *Money and Politics: A History of Federal Campaign Finance Law*, in *THE NEW CAMPAIGN FINANCE SOURCEBOOK* 7, 13–14 (Anthony Corrado et al. eds., 2005).

⁴⁸ *Citizens United v. FEC*, 558 U.S. 310, 343 (2010); LA RAJA, *supra* note 43, at 54–55, 60–61; SORAUF, *supra* note 1, at 6; Corrado, *supra* note 47, at 14–17.

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.⁵⁵ 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

⁵⁰ LEWIS L. GOULD, *THE MOST EXCLUSIVE CLUB: A HISTORY OF THE MODERN UNITED STATES SENATE* 111 (2005).

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.

⁵⁷ Louise Overacker, *Campaign Finance in the Presidential Election of 1940*, 35 AM. POL. SCI. REV. 701, 725 (1941) (quoting Maurice M. Milligan, Special Assistant to the Attorney General).

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).

⁵⁹ LA RAJA, *supra* note 43, at 66–72; Corrado, *supra* note 47, at 19–20; Hasen, *supra* note 43, at 349–50.

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.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.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 1972.⁶³

Although FECA lacked teeth, the events of 1972 fundamentally transformed the political dynamics of the campaign finance debate.⁶⁴ During the '72 campaign, Nixon enjoyed a huge financial advantage over his Democratic challenger, George McGovern.⁶⁵ The Nixon-McGovern race culminated a decade in which Democrats experienced growing fundraising problems even as they won Congressional elections.⁶⁶ The Vietnam War and the civil rights movement⁶⁷ profoundly divided the Democratic Party, with its divisions put on full display during the Party's chaotic 1968 convention in Chicago.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.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.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.⁷¹ Newspapers throughout the country rallied to the cause of reform. Citing Watergate's "sordid" revelations, the *New York Times* declared, "Now is the time for a full and fundamental cleansing of the nation's outmoded, corrupt system of financing public

⁶¹ LA RAJA, *supra* note 43, at 72–75; MUTCH, *supra* note 34, at 130–31; Corrado, *supra* note 47, at 20–22.

⁶² ALEXANDER, *supra* note 20, at 459.

⁶³ Corrado, *supra* note 47, at 21–22.

⁶⁴ MUTCH, *supra* note 34, at 133–34; JULIAN E. ZELIZER, ON CAPITOL HILL: THE STRUGGLE TO REFORM CONGRESS AND ITS CONSEQUENCES, 1948–2000, at 117–21 (2004); Joel L. Fleishman, *The 1974 Federal Election Campaign Act Amendments: The Shortcomings of Good Intentions*, 1975 DUKE L.J. 851, 852.

⁶⁵ ALEXANDER, *supra* note 20, at 78–79.

⁶⁶ LA RAJA, *supra* note 43, at 66–75.

⁶⁷ DAVID FARBER, CHICAGO '68, at 94 (1988); LA RAJA, *supra* note 43, at 72.

⁶⁸ LEWIS L. GOULD, 1968: THE ELECTION THAT CHANGED AMERICA 104–19 (2d ed. 2010); RICK PERLSTEIN, NIXONLAND: THE RISE OF A PRESIDENT AND THE FRACTURING OF AMERICA 307–54 (2008).

⁶⁹ LA RAJA, *supra* note 43, at 69, 72. Frank Sorauf places the Democratic Party's 1968 campaign debt at \$6 million in 1971. SORAUF, *supra* note 1, at 7.

⁷⁰ LA RAJA, *supra* note 43, at 66–75; SORAUF, *supra* note 1, at 7.

⁷¹ LA RAJA, *supra* note 43, at 75.

elections with private money.”⁷² 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.”⁷³

The reform groundswell finally forced Congress to act. In 1973 and 1974 Congress debated amendments to FECA that would revolutionize federal election law.⁷⁴ 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.⁷⁵

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.⁷⁶ 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.”⁷⁷ 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.”⁷⁸ 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.⁷⁹ “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.”⁸⁰

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.”⁸¹ 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

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.*

⁷⁶ 119 CONG. REC. 25984 (1973) (statement of Sen. Joe Biden).

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.”⁸² He concluded that the FECA amendments bill “gives us our best chance ever of cleaning up our politics.”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.”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.⁸⁵ Winter concluded that “[t]here is no room for price controls in the marketplace of ideas.”⁸⁶ The leading Senate opponent of the 1974 amendments was Senator James Buckley of New York.⁸⁷ The Republican senator described the amendments as an act of “cynicism” that should be retitled the “Incumbent Protection Act of 1974.”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.”⁸⁹ Buckley predicted that the Supreme Court would strike down both the proposed expenditure caps and the contribution limits on First Amendment grounds.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.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.⁹²

The steady drumbeat of new revelations about Nixon’s fundraising practices made support for reform irresistible in Congress.⁹³ On August 8,

⁸² *Id.*

⁸³ 120 CONG. REC. 8453 (statement of Sen. Hubert Humphrey).

⁸⁴ RALPH K. WINTER JR., WATERGATE AND THE LAW: POLITICAL CAMPAIGNS AND PRESIDENTIAL POWER 27 (1974).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Hasen, *supra* note 43, at 355.

⁸⁸ 120 CONG. REC. 8201, 34384 (statement of Sen. James Buckley).

⁸⁹ *Id.* at 34384.

⁹⁰ *Id.* at 34385.

⁹¹ *Money, Politics and the American Public*, ROPER CTR. FOR PUB. OPINION RES. (Oct. 14, 2014), <http://ropercenter.cornell.edu/money-politics-and-the-american-public/> [<https://perma.cc/ZS3S-APV4>].

⁹² *See* GEORGE H. GALLUP, THE GALLUP POLL: PUBLIC OPINION, 1972–1977, at 186 (1978).

⁹³ SORAUF, *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.*

⁹⁶ Remarks on Signing the Federal Election Campaign Act Amendments of 1974, 1974 PUB. PAPERS 302 (Oct. 15, 1974); Hasen, *supra* note 43, at 353.

⁹⁷ *McCutcheon v. FEC*, 134 S. Ct. 1434, 1443 (2014); *McConnell v. FEC*, 540 U.S. 93, 118–19 (2003), *overruled by* *Citizens United v. FEC*, 558 U.S. 310 (2010); *Buckley v. Valeo*, 424 U.S. 1, 7, 12–13, 39–40, 50, 54–55, 85–86, 109–13 (1976) (per curiam). A proposal for public financing of congressional campaigns passed the Senate but was rejected by the House. Malbin, *supra* note 35, at 234.

⁹⁸ Brice M. Clagett & John R. Bolton, *Buckley v. Valeo, Its Aftermath, and Its Prospects: The Constitutionality of Government Restraints on Political Campaign Financing*, 29 VAND. L. REV. 1327, 1328–29 (1976); Hasen, *supra* note 43, at 356.

⁹⁹ *Buckley v. Valeo*, 387 F. Supp. 135, 137 (D.D.C. 1975).

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-page¹⁰⁷ 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

¹⁰¹ *Buckley*, 387 F. Supp. at 138; Hasen, *supra* note 43, at 357; see also LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 800 n.1 (1978); Frank J. Sorauf, *Caught in a Political Thicket: The Supreme Court and Campaign Finance*, 3 CONST. COMMENT. 97, 119 (1986).

¹⁰² Hasen, *supra* note 43, at 357–58.

¹⁰³ *Buckley v. Valeo*, 519 F.2d 821, 831–33 (D.C. Cir. 1975) (en banc) (per curiam), *aff'd in part and rev'd in part*, 424 U.S. 1 (1976) (per curiam).

¹⁰⁴ *Id.* at 860.

¹⁰⁵ Hasen, *supra* note 43, at 363.

