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## **Making Law with Lawsuits: Understanding Judicial Review in Campaign Finance Policy**

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### ABSTRACT

Campaign finance law presents quite a puzzle: It is an area of federal policy closely tied to the interests of incumbents in the political branches, and yet, it is controlled to a great extent by unelected federal court judges. While we tend to assume that First Amendment considerations drive judicial review here, scholars have yet to account for political leaders' decisions to establish federal court jurisdiction in the first place, allowing lawsuits that either challenge or enforce the law. Can it be that Congress went to great lengths to write statutes regulating the use of money in elections, but had nothing to say about how and to what extent courts would review the law?

This Article examines the role political leaders played in judicializing campaign finance policy. In a survey of nearly a century of law, and in a close analysis of the legislative record, I make a number of surprising findings. I discover that there has been great variation in judicial review over this history and that it correlates directly with the choices activists and political leaders have made to mobilize legal institutions in the making of campaign finance policy. Moreover, I find that political leaders have maintained the upper hand in this: Where the efforts of independent policy activists ran counter to their interests—as they did for a brief period prior to Watergate—legislators quickly changed jurisdictional rules to foreclose activists' access to federal courts. But, even as they restricted public interest litigation in the field, legislators actually moved to judicialize the policy still more, and continued to do so even after the Supreme Court substantially altered the law with its *Buckley v. Valeo*<sup>1</sup> ruling. In fact, from 1974 onward, Congress deliberately delegated to the judiciary the power to interpret, enforce, and ultimately remake policy. This history reveals that campaign finance reform has long been a process of making law with

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

lawsuits, where courts enjoy significant discretion to revise policy not primarily because of their own activism, but because political leaders have given them the job.

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## I. INTRODUCTION

In much of the literature on campaign finance policy, judicial review is discussed as a choice judges make. As soon as Congress enacts a new statute limiting the use of money in elections, we are told, courts “jump in,” often overturning important aspects of the legislature’s regulatory scheme.<sup>2</sup> Because this scholarship focuses primarily on how judges’ interpretations of First Amendment doctrine lead to these case outcomes, it tends to proffer a uniquely rights-oriented model of judicial power.<sup>3</sup> In this model, federal courts are independent actors, where judges may take up policy questions at will and where rights claims usually trump legislative preferences. While this concept was once no more than an unspoken premise in the literature, it now appears to be coming to the fore, as scholars frustrated with judicial decisions in this and other areas of election law demand that courts extricate themselves from “the political thicket.”<sup>4</sup>

On the surface, there is much to recommend this view. In 1974, Congress passed a landmark reform that regulated most uses of private wealth in federal elections; and for the first time, it established an independent regulatory commission to oversee the new rules.<sup>5</sup> No sooner had the Federal Election Campaign Act (FECA) gone into effect, than the Supreme Court struck down its expenditure ceilings as violations of the First Amendment’s free speech guarantee.<sup>6</sup> Ever since the 1976 *Buckley* decision, the Court’s First Amendment jurisprudence has been central to any discussion of how to solve the problems associated with campaign finance.<sup>7</sup>

Still, that vision seems directly at odds with our general understanding of the constraints on judicial power in federal politics. After all, the history of constitutional adjudication is full of incidences where the other branches have

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2. See, e.g., Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CALIF. L. REV. 1, 4 (1996) (calling *Buckley* “the main legal roadblock to fundamental campaign finance reform”); Daniel R. Ortiz, *The Democratic Paradox of Campaign Finance Reform*, 50 STAN. L. REV. 893, 893-94 (1998) (arguing judiciary “quick to strike” wherever “reform should actually threaten to matter”); J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609, 609 (1982) (“[T]he present Supreme Court has put serious obstacles in the path of our society’s advancement toward political equality through law. . . . Within the confines of *Buckley* and *Bellotti*, only limited reforms are permissible. More effective measures will be possible only if the Court reconsiders these unfortunate precedents.”).

3. See Wright, *supra* note 2, at 644 (noting First Amendment interpretations by Court in *Buckley* and *Bellotti*).

4. See Pamela S. Karlan, *Exit Strategies in Constitutional Law: Lessons for Getting the Least Dangerous Branch Out of the Political Thicket*, 82 B.U. L. REV. 667, 671-72 (2002); see also Larry D. Kramer, *The Supreme Court 2000 Term Foreword: We the Court*, 115 HARV. L. REV. 4, 13-14, 127-30 (2001).

5. See Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263.

6. See *Buckley*, 424 U.S. at 1.

7. See generally *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010); *McConnell v. Fed. Election Comm’n*, 540 U.S. 93 (2003) (explaining First Amendment implications of campaign finance laws), *overruled by* *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

undermined judicial rulings—either because unpopular decisions were overridden in the legislature, or because a lack of support from other policy leaders meant that such decisions effected no lasting policy change.<sup>8</sup> If “the least dangerous branch” could not win interbranch disputes over the income tax, the voting age, or the rights of slaves,<sup>9</sup> how did it come to have the last word on a matter as important to elected officials as campaign finance?<sup>10</sup>

In this Article, I take up that question. Drawing on general theory from public law and judicial process scholarship, I posit that the judicial role in campaign finance policy is politically determined. Courts, being relatively passive institutions, tend not to become involved in any policy area until litigants bring cases.<sup>11</sup> In a basic way, then, judicial policymaking is dependent on the broader sociopolitical context that drives people to pursue change through litigation. In addition, the judicial role is politically determined because Congress controls most of the rules of jurisdiction for the federal courts. On any given issue, Congress can structure litigants’ access to the judiciary, either creating important incentives to seek out judicial intervention or placing obstacles on the path to judicial review.<sup>12</sup> I have therefore undertaken an empirical study, using both legal and legislative archives as well as some secondary materials, to uncover the political determinants of judicial policymaking in campaign finance.

Beginning with the country’s earliest campaign finance laws, passed in the nineteenth century, and continuing through to the FECA revisions of 1974 and 1976, I find that there has been great variation in judicial review throughout the policy’s history and that it correlates directly with the choices activists and political leaders have made to mobilize legal institutions in the making of campaign finance policy. Moreover, I find that political leaders have maintained the upper hand in this: Where the efforts of independent policy

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8. See generally DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* (1977); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2d ed. 2008); David Adamany, *The Supreme Court*, in *THE AMERICAN COURTS: A CRITICAL ASSESSMENT* 5 (John B. Gates & Charles A. Johnson eds., 1991).

9. See Adamany, *supra* note 8, at 13-14 (describing several constitutional amendments passed to override Supreme Court decisions).

10. See generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (Yale Univ. Press 2d ed. 1986) (1962).

11. See Marc Galanter, *Why the “Haves” Come Out Ahead: Speculation on the Limits of Legal Change*, 9 *LAW & SOC’Y REV.* 95, 95 (1974). See generally CHARLES R. EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* (1998).

12. See Michael E. Solimine, *Institutional Process, Agenda Setting, and the Development of Election Law on the Supreme Court*, 68 *OHIO ST. L.J.* 767, 772 (2007). See generally LOUIS FISHER, *CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS* (1988); GEORGE I. LOVELL, *LEGISLATIVE DEFERRALS: STATUTORY AMBIGUITY, JUDICIAL POWER, AND AMERICAN DEMOCRACY* (2003); Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875-1891*, 96 *AM. POL. SCI. REV.* 511 (2002); Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 *STUD. AM. POL. DEV.* 35 (1993); Mark J. Richards & Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making*, 96 *AM. POL. SCI. REV.* 305 (2002).

activists ran counter to their interests—as they did for a brief period prior to Watergate—legislators quickly changed jurisdictional rules to foreclose the groups’ access to federal courts. But, even as they restricted public interest litigation in the field, political leaders actually moved to judicialize the policy still more and continued to do so even after the Supreme Court substantially altered the law with its *Buckley* ruling. In fact, from 1974 onward, Congress deliberately delegated to the judiciary the power to interpret, enforce, and ultimately remake policy. Somewhat surprisingly, it was only when political leaders developed a preference for salient limits on their own funding practices that they turned over an important measure of policymaking authority to courts.

Indeed, as we will see below, the history of courts in campaign finance policy demonstrates something of a paradox. That is, the more seriously the legislature wishes to restrict campaign finance practices among incumbents in the political branches, the less likely it is able to fashion those rules entirely through direct legislation. Instead, members of Congress find it necessary to delegate policymaking discretion to another branch of government as a way of overcoming policy conflicts in the legislature and entrenching the policy for the future.<sup>13</sup> Moreover, the delegation to independent courts—where constitutional rights protections should hold sway over political exigencies and legislative prerogatives—turns out to be lawmakers’ chosen method for maintaining *congressional* control over the policy.<sup>14</sup>

Such findings offer important insights into the role of courts, and rights mobilization, in election law. In the particular “political thicket” that grew up around campaign finance law after 1974, courts have found themselves making policy not necessarily because their jurisprudence required it, but because political leaders have given them the job. Moreover, while many scholars see Supreme Court action in this area as having foreclosed reform, it turns out that recourse to legal institutions has been key to legislative policymaking in the field. First, the promise of immediate constitutional review was critical to the passage of the 1974 Act—both for those who hoped to thwart the FECA reforms and for the majority coalition that supported them. Second, litigation

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13. A similar claim can be found in Graber, *supra* note 12, at 37-38, and in JEB BARNES, *OVERRULED?: LEGISLATIVE OVERRIDES, PLURALISM, AND CONTEMPORARY COURT-CONGRESS RELATIONS* (2004), as well as in literature looking at courts in comparative perspective, see generally, e.g., Robert D. Cooter & Tom Ginsburg, *Comparative Judicial Discretion: An Empirical Test of Economic Models*, 16 INT’L REV. L. & ECON. 295 (1996); J. Mark Ramseyer, *The Puzzling (In)Dependence of Courts: A Comparative Approach*, 23 J. LEGAL STUD. 721 (1994); Gordon Silverstein, *Sequencing the DNA of Comparative Constitutionalism: A Thought Experiment*, 65 MD. L. REV. 49 (2006). The proposition has not been tested in the area of campaign finance law until now.

14. In this respect, the study recalls the claims of earlier political jurisprudence scholarship. See generally MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* (1981); MARTIN SHAPIRO, *LAW AND POLITICS IN THE SUPREME COURT: NEW APPROACHES TO POLITICAL JURISPRUDENCE* (1964); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957).

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was also chosen as a primary mechanism for the everyday application of the law. After *Buckley*, case-by-case lawmaking in federal trial courts would flesh out the legislation, working in concert with Agency rulemaking and allowing Congress to exercise oversight in the law's enforcement. Thus, the judicialization of our current campaign finance policy was caused, not by judges jumping in, but by lawmakers reaching out.<sup>15</sup>

This history is therefore an important case study for students of constitutional politics more generally, because the legislature's reliance on courts in its policymaking process is not per se the submission of political prerogatives to constitutional values and rights jurisprudence. Instead, the judicialization of campaign finance policy represents an attempt by the political branches to have their cake and eat it too—enjoying all the benefits of constitutional litigation without any of its usual constraints.

This Article proceeds as follows: Part II examines campaign finance law prior to the 1974 FECA, noting that Congress had long maintained direct control over the policy, with enforcement handled exclusively by legislative staff. Although early legal restrictions paralleled those of post-Watergate campaign finance reform, courts tended to defer to legislative preferences and uphold the statutes against constitutional challenges. Part III examines an important turning point in that deference and uncovers an interesting motive behind the judicialization of campaign finance policy after Watergate, namely, that the political branches sought out judicial review of campaign finance law as a way of regaining their own control over that policy. My study of the 1974 FECA legislation, in Part IV, finds considerable evidence that members of Congress deliberately delegated policymaking discretion to the courts, but did so in a way that harnessed judicial power in incumbents' interests. Part V analyzes the congressional reaction to the Supreme Court's review of that 1974 law and confirms the view that the Court's action was neither unexpected nor unwelcome to political leaders, who went on to judicialize the policy still further.

## II. NINETY YEARS OF LAW WITHOUT JUDICIAL POLICYMAKING

To explore how the judiciary became so central to campaign finance policymaking, it is useful to look back at a time when it played virtually no role at all in the field. This involves a brief review of the federal campaign finance laws that were enacted prior to Watergate-era FECA reforms. Here, we find that the country had a relatively long history of regulating federal campaign finance, although FECA's predecessors were largely seen as ineffective. These

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15. See generally THOMAS F. BURKE, *LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY* (2002); ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* (2001) (offering examples of similar legislative action in other policy areas).

early laws were surprisingly similar to the landmark 1974 Act in their substantive provisions, yet courts tended to uphold them against constitutional challenges. The main difference between the 1974 FECA and its predecessors was not substance but structure. The first generations of campaign finance law were designed for application almost exclusively by the legislature. That structure inhibited prosecution and therefore generated little opportunity for judicial review.

Restrictions on the use of private wealth in federal election campaigns have existed almost as long as formal campaign fundraising. In the mid-1800s, shortly after the rise of mass politics, political parties began taking in large amounts of money through a system of patronage: Successful candidates would appoint the party faithful to positions in government, in return for which the officeholder would “kick back” a certain percentage of his salary to the party.<sup>16</sup> This practice was eventually foreclosed by the 1883 Pendleton Act, which outlawed patronage and established the civil service system for federal employees.<sup>17</sup> As such, the law became the first in a long series of federal campaign finance restrictions to precede the 1974 FECA.<sup>18</sup>

Over the next nine decades, Congress would revisit the question of campaign finance reform at fairly regular intervals. Several specialists in the field have noted that there has been something of a vicious circle here: Parties often responded to one legal restriction by simply adopting new fundraising techniques; these new methods would then give rise to suspicions that they too fostered a corrupting relationship between public officials and their private-sector patrons. This cycling from legislation to adaptation meant that calls for legal reform would become a regular part of the political landscape throughout the twentieth century.<sup>19</sup> When scandals erupted, or when power changed hands, such calls often resulted in new law. The Pendleton Act was therefore followed by several statutes restricting federal election financing, including: the 1907 Tillman Act, the 1910 Publicity Act, the Federal Corrupt Practices Act of 1925 (FCPA), the Hatch Act of 1940, the Smith-Connally Act of 1943, the 1947 Taft-Hartley Act, the Long Act of 1966, and an initial FECA, passed in 1971.<sup>20</sup> Because these early laws entailed a much smaller policymaking role

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16. See MELVIN I. UROFSKY, *MONEY AND FREE SPEECH: CAMPAIGN FINANCE REFORM AND THE COURTS* 8 (2005). A similar assessment system existed for government contractors, as well. See *id.*

17. See Pendleton Act, ch. 27, § 13, 22 Stat. 403, 407 (1883).

18. See UROFSKY, *supra* note 16, at 11. States also began to pass campaign finance laws in the late 1800s. See *id.*

19. See generally, e.g., HERBERT E. ALEXANDER, *FINANCING POLITICS: MONEY, ELECTIONS AND POLITICAL REFORM* (2d ed. 1980); ROBERT E. MUTCH, *CAMPAIGNS, CONGRESS, AND COURTS: THE MAKING OF FEDERAL CAMPAIGN FINANCE LAW* (1988); UROFSKY, *supra* note 16.

20. See, e.g., Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972); Taft-Hartley Act, Pub. L. No. 80-101, 61 Stat. 136 (1947); Smith-Connally Act, Pub. L. No. 78-89, 57 Stat. 163 (1943); Hatch Act, Pub. L. No. 76-753, 54 Stat. 767 (1940); Federal Corrupt Practices Act of 1925, Pub. L. No. 68-506, 43 Stat. 1070, *repealed by* Federal Election Campaign Act, Pub. L. No. 92-225, 86 Stat. 3 (1972); Publicity Act

for courts than the campaign finance policy we know today,<sup>21</sup> they provide insights into the causes of judicialization in this field.

*A. Parallel Legal Restrictions*

Scholars suggest that the 1974 Act was a sea change in the rules governing federal campaigns, implicating constitutional rights as never before.<sup>22</sup> In that view, the substance of the law triggers judicial review. However, the substantive legal provisions of early campaign finance statutes bear a striking resemblance to the 1974 FECA. Indeed Congress modeled many of the 1974 restrictions, as well as its basic framework for controlling the flow of private money into federal campaigns, on those older laws. As such, none of the basic rules embodied in the 1974 FECA was particularly new.

For example, outright bans on campaign contributions from certain sources, such as corporations or federal government contractors, date back as far as the 1907 Tillman Act.<sup>23</sup> Similarly, reporting requirements and provisions for public disclosure of campaign monies had existed since the Publicity Act of 1910, and they continued to operate via the 1925 FCPA,<sup>24</sup> as well as under the 1971 FECA.<sup>25</sup> Individual contribution limits, capping the amount candidates could accept from any single donor, were added to the regulatory framework with the 1940 Hatch Act.<sup>26</sup> Even public financing, which the 1974 FECA enacted for presidential campaigns, had already been attempted in the 1966 Long Act.<sup>27</sup>

Surprisingly, limits on candidate spending long predate the 1974 FECA. Scholars who track campaign finance policy from *Buckley* onward often seem to take for granted that expenditure limits never existed before the 1974 Act.<sup>28</sup>

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of 1910, Pub. L. No. 61-274, 36 Stat. 822; Tillman Act, Pub. L. No. 59-36, 34 Stat. 864 (1907).

21. See generally ALEXANDER, *supra* note 19; UROFSKY, *supra* note 16.

22. See FRANK J. SORAUF, *INSIDE CAMPAIGN FINANCE: MYTHS AND REALITIES* 8 (1992).

23. ALEXANDER, *supra* note 19, at 26 (“The first federal prohibition of corporate contributions was enacted in 1907. The first federal campaign fund disclosure law was passed in 1910.”). The Pendleton Act could be seen as a de facto ban on contributions from government employees in that it prohibited politicians from soliciting their donations; however, a de jure ban did not occur until 1940. See Peter W. Schroth, *Corruption and Accountability of the Civil Service in the United States*, 54 AM. J. COMP. L. 553, 573-74 (2006).

24. ALEXANDER, *supra* note 19, at 26.

25. See *id.* The 1971 FECA extended disclosure to all federal candidates and therefore included presidential and vice presidential candidates. See Anthony Corrado, *Money and Politics: A History of Federal Campaign Finance Law*, in *THE NEW CAMPAIGN FINANCE SOURCEBOOK* 7, 21 (Anthony Corrado et al. eds., 2005).

26. See Hatch Act, Pub. L. No. 76-753, 54 Stat. 767 (1940).

27. ALEXANDER, *supra* note 19, at 28. Congress rescinded that law the very next year. See *id.*

28. See Daniel Hays Lowenstein, *A Patternless Mosaic: Campaign Finance and the First Amendment After Austin*, 21 CAP. U. L. REV. 381, 383 n.11.

At the time of the adoption of the 1974 Federal Election Campaign Act (FECA) amendments it was generally perceived that there were five basic types of regulation and reform available for consideration. The old-fashioned type was the prohibition of contributions from particular sources,

While that law did enact considerably broader spending restrictions than had been operative under the 1971 FECA, similar expenditure ceilings had actually been on the books for more than sixty years prior to the *Buckley* case.<sup>29</sup> A cap on total campaign spending was initially enacted as part of the Tillman Act of 1907.<sup>30</sup> Continued as a major feature of the FCPA, the expenditure limit remained in place through mid-1972. At that point, the 1971 FECA took effect and overall spending caps were replaced with limits on media expenditures only.<sup>31</sup> Thus, federal campaigns had been subject to spending limits for quite some time before the 1974 FECA, and before the *Buckley* decision striking them down as unconstitutional.

