

PATTERNS OF FAILURE: RETHINKING CAMPAIGN FINANCE  
REFORM - WHAT WENT WRONG?

By

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A DISSERTATION PRESENTED TO THE GRADUATE SCHOOL  
OF THE UNIVERSITY OF FLORIDA IN PARTIAL FULFILLMENT  
OF THE REQUIREMENTS FOR THE DEGREE OF  
DOCTOR OF PHILOSOPHY

UNIVERSITY OF FLORIDA

2015

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To my parents Roger and Sally Austin

## ACKNOWLEDGMENTS

I am very grateful to everyone whose assistance has made the completion of this dissertation possible. It would not have been possible without the help and support of my parents, family, friends, colleagues and mentors. I especially want to thank the dedicated members of my dissertation committee who hung in there with me through thick and thin: Chairman Daniel A. Smith, Co-Chair Lawrence C. Dodd, Beth Rosenson, Richard Scher and David Colburn. I feel honored to have had such a distinguished committee – your counsel and advice was needed as much as it was appreciated. I would also like to thank everyone in the Political Science Department – you have all been very supportive over the years while I have meandered through this process while trying to also earn a living – your patience and encouragement are much appreciated. At the risk of omitting anyone, special thanks go to Dr. Steve Craig, Sue Lawless-Yanchisin, Pat Root and Debbie Wallen. Finally, and once again, at the risk of omitting someone, I would like to thank my friends, far too many to name individually, but you know who you are. Special thanks goes to my close friends and confidants and who never stopped encouraging me to finish this damn thing – Ryan Garcia, Kevin Kuchenbaur, Liz Stinson, Will Foster, Barry Edwards, my editor-in-chief Kyle Fitzpatrick and last but certainly not least, my biggest cheerleader, Phyllis Batchelder.

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Abstract of Dissertation Presented to the Graduate School  
of the University of Florida in Partial Fulfillment of the  
Requirements for the Degree of Doctor of Philosophy

PATTERNS OF FAILURE: RETHINKING CAMPAIGN FINANCE  
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By

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December 2015

Chair: Daniel A. Smith  
Cochair: Lawrence C. Dodd  
Major: Political Science

Every attempt at federal campaign finance reform in the last century has not only ended in failure, but also in calls for more reform. The simple question asked and answered is what went wrong? This dissertation traces the patterns of failure – intellectual, empirical and theoretical – that permeate over 100 years of federal campaign finance reform. The patterns of failure are there waiting to be identified. Just as success leaves clues, so does failure and this failure demands investigation. Campaign finance reform was originally passed in order to limit the undue influence that campaign contributions by corporations, labor unions and so-called wealthy fat cats had on government policy. Subsequent reforms over the last century have not only continually addressed the proximate causes and ended in the same patterns of failure, but have ignored any lessons that might have been learned by considering the root causes of the failures. This has distorted the entire system of campaign finance and resulted in unintended consequences too numerous to list, the least of which are Super PACs which are only the most recent natural, foreseeable and ironic consequence of the patterns of failure: natural and foreseeable because previous reforms have resulted in money going to independent sources and ironic because one of the perverse effects of Super PACs is to help level the playing field among candidates, something reformers have been unsuccessfully seeking to do for a century by limiting money or through public financing. Rather than fulfilling the promise of reformers to limit the role of money in elections, add transparency to the system and to restore public trust in government,

our campaign finance laws do almost exactly the opposite - they enable the role of money, foster secrecy and promote distrust. After 100 years of reform, there is more money than ever in politics, campaigns are less than transparent, more negative, political efficacy and trust in government are low and free speech rights are very often abridged. This dissertation explores the goals and motives for campaign finance reform and argues that their failure is based upon a fundamental misdiagnosis of the underlying problem.

## CHAPTER 1 IDENTIFYING THE PATTERNS OF FAILURE

### Research Question

Reformers, scholars, the media and various other political actors<sup>1</sup> (candidates, parties and special interests) have been engaged in campaign finance reform on the federal level for over 100 years. Yet today nobody is satisfied with the current state of campaign finance and the 2016 presidential campaign is already revealing new issues and problems, most of which we will see are not new at all but merely a continuation of the patterns of failure that have plagued campaign finance reform for a century. In fact, it's fair to suggest that virtually every attempt at federal campaign finance reform failed to achieve its stated goals and has resulted in almost immediate calls for more reform.

The current campaign finance system is cluttered with layer upon layer of legislation, regulation and litigation and the foundation of the entire regime is on the verge of collapse. The patterns of failure are there waiting to be identified. Just as success leaves clues, so does failure and this failure demands investigation. The simple question this dissertation asks and answers is what went wrong with campaign finance reform?

The foundations of the modern campaign finance system are the twin pillars of disclosure of contributions and expenditures, and the regulation of sources and amounts of money flowing in and out of campaigns.<sup>2</sup> My argument is that the disclosure laws are good in theory (as they add transparency to a complicated and confusing

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<sup>1</sup> I will be using this term frequently and use it as an umbrella term to include candidates, incumbents, political parties, and special interests which are all inclusive of corporations, unions, wealthy fat-cats, PACs, Super PACs and 501c4 organizations.

<sup>2</sup> The modern campaign finance system is considered to have begun with the Federal Election Campaign Act of 1974 (FECA) as amended in 1976 by the Supreme Court in the landmark Buckley v. Valeo case.

process), but the regulatory system built around them has rendered the disclosure laws virtually negligible, almost completely undermining the transparency they seek. I demonstrate that the twin pillars of the regulatory regime work at cross purposes with one another instead of complementing and interacting with one another as was the intent. Rather than fulfilling the promise of reformers to limit the role of money in elections, add transparency to the system and to restore public trust in government, our campaign finance laws do almost exactly the opposite - they enable the role of money, foster secrecy and promote distrust.

This is eerily similar to how political scientist Louise Overacker described the workings of the early campaign finance system in her seminal 1946 work, *Presidential Campaign Funds*. This work investigated the financing of the 1944 Presidential campaign. She explains:

The Hatch Act limitations were included in an act which purported to “Prohibit Pernicious Political Practices.” One might almost parody it to read: “An Act to *Promote* Pernicious Political Activities.” It defeats its own purpose by encouraging decentralization, evasion and concealment. Worst of all it makes difficult if not impossible that publicity which is essential to full understanding of who pays our political bills – and why.<sup>3</sup>

Overacker’s statement is so prescient, it captures almost every problem up to and including the current state of campaign finance here in the beginning months of the 2016 Presidential campaign. Recent Supreme Court cases (e.g., *Citizens United*, *Wisconsin Right to Life*, *McCutcheon*) have made some fundamental changes in campaign finance that 2016 candidates are exploiting, as best perhaps illustrated by

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<sup>3</sup> Overacker, Louise, *Presidential Campaign Funds*, Boston University Press, 1946, page 45. Italics in the original.

Rick Hasen's article, "Citizens United and the Illusion of Coherence."<sup>4</sup> In this penetrating article, Hasen makes a compelling case that the Supreme Court, though claiming "that their triumphalism extended to their view that the majority had imposed coherence on the unwieldy body of campaign finance"<sup>5</sup> has actually made matters worse and failed to address important issues.

Hasen is not alone in his criticism of *Citizens United*; in fact, the vast majority of scholars, pundits and politicians roundly condemn the decision and some, Hasen in particular, almost view it as the root cause of all that is wrong with campaign finance reform today. Not only did President Obama chastise the Court for its decision in his State of the Union Address in 2010 mere days after the case was decided, but several 2016 presidential candidates have called for a constitutional amendment to overturn it.<sup>6</sup>

However, other scholars and pundits trace the current incoherence back to the "devastating legacy"<sup>7</sup> of the 2002 Bipartisan Campaign Reform Act (BCRA), commonly known as McCain-Feingold and the Supreme Court decision in *McConnell v. Federal Election Commission*,<sup>8</sup> which held BCRA facially constitutional. Raymond La Raja and Robert Kellner claim that *McConnell* "fundamentally reshaped our political system...and precipitated...a tectonic shift of political power away from the parties and toward outside

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<sup>4</sup> Hasen, Richard L., "Citizens United and the Illusion of Incoherence," *109 Michigan Law Review* 581 (2011).

<sup>5</sup> *ibid.*, p. 582.

<sup>6</sup> End Citizens United Now is but one PAC dedicated to overturning this decision and contains quotes from various candidates pledging to take action if elected. More on this subject will follow in the chapters ahead. See [EndCitizensUnitedNow.org](http://EndCitizensUnitedNow.org).

<sup>7</sup> La Raja, Raymond and Kelner, Robert, "McCain-Feingold's Devastating Legacy," *The Washington Post*, April 11, 2014

<sup>8</sup> 540 U.S. 93 (2003)

groups, which were likely to be far more extreme and far less accountable.”<sup>9</sup> This was able to happen because, “perversely, the ban on ‘soft money’ left individual and corporate donors free to direct their funds to outside groups, where donations are concealed from public scrutiny.”<sup>10</sup>

Consequently, both the Republican and Democratic political parties’ national committees have shrunk and are out-sourcing some “bread-and-butter activities, including opposition research and voter list management...(and are less able to play their historical)...moderating role...(by using)...their preponderance of resources to impose discipline on extremists who threatened party comity.”<sup>11</sup> In 2004, former Federal Elections Commission Chairman Bradley Smith harshly criticized the decision for the “shallowness of its analysis...(and)...extreme deference of the Court to judgments by an obviously self-interested legislature”<sup>12</sup> and noted that the dissenters correctly declared that “nothing in the majority opinion precludes the outright regulation of the press in the future,”<sup>13</sup> an issue that came up in 2009 in the oral arguments of the Citizens United case and helped lead to that 2010 decision. Smith suggested that “something has gone seriously wrong in the Court’s First Amendment jurisprudence...(and)...that BCRA itself provides a cudgel to attempt to silence or hinder opponents, while the Court’s lax standard of review is sure to encourage more such efforts. When all is said and done, I

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<sup>9</sup> La Raja, Raymond and Kelner, Robert, “McCain-Feingold’s Devastating Legacy,” *The Washington Post*, April 11, 2014

<sup>10</sup> *ibid.*

<sup>11</sup> *ibid.*

<sup>12</sup> Smith, Bradley A., “McConnell v. Federal Election Commission: Ideology Trumps Reality, Pragmatism,” *Election Law Journal*, Vol. 3, No. 2, 2004, at 350.

<sup>13</sup> *ibid.*, p. 351.

suspect it will be the McConnell plaintiffs and the dissenting justices who will be remembered.”<sup>14</sup> Like Overacker before him, Smith was quite prescient in his remarks, though he made them over half a century after Overacker.

While I don’t disagree with the criticisms of either *Citizens United* or *McCain-Feingold*, neither is the root cause of the problems with campaign finance reform. Neither is the landmark case of *Buckley v. Valeo*,<sup>15</sup> another favorite whipping boy of Hasen and other scholars and pundits. Rather than any of them being the root cause, this dissertation marshals the evidence and argues that they are all just proximate causes.

My claim is that the incoherence began long before *Citizens United* and long before BCRA. In 1946, Professor Overacker made similar claims about the Hatch Act, commenting that “another noble experiment has failed. The limitations have had a certain nuisance value...By multiplying money-raising agencies, and in some cases driving them underground as well, it has led to concealment and evasion...Evidence of the ineffectiveness of these limitations is overwhelming.”<sup>16</sup> This dissertation makes the case that the “incoherence” and “devastating legacy” have encompassed the entirety of campaign finance reform starting with the first federal legislation, the Tillman Act, passed in 1907.<sup>17</sup>

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<sup>14</sup> *ibid.*, p. 353.

<sup>15</sup> 424 U.S. 1 (1976).

<sup>16</sup> Overacker, Louise, *Presidential Campaign Funds*, Boston University Press, 1946, page 44.

<sup>17</sup> In fact, on April 29, 2015, as this was being written, the Supreme Court issued a landmark ruling, *Williams-Yulee v. Florida Bar*, 575 U.S. \_\_\_\_ (2015), which Hasen and others are already claiming adds more incoherence to campaign finance law as it upheld restrictions on fundraising by judicial candidates.

In this dissertation I trace the patterns of failure – intellectual, empirical and theoretical – that permeate campaign finance reform. After 100 years of reform, there is more money than ever in politics, campaigns are less than transparent, more negative, political efficacy and trust in government are low and free speech rights are very often abridged. While Justice Brandeis told us that “sunlight is said to be the best of disinfectants,”<sup>18</sup> the twin pillars of the regulatory regime work at cross purposes with one another rather than complement each other.

This dissertation explores the goals and motives for campaign finance reform and argues that their failure is based upon a fundamental misdiagnosis of the underlying problem. Additionally, the empirical failures will be broken into four analytically distinct categories: enforcement, transparency and fungibility (which will be examined in Chapter 3) and unintended consequences (which will be examined in Chapter 4).

The evidence suggests several possible reasons for the misdiagnosis. First, there was a certain naiveté of the Reformers of *real politique* and consequently a lack of forethought as to the nature of the problem and, as with many things in life, a band aid approach was taken, i.e., only the proximate causes were addressed. We see this in virtually every federal legislative attempt at reform. Second, the evidence also suggests that political actors were well aware of the loopholes in the laws (and sometimes authored them) and while giving lip service to the Reformers, stood ready to exploit and game the system from the beginning. Chapter Three will detail many such examples. Third, using the Path Dependency literature, I will endeavor to wade through the thicket

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<sup>18</sup> Brandeis. Louis D., *Other People's Money – and How Bankers Use It*, Seven Treasures Publications, 2009. Originally published in 1914 after first appearing as a series of articles in *Harper's Weekly*.

and jumbled mess that is campaign finance reform and trace these proximate causes back to the “critical juncture” and root cause during the Progressive Era when the initial intellectual and theoretical errors were made that has set us upon these continuing patterns of failure. Even today we remain on this course and will continue to do so until the initial misdiagnosis is acknowledged and corrected.

### **Campaign Finance Reform is a Critical and Timely Issue**

As of this writing, there are 14 announced Republican candidates, 3 announced Democratic candidates, and several other prominent candidates have already dropped out including Republicans Rick Perry, Bobby Jindal and Scott Walker and Democrats Lincoln Chafee and Jim Webb, and Vice President Joe Biden announced in late October that he would not run.<sup>19</sup>

A look at what Jeb Bush’s “shock and awe” presidential campaign did will be instructive and allow us to deconstruct how the campaign finance system was utilized in a completely new and innovative way early in the 2016 cycle. Though everything he did was not only perfectly (and ostensibly) legal and mostly being done in public, much of what was being done was behind the scenes and certainly not well understood. The conventional way to run for President is to announce your candidacy, open up a campaign account and begin your campaign. This is exactly what Ted Cruz did in March and Clinton, Rubio and Paul did in April, and what the rest of the candidates did in the late spring and early summer.

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<sup>19</sup> As most of these candidates will end up being footnotes to history, this can be the first. The three announced Democratic candidates are Hillary Clinton, Bernie Sanders and Martin O’Malley. The 14 announced Republicans are Jeb Bush, Marco Rubio, Mike Huckabee, Ben Carson (all from Florida), Donald Trump, John Kasich, Chris Christie, Rand Paul, Ted Cruz, Carly Fiorina, George Pataki, Jim Gilmore, Lindsay Graham and Rick Santorum.

Jeb Bush, however, did not actually announce his candidacy until June but raised over \$112 million by the time his first campaign report was due on July 10, 2015; and this was just for his Super PAC. In the last two weeks of June after officially announcing, his actual campaign raised over \$10 million, placing him far ahead of almost all of his fellow candidates in 2 weeks than they had raised in several months. In fact, in late April, Bush announced “that he had set a record in Republican politics for fundraising in the first 100 days of a White House bid.”<sup>20</sup>

What the younger scion of the Bush family political dynasty did was been bold and innovative, exploiting every angle and loophole in campaign finance. He played the media like a virtuoso throughout 2014, making appearances and speeches all around the country all while merely expressing his interest in running for President (but specifically not “testing the waters,” which is a legal term of art I’ll discuss later) and having the media ask virtually daily whether or not he would run. He announced in early December that he would make his intentions known “in short order” and in a December 16, 2014, Facebook post stated that he would “actively explore the possibility of running for president.”<sup>21</sup>

Bush did just that in early January when he simultaneously launched both a PAC and a Super PAC on the same day and word leaked out that the audacious goal was to raise \$100 million by June 30. The Right to Rise PAC, would be a traditional PAC and be used to fund his travels and to make donations to other candidates and would be limited to \$5000 donations per entity. The Right to Rise Super PAC, however, would be

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<sup>20</sup> Reinhard, Beth, “Still Undeclared, Jeb Bush Touts Record Fundraising Haul,” Wall Street Journal, April 27, 2015, <http://www.wsj.com/articles/still-undeclared-jeb-bush-touts-record-fundraising-haul-1430140658>

<sup>21</sup> <http://www.tampabay.com/news/politics/stateroundup/jeb-bush-exploits-non-candidate-status-to-rewrite-campaign-finance-playbook/2219414>

able to accept unlimited donations from individuals, corporations and other entities. In fact, by early March, Jeb's "fundraisers had been instructed not to ask donors to give more than \$1 million per person this quarter...This campaign is about much more than money, said Howard Leach, a veteran Republican fundraiser who recently co-hosted a finance event for Bush in Palm Beach, Fla., and confirmed the limit. 'They need substantial funds, but they don't want the focus to be on money'."22

It was learned in March that another Bush campaign entity had been quietly set up in Arkansas in February by a Bush surrogate. "The nonprofit group, Right to Rise Policy Solutions...shares the name of two political committees for which Bush has been aggressively raising money — blurring the line that is supposed to separate a campaign from independent groups. While ideological nonprofits have become major players in national politics in recent years, this marks the first time one has been so embedded in the network of a prospective candidate."<sup>23</sup> Unlike the PAC and the Super PAC, both of which are 527 organizations and report to the FEC, this new entity is a nonprofit organization and thus reports to the IRS. Right to Rise Policy Solutions Founder Bill Simon "stressed that the group will "comply with all applicable IRS regulations." While it can accept unlimited donations, he added, the nonprofit "is a policy group, not a political or fundraising group."<sup>24</sup>

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<sup>22</sup> Gold, Matea, "Awash in cash, Bush asks donors not to give more than \$1 million – for now," *The Washington Post*, March 4, 2015; [https://www.washingtonpost.com/politics/awash-in-cash-bush-asks-donors-to-limit-gifts-to-1-million--for-now/2015/03/04/0b8d3fc6-c1c8-11e4-9271-610273846239\\_story.html](https://www.washingtonpost.com/politics/awash-in-cash-bush-asks-donors-to-limit-gifts-to-1-million--for-now/2015/03/04/0b8d3fc6-c1c8-11e4-9271-610273846239_story.html)

<sup>23</sup> O'Keefe, Ed and Gold, Matea, "How a Bush-allied nonprofit could inject more secret money into '16 race," *The Washington Post*, March 31, 2015. [http://www.washingtonpost.com/politics/how-secret-donors-could-play-a-big-role-boosting-jeb-bush/2015/03/31/05647310-d7cd-11e4-b3f2-607bd612aeac\\_story.html](http://www.washingtonpost.com/politics/how-secret-donors-could-play-a-big-role-boosting-jeb-bush/2015/03/31/05647310-d7cd-11e4-b3f2-607bd612aeac_story.html)

<sup>24</sup> *ibid.*

The most novel part, however, is that because Bush was not yet a candidate for president himself, he was able to be involved with and coordinate with the Super PAC until he became a candidate. “Waiting to formally launch his campaign allows Mr. Bush to continue to solicit unlimited donations for the Super PAC. Once he becomes a declared candidate, he will be limited to asking for \$5,000 per person to the PAC and \$2,700 per person to the campaign. The Super PAC will still be able to raise uncapped amounts of money, but Mr. Bush will be limited in how much he can personally solicit.”<sup>25</sup>

Another unique aspect of this candidacy was the speed with which it was rolled out. Bush’s hope was to raise so much money so fast, that some of his opponents were unable to get traction and thus not even get into the race. Mitt Romney became such a casualty in February<sup>26</sup> and others are struggling to keep pace. In early May, it became known that Bush was “quietly waging a behind-the-scenes offensive to pick off disillusioned home-state supporters of Chris Christie,”<sup>27</sup> who had been weakened by the now infamous Bridge-gate scandal. Bush had already received the backing of several former Christie supporters and whether or not he would cripple Christie’s efforts is unknown at this time.

Regardless, the entire political world – all other candidates of both parties, the media, the pundits – were all now operating on Jeb’s timetable, which was the earliest

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<sup>25</sup> Reinhard, Beth, “Still Undeclared, Jeb Bush Touts Record Fundraising Haul,” Wall Street Journal, April 27, 2015, <http://www.wsj.com/articles/still-undeclared-jeb-bush-touts-record-fundraising-haul-1430140658>

<sup>26</sup> By early September, 2015, however, due to the “Summer of Trump,” and the rise of candidates who had never held office before, not only had Bush fallen in the polls, but due to the possibility of a deadlocked convention in 2016, rumors of an impending Romney candidacy were surfacing.

<sup>27</sup> Isenstadt, Alex, “Jeb’s Secret Jersey Mission, Politico, May 2, 2015. [http://www.politico.com/story/2015/05/jeb-secret-jersey-mission-117567.html?hp=t4\\_r](http://www.politico.com/story/2015/05/jeb-secret-jersey-mission-117567.html?hp=t4_r)

ever start of the presidential “silly season.”<sup>28</sup> Another unique aspect is that Bush already had the vast, nationwide fundraising base of an incumbent (and would be the third Bush president if elected); he inherits the family network of his brother and father, Presidents George Herbert Walker Bush (1989-1993) and George W. Bush (2001-2009).

Thus, not only did Bush begin (as did Hillary Clinton) as a “name brand candidate” with virtually 100% Name Identification and have a nationwide fundraising network, and not only did he hitting the ground at a galloping pace at the very beginning of 2015, but he was able to do so without even having to be a candidate, using his PAC and Super PAC to raise most of the money he would need before others even got out of the starting gate or even announce their candidacy.<sup>29</sup>

All of this was designed to create the perfect storm of a candidacy and the perfect storm of catastrophe for two groups – his opponents and campaign finance reformers – both of whom are horrified (and not just of a third Bush presidency) at what has become of the original premises and promises of campaign finance reform in the wake of the “devastating legacy” of BCRA and the “incoherence” of Citizens United.