¹⁰⁶ *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam). Francis R. Valeo was the Secretary of the Senate. Hasen, *supra* note 43, at 356, 364.

¹⁰⁷ The opinion was 294 pages including footnotes. Hasen, *supra* note 43, at 364. The Supreme Court noted *Buckley*'s 139-page length (excluding footnotes) in *McCutcheon v. FEC*, 134 S. Ct. 1434, 1437, 1445 (2014). See generally Richard L. Hasen, *The Untold Drafting History of Buckley v. Valeo*, 2 ELECTION L.J. 241 (2003) (discussing the drafting history of the case).

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,¹¹¹ a majority of the Court concluded that FECA's \$1,000 contribution limit was a reasonable policy response.¹¹² 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."¹¹³ Besides upholding contribution limits, the Court affirmed the creation of the FEC,¹¹⁴ the Act's public financing provisions, and its disclosure requirements.¹¹⁵

Momentously, however, the *Buckley* Court also struck down the caps on overall expenditures by candidates, parties, private individuals, and outside groups.¹¹⁶ The Court held that the restrictions on total spending violated the First Amendment rights of freedom of speech and association.¹¹⁷ 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."¹¹⁸ Such restrictions, the Justices held, "limit political expression 'at the core of our electoral process and of the First Amendment freedoms.'"¹¹⁹ 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."¹²⁰ 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."¹²¹

The *Buckley* decision thus created a hybrid campaign finance model that consisted of low limits on contributions to federal candidates and parties¹²² 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

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.

¹³¹ DENNIS J. HUTCHINSON, *THE MAN WHO ONCE WAS WHIZZER WHITE* 232, 236–40 (1998).

staff to communicate in more places and ways unconnected with the fundraising function.”¹³² 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.”¹³³

In his dissent, Chief Justice Burger took the exact opposite position, contending that the Court should have invalidated both the contribution and expenditure limits.¹³⁴ 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.”¹³⁵ 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.”¹³⁶ 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.¹³⁷ “I question whether the residue leaves a workable program.”¹³⁸

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.¹³⁹ 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.”¹⁴⁰ 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.”¹⁴¹ In contrast,

¹³² *Buckley*, 424 U.S. at 265 (White, J., concurring in part and dissenting in part).

¹³³ *Id.*

¹³⁴ *Id.* at 235 (Burger, C.J., concurring in part and dissenting in part).

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at 236.

¹³⁸ *Buckley*, 424 U.S. at 236 (Burger, C.J., concurring in part and dissenting in part).

¹³⁹ Sorauf, *supra* note 101, at 119.

¹⁴⁰ TRIBE, *supra* note 101, at 800 n.1.

¹⁴¹ Daniel D. Polsby, *Buckley v. Valeo: The Special Nature of Political Speech*, 1976 SUP. CT. REV. 1, 43 (1976).

Polsby observed, the Supreme Court Justices who invalidated FECA's expenditure limits lacked "comparable political credentials" in their pre-Court biographies.¹⁴²

The next forty years would provide the empirical data that the Supreme Court lacked in *Buckley*. Although the Supreme Court's decision in *Buckley* has been sharply criticized,¹⁴³ it proved remarkably enduring. Subsequent cases would modify *Buckley*, but none overturned its central holdings regarding contribution and expenditure limits. For example, in the 2010 case of *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.¹⁴⁴ Although the *Citizens United* decision created a storm of controversy,¹⁴⁵ it did not change the two key features of the post-Watergate campaign finance model that FECA and *Buckley* established: low contribution limits on candidates and parties but no overall expenditure caps.

The system that *Buckley* created soon proved to be deeply dysfunctional. As the distinguished political scientist Frank Sorauf observed on the tenth anniversary of the *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."¹⁴⁶ The *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."¹⁴⁷ Indeed, the last forty years of federal elections have demonstrated just how

¹⁴² *Id.*

¹⁴³ The literature on *Buckley* is far too vast to list in its entirety here, but for examples of the wide range of reactions to the landmark case, see generally HASEN, PLUTOCRATS UNITED, *supra* note 8, at 20–25, 176–89; Deborah Hellman, *Money Talks but It Isn't Speech*, 95 MINN. L. REV. 953 (2011); Bradley A. Smith, *Money Talks: Speech, Corruption, Equality, and Campaign Finance*, 86 GEO. L.J. 45 (1997); Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390 (1994); and J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001 (1976).

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

¹⁴⁵ See Dan Eggen, *Poll: Large Majority Opposes Supreme Court's Decision on Campaign Financing*, WASH. POST (Feb. 17, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/17/AR2010021701151.html> [<https://perma.cc/JTN6-MCEV>]; Adam Liptak, *Supreme Courts Gets a Rare Rebuke, in Front of a Nation*, N.Y. TIMES (Jan. 28, 2010), http://www.nytimes.com/2010/01/29/us/politics/29scotus.html?_r=2 [<https://perma.cc/HR8C-ZNB7>]. See generally Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581 (2011).

¹⁴⁶ Sorauf, *supra* note 101, at 119.

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

¹⁴⁸ POLSBY & WILDAVSKY, *supra* note 39, at 54.

¹⁴⁹ ALEXANDER, *supra* note 20, at 78.

¹⁵⁰ 120 CONG. REC. 8453 (1974).

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 1982.¹⁵³ 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 1982.¹⁵⁴ The increase in federal election spending far exceeded the rate of inflation.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.¹⁵⁶ Overall, average campaign expenditures by House candidates nearly tripled between 1974 and 1984.¹⁵⁷ 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 \$200,000.¹⁵⁸ In 1982, sixty-seven House candidates spent more than half a million dollars each on their campaigns.¹⁵⁹

Ironically, the burden fell particularly heavily on challengers.¹⁶⁰ FECA's critics had claimed that expenditure caps would harm challengers,¹⁶¹ but instead the reverse proved true. In the absence of expenditure limits, incumbents possessed a huge and growing fundraising advantage.¹⁶² In 1980, the average cost of a successful challenge to a House incumbent was 242% more than it was in 1974.¹⁶³ Similarly, in 1980 it cost on average \$353,000 to defeat a Republican House incumbent and \$341,000 to defeat a Democratic House incumbent.¹⁶⁴ By 1990, the average House incumbent spent approximately four times as much as the average challenger.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.¹⁶⁶ In 1996, congressional campaign expenditures

¹⁵³ Michael J. Malbin & Thomas W. Skladony, *Selected Campaign Finance Data, 1974–82*, in MONEY AND POLITICS IN THE UNITED STATES, *supra* note 35, app. at 278.

¹⁵⁴ *Id.* at 282.

¹⁵⁵ LA RAJA, *supra* note 43, at 3; NORMAN J. ORNSTEIN ET AL., VITAL STATISTICS ON CONGRESS, 1982, at 57 (1982).

¹⁵⁶ ORNSTEIN ET AL., *supra* note 155, at 56–57.

¹⁵⁷ CURRINDER, *supra* note 44, at 23.

¹⁵⁸ ORNSTEIN ET AL., *supra* note 155, at 57.

¹⁵⁹ Malbin & Skladony, *supra* note 153, at 281.

¹⁶⁰ MELVIN I. UROFSKY, MONEY & FREE SPEECH: CAMPAIGN FINANCE REFORM AND THE COURTS 62–63 (2005).

¹⁶¹ See Senator Buckley's comments, 120 CONG. REC. 8201 (1974), and WINTER, *supra* note 84, at 22–28.

¹⁶² Anthony Corrado, *Running Backward: The Congressional Money Chase*, in THE PERMANENT CAMPAIGN AND ITS FUTURE 75, 79 (Norman J. Ornstein & Thomas E. Mann eds., 2000) [hereinafter PERMANENT CAMPAIGN].

¹⁶³ ORNSTEIN ET AL., *supra* note 155, at 56.