The regulations that comprised the 1974 FECA were all of a piece with earlier campaign finance legislation.<sup>32</sup> The post-Watergate Act simply continued the tradition of restricting the flow of money into campaigns by capping contributions, limiting expenditures by candidates and their committees, and banning contributions from certain sources—all monitored through a regime of reporting and disclosure requirements. With the exception of public funding provisions, then, all of the 1974 FECA restrictions had already been on the books at one time or another, often simultaneously. Expenditure ceilings, in particular, had been the law of the land for decades. A good deal of early campaign finance law therefore implicated First Amendment rights, and thus it appears that courts could have tangled with Congress over campaign finance policy long before 1974. When litigants challenged these earlier laws as violations of constitutional rights, however, federal courts tended to uphold the restrictions.<sup>33</sup>

### B. Early Law Survives Constitutional Scrutiny

The Supreme Court had several opportunities to strike down campaign finance laws during this era, but it declined to make sweeping changes. One case, *Newberry v. United States*, is widely remembered as having limited congressional power to regulate primary elections because it overturned an amendment to the Publicity Act.<sup>34</sup> That ruling, however, left in place all of the

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such as corporations and labor unions. The “modern” types were disclosure, limits on the size of contributions, limits on campaign spending, and public financing.

*Id.* (citations omitted) (citing Eric S. Anderson, Comments, *Campaign Finance in Wisconsin After Buckley*, 1976 WIS. L. REV. 816, 819).

29. See *supra* note 20 (listing legislation enacted prior to 1974 FECA).

30. See SORAUF, *supra* note 22, at 5.

31. See *id.* at 5-6; see also ALEXANDER, *supra* note 19, at 29.

32. See Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263.

33. See *infra* Part III (describing how trend changed in one significant way just prior to passage of 1974 Act).

34. See *Newberry v. United States*, 256 U.S. 232, 247 (1921); see also Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. PA. J. CONST. L. 1, 6-7 (2010) (discussing

Act's restrictions on general election campaigns, including its ten-year-old expenditure ceilings.<sup>35</sup> The Taft-Hartley Act offered the Supreme Court a second chance to strike down spending caps,<sup>36</sup> but there too the provisions survived constitutional review against a labor union claim that they infringed on speech rights.<sup>37</sup> A third opportunity arose in 1957, when the Taft-Hartley Act was used to prosecute the United Auto Workers Union (UAW) for making expenditures in connection with a federal election.<sup>38</sup> Once again, the Supreme Court declined to overturn the law as violative of First Amendment rights—indeed, it refused to consider the defendants' constitutional case at all—opting instead to remand the case for a jury trial.<sup>39</sup>

It is not my intention to argue that First Amendment jurisprudence had nothing to do with these case outcomes. There is, no doubt, much to say about changing free speech doctrine throughout this period that cannot be covered in this necessarily brief overview of early campaign finance laws. Instead, I point to these cases simply as a contrast to the post-*Buckley* role of courts in campaign finance policy. Between the turn of the century and 1974, the substance of legal restrictions remained fairly constant. In addition, in the latter half of that era, organized litigants challenged these restrictions as violations of First Amendment protections for political freedoms. Yet courts did not find such claims persuasive, and they upheld the law.

The fact that courts did not substantially alter legislative enactments here poses something of a challenge to contemporary understandings about the role of courts in this field. That is, a common complaint among legal scholars is that, ever since *Buckley*, the judiciary has used First Amendment rights considerations to foreclose congressional innovations in campaign finance policy.<sup>40</sup> However, if legal substance and its conflict with constitutional rights were a sufficient cause for the judicialization of campaign finance policy, we would expect to see courts overturning some of these statutes on First Amendment grounds right from the start. Contrary to the present-day story of campaign finance policy, though, courts regularly upheld these earlier laws

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*Newberry* Court's restrictions on power).

35. See ALEXANDER, *supra* note 19, at 26. The case limited congressional power to regulate primary elections because it overturned a 1911 amendment that extended disclosure requirements to that primary period. See *Newberry*, 256 U.S. at 247. The Court eventually abandoned its opposition to federal regulation of primary elections in a 1941 case. See *United States v. Classic*, 313 U.S. 299 (1941). However, as Alexander points out, Congress would not use its power to regulate them for another thirty years. See ALEXANDER, *supra* note 19, at 26.

36. See *United States v. Cong. Indus. Orgs.*, 335 U.S. 106 (1948).

37. See UROFSKY, *supra* note 16, at 22-23.

38. See *United States v. UAW-CIO*, 352 U.S. 567 (1957) (upholding 18 U.S.C. § 610—Labor-Management Relations Act of 1947, or Taft-Hartley Act).

39. See *id.* at 589; see also UROFSKY, *supra* note 16, at 23.

40. See generally IF BUCKLEY FELL: A FIRST AMENDMENT BLUEPRINT FOR REGULATING MONEY IN POLITICS (E. Joshua Rosenkranz ed., 1999).

against constitutional challenges. Moreover, rather than jumping into the policymaking fray immediately after a law's passage, they tended to delay review, rendering rulings on the constitutionality of an Act only after it had been in force for some time.

While it would be natural to look for doctrinal changes to explain the variance that takes place between these early cases and those interpreting the Watergate-era statute, there is another factor that bears consideration. That is, from these earliest campaign finance laws through the 1974 FECA, we see striking changes in the degree to which Congress bestows policymaking authority on courts.

### C. *The Policymaking Structure of Early Law*

Prior laws had been examples of direct legislation, and thus differed greatly from the 1974 Act in what I will call their policymaking structure. As we will see below, that structure was largely to blame for the weakness of earlier restrictions. The 1974 statute, by contrast, delegated a good deal of policymaking authority outside the legislature. It was in this respect, rather than in its legal substance, that post-Watergate policy would differ from what had come before.

In passing a statute, Congress not only sets out the substantive rules for a policy, it also chooses among several options for administering, enforcing, and interpreting those rules. One of these options is direct legislation, where Congress retains all the duties associated with application and enforcement of the law; this necessarily reduces the role of the executive and the judiciary in that policy.<sup>41</sup> The alternative to direct legislation is to delegate policymaking power outside the legislature, whether to an executive agency, to state and local authorities, or to the judiciary.<sup>42</sup> And Congress may delegate in different degrees. Writing a detailed statute, for example, will curtail the discretion of the body charged with interpreting that law; whereas giving only a general or vague mandate, such as "to regulate in the public interest," delegates a much greater amount of policymaking authority. In this respect, lawmaking offers Congress the opportunity to structure the interbranch relationship in a given policy area. It can either vest another branch with primary responsibility for overseeing the policy and thus increase the role of the judiciary or the executive relative to its own role, or it may keep those duties in the legislature with a more direct system of policy management. When Congress passes a law, then,

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41. See DAVID EPSTEIN & SHARYN O'HALLORAN, *DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS* 29-33 (1999). Theoretically, it is even possible to foreclose executive and judicial action altogether, though this is somewhat hindered by the constitutional provisions for separation of powers. See Martin Shapiro, *Judicial Delegation Doctrines: The US, Britain, and France*, 25 W. EUR. POL. 173, 173 (2002).

42. See EPSTEIN & O'HALLORAN, *supra* note 41, at 29.

it designs both the substantive rules and the policymaking structure under which the rules are administered, enforced, and revised.

The earliest campaign finance laws kept policymaking authority tightly confined within the legislature. The Publicity Act, for instance, contained no enforcement provisions, and so it delegated no authority whatsoever to the executive branch.<sup>43</sup> When enforcement duties were specified, as in the FCPA, they were placed in the hands of the House Clerk.<sup>44</sup> This meant that all authority to interpret and to impose the law rested with Congress alone. Legislative staff maintained primary enforcement duties throughout the early history of campaign finance law, with the Clerk of the House and Secretary of the Senate being responsible for recommending prosecution to the Department of Justice (DOJ).<sup>45</sup>

This structure of direct legislation, with enforcement authority delegated no further than Congress's own staff, is not surprising given general theories on the delegation of policymaking authority. It is commonly posited that the elected branches prefer to maintain close control over policies that bear directly on their political power and incumbency, using delegation to rid themselves of policymaking duties in areas that are "least favorable to their reelection chances."<sup>46</sup> In fact, Congress maintains a direct structure for many rules governing politicians' activities to this day. Ethics rules, for example, are administered through committees in each chamber, and violations are often punished exclusively via legislative censure.<sup>47</sup> While lawmakers usually prefer the direct structure for statutes governing their own conduct, this approach poses obvious enforcement problems.

Early campaign finance laws were notoriously easy to circumvent because their policymaking structure made compliance largely a matter of individual choice. Political candidates and their parties naturally tended toward narrow readings of the limits and so continued to violate the spirit, if not the exact letter, of the law. For example, when the 1907 Tillman Act banned corporate contributions, parties sought donations from the wealthy men who headed those corporations, and no one went out of his way to ensure that the funds were coming from personal, rather than business, accounts.<sup>48</sup> Candidates further maintained that campaign finance restrictions did not extend to in-kind

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43. UROFSKY, *supra* note 16, at 16.

44. *See id.* at 18.

45. *See* Corrado, *supra* note 25, at 21; *see also* H.R. REP. NO. 93-1239, at 132 (1974) (supplemental views of Rep. Bill Frenzel, R-MN), *reprinted in* FED. ELECTION COMM'N, LEGISLATIVE HISTORY OF FEDERAL ELECTION CAMPAIGN ACT AMENDMENTS OF 1974, at 766 (1977).

46. *See* EPSTEIN & O'HALLORAN, *supra* note 41, at 206.

47. *See Jurisdiction*, COMMITTEE ON ETHICS, <http://ethics.house.gov/jurisdiction> (last visited Apr. 22, 2013); *Jurisdiction*, U.S. SENATE SELECT COMMITTEE ON ETHICS, <http://www.ethics.senate.gov/public/index.cfm/jurisdiction> (last visited Apr. 22, 2013) (describing each chamber's authority to investigate and censure members' conduct).

48. ALEXANDER, *supra* note 19, at 26.

contributions from corporations, such as volunteer labor or free use of office space—charity that was often as valuable to them as cash donations.<sup>49</sup> Expenditure ceilings were also rendered virtually meaningless because candidates simply established multiple campaign committees and allowed each one to spend up to the statutory limit.<sup>50</sup> Finally, contribution caps were likewise circumvented because donors were allowed to give up to the limit “to multiple committees working for the same candidate.”<sup>51</sup>

With so many fundraising and electioneering activities considered outside the scope of the law, it is perhaps not surprising that few incumbents were ever charged with violating it. (According to Frank Sorauf’s research, for instance, there were no prosecutions whatsoever under the FCPA in all its forty-seven years on the books.)<sup>52</sup> But it is apparent that legislative control over campaign finance enforcement helped to quash any accusations of wrongdoing that might have arisen during this period. For example, according to Congressman Bill Frenzel (R-MN), the Senate staff allowed political contributions to be secretly earmarked for individual candidates.<sup>53</sup> This made them impossible to trace through the disclosure system, and therefore eliminated the staff’s ability to bring a case against a candidate for failing to report the contribution to his campaign.<sup>54</sup> Even provisions that did not require formal prosecution for their legal effect were scuttled by the direct policymaking structure, as when congressional staff began charging a dollar for each page of candidate financial reports that they copied for the press or members of the public.<sup>55</sup> The fee, roughly five dollars per page in current values, necessarily diminished interest in the reports and so undercut the law’s reliance on public oversight.<sup>56</sup>

The 1974 FECA therefore stands out as a landmark in campaign finance policy not for any especially innovative legal restrictions, but by virtue of its profound changes to the existing policymaking structure in the field. For the first time in its long history of writing campaign finance laws, Congress opted to create an independent mechanism for enforcing the law and for adapting policy to new fundraising strategies as they arose. By delegating policymaking authority outside the legislature, to ostensibly apolitical actors, the 1974 FECA Amendments adopted a different policymaking structure for campaign finance. The central innovation on this score is well known; it is the establishment of the

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49. UROFSKY, *supra* note 16, at 15 (describing effective avenues of circumventing early campaign finance restrictions through free services).

50. *See* ALEXANDER, *supra* note 19, at 26.

51. *Id.*

52. *See* SORAUF, *supra* note 22, at 6.

53. *See* H.R. REP. NO. 93-1239, at 132 (1974) (supplemental views of Rep. Bill Frenzel, R-MN), reprinted in FED. ELECTION COMM’N, LEGISLATIVE HISTORY OF FEDERAL ELECTION CAMPAIGN ACT AMENDMENTS OF 1974, at 766 (1977).

54. *See id.*

55. *See id.*

56. *See id.* at 132-33.

Federal Election Commission (FEC).<sup>57</sup> Less noticed, however, is the fact that courts, too, were given a new and vital role in campaign finance's policymaking structure at this time.<sup>58</sup>

Political scientists may not be surprised to see the judiciary's role increasing with the introduction of an independent agency to administer the law, as this has been the case for much of the administrative state.<sup>59</sup> Still one interesting inference is possible from the findings thus far, pertaining to the legal scholarship on campaign finance: Constitutional rights protections, in themselves, do not necessarily lead courts to become embroiled in policymaking. Rather, the foregoing history demonstrates that judges may defer to legislators in policy battles even where the legal substance of that policy pointedly implicates political freedoms, and where strong organizational litigants—in this case, labor unions—are behind efforts to overturn the law.<sup>60</sup> Instead, before 1970, courts remained fairly passive, declining to make any significant changes to campaign finance policy for nearly a century.

As we will see below, this changed markedly in the period leading up to the 1974 FECA revisions. In the early 1970s, courts began responding to campaign finance litigants in a way that paralleled the judicial response to many social policy activists at the time: throwing open the courthouse doors and allowing citizen suits to enforce the law against government officials. Tracking these changes, and congressional reaction to them in the 1974 FECA, this study uncovers an important motive behind the judicialization of campaign finance policy after Watergate, namely, that the political branches sought out judicial review of campaign finance law as a way of regaining their own control over that policy.

### III. ENFORCEMENT TAKES AN UNEXPECTED TURN

From 1970 to 1974, three factors radically altered the salience of campaign finance law for political incumbents. First, litigation by government reform groups turned long-dormant restrictions into real and potent limits on funding practices. Also, government officials undertook more serious enforcement of the laws during this period, exhibiting more independence of political leaders' interests than their predecessors. Finally, courts began barring the application of campaign finance laws to activists and groups outside formal campaign organizations. As a result, politicians found themselves governed by a

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57. See Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 310(a)(1), 88 Stat. 1263, 1280 (codified as amended at 2 U.S.C. § 437c (2006)).

58. See *infra* Part IV.B, E.

59. But see *infra* Part III (discussing judicial review of administrative action as quite different from other policy areas).

60. See generally EPP, *supra* note 11. Epp's work is a classic study of the role of organized litigants in rights mobilization. See *id.*; see also LOVELL, *supra* note 12, at 220 (discussing labor-union litigation challenging Taft-Hartley Act and other acts).

regulatory policy that imposed a considerable burden on their electoral interests while offering little corresponding benefit. Examining these several phenomena below, I argue that they explain a great deal about the transformation that took place in campaign finance policy with the 1974 FECA Amendments.<sup>61</sup>

Moreover, I find that these changing phenomena reveal an important connection between the Watergate scandal and the campaign finance reforms that followed it—a connection that runs exactly counter to our conventional wisdom on the subject. That is, many of us view the 1974 FECA Amendments as a response to the scandal that brought down the Nixon White House, with the general understanding being that Watergate forced the passage of stronger campaign finance restrictions, along with a new dedication to enforcing the law on the books. There is no question that FECA’s changes were linked to Watergate.<sup>62</sup> After all, the House passed its version of the law on the same day that Nixon resigned the presidency.<sup>63</sup> And, in the end, the scandal pushed his successor to abandon a longstanding opposition to FECA’s public funding provisions. Explaining why he would sign the bill despite what he saw as its policy flaws, President Ford conceded, “the times demand this legislation.”<sup>64</sup>

But in all the attention given to Watergate in the history of campaign finance policy, we seem to have cause and effect backward, overlooking the fact that the law had taken on a new and unexpected salience in the years just preceding the scandal. The extent of the problem became obvious with Nixon’s impeachment, and it was in response to these phenomena that Congress passed the 1974 FECA. Thus, while Watergate brought about heavy *public* pressure for stronger and more strictly enforced law, the following analysis indicates that politicians were actually experiencing a great deal of *legal* pressure before the scandal. From 1970 to 1974, the campaign finance regulatory regime was more stringent than it had ever been in the past or would ever be in the future.

#### A. Interest Group Enforcement

In the early 1970s, a community of government reform groups sprang up and began pressing for closer adherence to campaign finance restrictions.<sup>65</sup> One such group, Common Cause, set out on a mission to improve “the integrity of the elective process,”<sup>66</sup> and being some 20,000-members strong,<sup>67</sup> it managed

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61. See *infra* Part III.A-C.

62. See UROFSKY, *supra* note 16, at 44-45 (describing demands for reform that contributed to 1974 FECA).

63. See ALEXANDER, *supra* note 19, at 31.

64. See *id.*

65. See 120 CONG. REC. 35,145 (1974). A long list of public interest groups is mentioned in the Congressional Record as having been active in the field, by the time the 1974 FECA Amendments were being considered, they had formed the “Public Financing/Election Reform Coalition.” *Id.*

66. See *Common Cause v. Democratic Nat’l Comm.*, 333 F. Supp. 803, 806 (D.D.C. 1971).

to effect profound changes in the enforcement of campaign finance laws.

As the 1971 FECA was coming into effect, the group announced a program to monitor all political contributions in federal politics and to make public any questionable donations.<sup>68</sup> Along with other similar watchdog groups coming on the scene at that time, Common Cause quickly altered the policymaking structure of campaign finance law. That is, despite Congress's apparent preference for more direct control over the law's administration, the group's program provided a politically independent mechanism for overseeing compliance after all. While, in the past, requirements to disclose information about campaign contributions had been widely ignored, Common Cause's efforts promised to expose both the overall amount of private money in federal campaigns and any wrongdoing associated with its use.

More important than this monitoring program was the Common Cause litigation campaign, which, in a handful of private lawsuits, radically changed the face of campaign finance enforcement. In September 1972, for example, the group filed a civil suit against President Nixon's reelection campaign for failure to disclose the names of campaign contributors as required under the 1925 FCPA.<sup>69</sup> (The Act had technically expired by this point, having been superseded by the 1971 FECA, but the suit, *Common Cause v. Finance Committee to Re-Elect the President (FCREEP)*, was made possible by the FCPA's five-year statute of limitations.)<sup>70</sup> In addition to seeking an order forcing the group to file the financial statements called for under the FCPA, the plaintiffs also sought an expedited trial.<sup>71</sup> By asking the court to hear its case before the upcoming presidential elections, Common Cause was attempting to pressure the Nixon camp on two fronts—politically as well as legally.

This two-pronged strategy ultimately succeeded. That is, even as attorneys for FCREEP launched a potent constitutional challenge to the case in the Supreme Court, they sensed enough political jeopardy for their clients to offer full disclosure in exchange for Common Cause dropping its suit.<sup>72</sup> Once settlement negotiations broke down and the case went forward, the legal discovery process revealed much of what the campaign committee would have

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67. See Ben A. Franklin, *New Political-Fund Law Attacked on Two Fronts*, N.Y. TIMES, Oct. 3, 1972, <http://query.nytimes.com/mem/archive/pdf?res=F20F1EFF3D55137B93C1A9178BD95F468785F9>.