However, by late October, even though Bush was raising money at a record setting pace, it “hasn’t scared away rivals, given the era in which a wealthy benefactor can pump millions into a Super PAC.”<sup>30</sup> “The role that Super PACs are playing in 2016 gives other candidates confidence that, if they can find an angel or two to give them

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<sup>28</sup> Isaacson, Walter, “Opening the Silly Season,” Time, February 28, 1983.  
<http://content.time.com/time/magazine/article/0,9171,955115,00.html>

<sup>29</sup> It should be noted that Senators Rand Paul, Ted Cruz and Marco Rubio each has a Leadership PAC that was opened in 2014 if not before.

<sup>30</sup> Leary, Alex, “Jeb Bush seeks authenticity by standing ground on key issues,” Tampa Bay Times, May 3, 2005.

multimillion-dollar contributions, they can be competitive...and...the early polls reinforce the feeling of “why not me” among prospective candidates. Even those at the front of the pack right now are struggling to get even a paltry 20 percent share of support.”<sup>31</sup>

There are now 13 other Republican candidates running and at least five – Paul, Santorum, Christie, Rubio and Cruz – have already opened or gained pledges for their own Super PACs that will give them at least \$25 million each, enough to be competitive in the early states. Thus, the very controversial Super PACs have actually had the ironic and unintended effect of leveling the playing field and creating a sort of political equality (at least among Presidential candidates), which, ironically, has been one of the unachieved goals of campaign finance reform for over a century. However, this was not what the campaign finance reform movement had in mind.

This phenomenon has actually caused some to speculate that rather than playing offense, Bush was actually playing defense by trying to raise \$100 million by June 30:

He’s going to have all of these other Republicans, each with their own Super PAC funded by their own billionaire, coming after him. He’s going to have to withstand what could be a \$50 million onslaught...added another Bush donor: These folks may have – altogether – somewhere in the neighborhood of \$50-70 million in the primary, and we may see them come to a collective decision to try to take Jeb out. Democrats, if there’s an opportunity, may throw some money on top of all that to help. Hence, the calculation that Bush may need to raise \$100 million “as a matter of survival.”<sup>32</sup>

That April observation has proved prophetic as Donald Trump took the Republican primary by storm and by late summer was leading in all of the polls while

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<sup>31</sup> Balz, Dan, “Is Anyone Afraid of Jeb Bush,” The Washington Post, April 25, 2015. [http://www.washingtonpost.com/politics/is-anyone-afraid-of-jeb-bush/2015/04/25/1a6791d0-eb59-11e4-aae1-d642717d8afa\\_story.html](http://www.washingtonpost.com/politics/is-anyone-afraid-of-jeb-bush/2015/04/25/1a6791d0-eb59-11e4-aae1-d642717d8afa_story.html)

<sup>32</sup> Stokols, Eli, “In fundraising, Jeb is on defense,” Politico, April 23, 2015. <http://www.politico.com/story/2015/04/jeb-bush-2016-fundraising-117304.html>

Jeb Bush was dropping in the polls. By October, 2015, Trump and Bush were engaging in open warfare against each other with some speculating that Bush's campaign was careening off course. "This is not how Jeb Bush thought his summer would end. The candidate once seen as the most likely Republican presidential nominee is languishing in the polls, his fundraising has slowed, and he endures daily taunts from the rival who unseated him as the front-runner, Donald Trump."<sup>33</sup> To make matters worse for Bush, Trump is a billionaire who is funding his own campaign and is largely using earned and social media to make his case. The net effect is that Trump is spending little money, Bush is spending a lot of money<sup>34</sup>, and his other opponents are sitting on the sidelines watching and saving their campaign cash for the battles ahead.

That Bush's campaign was careening off course was confirmed in late October by several things. First and most publicly, his performance in the October 28 CNBC debate was uniformly panned. However, behind the scenes, more telling things were occurring. A week prior to the debate, the reclusive head of Jeb's Super PAC, Mike Murphy gave his first media interview since the Spring, proclaiming Jeb still the candidate to beat. Two days later, an internal Bush campaign strategy memo was "leaked" detailing budget and salary cuts of 40%, staff re-deployment, an early state strategy and a general campaign make-over. Two days after that, the Super PAC announced that they would be adding staff in key early states. And right after the

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<sup>33</sup> [http://www.washingtonpost.com/politics/inside-jeb-bushs-fall-strategy-to-deflate-trump-and-court-conservatives/2015/09/02/809c2b4e-519f-11e5-9812-92d5948a40f8\\_story.html](http://www.washingtonpost.com/politics/inside-jeb-bushs-fall-strategy-to-deflate-trump-and-court-conservatives/2015/09/02/809c2b4e-519f-11e5-9812-92d5948a40f8_story.html)

<sup>34</sup> In early September, it was announced that the Bush campaign was spending \$500,000 on a New Hampshire TV ad buy and his Super PAC was spending an astounding \$20 million on a multi-state TV ad buy. <http://www.nationalreview.com/corner/422918/pro-bush-super-pac-nears-20-million-ad-spending-eliana-johnson>

debate, a 112 page internal strategy memo was “leaked” to the press giving, among other things, their vote goal for Iowa and opposition research on key rival, Marco Rubio.

While this may sound like normal campaign goings-on, it was really a very sophisticated form of coordination between the Bush Campaign and his Super PAC. By law, Super PACs cannot coordinate with any campaign and are limited to Independent Expenditures. This was the entire reason Jeb started his Super PAC in January but did not officially launch his campaign until June. However, when in less than a week, the previously silent head of the Super PAC gives an interview and two internal campaign strategy memos are “leaked” to the public, it is not difficult to realize that the actual intended audience is not the public but rather each other. In recent years, going public has become the preferred method of campaigns and Super PACs to coordinate with each other in a world where coordination is strictly forbidden. Going public has included “leaks,” Facebook posts and media interviews, among other things.

This development too was not something the campaign finance reformers (or even the candidates, pundits or media) was expecting. In spring 2015, several campaign watchdog groups filed complaints with the Federal Elections Commission against Jeb Bush, Rick Santorum and Martin O’Malley claiming they were actually candidates at a time when they were pretending not to even be “testing the waters.” It is inevitable that these same watchdog groups will also file complaints about this not well disguised coordination. It is also inevitable that the Federal Election Commission will not deal with this matter until well after the election.<sup>35</sup>

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<sup>35</sup> The numerous problems with the Federal Election Commission will be examined in Chapter 3.

On the Democratic side, Hillary Clinton is also off and running but at a much slower pace and in a more traditional manner, although she too has embraced Super PACs. At this point, Hillary is still the overwhelming favorite to gain the Democratic nomination, but has faced some rough times as well and has seen her once 30+ point lead in the polls shrink to single digits in some polls. However, she still has a network of her own in place from her 2008 run (plus her husband's network; in this regard, she and Bush began with enormous political, structural, institutional, monetary, networking and Name ID advantages over all of their opponents).

Unlike Bush whose Super PAC was run directly by him until his formal announcement, Hillary's group was technically unaffiliated with her and was called, "Ready for Hillary." Ready for Hillary is the Super PAC urging Hillary Clinton to run for president in 2016 and laying the groundwork for her candidacy.<sup>36</sup> It was formed in January, 2013, and limited its donations to \$25,000 per individual donation. After her formal entry into the race in April, in keeping with FEC regulations which do not allow a candidate's name to appear in the name of the Super PAC, the name was changed to Ready PAC.<sup>37</sup>

Super PACs have proliferated so much that in November 2015, Bernie Sanders, who had previously decried Super PACs and the undue influence supposedly obtained by those using them, unexpectedly dropped those standard lines from a speech shortly after a Super PAC backed him.<sup>38</sup>

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<sup>36</sup> <https://www.readyforhillary.com/home>

<sup>37</sup> <http://www.msnbc.com/msnbc/ready-hillary-no-longer-ready-hillary>

<sup>38</sup> <http://www.politico.com/story/2015/11/bernie-sanders-drops-super-pacs-attack-216088>

Prior to their official announcements, most of the other Republican and Democratic candidates were traveling and campaigning but none claimed to be a candidate or even to be “testing the waters.” “In legal parlance, ‘testing the waters’ means engaging in activity for the purpose of determining whether to run for office.”<sup>39</sup> But Bush and nearly every other potential 2016 candidate was very careful to avoid saying that they were “testing the waters” of a presidential campaign “because money spent to test the waters of a federal campaign must be raised under the \$2,700 candidate contribution limit — and nearly every prospective candidate is raising funds outside the limit, sometimes even far outside that limit.”<sup>40</sup>

Rather, they used euphemisms like, “If I decide to run,” or “I am merely exploring the idea of possibly running for president” – anything but the express advocacy (to coin a phrase) of their obvious candidacy. Even staffers are well versed on what to say to the media. When asked about the legality of the various Bush campaign entities in May, spokeswoman Kristy Campbell replied, “These questions are premature and speculative as Governor Bush is not a candidate for office at this time.”<sup>41</sup>

However, this too was not what the campaign finance reform movement had in mind. Given the goals of campaign finance reform – which will be reviewed in detail in this and the following chapters – these candidacies have flown in the face of everything and every premise the campaign finance reform movement holds dear: that there is too

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<sup>39</sup> Ryan, Paul S, “CLC Blog: How 2016ers Are Breaking the Law and Getting Away With It, Politico, March 24, 2015. Ryan, Paul S., ““Testing the Waters” and the Big Lie: How Prospective Presidential Candidates Evade Candidate Contribution Limits While the FEC Looks the Other Way, Campaign Legal Center, February 2015.

<sup>40</sup> *ibid.*

<sup>41</sup> O’Keefe, Ed and Gold, Matea, “How a Bush-allied nonprofit could inject more secret money into ‘16 race,” The Washington Post, March 31, 2015. [http://www.washingtonpost.com/politics/how-secret-donors-could-play-a-big-role-boosting-jeb-bush/2015/03/31/05647310-d7cd-11e4-b3f2-607bd612aeac\\_story.html](http://www.washingtonpost.com/politics/how-secret-donors-could-play-a-big-role-boosting-jeb-bush/2015/03/31/05647310-d7cd-11e4-b3f2-607bd612aeac_story.html)

much money in politics, that money is the corrupting influence in politics, that virtually unlimited sums of money from virtually any source should not be available to candidates, and that public funding is the necessary reform, among others.

Rather, in recent years, public funding has become virtually irrelevant (another relatively new development that will be discussed at length later), an obvious candidate can claim to be a non-candidate, candidates have a PAC and a Super PAC, and these non-candidates can literally coordinate their efforts with their Super PAC. Add to this the fact that Bush is having his Super PAC “handle his campaign’s TV ads and a host of other duties traditionally handled by the campaign itself...and crucial campaign endgame strategies: the operation to get out the vote and efforts to maximize absentee and early voting on Bush’s behalf... the goal is for the campaign to be a streamlined operation that frees Bush to spend less time than in past campaigns raising money, and as much time as possible meeting voters.”<sup>42</sup>

In fact, not all are in agreement that what Bush and the others are doing is even legal. Longtime “Democracy 21” President Fred Wertheimer, along with fellow campaign finance reform advocates at the Campaign Legal Center, have already filed complaints with the Federal Election Commission (FEC) against Republicans Bush, Walker and Santorum and Democrat O’Malley for acting like candidates while not following the rules that apply to individuals acting like candidates.”<sup>43</sup>

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<sup>42</sup> Smith, Adam C., “Jeb Bush Outsourcing Key Jobs to Super PAC,” Tampa Bay Times, April 22, 2015. <http://www.tampabay.com/blogs/the-buzz-florida-politics/jeb-bush-outsourcing-key-campaign-jobs-to-super-pac/2226527>

<sup>43</sup> Blumenthal, Paul, “How Jeb Bush is thumbing his nose at voters with his Super PAC Scheme,” Huffington Post, April 27, 2015. [http://www.huffingtonpost.com/2015/04/27/jeb-bush-super-pac\\_n\\_7154030.html](http://www.huffingtonpost.com/2015/04/27/jeb-bush-super-pac_n_7154030.html)

Paul S. Ryan of the Campaign Legal Center said: "The Supreme Court has recognized that a check above \$2,700 directly to someone who admits they are a candidate could corrupt them and therefore can be limited. But we're to believe that the corruptive potential is miraculously washed from a \$100,000 contribution handed to Jeb Bush for his Super PAC. It's absurd."<sup>44</sup>

While Ryan is highly critical of the potential candidates (recognizing that political actors will game whatever system is in place), his real target is the media, virtually accusing them of negligence and malpractice:

So why is the press allowing them to get away with this apparent fiction? As reporters cover the daily activities of these nascent presidential campaigns, they're ignoring what should be a major story. Any prospective presidential candidate who's paying for testing-the-waters activities with funds raised outside the \$2,700 per donor candidate limit is violating federal law. Isn't this worth a mention in the stories about Bush's self-imposed \$1 million contribution limit for the quarter?<sup>45</sup>

The role of the media will be another theme of this dissertation and Ryan is only one of many critics over the decades. Along with most other political actors who have focused on proximate causes, the media has often failed to really investigate or to understand the issue thoroughly and has thus, perhaps inadvertently and with good intentions, aided and abetted the Reformers and political actors, while missing the bigger picture and perhaps the public interest. Chapter Two will look more deeply at this issue. Ryan continues and emphatically encourages the media to be more inquisitive:

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<sup>44</sup> Leary, Alex and Smith, Adam C., Jeb Bush exploits non-candidate statues to rewrite campaign finance playbook, February 27, 2015, Tampa Bay Times, <http://www.tampabay.com/news/politics/stateroundup/jeb-bush-exploits-non-candidate-status-to-rewrite-campaign-finance-playbook/2219414>

<sup>45</sup> Ryan, Paul S, "CLC Blog: How 2016ers Are Breaking the Law and Getting Away With It, Politico, March 24, 2015. Ryan, Paul S., "'Testing the Waters' and the Big Lie: How Prospective Presidential Candidates Evade Candidate Contribution Limits While the FEC Looks the Other Way, Campaign Legal Center, February 2015.

Every reporter on the campaign trail should be sticking a microphone or a pocket recorder in the face of prospective candidates and asking them, point blank, whether they are “testing the waters” of a presidential run — i.e., whether they are spending any money in the process of determining whether to run. If they deny that they are “testing the waters” of candidacy, that absurdity alone warrants reporting. And if they acknowledge that they are “testing the waters,” they should be asked about their fundraising above the \$2,700 candidate limit and whether they are complying with federal campaign finance laws.<sup>46</sup>

Even opponent of most campaign finance reform, Brad Smith, the erstwhile former Republican Chairman of the FEC who was appointed by President Bill Clinton, has reservations about what Bush is doing. “How do you define who is a candidate? What kind of a test would you use to separate Jeb Bush from, say, Mike Pence or John Kasich?”<sup>47</sup> he asked, referring to the governors of Indiana and Ohio, respectively, who were potential contenders but not nearly as visible. “That’s always a problem with campaign finance law, coming up with a line-drawing test.”<sup>48</sup>

Nevertheless, Bush and the others are charting new territory in an area that Ohio State Law Professor Daniel Tokaji notes is always changing and where “There’s an incentive to innovate and the law has been a moving target over the last several years.”<sup>49</sup> As noted above, many blame this on the Citizens United case. Sen. John McCain, co-author of the sweeping eponymous McCain-Feingold campaign finance reform law, bemoaned the 2010 Supreme Court decision for unleashing the Super PAC

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<sup>46</sup> *ibid.*

<sup>47</sup> Leary, Alex and Smith, Adam C., Jeb Bush exploits non-candidate statues to rewrite campaign finance playbook, February 27, 2015, Tampa Bay Times, <http://www.tampabay.com/news/politics/stateroundup/jeb-bush-exploits-non-candidate-status-to-rewrite-campaign-finance-playbook/2219414>

<sup>48</sup> *ibid.*

<sup>49</sup> *ibid.*

era. "The day the Citizens United decision came down, I knew that we were on a downhill slide...it will continue ... until there is a national scandal."<sup>50</sup> Yet McCain does not fault Bush for playing the game. "You have to if you want to win...you're going to give your opponent the ability to raise all kinds of (unlimited) money and you're not going to? That's insane."<sup>51</sup>

History suggests that McCain is correct – it will take a national scandal for things to change. Scandal has driven many if not most campaign finance reforms. Though there has been no scandal yet, this has not stopped some from already proposing corrective legislation. Representatives David Price (D-NC) and Chris Van Hollen (D-MD) recently filed H.R. 425, the Stop Super PAC-Candidate Coordination Act. "The bill would prevent candidates from soliciting contributions for Super PACs and define common-sense coordination standards to prevent the widespread abuse currently occurring not only at the presidential level but at the congressional level as well."<sup>52</sup> Another thing McCain is likely correct about is that candidates have to play the game to win, thus the chances of this bill becoming law are close to zero without a scandal and not just because it is sponsored by Democrats in a Republican controlled Congress – during an election year, it's a pretty safe bet that even Republicans would not pass this or any other bill. It took nearly a decade for McCain-Feingold to pass and it took the Enron scandal to bring enough public pressure on Congress to pass BCRA and for

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<sup>50</sup> *ibid.*

<sup>51</sup> *ibid.*

<sup>52</sup> Campaign Legal Center Press Release, "Watchdogs Urge Members to Co-Sponsor Bill to Curb Candidate-Super PAC Coordination," March 12, 2015.

President George W. Bush to sign it. But these too are proximate causes, not the root cause and will be examined in depth in subsequent chapters.

Thus, after a century of reform, we are left not only with a “devastating legacy” and “incoherence” and a “moving target,” but something virtually nobody understands, all abhor and even experts cannot agree upon. It’s reminiscent of the southern gentleman who once noted that it wasn’t until he was up to his ass in alligators that he remembered that his goal had been to drain the swamp. We have layered legislation upon regulation upon litigation upon interpretation until it is now time to drain the swamp or at least start again at our beginnings.

In actuality, this disjointed situation is not atypical of Congress or Congressional reforms in general. According to Eric Schickler, a certain path-dependent layering occurs that creates “an accumulation of innovations that are inspired by competing motives, which engenders a tense layering of new arrangements on top of preexisting structures,”<sup>53</sup> and

often involves superimposing new arrangements on top of preexisting structures intended to serve different purposes. Established institutions create constituencies for their preservation, and thus it is typically easier to add new institutions than to dismantle preexisting ones. The effectiveness of institutional change has repeatedly been compromised by the need to accommodate a preexisting authority structure that privileged other interests.<sup>54</sup>

We have a century of proximate cause based, band-aid legislation, regulation and Court opinions based on the unverified claims of reformers, then exploited by political actors, which scholars then study. Rather than systematically analyzing all

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<sup>53</sup> Schickler, Eric, *Disjointed Pluralism: Institutional Innovation and the Development of the U.S. Congress*, Princeton University Press, 2001, page 15.

<sup>54</sup> *ibid.*, p. 252.

federal campaign finance legislation and noticing the repeated patterns of failure, scholars look piecemeal at proximate causes (Hasen – Citizens United; La Raja – BCRA; Malbin – FECA; Overacker – Hatch Act) rather than root causes. Now that the foundation (or lack thereof) is crumbling, it's long past time to address the root causes.

It is the task of this dissertation to transcend the disjointed nature of the legislation, regulation, litigation and abuses, wade through the mountain of proximate causes, trace the patterns of failure back to the root cause and bring some coherence to campaign finance reform by trying to provide some insight into what may be wrong and what may be some corrective measures.

### **The Premises and Promises of Campaign Finance Reform**

This dissertation traces the patterns of failure – intellectual, empirical and theoretical – that permeate over 100 years of federal campaign finance reform. Exactly what was it that the reformers hoped to achieve? What were their goals, what were their premises, what were their promises? Though there have been variations over the century, the core of the reform agenda has been consistently the same. The animating logic and underlying premise of campaign finance reform is that, “at some level money must be corrupting of the political process and that ...if money be the root of all evil, reducing the amount of money in the system is the natural conclusion.”<sup>55</sup>

The promises of campaign finance reform are numerous. If enacted, we are informed, reforms will, among others things: curtail the power of special interests; end corruption; reduce the costs of campaigns; provide transparency; reduce negative campaigning; elevate the level of debate; create political equality; restore public trust in government; and, reign in corporations, labor unions and so-called wealthy fat cats.

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<sup>55</sup> Issacharoff, Frank, “On Political Corruption,” *126 Harvard Law Review* 118, 2010, page 118.

The promised transparency has not materialized and what little we had has essentially evaporated, especially in the aftermath of Citizens United. The corporations, unions and fat cats are still the largest players in the game a century after trying to either ban or limit them. Campaigns are more expensive and more negative than ever. Additionally, the alleged deliberative democracy, equality, efficacy and trust in government are sorely lacking and are arguably at all time lows.

I do not suggest that these goals do not have merit (in fact, most of the goals are actually quite laudable), only that current federal campaign finance reforms are not even coming close to achieving them. Thus, not only have the promises of campaign finance reform not been realized, in many, many ways, the “problem” is worse.

This obviously calls into question the premises which have guided 100 years of reform. While I agree with Hasen that the Supreme Court’s campaign finance case law is “incoherent,” and with La Raja that McCain-Feingold has left a “devastating legacy,” I argue that the incoherence and devastating legacy date all the way back to the 1907 Tillman Act and encompasses all of the federal campaign finance reform laws passed by Congress as well as the subsequent case law. If the Reformers want the “right” outcome, they first have to get the right diagnosis. In arguing that we have not solved the “problem,” I will also argue that this is largely because we have failed to properly define and diagnose the malady.

There are many reasons to critique campaign finance reforms over the years. They could have a bad strategy, a bad outcome, neither, or both. In fact, there are four alternatives – Good Strategy/Good Outcome, Good Strategy/Bad Outcome; Bad Strategy/Good Outcome; or, Bad Strategy/Bad Outcome. My goal is to demonstrate that

the patterns of failure –intellectually, empirically and theoretically – are so pervasive that campaign finance reform has been a failure on both dimensions, i.e., a Bad Strategy/Bad Outcome.