¹⁶⁴ Malbin & Skladony, *supra* note 153, at 284.

¹⁶⁵ SORAUF, *supra* note 1, at 67.

¹⁶⁶ SARA FRITZ & DWIGHT MORRIS, HANDBOOK OF CAMPAIGN SPENDING: MONEY IN THE 1990 CONGRESSIONAL RACES 4 (1992).

reached \$765 million.¹⁶⁷ Inflation did not account for the difference. Campaign costs in Senate and House elections rose at twice the rate of inflation between 1974 and 1998.¹⁶⁸ The 2000s saw an even faster increase.¹⁶⁹ 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 2012.¹⁷⁰

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.¹⁷¹ The increase resulted in part from FECA's public financing program for presidential candidates.¹⁷² But the growth in private expenditures in presidential elections also grew at an accelerating rate, from \$275 million in 1980¹⁷³ to \$1.8 billion in 2008.¹⁷⁴ The increase far exceeded inflation. In real dollar terms, presidential campaign costs in 2008 were about four times higher than in 1972,¹⁷⁵ 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,¹⁷⁶ and Section 501(c)(4) groups¹⁷⁷ are added to spending by presidential and congressional

¹⁶⁷ Herbert E. Alexander, *Spending in the 1996 Elections*, in FINANCING THE 1996 ELECTION 11, 22 (John C. Green ed., 1999).

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>].

¹⁷⁰ Paul Steinhauer & Robert Yoon, *Cost to Win Congressional Election Skyrockets*, CNN (July 11, 2013), <http://www.cnn.com/2013/07/11/politics/congress-election-costs/> [<https://perma.cc/4H3H-FWQ8>].

¹⁷¹ Herbert E. Alexander, *Making Sense About Dollars in the 1980 Presidential Campaigns*, in MONEY AND POLITICS IN THE UNITED STATES, *supra* note 35, at 11, 11.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ David B. Magleby, *Adaptation and Innovation in the Financing of the 2008 Elections*, in FINANCING THE 2008 ELECTION 1, 19 (David B. Magleby & Anthony Corrado eds., 2011).

¹⁷⁵ Dave Gilson, *The Crazy Cost of Becoming President, From Lincoln to Obama*, MOTHER JONES (Feb. 20, 2012), <http://www.motherjones.com/mojo/2012/02/historic-price-cost-presidential-elections> [<https://perma.cc/U3MG-ZWD4>].

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).

¹⁷⁷ See generally ERIKA K. LUNDER & L. PAIGE WHITAKER, CONG. RESEARCH SERV., R40183, 501(C)(4)S AND CAMPAIGN ACTIVITY: ANALYSIS UNDER TAX AND CAMPAIGN FINANCE LAWS (2013) (describing the restrictions 501(c)(4) organizations face after *Citizens United*).

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.

¹⁷⁹ *History: 1970s*, ADVERTISINGAGE (Sept. 15, 2003), <http://adage.com/article/adage-encyclopedia/history-1970s/98703/> [<https://perma.cc/P3FK-XN8S>]; see also SORAUF, *supra* note 1, at 3.

¹⁸⁰ SORAUF, *supra* note 1, at 3; see also STEPHEN ANSOLABEHRE 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.

¹⁸⁴ On the history of Super Bowl advertising, see Natalie Moses, *Break Time is Game Time: A History of Super Bowl Advertising*, in 3 *WE ARE WHAT WE SELL: HOW ADVERTISING SHAPES AMERICAN LIFE . . . AND ALWAYS HAS* 157, 157–71 (Danielle Sarver Coombs & Bob Batchelor eds., 2014).

¹⁸⁵ Glenn Davis, *The Rising Costs of Super Bowl Ads in One Chart*, USA TODAY (Feb. 1, 2014), <https://web.archive.org/web/20151110202031/http://www.usatoday.com/story/sports/ad-meter/super-bowl/2014/01/20/ad-meter-story-super-bowl-ad-costs/4476441/> [<https://perma.cc/RG8K-53NQ>].

¹⁸⁶ *Super Bowl Ad Pricing Has Increased 76% over Past Decade, Generating \$2.38 Billion in Total Network Ad Sales*, KANTAR MEDIA (Jan. 12, 2016), <http://www.kantarmedia.com/us/newsroom/press-releases/super-bowl-ad-pricing-has-increased-76-over-past-decade> [<https://perma.cc/XT83-8NRM>].

¹⁸⁷ Max Miceli, *Super Bowl Ads Cost More than Ever*, U.S. NEWS & WORLD REP. (Feb. 4, 2016), <http://www.usnews.com/news/articles/2016-02-04/super-bowl-ads-cost-more-than-ever> [<https://perma.cc/Z3DY-UH4L>].

expensive. A thirty-second television advertisement during a primetime regular season game in 2011 cost \$425,000.¹⁸⁸ Moreover, those numbers do not include the cost of producing the commercial itself.¹⁸⁹

The result is relentlessly increasing media costs for commercial and political advertisers alike.¹⁹⁰ Indeed, annual outlays of billions of dollars are a commonplace feature of the American commercial advertising landscape.¹⁹¹ Thus, while the billions spent on federal election campaigns outrages 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.¹⁹² *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.¹⁹³ 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,¹⁹⁴ claim that *Citizens United* is the

¹⁸⁸ Anthony Crupi, *In Their Prime: Broadcast Spot Costs Soar*, ADWEEK (June 22, 2011), <http://www.adweek.com/news/television/their-prime-broadcast-spot-costs-soar-132805> [<https://perma.cc/XNB9-KDUV>].

¹⁸⁹ John Franzén, *Consultants and Candidates*, in POLITICAL COMMUNICATION: THE MANSHIP SCHOOL GUIDE 13, 20 (Robert Mann & David D. Perlmutter eds., rev. ed. 2011) [hereinafter POLITICAL COMMUNICATION].

¹⁹⁰ Darrell M. West, *A Brief History of Political Advertising on Television* ("Ads now constitute about 60 percent of the budget for major presidential campaigns."), in POLITICAL COMMUNICATION, *supra* note 189, at 23, 23. For example, Proctor & Gamble spent \$43 million on television advertisements in 1956. JAMES L. BAUGHMAN, *SAME TIME, SAME STATION: CREATING AMERICAN TELEVISION, 1948–1961*, at 202 (2007). By June 2014, Proctor & Gamble spent \$9 billion annually on advertising. Nathalie Tadena, *P&G Joins Movement to Cut Ad Costs*, MARKETWATCH (Apr. 26, 2015), <http://www.marketwatch.com/story/pg-joins-movement-to-cut-ad-costs-2015-04-26-214854045> [<https://perma.cc/8FMQ-4RJ4>].

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/7Q5J-NH5R>].

¹⁹² *Total US Ad Spending to See Largest Increase Since 2004*, EMARKETER (July 2, 2014), <http://www.emarketer.com/Article/Total-US-Ad-Spending-See-Largest-Increase-Since-2004/1010982> [<https://perma.cc/LL2E-7JFP>]. The rise of digital advertising is yet another expense for political campaigns. See Nathaniel Persily, *The Campaign Revolution Will Not Be Televised*, AM. INT., Nov./Dec. 2015, at 33, 34.

¹⁹³ UROFSKY, *supra* note 160, at 63.