68. See *Gardner Unit Gives Plan on Monitoring Spending*, N.Y. TIMES, Mar. 31, 1972, <http://query.nytimes.com/mem/archive/pdf?res=F00D17FB3B591A7493C3AA1788D85F468785F9>.

69. See Joel Seligman, *A Sheep in Wolf's Clothing: The American Law Institute Principles of Corporate Governance Project*, 55 GEO. WASH. L. REV. 325, 333 (1987) (describing lawsuits filed by Common Cause).

70. See *id.* (detailing Common Cause lawsuit against FCREEP); see also Ben A. Franklin, *Nixon Unit Fights Naming of Campaign Contributors*, N.Y. TIMES, Sept. 30, 1972, <http://query.nytimes.com/mem/archive/pdf?res=F00E16FE3E5F117B93C2AA1782D85F468785F9>.

71. See Ben A. Franklin, *Common Cause Suit Asks Names of Donors to Nixon*, N.Y. TIMES, Sept. 7, 1972, <http://query.nytimes.com/mem/archive/pdf?res=FB0813F93F5F117B93C5A91782D85F468785F9>.

72. See Steven V. Roberts, *Ex-Nixon Aides May Face Indictments in Coast Plot*, N.Y. TIMES, July 6, 1973, <http://query.nytimes.com/mem/archive/pdf?res=F20617FA385C1A7A93C4A9178CD85F478785F9>.

disclosed had it followed the FCPA to the letter.<sup>73</sup> In achieving that result, the suit did in a single year what the FCPA had failed to do in its half-century on the books: It made public both the amount of money a campaign had collected and the identity of the campaign's principal donors. In this particular case, that disclosure exposed unethical dealings on Nixon's behalf—such as collecting secret contributions to his 1972 presidential campaign totaling more than sixty million dollars, and showing that business interests were getting enormous sums into campaign coffers despite a formal ban on corporate contributions.<sup>74</sup> By June 1974, the political importance of these revelations was apparent: The Senate Watergate Committee noted its reliance on the testimony taken in Common Cause's depositions and speculated that the evidence for Nixon's impeachment might never have come to light were it not for the civil suit.<sup>75</sup>

This is not to say that the case was a conventional legal success, however. The trial judge, who had been personally sued by members of the Nixon camp in connection with the case, ultimately dismissed the suit as harassment of the President's backers.<sup>76</sup> But individual setbacks did little to diminish the overall impact of Common Cause's litigation campaign. Beyond uncovering specific wrongdoing in the 1972 presidential campaign, it also established civil litigation as a mechanism for enforcing the criminal statutes that governed campaign finance at the time. That result amounted to a distinct change in the policymaking structure of campaign finance—one that posed difficulties for incumbents on both sides of the aisle.

Decided in August 1971, the critical case here was *Common Cause v. Democratic National Committee*.<sup>77</sup> Common Cause brought a civil action directly against the national committees for the Democratic, Republican, and Conservative parties.<sup>78</sup> The suit alleged that the committees had violated sections 608 and 609 of the Hatch Act, which limited individual contributions to campaigns, capped general expenditures by their committees, and placed ceilings on any expenditures made on behalf of a candidate.<sup>79</sup> But, because the statute contained only criminal sanctions, the defendants immediately moved to have the suit dismissed.<sup>80</sup> If a case were to be brought, they argued, it needed

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73. See Ben A. Franklin, '72 Nixon Aides Disclose 60-Million Election Fund, N.Y. TIMES, Sept. 29, 1973, <http://query.nytimes.com/mem/archive/pdf?res=F30715FA3554137A93CBAB1782D85F478785F9> (reporting information revealed in course of *Common Cause v. FCREEP* suit).

74. See Monroe W. Karmin, *New Nixon Campaign Report Sheds Light on Funding Drive in Corporate Community*, WALL ST. J., Oct. 1, 1973, at 9.

75. See Anthony Ripley, *Common Cause Suit on Campaign Funds Dismissed*, N.Y. TIMES, June 29, 1974, <http://query.nytimes.com/mem/archive/pdf?res=F70E17FD3E5A1A728DDDA00A94DE405B848BF1D3>.

76. See *id.*

77. 333 F. Supp. 803 (D.D.C. 1971).

78. See *id.* at 806.

79. See *id.* at 805-06 & nn.1-2.

80. See *id.* at 807.

to be a criminal prosecution directed by the Justice Department, not a civil lawsuit brought by Common Cause.<sup>81</sup> The court, however, found that the group had standing to sue and allowed the case to proceed.<sup>82</sup> Arguing that there was no “express statutory provision to the contrary,” the court implied a civil right of action to enforce the law.<sup>83</sup> In doing so, it accepted Common Cause’s argument that campaign finance law was just like any other statute designed to protect the right to vote.<sup>84</sup> As such, the Hatch Act afforded the same expansive jurisdiction for private-citizen suits as the Civil Rights Act.<sup>85</sup>

With this holding, campaign finance policy went from a largely symbolic law and a political question over which the elected branches had almost exclusive control, to a matter of an individual voter’s right to effective participation in the electoral process.<sup>86</sup> This gave private-citizen litigation unprecedented power as an enforcement tool in campaign finance policy. Indeed, Common Cause succeeded in having the case designated a class action with respect to its members—a status that allows litigants to have maximum impact in civil actions at minimum cost.<sup>87</sup> Under the rubric of the class action suit, the group was able to direct the public’s attention to what it charged was a thirty-year history of the parties flouting contribution and spending limits.<sup>88</sup> And once the courts agreed that this amounted to a “flagrant and irreparable erosion of the right to an effective vote,”<sup>89</sup> interest group litigation threatened to publicize the apparently illegal practices that had become the modus operandi of federal politics. Private lawsuits would take over where government prosecutors fell short.

Naturally, this litigation also altered the role of the courts in campaign finance policymaking. Whereas the courts had historically been something of a rubberstamp for legislative choices with respect to campaign restrictions, they were suddenly seen as venues for “broad-based public interest actions.”<sup>90</sup> The *New York Times* described campaign finance litigation as a “key focus” of the 1972 presidential campaign in its final months<sup>91</sup> and Nixon’s attorney

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81. See *Common Cause*, 333 F. Supp. at 809.

82. See *id.* at 808-09.

83. See *Common Cause v. Democratic Nat’l Comm.*, 333 F. Supp. 803, 814 (D.D.C. 1971).

84. See *id.* at 808-09.

85. See *id.* at 808 & n.8 (discussing 28 U.S.C. § 1343 (1952), amended by Act of Dec. 29, 1979, Pub. L. No. 96-170, § 2, 93 Stat. 1284, 1284).

86. See *id.* at 808. “Plaintiffs are asserting a plain, direct and adequate interest in maintaining the effectiveness of their votes . . . not merely a claim of the right, possessed by every citizen to require that the Government be administered according to law . . .” *Id.* (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)) (internal citations and quotation marks omitted).

87. See *Common Cause*, 333 F. Supp. at 815.

88. See *id.*

89. See *Common Cause v. Democratic Nat’l Comm.*, 333 F. Supp. 803, 814 (D.D.C. 1971).

90. Joseph A. Califano, Jr., *Needed: A Special Prosecutor for Watergate*, N.Y. TIMES, Apr. 24, 1973, <http://query.nytimes.com/mem/archive/pdf?res=F1071FFC395C1A7A93C6AB178FD85F478785F9>.

91. Ben A. Franklin, *Key Focus of Campaign Shifts to the Courts over Financing*, N.Y. TIMES, Oct. 1,

complained that never in U.S. history had “political issues . . . been so much before the courts.”<sup>92</sup> Judicial rulings were thought to be important enough—both to campaign finance policy and to election politics generally—that plaintiffs considered filing suit to postpone the 1972 election until after their campaign finance cases could be resolved.<sup>93</sup> Faced with what a former Johnson aide described as the public’s “nagging suspicion of corruption uncovered and crime unpunished in the highest levels of our Government,”<sup>94</sup> as well as new Supreme Court doctrine allowing suits on political regulation, federal judges found themselves in an unprecedented policymaking role.

Private litigants, meanwhile, seemed buoyed by this new avenue for campaign finance policymaking. They soon moved from suits that merely sought to enforce the law on the books into cases that would have greatly altered the law’s available remedies. Ralph Nader, for example, brought suit against the Department of Agriculture, claiming that its 1971 decision to raise milk prices was a quid pro quo for the dairy industry’s six-figure contribution to Nixon’s campaign a few weeks before.<sup>95</sup> While the law normally would have imposed fines or other criminal sanctions on donors and campaign organizations, Nader’s suit attempted to force a reversal of the Agency’s pricing decision.<sup>96</sup> This would have expanded the legal remedies—and drawn many more federal officials into the scope of legal responsibility for financing violations—beyond what even the law on the books provided. It certainly offered a drastic change from the way that law had been interpreted by federal authorities throughout campaign finance history.

Interest group plaintiffs also displayed a tenacity that was unknown in the government’s earlier prosecutions of finance violations. Nader, for example, first brought suit against milk lobbyists and the Secretary of Agriculture in January 1972.<sup>97</sup> He then went on amending his complaint and repeatedly appealing judicial losses for the next three and a half years. This meant that he pressed on with his suit long after the Agency had rescinded the order in question and even after all of the principals—including the President—were out of office. It literally took an act of Congress to stop the litigation. A year after the 1974 FECA Amendments were enacted, the judge in Nader’s case ruled that the new statute barred his suit.<sup>98</sup>

Even where a case ostensibly targeted just one side of the aisle, politically, it

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1972, <http://query.nytimes.com/mem/archive/pdf?res=F50717F73C5A137A93C3A9178BD95F468785F9>.

92. *Id.* (quoting Kenneth W. Parkinson, lawyer defending President Nixon’s Campaign Committee in *Common Cause* lawsuit).

93. *See id.*

94. *See* Califano, *supra* note 90.

95. *See* Nader v. Butz, 398 F. Supp. 390, 392, 400 (D.D.C. 1975).

96. *See id.*

97. *See id.*

98. *See id.* at 401-02. The Act decriminalized certain legal provisions of the 1971 law and established the FEC, endowing it with primary jurisdiction in civil enforcement. *Id.*

tended to challenge the financing practices of both major parties. For example, the *FCREEP* suit gave rise to a third-party claim asserting that the Democrats had also failed to identify donors to the extent that Common Cause contended was required.<sup>99</sup> Thus, as it attempted to defend both parties' right to withhold information about donors' identities, the Nixon camp made plain that "the Democratic candidate's interests would be adversely affected if Common Cause were to win . . . ."<sup>100</sup> And so while Democrats initially joined in public interest group lawsuits seeking to enforce campaign finance laws against their Republican rivals,<sup>101</sup> the party soon dropped that strategy.

The interest group litigation discussed here is almost unknown in the panoply of campaign finance case law. Since many of the suits were either settled out of court or dismissed outright, they failed to produce the kind of final ruling we normally associate with a courtroom victory. And as interpretations of defunct statutes with little current value as precedent, whatever decisions were published in these cases tend not to attract the attention of legal scholars.

I would contend, however, that they mattered a great deal for the policymaking structure of campaign finance law in their time. First, the publicity these suits generated went a long way toward fueling public concern about money in politics and led to more scrutiny of campaign finance practices then underway. That scrutiny, in turn, proved politically embarrassing for incumbents across the board. The *FCREEP* case was certainly awkward for President Nixon since it exposed how much he had done to undermine the 1971 FECA restrictions with respect to his own campaign, even as he signed the law into existence.<sup>102</sup> But because common circumvention schemes involved funneling donations through *congressional* campaigns, the public was left with the general impression that money had corrupted federal politics at every level. Second, the extensive discovery undertaken in these suits amounted to real prosecutorial work, revealing violations of what were, at the time, criminal campaign finance provisions. Like Common Cause's lawsuit against *FCREEP*, Nader's case also yielded evidence that was then used as part of the impeachment case against President Nixon,<sup>103</sup> as well as in the indictment of Nixon's Treasury Secretary, John Connally.<sup>104</sup> Finally, where cases settled out of court, interest groups often won important concessions from government

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99. See Ben A. Franklin, *Trial Set for Oct. 31 in G.O.P. Fund Case*, N.Y. TIMES, Oct. 14, 1972, <http://query.nytimes.com/mem/archive/pdf?res=FA0612FC3D55137B93C6A8178BD95F468785F9>.

100. See *id.*

101. See Anthony Ripley, *G.O.P. Bid Spurned on Settling Suits: Common Cause, Democrats to Press Republicans on Finance and Watergate*, N.Y. TIMES, Apr. 20, 1973, <http://query.nytimes.com/mem/archive/pdf?res=F50610FC38551A7493C2AB178FD85F478785F9>.

102. See Franklin, *supra* note 91. Reporting on the case was quick to cite the President's public statements about the importance of fighting campaign finance abuses. See *id.*

103. See *Nader v. Butz*, 398 F. Supp. 390, 393 (D.D.C. 1975).

104. See *id.* Connally was later found not guilty at trial. *Id.*

officials as to how campaign finance law would be enforced in the future. For example, in exchange for dropping its case against the national party committees, Common Cause got FECA's enforcement officers to change their policy on earmarked contributions.<sup>105</sup> Because the clerks had up to then maintained that FECA did not specifically require political committees to report the names of donors who had earmarked their contributions for specific candidates, the policy amounted to a critical loophole in the law's formal contribution caps: Donors could easily exceed contribution limits by channeling additional donations through party committees, with the assurance that the committee would pass money on to the designated candidate.<sup>106</sup> By reaching an agreement to disclose such earmarks, Common Cause effectively closed that loophole. (Such negotiating power was unquestionably linked to the fact that these litigation campaigns had yielded a private right of action in campaign finance law, and thus had taken enforcement power out of the exclusive control of government insiders.) On the whole, then, interest group litigation did a great deal to increase the relevance of campaign finance restrictions for political incumbents at the time.

It was, however, just one of several factors contributing to that result during this era; changes were also taking place in the government's own administration of the law, apart from these interest group efforts.

#### *B. More Independent Government Enforcement*

While interest groups were lobbying for more stringent enforcement of campaign finance law, some government officials were taking matters into their own hands and prosecuting alleged violations as never before. Thus the 1971 FECA, which was much weaker than its predecessors in terms of how broadly it restricted funding practices, actually generated high-level criminal convictions soon after its passage.

Once again, the critical case involved members of Nixon's campaign apparatus. In *United States v. Finance Committee to Re-Elect the President*, the President's Finance Committee was charged with violating the original FECA's reporting and disclosure requirements.<sup>107</sup> Specifically, the charges were that Maurice Stans, the committee chair, had failed to report a detailed account on a \$200,000 contribution, as required by the statute; that the committee treasurer, Hugh Sloan, had likewise failed to record this contribution; and finally, that the organization had failed to report the

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105. See Anthony Ripley, *2 Congress Aides Agree to Stop 'Laundering' Gifts: Common Cause Suit Settled Out of Court—House Clerk and Senate Secretary Must Enforce 1972 Election Law*, N.Y. TIMES, May 21, 1974, <http://query.nytimes.com/mem/archive/pdf?res=F10F1EFD3F591A7A93C3AB178ED85F408785F9>.

106. See ALEXANDER, *supra* note 19, at 33.

107. See *United States v. Fin. Comm. to Re-Elect the President*, 507 F.2d 1194, 1195 (D.C. Cir. 1974) (appealing conviction in lower court).

contribution to the Agency charged with administering FECA rules in presidential contests, the General Accounting Office (GAO).<sup>108</sup> Whereas federal prosecutors had never brought any cases under the FCPA and tended to target activists outside government in other campaign finance prosecutions, the Justice Department's successful pursuit of a sitting President's own campaign staff seemed to mark a clear turning point in the administration of campaign finance limits.

Of course, as criminal sanctions go, nothing about the case was especially severe. The punishment was slight, with the court affirming the trial court's determination of just a \$1000 fine for each of the three counts charged, and declining to invoke the law's provisions for jail time.<sup>109</sup> The threat of such punishment, however, did seem to matter a great deal to the regulated parties. As the court noted, in the run-up to the 1971 FECA effective date, "[c]ommittee attorneys spent many, many hours reviewing each detail of the old [and] new laws," and scrambled to have donations "made during the pre-April 7 secrecy period."<sup>110</sup> The committee further took the unusual step of dissolving and then officially reestablishing itself on the eve of the change to FECA in an attempt to ensure that money collected under the previous law would not be subject to the new Act's reporting and disclosure requirements.<sup>111</sup>

The court suspected, and eyewitness accounts indicate, that there was much more to this than simple, lawyerly attention to a changing regulation. Instead, there seemed to be a general atmosphere of panic as the new, albeit relatively mild, rules went into effect. For example, in *Money, Power and Elections*, Rodney Smith describes his experience among Republican staffers on April 6, 1972—the day before the 1971 FECA went into effect.<sup>112</sup> In a bank across the street from the White House, Smith says, campaign employees "were frantically working on an emergency project" to sort, stack, and deposit several million dollars, in mostly cash donations, into an FCREEP bank account before FECA became law at 12:01 AM on April 7, 1972.<sup>113</sup> The result was an essentially secret bank account from which Nixon's campaign could make expenditures that went undisclosed despite the new regime of reporting and donor-identification requirements.<sup>114</sup> Various illegal activities were later traced back to this account—most notoriously, the Watergate burglary.<sup>115</sup> But, for this analysis, it is noteworthy that the account itself represented a concerted attempt

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108. *See id.* The contribution was promised before the effective date of the statute, but was not received until after the statute had gone into effect. *See id.* at 1198.

109. *See id.* at 1195.

110. *Id.* at 1197.

111. *See Fin. Comm. to Re-Elect President*, 507 F.2d at 1197.

112. RODNEY A. SMITH, *MONEY, POWER & ELECTIONS: HOW CAMPAIGN FINANCE REFORM SUBVERTS AMERICAN DEMOCRACY* 1-2 (2006).

113. *See id.*

114. *See id.* at 3.

115. *See id.*

to evade the new law, if not to break it outright. Why such extreme measures in the face of a campaign finance statute that was arguably much narrower than its predecessors? As it happens, politicians were reacting to the changing policymaking structure, embodied in the 1971 FECA, which placed enforcement authority in relatively independent offices of government.

For nearly a century, criminal prosecution had been the only mechanism for pursuing violations of the disclosure provisions in campaign finance laws.<sup>116</sup> Ordinarily, federal officials enjoy no special immunity from prosecution under campaign finance law. However, earlier campaign finance statutes had left investigation of criminal wrongdoing to institutional insiders like the Clerk of the House or the Secretary of the Senate, with prosecutors able to act only on the recommendation of the legislative staffs.<sup>117</sup> Predictably, few formal cases were ever launched.

All this changed with the 1971 FECA, which gave the job of policing presidential campaigns to the GAO. As “the least politically encumbered” of the law’s three enforcement entities,<sup>118</sup> the GAO offered the kind of independence that could overcome campaign finance law’s past inertia. Indeed, shortly after the 1971 FECA’s passage, the GAO began issuing reports, conducting investigations, and establishing a clearinghouse to assist state and local officials in their own administration of federal campaign finance laws.<sup>119</sup> As Nixon’s campaign staff feared—and as their convictions later verified—such independence would greatly increase the salience of campaign finance regulation for federal officeholders.<sup>120</sup> Thus, just as interest group litigation had turned dormant campaign finance restrictions into real limits on political fundraising, government administrators were also taking a renewed interest in the law’s enforcement. Interestingly, defendants in both the civil and criminal cases claimed First Amendment protections against the charges, but these claims were usually met with little sympathy in the federal courts. There was, however, an important exception whereby the pre-*Buckley* cases carved out a special class of political activity to which the campaign finance laws would not apply.