In 2015, reformers are seeking to solve the same problems as their predecessors were attempting to do in 1907 when they successfully pushed through the Tillman Act, which was signed into law by President Theodore Roosevelt. A century of reforms not only has failed to cure the problem nor brought about the promised results, but these reforms have often backfired and resulted in many unintended consequences as both Overacker and Smith have noted a half century apart.

Early in 2015, noted election law lawyer Bob Bauer noted that, “The debate is stuck, and one reason is that a number of interested observers are dedicated to fighting the same arguments heard since the 1970s.<sup>56</sup> While this is absolutely accurate, another running theme of this dissertation is not only that the continuing patterns of failure have gone on for a century, but that this is largely unknown. My research agenda is to bring these patterns to light, examine why this has continued to happen and suggest what we need to do to achieve these goals, or to set new goals.

### **Defining Failure**

How do we know if a campaign finance reform has failed, or not failed? In this dissertation, I will define failure very simply and directly – I will look at the premises, promises and stated goals of the Reformers and proponents of reform and see whether or not 100 years of reform have achieved their goals or not. Since a century is a long enough period of time to be fair and since most of the goals of the proponents of reform

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<sup>56</sup> Bauer, Robert, “Disclosure in a 21<sup>st</sup> Century Reform Program,” February 2, 2015, MoreSoftMoneyHardLaw.com.

have been consistent across time, it is a fair enough span of time to demonstrate whether or not the goals of these reforms have been achieved.

Later chapters will elaborate in detail on my assertions, but suffice to say at this juncture that not only have the policies and objectives prescribed by the proponents of reform not achieved the stated goals, but the same types of federal reforms have been attempted several times and have failed each time. Indeed, one could argue that the adoption of these reforms, and the judicial review by the Court, have made the underlying concerns about the potential corrosive influence of money in politics only worse. So, what went wrong?

There is certainly more than one way to diagnose a problem incorrectly. That each successive reform has failed suggests an overarching policy failure. There are at least two different types of policy failure. There could be a failure of definition or a failure of execution. This dissertation will explore each potential failure in detail. In its simplest form, I am defining failure based on the stated goals and promises of the reformers themselves.

A failure of execution is rather basic in that the law failed to achieve its stated goal. There can be many ways a law can fail and many reasons for the failure. What are the determinants of failure and how will they be measured? Is it more money rather than less? Is it less transparency rather than more transparency? Is it the failure to achieve political equality? Is it bad enforcement? Is it decreased efficacy and trust in government? Is it public funding or the lack thereof? In most cases, all of the above apply and Chapter 3 will explore these in detail.

I will attempt to demonstrate the failure of campaign finance reform in several ways. My overarching themes will be to show that campaign finance reform has failed intellectually, empirically and theoretically and these will be discussed in detail in Chapters 2-4, respectively. Within the empirical failures, I find four distinct categories of failure: enforcement, fungibility, transparency and unintended consequences. Using these analytically distinct categories of failure, I will tell the history of campaign finance reform and attempt to bring some coherence into what is otherwise an incoherent body of thought.

There are many ways to fail in execution. Clearly, with 100 years of failed laws in our wake and urgent cries for reform in our midst, there have been failures of execution. However, it is also possible to misunderstand the problem such that it really does not matter how you execute, you will get it wrong and not solve the problem. Successive policy failures over a century suggest there may be something more fundamental going on; there very well may also be a failure of definition.

To paraphrase Austin Ranney's query regarding the APSA Committee on Political Parties, "does not the soundness of any therapeutic regimen depend upon the accuracy of the diagnosis upon which it is based?"<sup>57</sup> I marshal the evidence and argue that there is a failure of definition such that no remedy will cure the patient in Chapter Four, thus reinforcing Einstein's dictum that the definition of insanity is doing the same thing over and over and expecting a different result.

For ease of understanding, I have placed the intellectual, empirical and theoretical patterns of failure horizontally. The intellectual and theoretical patterns of

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<sup>57</sup> Ranney, Austin, "Toward a More Responsible Two-Party System: A Commentary," *American Political Science Review*, Vol. 45, No. 2. (Jun. 1951), pp 488-499.

failure constitute failures of definition while the empirical patterns of failure constitute a failure of execution. Under each of the horizontal failures, I have enumerated several different types of failure which I have placed vertically for easy reference and which will be covered in Chapters 2, 3 and 4, respectively.

Table 1-1. Patterns of Failure

Intellectual (Definition)	Empirical (Execution)	Theoretical (Definition)
Reformers	Enforcement	Path Dependency
Supreme Court	Fungibility	Privileging Prohibitions or Publicity
Media	Transparency	Madisonian or Progressive Approach
Academics	Unintended Consequences	Privileging Regulation or Speech

### Preview of Chapters

The first chapter, Identifying the Patterns of Failure, introduces the problem and my research question, spells out the original and ongoing goals of campaign finance reform, defines policy failures and previews the chapters to follow.

Chapter 2, Intellectual Patterns of Failure, offers a critical analysis of the intellectual failures of campaign finance reform. I begin the chapter with an analysis of the intellectual failures in order to make a normative argument about the premises and faulty assumptions. There has been little recognition of or curiosity about a systemic failure occurring right before our eyes; the patterns of failure are obvious if one looks. The underlying premises have never been challenged; it has just been taken for granted that because the motives were pure, that the reforms were good. It apparently never occurred to anyone that the reformers were naïve, wrong or in many ways theoretically incoherent. However, they had too many conflicting goals that they were trying to accomplish merely by limiting money or getting money out of politics.

In this chapter I trace the role of the Reformers and the Academics in the failure of campaign finance reform. The pattern is pretty predictable – the Reformers discover a need, are egged on by the media which pressures legislative action, which is then overturned in whole or in part by the Supreme Court and then studied by the Academics. The intellectual failures manifest themselves in several ways. First, the Reformers often propose incoherent, inconsistent, incommensurate and incompatible goals. Second, the media adopt the proposals as do entrepreneurial politicians. Ironically, as we shall see in Chapter 2, the media played a major, albeit inadvertent, role in the development of campaign finance reform by often being negligent in investigating the claims of the Reformers rather than accepting them at face value. Third, a scandal or political or partisan need or ability propels legislation to passage. Fourth, the Supreme Court consistently upholds the First Amendment right of free speech and thus often finds the reforms unconstitutional. Finally, the Academics examine the goals and outcomes and often find them wanting.

In most instances, there is a lack of rigorous analysis and failure to challenge the premises and promises of the reformers and overlook the obvious failures of the reforms to achieve their stated goals. Early reformers had an excuse (and as we will see, some of the early reformers and scholars got it right from the beginning), but the patterns of failure have been obvious for at least 50 years and yet few have bothered to follow the trail of evidence or to notice the patterns of failure. Drawing on the actual words of the Reformers, I will lay the foundation of my argument which will animate the remaining chapters. In those chapters, I will demonstrate how campaign finance reform

has developed its patterns of failure and has led to some absurd unintended consequences.

Chapter 3, Empirical Patterns of Failure, traces the many failures of execution of campaign finance reform from the 1907 Tillman Act through BCRA in 2002 and Citizens United in 2010, and the opening months of the 2016 Presidential election. These are failures of execution and I have identified four analytically distinct categories by which to analyze the empirical failures of campaign finance reform. The four areas of analytical review are Enforcement, Fungibility, Transparency and Unintended Consequences (which will be covered in Chapter 4). This chapter discusses in detail the responses of the political actors to the Reformers, the media and the Courts and tracks the empirical failures of campaign finance reform, specifically the failures of execution. Campaign finance reform was often scandal driven, and was always partisan driven. But the federal reforms generally failed quickly and for similar reasons and with almost immediate calls for more reforms. The patterns of failure are as constant and consistent as are the calls for reform.

Chapter 4, Theoretical Patterns of Failure, uses the Path Dependency literature to trace the patterns of failure and underlying theory driving campaign finance reform for over a century back to the root causes and identifies the flaws in the theory. The path dependency literature is critical here as it helps to set the stage and tell the story of the intellectual and empirical failures, i.e., had not the path been already set, those reforms coming later may not have followed. I argue that campaign finance reform is a text book case of path dependency and go back to the “critical juncture” where the problem began. It deals with the policy failure of definition and traces the problems of campaign

finance reform back to the beginning and the “focusing events” of the Progressive Era which led to the subsequent empirical failures and finds that campaign finance reform also has a theoretical and conceptual problem – a failure of definition.

For over a century, we have misdiagnosed the problem and therefore offered the same failed treatment over and over, thus leading to the repeated intellectual and empirical failures. Ironically, the early calls were for publicity, not regulatory or criminal law. I address the root causes of the theoretical failures that led to the misdiagnosis of campaign finance reform.

I will explore the reasons for the failure and it will be this chapter where I will get into the errors of definition vs. execution and discuss why these failed reforms, which all resemble one another on many levels (all begin from same premise, all were passed by incumbents, all protect incumbents, all follow scandal and all fail to achieve their stated goals). This is where I will demonstrate that the policy failures do indeed constitute a theoretical failure and failure of definition and not just a failure of execution and show that why in another 50-100 years we are likely to be in the same boat if we continue on the same path. Likewise, I will offer an alternate path that may work better and why.

Finally, Chapter 5, *Overcoming the Patterns of Failure*, concludes the dissertation with some normative observations and conclusions regarding a proper diagnosis leading to the right treatment. In other words, if we correct the theory, the intellectual and empirical solutions will present themselves. It appears that two of the earliest reformers, Perry Belmont, the father of disclosure (what was then called Publicity), and Louise Overacker, the mother of all campaign finance reform scholars, were on the right track from the beginning. In 1905, Belmont stated that “contributions

and expenditures in elections are public acts for public purpose”<sup>58</sup> and in 1946, Overacker stated that “once we have real publicity, the question of “how much” is ‘too much” may safely be taken out of courts of law and left to courts of public opinion.”<sup>59</sup>

The solution is not deregulation or a return to the State of Nature because to do so would suggest that money is not an issue in politics. Money *is* an issue in politics, but it needs to be seen and dealt with in the right context. Money has a place in politics, just as it does in every other aspect of our lives; it is also inevitable and unavoidable. To paraphrase Madison in Federalist 10 who noted that what was needed was a “well constructed union...(to deal with)...the mischief of faction,”<sup>60</sup> I suggest that today we need a well constructed campaign finance reform system to deal with the mischief of faction.

However, history suggests that a system that privileges publicity first and surrounds that with the appropriate minimal prohibitions may have a better chance of working than a system that privileges prohibitions surrounded by publicity provisions meant to ensure compliance with the prohibitions. The current system has not only failed to achieve its stated goals, but has essentially encouraged political actors to exploit every loophole available and that they have written into the law or which has been opened via regulation or litigation. This dissertation explores America’s century long history with campaign finance reform and our repeated patterns of failure and attempts to offer suggestions not only about why this has been the case, but alternative

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<sup>58</sup> Overacker, Louise, *Presidential Campaign Funds*, Boston University Press, 1946, page 20.

<sup>59</sup> *ibid.*, p. 47.

<sup>60</sup> Madison, James, “Federalist 10,” *The Federalist Papers*, MacMillan, 1967.

strategies that may enable us to finally break with the past patterns and actually make some progress in dealing with this pressing issue.

## CHAPTER 2 INTELLECTUAL PATTERNS OF FAILURE

### Introduction

We have a lot of issues that are more important than campaign finance reform but none will get solved until we solve campaign finance reform.

--Doug Hughes, Gyrocopter Mailman  
*Tampa Bay Times*

On April 16, 2015, Florida mailman Doug Hughes stunned the world by landing his homemade gyrocopter on the Capitol lawn, not only having flown below the radar into one of the most secure areas on the planet, but also with 535 letters, one addressed to each member of Congress, demanding campaign finance reform for the reason stated in his quote above. Much to his surprise, he was arrested and this and the national security implications of what he had done led the news rather than his call to reform campaign finance and thus democracy itself. In late November, 2015, he plead guilty and sentencing was set for April, 2016.<sup>1</sup>

His sentiment (if not his actions) captures the essence of the complaints of the campaign finance reformers and has driven the debate for the last 100 years. The Reformers have been nothing if not consistent in their identification of the problems of money in politics, the nature of their complaints and their proposed solutions; their litany of premises and promises has evolved somewhat but has been very consistent and constant.

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<sup>1</sup> <http://www.tampabay.com/news/courts/criminal/florida-mail-carrier-doug-hughes-who-landed-gyrocopter-on-capitol-lawn-to/2254790>

The Reformers are the ones who established the premises and then made the promises that campaign finance reform would achieve if passed. Notwithstanding the relative consistency of the Reformers, as will be demonstrated, the Reformers have often had inconsistent, incoherent, incommensurate and incompatible goals. This has not helped their cause and thus they have achieved only limited success in their efforts.

That most of their stated goals have not been achieved on the federal level does not mean that money is not an issue in politics; it most certainly is. However, the issue is how to deal with it. While the Reformers have often had inconsistent and incompatible goals, these goals fall naturally into three broad categories of concern – those of Enforcement of the laws, public Transparency and disclosure of the monies in politics and the Fungibility of money. The specific goals they seek fall under one or more of these broad analytical categories.

However, one of the reasons for the repeated failures were the Reformers focus on proximate rather than root causes, their continued failure to adequately define their goals and the inability to learn from previous errors. In Chapter 3, as we explore the empirical failures of execution, we see the same types of mistakes made over and over in campaign finance reform legislation and political actors exploiting them in the same ways. In other words, these intellectual failures of definition led directly to the failures of execution. The chief reason these are intellectual failures is that for the most part, the underlying premises behind the Reformers complaints and demands for reform have seldom been unpacked, challenged and refuted.

As noted previously, there is more than one way to have a policy failure: there can be failures of execution and failures of definition. In campaign finance reform there

are plenty of both and this chapter, by discussing the intellectual failures of definition by the Reformers and others lays the foundation for the detailed discussion of the empirical failures of execution in the following chapter on the legislative, judicial and regulatory fronts.

This chapter will trace the story arc and it is a compelling one about the nature of the premises and promises of the Reformers and look at them in their respective analytical categories. The goals of the political actors are, for the most part, the exact opposite of those of the Reformers and will be explored in Chapter 3, as well as how they exploited the laws the Reformers got enacted.

Although there is a long history of campaign finance reform dating back to the 1880s and the Pendleton Act, this dissertation will trace the patterns of failure from the Tillman Act of 1907 forward to the 2016 Presidential election. The fundamental tension between the Reformers often incompatible goals, their adversaries in the media, Academia, the Courts and especially the political actors, will animate this Chapter and set the stage in two ways for succeeding chapters. First, although the Reformers and their foes have been relatively consistent, they have talked past each other and inadvertently only dealt with proximate causes as the Reformers have pursued their agenda. Second, this “call and response” over the course of a century between the Reformers and the others belies the deeper root causes, failures of definition and the ultimate misdiagnosis plaguing campaign finance reform.

The Reformers goals have evolved somewhat over the century and in some ways their arguments have now come full circle as BCRA has been continually undermined in the courts in “as-applied” challenges, returning us to the virtual State of

Nature that existed before the Tillman Act of 1907. Nevertheless, the Reformers have almost always privileged and erred on the side of monetary limits and transparency (formerly referred to as prohibition and publicity).

This chapter will briefly discuss why these constitute intellectual failures on all parts, then review the premises and promises of campaign finance reform, categorize the types of intellectual failures, then proceed to an analysis of these categories of failure and demonstrate where the reformers, media, academics and the Courts made their errors. Because this pattern repeated itself for an entire century, this is why I refer to them as intellectual patterns of failure. The purpose of this work is to bring to light what has been there the entire time, but never actually pulled together or analyzed in this particular way. Finally, I will offer some concluding remarks as a way to segue into Chapter 3, the Empirical Patterns of Failure.

### **The Premises and Promises of Campaign Finance Reform**

The driving and underlying premise of campaign finance reform is that there is too much money in politics and that money is the corrupting influence on politics, giving special interests “undue influence” over government policy. While others have suggested that the corrupting influence on politics is human nature<sup>2</sup>, or the cost of doing business, or the cost of educating tens of millions of voters<sup>3</sup> or that “money isn’t the problem in politics, it’s a symptom,”<sup>4</sup> the Reformers have consistently focused their

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<sup>2</sup> Madison, James, John Jay and Alexander Hamilton, *The Federalist Papers*, Penguin Press, 1987.

<sup>3</sup> Overacker, 1946 and Smith, 2004.

<sup>4</sup> Hunter, Derek, “Money in Politics,” April 26, 2015.  
[http://townhall.com/columnists/derekhunter/2015/04/26/money-in-politics-n1990453?utm\\_source=thdaily&utm\\_medium=email&utm\\_campaign=nl&newsletterad=](http://townhall.com/columnists/derekhunter/2015/04/26/money-in-politics-n1990453?utm_source=thdaily&utm_medium=email&utm_campaign=nl&newsletterad=)

attention on money. To them, it is the root of all evil<sup>5</sup>, the amounts of money spent on campaigns are “obscene<sup>6</sup>,” there is too much money in politics<sup>7</sup>, special interests have “undue influence<sup>8</sup>,” and public financing and limits on (or elimination of) private money is what is needed to remedy the ills of money and avoid “a disaster for democracy.”<sup>9</sup>

The promises of campaign finance reform are numerous. If enacted, we are informed by the Reformers, reforms will, among others things:

- Get the private money out of politics or at least reduce the costs of campaigns by regulating the sources and amounts of contributions and expenditures and/or by instituting full public funding of campaigns
- End or curtail the power and “undue influence” of special interests
- End corruption, the appearance of corruption and conflicts of interest
- Make campaigns more transparent
- Reduce or limit negative campaigning
- Limit the role of parties in campaigns
- Create political equality
- Restore public trust in government
- Reign in corporations, labor unions and so-called wealthy fat cats.
- Elevate the level of debate and foster a deliberative democracy

Reformers were on the offensive for the last century with allegations (often true) of rampant corruption, conflicts of interest and undue influence and their premises and

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<sup>5</sup> Issacharoff, Frank, “On Political Corruption,” 126 *Harvard Law Review* 118, 2010, page 118.

<sup>6</sup> [http://www.huffingtonpost.com/peter-d-rosenstein/campaign-finance-reform\\_b\\_1187107.html](http://www.huffingtonpost.com/peter-d-rosenstein/campaign-finance-reform_b_1187107.html)

<sup>7</sup> Donnelly, David, Janice Fine and Ellen S. Miller, *Money and Politics*, Beacon Press, 1999, page xiii.

<sup>8</sup> *ibid.*

<sup>9</sup> *ibid.*

promises led to a century of federal campaign finance reform, much of which has failed and the foundation of which has begun to crumble in the last decade. Lawyer and blogger Bob Bauer notes:

The debate is stuck, and one reason is that a number of interested observers are dedicated to fighting the same arguments heard since the 1970s. Political spending is to be reduced and the prohibition on corporate spending restored. Independent spending is to be curtailed because some of it is suspect, gutted by disreputable, if not invariably illegal, forms of coordination. Political discourse is being poisoned by attack advertising. And, of course, there is too much “dark money” and disclosure law should be strengthened against it.<sup>10</sup>

But as this dissertation demonstrates, Bauer’s “interested observers” make the same arguments heard since the early 1900s, whether it be from President Theodore Roosevelt and Perry Belmont in 1905, or James K. Pollock and Louise Overacker in the 1920s, 1930s and 1940s, or the Committee on Campaign Contributions (including Eleanor Roosevelt) in 1958, or the Citizens Research Foundation led by Herbert Alexander, or JFK’s Commission on Campaign Costs headed by Alexander Heard, or Senator Albert Gore Sr. in the 1960s, not to mention the myriad of reform organizations today.<sup>11</sup>

Chapter 3 will focus on the empirical patterns of failure of campaign finance reform by categorizing the failures of execution into three analytical categories – Enforcement, Transparency and Fungibility – each with its own failures and each with its own set of unintended consequences which will be discussed in Chapter 4. In

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<sup>10</sup> Bauer, Robert, “Disclosure in a 21<sup>st</sup> Century Reform Program,” February 2, 2015, [MoreSoftMoneyHardLaw.com](http://MoreSoftMoneyHardLaw.com).

<sup>11</sup> Among the most notable are Common Cause, The Brennan Center for Justice, Democracy 21, Open Secrets and the Campaign Legal Center.

preparation for Chapter 3, let's review the premises and promises and place them into the analytical framework I will be using.

### **The Categories of Failure**

The three analytically distinct categories of empirical failures are Enforcement (originally called Prohibition by early Reformers), Transparency (originally called Publicity by early Reformers), and Fungibility. Because of the nature of money, it is fungible and thus capable of flowing through various entities, whether they be parties, corporations, unions, PACs, Super PACs, Independent Expenditures, 527s, 501(c)(4) organizations, or assorted other campaign committees.<sup>12</sup> “By multiplying money-raising agencies, and in some cases driving them underground, it has led to concealment and evasion”<sup>13</sup> of the various laws and regulations.

The goals of the Reformers were to increase the Enforcement of various limits on sources and amounts and increase the Transparency of political spending and thus reduce the Fungibility of money (or at least enable the public to see where it goes). One of the key findings of this work is that the Reformers, political actors, the Academics, the Courts and the media are so focused on the here and now that they are often unaware of the history of campaign finance reform and are thus unaware of the repeating patterns of failure. Perhaps the major contribution to the academic literature of this dissertation is to marshal the evidence which has always been there and to bring it together to present and reveal the patterns of failure which have plagued campaign

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<sup>12</sup> See Appendix A and B.

<sup>13</sup> Overacker, *“Presidential Campaign Funds*, Boston University Press, 1946, page 44.

finance reform from the beginning but have either been overlooked or not placed in this perspective.

The Reformers goals have evolved over time and have not always been consistent or even offered under the same rationale. For example, originally Perry Belmont, the father of disclosure, believed it was for its own sake because “contributions and expenditures in elections are public acts for public purposes and that publicity would serve the three-fold purpose of protecting the public interest, the honest collector and the contributor, who had no ulterior motive.”<sup>14</sup> If this were done, “the question of how much is too much may safely be taken out of the courts of law and left to the courts of public opinion.”<sup>15</sup>

However, in the modern era, not only has this original purpose been forgotten, but the exact opposite is true. With FECA, the operating rationale of disclosure was to prove compliance with the multitude of new laws and regulations as to sources and amounts of contributions and expenditures. In other words, with the advent of the modern era of FECA and BCRA and the advent of criminal penalties added to the laws, everything was left to the courts of law rather than the courts of public opinion.