¹⁹⁴ Eliza Collins, *Sanders Takes Dead Aim on Citizens United Ruling*, POLITICO (May 10, 2015), <http://www.politico.com/story/2015/05/bernie-sanders-takes-dead-aim-on-citizens-united-ruling-117792> [<https://perma.cc/DP6M-MB2E>].

cause of America's billion dollar federal election campaigns.¹⁹⁵ 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.¹⁹⁶

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.¹⁹⁷ The 2000 election cost \$3.8 billion, the 2004 election cost \$4.5 billion, and the 2008 election cost just under \$6 billion.¹⁹⁸ 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.¹⁹⁹ 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 2012.²⁰⁰ 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.²⁰¹

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.²⁰²

¹⁹⁵ See, e.g., Peter Overby, *Presidential Candidates Pledge to Undo 'Citizens United.' But Can They?*, NPR (Feb. 14, 2016), <http://www.npr.org/2016/02/14/466668949/presidential-candidates-pledge-to-undo-citizens-united-but-can-they/> [<https://perma.cc/C5NF-GQX7>].

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.

¹⁹⁹ *FEC Summarizes Campaign Activity of the 2011–2012 Election Cycle*, FEC (Apr. 19, 2013), http://www.fec.gov/press/press2013/20130419_2012-24m-Summary.shtml [<https://perma.cc/HR23-TV9Y>] [hereinafter *FEC Summarizes*].

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,²⁰³ 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.²⁰⁴ In addition, PACs spent \$135 million in independent expenditures in 2008, double the amount they spent in 2004.²⁰⁵ *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."²⁰⁶

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.²⁰⁷ As fundraising monopolized elected officials' time and energy, it also distracted them from their core legislative duties.²⁰⁸ Members

²⁰³ *FEC Summarizes*, *supra* note 199.

²⁰⁴ Allan Cigler, *Interest Groups and the Financing of the 2008 Elections*, in FINANCING THE 2008 ELECTION, *supra* note 174, at 249, 270.

²⁰⁵ *Id.* at 263.

²⁰⁶ *Buckley v. Valeo*, 424 U.S. 1, 264 (1976) (White, J., concurring in part and dissenting in part) (per curiam).

²⁰⁷ White himself used the "treadmill" metaphor to describe the practical impact of the majority's ruling. *See id.* at 265.

²⁰⁸ LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* 138–42 (2011).

of Congress found themselves with far less time to develop public policy expertise and to master the legislative process.²⁰⁹ 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.”²¹⁰ 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.²¹¹ Washington’s fiscal restraint did not impress the electorate and they handed him in return a surprising defeat.²¹² He would not make the same mistake again. In the 1758 election, Washington spared no expense, purchasing 160 gallons of alcohol for the voters.²¹³ Washington’s generous campaign expenditure impressed the voters and he went on to win the first election victory of his long political career.²¹⁴

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.²¹⁵ 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.²¹⁶ The practice of soliciting large contributions from the rich and

²⁰⁹ *See id.*

²¹⁰ JEFFREY H. BIRNBAUM, *THE MONEY MEN: THE REAL STORY OF FUND-RAISING’S INFLUENCE ON POLITICAL POWER IN AMERICA* 29–30 (2000) (quoting Mark Hanna); see also UROFSKY, *supra* note 160, at 3 (quoting Mark Hanna).

²¹¹ W.J. RORABAUGH, *THE ALCOHOLIC REPUBLIC: AN AMERICAN TRADITION* 152 (1979).

²¹² DENNIS J. POGUE, *FOUNDING 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) (“[P]rior 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).

²¹⁶ MARGARET LEECH, *IN THE DAYS OF MCKINLEY* 86–87 (1959); see also BIRNBAUM, *supra* note 210, at 29; BROGAN, *supra* note 215, at 255; GEORGE THAYER, *WHO SHAKES THE MONEY TREE? AMERICAN CAMPAIGN FINANCING PRACTICES FROM 1789 TO THE PRESENT* 48–50 (1973).

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

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 KOLODNY, *supra* note 56, at 90.

²²¹ BROWN ET AL., *supra* note 215, at 45–49.

²²² *See* BROGAN, *supra* note 215, at 259.

²²³ DONALD R. MATTHEWS, U.S. SENATORS AND THEIR WORLD 72 (1960).

²²⁴ *Id.* at 73.

²²⁵ BROGAN, *supra* note 215, at 259.

²²⁶ *See* NEIL MACNEIL & RICHARD A. BAKER, THE AMERICAN SENATE: AN INSIDER'S HISTORY 52 (2013); Corrado, *supra* note 162, at 84–85, 87.

²²⁷ *See* Corrado, *supra* note 162, at 77.

attention to legislation.²²⁸ With no need for members to hurry home for weekend fundraisers, a five-day Congressional workweek was standard in the mid-twentieth century.²²⁹

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.²³⁰ Members who failed to assume sufficient legislative responsibilities incurred the disdain of their peers.²³¹ The political scientist Richard Fenno, Jr., found a similar culture in the House of Representatives in a 1962 study.²³² 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.²³³ House Speaker Sam Rayburn set the example himself, working in his Capitol Hill office six days a week.²³⁴

Equally important, in the pre-FECA era, members of Congress had time to get to know their colleagues, including members of the other party.²³⁵ 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.²³⁶ 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.²³⁷ Rayburn likewise used his free time to build a personal connection with rank-and-file House members.²³⁸

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.

²³² See Richard F. Fenno, Jr., *The House Appropriations Committee as a Political System: The Problem of Integration*, 56 AM. POL. SCI. REV. 310, 314 (1962).

²³³ See *id.*

²³⁴ D.B. HARDEMAN & DONALD C. BACON, RAYBURN: A BIOGRAPHY 417 (1987).

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.

²³⁷ See ROBERT DALLEK, LONE STAR RISING: LYNDON JOHNSON AND HIS TIMES 1908–1960, at 378–82 (1991).

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."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."²⁴⁰

The 1974 FECA amendments brought an end to the age of quickly raising large sums of campaign money. FECA's contribution limits²⁴¹ gave rise to a drastically changed fundraising environment.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."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.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.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.²⁴⁶ The inevitable consequence was federal candidates had no choice but to constantly search for new donors.²⁴⁷ Even when the Bipartisan Campaign Finance Reform Act of 2003 (BCRA) raised the contribution limit to \$2,000 and indexed it to inflation,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

²³⁹ The term "permanent campaign" was coined by former Clinton Administration adviser Sidney Blumenthal. Hugh Hecl, *Campaigning and Governing: A Conspectus, in* PERMANENT CAMPAIGN, *supra* note 162, at 1, 1–2; *see also* Corrado, *supra* note 162, at 75, 104.

²⁴⁰ GOULD, *supra* note 50, at 278.

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

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.")

²⁴³ *Id.* at 19 (quoting Democratic fundraiser, Carol Hassamen).

²⁴⁴ BAKER, *supra* note 235, at 283 n.10.

²⁴⁵ *See* BROWN ET AL., *supra* note 215, at 19.

²⁴⁶ Corrado, *supra* note 47, at 23.

²⁴⁷ BROWN ET AL., *supra* note 215, at 19.

²⁴⁸ Corrado, *supra* note 47, at 41. *See generally* LIFE AFTER REFORM: WHEN THE BIPARTISAN CAMPAIGN REFORM ACT MEETS POLITICS (Michael J. Malbin ed., 2003) (discussing BCRA).

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).

²⁵⁵ Shane Goldmacher, *Former Senate Leader Says Senators Spent Two-Thirds of Time Asking for Money*, NAT’L J. (Jan. 16, 2014), <http://www.nationaljournal.com/congress/2014/01/16/former-senate-leader-says-senators-spent-two-thirds-time-asking-money> [<https://perma.cc/694G-T2Q2>].

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).

²⁶¹ *Life in Congress: The Member Perspective*, CONG. MGMT. FOUND. & SOC’Y FOR HUMAN RES. MGMT. 12 (2013), http://www.congressfoundation.org/storage/documents/CMF_Pubs/life-in-congress-the-member-perspective.pdf [<https://perma.cc/NHT8-A8KQ>]; see also RICHARD F. FENNO, JR., HOME STYLE: HOUSE MEMBERS IN THEIR DISTRICTS 32 (1978) (describing how the trend was underway on the eve of FECA).