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116. See Craig C. Donsanto & Nancy L. Simmons, *Prosecution of Campaign Finance Crimes in the United States*, in CORPORATE POLITICAL ACTIVITIES 2006: COMPLYING WITH CAMPAIGN FINANCE, LOBBYING & ETHICS LAWS 2006, at 595, 611 (PLI Corporate Law & Practice, Course Handbook Ser. No. 8775, 2006).

117. See *supra* note 45 and accompanying text (discussing limitations of legislative staff).

118. H.R. REP. NO. 93-1239, at 133 (1974) (supplemental views of Rep. Bill Frenzel, R-MN), reprinted in FED. ELECTION COMM’N, LEGISLATIVE HISTORY OF FEDERAL ELECTION CAMPAIGN ACT AMENDMENTS OF 1974, at 767 (1977).

119. See *id.* at 135.

120. See *United States v. Fin. Comm. to Re-Elect President*, 507 F.2d 1194, 1196 (D.C. Cir. 1975). The GAO initially pushed the matter leading to the conviction, and its report became the factual basis on which the case was tried. See *id.*

### C. Policy Benefits Foreclosed

As the political costs associated with the extant campaign finance regime were increasing due to the combined efforts of reform groups and government enforcers, there was a simultaneous decrease in the benefits incumbents could hope to gain from a more stringent law. That is, scholars often note at least two important advantages associated with campaign finance restrictions: First, limits on candidates' use of private wealth in their campaigns tend to reduce electoral competition, especially from minor or third parties; and, second, they tend to hold down the overall cost of campaigning.<sup>121</sup> For these reasons even rationally self-interested political leaders will favor laws, like campaign finance limits, that on their face seem to run counter to incumbents' electoral ambitions. Thus it is particularly noteworthy that in the years immediately preceding passage of the 1974 FECA Amendments, judicial rulings interpreted campaign finance law in ways that foreclosed these beneficial effects.

#### 1. A Legal Exception for Independent Activists and Interest Groups

Political activists outside government won an important legal victory with respect to the 1971 FECA, one that greatly increased their freedom to criticize federal candidates during the election season. Toward the end of Nixon's first term, the Justice Department charged an independent activist group with violating the 1971 FECA.<sup>122</sup> The group, National Committee for Impeachment (NCI), had taken out a two-page advertisement in the *New York Times* calling for Nixon's impeachment and soliciting contributions that the group would use on behalf of congressional candidates in the 1972 elections.<sup>123</sup> The government maintained that NCI should be enjoined from accepting or spending any such contributions until it registered as a political committee as required under the 1971 FECA.<sup>124</sup> That law defined political committees as any "organization which accepts contributions or makes expenditures . . . for the purpose of influencing the nomination for election, or election, of any person to Federal office."<sup>125</sup> Committees were required to file reports of their receipts and expenditures as well as to disclose the names of donors to the committee and the names of candidates to whom the group contributed.<sup>126</sup> Because NCI's advertisement listed certain congressional candidates, encouraged contributions on their behalf, and called for the impeachment of the President, the DOJ

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121. See SORAUF, *supra* note 22, at 19; Corrado, *supra* note 25, at 19.

122. See *United States v. Nat'l Comm. for Impeachment*, 469 F.2d 1135, 1137 (2d Cir. 1972).

123. See *id.* at 1137-38.

124. See *id.* at 1137.

125. *Id.* at 1139 (citing Federal Election Campaign Act of 1971, Pub. L. No. 92-225, § 301(d)-(f), 86 Stat. 3, 11 (current version at 2 U.S.C. § 431 (2006))).

126. See *Nat'l Comm. for Impeachment*, 469 F.2d at 1137 n.4 (describing sections 303, 304, and 306 of Act).

argued that the advertisement qualified as an attempt to influence federal elections. Prosecutors therefore contended that NCI was subject to the 1971 Act's disclosure and reporting requirements.<sup>127</sup>

NCI countered with a constitutional challenge to the Act. Arguing that the law's definition was overly broad and its restrictions too heavy a burden on political activity, the group maintained that Titles I and III of the 1971 FECA should be overturned as violating First Amendment rights.<sup>128</sup> After an initial loss in district court, NCI ultimately won its case.<sup>129</sup>

Citing Nixon's own constitutional defense in *Common Cause v. Finance Committee to Re-Elect the President*,<sup>130</sup> the court found the 1971 FECA's definition of "political committee" vague.<sup>131</sup> It then narrowed the term in two respects: First, the organization must coordinate its activities with at least one candidate, and second, it must have as its "major purpose" the nomination or election of a federal candidate.<sup>132</sup> The ruling thus avoided overturning FECA outright; finding no evidence that NCI qualified under this more precise definition, the court declined to address the broader question of whether such a law ran afoul of speech guarantees.<sup>133</sup> Admitting that it was reading into the text a meaning that was not explicitly stated there, the court noted that any broader definition of political committee "would raise serious constitutional issues."<sup>134</sup>

Although modest from a legal perspective, the ruling would have important consequences with respect to practical electoral politics. That is, the 1971 FECA remained in place as a restriction on federal candidates and on their designated political committees; but groups that sought mainly to *remove* federal officeholders, or to *defeat* federal candidates, would not necessarily be subject to the same restrictions. Moreover, when a similar case reached the Supreme Court that same year, the holding yielded much the same result.<sup>135</sup> The Court clarified the terms by which unions could participate in elections despite longstanding bans on their direct contributions to candidates.<sup>136</sup> Against a government claim that the law prohibited contributions from any fund under union control, the Court held that unions were permitted to contribute as long as they did so via funds that segregated union dues from

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127. *See id.* at 1138.

128. *See United States v. Nat'l Comm. for Impeachment*, 469 F.2d 1135, 1137 (2d Cir. 1972).

129. *See id.* at 1142.

130. *See id.* at 1137 n.5.

131. *See id.* at 1142 (discussing implications of government's position on Act).

132. *See Nat'l Comm. for Impeachment*, 469 F.2d at 1141.

133. *See id.* at 1137-38. The court does find, however, that FECA's authors contemplated such a connection in their definition of the term. *See id.* at 1139-40.

134. *See United States v. Nat'l Comm. for Impeachment*, 469 F.2d 1135, 1140 (2d Cir. 1972).

135. *See generally* *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385 (1972).

136. *See id.* at 414.

members' voluntary donations toward political advocacy.<sup>137</sup> Overall, then, the message coming from courts in the early 1970s was that the First Amendment protected independent activists and interest groups from the strictures of campaign finance law, even as it allowed restrictions on candidates and political parties.<sup>138</sup> Thus, the 1971 Act would do little to relieve major party incumbents of the pressure these outside groups were exerting at the time.<sup>139</sup>

## 2. *The Fall of an Important Control on Campaign Costs*

Just as the 1971 FECA reflected incumbents' interest in reducing electoral competition, it also addressed their growing concern for skyrocketing campaign costs. The Act established spending limits specifically for broadcast communications and print advertisements as a way of holding down costs in those areas. It also established a unique system for administering these limits—one that was both a mark of its seriousness as salient law and its constitutional downfall. When the system was overturned as unconstitutional, a second benefit of the early campaign finance regulation was foreclosed.<sup>140</sup>

The 1971 statute required any media organization that accepted advertisements supporting or criticizing a candidate to obtain a certification from the candidate, or to make some determination as to the political connections between the sponsor and the named candidate, before running the piece.<sup>141</sup> Broadcasters and publishers who failed to do so were subject to criminal penalties.<sup>142</sup> Since that system closely resembled a prior restraint on publication, it seemed to implicate several well-established doctrines on the freedom of the press.

Invoking those doctrines, the ACLU joined with the *New York Times* and brought a constitutional challenge to the law, *ACLU v. Jennings*.<sup>143</sup> A three-judge district court agreed with the plaintiffs that the enforcement duties imposed by the Act amounted to an unconstitutional prior restraint on speech, and so permanently enjoined enforcement of Title I.<sup>144</sup> Citing *Near v. Minnesota*,<sup>145</sup> among other landmark First Amendment cases, the court noted

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137. See *id.*; see also UROFSKY, *supra* note 16, at 54.

138. See *ACLU v. Jennings*, 366 F. Supp. 1041, 1042 (D.D.C. 1973) (finding Title I of Act imposes impermissible restraints), *vacated by* *Staats v. ACLU*, 422 U.S. 1030 (1975).

139. See generally MUTCH, *supra* note 19; LARRY J. SABATO, PAC POWER: INSIDE THE WORLD OF POLITICAL ACTION COMMITTEES (1984).

140. See *Jennings*, 366 F. Supp. at 1051.

141. See *id.* at 1044. The second part of the rule was added by regulations adopted pursuant to the Act. See *id.* at 1050.

142. See *id.* at 1044. "[W]ith this provision Congress has charged the media with first-line responsibility to enforce, by refusal to publish, the requirements of the Act." *Id.* at 1049.

143. *Id.* at 1043.

144. See *ACLU v. Jennings*, 366 F. Supp. 1041, 1042 (D.D.C. 1973), *vacated by* *Staats v. ACLU*, 422 U.S. 1030 (1975).

145. 283 U.S. 697 (1931).

that the law effectively gave candidates the power to block publication wherever they did not wish to have certain views aired, or even where they simply did not want to be associated with the group behind the advertisement.<sup>146</sup> Unlike the provisions challenged in *National Committee for Impeachment*, the constitutional infirmities here “inhere[d] in the enforcement structure” and thus could not “be removed by a narrowing construction drawn by the Court.”<sup>147</sup> FECA was found not just problematic as applied to certain groups; instead, its media-spending restrictions were unconstitutional on their face.<sup>148</sup>

After *ACLU v. Jennings*, politicians faced serious barriers in their attempts to use campaign finance law as a mechanism for holding down campaign expenditures. Spending caps were still permissible under the Constitution, but this gloss on the policy raised two fundamental problems. The first was the obvious legal loophole: If the law applied only to the candidate’s official campaign apparatus, then his friends could run ads on his behalf and effectively render formal expenditure ceilings all but meaningless.<sup>149</sup> The second problem was structural: If Congress opted to keep spending caps in place, to whom would it delegate enforcement duties? Earlier statutes had proven that congressional enforcement would likely be ineffective, while executive branch enforcement would likely be just the opposite: too strict and too independent of political leaders’ interests. Addressing incumbents’ growing concerns about costs and competition in federal elections was therefore going to require a major overhaul of the regulatory scheme.

#### D. Implications for the 1974 FECA

In summary, this period at the beginning of the 1970s marked a change in politicians’ attitudes toward enforcement of campaign finance laws. Whereas in the earliest days of campaign finance regulations, lawmakers seemed to avoid enacting strong enforcement mechanisms, they were now responding to the problems of rising costs and the growing importance of independent groups in national politics. These problems gave them reason to want some more salient form of campaign finance restriction, while, at the same time, giving them pause about existing mechanisms for the law’s enforcement. On the one

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146. *Jennings*, 366 F. Supp. at 1053.

147. *See id.* at 1054.

148. *See id.* In addition, *Jennings* contained the same challenge to the 1971 law’s Title III as *National Committee for Impeachment* and it yielded the same result. *See United States v. Nat’l Comm. for Impeachment*, 469 F.2d 1135, 1040 (2d Cir. 1972). Citing *National Committee for Impeachment*, the *Jennings* court adopted that court’s narrower definition of the term “political committee” and ruled that the group did not fall within the definition. *Jennings*, 366 F. Supp. at 1057.

149. Because candidates who respected spending caps would be limited in their ability to respond to any “attack ads” run by independent, unrestricted groups, the system provided a strong incentive for regulatees to take advantage of that loophole.

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hand, because courts had adopted a private right of action, enforcement had become unintentionally severe for incumbents. At the same time, however, judicial rulings were complicating the possibilities for enforcing the law with respect to advocates outside official campaign organizations. All of this left incumbents of the two major parties feeling quite ambivalent about campaign finance law and looking for some way to recapture control of a policymaking structure that was changing despite lawmakers' initial design.

Thus, when Congress met to enact the 1974 FECA Amendments, it seems that the times really did demand the legislation, but for very different reasons than we normally credit. From a strictly political standpoint, the old legal structure had become almost all cost and no benefit for incumbents in the two major parties. As we explore the legislative history and other material from the time, we will find lawmakers giving considerable attention to reversing that trend. And, in light of the legal and political context discussed above, incumbents' efforts in this regard indicate that the truth about post-Watergate campaign finance reform is likely exactly the opposite of our conventional wisdom. That is, we did not develop an especially stringent campaign finance law because of Watergate; instead, we uncovered the funding scandals behind Watergate because we experienced a rare—and very brief—period of strictly enforced campaign finance law. The 1974 Amendments seemed tailored toward reining in the law's independent enforcement.

#### IV. THE JUDICIALIZATION OF CAMPAIGN FINANCE POLICY AFTER 1974

As Congress set out to revise campaign finance policy again in the wake of Watergate, lawmakers seemed to put a priority on overriding the recent judicial rulings that had increased costs and reduced benefits for incumbents. Somewhat ironically, the new law would give even more discretion to courts in campaign finance policy. This time, however, the statute harnessed judicial policymaking in a way that would serve incumbents' interests. Indeed, the 1974 FECA contained many features that promised to restore control over campaign finance policy to the elected branches. This Part examines those elements of the law and analyzes the political support behind their enactment.

##### *A. Reining in Legal Enforcement*

Legislators had long been aware that an independent enforcement mechanism would be needed if campaign finance laws were to become any sort of meaningful limit on federal elections. Sponsors of campaign finance bills had called for the creation of such an entity as early as 1966, and a unanimous Senate vote authorized a bipartisan FEC the following year; it was only when the House opted not to pursue it that the proposal died.<sup>150</sup> Similar efforts had

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150. See ALEXANDER, *supra* note 19, at 28.

likewise been made in connection with the 1971 FECA, but ultimately rejected.<sup>151</sup> Thus, it was not for lack of imagination that there was no independent regulatory agency in charge of campaign finance policy before 1974. Rather, lawmakers seem to have resisted this option out of a desire to keep campaign finance enforcement closer to home, with the legislative staff.

When the 1974 Amendments authorized Agency enforcement of campaign finance law, they did so with an FEC that was much more politically encumbered than the traditional independent regulatory commission.<sup>152</sup> First, the Agency's policymaking power was hamstrung by virtue of its even-numbered board.<sup>153</sup> And, initially, the FEC's six members were to be appointed jointly by all three elected bodies, with the House, Senate, and President nominating two commissioners each.<sup>154</sup> (This appointment scheme was ruled a violation of separation-of-powers principles in *Buckley v. Valeo*.)<sup>155</sup> The Clerk of the House and Secretary of the Senate also sat on the Commission, as nonvoting members, until that too was found to violate constitutional prerogatives in the mid-1990s.<sup>156</sup> Further legislative oversight was guaranteed by controls on both the Commission's budget and its rulemaking. Thus the Agency was denied multi-year funding, and instead has always had to present its budget to Congress annually. As Congressman Wayne Hays, the Chair of the House Administration Committee, informed the first FEC Chair at the time, this was explicitly to prevent the Agency from establishing too much independence from Congress. "You're not going to set the ground rules," he said. "As chairman, I'll tell you. You're coming back every year for an authorization."<sup>157</sup> Finally, from the FEC's inception until the practice was ruled unconstitutional in 1983, Congress subjected the Agency's regulations to legislative veto.<sup>158</sup> While the Agency was obviously different from the legislative staff oversight characteristic of the past policymaking structure—and was therefore, technically, a delegation of campaign finance policy—it was much more responsive to incumbent interests than enforcement via class action suits or even by the DOJ. When Congress vested this body

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151. BROOKS JACKSON, *BROKEN PROMISE: WHY THE FEDERAL ELECTION COMMISSION FAILED* 24-25 (1990).

152. See Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 310(a), 88 Stat. 1263, 1280-82 (codified as amended at 2 U.S.C. § 437c (2006)) (describing method of selecting members of Commission).

153. See *id.* § 310(a)(1) (noting six members appointed).

154. See *id.* The President's appointees were to be approved by both houses of Congress. See *id.* § 310(a)(1)(c). This appointment scheme was ruled a violation of separation-of-powers principles in *Buckley v. Valeo*, 424 U.S. 1, 140 (1976).

155. See *Buckley*, 424 U.S. at 138-39.

156. See *Fed. Election Comm'n v. Nat'l Rifle Ass'n Political Victory Fund*, 6 F.3d 821, 827 (D.D.C. 1993).

157. JACKSON, *supra* note 151, at 27.

158. See ALEXANDER, *supra* note 19, at 32; see also *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983).

with primary jurisdiction to enforce FECA, it returned to a more direct policymaking structure for campaign finance.<sup>159</sup>

More subtly, the 1974 Act reinstated political control over enforcement by changing what had been criminal provisions in the earlier FECA to civil ones.<sup>160</sup> Not only did this take the GAO and the DOJ off the front lines of campaign finance law enforcement, it also critically undermined private litigants' jurisdiction to pursue their own allegations against federal candidates. As discussed above, reform groups had won a private right of action to sue regulatees directly, in civil court, for alleged violations of *criminal* statutes.<sup>161</sup> Eliminating such criminal provisions from the law had the effect of eliminating the most potent form of *civil* enforcement then underway. The change effectively overrode the holding in *Common Cause v. Democratic National Committee*.<sup>162</sup> With respect to most possible campaign finance violations, interest groups would now have to file their complaints with the FEC rather than with the federal courts, and they could no longer sue regulatees directly. Enforcement matters would end up in a public trial only where regulatees failed to reach an administrative settlement with the FEC.

These aspects of the 1974 Amendments evidence an overall effort to regain congressional autonomy in campaign finance policy. They go hand-in-hand, for example, with the preemption it effected on the many campaign finance restrictions that the states were passing in that era,<sup>163</sup> and with its unusually short statute of limitations for criminal prosecutions (reduced from the federal norm of five years to three).<sup>164</sup> And they were especially intended to combat the influence reform groups were having in the field. One particularly telling example of that effort was in a FECA provision referred to as the "Common Cause Amendment," which extended the new restrictions to the very same reform groups that had lobbied for campaign finance law in the first place. The House Majority Leader explained the provision as follows:

We also have a little thing in here which I think the Members might be interested in. That is, we require any organization which spends any money or commits any act for the purpose of influencing an election, must report as a political committee . . . ; if it goes national and issues reports purporting to condemn somebody for voting such a way, it has to report. We have to know

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159. See 120 CONG. REC. 35,134 (1974). "[T]he act provides that all civil complaints predicated upon or pertaining in any manner to titles I and III of the act or sections 608 through 617 of title 18 United States Code shall be channeled to the Commission." *Id.* (statement of Rep. Wayne Hays, D-OH).

160. See *id.* (statement of Rep. Wayne Hays, D-OH, describing final FECA bill).

161. See *supra* text accompanying notes 80-85.

162. See 333 F. Supp. 803 (D.D.C. 1971).

163. See 120 CONG. REC. 35,133 (1974). The effective date for the 1974 FECA was January 1, 1975 for all its provisions except one: Its preemption of all state-level campaign finance law took effect immediately upon its passage. See *id.*

164. See Donsanto & Simmons, *supra* note 116, at 611.

the source of its income. If we want to know who that is aimed at, I do not want to say out loud, but their initials are C.C.<sup>165</sup>

This was discussed more openly as the “Common Cause Amendment” in legislative debate, and it was passed along with the rest of the regulatory package.<sup>166</sup>

Oddly, though, while the statute contained provisions that severely restricted litigation by citizens and interest groups, it did not seek to foreclose judicial review per se. In fact, the 1974 FECA actually empowered the judiciary to make and alter campaign finance policy more deliberately than any other such law in the nation’s history. As I have argued from the outset, the Act marked a distinct turning point in the judicialization of campaign finance by virtue of its special mechanisms for bringing courts into policy decisions in this field. Examining these several mechanisms in turn, we can see that they all empower courts to make policy.