While there is substantial overlap in these categories, the key items the Reformers focused on in each category are briefly outlined below:

- Enforcement/Prohibitions - Reduce the costs of campaigns by limiting the sources and amounts of contributions and expenditures; End corruption or the appearance of corruption; Reduce or limit negative campaigning; Get private money out of politics by instituting partial or full public funding of campaigns; Create political equality; Reign in corporations, labor unions and so-called wealthy fat cats and end their undue influence and conflicts of interest; and,

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<sup>14</sup> Overacker, “*Presidential Campaign Funds*, Boston University Press, 1946, page 21.

<sup>15</sup> *ibid.*, p. 47.

Require periodic reporting of campaign contributions and expenditures to prove compliance with the prohibitions.

- Transparency/Publicity - Require periodic public disclosure of campaign contributions and expenditures, making political campaigns more transparent; End or curtail the “undue influence” of special interests by exposing large contributions; End corruption or the appearance of corruption; End conflicts of interest; Restore public trust in government; Elevate the level of debate and foster a deliberative democracy.
- Fungibility – Limit the role of Political Parties in campaigns; Eliminate “soft money” in campaigns (accomplished via BCRA<sup>16</sup>); Limit the role of Independent Expenditures in campaigns whether they be from 527s, PACs, Super PACs, 501(c) organizations or other special interests; Limit the role of corporations, labor unions and so-called wealthy fat cats; Eliminate “dark money” in campaigns; Reveal, expose and eliminate coordination

Few of these promises have been fulfilled; most of the federal reforms have failed on virtually every count and in foreseen and unforeseen ways. Campaigns are more expensive, less transparent, more negative than ever and the biggest players in the game are still corporations, labor unions, wealthy fat cats and, of course, the political parties. I don't suggest that the goals of the Reformers are not noble or do not have merit, only that current federal campaign finance laws are not even coming close to achieving them and in most cases the problems have worsened over the course of the century.

Rather than fulfilling the promise of reformers to limit the role of money in elections and add transparency to the system and to restore public trust in government, a century of campaign finance reform does almost exactly the opposite – it enables the role of money, fosters secrecy and promotes distrust. Additionally, the First Amendment is under attack both by Reformers who inadvertently privilege their reforms over free

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<sup>16</sup> In late November, 2015, a 3-judge panel was set to hear a Louisiana case challenging the constitutionality of BCRA's soft money ban. Scholar Richard Hasen predicts this case will eventually go to the Supreme Court. <https://mail.google.com/mail/u/0/#search/rhasen%40law.uci.edu/1514b229ae9c6e88>.

speech and by politicians who call for a constitutional amendment allowing Congress to control political speech. This chapter and the rest of this dissertation grapple with all of these issues including and especially who should regulate political speech.

The Reformers have demanded and Congress has passed 7 major campaign finance reform measures (for any number of reasons and motives) and many of these have been either found unconstitutional or have been abused and eroded over time. This can specifically be seen with the last two major campaign finance reforms, FECA and BCRA. Both were passed with great fanfare after major scandals brought public pressure for Congress to take action. And as will be described, the pattern repeats itself – a scandal brings public pressure from Reformers, who are then encouraged by the media which gathers public support for and puts pressure on Congress to “solve” the problem. With both FECA and BCRA, Congress passed sweeping legislation which was championed as the needed reform to resolve campaign finance woes.

Over the course of the century, there are discernible and interesting parallels and repeating patterns of concern as espoused by the Reformers. One of the interesting things about them is that the current day Reformers are seemingly unaware of the same concerns having been raised (and often legislated upon) previously.

Notwithstanding this, the Reformers have been on the offensive for over a century, pleading for their cause at every occasion and after every reform victory, always wanting more and never giving an inch in their ultimate quest for full public financing of elections. Gyrocopter Mailman Hess, whose exploits open this Chapter, captures the essence of the complaints of the reformers. In 1999, Gore Vidal said that, “To be sure, curing the evils of campaign finance will not solve all of America’s other

problems, but without such reform it is difficult to see how those other problems can even be addressed, much less dealt with.”<sup>17</sup> James K. Pollock noted, “But in spite of the great progress that has been made toward the elimination of the grosser forms of political corruption, there is still some secrecy and not a little suspicion surrounding the use of money in politics...Notwithstanding the existing laws, there is probably greater need for public attention and legislative action today than there has been at any time in the past.”<sup>18</sup> It should be noted that Pollock made his remarks in 1926 in the first ever book on campaign finance reform. The comments of Pollack in 1926, Vidal in 1999 and Hess in 2015, aptly sum up the gist of the crusade of the Reformers for an entire century.

After a century on offense, post-Citizens United, the Reformers have had to go on the defensive and at this point they are in full retreat. This can be seen in the ramping up of their rhetoric (“dark money” is the new term for money whose source is not disclosed), the 3200 mile, nation-wide walk of “Granny D,” Doris Haddock in 1999 to bring attention to the issue, in Harvard Law professor Lawrence Lessig setting up a Super PAC for the purpose of fighting and eliminating Super PACs, and, of course, the ill-fated flight of the Gyrocopter Mailman, though this was by far the most extreme action taken.

Ever since the Supreme Court upheld BCRA on “facial” grounds, the entire campaign finance regime has been under attack on “as-applied” grounds and a series of cases, culminating in Citizens United and McCutcheon, has, depending on one’s

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<sup>17</sup> Donnelly, David, Janice Fine and Ellen S. Miller, “Money and Politics,” Beacon Press, 1999, xi.

<sup>18</sup> Pollock, James K., Jr., *Party Campaign Funds*, Alfred A. Knopf, 1926.

point of view, demolished the foundation of a century of campaign finance reform or finally accepted the First Amendment at face value and determined that Congress has a conflict of interest in making the rules for how someone is elected to Congress. Let's explore the intellectual failures and each category in detail to set the stage for Chapter 3.

### **Enforcement/Prohibition**

Early 20<sup>th</sup> century reformer, Perry Belmont, and early 21<sup>st</sup> century reformer, Bradley Smith, both expressed concerns about the use of the criminal law to deal with campaign finance disputes. Belmont opined, "There seems to be very general confusion as between legislation to secure publicity of campaign expenditures and legislation to punish specific acts done in connection with an election, which acts are commonly known as corrupt practices,"<sup>19</sup> while Smith stated in his harsh commentary on the McConnell decision that in addition to having an "exhaustive list of provisions included in BCRA but not in prior law...BCRA then supplements these new, farther reaching provisions, with added criminal penalties absent from the 1974 law"<sup>20</sup>

Equality is never far from the concerns of the Reformers. "The relative importance of getting a level playing field among candidates and ensuring more popular democratic accountability"<sup>21</sup> and equalizing "the resources at the disposal of candidates by limiting the funds which may be spent on their behalf"<sup>22</sup> has been a driving goal of the Reformers for decades. Janice Fine laments the current imbalances in campaign

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<sup>19</sup> Belmont, Perry, "Return to Secret Party Funds," 1927, page xxi.

<sup>20</sup> Smith, Bradley A., "McConnell v. FEC: Ideology Trumps Reality, Pragmatism," *Election Law Journal*, Volume 3, Number 2, 2004 at page 348.

<sup>21</sup> Donnelly, David, Janice Fine and Ellen S. Miller, *Money and Politics*, Beacon Press, 1999, xv.

<sup>22</sup> Overacker, "*Presidential Campaign Funds*, Boston University Press, 1946, page 18.

resources but seeks lower contribution limits rather than higher limits and more disclosure because “mere documentation does not correct the imbalances cited above.”<sup>23</sup> “In order for this to happen, the role of small contributors must be strengthened by reducing the role of wealthy contributors, including wealthy individuals and large corporate interests.”<sup>24</sup> As will be discussed more fully later, the Supreme Court has spoken clearly on this issue saying, “The concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.”<sup>25</sup> Additionally, there is scant evidence that there are small donors out there just waiting to be asked to contribute to their favorite politician. In fact, Alan Abramowitz’s research tends to refute this.<sup>26</sup>

Reformers always lament the “obscene<sup>27</sup>” amounts of money in politics and offer campaign finance reform as a way to reduce the costs of campaigns. The Hatch Act was passed with such a promise and limited the parties to spending \$3,000,000 in the 1944 Presidential election and Overacker’s research shows that the Democrats spent almost double this limit and “the Republicans spent close to five times that sum. If its purpose was that of reducing expenditures, it likewise failed lamentably.”<sup>28</sup> Notwithstanding history, Janice Fine claims that full public financing of campaigns “will

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<sup>23</sup> Donnelly, David, Janice Fine and Ellen S. Miller, “Money and Politics,” Beacon Press, 1999, 14.

<sup>24</sup> *ibid.*, p. 67.

<sup>25</sup> *Buckley v Valeo*, 424 US at 48-49.

<sup>26</sup> Abramowitz, Alan, *The Disappearing Center: Engaged Citizens, Polarization and American Democracy*, Yale University Press, 2010.

<sup>27</sup> [http://www.huffingtonpost.com/peter-d-rosenstein/campaign-finance-reform\\_b\\_1187107.html](http://www.huffingtonpost.com/peter-d-rosenstein/campaign-finance-reform_b_1187107.html)

<sup>28</sup> Overacker, *Presidential Campaign Funds*, Boston University Press, 1946, page 35.

lower campaign spending.”<sup>29</sup> Ellen Weintraub cites a USA Today poll from October, 2008 indicating that 70% of respondents thought that, “\$2.4 billion was too much to spend on the 2008 presidential campaign.”<sup>30</sup> To her credit, she is quick to add that, “it is less clear how this is to be accomplished.”<sup>31</sup> Perhaps the bigger issue is the actual claim itself that there is too much money in campaigns. Who says there is too much money and how do they know? And how much is the right amount?

Both Louise Overacker and Bradley Smith express concerns over how the voters will be educated and informed if money is taken out of campaigns. Overacker, in her typical snarky style, noted that while voters may “prefer their “Boogie-Woogie” minus the politics may wish that both parties would spend less...campaigning in a constituency of 60,000,000 voters is necessarily an expensive business. The choice of the voter cannot, in the nature of things, be among men who he knows, but must be among artificial pictures of men whom he does not know. The making and selling of these pictures is the costly part of campaigning for the presidency.”<sup>32</sup> Smith notes essentially the same thing almost 60 years later when he says, “Because of a failure to include indexing for inflation, let alone population and income growth, contributions which, in purchasing power, would have been legal under the 1974 law had been made illegal.”<sup>33</sup>

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<sup>29</sup> Donnelly, David, Janice Fine and Ellen S. Miller, *Money and Politics*, Beacon Press, 1999, 27.

<sup>30</sup> Weintraub, Ellen and Jason K. Levine, “Campaign Finance and the 2008 Elections: How Small Change(s) Can Really Add Up,” *St. John’s Journal of Legal Commentary*, Vol 24, Ed. 2, page 468.

<sup>31</sup> *ibid.*, p. 468.

<sup>32</sup> Overacker, *Presidential Campaign Funds*, Boston University Press, 1946, page 4.

<sup>33</sup> Smith, Bradley A., “McConnell v. FEC: Ideology Trumps Reality, Pragmatism,” *Election Law Journal*, Volume 3, Number 2, 2004 at page 348.

In 2012, another record amount was spent and it is expected that this amount will be exceeded in 2016. While perhaps six billion dollars is a lot of money, in the context of a \$17 trillion annual GDP or a \$4 trillion annual federal budget, \$6 billion biennially on elections constitutes less than 1% of the government budget for just one of those years. It should likely be noted that whereas tax dollars are not often voluntarily given, 98% of all campaign dollars are.

Since the cost of nearly everything rises over time, does it not make sense that the cost of political advertising would also rise? How will lowering the cost of campaigns benefit democracy or help educate the voters. It's hard to argue that voters have too much political information or are too educated in how they vote; in fact, quite the opposite is true. Reformers never tell us how the voters will be educated if the campaigns and political parties do not advertise. Again, this constitutes an intellectual failure on the part of the Reformers to align and prioritize their goals and in many cases, as Lowenstein notes above, demonstrates a misunderstanding of democracy.

Some have suggested that if less money is spent, then campaigns will be less negative, but this has been refuted in the literature because with even less money to spend, candidates feel compelled to get the dirt out on their opponents with the limited funds they have. Furthermore, none of the advocates for decreased campaign spending advocates a smaller federal budget or a smaller GDP. This is relevant because studies have shown that over the last five decades that the federal budget has remained a consistent 20% of GDP and that campaign spending has been a consistent 1% of the

federal budget.<sup>34</sup> In other words, over time, the amount spent on elections has kept pace with the growth of the federal budget which in turn has kept pace with the growth of the overall economy. This is just another example of their incompatible, incomprehensible goals getting in the way of the real issues, which are corruption and transparency.

### **Transparency/Publicity**

Two noted reformers, President Theodore Roosevelt and Senator John McCain only became born-again reformers after getting caught in a campaign finance scandal. After Roosevelt's re-election in 1904, corporate "assessments" became publicly known, forcing Roosevelt to call for campaign finance reform in his 1905 State of the Union Speech and even calling for public financing of campaigns. Although this failed, it became a leading cry of reformers for the following century and the public outcry eventually led to the Tillman Act of 1907. Chapter 3 details how this law failed empirically. In the late 1980s, Senator John McCain (R-AZ) became embroiled in what became known as the "Keating Five" scandal in which 5 United States Senators were accused of essentially taking bribes from banker and financier Robert Keating. After being censured by the Senate for his conduct, McCain began sponsoring the eponymous campaign finance reform legislation that eventually passed almost a decade later, BCRA, commonly known as McCain-Feingold.

Both Louise Overacker and Ellen Weintraub, in their support of "Publicity" or "Disclosure," express how much better a regulation it is when it is voluntarily done and

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<sup>34</sup> Ansolabehere, Stephen, John M. de Figueiredo and James M. Snyder, Jr., "Why is there so Little Money in U.S. Politics?" *Journal of Economic Perspectives*, Volume 17, Number 1—Winter 2003—Pages 105–130.

voters are allowed to judge for themselves. Overacker states, “Once we have real publicity, the question of how much is “too much” may be safely taken out of the courts of law and left to courts of public opinion.”<sup>35</sup> Some 63 years later, Ellen Weintraub noted that, “in 2008, more than 450 federal races were run and more than 1600 authorized committees filed regular public disclosures with the Federal Elections Commission... (and)...every contribution or expenditure over \$200 was made available for inspection by the public, the media, and by the competing candidates, in real time...Moreover, candidates went above and beyond the law, disclosing information about small donors and large bundlers providing grist for analysis and insights about an election that motivated millions of Americans to donate their time and money.”<sup>36</sup>

Reformers like Janice Fine believe that only public financing can end “the conflicts of interest produced by accepting money from private sources.”<sup>37</sup> Louise Overacker and law professor Daniel Lowenstein politely challenge her assertions about how democracy works. Overacker states boldly (as usual) “that to bar expenditures by all such groups would seriously restrict the most priceless heritage and the strongest defense of democracy – freedom of discussion”<sup>38</sup> She continues, quoting CIO-PAC founder Sidney Hillman:

Organizations of men and women, united by a common interest, for the advancement of their own and the general welfare through political action are as old as our Nation. The most casual study of our history discloses that organizations of workers, like organizations of farmers

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<sup>35</sup> *ibid.*, p. 47.

<sup>36</sup> Weintraub, Ellen and Jason K. Levine, “Campaign Finance and the 2008 Elections: How Small Change(s) Can Really Add Up,” *St. John’s Journal of Legal Commentary*, Vol 24, Ed. 2, page 477.

<sup>37</sup> Donnelly, David, Janice Fine and Ellen S. Miller, “Money and Politics,” Beacon Press, 1999, 18.

<sup>38</sup> Overacker, “*Presidential Campaign Funds*, Boston University Press, 1946, page 68.

and businessmen, have long been concerned with and have actively participated in politics. The activity of such groups in shaping the course of their Government is essential to the functioning of our democracy.”<sup>39</sup>

Lowenstein suggests that Fine misunderstands James Madison and The Federalist No. 10:

Madison argued persuasively that the clash of public and private interests is inevitable in a republic...It is to be expected that private interests will deploy whatever resources are at hand to influence public policy. Of course corporations, unions, and other interests will use campaign contributions – and other measures far more potent than campaign contributions – to further their interests...Those who believe that politics should resemble a learned debate society may look askance at such activities; Madison will recognize them as symptoms not of democratic failure but of democracy itself.”<sup>40</sup>

Fine argues the other side of Madison, noting, “We prefer to listen to Madison when he directly addresses the central role of money in politics: ‘Who are to be the electors of federal representatives? Not the rich more than the poor; not the learned more than the ignorant; not the haughty heirs of distinguished names more than the humble sons of obscure and propitious fortune’.”<sup>41</sup> That this does not directly address money in politics but rather the role of voters is emblematic of the intellectual debate going on and my assertion above that rather than engage each other, the competing sides often talk past each other. We see this among and between the Reformers, the Courts, the Media, Academia as well as the political actors. Again, the intellectual failure is the failure to engage in a substantive debate about the issues that divide them.

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<sup>39</sup> *ibid.*, p. 68.

<sup>40</sup> Donnelly, David, Janice Fine and Ellen S. Miller, “Money and Politics,” Beacon Press, 1999, 78.

<sup>41</sup> *ibid.*, p. 91.

Removing all private money as a corrupting influence and having full public funding of campaigns has been another longstanding goal of Reformers. However, public funding has been rejected by both the voters, taxpayers and now the candidates themselves. Polling shows voters do not want taxpayer dollars spent on political campaigns and IRS records show that only about 8% of all who file taxes (about 140 million people per year) check the box to voluntarily donate to the Presidential Campaign Trust Fund. Daniel Lowenstein notes that the conflict of public and private interests is the essence of democracy, not the sign of an unhealthy one.<sup>42</sup> James Madison famously thought that a well constructed union intentionally pitted ambition against ambition in order to control the mischief of faction.<sup>43</sup> The real conflict of interest is Congress passing the laws governing its own elections, which is why scholars like Richard Hasen and others lament the deference shown to campaign finance laws and the low standard and threshold of evidence often required by the Supreme Court when the need for oversight is obvious. One can only imagine if Congress had the ability to fund their campaigns by merely casting a vote?

### **Fungibility**

Independent Expenditure spending has often been a target of reformers, whether by Overacker, FECA, BCRA or otherwise. Reformers hate it is because they believe it constitutes money laundering in that while the limit to a candidate's campaign may be capped, contributions to other entities are not and these entities can thus spend unlimited sums to promote the same candidate they had to give a limited amount to.

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<sup>42</sup> Donnelly, David, Janice Fine and Ellen S. Miller, "Money and Politics," Beacon Press, 1999, 78.

<sup>43</sup> Federalist 10 and 51.

Prior to BCRA, the unlimited contributions were made to the political parties and were called “soft money,” and though the source of these contributions was disclosed, how it was spent was not. Though BCRA banned soft money to the national parties, some state parties were still able to receive it. After the Citizens United and Speech Now decisions, although entities were again allowed to make unlimited contributions, they were still not allowed to make them to the political parties. Thus were born Super PACS and their evil twin cousin, the 501(c)(4) organizations and the term “dark money” replaced the old “soft money” but with a critical difference – whereas the source of soft money to political parties was disclosed, many contributions to Super PACs and 501(c)(4)s are not disclosed. This is where the issue of coordination comes in. The very term Independent Expenditure implies independence and lack of coordination, but it is widely known that candidates and their parties and their Super PACs and their 501(c)(4)s have found gaping loopholes in the laws and regulations and routinely coordinate their spending. This is done in a myriad of ways, whether it be casual conversation, overt cheating, releasing a press release containing strategy or a blog post with the same, hiring a former, long-time staffer to run the Super PAC, or, as Jeb Bush did in 2015, delay the formal announcement of his candidacy until 5 months after formation of the Super PAC which he actively and aggressively raised money for.

### **The Academic Literature**

Scholars overall do the best and most consistent job of tackling this overwhelming subject. However, most of the academic studies make one of two errors – either their focus is too narrow, looking at the effects of the last reform and running regression analysis on comparative fundraising and spending totals, or their narrative history is too micro-focused on the minutiae of the legislative struggles. In both cases,

what is missing is a bird's-eye-view of the century long project of campaign finance reform and the patterns of failure that repeat themselves repeatedly.

The twin premises of campaign finance reform, that money has a corrupting influence on politics and that there is too much money in politics, is supported by a century of anecdotal evidence. Since the post-Watergate reforms sought to reign in campaign spending, there has been an explosion of a lot of things, namely anecdotes, campaign spending and scholarly research on the issues involved.

The studies do a fine job in many regards and provide a lot of illuminating data on the entire electoral and policymaking process. They also do a fine job of tracking the trends in donations and expenditures, which allows one to grasp the larger picture of our campaign finance system. For example, Frank Sorauf's study has found that PACs give over 75% of their donations to incumbents in both parties, thus indicating their strategy as a legislative oriented one rather than an electoral one (Sorauf 1988).

The conventional wisdom is that money is evil and corrupts politicians and the system. However, the conventional wisdom is largely based on anecdotal evidence. But what if the conventional wisdom is not true? What does the research show? What does the academic community have to say about the campaign finance system and campaign finance reform? Generally, the academic literature does not back up the conventional wisdom. Money is certainly influential in political campaigns:

Money does effect the outcome of elections, money does provide some basis for legislative influence, and money does sometimes try to escape the structures of regulation. It does not, however, rule American politics with the power so many Americans imagine. Whether their fears and images are susceptible to counter arguments is by no means clear. Part of the problem is that the burden of proof has shifted. One apparently doesn't have to prove that money "buys" an election or a Congress. Since common sense and conventional wisdom do not yield, one is expected to

prove that it does not. That shift of presumption is perhaps the best indication of the strength and direction of pervasive public attitudes about money on American campaigns (Sorauf 1988, 326).