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

²⁶³ See Ezra Klein, *The Most Depressing Graphic for Members of Congress*, WASH. POST (Jan. 14, 2013), <https://www.washingtonpost.com/news/wonk/wp/2013/01/14/the-most-depressing-graphic-for-members-of-congress/> [<https://perma.cc/W8RH-SAPZ>].

²⁶⁴ Norah O'Donnell, *Are Members of Congress Becoming Telemarketers?*, CBS NEWS (Apr. 24, 2016), <http://www.cbsnews.com/news/60-minutes-are-members-of-congress-becoming-telemarketers/> [<https://perma.cc/F8T3-KYRD>].

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.

²⁶⁸ JAMES M. CURRY, *LEGISLATING IN THE DARK: INFORMATION AND POWER IN THE HOUSE OF REPRESENTATIVES* 26 (2015).

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; TRENT 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.

²⁷⁵ See LA RAJA, *supra* note 43, at 214–18; PETER J. WALLISON & JOEL M. GORA, BETTER PARTIES, BETTER GOVERNMENT: A REALISTIC PROGRAM FOR CAMPAIGN FINANCE REFORM 9 (2009).

²⁷⁶ See 120 CONG. REC. 27510 (1974) (statement of Rep. Bella Abzug).

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>].

²⁷⁹ See LA RAJA, *supra* note 43, at 214–18. See generally SORAUF, *supra* note 1, at 75–79, 89–92.

²⁸⁰ See Corrado, *supra* note 162, at 104.

²⁸¹ See LA RAJA, *supra* note 43, at 214–15.

²⁸² DOUGLAS E. SCHOEN, HOPELESSLY DIVIDED: THE NEW CRISIS IN AMERICAN POLITICS AND WHAT IT MEANS FOR 2012 AND BEYOND 185–86 (2012).

dollars in contributions to a single federal candidate.²⁸³ In the era of low contribution limits, bundlers have become indispensable to federal campaigns.²⁸⁴ President George W. Bush's campaign awarded honorary designations to bundlers who solicited money above certain thresholds.²⁸⁵ 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.²⁸⁶

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.²⁸⁷ The post-Watergate reforms thus shifted the center of gravity in Congress from members with seniority²⁸⁸ and legislative expertise to members with fundraising skills.²⁸⁹

Fundraising remains a central duty of congressional leaders even after they assume leadership positions.²⁹⁰ House and Senate caucus rules require party leaders to establish personal "leadership PACs" to raise money on behalf of colleagues and party committees.²⁹¹ 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.²⁹² But the reality is all members bear heavy fundraising burdens.²⁹³ 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.²⁹⁴ Congressional Democratic leaders later adopted the same requirements for their caucus members.²⁹⁵ In addition, both parties base committee assignments

²⁸³ *Id.*; see also BIRNBAUM, *supra* note 210, at 42.

²⁸⁴ BIRNBAUM, *supra* note 210, at 50.

²⁸⁵ CHARLES LEWIS & CTR. FOR PUB. INTEGRITY, *THE BUYING OF THE PRESIDENT 2004*, at 8–10 (2004).

²⁸⁶ *Id.*

²⁸⁷ 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.

²⁸⁸ On the seniority system, see Nelson W. Polsby et al., *The Growth of the Seniority System in the U.S. House of Representatives*, 63 AM. POL. SCI. REV. 787, 787 (1969).

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; SORAUF, *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.

²⁹⁸ See PAUL S. HERRNSON, CONGRESSIONAL ELECTIONS: CAMPAIGNING AT HOME AND IN WASHINGTON 128 (1995); Tom King, *Candidates as Fund-Raisers* ("[F]ear and loathing of fund-raising are pandemic among American politicians."), in THE MANSHIP SCHOOL GUIDE TO POLITICAL COMMUNICATION 311 (David D. Perlmutter ed., 1999).

²⁹⁹ See SORAUF, *supra* note 1, at 188; WALLISON & GORA, *supra* note 275, at 12–13; Corrado, *supra* note 162, at 103.

³⁰⁰ Carl Hulse, *Steve Israel of New York, a Top House Democrat, Won't Seek Re-election*, N.Y. TIMES (Jan. 5, 2016), http://www.nytimes.com/2016/01/06/us/politics/steve-israel-house-democrat-new-york.html?_r=1 [<https://perma.cc/DGV8-S7AG>].

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.”³⁰⁴

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.³⁰⁵ Another study found that the percentage of Americans who believe that special interests dominate the government doubled between the 1960s and the 1990s.³⁰⁶ Even more striking, a 2008 Gallup Poll found that Americans' level of trust in government was at the lowest level since Watergate³⁰⁷ 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 2012.³⁰⁸

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.”³⁰⁹

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”).

³⁰⁵ Matthew J. Streb & April K. Clark, *The Public and Political Corruption*, in CORRUPTION AND AMERICAN POLITICS 275, 294 (Michael A. Genovese & Victoria A. Farrar-Myers eds., 2010); *see also Public Trust in Government: 1958–2014*, PEW RES. CTR. (Nov. 13, 2014), <http://www.people-press.org/2014/11/13/public-trust-in-government/> [<https://perma.cc/2L2C-YCP7>].

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.

³⁰⁸ *Are Government Officials Crooked 1958–2012*, ANES GUIDE TO PUB. OPINION & ELECTORAL BEHAV. (Nov. 11, 2015), http://www.electionstudies.org/nesguide/toptable/tab5a_4.htm [<https://perma.cc/2QXV-GHCK>].

³⁰⁹ Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. PA. L. REV. 119, 122 (2004).

Likewise, a study by David Primo found that campaign finance laws did little to improve public confidence in the government's integrity.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.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.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.³¹³ The result, they warn, is that Americans have "vanishingly low trust in government when their party is out of power."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."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?

³¹⁰ See David M. Primo, *Public Opinion and Campaign Finance: Reformers Versus Reality*, 7 INDEP. REV. 207, 217–18 (2002).

³¹¹ Marc Hetherington & Thomas Rudolph, *Why Don't Americans Trust the Government? Because the Other Party Is in Power.*, WASH. POST (Jan. 30, 2014), <https://www.washingtonpost.com/news/monkey-cage/wp/2014/01/30/why-dont-americans-trust-the-government-because-the-other-party-is-in-power/> [<https://perma.cc/9ZUS-9EDA>].

³¹² John Sides, *Washington Doesn't Work. This New Book Tells Us Why.*, WASH. POST (Nov. 5, 2015), <https://www.washingtonpost.com/news/monkey-cage/wp/2015/11/05/washington-doesnt-work-this-new-book-tells-us-why/> [<https://perma.cc/U3QB-48S4>]; see also MARC J. HETHERINGTON & THOMAS J. RUDOLPH, WHY WASHINGTON WON'T WORK: POLARIZATION, POLITICAL TRUST, AND THE GOVERNING CRISIS 9 (2015).

³¹³ Sides, *supra* note 312.

³¹⁴ Hetherington & Rudolph, *supra* note 311.

³¹⁵ Orren, *supra* note 306, at 83.

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.³¹⁶ 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.³¹⁷ 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.³¹⁸

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

³¹⁶For scholarly critiques of campaign finance reform, see generally JOHN SAMPLES, *THE FALLACY OF CAMPAIGN FINANCE REFORM* (2006); BRADLEY A. SMITH, *UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM* (2001); Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 *YALE L.J.* 1049 (1996); and Eugene Volokh, *Freedom of Speech and Speech About Political Candidates: The Unintended Consequences of Three Proposals*, 24 *HARV. J.L. & PUB. POL'Y* 47 (2000).

³¹⁷See, 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).