### *B. Increasing Judicial Discretion*

Among the elements contributing to the judicialization of campaign finance policy in the 1974 Act were two unusual mechanisms for abstract review by courts. The first was expedited review, which authorized a special, accelerated process for constitutional litigation under the Act.<sup>167</sup> Under this procedure, a party seeking to overturn the law needed only to file a claim with a district court.<sup>168</sup> No trial would be held; instead, constitutional questions would simply be certified up through the appeals court to the Supreme Court.<sup>169</sup> As is the case any time expedited review is included in a federal statute, this had the

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165. 120 CONG. REC. 35,131 (1974) (statement of Rep. Wayne Hays, D-OH).

166. See H.R. REP. NO. 93-1239, at 145 (1974) (supplemental views of Rep. Bill Frenzel, R-MN), reprinted in FED. ELECTION COMM’N, LEGISLATIVE HISTORY OF FEDERAL ELECTION CAMPAIGN ACT AMENDMENTS OF 1974, at 779 (1977). The Center for Public Financing of Elections described the provision as follows:

[FECA] [r]equires that any organization which spends money or commits any act for the purpose of influencing any election (such as the publication of voting records) must report as a political committee. (This would require reporting by such lobbying organizations as Common Cause, Environmental Action, ACA, etc., and perhaps many other traditionally non-electoral organizations).

Every person who spends or contributes over \$100, other than to or through a candidate or political committee, is required to report.

See 120 CONG. REC. 35,133 (1974) (emphasis added) (incorporating into record summary of Act by Center for Public Financing of Elections).

167. See Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 315, 88 Stat. 1263, 1285 (codified as amended at 2 U.S.C. § 437h (2006)). This right of action belongs to the Commission, the national committee of any political party, and any individual eligible to vote in a presidential election. See *id.*

168. See *id.*

169. See *id.*

effect of empowering the judiciary, especially the Supreme Court, relative to the other branches. Congress mandated that the Court weigh in on the policy in much the same way that a legislative conference committee would, by making decisions about the scope and meaning of the law before it ever took effect and having a free hand to revise provisions that legislators had enacted. Adding to this judicial “veto” power was the Act’s severability clause, which left standing any provisions of the regulatory scheme that the courts did not explicitly overturn.<sup>170</sup> While perhaps seeming to limit judicial discretion, severability enables the courts to pass a very different regulatory scheme than the one enacted by Congress.<sup>171</sup> Often, judge-made policy—being last in time and carrying with it the imprimatur of constitutional law—endures much longer than congressional policy.

A second form of abstract review was imposed on decisions of the FEC, although perhaps less intentionally than the provisions above. Like many administrative agencies in the federal government, the Commission was given the duty of issuing advisory opinions to regulatees, telling them how the law would be interpreted in a given, usually hypothetical, situation.<sup>172</sup> Such opinions are necessarily a kind of abstract review of the law: They are forward-looking determinations about whether particular activities or funds would violate either the FECA statute or the FEC’s regulations pursuant to the Act. While it is typical of agencies to do this sort of work, it is unusual for their decisions in such matters to be subject to judicial review—under FECA, however, that is the case. A catchall provision in the accompanying Presidential Primary Matching Funds Act (enacted as part of the 1974 FECA) subjected any Commission action to judicial review.<sup>173</sup> This meant that regulatees would be able to seek virtually the same abstract, forward-looking legal determination from a federal court. And, although regulatees brought suits to do just that immediately after passage of the law,<sup>174</sup> subsequent revisions to FECA have never attempted to restrict court jurisdiction with respect to advisory opinions. (To the contrary, subsequent amendments to FECA established specific, sometimes relatively short, time periods during which the FEC must respond to advisory opinion requests, and the Agency’s failure to act within those time frames will also give rise to a suit.)<sup>175</sup> Just as

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170. See Federal Election Campaign Act of 1971, Pub. L. No. 92-225, § 404, 86 Stat. 3, 20 (1972) (codified as amended at 2 U.S.C. § 454 (2006)).

171. See GORDON SILVERSTEIN, *LAW’S ALLURE: HOW LAW SHAPES, CONSTRAINS, SAVES, AND KILLS POLITICS* 274-75 (2009).

172. See Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 313, 88 Stat. 1263, 1283 (codified as amended at 2 U.S.C. § 437f (2006)).

173. See *id.* at sec. 408, § 9041 (codified as amended at 26 U.S.C. § 9041 (2006)).

174. See David M. Ifshin & Roger E. Warin, *Litigating the 1980 Presidential Election*, 31 AM. U. L. REV. 485, 498, 521-27 (1982).

175. See Federal Election Campaign Act of 1979, Pub. L. No. 96-187, sec. 107, § 308, 93 Stat. 1339, 1357 (1980) (codified as amended at 2 U.S.C. 437f(a)).

expedited review turned the judiciary into an extension of the legislature, this form of abstract review turns the courts into a kind of secondary Agency.

Beyond these mechanisms for abstract review, further judicialization of campaign finance policy can be found in the 1974 FECA's provisions for judicial review of the Commission's day-to-day work.<sup>176</sup> Here, the Act gave courts the power to review Agency enforcement actions, and provided for judicial review of Agency rulemaking, on either constitutional grounds or as failure to comply with the intentions of the Act.<sup>177</sup> Whether facilitating abstract or ordinary judicial review, all of these provisions gave courts a powerful say in the force and meaning of federal campaign finance law. On the whole, then, the statute placed substantial policymaking power in the hands of federal judges, giving them, in many respects, the last word in campaign finance controversies.

This presents a real puzzle. At the same time that incumbents actively foreclosed one kind of campaign finance litigation—the public interest lawsuit—they judicialized campaign finance policy as never before. While laboriously crafting new campaign finance rules and staking out an unusual (ultimately unconstitutional) level of congressional control over the Agency that was to enforce them, legislators simultaneously gave an independent judiciary the power to remake the whole scheme. Given that the courts had played a key role in the events leading up to these new amendments, by welcoming class action suits and rejecting politicians' interpretations of previous campaign finance laws, what explains Congress's unprecedented delegation to courts in 1974?

### *C. Opponents of Reform Appeal to Courts*

One possible answer is that politicians were using courts as a cover, never intending for the legislation to go into effect as passed. In delegation theory, this sort of strategy is postulated as a corollary to rational choice models of legislative decision-making.<sup>178</sup> Self-interested legislators consider the transaction costs associated with policymaking, weighing the benefits they might gain from responding to constituents' demands for law against the costs they would incur under the new rules, with their overall goal being to preserve their reelection chances. In the past, the elected branches had seemed to prefer weak rules administered directly in the legislature, a system that obviously preserved electability for the two major parties. After Watergate, however, incumbents were under a unique pressure to pass more substantial campaign finance restrictions and thereby to legislate against their self-interest. It is

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176. See Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 314(a)(9), 88 Stat. 1263, 1285 (codified as amended at 2 U.S.C. § 437g (2006)).

177. See *id.* sec. 408, § 9041 (stating any action by Commission subject to judicial review).

178. See EPSTEIN & O'HALLORAN, *supra* note 41, at 29-33.

possible, then, that they simply responded to that pressure superficially, passing a law that ostensibly constrained their fundraising but, in fact, turned the final policymaking power over to the courts. There, judges could be counted on to overturn the law according to established constitutional doctrines and case precedent. As Mark Graber and others have noted, Congress has a history of shifting blame for policy outcomes onto the courts—both by enacting legislation that runs afoul of established doctrine, and by signaling these constitutional problems in their debates over the legislation.<sup>179</sup>

Although this will turn out to be only part of the story, it was an important force behind the judicialization of campaign finance policy. Among a certain faction of FECA's authors, there is ample evidence of an attempt to kill the law with constitutionalism.

### *1. Couching Political Opposition in Constitutional Rhetoric*

Opponents of the reforms quickly abandoned their early threats to filibuster the bill after newspaper editorials condemned that approach.<sup>180</sup> Instead, whenever legislators openly opposed the law, they insisted that they were doing so out of fealty to constitutional values. This turned FECA's legislative record into a long complainant's brief to the Supreme Court, and thus signaled to the Court that its entry into the policymaking fray would be welcome, at least to the legislative minority. Moreover, these lawmakers directed their legal critiques not at the most constitutionally vulnerable aspects of reform, but at provisions that threatened them the most politically. For example, congressional Republicans were particularly vocal about public funding provisions and so maintained that such proposals ran counter to judicial precedent.

In doing so, critics tended to elide constitutional issues raised by one aspect of the law—such as the speech burdens created by contribution limits—with the provisions they disfavored. Saying that any limit on the power of citizens to give money to their favorite candidate would be “an infringement of freedom of speech,” one partisan criticized both public funding and expenditure ceilings as First Amendment violations.<sup>181</sup> As he did so, however, he continued to press for FECA's contribution limits, which were arguably much more obvious barriers to individual giving.<sup>182</sup>

Likewise, Republican lawmakers condemned public funding proposals as

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179. See LOVELL, *supra* note 12, at 20; Graber, *supra* note 12, at 39-40.

180. See 120 CONG. REC. 8421 (1974) (discussing *N.Y. Times* editorial); Editorial, *Inaction on Inflation*, N.Y. TIMES, Mar. 22, 1974, <http://query.nytimes.com/mem/archive/pdf?res=F50F1FFD355E1A7493C0AB1788D85F408785F9>.

181. See H.R. REP. NO. 93-1239, at 155 (1974) (supplemental views of Rep. Bill Frenzel, R-MN), reprinted in FED. ELECTION COMM'N, LEGISLATIVE HISTORY OF FEDERAL ELECTION CAMPAIGN ACT AMENDMENTS OF 1974, at 789 (1977).

182. See *id.*

unconstitutional, accusing their backers of attempting to establish a system of “political incest.”<sup>183</sup> However, this was a strange charge to levy at a program that was to work alongside, not in place of, private contributions, and arguments often appealed to principles that had not been established in the jurisprudence of the time.<sup>184</sup> For example, legislators asserted that public funding measures violated taxpayers’ First Amendment rights by forcing them “to support candidates who are in opposition to their own political views.”<sup>185</sup> Because the program would have been a government allocation like any other spending out of the federal treasury, it is unlikely that individual taxpayers could have raised any such claim. To do so, they would have had to argue that they enjoy a constitutional right to stop Congress’s allocation of money to federal programs wherever they are politically opposed to the activity being funded. No court had ever established such a right, except perhaps with respect to religious freedoms,<sup>186</sup> and critics cited no precedent to support their view. Also, because legislators authorize spending from the federal treasury as a matter of course, it seems doubtful that lawmakers actually believed their own constitutional rhetoric on this score.

Instead, these constitutional arguments seem like legislators’ effort to signal their policy preferences to the judges who would eventually hear challenges to the law. Indeed, at several points in the legislative record, members of the minority expressed the hope that the judiciary would take up their side of the policy fight. A notable example occurred after Senator Buckley presented one of the longest critiques in the entire legislative history, arguing primarily that expenditure ceilings were unconstitutional.<sup>187</sup> Immediately afterward, Senator Dominick took the floor to congratulate him and to make the following prediction: “I suspect he is not going to win on a vote, but I think this may be very good history for the country and for the courts in determining what we are voting for when this bill finally goes down.”<sup>188</sup>

## 2. *Adding Vulnerable Provisions to the Law*

Beyond arguing that courts should overturn certain provisions of the reformers’ original bill, legislators also sought changes that would likely make the statute even more vulnerable to constitutional attack. For example, the House Committee on Administration added a provision to the bill that punished

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183. See 120 CONG. REC. 8773 (1974) (statement of Sen. Howard H. Baker, Jr., R-TN).

184. See H.R. REP. 93-1239, at 155 (1974) (supplemental views of Rep. Bill Frenzel, R-MN), reprinted in FED. ELECTION COMM’N, LEGISLATIVE HISTORY OF FEDERAL ELECTION CAMPAIGN ACT AMENDMENTS OF 1974, at 789 (1977).

185. *Id.*

186. See generally *Flast v. Cohen*, 392 U.S. 83 (1968).

187. See 120 CONG. REC. 10,558-62 (1974) (statement of Sen. James L. Buckley, Conservative Party of New York).

188. 120 CONG. REC. 10,562 (1974) (statement of Sen. Peter H. Dominick, R-CO).

FECA violations by disqualifying candidates from running in subsequent elections.<sup>189</sup> Compared to the typical enforcement, this seemed unusually severe. The penalty was to be applied for even minor oversights, such as neglecting to file a financing report.<sup>190</sup> It also stood out as a uniquely stringent approach from this body; the Committee—like members of the House generally—had tended to oppose other efforts to strengthen FECA’s enforcement.

Thus it is noteworthy that the provision raised a constitutional issue, based on the precedent established in *Powell v. McCormack*.<sup>191</sup> Decided five years earlier, *Powell* held that, except where candidates failed to meet the age, citizenship, or residence requirements of Article I, Congress had no power to bar them from taking office.<sup>192</sup> With this precedent on the books and being cited by members of that same committee as an argument against the penalty, one would expect to see a move on the majority’s part to defend the proposal—for example, by distinguishing their penalty from the one barred by the Supreme Court. Instead, proponents simply pointed to similar practices in state governments (which are not bound by Article I of the federal Constitution) and then authorized judicial review for such enforcement actions.<sup>193</sup> By adopting the most constitutionally vulnerable option and then authorizing judicial review, this committee seemed to be engaging in a classic game of “blameshifting.” That is, they were formulating what appeared to be a strict law, but counting on courts to order that it not be enforced as written.

The blameshifting strategy was in evidence throughout the legislative debate. In one especially candid moment, James L. Buckley spelled it out on the Senate floor, arguing that his colleagues should deliberately set out to pass an *unconstitutional* bill.<sup>194</sup> He said: “I intend to vote against all amendments that might ameliorate some of the constitutional objections, so that whatever is enacted will be as vulnerable as possible to judicial attack.”<sup>195</sup> Notably, it was this same legislator who added the FECA’s special provisions for expedited review and later became the lead plaintiff in *Buckley v. Valeo*, 424 U.S. 1 (1976). Senator Buckley was therefore directly responsible for the element of

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189. See Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 407(a), 88 Stat. 1263, 1290 (codified as amended at 2 U.S.C. § 456 (2006)).

190. See H.R. REP. NO. 93-1239, at 134 (1974) (supplemental views of Rep. Bill Frenzel, R-MN), reprinted in FED. ELECTION COMM’N, LEGISLATIVE HISTORY OF FEDERAL ELECTION CAMPAIGN ACT AMENDMENTS OF 1974, at 768 (1977).

191. 395 U.S. 486 (1969).

192. See *id.* at 521-22.

193. See H.R. REP. NO. 93-1239, at 134-35 (1974) (supplemental views of Rep. Bill Frenzel, R-MN) (discussing Committee’s position that exclusion clause unconstitutional), reprinted in FED. ELECTION COMM’N, LEGISLATIVE HISTORY OF FEDERAL ELECTION CAMPAIGN ACT AMENDMENTS OF 1974, at 768-69 (1977).

194. See 120 CONG. REC. 8455 (1974) (statement of Sen. James L. Buckley, Conservative Party of New York).

195. See *id.*

FECA's judicialization that gave campaign finance its most notorious loophole: the 1976 ruling that expenditure ceilings were barred under the First Amendment.<sup>196</sup> Turning to Buckley's other contributions to the legislative debate, one can see that he and his Republican colleagues preferred exactly that policy.

### 3. *Inviting Courts to Strike Disfavored Provisions*

From the first day that Congress took up the FECA Amendments, Republicans had been lobbying for a regulatory scheme that capped donations and mandated disclosure of contributions, but that left campaigns free to spend whatever money they could take in.<sup>197</sup> Senator Buckley followed with a constitutional gloss on this approach, contending that while any restriction on political funding would be constitutionally suspect, expenditure ceilings were the most likely to be overturned by the Supreme Court.<sup>198</sup> Then, at the conclusion of his argument, the Senator offered two options for amending the campaign finance bill. The first proposed eliminating spending ceilings from the initial regulatory package; the other left the entire FECA scheme intact, including spending limits, but added expedited review.<sup>199</sup> Congress passed the latter, and Buckley went to court as soon as he was eligible to do so—the day after the law took effect—and won from the Supreme Court precisely what he had requested from his legislative colleagues.<sup>200</sup>

In achieving this result, Buckley's case was much more than a victory for the Senate's Republican minority; instead, the decision eliminated what legislators from all sides of the policy debate saw as the most problematic aspect of the new regulatory scheme. As Sorauf has pointed out, the "closed system" enacted in the 1974 FECA would have been very difficult to administer.<sup>201</sup> It would have required not only that government control the money flowing into the hundreds of races in federal elections, but that it invent some way of accommodating the funds campaigns took in above their overall spending limits. Because expenditure ceilings closed off the system, Sorauf argues that they left no effective outlets for candidates' hard-won campaign funds.<sup>202</sup>

Perhaps because of this, legislators had been moving away from expenditure ceilings in campaign finance law for some time. President Johnson's 1966 reform proposal would have repealed them (while tightening contribution limits

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196. See generally *Buckley v. Valeo*, 424 U.S. 1 (1976).

197. See 120 CONG. REC. 8202-04 (1974) (statement of Sen. Howard H. Baker, Jr., R-TN).

198. See *id.* at 8453-56 (statement of Sen. James L. Buckley, Conservative Party of New York).

199. See *id.* at 10,562.

200. See generally *Buckley*, 424 U.S. 1.

201. See SORAUF, *supra* note 22, at 238.

202. See *id.*

and disclosure requirements)<sup>203</sup> and, as noted above, the 1971 FECA replaced the wide-ranging spending limits of earlier eras with a cap on media expenditures only.<sup>204</sup> By 1974, expenditure ceilings remained a favorite option among reform groups and other elites outside government, but they were far from uncontroversial among lawmakers themselves.

Thus, to a certain extent, FECA's authors provide us with a textbook example of "blameshifting" in constitutional politics—creating a case by which the Supreme Court would overturn the legislation that Congress had just passed, with legislators then blaming the Court (and, by extension, the Constitution) for whatever policy failures occur in the aftermath. In the process, lawmakers get the best of both worlds: a statute they can point to as evidence of their own commitment to good government practices and budgetary restraint, while, at the same time, suffering few practical obstacles to political fundraising.

#### 4. *Limits to the "Blameshifting" Rationale*

It would be inaccurate, however, to conclude that opposition to the 1974 reforms was the sole, or even the primary, force behind the judicialization of campaign finance policy. The "blameshifting" model leaves too many questions unanswered. First, it does not explain all the elements of judicialization. Why, for example, would legislators intent on defeating the Act via judicial review include a severability clause? That provision allowed the Supreme Court to *avoid* overturning the law in its entirety, and guaranteed that whatever portions not found in violation of the Constitution would remain in effect.<sup>205</sup> Moreover, the constitutional waters were sufficiently murky to make judicial outcomes fairly unpredictable. On the one hand, many of the Act's substantive provisions had already survived constitutional challenges.<sup>206</sup> On the other hand, new First Amendment rulings seemed to signal heightened protection of speech rights,<sup>207</sup> as had cases interpreting the 1971 Act with respect to independent groups.<sup>208</sup>

Because of this uncertainty, even those who hoped the judiciary would eventually overturn the reforms did not want to abandon efforts to enact their policy preferences in the statute. As Senator Dominick argued: "[I]f we are going to have an unconstitutional bill, which I think is a disaster from beginning to end . . . to the detriment of the taxpayer, then we ought to have a

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203. See UROFSKY, *supra* note 16, at 33.