More than most of the other political actors, the Academics have taken an objective look at campaign finance reform and the claims, premises and promises of the Reformers. Not surprisingly, for the most part, they have found them wanting. Study after study has debunked the claims of corruption and have concluded that there are other far more compelling reasons for an elected official to vote the way they do: they believe in the issue, partisanship, ideology, the preferences of voters in their district, their desire for re-election and that the money followed the vote and not vice versa.

There is no single study which conclusively shows that parties or special interest groups use money to buy votes and/or to corrupt politicians. In fact, the vast weight of the scholarly evidence does not even back the central thesis of the reform movements: that money is corrupting. There are, however, some studies which do show a correlation between money and voting in very specific cases (for example, sugar subsidies, some defense contract votes) but the weight of the evidence moves in the opposite direction (Smith 1995). However, there is a study showing strong evidence of lobbyists buying access and thus obtaining stronger influence on agenda setting than the average citizen.<sup>44</sup>

Furthermore there is the constitutional issue of free speech. And lastly, not only is the premise of campaign finance reform faulty, but the campaign finance system is viewed in a vacuum, rather than in the larger context as one component in a system of

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<sup>44</sup> Smith, Daniel A., Josh Brodbeck and Matthew T. Harrigan, "Citizen and lobbyist access to Members of Congress: Who gets and who gives?" *Interest Groups & Advocacy* (2013) 2, 323–342. doi:10.1057/iga.2013.11; published online 3 September 2013.

free and fair elections and responsible government policymaking. Focusing only on how a political campaign is financed is too narrow in scope and does not take into account the other elements of electoral politics nor their implications for subsequent governance. Because of the exclusive focus on money when it may not be the key problem or goal, a holistic approach that views our electoral system in context has not been offered.

Additionally, most of the academic literature does not look at the totality of the campaign finance system but takes a specific topic for study. While most all of the literature cites the problems with each reform and the resulting unintended consequences, nobody challenges the underlying premises. Rather, they begin, perhaps unknowingly, with the underlying assumptions as a given and begin their research from that perspective.

And while incumbents, reformers and academics alike take note of and decry the rapidly increasing costs of campaigning, none relate it to the equally expanding size, scope and cost of the federal government (this is not so much of a criticism of the latter as it is making the point that one leads to the other). There is one notable exception here, the 2002 article whose title asks and answers a very interesting question, “Why is There So Little Money in Politics?”<sup>45</sup>

Perhaps it is just the zeitgeist, or spirit of the times, but the issue always seems to be what type of reforms to have rather than whether to have reforms. As Thomas Mann notes in his 2003 article on academics involved with campaign finance reform, the

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<sup>45</sup> Ansolabehere, Stephen, John M. de Figueiredo and James M. Snyder, Jr., “Why is there so Little Money in U.S. Politics?” *Journal of Economic Perspectives*, Volume 17, Number 1—Winter 2003—Pages 105–130.

political scientists have largely been at odds with the reform community, at least in the early days (Mann, 2003).

The social sciences love to gather empirical data and in campaign finance reform, data is gathered as to how much money is given and by whom and to whom and what percentage is from this or that PAC, party or profession. This gives us a great indicator of all of those things. However, what it is missing is the value added that social science can provide in terms of making a normative argument regarding success or failure of the enterprise (Flyvbjerg 2001). I argue that the entire project of campaign finance reform has failed from its inception but that most scholars have merely measured what has happened before or after the reforms are passed and the impact of the reforms.

Where the academic literature provides its best data however, is in its historical tracing of the century long efforts at reform, culminating in the post-Watergate era explosion of reforms. Each idea is tracked and traced and shown how it has been turned on its head with unintended consequences thereby leading to an additional cycle of reforms and regulations (Sorauf 1988). Thus, two findings of the academic research are the unintended consequences and the failure of the reforms to achieve their purposes. And this has been true for a very long time.

But in spite of the great progress that has been made toward the elimination of the grosser forms of political corruption, there is still some secrecy and not a little suspicion surrounding the use of money in politics...Notwithstanding the existing laws, there is probably greater need for public attention and legislative action today than there has been at any time in the past." "The use of money in this country has been

characterized as “shocking” and “excessive” and ours has been branded as a dollar democracy.<sup>46</sup>

Though there has been an explosion in literature in recent years, there were also some early studies. One of the first was by Professor Louis Overacker of Wellesley College, *Presidential Campaign Funds*, in 1946. In this early study of the financing of the 1944 Presidential campaign, based on a lecture series, she focuses on presidential fundraising, the Hatch Act and Union contributions. She opens her study with a great historical note, “Since the days when Athenian candidates curried favor with voters by dinners and banquets, the problem of who pays our political bills, and why, has risen to plague statesmen, politicians and political scientists (Overacker 1946, 3). Her thesis is “that a sound program of legislative control should be firmly grounded upon the principle of publicity, and that the shift in emphasis from publicity to prohibition has been most unfortunate,” (Overacker 1946, 11). Later she notes something that proves prescient going forward, “Our American passion for laying down rules without adequate machinery for carrying them out has been pointed out frequently” (Overacker 1946, 25). This “passion” was true regarding the reforms prior to her writing and has been even more so in the years since, something that is the theme and driving force of this dissertation.

Other early scholars were Alexander Heard, who wrote *The Cost of Democracy*, and his protégé Herbert Alexander, who served as consultants to the Senate Rules Committee in 1956. Later, Vanderbilt University “appointed Herbert Alexander to direct a research division that would analyze existing data and disseminate that data to the

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<sup>46</sup> The first quotes were by James K. Pollock, Jr., a professor in the University Of Michigan Department Of Political Science in the first book on Campaign Finance Reform in 1926. The second quote was from Professor Louise Overacker of Wellesley College in her 1932 book on Campaign Finance Reform.

public through the media. The committee was renamed the Citizen's Research Foundation" (Zelizer 2002, 80). "Disclosure was the committee's most desired goal... (but)...the data were notoriously unreliable" (Zelizer 2002, 80). In the 1960s, President Kennedy established the Commission on Campaign Costs and hired Heard and Alexander. Their report "said it was essential to minimize campaign costs and establish an independent commission to publish data...they dismissed spending limits and instead supported full disclosure" (Zelizer 2002, 81). Commissions and discussion reigned throughout the 1960s before legislative action was finally taken in the 1970s; this and other legislation will be the focus of Chapter 3.

The academic literature is quite extensive in its review of the campaign finance system post-Buckley. For example, PACs have been studied extensively, as have political parties, presidential campaigns, soft money and Independent Expenditures, to name a few areas. Most of the literature is topical and if it offers suggestions or reforms, they are usually tactical or strategic in nature. They call for the strengthening of parties or the elimination of soft money or increasing the individual contribution limit to keep pace with inflation (Sorauf 1988; Malbin 1984; Sorauf 1984) - a piecemeal approach in keeping with the nature of the legislation. Often the suggested reform relates to the topic studied and the problem identified without seeing how the entire system fits together or what role each component plays in the whole. Scholar after scholar has looked out over the landscape - the campaign finance system, the regulatory scheme, the attempts at reform and the like and few have dared to state the obvious - that the experiment has failed. Every cycle some pundit, scholar or politician declares that that cycle has been the most expensive and corrupt yet. Most pundits agree and the calls for

reform grow louder and stronger. However, these reforms take the piecemeal approach and do not correlate with the findings of the academic literature.

Since Buckley, the two driving principles of the campaign finance system have been strict disclosure laws and that "money and speech are equivalent in the political arena" (Ornstein 1997, 5). Although no serious law was passed until BCRA in 2002, campaign finance has continued to be an issue and the system in place has been substantially altered by further court decisions and administrative rulings by the FEC itself. Congress has taken up some type of legislation almost every year to deal with some aspect of the campaign finance system.

Most everyone agrees that there are problems with the current campaign finance system. However, while there is general agreement with this proposition, there is not agreement upon what direction to take to reform it. The current system's two pillars of disclosure and free speech are under attack.

"The unanticipated consequences bemoaned by regulators are merely adaptations of the regulated. From the point of view of the regulated, "unanticipated" consequences are merely adaptations to regulation that the legislature was not able to predict and head off. They are the norm in all regulation, whether of campaign finance or environmental hazards or television programming" (Sorauf, 1995, 188).

However, the major finding in the academic research is the inability to prove the central thesis of the entire reform movement, that is, that money is a corrupting influence in politics or that there is too much money in politics. All of the studies allude to the perception of corruption and the damage that can be caused by this and all

feature anecdotal evidence of abuses which lead to reforms. However, not one study has conclusively shown that money is a corrupting influence on political campaigns.

Larry Sabato states the case quite well for PACs:

Another example of such pseudo, or false, corruption can be found in the controversy over political action committees. PACs are both natural and inevitable in a free, pluralist democracy. In fact, the vibrancy and health of a democracy depend in good part on the flourishing of interest groups and associations among its citizenry. This is not to defend PACs in all circumstances; indeed, on occasion they have engaged in coercion of employees and have undertaken barely concealed bribery to secure a legislator's vote. But these specific acts, and the guilty parties, not PACs themselves ought to be castigated (Sabato 1989, 4).

Michael J. Malbin calls it a logical fallacy to assume that contributions lead directly to favorable votes, but that the media, the reformers and even some PAC representatives believe that it does (Malbin 1984). Malbin says that this "argument suffers from both a lack of evidence and faulty causal logic. Two simple logical errors recur frequently" (Malbin 1984, 247). The first error is the confusion of correlation (Common Cause had published a list of contributions and favorable votes) with causation and the second is in accepting a more complex and indirect explanation for a phenomenon rather than a simpler and more direct explanation. Then Democrat Whip and future Speaker of the House Thomas Foley said, "Money follows votes and not the other way around" (ibid.). Self-serving perhaps, but the academic research backs it up.

M. Margaret Conway and Joanne Connor Greene conclude that "insufficient research exists to permit a definitive answer to the question" (Conway and Greene 1995, 166) of whether campaign contributions influence legislative votes. The studies are conflicting with some studies indicating a correlation and others suggesting that donations are rarely related to votes.

Richard A. Smith's research concurs with that of Conway and Greene in that it finds conflicting studies. He studied 35 studies of which a few found virtually no correlation, a few more that found statistically significant relationships between votes and money and many more that had mixed results. Smith says that possible reasons for the disparity are that lobbyists and PACs want access, that there may be some correlation in 12 specific situations, that perhaps the influence occurs in an earlier aspect of the legislation, or that there are methodological flaws in the studies. Smith concludes that, "the real story...seems to be that the campaign contributions of interest groups have far less influence than commonly thought, although even the scholarly work suffers from methodological problems and data inadequacies that make firm conclusions difficult" (Smith 1995, 91).

What these studies do not do, however, is to link all of the data together and to draw what, to me, is an obvious conclusion. An entire century of campaign finance reform is based on the premise that money is a corrupting influence in politics. The studies indicate that this premise is unable to be proved. However, the studies never suggest that perhaps the premise is wrong and that alternative ones should be pursued. For example, Malbin has called for unlimited public financing and for the government to "reclaim" airtime from TV stations to give to candidates (Malbin 1984). Frank Sorauf likes the 1974 FECA amendments and seeks to overturn the Buckley decision to end Independent Expenditures (Sorauf 1988).

Frank Sorauf has found two reasons why legislators do not anticipate consequences and why the major actors have had such an easy time adapting. "First, money is a fluid, flexible, mobile resource...It is not easy to contain and...it flows to

points of least restraint in the system. Second, there is a flourishing market for campaign money. Moneyed contributors believe their contributions yield important access and influence or that it might do so. In the media-based campaigns of today, candidates need those contributions badly" (Sorauf, 1995,188).

The law of unintended consequences has taken over and the Reformers complain that the cost of campaigns is more expensive than ever. However, everything is more expensive than ever including the price of government, which rises faster than the rate of inflation each and every year. It should thus surprise no one that those paying for an ever increasing cost of government and those being regulated by this government will be willing to expend resources to influence the process. The \$4 billion spent on campaigns in the two-year 1997/1998-election cycle was less than 1/2 of 1% of the government budget for one year. In 2012, it was about the same percentage of the federal budget even though over \$7 billion was spent.

While some studies have been time-bound and studied reactions to reforms, various other scholars have done historical overviews of aspects of campaign finance reform. Law Professor Adam Winkler has specifically studied the role of corporations in campaigns, especially in the early 20th century. The standard view of corporations has been that their ban has been "motivated by the desire to limit the power and influence of big business (Winkler 2004, 871). There are even Supreme Court cases decided on this theory, specifically *Federal Election Commission v. Beaumont* (539 US 146, 2003).

However, Winkler challenges this prevailing view, instead arguing that the ban was based upon the notion that corporate political donations were "corrupt because they amounted to a misuse of "other people's money": corporate executives were

opportunistically misappropriating the company owner's money to purchase legislation benefitting the executives themselves" (Winkler 2004, 873) and not due to "concerns about excessive corporate power" (Winkler 2004, 937). Additionally, Winkler notes that a Supreme Court case "unhesitatingly equated unions and corporations, contending that the rule for one applied to the other. This linkage, treating unions and corporations as equivalent entities with nearly identical limits and rights, continues to the present day" (Winkler 2004, 931).

Historian Julian Zelizer has written extensively and in minute detail about how the FECA reforms came about in the 1970s. He gets so caught up in the minutiae that he seems to wonder at times whether the Watergate scandal was the catalyst for the reforms of the 1970s, and instead tries to trace the reforms back to "focusing events" (Zelizer 2004, 9) starting in the 1950s stating that "Although most accounts stress Watergate, this study suggests that a more complex intersection of events culminated in reform (Zelizer, 2003, 74). However, he contradicts himself about scandals driving reform on two occasions. At one point, he suggests that no reforms were passed in the 1950s because "there was no major scandal to keep it at the forefront of public attention (Zelizer 2002, 80) and later says that "without a scandal as shocking as Watergate, the coalition may not have been able to secure legislative support for reform (Zelizer 2002, 99).

Additionally, Zelizer seems puzzled about how reforms were passed when they had little public support and huge political opposition (Zelizer 2002). He claims that campaign finance reform had lukewarm public support (Zelizer 2002, 74) but Rick Hasen claims that "the public, for a time, became intensely interested in the issue, with

well over 25 percent of all mail sent to members of Congress in the post-Watergate period on campaign finance, far more than on any other issue” (Hasen, 2010, 7). Zelizer is even more perplexed that, “after a decade under the new laws, citizens still felt that campaign finance was corrupt” and is curious as to “why reform failed to end public distrust of campaigns” (Zelizer 2002, 73, 75). Although his studies are detailed and thorough, he is so caught up in the minutiae of every jot and tittle of his story line, he seems to have missed the bigger picture including that a healthy distrust of all things political is as, if not more, American than apple pie. One thing Zelizer does get correct, however, is the bottom line. “The reforms did not achieve all their objectives. Campaign costs continued to rise...(and)...by forcing politicians to seek smaller contributions from a broader base of supporters, moreover, fund-raising became even more important than in previous decades” (Zelizer 2002, 104).

Raymond La Raja suggests that “scandal plays a modest role in shaping political reforms” (La Raja 2008, 81). This despite the Tillman Act of 1907 coming on the heels of the Insurance Scandals of 1904, the Publicity Act of 1925 coming on the heels of the Teapot Dome scandal, FECA coming on the heels of Watergate and the first and only presidential resignation, and BCRA coming on the heels of the Enron scandal of late 2001. He claims that scandal “occasionally provides a useful catalyst...(and)... the role of scandal is to cast the rival party as corrupt” (La Raja 2008, 82). Rather, La Raja finds the source of reform in “strategic partisanship in pursuit of electoral advantage” (La Raja 2008, 81). Given that partisanship and electoral advantage are about all that go on in Washington DC, I find his claims, though enticing, to fall short in their explanatory power.

Where La Raja excels, however, is in explaining the overwhelming need for campaign funds and the vital roles that political parties play in this process. He correctly notes that “the current regulatory regime emerged from a wave of anticorruption and antipartisan reforms during the Progressive Era (La Raja 2008, 18). He also correctly predicts that BCRA as amended by *FEC v. Wisconsin Right to Life* would result in ideological organizations using their “free-speech rights to compete with candidates and political parties for the attention of voters, creating a maelstrom of political messages that are not likely to make it easier for voters to choose candidates” (La Raja 2008, 237). Little did he know as he wrote this in 2008 that the *Citizens United*, *Speech Now* and *McCutcheon* cases were to come in the following years, thus causing his prediction to come true even before it might have otherwise.

While campaign finance reform is clearly an enduring issue and “one of the most vexing problems in American democracy” (Zelizer 2002, 73), it is also clear that politicians only act out of self-interest and that while they play around with campaign finance reform issues to gain partisan and electoral advantages, they also only get down to business and pass legislation when the public is aroused by scandal and/or they have a legitimate fear of losing their jobs – and this often happens during a scandal. This will be covered in more detail in subsequent chapters.

### **Conclusion**

While the flight of the gyrocopter mailman may be the most outlandish ploy for attention by campaign finance reformers, it is not entirely inconsistent with their “exaggerations and over-promising”<sup>47</sup> or their “hyperbole...(or)...its shaky

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<sup>47</sup> Mann, Thomas, “Money and Politics,” Beacon Press, 1999, 75-76. .

foundation”<sup>48</sup> in pushing their agenda. Just a few years ago, an 89 year old woman, Doris Haddock, known as “Granny D”<sup>49</sup>, made a 3200 mile country-wide trek to bring attention to the need for campaign finance reform and in 2014, Larry Lessig formed his own Super PAC for the purpose of fighting Super PACs. In fact, campaign finance reform has a long history in this country and an equally long history of over-promising and under-delivering. This is borne out in the research of the academics, empirically (which will be the topic of Chapter 3) but also there has been considerable pushback from the Supreme Court, generally on First Amendment grounds (which will be one of the topics in Chapter 4).

The history of campaign finance reform is the story of failed attempt after failed attempt to regulate the flow of money to power. It is a story of good intentions: reformers seeking a clean and corruption free system of government, interests seeking to influence the way government regulates their livelihood. It is also a story of bad intentions: one party seeking advantage over another, incumbents protecting their perks and power, interests seeking unfair advantage over a competitor or over the consumer. More importantly, it is a story of intrigue, the maneuvering of the various effected institutions to protect their interests and to gain advantage. These institutional players are large and small, powerful and not so powerful. They include but are not limited to the political parties, incumbents, corporations, unions, the media, reform groups, politicians, and increasingly as the century wore on, the courts, special interest groups and PACs.

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<sup>48</sup> Lowenstein, Daniel, “Money and Politics,” Beacon Press, 1999,

<sup>49</sup> <https://www.google.com/search?q=grandma+who+walked+for+campaign+finance+reform&ie=utf-8&oe=utf-8>

The story of campaign finance reform has now come full circle. Beginning from a deregulated State of Nature and then progressing to various levels of comprehensive reforms over the last century, we have now seen it begin to crumble from within and become a dismantled and disjointed mess. Due to the adaptations of entrepreneurial political actors, ineffective laws, lack of public support for public financing (first by the voters, then by the taxpayers and ultimately by the candidates themselves) and the Supreme Court's consistent rulings in favor of the First Amendment (albeit with inconsistent rationales), we have all but returned to a deregulated State of Nature.

While the Reformers have been pretty consistent in their goals, they have also been consistently immune to and/or unaware of the lessons a century of failure have provided; they have also been immune to the consistent findings of the scholars that campaign contributions are not necessarily corrupting and immune to the consistent opinions of the Supreme Court upholding the First Amendment right to free speech. Thus, there are serious reasons to doubt the accuracy of their diagnosis: campaigns are not only more expensive than ever, but the myriad of inconsistent, incommensurate, incoherent and incompatible laws and regulations makes following the money a difficult and often impossible task which ends up harming rather than helping voter competence and thus has a negative impact on efficacy and trust.

This chapter has traced the intellectual failures of campaign finance reform and leads directly into the next chapter which will focus in on the empirical failures of campaign finance reform. Like the other political actors, the reformers have their own agenda and to give them some credit, they have single-mindedly pursued it for a century. Their firm belief is that private money is the corrupting influence in politics and

so must be limited or banned. This belief permeates campaign finance reform and represents the driving theory of all reforms of the last century.

In fact, the entire campaign finance reform project has been driven from the beginning by the diagnosis by the Reformers as money being the problem with politics. Though largely led by Democrats, there have been several prominent Republicans who have pushed for campaign finance reform, namely Senator John McCain (R-AZ), author of the eponymous McCain-Feingold legislation, Chris Shays (R-CT), author of the companion legislation in the House and John Gardner, the founder of Common Cause and former Republican Congressman from New York.

Generally speaking, the Reformers have focused on eliminating money from politics and have been largely anti-party. From the beginning they have been adamant about limiting and controlling these two aspects of politics but at this point have reached an intellectual dead-end. In the aftermath of Citizens United, Speech Now, McCutcheon, et. al., the Reformers and their reform movement have reached their natural and foreseeable intellectual dead-end – with every perceived problem and every reform, the Reformers have been gamed by politicians and all other political actors who have thwarted their every reform and every goal. After a century of playing offense, the Reformers are now clearly on the defensive. Chapter 3 will explore in detail the empirical failures of execution which are the repercussions of the intellectual failures discussed in this chapter. Chapter 4 will explore the theoretical failures which begat the intellectual failures discussed in this chapter and the empirical failures detailed in the next chapter.

## CHAPTER 3 EMPIRICAL PATTERNS OF FAILURE

### **Introduction**

Chapters 1 and 2 began building the case for the century long patterns of failure that have plagued campaign finance reform policies, suggesting that there are both failures of execution and failures of definition. Chapter 1 laid out the structure of my argument of the three horizontal failures – intellectual, empirical and theoretical and the vertical failures under each (see Table 1-1 on page 37). Chapter 2 examined the intellectual failures of definition as illustrated by the premises and promises of the Reformers and an examination of the federal legislation in the academic literature. The Reformers had legitimate concerns about the role of money in politics and ushered campaign finance reform legislation through Congress on multiple occasions but these reforms were compromised by incompatible goals, pushback by the Supreme Court on constitutional grounds, exploitation by political actors and most academic studies failed to validate the critical assumptions of the Reformers.