³¹⁸See, e.g., HASEN, *PLUTOCRATS UNITED*, *supra* note 8, at 176–89; Edward B. Foley, *Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 *COLUM. L. REV.* 1204, 1208–13 (1994); J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 *YALE L.J.* 1001, 1010 (1976). See generally Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 *U. PA. L. REV.* 73 (2004); Frank Pasquale, *Reclaiming Egalitarianism in the Political Theory of Campaign Finance Reform*, 2008 *U. ILL. L. REV.* 599.

Alabama, and purple states like Iowa.³¹⁹ 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.³²⁰

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.³²¹ Democrats have won every Oregon governor's race since 1986.³²² In legislative elections, Democrats hold large majorities in the state senate and state house.³²³ 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.³²⁴ Democratic presidential candidates have won Oregon in every election since 1988.³²⁵

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

³¹⁹ *State Limits on Contributions to Candidates: 2015–2016 Election Cycle*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/Portals/1/documents/legismgt/elect/ContributionLimitstoCandidates2015-2016.pdf> [<https://perma.cc/K92R-SFRV>] (last updated Oct. 2015). Iowa prohibits corporate contributions to candidates for state office. *Id.* On the partisan makeup of Iowa, Alabama, and Oregon, see RICHARD E. COHEN & JAMES A. BARNES, *THE ALMANAC OF AMERICAN POLITICS 2016*, at 27–29 (Lisa L. Lang ed., 2015) [hereinafter *ALMANAC 2016*] (describing Republican control of most state and federal elected offices in Alabama); *id.* at 695 (describing Iowa's political "moderation" and split control of the state legislature); *id.* at 1495–96 (describing Democratic control of most state and federal elected offices in Oregon).

³²⁰ A 2011 CNN poll found that 67% of Americans believe that "[e]lections are generally for sale to the candidate who can raise the most money." See *CNN Opinion Research Poll*, CNN (June 3–7, 2011), <http://i2.cdn.turner.com/cnn/2011/images/06/09/rell10d-2.pdf> [<https://perma.cc/4KNG-BJAR>].

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

³²² *Id.* at 1498; see also MICHAEL BARONE & GRANT UJIFUSA, *THE 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.³²⁶ Republicans have held Alabama's governor's office since 2003.³²⁷ In legislative elections, Alabama Republicans have controlled the state senate and the state house since 2011.³²⁸ 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.³²⁹ Republican presidential candidates have won Alabama in every election since 1980.³³⁰

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.³³¹ Iowa Republicans control the State House and Iowa Democrats control the State Senate.³³² In federal elections, Republicans hold both U.S. Senate seats and three of Iowa's four U.S. House seats.³³³ Yet, in presidential elections, Democrats have won Iowa in every election but one since 1988.³³⁴ By any measure, Iowa is a middle of the road state in both no-limit state elections and strict-limit federal elections.³³⁵

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.³³⁶ Alabama has fared poorly in rankings of corruption in state government, whereas Oregon and Iowa have fared

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 Koszczuk 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.

³³⁴ *Id.* at 695; see also *ALMANAC* 1990, *supra* note 322, at 431; MICHAEL BARONE & RICHARD E. COHEN, *THE ALMANAC OF AMERICAN POLITICS* 2006, at 648 (Charles Mahtesian ed., 2005).

³³⁵ See *ALMANAC* 2016, *supra* note 319, at 695 (explaining that since the 1980s, Iowa's election results "indicate a sort of steady moderation").

³³⁶ WALLISON & GORA, *supra* note 275, at 44–45. On the rankings of corruption in states, see Edward L. Glaeser & Raven E. Saks, *Corruption in America*, 90 J. PUB. ECON. 1053, 1069 (2006); Katherine Barrett & Richard Greene, *Grading the States '08: The Mandate to Measure*, GOVERNING, Mar. 2008, at 24, 24–95, http://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs_assets/2008/gradingthestates2008pdf.pdf [<https://perma.cc/4A93-2AER>]; Bill Marsh, *Illinois Is Trying. It Really Is. But the Most Corrupt State Is Actually . . .*, N.Y. TIMES (Dec. 13, 2008), <http://www.nytimes.com/2008/12/14/weekinreview/14marsh.html> [<https://perma.cc/JP9Q-PETV>].

comparatively well.³³⁷ For example, Oregon and Iowa have among the lowest rates of convicted public officials.³³⁸ 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.”³³⁹ 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.³⁴⁰ 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.”³⁴¹ Similarly, in the 1960s, Congressman James Wright of Texas warned that federal campaign finance law was “intentionally evaded by almost every candidate.”³⁴²

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,³⁴³ Social Security,³⁴⁴ Truman’s Fair Deal,³⁴⁵ the Great Society,³⁴⁶ Medicare,³⁴⁷

³³⁷ Reid Wilson, *The Most Corrupt State(s) in America*, WASH. POST (Jan. 22, 2014), <https://www.washingtonpost.com/blogs/govbeat/wp/2014/01/22/the-most-corrupt-states-in-america/> [https://perma.cc/9L3B-VKBF].

³³⁸ See Mike Maciag, *Which States Have the Highest Public Corruption Convictions?*, GOVERNING (Mar. 23, 2012), <http://www.governing.com/blogs/by-the-numbers/state-public-corruption-convictions-data.html> [https://perma.cc/8KWS-2Y7G]; *Number of Guilty Officials*, N.Y. TIMES (Dec. 14, 2008), http://www.nytimes.com/imagepages/2008/12/14/weekinreview/20081214_MARSH_GRFK_1.html [https://perma.cc/38RG-EHJM]; Rob Wile, *RANKED: The Most Corrupt States*, BUS. INSIDER (Sept. 3, 2013), <http://www.businessinsider.com/most-corrupt-states-and-territories-2013-9> [https://perma.cc/KQ2E-XDZS].

³³⁹ WALLISON & GORA, *supra* note 275, at 44.

³⁴⁰ SORAUF, *supra* note 1, at 6; Zelizer, *supra* note 37, at 80.

³⁴¹ Overacker, *supra* note 57, at 708.

³⁴² GEORGE C.S. BENSON, *POLITICAL CORRUPTION IN AMERICA 181–82* (1978) (quoting Representative James C. Wright).

³⁴³ On the New Deal, see DAVID M. KENNEDY, *FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929–1945*, at 363–80 (1999).

³⁴⁴ On Social Security, see generally DANIEL BÉLAND, *SOCIAL SECURITY: HISTORY AND POLITICS FROM THE NEW DEAL TO THE PRIVATIZATION DEBATE* (2005).

³⁴⁵ On the Fair Deal, see JAMES T. PATTERSON, *GRAND EXPECTATIONS: THE UNITED STATES, 1945–1974*, at 166 (1996).

³⁴⁶ On the Great Society, see *id.* at 562–92.

³⁴⁷ On Medicare, see generally THEODORE R. MARMOR, *THE POLITICS OF MEDICARE* (2d ed. 2000).

Medicaid,³⁴⁸ the Civil Rights Acts,³⁴⁹ and the highest tax rates³⁵⁰ 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.”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.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.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.³⁵⁴ Frick personally contributed \$100,000 to the President’s campaign and corporations and insurance companies donated more than \$1.5 million to Roosevelt.³⁵⁵ But after his election, Roosevelt embraced sweeping progressive reforms, infuriating his

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

³⁴⁹ On the Civil Rights Acts, see generally ROBERT MANN, *THE WALLS OF JERICHO: LYNDON JOHNSON, HUBERT HUMPHREY, RICHARD RUSSELL, AND THE STRUGGLE FOR CIVIL RIGHTS* (1996).