204. See Corrado, *supra* note 25, at 21.

205. See Federal Election Campaign Act of 1971, Pub. L. No. 92-225, § 404, 86 Stat. 3, 20 (1972) (codified at 2 U.S.C. § 454 (2006)).

206. See *supra* Part II.B (describing constitutional challenges to substantive provisions prior to 1974 Act).

207. See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

208. See *United States v. Nat'l Comm. for Impeachment*, 469 F.2d 1135 (2d Cir. 1972); *supra* Part III.C.1.

limit which is high enough.”<sup>209</sup> Incumbents planning to pass draconian campaign finance restrictions purely to satisfy public demand were “all acting as masochists,” he said.<sup>210</sup> Thus, however strategically rational it appears in hindsight, relying on courts to dismantle campaign finance reforms was something of a gamble in the legal and political context of the time.

#### D. The Pro-Reform Factions in Congress

The blameshifting rationale does not tell the whole story of FECA’s judicialization because, in fact, many of the Act’s authors actually wanted relatively strict new limits on campaign finance. Campaign costs had more than doubled in the decade before FECA reforms.<sup>211</sup> Democrats were particularly troubled by that state of affairs because Republicans had been raising more in contributions and “had spent more than twice as much as the Democrats in the 1968 presidential contest.”<sup>212</sup> But, across the political spectrum, incumbents were openly worrying about the fact that campaign costs had continued to rise despite limits enacted in the 1971 FECA.<sup>213</sup> There was even support for several FECA provisions among the bill’s most ardent opponents: Some Republicans were lobbying *for* contribution limits even as they argued against the legislation in general.<sup>214</sup>

Indeed, the desire for further limits on campaign finance was strong enough in some quarters that a few candidates took matters into their own hands, limiting their finances more strictly than any law required at the time.<sup>215</sup> According to several accounts, they did this through private, informal agreements with rival campaigns—each side agreeing to limit its campaign expenditures to some mutually agreed amount.<sup>216</sup> Moreover, by the mid-1970s, lawmakers and other policy advocates saw these practices as a possible alternative to the legalization of campaign finance policy.<sup>217</sup> Congressman M. Caldwell Butler proposed formalizing the system in the 1974 FECA, suggesting that Congress adopt a procedure whereby opponents in a federal contest would enter into valid, binding agreements to abide by the spending and

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209. 120 CONG. REC. 10,552 (1974) (statement of Sen. Peter H. Dominick, R-CO).

210. *Id.*

211. See Corrado, *supra* note 25, at 20.

212. *Id.*

213. See *id.*

214. See *supra* notes 197-98 and accompanying text.

215. RALPH K. WINTER, JR., WATERGATE AND THE LAW: POLITICAL CAMPAIGNS AND PRESIDENTIAL POWER 34-35 (1974).

216. See *id.* at 34 (noting “[i]n a number of recent elections, candidates have reached agreements as to limitations on expenditures” whereas limits appearing in extant campaign finance law had been in place for some forty-five years without inspiring any prosecution). See generally ALEXANDER, *supra* note 19.

217. See H.R. REP. NO. 93-1239, at 159-60 (1974) (supplemental views of Rep. M. Caldwell Butler, R-VA), reprinted in FED. ELECTION COMM’N, LEGISLATIVE HISTORY OF FEDERAL ELECTION CAMPAIGN ACT AMENDMENTS OF 1974, at 793-94 (1977).

contribution limits set forth in the legislation.<sup>218</sup> This would have entailed, for example, filing contracts with the congressional clerk's office, or some similar supervisory officer.<sup>219</sup> And, since private contracts would be subject to less constitutional scrutiny than public laws, the option would have allowed limits to take effect "even if the courts ruled a portion of the law . . . unconstitutional."<sup>220</sup>

As clever as it was in eliminating the constitutional barriers to making new campaign finance policy, however, Congressman Butler's proposal could do little to overcome the institutional barriers to it. In fact, the idea of limiting funding practices via contract highlights the structural problems lawmakers face when they set out to regulate federal elections—namely, that once elected officials agree among themselves on substantive rules, they will have to look to some other institution to enforce that agreement. Hence, Representative Butler's proposal included provisions for civil lawsuits wherever candidates failed to live up to their part of the bargain.<sup>221</sup> As we turn to look at the impetus for judicialization from the pro-reform perspective, we will see that, in much the same way, litigation was indispensable to their project.

### *1. Conflicts of Interest Among FECA's Proponents*

Lawmakers hoping to pass strong campaign finance restrictions faced a number of institutional constraints because a law that aims to restrict the use of private wealth in federal campaigns can hardly help but affect existing power relationships. Any change to existing rules usually threatens to put some actors at a disadvantage. Congressional debate over the 1974 FECA was therefore preoccupied with discussions about how the law would affect the political environment of the time. As such it revealed a number of tradeoffs that lawmakers would have to make in settling on a campaign finance policy. For example, they worried that adopting a system that encouraged the direct financing of individual candidates—such as providing tax exemptions or matching funds for campaign contributions—would inadvertently weaken political parties.<sup>222</sup> Alternatively, lawmakers wondered whether a program that naturally bolstered national parties—such as a party-centered public funding program—would have negative effects for state and local party organizations.<sup>223</sup> Moreover, would it diminish the autonomy of individual

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218. *See id.*

219. *See id.*

220. *Id.* at 160.

221. *See* H.R. REP. NO. 93-1239, at 160 (1974) (supplemental views of Rep. M. Caldwell Butler, R-VA), reprinted in FED. ELECTION COMM'N, LEGISLATIVE HISTORY OF FEDERAL ELECTION CAMPAIGN ACT AMENDMENTS OF 1974, at 794 (1977).

222. *See* 120 CONG. REC. 8453-55 (1974) (statement of Sen. James L. Buckley, Conservative Party of New York).

223. *See id.* ("[T]he various schemes devised to distribute Federal dollars among various candidates and

incumbents?

As a practical matter, incumbents often disagreed about what the substantive rules of a new policy should be. This was due to the longstanding differences between the two major parties, between the various elected bodies in the federal government, and the diverse political environments in which federal elections take place. Add to this their understanding of how quickly electoral politics can change—with new campaign techniques or activist groups arising out of the blue—and even lawmakers willing to vote for some campaign finance package were hard-pressed to settle on any given proposal.

They first split along party lines, owing to the financial differences between Democratic and Republican constituencies. Republican donors, having more money to donate than most of their Democratic counterparts, were more likely to contribute and to do so at the legal limits FECA's authors were considering.<sup>224</sup> This would tend to leave their candidates with greater amounts to spend, and so, to the extent that Republicans in Congress supported campaign finance restrictions at all, they normally preferred contribution caps to spending limits. Democratic lawmakers, on the other hand, had exactly the opposite inclination. Because they have fewer wealthy constituents than the Republican Party, they wanted to be able to take in contributions well over the \$1000 to \$2000 limits under discussion.<sup>225</sup> Going into the 1974 FECA Amendments, Republicans favored many of the law's provisions, but lobbied against its spending caps and its program of public funding for congressional races<sup>226</sup> because both of these threatened to reduce the advantages they were enjoying under the status quo. Meanwhile a large part of the Democrats' interest in the legislation was to curtail those Republican advantages by instituting caps on campaign spending and lobbying for higher contribution caps.

The majority party found a powerful ally for their position in the coalition of public interest groups lobbying for reform.<sup>227</sup> But apart from support for spending caps per se, Democratic leaders had trouble coming to consensus even with these outside groups. That is, reform groups were hoping to increase the viability of electoral challengers, so as to make federal elections more competitive, and to this end they proposed high expenditure ceilings, such as

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between the parties has to affect power relationships that now exist. Thus, if you give money directly to the candidate you further weaken the party system. If you give money to the national party, you strengthen the national party organization relative to the State parties. If you are not extremely careful you will freeze out or lock in minor parties. These are real problems with significant policy consequences . . . ."); *see also id.* at 8456-57 (statement of Sen. Paul J. Fannin, R-AZ).

224. *See SORAUF, supra* note 22, at 7 (noting Democrats "had lost the money chase to the Republicans").

225. *See* 120 CONG. REC. 10,963-64 (1974) (statement of Sen. Lawton Chiles, D-FL) (describing his support for proposed amendment to raise contribution ceilings to \$3000 for individuals and \$6000 for committees).

226. *See id.* at 8451-52 (discussing spending caps during Senate debate).

227. *See id.* at 27,460 (statement of Rep. David R. Obey, D-WI).

\$187,000 for a House seat.<sup>228</sup> Democratic leaders like Congressman Hays, however, argued that the spending limits should be set at lower amounts. Hays claimed Common Cause and several newspaper editorials criticized this approach as an attempt to “freeze out everybody from running and protect the incumbent,” pointing out how expenditure caps might serve to secure incumbents’ election advantages if set too low.<sup>229</sup> And it was true that the Democrats’ position tended to protect the majority they enjoyed in both chambers. However, the debate also reflected the fact that campaign costs vary radically from one part of the country to the next. As Congressman Armstrong argued:

The amount in the bill \$187,000 may seem a reasonable amount to spend to get elected to Congress in some States . . . but in the State of Wisconsin no candidate for the House of Representatives has ever spent over \$80,000 in the history of the State. To us [the proposed spending limits are] outrageous.<sup>230</sup>

This highlights a second point of contention among FECA backers: that financing needs differed sharply from one office to the next. Statewide Senate races and the nationwide presidential campaign require considerably more capital than running in a House district. Some in the Senate therefore lobbied for provisions that would bring in more money—whether from public funding programs, or provisions that allowed for much higher contributions from interest groups.<sup>231</sup> Meanwhile, their colleagues from small states, as well as members of the House, found those approaches quite threatening. As one lawmaker explained during these debates:

I might agree with the Senator in terms of a Presidential election or a Senate election in a big State. But when we are talking about a congressional election in which the total amount of the funds is much smaller, I would suggest that two or three of these organizations which are essentially in league with one another could have a great impact on a congressional election.<sup>232</sup>

Overall, then, the complex political terrain of federal government made it difficult for lawmakers to settle on any single regulatory approach that would suit every campaign.

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228. *See id.* (discussing Common Cause’s proposal for \$187,000 spending limit).

229. *See* 120 CONG. REC. 27,462 (1974) (statement of Rep. Wayne Hays, D-OH).

230. *See id.* at 27,460 (statement of Rep. David R. Obey, D-WI).

231. *See id.* at 8206 (statement of Sen. William D. Hathaway, D-ME). For example, Senator Hathaway offered an amendment to double the contribution limit for organizations, which under the first version of the FECA bill (S. 3044) would have been limited to the same contribution ceiling as individuals. *See id.*

232. *Id.* (statement of Sen. Robert P. Griffin, R-MI).

## 2. Logrolling to Overcome Political Conflicts

Some provisions met with so much opposition throughout Congress that they were simply dropped. Thus FECA's initial Title I, a program of public funding for House and Senate races, was eliminated in the legislative process.<sup>233</sup> In many cases, however, FECA's authors resolved conflicts over campaign finance policy in the time-honored tradition of logrolling—passing a provision that benefits one faction, in exchange for that group's support of another legal element favored by another set of legislators. The 1974 FECA can be read as just this sort of compromise. Democrats agreed to live with contribution limits in exchange for Republicans agreeing to expenditure ceilings—each party estimating that whatever impediments to fundraising it suffered under the new law would be made up for by the corresponding restrictions on its electoral counterpart. And while the White House had long opposed campaign finance proposals, particularly where they imposed spending caps,<sup>234</sup> the President's support was likely won with the inclusion of a public funding program exclusively for presidential candidates.

In addition, lawmakers negotiated tradeoffs with the reform groups that had been pushing for the new law. The influence of such groups can be seen not only in the praise they received from legislators as the amendments passed,<sup>235</sup> but also in the irritation expressed by legislative leaders who had opposed many of the elements reform groups proposed. Congressman Wayne Hays complained, for example: "Speaking of roadblocks, one thing that slowed the conference down is the fact that the Common Cause lobby was outside the door all the time sending messages in to staff people, which went to conferees . . ." <sup>236</sup> That influence led to expenditure caps being set at a level higher than many legislators would have preferred, as Congressman Joseph Gaydos told his colleagues: "[T]his is a compromise . . . We compromised because outfits such as Common Cause and, without mentioning them specifically, others pressured the committee and put forth their positions." <sup>237</sup>

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233. The initial Senate bill began with the public financing program in Title I. *See* S. 3044, 93d Cong. (as reported by S. Comm. on Rules and Admin., Feb. 21, 1974). This element did not survive into the final legislation, where Title I addressed contribution caps and expenditure ceilings. *See* Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, tit. I, 88 Stat. 1263, 1263-72.

234. *See* John Herbers, *Bill to Reform Campaign Funds Signed by Ford Despite Doubts*, N.Y. TIMES, Oct. 16, 1974, <http://query.nytimes.com/mem/archive/pdf?res=FA0E1FFC355F107A93C4A8178BD95F408785F9> (describing President Ford's longstanding opposition to reform package). That fight had been going on since the original 1971 FECA debates. *See* Jeffrey M. Berry & Jerry Goldman, *Congress and Public Policy: A Study of the Federal Election Campaign Act of 1971*, 10 HARV. J. ON LEGIS. 331, 334-36 (1973) (describing President Nixon's veto of campaign finance legislation).

235. *See* 120 CONG. REC. 27,247 (1974) (statement of Rep. Edward P. Boland, D-OH). "[M]uch of the encouragement, the research and the inspiration for this bill and the amendments which will be offered to it are the work of Common Cause . . ." *See id.*

236. *Id.* at 35,134 (statement of Rep. Wayne Hays, D-OH).

237. *Id.* at 27,262 (statement of Rep. Joseph Gaydos, D-PA).

These compromises, however, did not so much resolve conflicts between the pro-reform factions in Congress as hold them over to a later stage in the policymaking process. In important ways, the judiciary would be called on to interpret and enforce the compact FECA's authors had made.

### 3. *Statutory Vagueness and the Problem of Regulating Campaign Assets*

Finally, legislators hoping to pass a strong law faced another constraint, having to do with the social context, or "task environment," of campaign finance law. The main targets of the legislation were campaign donations and expenditures; through a series of disclosure and reporting mechanisms, the law would track almost every dollar coming into or going out of election coffers.<sup>238</sup> But, as we saw in the early legal history of the field, that has always been difficult work—not just because there was little political will to restrict campaign finance, but also because there are so many viable substitutes for these campaign assets in society at large.<sup>239</sup> A candidate who has reached his expenditure ceiling would look to political allies outside the campaign for the very resources, services, and publicity that he would otherwise have bought himself. This phenomenon is often cited as the reason behind "issue advocacy" in federal campaigns.<sup>240</sup> When the law placed limits on how much interest groups and party committees could *expressly* advocate the election or defeat of a given candidate, supporters found other words that, while meaning essentially the same thing, did not come under FECA's legal restrictions.<sup>241</sup> Thus, the task of regulating campaign assets is problematic because both money and the speech that a candidate's money buys are fungible. Restricting any specific resource often simply encourages the use of an obvious alternative, while following every dollar traded or every word uttered throughout a campaign season is highly impractical.

Authors of campaign finance law have traditionally dealt with this dilemma by including vaguely worded catchall provisions alongside specific restrictions.<sup>242</sup> For example, the 1971 Act limited any donation, spending, or advertizing "made for the purpose of influencing" elections.<sup>243</sup> Technically speaking, the law encompassed a great deal of activity: General political

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238. See Corrado, *supra* note 25, at 23-24.

239. See generally Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705 (1999).

240. See Richard Briffault, *Issue Advocacy: Redrawing the Elections/Politics Line*, 77 TEX. L. REV. 1751, 1762-63 (1999).

241. See *id.* at 1759 (noting current definition of express advocacy as "open invitation for evasion"). National parties might likewise encourage their state counterparts to take over some of the work of mounting campaigns for federal candidates in the face of FECA's limits.

242. See Berry & Goldman, *supra* note 234, at 360 (discussing use of this technique in 1971 FECA).

243. See Federal Election Campaign Act of 1971, Pub. L. No. 92-225, § 301(e)(1), 86 Stat. 3, 11-12 (codified at 2 U.S.C. § 431 (2006)); *United States v. Nat'l Comm. for Impeachment*, 469 F.2d 1135, 1139 (2d Cir. 1972).

discourse, news reporting, and normal election-year debate about the candidates and their platforms can all potentially influence an election, and much of it is intended to do so. Moreover, as noted above, that language was so ambiguous as to be found void for vagueness in *United States v. National Committee for Impeachment*.<sup>244</sup> But, in the 1974 FECA, Congress maintained the same approach. There, lawmakers reinstated the catchall spending and contribution limit that had been overturned in that earlier case. Thus, Congressman Hays explained that the new law would still “require any organization which spends any money or commits any act for the purpose of influencing an election [to] report as a political committee.”<sup>245</sup> And at several points in the legislative record, members noted the parallel between the new Act’s language and that which had been struck down as vague. Congressman Armstrong, for example, argued that “[t]he language contained in this bill is strikingly similar to that which was held by a New York court to be unconstitutional just a few months ago.”<sup>246</sup>

This confrontation with judicial precedent was similar to the constitutional gamesmanship of reform opponents, but it had the opposite goal. Rather than passing constitutionally vulnerable legislation in the hope that courts would overturn it, FECA’s enacting majority was aiming for a stronger law. As the House report on the bill explained, “if these [contribution and expenditure ceilings] are to be meaningful, campaign-related spending by individuals and groups independent of a candidate must be limited as well.”<sup>247</sup> The 1974 Amendments therefore sought to limit independent spending by restricting any expenditures meant to influence an election and requiring independent groups to report their activities to the FEC.<sup>248</sup> It would seem then that to get strong law that was not immediately subject to circumvention, Congress maintained the vagueness that characterized the 1971 provisions.

In doing so, FECA’s authors necessarily delegated to enforcement officials the job of discerning which activities would be covered by the law, and therefore allocated an important measure of Congress’s own policymaking authority to other branches. As commentators noted with respect to the 1971 Act’s catchall provision, “Congress purposely left its provisions ambiguous in this area, thus *passing the buck to the administrators*.”<sup>249</sup> The *National Committee for Impeachment* court also remarked on the tendency of this

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244. See *Nat’l Comm. for Impeachment*, 469 F.2d, at 1140-41. The court commented that the Act “may be searched in vain for any passage which throws further light upon the meaning of ‘political committee’ or ‘made for the purpose of influencing.’” *Id.* at 1139.

245. See 120 CONG. REC. 35,131 (1974) (statement of Rep. Wayne Hays, D-OH).

246. See *id.* at 27,213 (statement of Rep. William L. Armstrong, R-CO).

247. H.R. REP. 93-1239, at 6 (1974), reprinted in FED. ELECTION COMM’N, LEGISLATIVE HISTORY OF FEDERAL ELECTION CAMPAIGN ACT AMENDMENTS OF 1974, at 640 (1977).