Having discussed the intellectual patterns of failure, I now turn to the empirical patterns of failure and demonstrate how campaign finance reforms have failed in execution. More specifically, this chapter will explain in detail what the political actors did in response to the legislation, regulation and litigation on campaign finance reform and in the creative methods they have used to adapt and to stay one step ahead of the Reformers, the Courts and their political opponents.

This chapter is exceptionally long not only because it is complicated but in order to demonstrate the profound failures of execution of campaign finance reform on the federal level, I have had to break the empirical failures into distinct analytical categories

and then discuss the failures of each of the seven major pieces of federal campaign finance legislation in each of the categories.<sup>1</sup> The categories of analysis discussed in this chapter are Enforcement, Fungibility and Transparency. The Unintended Consequences will be discussed in Chapter 4. Though these are distinct categories, they are so naturally intertwined that many of the failures overlap, complicate or implicate all categories.

For example, to the extent transparency has been a primary goal of reform (and a good and necessary one), the laws and regulations meant to compliment and work interactively with the transparency laws often times complicated and undermined them and actually served to defeat the transparency sought. Thus, we see countless examples of the empirical failure of execution of these laws. This also further demonstrates the intellectual failures of definition discussed earlier and the lack of clarity, vision or focus by those passing laws and regulations; on the other hand, perhaps it is intentional in some cases. Both possibilities will be explored.

That the laws often work at cross purposes with each other (whether intentional or not) is undeniable and in the pages that follow, I will discuss the successes and failures of campaign finance reform and lay out the case for the empirical failure of campaign finance reform on the federal level as we seek to answer the major research question asked – What Went Wrong?

Campaign finance lawyer, Bob Bauer notes:

The debate is stuck, and one reason is that a number of interested observers are dedicated to fighting the same arguments heard since the

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<sup>1</sup> The Tillman Act of 1907, Publicity Acts of 1910 and 1911, Federal Corrupt Practices Act of 1925, Hatch Act of 1939, Smith-Connally Act of 1943, Federal Elections Campaign Act of 1971 and 1974 (FECA) and Bipartisan Campaign Reform Act of 2002 (BCRA).

1970s. Political spending is to be reduced and the prohibition on corporate spending restored. Independent spending is to be curtailed because some of it is suspect, gutted by disreputable, if not invariably illegal, forms of coordination. Political discourse is being poisoned by attack advertising. And, of course, there is too much “dark money” and disclosure law should be strengthened against it.<sup>2</sup>

One of the critical assumptions of this dissertation is that 100 years into campaign finance reform, the patterns of failure are so repetitive, that if we keep doing what we have been doing, in another 50-100 years we will be having the same discussions about solving the same problems.

In this chapter, I will give a brief history of campaign finance reform, define the 4 distinct categories of empirical failure of execution, then analyze each of the 7 major pieces of federal campaign finance reform legislation in each category. Finally, I will summarize my findings of the intellectual and empirical failures in order to segue directly into Chapter 4, which discusses the theoretical failures.

### **Brief History of Campaign Finance Reform**

The history of campaign finance in American politics can be divided into three distinct time periods: before 1907, 1907 to the 1970s, and the modern era which essentially begins with the Watergate scandal. Campaigns were essentially unregulated prior to 1907, resembling a State of Nature. There were no limits on sources or amounts, no disclosure and no accountability. The political parties selected their candidates, assessed them and their personal and corporate supporters and funded the campaigns. The role of money in politics became an issue during the Progressive Era as corporate, banking and railroad money flooded into races. During the 1896 and 1900

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<sup>2</sup> Bauer, Robert, “Disclosure in a 21<sup>st</sup> Century Reform Program,” February 2, 2015, MoreSoftMoneyHardLaw.com.

presidential campaigns, Mark Hanna raised millions of dollars for the campaigns of Republican nominee William McKinley, sums that had previously been unheard of. Some corporations donated over \$50,000 to the national political parties. All of this came to light during and after the 1904 election of Theodore Roosevelt.

In 1907, America moved from an unregulated to a regulated environment. The Progressive Era ushered in many electoral reforms including the first federal attempt to regulate campaign finances in 1907 with the Tillman Act. Within 18 years, three major attempts at campaign finance reform had been passed by Congress. Each was inspired by scandal or other political motivation, each was passed by a reluctant Congress (and at least one was “inspired” by public pressure), each encompassed more regulation than its predecessor did and each was essentially ineffective.

The first three direct pieces of legislation were the Tillman Act in 1907 (which prohibited direct corporate contributions to federal campaigns), the Publicity Acts of 1910 and 1911 (which created the first limits and disclosure rules), and the Federal Corrupt Practices Act of 1925 (which updated the earlier laws). During the World War II era, Congress passed the Hatch Act (which limited parties to \$3 million in expenditures and individuals to \$5000 in contributions) and the Smith-Connally Act (which prohibited direct labor union contributions to federal campaigns) and these too were less than effective, chiefly due to the ease in getting around the laws.

While attempts at campaign finance regulation were erratic and ineffective for the 67 years between the Tillman Act and the Watergate scandal, the country and nature of campaigns was changing dramatically. Among the most notable are these four – the 17th amendment allowed for the direct election of US Senators, creating more elections;

the 19th Amendment gave women the right to vote, essentially doubling the size of the electorate that candidates needed to communicate with; the advent of radio brought about the first generation of mass communication; and, finally, the advent of television, brought about the second generation of mass communication. As these factors developed, costs rose accordingly, campaigns became more candidate centered as candidates gained the ability to appeal to voters directly via mass communication and consequently parties declined somewhat in prominence.

In the 1960s, public financing was raised as a possibility, but Democrats, led by Senator Albert Gore Sr., were opposed as it did not control spending but only added tax dollars on top of private spending. Republicans were opposed because it spent tax dollars on campaigns and would place huge sums in the hands of party leaders. However, incumbents were worried about the increase in campaign spending because they feared not being able to raise the money to compete and also feared having to run against a wealthy opponent who could outspend them in media advertising. Democrats were more fearful than Republicans as they were being outraised and outspent by the better organized Republican Party. In the 1968 presidential campaign, the Republicans more than doubled Democratic expenditures (Corrado 1997).

The multiple factors noted above affected the costs of campaigning and drove the debate about what to do about it, but as in several of the earlier reforms, it took a scandal to force change. The Watergate scandal not only forced the resignation of a president, but ushered in the modern regulatory era with the passage of the Federal Election Campaign Act (FECA), the most comprehensive federal legislation ever. However, due to language allowing for expedited judicial review, the new law was

largely undermined by the landmark *Buckley v. Valeo*<sup>3</sup> case, which held major provisions of the legislation to be unconstitutional even before it could take effect. Following FECA was a proliferation of regulation from the Federal Election Commission, litigation at the Supreme Court and a more sophisticated manipulation of the new laws by political actors unlike any of the previous manipulations. While disclosure and transparency of campaign finance was clearly a major success, even this lessened over time.

The final and most recent comprehensive campaign finance reform legislation, the Bipartisan Campaign Reform Act (BCRA), was passed in 2002 following the Enron scandal and, like FECA before it, got an expedited review from the courts and was upheld as “facially”<sup>4</sup> constitutional in *McConnell v FEC*.<sup>5</sup> Where FECA was undermined immediately by the Supreme Court, BCRA has been systematically undermined over the last decade in two significant ways.

First, an unintended consequence of BCRA was the proliferation of non-party and non-candidate organizations, namely so-called 527 organizations, 501(c)(4) organizations and more recently, Super PACs.<sup>6</sup> Second, a series of Supreme Court cases held provision after provision of BCRA unconstitutional on “as-applied”<sup>7</sup> challenges. Cases like *Wisconsin Right to Life*, *Davis*, *Citizens United* and *McCutcheon*

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<sup>3</sup> 424 U.S. 1 (1976).

<sup>4</sup> Facially constitutional means that on its face, the written language of BCRA did not violate the constitutional guarantee of free speech.

<sup>5</sup> 540 U.S. 93 (2003).

<sup>6</sup> This was addressed earlier in the “Devastating Legacy” article.

<sup>7</sup> While a statute could be constitutional on its face, when applied in an actual situation, it may violate the First Amendment. *McConnell* invited such challenges and they have come in droves.

have systematically dismantled significant parts of FECA and BCRA, leaving the foundation of campaign finance reform on shaky grounds. In late November, 2015, scholar Richard Hasen reported on his Election Law Blog that, “a federal district court held that the Louisiana GOP, under the guidance of tenacious campaign finance lawyer Jim Bopp, has the right to have a challenge to McCain-Feingold’s soft money ban applied to state parties through a three-judge court.”<sup>8</sup> Hasen predicts that this case<sup>9</sup> will wind up in the Supreme Court.

Let’s follow the money and see where it leads. As each of the seven major pieces of federal legislation is reviewed, I will explain a little more about what was in each reform and how it subsequently failed empirically.

### **Categories of Analysis of Empirical Failures of Execution**

With few exceptions (which will be covered later), all seven major federal pieces of campaign finance reform legislation have quickly failed to achieve their stated goals and almost always for similar reasons. Because the failures have been so prolific for a full century, I have had to break them down into four analytically distinct categories of failures of execution all of which separately and cumulatively demonstrate the empirical failure of campaign finance reform. There are failures of enforcement, fungibility, transparency and unintended consequences (which are covered in Chapter 4). There is some overlap in the categories in that some problems of enforcement lead to lack of transparency; the fungibility of money allows for a lack of transparency which adds to the problem of enforcement. It’s a vicious circle and just one of many reasons for the continuing patterns of failure.

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<sup>8</sup> <https://mail.google.com/mail/u/0/#search/rhasen%40law.uci.edu/1514b229ae9c6e88>

<sup>9</sup> Case 1:15-cv-01241-CRC Document 24 Filed 11/25/15 Page 1 of 19.

The four analytically distinct categories of failures of execution are:

- **ENFORCEMENT.** The enforcement failures are generally because the legislation is toothless or lacks the means to force compliance or contains enormous loopholes (sometimes both, and sometimes purposely written into the law). The lack of enforcement powers written into the law encouraged and enabled the lack of compliance and exacerbated the gaming of the system. At other times, enforcement measures have been written into the law but have either been unenforceable, easy to get around or have allowed entrepreneurial political actors look elsewhere. That this feature – few or no enforcement mechanisms or powers – is not present in other laws passed by the same congressmen makes one wonder if this is mere negligence or is purposeful. This idea will be explored more in the conclusion.
- **FUNGIBILITY.** The fungibility failures stem from the nature of money: one dollar is the same as another dollar. While fungibility is a close cousin of transparency, it is different: transparency is about *the money we can see* whereas fungibility is about *the money we cannot see*. The fact that dollars are fungible allows not only flexibility but allows money to flow without being seen or tracked. Because of the fungibility of money, something apparently not anticipated by the reformers (but entirely understood by all those being regulated, i.e., the politicians and the special interests, corporations, unions and fat cats), the very regulations meant to regulate and follow the flow of money to power actually allow it to flow and go elsewhere. Though the techniques have changed over the last 100 years, the concept is the same – get the campaign contribution to the desired candidate. In recent years, the fungibility issue has exploded post BCRA and post Citizens United with the proliferation of PACs, Super PACs, 527s and 501(c)(4) organizations. A great example of the fungibility issue are the candidates for President in 2016. To name but one, Jeb Bush has a PAC, a Super PAC, a 501(c)(4) and a campaign account. Dollars will be legally funneled to each of these four entities and we may or may not find out about some of them and we may or may not find out before the election.
- **TRANSPARENCY.** The transparency failures occur because political actors don't like anyone to know what they are up to. Early reformers used the term Publicity and the term disclosure is often used, but they are both interchangeable with the term transparency. Disclosure laws are often referred to as "Who gave it, Who got it" laws because the goal is, as Overacker put it, is to find out "who is paying our political bills – and why."<sup>10</sup> The transparency failures often overlap with the others but are its own category because in the event the limit laws are complied with and the dollars going to a particular committee are reported under the law, there is no guarantee that anyone will be able to track those dollars to see where they went or where they actually came from. Under Tillman, no reporting was required; in the Publicity Act, the first reports were due *after* the election rather

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<sup>10</sup> Overacker, Louise, *Presidential Campaign Funds*, Boston University Press, page 45.

than before and were not available to the public among other problems. In the modern era, although transparency has been the most successful reform, there are still massive failures - the forms are difficult to read or filed with different reporting agencies (IRS, FEC, FCC, the states), have inconsistent filing dates or in the case of the US Senate, are filed by paper and have to be converted to digital format which can take weeks or months. More recently, due to the myriad of laws, regulations and political entities, the dollars are more difficult to follow, even in the age of the Internet. And, of course, as mentioned above, post BCRA there is more and more money that does not have to be disclosed and this has earned the name "dark money," (as opposed to "soft money" which was disclosed because it was donated to a political party), but it was still not known where it was spent.

- **UNINTENDED CONSEQUENCES.**- The key ingredient in an unintended consequence, unlike the other three categories where the laws empirically failed in execution, was that the unintended consequences were either entirely unforeseen or are the ironic outcomes to ill-conceived and poorly crafted reforms or Supreme Court decisions. The unintended consequences are almost too numerous to list and each of the main three categories has its own set of unintended consequences. Political actors have demonstrated that they will not be deterred by obstacles put in their path. Probably the two best examples of unintended consequences are public financing which has been rejected by both the voters, taxpayers and now the candidates and Super PACs which have inadvertently created the political equality and competitive races that Reformers have always sought. The Unintended Consequences will be covered in Chapter 4.

### **Execution Failure #1 – Enforcement**

Unfortunately, however, in 1940 we abandoned the path of Publicity for the characteristically American trail of Prohibition. This step was taken without discussion of the important change in public policy which it involved...The result is a futile legislative gesture which has not limited expenditures and which lessens the effectiveness of publicity provisions.

–Louise Overacker  
*Presidential Campaign Funds*

### **The Tillman Act of 1907**

In the 1904 presidential race, Democrat nominee Alton B. Parker charged Republican nominee Theodore Roosevelt with accepting contributions from corporations and wealthy "fat cats" who sought special privileges and favors. Although Roosevelt denied the charges, after the campaign was over, several corporations

admitted that they had given large contributions (Corrado 1997; Ornstein 1997). When it was revealed that large insurance corporations had financed his campaign and some had given up to \$50,000 each, Congress was moved to do something.

This lead directly to several things. First, Roosevelt called for campaign finance reform in his State of the Union Speech in 1905. Second, the first grassroots organization was formed demanding campaign finance reform, the National Publicity Law Organization (NPLO). For example, the NPLO sought a law demanding the disclosure of party contributions and expenses. Others sought to cap the donations of wealthy individuals. President Theodore Roosevelt even suggested in 1907 that public financing be considered. Congress disagreed and took no action. Although the idea of regulating campaign money had been around for a while and a similar bill had been filed in a previous Congress, it took the crisis of the 1904 campaign, a grassroots lobbying organization and public pressure for Congress to act (Corrado 1997). This is part of a pattern which emerges over the course of the century.

Though bills failed in 1905 and 1906, one did pass in 1907. The Tillman Act banned corporations and national banks from making direct campaign contributions to any federal campaign. Despite this, corporate involvement in politics was not even slowed; there was no compliance because there were no enforcement methods written into the law. In lieu of cash donations, corporations gave in-kind gifts (office space, free travel, etc.), placed candidates on the corporate payroll, and reimbursed officers, directors and employees who donated in their own name. "Some corporate executives simply defied the law, viewing it much the same way most Americans would soon view

prohibition: as something that turned reasonable and non-corrupting activity – in this case, political activism – into a crime”<sup>11</sup>.

The Tillman Act, named for South Carolina Democrat Ben “Pitchfork” Tillman (who ironically, was not only not a Progressive, but who was motivated by his hatred of President Roosevelt), contained no enforcement mechanism or penalties and compliance was essentially nil. While Roosevelt became the first to call for the public financing of campaigns, this never passed, was never seriously considered, but nevertheless became a rallying cry for all reformers ever since and finally came to fruition in a limited way in presidential elections in 1976 via the Federal Election Campaign Act (Corrado 1997). Several states and cities have also enacted their own public financing laws and many of these have worked better than the federal attempt.

### **The Publicity Acts of 1910 and 1911**

These Acts were very partisan, ended up backfiring and contained no enforcement or compliance measures. During passage of the Tillman Act, Perry Belmont helped to organize the National Publicity Law Organization<sup>12</sup> in 1906 and it was this organization, which “kept the question before Congress and the country, and was largely responsible for the passage of the acts of 1910 and 1911”<sup>13</sup> (Overacker 1932, 235). In 1910, public pressure resulted in the passage by the Republican Congress of

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<sup>11</sup> Smith, Bradley A., *Unfree Speech – The Folly of Campaign Finance Reform*, Princeton University Press, 2001, page 24.

<sup>12</sup> In an utterly uninteresting mystery which shall never be solved, there is academic confusion on the real name of this organization with Pollock calling it the National Publicity Law Association, Overacker calling it the National Publicity Bill Organization and Corrado calling it the National Publicity Law Organization. Sheesh, you make the call!

<sup>13</sup> Overacker, Louise, *Money in Elections*, The Macmillan Company, 1932, page 235.

the Federal Corrupt Practices Act (commonly known as the Publicity Bill) just prior to the November elections.

However, the Democrats regained control of the House and picked up seats in the Senate in the November election. They and the reformers sought to strengthen the original 1910 Publicity Act. In an attempt to kill the bill, Republicans in the House and the Senate offered poison pill amendments to strengthen the reforms. However, these tactics backfired. The 1911 Publicity Act extended the disclosure requirements to House and Senate races before and after the elections as well as capping expenditures of campaigns to \$5000 for a House seat and \$10,000 for a Senate seat.

But, as Larry Sabato explains, “the law sounded better than it read” (Sabato, 1996, 12). The ban on corporate giving had loopholes, the candidate’s only requirement as to spending limits was what he actually knew about and the enforcement mechanisms were virtually nonexistent and there was no authority to compel compliance (Smith 2001; Sabato 1996).

### **The Federal Corrupt Practices Act of 1925**

The Teapot Dome scandal of the Harding administration (involving gifts for oil leases in a nonelection year) led to amendments in the Federal Corrupt Practices Act in 1925. These essentially reinforced and tightened the 1911 amendments and now covered the type of activity involved in Teapot Dome, spending caps were raised to \$25,000 for Senate races and remained at \$5000 for the House. “On February 28, 1925, Congress passed what was then known as the Postal Salary Increase Act, Title III of which is called the ‘Federal Corrupt Practices Act, 1925’” (Pollock 1926, 185). This act was the most comprehensive attempt yet dealing with campaign finance reform. It

attempted to consolidate all previous reforms under one law and to expand the coverage in three major areas.

First, it required disclosure every year (not just election years) and called for quarterly reports in addition to those just before and after the election. Second, it increased the limit that could be spent in campaigns and created a formula whereby various states of differing sizes were not all held to the same standard amount. Third, it removed primaries from the elections it sought to regulate (Mutch 1988; Thayer 1973; Overacker 1932; Pollock 1926). However, because there were few enforcement mechanisms put into place, the law was essentially ignored. "To be sure, anyone, even a political amateur, could get around the limits and disclosure requirements of the feeble old Corrupt Practices Act of 1925."<sup>14</sup>

With women now eligible to vote, the electorate was now substantially larger. Notwithstanding the increased spending limits, this was still not enough to offset the additional costs of campaigning brought about by the advent of radio and by the direct election of Senators. Additionally, the laws were ineffective because the wealthy "fat cats" gave money through friends and relatives and corporations still gave through their individual officers and directors through the ruse of bonuses and raises.

There are two distinct patterns to the enforcement mechanisms of the early campaign finance laws. First, they created criminal sanctions for violations. In each successive set of laws, there was a consistent attempt to establish a hierarchy of punishments, ranging from \$5000 fines for corporate or political committee violations, \$1000 fines for individual violations and up to a year in jail for persons convicted. By

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<sup>14</sup> Jackson, Brooks, *Broken Promise: Why the Federal Election Commission Failed*, Priority Press Publications, 1990, page 2.

1925, this same framework existed, but only for “willful” violations, the fine could be \$10,000 and the individual convicted could spend up to two years in jail. Thus, candidates just made sure they were unaware of the expenditures.

The second pattern was that these enforcement mechanisms were seldom if ever used. Although two Republican members were excluded from office in 1927 for violation of the expenditure laws, this occurred in the aftermath of the first elections conducted after the 1925 FCPA. This was the first and only time candidates were ever punished under this act (Corrado 1997). Frank Sorauf states “there were no prosecutions under the 1925 law from its origins to its repeal in 1971” (Goidel 1999, 23) when it was superseded by the Federal Election Campaign Act.

It should be noted that while there was certainly no enthusiasm for enforcing these laws, they were crafted in such a way that they were easy enough to get around without violating them, at least explicitly. Overacker notes two major problems of enforcement. First, “since no uniformity of reports is required, it is extremely difficult to assemble comparable data...(and)...secondly, no public officer is vested with the responsibility of examining the records and reporting violations to the Attorney General.”<sup>15</sup>

### **The Hatch Act of 1940**

In 1939 and 1940, the Hatch Act expanded the number of employees covered by the Pendleton Act<sup>16</sup> and prohibited their political activity and their solicitation of campaign contributions, thus removing another major source of party funding. “The

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<sup>15</sup> Overacker, Louise, *Presidential Campaign Funds*, Boston University Press, 1946, page 23.

<sup>16</sup> The Pendleton Act of 1883 had created the civil service system and had prohibited a small number of federal employees from soliciting contributions and stopped the forced political assessments which had funded the parties.

Hatch Act limitations were legislative step-children of dubious parentage,<sup>17</sup> in that they were three amendments tacked on to other legislation, similar to the FCPA in 1925. It capped individual contributions to candidates or parties at \$5000 per year and capped party contributions and spending at \$3 Million. The third provision “made it unlawful for persons or corporations to aid candidates for federal elective office by purchasing ‘goods, commodities, advertising or articles of any kind.’ This was directed at certain novel money-raising devices which had figured in the financing of the democratic campaign of 1936.”<sup>18</sup> “The Democratic Party published the Book of the Democratic Convention 1936, which featured lavish (and expensive) advertisements from corporations. The Party sold the book, and a number of large purchasers were corporations.”<sup>19</sup> The Republicans demanded an investigation, claiming the book was in violation of the FCPA, but the Hatch Act banned them in the future and there were no prosecutions.