³⁵⁰ See MARK P. KEIGHTLEY & MOLLY F. SHERLOCK, *CONG. RESEARCH SERV.*, R42726, *THE CORPORATE INCOME TAX SYSTEM: OVERVIEW AND OPTIONS FOR REFORM* 12 (2014); STEVEN R. WEISMAN, *THE GREAT TAX WARS* 352–67 (2002); *U.S. Federal Individual Income Tax Rates History, 1862–2013 (Nominal and Inflation-Adjusted Brackets)*, TAX FOUND. (Oct. 17, 2013), <http://taxfoundation.org/article/us-federal-individual-income-tax-rates-history-1913-2013-nominal-and-inflation-adjusted-brackets> [https://perma.cc/38DS-6PJ8].

³⁵¹ WINTER, *supra* note 84, at 10.

³⁵² MUTCH, *supra* note 34, at 133–35.

³⁵³ 3 STEPHEN E. AMBROSE, *NIXON: RUIN AND RECOVERY 1973–1990*, at 155–56 (1991); 2 STEPHEN E. AMBROSE, *NIXON: THE TRIUMPH OF A POLITICIAN 1962–1972*, at 458–59 (1989); JOAN HOFF, *NIXON RECONSIDERED* 21–27, 115–44 (1994); BENJAMIN W. MINTZ, *OSHA: HISTORY, LAW, AND POLICY*, at vii, 1 (1984).

³⁵⁴ JAMES MACGREGOR BURNS & SUSAN DUNN, *THE THREE ROOSEVELTS: PATRICIAN LEADERS WHO TRANSFORMED AMERICA 97–99* (2001); NATHAN MILLER, *THEODORE ROOSEVELT* 440 (1992).

³⁵⁵ MILLER, *supra* note 354, at 440.

campaign contributors.³⁵⁶ In frustration, Frick angrily declared, “We bought the son of a bitch . . . and then he did not stay bought.”³⁵⁷

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.”³⁵⁸ 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.³⁵⁹

The evidence also failed to show that contributions determined who won election campaigns during the pre-FECA era.³⁶⁰ In assessing the forty-four years of presidential elections between 1932 and 1976, Wildavsky and Polsby found no evidence that money bought election victories.³⁶¹ 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.³⁶² 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.”³⁶³

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.³⁶⁴ 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

³⁵⁶ BURNS & DUNN, *supra* note 354, at 97–99.

³⁵⁷ EDMUND MORRIS, *THE RISE OF THEODORE ROOSEVELT* 12 (1979) (quoting Henry Clay Frick).

³⁵⁸ ALEXANDER HEARD, *THE COSTS OF DEMOCRACY* 6 (1960); Malbin, *supra* note 35, at 247.

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.*

³⁶⁴ See Richard L. Hasen, *Campaign Finance Laws and the Rupert Murdoch Problem*, 77 TEX. L. REV. 1627 (1999) [hereinafter Hasen, *Campaign Finance*]; see also HASEN, *PLUTOCRATS UNITED*, *supra* note 8, at 37–59.

favor of the contributor's position on legislation."³⁶⁵ 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.³⁶⁶ 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.³⁶⁷

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.³⁶⁸ 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.³⁶⁹ The survey found that 80% of donors reported being regularly pressured by officeholders to contribute money.³⁷⁰ Moreover, 57% of donors agreed that "[d]onors regularly pressure officials for favors."³⁷¹ 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.³⁷² 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."³⁷³

The *Buckley* decision prevented Congress and the country from finding out whether FECA's expenditure caps would have created a better campaign finance system.³⁷⁴ However, our neighbor Canada provides an example of what might have happened in the United States if the *Buckley* ruling had come

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.³⁷⁵ 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.

A diverse and democratic nation of 36 million people located on America's northern border, Canada shares many similarities with the United States.³⁷⁶ In 1974, the year Nixon resigned from office and Congress adopted the FECA amendments, Canada enacted the Election Expenses Act.³⁷⁷ The Act was adopted in part as a response to the Watergate scandal.³⁷⁸ As Minister of Parliament Terry O'Connor explained during the House of Commons debate on the election expenses reform bill, "We as politicians in this House, and our parties, have suffered vicariously from the tremendous lack of confidence and distrust inspired by the Watergate case in the American system."³⁷⁹ The Canadian law, which established an expenditures cap on federal election spending for the express purpose of facilitating "a level playing field among candidates,"³⁸⁰ passed the House of Commons in January 1974 by a vote of 174 to ten.³⁸¹

Four decades later, expenditure limits in Parliamentary elections remain in place today, as well as contribution limits, which Parliament added in 2003.³⁸² Under Canadian law, House of Commons candidates must abide by strict expenditure limits, the precise amount of which depends on the length of the

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.*

³⁷⁶ For comparisons of American and Canadian political cultures, see generally SEYMOUR MARTIN LIPSET, *CONTINENTAL DIVIDE: THE VALUES AND INSTITUTIONS OF THE UNITED STATES AND CANADA* (1991), and DAVID SCHNEIDERMAN, *RED, WHITE, AND KIND OF BLUE? THE CONSERVATIVES AND THE AMERICANIZATION OF CANADIAN CONSTITUTIONAL CULTURE* (2015).

³⁷⁷ *The Electoral System of Canada: Political Financing*, ELECTIONS CAN., <http://www.elections.ca/content.aspx?section=res&dir=ces&document=part6&lang=e> [<https://perma.cc/X9PG-GUKV>] (last updated Nov. 16, 2015).

³⁷⁸ See SORAUF, *supra* note 1, at 8.

³⁷⁹ 5 H. OF COMMONS DEBATES, 29th Parliament, 1st Sess. 5523 (1973) (Can.) (statement of Terry O'Connor).

³⁸⁰ *Political Financing Handbook for Candidates and Official Agents, Chapter 3—Campaign Outflows*, ELECTIONS CAN., <http://www.elections.ca/content.aspx?section=pol&dir=can/man/ec20155&document=p3&lang=e#b> [<https://perma.cc/D7D9-KGPE>] (last updated June 16, 2016).

³⁸¹ 119 H. OF COMMONS JOURNAL, 29th Parliament, 1st Sess. 793 (1974) (Can.).

³⁸² Young, *supra* note 375, at 110–14.

election period and the population of the riding, the Canadian equivalent of a congressional district.³⁸³ 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.³⁸⁴ Although the average riding expense limit rose from \$91,000 in the 2011 election to \$219,000 in the 2015 election,³⁸⁵ 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.³⁸⁶

The Canadian Election Expenses Act also imposes strict expenditure limits on political parties.³⁸⁷ 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.³⁸⁸ Some parties only compete in a few ridings while others compete in all 338 of Canada's ridings.³⁸⁹ 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.³⁹⁰ Like candidates, political parties are eligible for publicly funded reimbursements of up to 50% of their campaign expenses.³⁹¹

³⁸³ See *Final Candidates Election Expenses Limits*, ELECTIONS CAN., <http://www.elections.ca/content.aspx?section=ele&document=index&dir=pas/42ge/canlim&lang=e> [https://perma.cc/9GBX-7QPG] (last updated Dec. 10, 2015) (listing the limits of each Canadian district in Canadian dollars for the 42nd General Election on October 19, 2015).

³⁸⁴ *Report on the 42nd General Election of October 19, 2015*, ELECTIONS CAN., http://www.elections.ca/content.aspx?section=res&dir=rep/off/sta_2015&document=p2&lang=e [https://perma.cc/VX45-XD6Q] (last updated Mar. 24, 2016).

³⁸⁵ *Id.*

³⁸⁶ See *The Electoral System of Canada*, ELECTIONS CAN., <http://www.elections.ca/content.aspx?section=res&dir=ces&document=part6&lang=e> [https://perma.cc/FY2J-YGS6] (last updated Nov. 16, 2015) (describing the reimbursements for candidates).