248. See *supra* note 166 (describing provision known as the “Common Cause amendment”).

249. Berry & Goldman, *supra* note 234, at 360 (emphasis added).

legislative tactic to transfer policymaking discretion, concluding that Congress had “voiced its wishes in muted strains and *left it to the courts* to discern the theme in the cacophony of political understanding.”<sup>250</sup> To keep FECA’s legal restrictions relevant, lawmakers had little choice but to use vague wording in the 1974 statute. As they did so, they would inevitably delegate policymaking authority outside of the legislature—to the administrative agency charged with further defining and enforcing the law and, ultimately, to courts.

FECA’s backers, therefore, faced a number of institutional constraints that made policymaking difficult. Even lawmakers who supported stronger campaign finance restrictions in principle disagreed about exactly which substantive rules would be best, owing to their different constituencies and the way political interests change from one federal office to the next. Adding to the trouble was the fact that FECA would necessarily regulate a complicated task environment of fungible assets, where regulatees would likely be able to circumvent any hard-and-fast rules as soon as they were enacted. However, as they had done in many other areas of national policy, lawmakers could resort to two techniques that would enable them to enact the 1974 FECA Amendments in spite of these constraints: legislative compromise and statutory vagueness. As noted above, logrolling is a useful legislative tool because it allows Congress to pass laws even where political leaders disagree about policy options.<sup>251</sup> Likewise, through broad or vaguely worded statutory provisions, Congress can direct public policy toward a particular legal harm without having to specify, in advance, exactly which activities and behaviors cause the problem.

With either tool, however, Congress necessarily delegates a measure of its policymaking work to other branches. First, to the extent that the legislation cobbled together a variety of conflicting interests, FECA was a kind of contract—an agreement between political rivals similar to that which Congressman Butler proposed incumbents negotiate individually. And, just as Butler’s proposal would have relied on federal courts to enforce those individual contracts, the 1974 Amendments would also depend on some entity outside the legislature for its enforcement. Moreover, legislative logrolling meant there would be high stakes in how the law was administered: Each provision of the Act would have differential effects from one party to the next and from one seat to another. Enforcement duties therefore entailed a good deal of discretion to change the force and meaning of the law. Further, the law’s vague provisions would require interpretation by courts and Agency administrators, so, in many respects, it would be up to these outside actors to determine what was, and was not, covered by the Act.

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250. *United States v. Nat’l Comm. for Impeachment*, 469 F.2d 1135, 1138 (2d Cir. 1972) (emphasis added) (quoting *Rosado v. Wyman*, 397 U.S. 397, 412 (1970)).

251. *See supra* Part IV.D.2.

*E. Designing a New Policymaking Structure for Campaign Finance*

Because the 1974 Act promised to place real limits on incumbents' campaign funding practices, it brought out a number of crosscutting and longstanding differences between various lawmakers, and thus made legislation very difficult to pass. Moreover, once a deal was struck, it promised to be very difficult to revise through subsequent legislation. Delegating policymaking authority to another institution was a natural solution to the problem, and something Congress had often done in the face of intractable political disagreements.<sup>252</sup> That solution was not without its drawbacks, however. In particular, FECA's legislative logrolling meant there would be high stakes in how the law was administered. Thus, as lawmakers bargained their way toward the new campaign finance policy, they also debated which institution would be the best choice to manage and enforce the new rules.

*1. Choosing a Delegate*

The most obvious option would have been to turn to the executive branch. Congress might have vested a federal agency with civil enforcement authority just as it had given the DOJ power to enforce the Act's criminal provisions.<sup>253</sup> But because executive agencies are controlled primarily by the President, this would have put legislators' electoral futures in the hands of a rival politician, and one who might often represent a different party than the one controlling the legislature. Congress had therefore always avoided vesting cabinet agencies with much authority with respect to campaign finance.<sup>254</sup> Watergate only hardened legislators' resistance to this approach. Connecticut Senator Lowell Weicker, for example, opposed an early version of FECA that left the administration of campaign funds to the Treasury Department, saying:

Now if that does not scare other Senators, it certainly scares me. I think that one of the principal lessons of Watergate is not only that Government can commit illegal acts to suppress dissent but that Government has enormous legal powers to suppress dissent and to play politics with the system.<sup>255</sup>

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252. See generally Graber, *supra* note 12.

253. See Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 314(a)(6), 88 Stat. 1263, 1284 (codified as amended at 18 U.S.C. § 591 (2006)).

254. See *supra* notes 152-58 and accompanying text. As noted above, even criminal enforcement by the DOJ was subject to legislative control, under a policy that required prosecutions to be sanctioned by congressional staff. See Berry & Goldman, *supra* note 234, at 343 & n.62.

255. See 120 CONG. REC. 8200 (1974) (statement of Sen. Lowell Weicker, R-CT). Senator Baker echoed that sentiment in arguing against any delegation of authority to a federal agency, saying, "if we continue to delegate responsibility for regulating campaigns to the bureaucracy . . . then I fear that a situation could arise in which the executive branch had the power to manipulate political campaigns in a manner which would make Watergate pale in comparison." *Id.* at 8202 (statement of Sen. Howard H. Baker, Jr., R-TN).

The independent regulatory commission was a more palatable option because it would have entailed a board that was split down party lines and would have given the Senate the power to refuse to seat presidential nominees. Common Cause favored this approach, as did many in the Senate and the Republican minority in the House.<sup>256</sup> In fact, ever since Congress opened debate on the original 1971 FECA, Republicans had been lobbying for an independent commission; this likely reflected their concern that, if left in the hands of the Democratic majority in the legislature, campaign finance administration would be strongly biased against them.<sup>257</sup> This option also carried with it the advantage of institutional legitimacy. Proponents argued that incumbents who were cleared of campaign finance charges under a system of independent administration would be truly vindicated in the eyes of the public. "If a candidate is cleared of false charges by an independent Commission, the public will more than likely have confidence" in the acquittal, one backer said.<sup>258</sup> In contrast, proponents argued, the failure of politically beholden administrators to prosecute lawmakers would be seen as nothing but "cronyism."<sup>259</sup>

These arguments failed to persuade many lawmakers outside the Senate, however, particularly since the House offered a proposal for returning to a more legislatively controlled administration. The House plan would have established a regulatory board staffed by legislative, rather than presidential, appointment; it also would have given legislative clerks and the GAO the power to promulgate regulations interpreting FECA.<sup>260</sup> Critics countered that this would do little for politicians' public image.<sup>261</sup> However, there was heavy opposition to the creation of a traditionally independent regulatory commission, because it likely would have exacerbated the problem lawmakers had set out to solve. That is, an independent commission promised to enforce the law in much the same way the reform lobby's civil suits had: strictly and with little concern for incumbents' interests. Meanwhile, the House alternative was not

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256. See *id.* at 27,472 (statement of Rep. Robert B. Mathias, R-CA). Congressman Mathias argued that Common Cause was the sole source of political support for an independent FEC: "Where does this amendment come from? . . . I think the obvious truth is that it came from Common Cause. Mr. Chairman, I have not had one constituent in my district, except a few members of Common Cause, contact me about an independent election commission." *Id.* But records of various congressional debates indicate that some incumbents favored the approach as well. See H.R. REP. NO. 93-1239, at 137 (1974) (supplemental views of Rep. Bill Frenzel, R-MN), reprinted in FED. ELECTION COMM'N, LEGISLATIVE HISTORY OF FEDERAL ELECTION CAMPAIGN ACT AMENDMENTS OF 1974, at 771 (1977); see also Berry & Goldman, *supra* note 234, at 340-41.

257. See Berry & Goldman, *supra* note 234, at 340-41.

258. See H.R. REP. NO. 93-1239, at 137 (1974) (supplemental views of Rep. Bill Frenzel, R-MN), reprinted in FED. ELECTION COMM'N, LEGISLATIVE HISTORY OF FEDERAL ELECTION CAMPAIGN ACT AMENDMENTS OF 1974, at 771 (1977).

259. See *id.*

260. See *id.* at 133.

261. As the main sponsor of the independent alternative put it: "Not only is the fox in charge of the chicken coop, he is living in the farm house and managing the farm." See *id.* at 131.

appropriate either because Article II would preclude vesting the board with the kind of strong enforcement powers incumbents were seeking under the new regulatory regime.

As noted above, the solution Congress found was to create a hybrid between the independent regulatory commission and the legislatively controlled regulatory board.<sup>262</sup> While technically categorized as an independent commission, the FEC established in the 1974 Act was legally unique. Whereas other independent agencies normally have seven members, the FEC would have only six. This not only hampered Agency activism, but also ensured that party representation would be evenly balanced at all times. Both the House and Senate would have to approve presidential appointments to the Commission.<sup>263</sup> And two additional, nonvoting seats on the Commission would be reserved for the Clerk of the House and the Secretary of the Senate; there, the legislative staff would exercise important oversight and “gatekeeping” functions.<sup>264</sup>

The invention served lawmakers’ interests on a number of fronts. First, by establishing a policymaking body outside the legislature that would promulgate specific regulations pursuant to the law, FECA’s authors were able to leave certain aspects of the new campaign finance rules fairly vague. This would help to ensure that the rules would remain relevant over time. Two other goals also became clear as Congress settled on this choice. On the one hand, the new institution would provide regulatees with critical information about what was—and was not—prohibited under the Act. As Congressman Hays explained when he presented the final version of the bill to the House, the Commission would “serve as an election information clearinghouse,” issuing advisory opinions in response to candidate queries about specific factual situations.<sup>265</sup> Moreover, it was to serve as a guarantee against haphazard administration of the rules: “If they give a Member an advisory opinion that he can do something, he cannot later be prosecuted because they have changed their minds.”<sup>266</sup>

Considered against the political power sharing inherent in the FEC’s special appointment provisions, Congressman Hays’s assurances on these points seem quite important. In what would otherwise remain a fairly fluid regulatory scheme, lawmakers from each branch and from both parties had reason to believe that the new institution would be responsive to incumbent interests.

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262. See *supra* notes 152-58 and accompanying text.

263. See Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 310(a), 88 Stat. 1263, 1280-81 (codified as amended at 2 U.S.C. § 437c (2006)).

264. See 120 CONG. REC. 35,132 (1974) (statement of Rep. John Brademas, D-IN). “[C]andidates for the House and Senate would continue to file disclosure reports with the Clerk of the House and the Secretary of the Senate. Any apparent violations of election laws which the Clerk or the Secretary discovers would have to be referred immediately to the Commission.” *Id.*

265. See *id.* at 35,131 (statement of Rep. Wayne Hays, D-OH).

266. *Id.*

Thus it is significant that Hays highlighted these two items as among “[t]hree important aspects of the legislation [that] should be underlined.”<sup>267</sup> By way of contrast, when Hays discussed substantive elements of the law—the final contribution caps, provisions for convention funding, et cetera—he remarked several times how little interest his colleagues were showing, and twice turned to the Speaker to complain that the Members were not listening to him.<sup>268</sup>

The new law allowed politicians to place salient limits on candidates’ funding practices as well as to attempt to extend those limits to the various interest groups and activists who were becoming active in national politics—while simultaneously checking the authority of policy administrators. It did this not by setting out hard and fast rules in exacting statutory detail; instead, it created a *sui generis* institution, the FEC, which would become a forum for an ongoing negotiation among political leaders over the substantive rules of campaign finance.

## 2. *Harnessing Judicial Power*

Judicial review was central to lawmakers’ goals in this respect. First, access to courts was refashioned to favor political incumbents over other potential policy activists. The FEC would not take the place of courts, *per se*. Instead, as Congressman Hays indicated when making the points above, “[u]nder section 315 persons challenging the constitutionality of any provision of the act, retain their right to do so in court without exhausting administrative remedies . . . .”<sup>269</sup> But the introduction of an independent regulatory agency would allow Congress to place an important limit on the law’s enforcement. Most notably, there would no longer be a private right of action to enforce the law. Instead, as Hays put it, “[t]he delicately balanced scheme of procedures and remedies set out in the act is intended to be the exclusive means for vindicating the rights and declaring the duties stated therein.”<sup>270</sup> In the new procedural scheme, courts would be available to challenge campaign finance regulations, but not to bolster their enforcement. FECA provided that “a determination [by the FEC] that there is no probable cause to believe that a violation charged has occurred . . . is not reviewable.”<sup>271</sup> Federal courts would therefore have much more limited jurisdiction to hear cases brought by pro-reform groups. Where the Agency chose not to pursue suspected violations, it would have the last word.

Judicial review was important for a second reason, as well. That is, as they designed the new institution, lawmakers were aware that they were pushing

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267. *Id.* at 35,134.

268. *See* 120 CONG. REC. 35,130 (1974) (statement of Rep. Wayne Hays, D-OH).

269. *Id.* at 35,134.

270. *Id.*

271. *Id.*

constitutional boundaries, and thus that the central aspects of the legislation could each be eliminated by subsequent judicial review. So, while they agreed that the “compromise FEC” was the best solution for the interests in the political branches, there was some question as to whether such a structure would be upheld against existing separation-of-powers jurisprudence.<sup>272</sup> In addition, of course, the substantive rules on expenditures and contributions at the heart of the legislative compromise could plausibly be challenged as constitutional violations. Expedited review to the Supreme Court provided a workable solution to this problem, in that it enabled lawmakers to have this question answered before the new rules took effect. As one legislator put it: “[T]he bill provides for expeditious review of constitutional questions. Unlike at present, we will not be left in limbo for a prolonged period of time because of the failure of the courts to expeditiously review the constitutionality of election law.”<sup>273</sup>

In short, then, the political branches needed something of an advisory opinion on constitutional questions immediately upon FECA’s passage. In particular, the existence of a politically neutral FEC was fundamental to lawmakers’ willingness to enact, and to comply with, the rest of the regulatory package. Hence, a Democratic majority agreed to include expedited review provisions in a statute that would be challenged by the Republican minority before a Republican-led Supreme Court.<sup>274</sup> Whether the Act survived was less consequential than the fact that the various sides of the policy debate would know where they stood only after judicial review.

Scholarship on campaign finance has tended, with good reason, to focus on how the Supreme Court altered the *substance* of the 1974 FECA.<sup>275</sup> This analysis, in contrast, highlights how important that judicial review was for the *structure* of the new law.<sup>276</sup> While the review was fueled in part by FECA’s opponents, it was no less important for supporters of campaign finance reform. Politicians who had been elected from different parties and regions into different branches of government—where policymaking was heavily influenced by outside interest groups—had little choice but to enact compromise legislation. As an omnibus set of tradeoffs between political factions, the 1974 FECA left its enacting coalition in a position similar to that of foreign enemies contemplating a peace treaty: Each side wants some assurance that the accord will be enforced as written before laying down its own arms. Judicial review was necessary to determining whether the new policy would be enforced in the way the parties intended; therefore, it mattered

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272. See *supra* notes 154-55 and accompanying text.

273. See 120 CONG. REC. 35,136 (1974) (statement of Rep. Bill Frenzel, R-MN).

274. See *Buckley v. Valeo*, 424 U.S. 1 (1976); *supra* notes 167-68 and accompanying text.

275. See *supra* note 2 and accompanying text.

276. I therefore rely on insights from judicial process scholarship. See generally KAGAN, *supra* note 15; Graber, *supra* note 12.

less how the Court ruled than that such review was available to settle the matter in the first place.<sup>277</sup> The legislative reaction to the 1976 *Buckley* decision seems to bear this out.

#### V. THE CONGRESSIONAL RESPONSE TO *BUCKLEY V. VALEO*

The Supreme Court ruling altered the 1974 FECA in several important respects: It struck down FECA's expenditure ceilings, it considerably narrowed the reach of the Act's restrictions on independent groups, and it found the initial FEC appointment structure unconstitutional.<sup>278</sup> Because the decision changed so much of the law, one might expect legislators to denounce the Court soon afterward and then to set about overriding it. Surprisingly, however, the record indicates no such reaction from Congress. There was little criticism of the *Buckley* decision among lawmakers as they enacted the 1976 FECA, and no attempt to push back on its decision with obviously contradictory legislation or constitutional amendment. Moreover, Congress made no effort to rescind the remaining provisions of the Act, despite a widespread understanding that they would have a very different effect from the original regulatory package. Likewise, lawmakers rejected a White House proposal to retire all of FECA's substantive provisions after the 1976 elections.<sup>279</sup> Instead, each side of the policy battle claimed that the case was something of a victory for them, and Congress went on to pass the 1976 FECA Amendments in a way that seemed untroubled by the ruling.

Congressional debates in 1976 focused on two relatively narrow goals. First, lawmakers were intent on finding an agency design that would ensure regulators' responsiveness to the interests of political leaders. Second, they were concerned with how they might maintain salient campaign finance restrictions now that most expenditure ceilings had been removed from the law. As we will see below, courts became central to both these efforts.

##### A. *Recreating the Responsive Agency*

The Court's rejection of the original FEC design posed several practical problems for federal candidates. Most immediately, there was the issue that presidential campaigns were eligible for public funding under the law, but there was no longer an agency authorized to distribute the money. In addition, many FECA restrictions remained in place, but after the interim FEC term expired,

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277. In this respect, my findings run counter to the arguments of Graber and Lovell, where delegation to the judiciary is thought to be driven primarily by lawmakers' desire to undermine their own legislation. The campaign finance story does, however, support Kagan's view that adversarial legalism is often borne of political parties' distrust of each other. See generally KAGAN, *supra* note 15; LOVELL, *supra* note 12; Graber, *supra* note 12.

278. See *Buckley*, 424 U.S. at 58-59, 81-82, 140.

279. See *infra* notes 294-96 and accompanying text.

candidates would have no particular government bureau to look to, either for advisory opinions or to report suspected violations. Acknowledging that its decisions would present these kinds of difficulties, the *Buckley* Court gave Congress a thirty-day window in which to reauthorize the Commission, and during which time the rest of the FECA provisions would be suspended.<sup>280</sup> In working to meet that deadline, legislators considered two options for reinstating the Agency fairly quickly: They could either authorize a new FEC using the traditional design for an independent regulatory commission, or they could hand off FECA's enforcement and funding-distribution duties to other, already operative agencies. Thus, the DOJ, the Comptroller General, and the Treasury were all asked about their ability to take on some of the new regulatory work.<sup>281</sup>

Lawmakers' behavior under these circumstances seems to highlight how important the issue of Agency responsiveness was for them. In the spring of a presidential election year, with federal campaigns already underway, Congress let the thirty-day deadline pass. Rather than choosing a quicker fix, it sought an extension from the Court, and then missed its deadline a second time.<sup>282</sup> Considering that the Agency was ultimately reauthorized in exactly the form the Supreme Court required—with commissioners appointed by the President on the advice and consent of the Senate—why did it take so long? A look at the congressional record shows that legislators were using the time to create a number of new structural limits on FEC action.

### *1. Further Limiting FEC Action and Restricting Reform Group Activism*

First, the 1976 Amendments introduced a complex, eight-stage conciliation process, which remains the Agency's method for addressing alleged violations today.<sup>283</sup> Legislative leaders also imposed a "rule of four" on Agency action, requiring four commissioners to vote in favor of any Agency action on an alleged violation.<sup>284</sup> This would make it difficult for the Commission to act on behalf of one party against the other, but left it free to prosecute campaign finance violations wherever there was broad consensus to do so.<sup>285</sup> Congress

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280. See *Buckley v. Valeo*, 424 U.S. 1, 142-43 (1976).