The new Hatch Act laws were routinely ignored because “the loosely-drawn, ambiguously worded provisions made the task not too difficult...(and)...the gaps in the law were as wide as a barn door.”<sup>20</sup> There was no debate in the House on the amendments and they were accepted by the Senate and passed without either any changes or any debate.

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<sup>17</sup> Overacker, Louise, *Presidential Campaign Funds*, Boston University Press, 1946, page 27.

<sup>18</sup> *ibid.*, p. 28.

<sup>19</sup> Hayward, Allison R., “The Michigan Auto Dealers Prosecution,” *Election Law Journal*, volume 9, Number 3, 2010, page 179.

<sup>20</sup> Overacker, Louise, *Presidential Campaign Funds*, Boston University Press, 1946, page 30.

“Thus proceeding by the rule of by guess and by gosh, we launched a totally new attack upon the problem of campaign funds, applying a totally different formula, with no consideration of its merits or probable consequences.”<sup>21</sup> In addition, Overacker notes that, “the provision is nullified in the very wording of the Act itself which expressly excepts contributions to state and local political committees.”<sup>22</sup> She concludes that “the financing of the 1944 campaign affords additional evidence that the present limitations have little more than nuisance value.”<sup>23</sup>

Overacker is unsparing in her criticism. Her characteristically snarky comments demonstrate the overlap between the categories of enforcement, transparency, and fungibility:

Earlier regulations of presidential campaign funds were firmly grounded upon the principle of publicity, although without adequate machinery for carrying out the principle. In 1940, we embarked upon a characteristically American program of prohibition, with little thought to enforcement provisions. Experience with those limitations indicates that they do not limit and that their chief effect is to obscure pertinent information, thus giving us even less publicity than we had before. By trying to dash furiously in opposite directions we have arrived nowhere.<sup>24</sup>

She concludes “It is not without its touch of irony that in the first presidential campaign in which we attempted to place a ceiling upon expenditures, more money was spent than in any previous election.”<sup>25</sup> The \$3,000,000 limit was completely arbitrary, was absolutely ignored and unenforced, and did not take into account either the increasing size of the electorate or that in 1928 the Democratic National Committee had

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<sup>21</sup> *ibid.*, p. 27.

<sup>22</sup> *ibid.*, p. 44.

<sup>23</sup> *ibid.*, p. 40.

<sup>24</sup> *ibid.*, p. 25.

<sup>25</sup> *ibid.*, p. 35.

spent over \$5,000,000 or that in 1936 the Republican National Committee had spent over \$8,000,000.

### **The Smith-Connally Act of 1943**

As with the Hatch Act previously, it was not until after the elections that union political activity became public. The situation with labor unions is quite interesting and prescient in several ways and was investigated by numerous House and Senate investigations, just as the Hatch Act was. It is quite instructive on several levels. First, rather than merely defying the law as had been routinely done by political actors since Tillman, the Unions complied. Second, they legally and creatively created a way to participate politically when the clear intent of the law was to shut them down. This begins a pattern we still see even today and confirms another critical assumption of this dissertation – that political actors will not be deterred in doing what they seek to do.

Prior to 1936, trade union political contributions were small and sporadic and even occasionally even went to the Socialist Party. However, by 1936, labor contributed almost \$800,000 to the re-election efforts of President Roosevelt and “labor’s role in the financing of the second Roosevelt campaign was widely publicized and discussed before the election and afterward.”<sup>26</sup> “Labor’s enemies bided their time until the situation was propitious for drastic action. This opportunity came in the summer of 1943 when a wave of anti-labor feeling carried the Smith-Connally Anti-Strike Act through Congress.”<sup>27</sup>

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<sup>26</sup> *ibid.*, p. 51.

<sup>27</sup> *ibid.*, p. 55.

Republicans and southern Democrats teamed up to pass over a Roosevelt veto the Smith-Connally Act which banned labor union contributions to campaigns. “The circumstances under which the limitation upon trade union contributions was included in this Act are discouragingly reminiscent of the inclusion of campaign fund ceilings in the Hatch Act. Again the provisions were not germane to the main purpose of the bill which, purportedly at least, was an emergency measure to prevent strikes in war time.”<sup>28</sup> This was a direct response to the growing influence of organized labor within the Democratic Party and within the New Deal coalition. Originally enacted as a war measure, it was renewed in 1947 as part of the Taft-Hartley Act when the Republicans took control of the Congress (Corrado 1997; Ornstein 1997).

As a direct result of the Smith-Connally Act, the Congress of Industrial Organizations (CIO) responded by creating a mechanism to stay involved in the 1944 presidential race. The CIO’s political arm created the first political action committee, which it called CIO-PAC. Using this vehicle, labor unions were able to participate in federal campaigns and in the 1944 elections, raising and spending approximately \$1.2 million, most of which went to help FDR win his fourth term.

First, the language of the legislation only prohibited contributions “*in connection with any election.*”<sup>29</sup> Thus, unions chose not to consider pre-nomination direct union expenditures as contributions but rather as educational expenditures. Almost \$500,000 was spent directly by unions before the July 23 nomination of FDR. After July 23, union funds were “frozen” and PAC funds were spent, again almost \$500,000. These were

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<sup>28</sup> *ibid.*, p. 56.

<sup>29</sup> *ibid.*, p. 60. Italics in the original.

voluntary contributions of union members and were kept in separate segregated accounts and even though “its separate identity was scrupulously preserved, it is hard to escape the conclusion that it was the “*alter ego*” of the organization which inspired it...by the simple device of creating such a nominally independent but closely related organization the trade unions had brought their political activities within the prohibitions of the Smith-Connally Act. One may well ask, of what use the prohibition?”<sup>30</sup>

Perhaps even more interesting is what the unions did *not* do. They were innovative enough to find the loopholes in the Smith-Connally Act and use union funds in the primaries and PAC funds in the general election. But what they did *not* do was to argue “that money spent *directly* by the unions and not given to candidates or parties was not a contribution in the strict sense of the word and, therefore, that the unions could have spent an unlimited amount *directly* even during the campaign itself.”<sup>31</sup> Of course, today we call such expenditures Independent Expenditures and they are an everyday occurrence in modern campaigns, having been specifically and repeatedly held to be constitutionally protected free speech in, among other Supreme Court cases, Buckley, Colorado I and most recently in Citizens United.

The other innovation was the first Political Action Committee. They were both novel at the time and as the Smith-Connally Act was passed specifically by a Republican Congress to curb the influence of unions, the unions and their leaders erred on the side of caution and only proceeded with the PAC and not the Independent Expenditures.

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<sup>30</sup> *ibid.*, p. 62. Italics in the original.

<sup>31</sup> *ibid.*, p. 60. Italics in the original.

As always, Overacker is ahead of the curve as she notes, “the point, however, is both highly important and highly controversial, for if *direct* expenditures of trade unions are not “contributions” within the meaning of the Act, neither are *direct* expenditures of corporations.”<sup>32</sup> In the 1940s, as we have repeatedly seen, the laws were “clumsily drawn,” of “nuisance value,” “failed noble experiments,” or “have gaps in the law as wide as a barn door.” Overacker was savvy and prescient, the political actors savvy and innovative and as years went by the patterns repetitive. In the case of the Smith-Connally Act, “In spite of the sweeping prohibition...the clumsily drawn provision, even when added to the limitations of the Hatch Act, presented no barrier to trade unions bent upon throwing their full weight into the scales on the side of their chosen candidates. The 1944 election may well go down in history as a victory for PAC as well as F.D.R.”<sup>33</sup>

Overacker sums it up nicely and succinctly:

Our experience with the Hatch Act and Smith-Connally Acts demonstrates conclusively that present limitations do not limit and present prohibitions do not prohibit. Moreover, they tend to break down the effectiveness of the publicity which should be the guiding principle of any regulatory program... limitations are bound to defeat their own purpose by breaking down publicity, driving organizations underground, and facilitating evasions...the Hatch Act ceilings which were designed to limit expenditures tended to decentralize the collection and distribution of funds, thus making overall limitation impossible. The prohibitions of the Smith-Connally Act have had essentially the same effect so far as trade union contributions are concerned... limitations are bound to defeat the very purpose they are designed to achieve.<sup>34</sup>

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<sup>32</sup> *ibid.*, p. 60. Italics in the original.

<sup>33</sup> *ibid.*, p. 57.

<sup>34</sup> *ibid.*, p. 65.

Julian Zelizer, writing over five decades later, agreed with Overacker's analysis and forecast. "During the post-World War II era, the Progressive Era laws failed to eliminate the four underlying factors that generated the strong incentives for candidates to seek private money... These four factors – weak parties, rising campaign costs, limited public pressure for reform and the constitutional protection of free speech – shaped campaign finance,"<sup>35</sup> for the period following the New Deal. However, as the 1960s progressed, several interdependent forces recognized the failure of earlier reform legislation and forged an uneasy alliance for reform, led by organized labor regarding the regulation of PACs and reformers on the issue of disclosure. "As a result, tensions over campaign finance reached a boiling point when President Nixon began his second term in the office."<sup>36</sup>

### **The Federal Election Campaign Acts of 1971 and 1974**

In 1971 Congress passed the Federal Election Campaign Act (FECA). This act addressed two of the concerns and loopholes in previous legislation. First, it set limits on how much a person could contribute to their own campaign and how much a campaign could spend on media. This clearly stands out as the first incumbency protection act. "On observing the many incumbent-protection devices embedded in congressional institutions, Mayhew suggests that, 'if a group of planners sat down and tried to design a pair of American national assemblies with the goal of serving members interests year in and year out, they could be hard pressed to improve on what exists.'"<sup>37</sup>

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<sup>35</sup> Zelizer, Julian, "Seeds of Cynicism: The Struggle over Campaign Finance, 1956-1974," *The Journal of Policy History*, Vol. 14, No. 1, 2002, page 77.

<sup>36</sup> *ibid.*

<sup>37</sup> Schickler, Eric, *Disjointed Pluralism: Institutional Innovation and the Development of the U.S. Congress*, Princeton University Press, 2001, page 7.

There will be more on this topic later, but incumbents begin with tremendous advantages, one of which is Name Identification. If a challenger cannot fund their race or buy TV time, this enhances the advantage of the incumbent.

The second aspect of FECA imposed disclosure requirements on candidates and political parties. Ironically, Nixon was partially done in during the Watergate scandal by the very disclosure laws he signed. FECA also set up a tax check off system to be used to subsidize presidential elections but it was not scheduled to go into effect until 1976, based on the veto threat of President Nixon (Corrado 1997). This act did little to stem the growth in campaign spending.

President Nixon set up his own reelection campaign separate from the party apparatus and not only took illegal corporate contributions but accepted over \$2.5 million from one wealthy donor and was widely seen as having intimidated many other contributors. Additionally, as the new 1971 FECA disclosure requirements did not take effect until April of 1972, every effort was made to raise these sums prior to that date in order to avoid full disclosure (Sorauf 1988). As the Watergate scandal unfolded, the role of money in politics was being more scrutinized than ever. Politicians in both parties were effected, reformers were aghast, the public was outraged and the system was in crisis.

The Watergate scandal not only forced a president from office for the first time in American history, but the crisis created an opportunity and a need to revisit the American campaign finance system. In 1974, Congress passed amendments to the 1971 FECA but in reality these new amendments constituted "the most sweeping set of campaign finance law changes ever adopted in the United States, if not the world"

(Malbin, 1984, 7). Ironically, “the House passed legislation on August 8 by a vote of 355-48 hours before President Nixon resigned from office. The bill included contribution and spending limits, publicly financed presidential elections, and a part-time independent commission.”<sup>38</sup> The final bill was eventually passed in the fall and President Ford reluctantly signed it into law on October 15, 1974.

The 1974 FECA amendments accomplished the following:

- Individuals & Candidates - limited individual contributions to federal candidates to \$1000 per election and a cumulative total of \$25,000 per year; limited candidate contributions to their own campaigns; limited Independent Expenditures by individuals to \$1000; limited candidate expenditures to get elected.
- PACs – codified PACs; allowed federal contractors to form PACs; limited PAC contributions to \$5000 per candidate per election, with no cumulative limit.
- Parties - limited party expenditures to \$10,00 per candidate for the House in general elections, \$20,000 or two cents per eligible voter, whichever was greater, for the Senate in general elections, and two cents per voter in the presidential general election.
- Presidential Campaigns - established matching funds of up to \$250 for presidential candidates in primary elections; established flat grants to pay for the conventions and the presidential general election campaigns for the Democrats and the Republicans and proportional post-election grants to qualified candidates of minor parties; required major party candidates who accept flat grants for general elections to reject private financing and limit their expenditures to the amount of the grant.
- Administrative - created the Federal Election Commission (FEC), an independent, six-member enforcement body; closed loopholes in the Federal Corrupt Practices Act of 1925 and required disclosure and limited candidates to one campaign committee. Strengthened disclosure and closed previous legal loopholes by requiring any federal candidate to establish a single central campaign committee through which all contributions and expenditures would have to be reported. (Malbin 1984, 7, 8).

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<sup>38</sup> Zelizer, Julian, “Seeds of Cynicism: The Struggle over Campaign Finance, 1956-1974,” *The Journal of Policy History*, Vol. 14, No. 1, 2002, page 102.

However, as we have seen with each of the five previous pieces of campaign finance legislation, the passage of reform was not only not the end of the story, but rather the beginning of the new round of political actors figuring out ways to exploit the new system, frustrating the goals of reform and the reformers and running into the requirements of the First Amendment and its right of free speech. From this point forward, the Supreme Court has played an ever-increasing role in thwarting the aims of reformers although, as we will learn in the next chapter, its doctrine has not been without its own inconsistencies. Nevertheless, campaign finance reform becomes far more complex at this point of the story up to and including the present day.

Prior to this new set of reforms going into effect, they were significantly altered by a major Supreme Court decision. On January 30, 1976, the Supreme Court issued the landmark *Buckley v. Valeo*<sup>39</sup> case and overturned major portions of the 1974 legislation declaring them to be violations of the First Amendment's guarantee of free speech. Overturned were limits on campaign expenditures, limits on Independent Expenditures and limits on what an individual may contribute to his own campaign and the organizational format of the independent Federal Election Commission was struck down as unconstitutional for failure of separation of powers. Upheld were the disclosure requirements, public funding of presidential elections and contribution limits due to concerns about quid pro quo corruption.

*Buckley* had the effect of bifurcating the holistic FECA, upholding contribution limits as necessary to avoid corruption or the appearance thereof but upending expenditure limits as an unconstitutional abridgement of free speech. This bifurcation,

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<sup>39</sup> 424 U.S. 1 (1976).

though grounded on the Supreme Court's standard of review of protected speech (expenditures having greater First Amendment protection than contributions and thus a higher constitutional standard for the government to demonstrate in order to regulate) was controversial not only among the Justices in the Buckley decision itself, but with the media, pundits and scholars immediately afterwards and continues to be controversial today.

In 1976 and again in 1979, minor amendments were made to this new regulatory scheme, the most significant of which were those which, in an effort to enhance the diminished role of political parties, allowed unlimited expenditures by state and local parties for grassroots and party building activities and for collateral materials for presidential campaigns (Corrado 1997; Sorauf 1988; Malbin 1984). This and judicial and administrative rulings allowed for what became known as "soft money." Over time, PACs proliferated, as did Independent Expenditures and a new phenomenon called "bundling." Just as the most comprehensive reforms in history went into effect, they began being pulled apart.

Since Buckley, the two driving principles of the campaign finance system have been strict disclosure laws and that "money and speech are equivalent in the political arena" (Ornstein 1997, 5). While there have been subsequent legislative, administrative and judicial interpretations, the combination of the 1974 FECA amendments and the 1976 Buckley v. Valeo decision still form the foundation for the modern campaign finance system in effect today and "the Court has never overruled any part of Buckley."<sup>40</sup>

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<sup>40</sup> Hasen, Richard L., "The Nine Lives of Buckley," *Legal Studies Paper No. 2010-15*, page 25.

Notwithstanding this, other aspects of FECA have been exploited. Today the foundation of the campaign finance reform movement is on shaky ground and the reformers playing defense for the first time in a century, including for the first time on the once non-controversial issue of disclosure. Before getting to that however, let's now take a closer look at the empirical failures, unintended consequences and ironies that manifested themselves in the wake of FECA.

Ironically, PACs, once seen as a reform mechanism, became controversial. The codification of PACs merely formalized what had been going on since the 1940s when labor crated them by necessity to legally comply with the Smith-Connally and Taft Hartley Acts. "Campaign costs continued to rise, while wealthy citizens and congressional candidates could spend as much as they wanted on campaigns. The growth of PACs indicated to many reformers that private interests continued to dominate politics through contributions. Candidates were as desperately in need of private money as ever before, and PACs are a bountiful source. By forcing politicians to seek smaller contributions from a broader base of supporters, moreover, fundraising became even more important than in previous decades."<sup>41</sup> By the 1990s, reformers were gunning for PACs and their elimination were once a part of what eventually became known as BCRA (commonly known as McCain-Feingold). The reform coalition was regretting one of their critical compromises, "such as the failure to place PAC regulation at the top of their agenda."<sup>42</sup> Among the problems Reformers developed with

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<sup>41</sup> *ibid.*, p. 104.

<sup>42</sup> *ibid.*, p. 104.

PACs was the reliance candidates developed upon them as well as the reliance on money from outside of their district.

### **Independent Expenditures**

Due to the Buckley ruling, Independent Expenditures by non-party, non-candidate entities were allowed and proliferated. This defeated one of the key goals of FECA, which was to limit expenditures as well as contributions. Independent Expenditures have grown and proliferated over the decades, first by PACs (as corporations finally adapted and found ways to legally get corporate money into campaigns) and then by political parties as they set up “firewalls” between campaigns and their in-house staff in order to bypass the FECA limits on how much they could give to their nominees in aid of their election. One of the enduring goals of the Reformers and of campaign finance reform (and not entirely without reason as will be discussed in Chapter 4) was to diminish the power and the role of political parties (as well as special interests, including corporations, unions and wealthy fat cats). Independent Expenditures allowed them back in the game and a Supreme Court decision (commonly referred to as Colorado I) validated the First Amendment rights of political parties to spend independently on behalf of their nominees in addition to the statutory amounts allowed by FECA to be given directly to candidates.

### **Soft money**

Created by a series of administrative rulings by the FEC in order to clarify what political parties could and could not do, the creation of soft money (to be distinguished from so-called “hard money,” which are the source and limitation amounts codified by FECA and “dark money,” which is the post-Citizens United term for totally undisclosed contributions) was another way that the monetary limits of FECA were defeated. Soft

money are unlimited contributions directly to the parties which are then used to help the candidates. Though they are disclosed in the Party disclosure reports, there is no way to know exactly where those same dollars were spent. Parties were slow to realize the potential of soft money but over the 1980s and 1990s as campaign costs continued to rise, the Presidential Matching Funds became relatively lesser vis-à-vis the overall cost of campaigns, and the innovative adaptations of the political actors, soft money and its elimination replaced PACs as the main target of what became McCain-Feingold in 2002. There was no such thing as soft money in 1974, no record of it in 1982, \$11.6 million reported in 1984, over \$100 million in 1994 and over \$200 million in 1996 and 1998.

### **Bundling**

This was another simple, but brilliant and innovative way to get around FECA monetary limitations. Famously perfected by Ellen Malcolm of Emily's List, the concept is simple. A PAC gives a candidate its \$5000 check along with as many other checks as possible from individual PAC members for any amount up to the \$2700 limitation. When done correctly, one PAC can deliver well over \$50,000 to one candidate at one event and there is no question that the candidate is both extremely grateful as well as extremely knowledgeable about the origination and source of the funds. Though the Reformers and especially the editors of the New York Times have railed against bundling, it has only proliferated over time and the media has had to satisfy itself in the presidential elections (especially in 2004 and 2008) with the "voluntary" disclosure by the general election nominees of their list of bundlers. This is another instance of the overlapping of enforcement, fungibility and transparency issues manifesting themselves in one creative adaptation and exploitation of the statutes.

## Federal Election Commission

The FEC was reinstated in 1976 after being struck down by *Buckley v. Valeo* as being unconstitutional. Although enforcement was better than it had ever been before due to the new requirement of one committee per candidate, thereby closing the gaping loophole that had existed since the Publicity Act and that Overacker famously railed against, the FEC was slow and was intentionally emasculated over time by the very Congress which created it. Rather than being toothless and without enforcement mechanisms as previous reforms were, the newly created independent entity was hamstrung in another manner. The regulatory board was set up with an even number of regulators in order to ensure tie votes and was created to require 3 Democrats and 3 Republicans at any given time. This has resulted in Democratic presidents being forced to appoint conservative Republican members and vice versa in order to maintain the partisan balance.

But this only begins to scratch the surface of the problems with the FEC. Once seen as one of the most significant reforms borne of Watergate and envisioned as an independent enforcement watchdog, Brooks Jackson states it bluntly: “why isn’t the watchdog barking?...the FEC has failed. It has neither the will nor the means to deter wanton violators, who sometimes ridicule openly the commission’s weakness...more and more politicians have come to view these fines not as a deterrent but simply as another, modest, cost of doing business.”<sup>43</sup> A perfect example of both of these complaints comes from former Congressman Tony Coelho (D-CA), who as head of the Democratic Congressional Campaign Committee bluntly declared in 1986, “Do away

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<sup>43</sup> Jackson, Brooks, *Broken Promise: Why the Federal Election Commission Failed*, Priority Press Publications, 1990, page 1.

with the whole damn thing. It's a farce what happens. It's used for cover when you want it, and you abuse it when you want to. The public is not benefitting from the damn thing at all."<sup>44</sup>

Brooks Jackson identifies at least six separate reasons for the FEC's failure and why the watchdog is not barking: missing investigations, cronyism, hostile lawmakers, faulty priorities, suppression of information and inadequate budget (Jackson 1990). While the FEC staff includes many lawyers and financial auditors, it has few investigators and actually eliminated several employees in investigative positions because, "They made the commissioners particularly nervous when it came to investigating people who happened to be incumbents."<sup>45</sup> This is because of the cozy monopoly created by the parties in only having six commissioners and requiring three of each party. "Congress wants more than statutory balance between Republicans and Democrats on the commission – Congress wants the right kind of Republicans and Democrats."<sup>46</sup>

"Even when it wanted to be independent, the commission was faced with the stark fact that some of those it investigated controlled its lifeline to the Treasury. After one investigation of a fellow incumbent, House Administration Committee Chairman Wayne Hayes (D-Ohio) thundered, "If you don't fire the employees involved, I'll cut the guts out of your budget...If you can't control this staff you've got, we'll do it for you."<sup>47</sup> As it happened, the charges were false, but the allegations were made anonymously.