³⁸⁷ See F. Leslie Seidle, *Public Funding of Political Parties: The Case for Further Reform*, in *MONEY, POLITICS, AND DEMOCRACY: CANADA'S PARTY FINANCE REFORMS* 37, 41 (Lisa Young & Harold J. Jansen eds., 2012).

³⁸⁸ See *The Electoral System of Canada*, *supra* note 386 (describing the reimbursements for political parties).

³⁸⁹ *Report on the 42nd General Election of October 19, 2015: Appendix: Tables*, ELECTIONS CAN., http://www.elections.ca/content.aspx?section=res&dir=rep/off/sta_2015&document=p5&lang=e#T2 [https://perma.cc/GX33-9DKX] (last updated Feb. 15, 2016).

³⁹⁰ *Report on the 42nd General Election of October 19, 2015*, *supra* note 384; see also *Final Election Expenses Limits for Registered Political Parties*, ELECTIONS CAN., <http://www.elections.ca/content.aspx?section=ele&document=index&dir=pas/42ge/pollim&lang=e> [https://perma.cc/C9R7-ANE6] (last updated Dec. 10, 2015) (listing the election expenses limits for the registered political parties running in the 42nd General Election on October 19, 2015).

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.³⁹² 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.³⁹³ 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.³⁹⁴ Canada imposes severe restrictions on such groups. In the 2015 election, 115 outside groups registered as third parties,³⁹⁵ many with names that echo American Super PACs, such as “We Love Canada,” “Voters for Honest Politicians,” and “Stand up for Canada.”³⁹⁶ 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.³⁹⁷ The caps are so low they essentially mean that there are no Super PAC-type ads during Canadian elections.³⁹⁸

Moreover, in a striking departure from the U.S. Supreme Court’s *Buckley* ruling, the Canadian Supreme Court has repeatedly upheld the expenditure caps.³⁹⁹ As Professor Daniel Tokaji notes, “The contrast between the

³⁹² See, e.g., Jason Fekete, *New Pro-Conservative ‘PAC’ Launches Ad Campaign Blasting Justin Trudeau, Aims to Fight Unions*, NAT’L POST (June 22, 2015), <http://news.nationalpost.com/news/canada/new-pro-conservative-pac-launches-ad-campaign-blasting-justin-trudeau-aims-to-fight-unions> [<https://perma.cc/R3S3-8RLH>]; see also *Election Advertising Handbook for Third Parties, Financial Agents and Auditors*, ELECTIONS CAN. (July 2015), http://www.elections.ca/pol/thi/ec20227/EC20227_e.pdf [<https://perma.cc/E95G-3RNC>].

³⁹³ *Election Advertising Handbook for Third Parties, Financial Agents and Auditors*, *supra* note 392.

³⁹⁴ *Id.*

³⁹⁵ See *Registered Third Parties—42nd General Election—October 19, 2015*, ELECTIONS CAN., <http://www.elections.ca/content.aspx?section=pol&document=42ge&dir=thi/tie&lang=e> [<https://perma.cc/A6MU-HQFT>] (last updated Feb. 18, 2016).

³⁹⁶ *Id.*

³⁹⁷ See *Limits on Election Advertising Expenses Incurred by Third Parties—42nd General Election*, ELECTIONS CAN., <http://www.elections.ca/content.aspx?section=ele&document=index&dir=pas/42ge/thilim&lang=e> [<https://perma.cc/D5L2-YVGT>] (last updated Feb. 22, 2016). For the 2011 limits, which were much lower because of a shorter campaign season, see *Election Advertising Handbook for Third Parties, Financial Agents and Auditors*, *supra* note 392.

³⁹⁸ Karl-Heinz Nassmacher, *The Established Anglophone Democracies* (noting that spending by third parties in Canadian elections is “negligible”), in *FUNDING OF POLITICAL PARTIES AND ELECTION CAMPAIGNS*, *supra* note 7, at 255, 260; Aaron Broverman, *Will Non-Political Third Parties Have an Influence on the Canadian Election?*, YAHOO! NEWS (Aug. 31, 2015), <https://ca.news.yahoo.com/blogs/canada-politics/will-non-political-third-parties-have-an-influence-on-the-canadian-election-165720083.html> [<https://perma.cc/E86S-AAQ2>].

³⁹⁹ See *Harper v. Canada*, [2004] S.C.R. 827 (Can.); see also Andrew Heard, *Canadian Election Laws & Policies*, SIMON FRASER U., <https://www.sfu.ca/~aheard/elections/laws.html> [<https://perma.cc/8ZQN-9CA6>].

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.⁴⁰⁰

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,⁴⁰¹ an increase of 148 seats in the 338-seat parliamentary body.⁴⁰² The Conservative Party dropped from 159 seats to ninety-nine seats, a decline of sixty seats.⁴⁰³ The New Democratic Party also declined sharply, falling from ninety-five seats to forty-four, a fifty-one seat loss.⁴⁰⁴

The 2015 election was not unique. Canadians also saw high levels of election turnover in 2011, 2006, 1993, and 1984.⁴⁰⁵ 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.⁴⁰⁶ Most remarkable of all, in 1993 the governing Conservatives were reduced from 169 seats in Parliament to two seats in a single election.⁴⁰⁷ In contrast, the United States Congress during the same time period consistently experienced reelection rates of 90% or more.⁴⁰⁸

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

⁴⁰⁰ Daniel P. Tokaji, *The Obliteration of Equality in American Campaign Finance Law: A Trans-Border Comparison*, 5 J. PARLIAMENTARY & POL. L. 381, 393–94 (2011).

⁴⁰¹ Ishaan Tharoor, *Canada's Justin Trudeau Leads a Liberal Landslide in Stunning Election Victory*, WASH. POST (Oct. 20, 2015), <https://www.washingtonpost.com/news/worldviews/wp/2015/10/20/canadas-justin-trudeau-leads-a-liberal-landslide-in-stunning-election-victory/> [<https://perma.cc/YW3N-M3JP>].

⁴⁰² *Report on the 42nd General Election of October 19, 2015*, *supra* note 384.

⁴⁰³ *Id.*

⁴⁰⁴ *Id.*

⁴⁰⁵ THE CANADIAN FEDERAL ELECTION OF 2006 (Jon H. Pammett & Christopher Dornan eds., 2006); ROBERT J. JACKSON & DOREEN JACKSON, *POLITICS IN CANADA* 431 (4th ed. 1998); Peter Woolstencroft, "Doing Politics Differently": *The Conservative Party and the Campaign of 1993*, in THE CANADIAN GENERAL ELECTION OF 1993, at 9, 9–23 (Alan Frizzell et al. eds., 1994); *Report of the Chief Electoral Officer of Canada on the 41st General Election of May 2, 2011*, ELECTIONS CAN., http://www.elections.ca/content.aspx?section=res&dir=rep/off/sta_2011&document=p2&lang=e#a35 [<https://perma.cc/SSP9-QBR9>] (last updated Feb. 4, 2015) [hereinafter *Report of the Chief*].

⁴⁰⁶ *Report of the Chief*, *supra* note 405.

⁴⁰⁷ Woolstencroft, *supra* note 405, at 9; *see also* JACKSON & JACKSON, *supra* note 405, at 454; Richard Johnston et al., *The Collapse of a Party System? The 1993 Canadian General Election*, AM. NAT'L ELECTION STUD. (Sept. 1994), http://www.electionstudies.org/conferences/1994Impact/1994Impact_JohnstonBlais.pdf [<https://perma.cc/2CSM-Z63J>].

⁴⁰⁸ LOWENSTEIN ET AL., *supra* note 178, at 146.

that our Supreme Court has thus far never permitted Congress to establish in this country.⁴⁰⁹ As the Canadian experience demonstrates, competitive elections and high levels of incumbent turnover are possible even in a highly regulated campaign finance environment.⁴¹⁰

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.⁴¹¹ 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.

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.