281. See *Federal Election Campaign Act Amendments of 1976: Hearing on S. 2911, S. 2911-Amdt. No. 1396, S. 2912, S. 2918, S. 2953, S. 2980, and S. 2987 Before the Subcomm. on Privileges & Elections of the S. Comm. on Rules & Admin.*, 94th Cong. 83 (1976) (statement of Sen. Richard S. Schweiker, R-PA), reprinted in *FED. ELECTION COMM'N, LEGISLATIVE HISTORY OF FEDERAL ELECTION CAMPAIGN ACT AMENDMENTS OF 1976*, at 89 (1977) [hereinafter *Hearing*].

282. See 122 CONG. REC. 7592 (1976) (statement of Sen. John Beall, R-MD) ("We have now failed to meet the [March 22] deadline imposed by the Court.").

283. See *Complaint Process*, *FED. ELECTION COMM'N*, <http://www.fec.gov/pages/process.shtml> (last visited Apr. 12, 2013).

284. Corrado, *supra* note 25, at 27.

285. See *id.* Because the Commission was to be made up of three Republicans and three Democrats, this rule is usually seen as a source of Agency gridlock and thus as evidence that the FEC was always intended to

likewise restricted the FEC's power to issue advisory opinions.<sup>286</sup> Theoretically, that process might allow for the law to be specified in a way that *extended* its reach beyond regulatees' understanding of the legal limits. Reform groups could potentially seek advisory opinions on issues where loopholes appeared to be developing, and perhaps secure a reading of the law that addressed regulatory weak points. At the same moment that it brought the FEC into line with the more politically independent administrative agency structure, however, Congress eliminated the Commission's power to issue advisory opinions in such circumstances. Instead, it would henceforth provide opinions only in response to requests by individual regulatees that dealt with specific factual situations.<sup>287</sup>

The revisions also foreclosed reform lobby activism by restricting civil jurisdiction even further. That is, the amendments elevated the Commission's role from having *primary* responsibility for prosecuting civil cases under the Act to having *exclusive* jurisdiction to pursue violations.<sup>288</sup> Moreover, the provisions for judicial review adopted in the 1974 law remained in its 1976 Amendments as a recourse to overzealous Agency enforcement.

## 2. Institutionalizing Political Ambivalence

This additional bureaucracy ensured that the new system would be less rigid and less legally threatening than the regime that took hold in the pre-Watergate period, but it did not seem intended to block enforcement altogether. Instead, the new FEC reflected lawmakers' ambivalence about campaign finance regulation. Since the broad consensus remained in favor of some restriction on private financing and a new, more accurate system of disclosure, the Act ensured that political candidates would be accountable under the law on a number of fronts. Thus financial limits and disclosure provisions remained in place for individuals, campaign committees, political action committees, parties, and interest groups—with civil and criminal penalties available for violations. But the Act also made clear incumbents' worries about the phenomenon of "delegate drift"—where agents, once charged with legal enforcement, behave in ways that run counter to the principals' interests. Bureaucratic complexity and oversight through judicial review of Agency action would ensure that enforcement, while relevant, would not go too far afield.

The conciliation process particularly embodied that ambivalence. In

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be weak. See *Reforming the FEC: Designed for Partisan Gridlock*, FIX THE FEC, <http://www.fixthefec.org/fix-the-fec/entry/reforming-the-fec-partisan-gridlock> (last visited Apr. 12, 2013). My point is slightly different, however. In my view, the rule controls the Agency's power in politically important ways; it does not eliminate that power altogether.

286. See Corrado, *supra* note 25, at 27-28.

287. See *id.* at 27.

288. See *id.*

recommending the new process to Congress, interim FEC Chair Thomas E. Harris explained how it would address the need for salient law:

I think that some kind of civil enforcement, particularly in the case of the innumerable inadvertent filing violations is desirable. There needs to be some agency that can oversee compliance with the filing requirements and with the complexities of the law and bring some corrective to bear short of a criminal prosecution.<sup>289</sup>

It would do so, however, by taking a uniquely flexible and consensual approach toward legal compliance. Describing the 1976 Act's conciliation system, Harris said: "The present statute puts considerable emphasis on voluntary compliance even in the case of compliance actions and on some conciliation and the Commission is to refer the matter to Justice or bring a civil suit only if it is [un]able to obtain satisfactory voluntary compliance or conciliation."<sup>290</sup> In this way, the new FEC would privilege dialogue with regulatees over the formal enforcement of black-letter rules. Of course, negotiating with regulators was far preferable to being prosecuted by them. But, in addition, the newly responsive system also benefitted lawmakers by allowing them, once again, to enact a fairly vague statute, and thus to leave many of the regulatory specifics to someone else.

In his congressional testimony, Harris was given several opportunities to reassure legislators that he understood the Commission's role was not simply to enforce the law on the books. Rather, he said, it was also "fleshing out the statute [with] rulemaking and advisory opinions" and "insur[ing] compliance [through] . . . informal procedures . . ."<sup>291</sup> Unsatisfied with that general statement, one senator asked why the Agency had been so slow in responding to his request for details about the steps his own campaign would need to take to comply with the law.<sup>292</sup> When the commissioner promised new procedures for getting such information to lawmakers quickly, the senator's retort indicated how much the Agency's tenuous existence depended on its ability to satisfy lawmakers on this score. Putting new procedures in place would be fine, the senator said, "[p]rovided you are in place."<sup>293</sup>

There was, however, one important area of legal interpretation in which the

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289. *Hearing, supra* note 281, at 160 (statement of Thomas Harris, Comm'r, Fed. Election Comm'n), reprinted in FEDERAL ELECTION COMMISSION, LEGISLATIVE HISTORY OF FEDERAL ELECTION CAMPAIGN ACT AMENDMENTS OF 1976, at 166 (1977).

290. *Id.* at 154. The original transcript reads "able," which is clearly a typographical error given the context of the speaker's overall testimony.

291. *See id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 137 (1976)).

292. *See id.* at 158 (statement of Sen. Claiborne Pell, D-RI).

293. *See Hearing, supra* note 281, at 159, reprinted in FED. ELECTION COMM'N, LEGISLATIVE HISTORY OF FEDERAL ELECTION CAMPAIGN ACT AMENDMENTS OF 1976, at 165 (1977).

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Agency would likely fall short. This brings us to the second goal that political leaders addressed in the 1976 legislative debates, i.e., adapting FECA in light of the new *Buckley* jurisprudence.

*B. Maintaining Salient Restrictions Despite Buckley*

Lawmakers faced the problem of how to maintain the restrictions they had imposed on federal campaigns now that *Buckley*'s holding prevented them from regulating spending by anyone not directly associated with the campaign. This seemed to open an obvious loophole. A law limiting the official campaign apparatus would not necessarily apply to the independent activists or interest groups that regularly took part in electioneering—with advertisements, get-out-the-vote campaigns, et cetera. Therefore, any rules holding down the candidate's own fundraising would subject him to the possibility that these other, unrestricted political actors would “hijack” his own campaign, flooding the airwaves with publicity for and against him, while he would be legally restricted in his capacity to respond. Also, as noted above, this legal exception could be exploited by regulatees themselves wherever they had supporters willing to make ostensibly independent expenditures on the candidate's behalf.

The 1974 Act therefore attempted to codify some limits on the election-season activities of independent groups, despite First Amendment doctrine at the time. When the *Buckley* Court failed to uphold Congress's approach in full, legislators focused much of their 1976 revision efforts on finding a new way around the problem.

In their congressional testimony, DOJ officials and the interim FEC commissioners were quizzed extensively about viable options for regulating independent groups and their election-season expenditures. For example, Senator Pell took up the matter at length with then-Assistant Attorney General Antonin Scalia, asking what he characterized as “a couple of questions . . . the Supreme Court left unanswered,” namely:

[D]o you have any views as to the standards which would be proper to employ in determining the difference between a controlled or coordinated expenditure, which the Supreme Court held would be considered a contribution subject to limitation, and an independent expenditure to expressly advocate the election or defeat of a clearly identified candidate, which may be made without limit?<sup>294</sup>

Scalia's answer revealed the depth of the problem. He said, “I guess an honest answer is, ‘No,’ and probably nobody does.”<sup>295</sup>

Scalia recommended, instead, that Congress take up the President's stop-gap

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294. *See id.* at 139 (statement of Sen. Claiborne Pell, D-RI).

295. *Id.* (statement of Asst. Att'y Gen. Antonin Scalia).

measure and rescind the remaining provisions of the 1974 FECA.<sup>296</sup> This would have eliminated restrictions on coordinated expenditures just as the Supreme Court had eliminated controls on independent spending and so would have alleviated the need to distinguish one from the other. Lawmakers rejected the President's proposal, however.<sup>297</sup> They likewise rejected proposals to implement a broad system of public funding for congressional elections, which would have mooted the *Buckley* Court's contribution-expenditure distinction considerably.<sup>298</sup> The 1976 FECA therefore left contribution limits and restrictions on coordinated expenditures in place in a way that arguably elevated the importance of the *Buckley* ruling. In this respect, the amendments sustained the well-acknowledged loophole created by that case.

Passage of the 1976 FECA thus ensured that judicial review would continue to hold a prominent place in campaign finance policymaking. That is, the law's force over many aspects of federal campaigns would now rest on a factual determination. For example, if regulators were to learn of a financial exchange in which a donor, X, gave \$5000 to a recipient, Y, they would not be able to say whether FECA was implicated. Instead, they would need to know something about the relationship between X and Y, as well as what X intended Y to do with the money. Is the donor a loyal supporter of the recipient's efforts to promote a particular social issue through, for example, television advertising on the subject? Or are the spots simply thinly veiled advertisements for a candidate in the district's congressional race to whom X has already given the maximum legal contribution? Scalia concluded that it was this sort of "crucial distinction" on which the law now rested, and that such matters would present law enforcement with "a factual determination that is going to be very difficult to make in a lot of cases . . ."<sup>299</sup> Moreover, it was the sort of factual determination that was very unlikely to be resolved with FEC advisory opinions, as those were henceforth confined to the specific factual questions regulatees posed.<sup>300</sup> Instead, regulators were going to have to prosecute electioneering that seemed to be exploiting the borderline between free political speech and regulated campaign funding, and just see how it turned out. It would have been easy to predict, at the time, that regulators would end up in court on the most crucial of these distinctions.

Some cases would surely be settled through conciliation, particularly where

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296. *See id.* at 139-40.

297. 32 CONG. Q. ALMANAC, 94th Cong., 2d Sess. 463-64 (1976) (noting Senate defeat of Griffin-Block proposal, similar to President Ford's proposed amendments).

298. *See Buckley v. Valeo*, 424 U.S. 1, 107-08 (1976). The Court held that both contributions and spending could be limited for candidates who participated in a public funding program. *See id.*

299. *See Hearing, supra* note 281, at 143 (statement of Asst. Att'y Gen. Antonin Scalia), reprinted in FED. ELECTION COMM'N, LEGISLATIVE HISTORY OF FEDERAL ELECTION CAMPAIGN ACT AMENDMENTS OF 1976, at 149 (1977).

300. Regulatory cheaters would be unlikely to ask for permission ahead of time.

the Agency found clear evidence of a violation, or where it found none at all. But defendants with close cases would have recourse to federal court under the Act's jurisdictional rules. In fact, during the 1976 revisions, lawmakers foresaw a good deal of litigation on questions of fact, and considered creating staff in the Agency to deal with it—for example, having FEC hearing examiners conduct quasi-judicial review to determine when advertising pertaining to candidates and political issues amounted to a campaign contribution.<sup>301</sup> It is not hard to see why they ultimately preferred independent federal judges, sworn to uphold the Constitution, over specialist judges working exclusively for campaign finance regulators. As regulatees themselves, they likely imagined using constitutional claims to defend against FEC enforcement. Notice, however, that by leaving the loophole in place and establishing the federal judiciary as the site for resolving the closest cases, Congress judicialized campaign finance for a second time. Whereas the 1974 Act required expedited review to determine constitutional questions in the abstract, along with extensive judicial review of Agency action, the 1976 Amendments now envisioned *additional* litigation over questions of fact. In the end, then, Congress needed both abstract constitutional adjudication and day-to-day litigation to settle the force and meaning of campaign finance law.

### C. Implications for Judicial Power

The 1976 Amendments, much like their predecessors in 1974, restructured policymaking authority and returned control over the law's administration to political insiders. Paradoxically, however, that control was achieved in large part by delegating policymaking discretion to courts. The new FEC was redesigned with a number of bureaucratic constraints to hinder its ability to enforce the law in ways that conflicted with politicians' interests, and, as in the 1974 Act, judicial review would play an important role in fostering Agency responsiveness. This is not to say that the judiciary's discretion was unlimited. Rather, while courts would be empowered to consider candidates' complaints against the FEC, they would not be able to hear cases brought by reform groups trying to enforce the law through civil litigation—as of 1976, the FEC would have exclusive jurisdiction to bring FECA suits in federal court. Still, judicial discretion was considerable: Courts would now have the primary responsibility for policing the boundary between the many forms of political speech and activism that were not regulated under the law, on the one side, and the contributions and coordinated expenditures that FECA sought to limit, on the other.

Thus, lawmakers created multiple fora for promulgating campaign finance

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301. See *Hearing*, *supra* note 281, at 141-43 (1976) (response of Assistant Att'y Gen. Antonin Scalia to Sen. Harrison A. Williams), *reprinted in* FED. ELECTION COMM'N, LEGISLATIVE HISTORY OF FEDERAL ELECTION CAMPAIGN ACT AMENDMENTS OF 1976, at 147-49 (1977).

policy under FECA. If legislators agreed on changes to the law, they could enact amendments to it in Congress; this occurred, for example, in 1979 and in 2002.<sup>302</sup> In addition, where individual candidates found themselves on the wrong side of the regulations, they could negotiate a resolution through the FEC conciliation process. The FEC would also be the site for developing specific rules to flesh out the statute and to adapt it to changing electoral circumstances. But wherever there was considerable conflict over policy, lawmakers would likely end up in court. This arguably put the federal judiciary on the front lines of campaign finance policymaking for the next several decades. And, according to the evidence from congressional deliberations, noted above, this was an intended outcome.

## VI. CONCLUSION

The history of campaign finance law in the United States is primarily the story of a transformation in the judiciary's policymaking role. For some ninety years, judicial review had very little effect on the policy; courts heard few cases and, in those, they tended to uphold the legislation despite constitutional challenges. When public interest litigation greatly upset that status quo in the early 1970s, Congress reacted. Interestingly, it did so not by diminishing the role courts would play in policymaking, but by changing the way cases would come before them. First, lawmakers limited public interest litigation by establishing the FEC and giving it primary jurisdiction to enforce the law. Then, they set up an expedited constitutional case in which the Supreme Court would rule immediately on the constitutionality of the landmark 1974 FECA. In addition, they enacted numerous provisions to judicialize the FEC's work, as a way of reining in administrative enforcement. As the FEC took on a less politically encumbered structure in the wake of the *Buckley* case, Congress judicialized campaign finance policy still further—making the federal courts the primary venue for resolving future battles over the scope and meaning of the law. By 1976, then, courts had a great deal of policymaking authority in the field.

There is much in this history to dispel the notion that courts have “jumped in” to campaign finance policy of their own accord. Likewise, there is little evidence that the role of courts has varied along with substantive innovations in the law. Instead, while the substance of the policy remained constant for generations, we find procedural changes making all the difference. Prior to 1971, campaign finance statutes limited the judiciary's role to simply hearing criminal cases brought by the government, and that is all it did. When courts

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302. See Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (banning FEC's practice of conducting random audits on federal campaigns); see also Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (commonly known as McCain-Feingold law).

suddenly took on a more active and independent role in campaign finance policy, as they did in the early 1970s, it was largely a response to changing procedural factors: New jurisdictional rules opened up the federal courts as policymaking venues, particularly with respect to the right to vote, and well-organized public interest litigants began urging judges to apply the private right of action to campaign finance law as well. The 1974 FECA enacted a complete revision of the procedures for litigating campaign finance cases, and the judicial role again changed accordingly. The Supreme Court quickly became a major policymaker in the field, and the work of the federal courts as a whole expanded to include far-reaching administrative review in addition to constitutional adjudication. Moreover, as-applied constitutional cases promised to become much more important to the overall force of campaign finance law, given the complexity of the regulatory task environment after 1976. These judicial roles were written into the FECA statutes by their authors; thus, the most direct cause of all this judicial policymaking was not judges jumping in, but political leaders conscripting them to the cause.

As is the case in many other areas of national policy, this came about because of fragmentation in governmental authority and longstanding, crosscutting conflicts among leaders in the political branches.<sup>303</sup> With the 1974 Act, for example, those who benefitted from the status quo ante sought judicial review in the hope of quashing legal reforms altogether—adding both expedited review and provisions to make the statute even more vulnerable to constitutional challenge. At the same time, the majority that favored new, more stringent restrictions also supported judicializing the policy. In the near term, this allowed them to test the viability of their compromise legislation. Beyond that, however, judicial review also offered a way to keep the law relevant over time and in different electoral contexts; thus, legislators purposely left important provisions of law unspecified, counting on courts and the FEC to clarify the rules afterward. So, for very different reasons, both those who opposed the law and those who favored it found that they needed judicial review. Indeed, lawmakers seemed to agree that the policy should be sent to court primarily because they could agree on little else.

In that respect, Congress demonstrated an important paradox in reform legislation. That is, the more salient the restrictions were for politicians' own campaign finance practices, the less able they were to fashion those limits through legislation alone. Instead, Congress needed to delegate policymaking authority to the other branches of government to overcome internal conflict and to entrench the policy for the future. More paradoxically still, legislators appeared to favor delegation to courts—where constitutional prerogatives

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303. See generally P.S. ATIYAH & R.S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY IN LEGAL REASONING, LEGAL THEORY AND LEGAL INSTITUTIONS (1987); THE GLOBAL EXPANSION OF JUDICIAL POWER (C. Neal Tate & Torbjörn Vallinder eds., 1995); KAGAN, *supra* note 15.

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would presumably take precedence over legislative ones—as a way of maintaining congressional control over the policy’s implementation.

As noted at several points above, these findings connect to a broader literature on judicial politics, where one sees several different (and sometimes conflicting) rationales for political leaders delegating power to independent courts. I find some evidence that leaders are acting out of strategic rational choice—as when legislators responded to public pressure for a new law, while also working furtively to have its provisions overturned through constitutional review. Alternatively, however, much of the evidence points to institutional gridlock and therefore indicates that political leaders delegate authority not as a blameshifting strategy, but because they have no choice.<sup>304</sup> Indeed, to the extent that judicialization is a strategy in campaign finance policy it seems to be a deft sort of “satisficing.”<sup>305</sup> The post-Watergate policymaking structure was designed over several iterations, with leaders in the political branches responding both to policy activists and to court decisions. By 1976, they had arrived at a system that promised to be very responsive to the interests of political insiders: It allowed them to adapt quickly to whatever substantive rules were developed by their administrative and judicial “delegates,” and it afforded them many opportunities to override those rules where the delegates failed them. Despite strong institutional constraints on their own policymaking and on the degree to which they were able to check Agency administrators, members of Congress seemed to have cobbled together a policy and an implementation structure that served their interests. Litigation was fundamental to that structure.

In other words, legislators seem to have landed on a system that would allow them many of the benefits of judicial review while mitigating its political costs.

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304. See MARTIN SHAPIRO & ALEC STONE SWEET, *ON LAW, POLITICS, & JUDICIALIZATION* 163-64 (2002).

305. See HERBERT A. SIMON, *ADMINISTRATIVE BEHAVIOR: A STUDY OF DECISION-MAKING PROCESSES IN ADMINISTRATIVE ORGANIZATION*, at xxviii-xxxii (3d ed. 1976).