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<sup>44</sup> *ibid.*, p. 37.

<sup>45</sup> *ibid.*, p. 8.

<sup>46</sup> *ibid.*, p. 10.

<sup>47</sup> *ibid.*, p. 12.

Thus, Congress amended the law to prevent the FEC from acting on an anonymous complaint; now the FEC can't act unless a complaint is signed and notarized. "This protects innocent incumbents from embarrassing publicity, but it also requires the commission to turn a deaf ear to some detailed allegations of illegality....In 1979, Congress stripped the commission of authority to audit candidates except for cause."<sup>48</sup>

Along the same lines as this obvious cronyism is their faulty priorities. "The commission has consistently taken an unrelentingly strict line on minor violations and an astonishingly relaxed attitude about big ones. For example, it would routinely insist that candidates return corporate donations as small as \$10 or \$25 from small business owners unaware of the law,"<sup>49</sup> but allowed a dozen Democratic incumbents, including Majority Leader (and later Speaker) Jim Wright to keep nearly \$75,000 in illegal corporate contributions. At the time, it was the largest corporate donation case since Watergate. Additionally, the FEC has a habit of ignoring abuses reported by the press, but compounds this by taking steps to make it more difficult for the press to even report abuses it uncovers. In one case, it actually subpoenaed "all confidential story proposals by investigative reporters seeking grants from a nonprofit group to pursue stories about abuses of money in politics."<sup>50</sup>

This not only constitutes intimidation but creates a "chilling effect" on those attempting to exercise their First Amendment rights. Sadly, in the realm of campaign finance reform, there are too many examples to list of incumbents and their cronies intimidating citizens and creating a chilling effect not only of the media but of regular

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<sup>48</sup> *ibid.*, p. 12-13.

<sup>49</sup> *ibid.*, p. 14.

<sup>50</sup> *ibid.*, p. 15.

citizens and political opponents. To add insult to injury, Congress controls the purse strings of the FEC as well as being able to direct some of the budget money. For example, not only can Congress cut the FEC budget, but it can direct it to audit presidential campaigns that obtain public funding. This has the intended dual effect of keeping the FEC underfunded and understaffed but also assuring that the staff it has is focused on an  $n = 1$  (presidential campaigns) rather than the 535 campaigns for the House and the Senate.

A personal example I had with the FEC is instructive and telling about the incompetence, slowness and arrogance of the FEC. In the early 1990s, I was the Political Director and Legal Counsel for the Republican Party of Florida. I received a Request for Production of Documents from the FEC. Not only was this for the 1988 Presidential campaign, but it was specifically for George H.W. Bush's primary campaign from 1987-1988 and focused on a list of volunteers from a random campaign event Bush attended in Florida. On behalf of the Party, I filed a Motion to Dismiss due to the running of the Statute of Limitations on something 3-4 years old. Not only did the FEC not accept this Motion, but they declared that they had "waived" the Statute of Limitations in this case. Fortunately for my sanity, I left the Party before the conclusion of this case so I do not know the final result but I can state with certainty that I have never before or since heard of a party to litigation (as opposed, of course, to a judge) waiving the Statute of Limitations that they had missed.<sup>51</sup>

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<sup>51</sup> On a somewhat related note, in my one and only litigation with the IRS, they tried to pull the same maneuver and were literally laughed out of the Dade County Courthouse in which we appeared, but it was not a campaign related case.

In all fairness, there are examples of the FEC doing its job. While they are few and far between, they do send a signal and in one particular recent case, they caught a big fish. Noted conservative author and pundit, Dinesh D'Souza was indicted and plead guilty in 2014 for contributing to a campaign by giving money to friends and employees to then donate to a candidate; in that case, he was charged with and plead guilty to being the "guiding genius" who routed the contributions where they were needed. After he plead guilty, he was sentenced to house arrest and probation. There have been many cases of this type over the years, but they are relatively minor in the larger scheme of things but perhaps more consequentially are no longer necessary in the age of Citizens United, McCutcheon and 501(c)(4) organizations when donors can give as much as they like and do no longer need to seek out straw man donors.

### **The Bipartisan Campaign Reform Act of 2002 (BCRA)**

Passed with great fanfare and great expectations, the next major piece of campaign finance reform legislation was the Bipartisan Campaign Reform Act (BCRA), commonly known as McCain-Feingold, after its prime Senate sponsors. Prominent columnist David Broder noted that BCRA was "widely hailed as the greatest advance in a generation in cleansing the political system of the corrupting effects of money,"<sup>52</sup> and was the first comprehensive reform passed since FECA (and the most recent). It was passed in 2002 due to public pressure in the wake of the Enron scandal, and cynically signed into law by President George Bush who was convinced by his lawyers that it would be held unconstitutional.

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<sup>52</sup> Broder, David, "What McCain-Feingold Didn't Fix," *The Washington Post*, May 20, 2004; Page A29 <http://tinyurl.com/36wkm>

Its primary goals were to end soft money donations to political parties (also a fungibility problem since contributions to political parties were disclosed) and end “sham” issue ads. BCRA also contained many provisions “that regulate things never before regulated...and supplements these new, farther reaching provisions with added criminal penalties absent from the 1974 law.”<sup>53</sup> Additionally, it included what became known as the “Millionaire’s Amendment” which ostensibly increased contribution limits for candidates opposed by self-funded millionaires, but which was, again like FECA, widely seen as an incumbency protection act. In the McConnell decision, “the dissenters pointed out the naked self-interest that members of Congress have in such legislation, and that the practical effect of the law, at every step was to favor incumbent members of Congress over their challengers.”<sup>54</sup>

Like its predecessor FECA, it too has been decimated by Supreme Court decisions, but only after originally being upheld facially in *McConnell v. Federal Election Commission*.<sup>55</sup> As with FECA, there was a provision in the law to expedite the litigation and the suit was filed the day President Bush signed BCRA into law in 2002 and was decided by the Supreme Court in 2003 in time for the 2004 elections. It was subsequently further decimated by a series of Supreme Court cases which dealt not with issues of “facial” constitutionality but rather “as applied” situations. These cases will be discussed in detail elsewhere.

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<sup>53</sup> Smith, Bradley A., “*McConnell v. Federal Election Commission: Ideology Trumps Reality, Pragmatism*,” *Election Law Journal*, Vol. 3, No. 2, 2004, at 348.

<sup>54</sup> *ibid.*, p. 349.

<sup>55</sup> 540 U.S. 93 (2003).

Broder goes on to note, however, some of the early unintended consequences. "For the first time, the nominees of both major parties have discarded public financing of their pre-convention campaigns...and a whole new category of groups -- allied with but formally separate from the party -- has sprung up to raise hundreds of millions of additional dollars for the presidential campaign. These "527" organizations (named for the section of the tax code under which they're organized) are collecting the same huge "soft money" contributions that were outlawed by McCain-Feingold, from many of the same individuals and groups."<sup>56</sup>

What is astounding, however, is that the Reformers did not see this coming. Harold Ickes was literally setting up multiple 527s in late 2002 and 2003 in anticipation of the crippling effects BCRA would have on the political parties. Although Broder states that the reformers "did not anticipate that the ban would simply divert the flow of big contributions into other channels,"<sup>57</sup> he did admit that "McCain-Feingold is one more chapter in a long history of campaign finance regulation. Once again, unanticipated consequences of new rules are largely subverting their intended purposes."<sup>58</sup> Little did he know in 2004 what was to come. Although no serious law has passed since 2002, most of the campaign finance reform since BCRA has occurred in the Supreme Court and chiefly in overturning major portions of BCRA.

Because of the overreach of McCain-Feingold and the subsequent court decisions, campaign finance reform's foundation has been shaken to its core. The law

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<sup>56</sup> Broder, David, "What McCain-Feingold Didn't Fix," *The Washington Post*, May 20, 2004; Page A29 <http://tinyurl.com/36wkm>

<sup>57</sup> *ibid.*

<sup>58</sup> *ibid.*

itself, by eliminating soft money from the parties, led to the creation (before the McConnell decision was even out) of 527 entities which were outside of the parties and thus not accountable to them. As these non-party entities proliferated and led to more litigation and “as-applied” challenges to BCRA, Super PACs and other Independent Expenditure organizations sprang up like weeds. This has had many unintended consequences in that these non-party entities are not under the control of any candidate or party and thus not accountable to anyone (technically, the parties are not accountable either – except at the ballot box, which is the only thing that matters so is the only thing that kept them somewhat accountable). The weakening of the parties has been a theme of the Reformers since the early days of the Progressive Era in the 1880s, but the Reformers have never particularly appreciated the mediating role of the parties. Now with the weakening of the parties, the money is decentralized rather than centralized, as Overacker demonstrated in the 1940s, and there is no accountability with these outside groups as there is with parties.

With the proliferation of Super PACs and 501(c)(4) organizations, we have in many ways returned to the State of Nature that we began with before the Tillman Act. This has caused some, including the Brennan Center for Justice, a leading reform advocacy group, to “re-think” its approach to campaign finance reform and to publish in late 2015 a book entitled, *Stronger Parties, Stronger Democracy: Rethinking Reform*.<sup>59</sup>

Additionally, the Super PACs and other non-party entities often spend more money on campaigns than do the actual candidates themselves. For example, the Koch Brothers have already announced their intention to spend over \$900 million in the 2016

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<sup>59</sup> Weiner, Daniel I. and Ian Vanderwalker, *Stronger Parties, Stronger Democracy: Rethinking Reform*, The Brennan Center for Justice, 2015.

election cycle. Enforcement issues have proliferated under BCRA with the growth of non-party entities and now in addition to the FEC, other agencies are being tasked with monitoring campaign finance issues, namely the IRS and some Reformers are demanding that the SEC monitor corporate expenditures and that the FCC “Enforce Broadcaster Mandate to Disclose Funders Behind Super PAC & ‘Dark Money’ Ads.”<sup>60</sup>

### **Execution Failure #2 – Fungibility**

‘Farming out’ the obligations of a national committee to a state committee with assurances that these bills will be met by loans from a fairy godfather... again...led to the suppression of important facts without altering the practices.

--Louise Overacker  
*Presidential Campaign Funds*

Fungibility has always and continues to be an issue. This is an issue that no law has been able to get under control, unless you count the first 2-3 years under FECA before soft money was created. Even during this time, there is no assurance that moneyed interests did not use the time honored tradition of giving money from various entities to various other entities and under various other names.

It is difficult to explain exactly what fungibility is but suffice to say it is the opposite problem from transparency. Transparency deals with the disclosure of campaign money, while fungibility is about the money you cannot see or cannot trace without great difficulty. Here is a list of several ways money can be fungible: give money in the name of another; Independent Expenditures; give money to Leadership Committees; give to the convention fund; give to the Levin fund that came out of BCRA; Give soft money to the party; give money to a 501(c) organization; give money to a Super PAC; for 2016 presidential candidates, give money to the campaign from

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<sup>60</sup> Campaign Legal Center Press Release, October 29, 2015.

yourself, spouse, kids and relatives, give money to the PAC, give money to the Super PAC, give money to the 501(c)(4), give money to the state party and the national party; earmarking by donating to the political party for a favored candidate; bundling by having a law or other firm make a donation and then every partner and employee also give a contribution (the candidate, of course, realizing all \$10-20,000 came from Dewey, Cheatem and Howe); or having a husband, wife, kids and their various corporations all give maximum contributions.

### **The Tillman Act of 1907**

Despite the Tillman Act, corporate involvement in politics was not even slowed; there was no compliance because there were no enforcement methods written into the law. In lieu of direct contributions to the candidates, corporations gave in-kind gifts (office space, free travel, etc.), placed candidates on the corporate payroll, and reimbursed officers, directors and employees who donated in their own name. “Some corporate executives simply defied the law, viewing it much the same way most Americans would soon view prohibition: as something that turned reasonable and non-corrupting activity – in this case, political activism – into a crime”<sup>61</sup>.

### **The Publicity Acts of 1910 and 1911**

Because there were few if any enforcement mechanisms, few if any disclosure requirements, numerous ways around the laws and the legal requirement that any violation be “willful” and no central agency or authority to monitor any of the above, business went on as usual. Those candidates who tried to comply, did so by setting up multiple committees and knowingly not knowing about the other committees.

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<sup>61</sup> Smith, Bradley A., *Unfree Speech – The Folly of Campaign Finance Reform*, Princeton University Press, 2001, page 24.

## **The Federal Corrupt Practices Act of 1925**

Because there were few if any enforcement mechanisms, few if any disclosure requirements, numerous ways around the laws and the legal requirement that any violation be “willful” and no central agency or authority to monitor any of the above, business went on as usual. Those candidates who tried to comply, did so by setting up multiple committees and knowingly not knowing about the other committees.

## **The Hatch Act of 1940**

By 1940, it was determined to place limits on the political parties and they were capped at \$3 Million per year. Once again, however, this limit was easily exceeded by the use of separate committees for the same candidate. Additionally, since corporations and the wealthy could funnel monies through employees, friends and family members, many times the legal amounts could easily and legally be spent. As the threshold for disclosure was \$100, small amounts could be directed to multiple sources and legally flow under the radar (Corrado 1997).

Overacker is characteristically blunt in her assessment of the ineffectiveness of the Hatch Act on issues of Fungibility/Transparency. “Thus proceeding by the rule of “by guess and by gosh,” we launched a totally new attack upon the problem of campaign funds, applying a totally different formula, with no consideration of its merits or probable consequences.”<sup>62</sup> She concludes that “the financing of the 1944 campaign affords additional evidence that the present limitations have little more than nuisance value.”<sup>63</sup>

“Farming out’ the obligations of a national committee to a state committee with assurances that these bills will be met by loans from a fairy godfather... again...led to

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<sup>62</sup> *ibid.*, p. 27.

<sup>63</sup> Overacker, Louise, *Presidential Campaign Funds*, Boston University Press, 1946, page 40.

the suppression of important facts without altering the practices.”<sup>64</sup> Though the Hatch Act had a \$5000 per person contribution limit, “as soon as one digs below the surface, however, it is clear that this limitation changed the situation little if at all.”<sup>65</sup> Prior to the Hatch Act, “both parties discouraged independent money-raising committees and there was a conspicuous trend toward centralization in the field of party finance...(but)...the Hatch act reversed that trend. By multiplying money-raising agencies, and in some cases driving them underground as well, it has led to concealment and evasion.”<sup>66</sup> This is a perfect instance of the overlapping of the failures of execution in enforcement, fungibility and transparency and its genesis was easy to find. Overacker correctly notes (and was clearly studied by future political actors and scholars if not the reformers), “the provision is nullified in the very wording of the Act itself which expressly excepts contributions to state and local party committees.”<sup>67</sup>

Gifts were hung on more branches of the family tree and routed through a variety of committees, but they came from the same old Santa Claus...More than sixty members of the Du Pont clan contributed over \$200,000 to various Republican committees; the \$164,500 contributed by members of the Pew family was listed under a dozen names; contributions from the Rockefellers exceeded \$100,000; three Queenys (identified with the Monsanto Chemical Company) gave over \$55,000.<sup>68</sup>

This technique may have been relatively new in the 1940s, but it would be duplicated and perfected in the 1990s by Emily’s List and then copied by others and is now known as “Bundling.” Other techniques used were Independent Expenditures,

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<sup>64</sup> *ibid.*, p. 36.

<sup>65</sup> *ibid.*, p. 43.

<sup>66</sup> Overacker, Louise, *Presidential Campaign Funds*, Boston University Press, 1946, page 44.

<sup>67</sup> *ibid.*, p. 44.

<sup>68</sup> Overacker, Louise, *Presidential Campaign Funds*, Boston University Press, 1946, page 36.

giving in the name of another, and maxing out to every local, state and federal candidate, party and non-party committee. In fact, going into the 2016, nothing much has changed as a New York Times article demonstrates, noting that “Just 158 families have provided nearly half of the early money for efforts to capture the White House.”<sup>69</sup>

Overacker makes the persuasive point that this will always be the case as long as American politics is decentralized. The only way to track all of the money is to have everything centralized in one national committee. With the new Hatch Act limits, “in 1944, an unusually large number of independent, non-party organizations were active on both sides.”<sup>70</sup> She proceeds to name several such organizations, such as “Hollywood Democrats Committee” and “Servicemen’s Wives to Re-Elect Roosevelt,” and “Democrats for Dewey” and “National Association of Pro-America.”

In another case of her correctly but inadvertently forecasting the future, she notes, “before the Hatch Act limitations went into effect independent party and non-party organizations would have been discouraged; now they are condoned and sometimes inspired by the party’s official hierarchy. This decentralization of responsibility for the collection and distribution of money in presidential campaigns is one of the most unfortunate effects of the Hatch Act.”<sup>71</sup> “In no previous campaign in our history were non-party agencies so important.”<sup>72</sup>

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<sup>69</sup> [http://www.nytimes.com/interactive/2015/10/11/us/politics/2016-presidential-election-super-pac-donors.html?emc=edit\\_th\\_20151011&nl=todaysheadlines&nid=37375663&\\_r=0](http://www.nytimes.com/interactive/2015/10/11/us/politics/2016-presidential-election-super-pac-donors.html?emc=edit_th_20151011&nl=todaysheadlines&nid=37375663&_r=0)

<sup>70</sup> Overacker, Louise, *Presidential Campaign Funds*, Boston University Press, 1946, page 41.

<sup>71</sup> *ibid.*, p. 42.

<sup>72</sup> *ibid.*, p. 43.

This remained true for over 60 years until the unholy alliance of the “devastating legacy of McCain-Feingold” combined with the “incoherence of Citizens United” unleashed what, at this writing, seems to be a combination of PACs, Super PACs, 501(c)(4) organizations and other creative financing entities which not only have the Reformers playing defense for the first time in a century but are threatening to shatter the foundations of the modern campaign finance regime.

### **The Smith-Connally Act of 1943**

There is not much to be said here as this act only applied to labor unions. As discussed in the Enforcement section above, the unions found a legal way to be in technical compliance with the act via their “alter ego,” the CIO-PAC. Overacker offers an interesting insight about the unions and our knowledge of their actual contributions. “Under existing publicity provisions, the names and addresses of those who contribute \$100 or more to a political committee must be filed with the Clerk of the House; contributions of less than \$100 are reported in lump sum only...hence, it would be possible for trade union members as individuals to contribute unrevealed amounts to a variety of political committees without violating the law and with no public knowledge of those gifts. Under these circumstances we might well know less about labor’s stake in the campaign than about the contributions of those who are identified with corporations.”<sup>73</sup> While this is certainly and likely true of unions, this was during an era in which many corporations did not even pretend to comply with the laws which were of mere “nuisance value” because of the “gaps in the law as wide as a barn door” and filled with “loop-holes.”

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<sup>73</sup> *ibid.*, p. 64.

Currently, the previous \$100 limit is now \$200 and while all federal and Presidential campaigns do this, Barack Obama famously raised well over \$200 million from small, undisclosed donors in his first presidential campaign in 2008. Legislation is pending to increase this limit to either \$500 or \$1000. As innocuous as this sounds, Overacker was again a savvy reader of the political tea leaves and it does not take much imagination to see how this can and will be exploited if it is passed.

### **The Federal Election Campaign Acts of 1971 and 1974 (FECA)**

Because this law did not take effect until April of 1972, there was an all-out race for money throughout 1971 and the first quarter of 1972. The old State of Nature rules applied for most of the cycle so the same fungibility rules applied but as there was still no real enforcement and no real transparency, it was a wash.

For the first time ever, the fungibility issue was seemingly dealt with. As Overacker repeatedly noted in the 1940s, the only way to avoid the enforcement (prohibition), transparency (publicity), and fungibility issue was the centralization of the committees. FECA did that by closing the loopholes which had been successfully exploited since the 1920s. Each campaign was required to have one central committee that collected and reported all contributions and expenditures and did so on one unified form and to one unified location and which were available to the public before the election. For once, it appeared that the “complete centralization of the collection and distribution of funds in the hands of a single”<sup>74</sup> entity would allow all three aspects of the control of money in campaigns – enforcement, fungibility and transparency – to be controlled. Because there was now an agency to enforce the law and to force

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<sup>74</sup> Overacker, Louise, *Presidential Campaign Funds*, Boston University Press, 1946, page 47.

disclosure, the blatant disregard of the law that allowed the free flow of money was going to be stopped. Or at least that was the plan. However, before FECA could even take effect, it was dramatically altered, in a pattern which would be repeated time and again by the Supreme Court, in the landmark Buckley v. Valeo case.

### **Independent Expenditures**

The main thing that Buckley did that effected fungibility was to overturn the ban on Independent Expenditures on First Amendment grounds declaring Independent Expenditures protected speech. The use of Independent Expenditures developed over the years from PACs to political parties to other outside entities and the flow of money barely missed a beat. Most notably, today Super PACs are the largest Independent Expenditure organizations.

### **Soft Money**

Soft money is unregulated money by source or amount and while most soft money donations to political parties are disclosed, one never knows what the monies were specifically used for. This is another instance of the transparency issues implicating the enforcement and fungibility issues.

The advent of soft money completely undermined FECA and its strict hard money limits for contributions to both candidates and parties. Soft money allowed unlimited contributions to the political parties and while Common Cause filed suit the FEC “continued to grant opinions and write regulations allowing for soft money to be allocated to pay for supposedly non-federal activities. There is no question the FEC was doing what many in Congress wanted. Until the Supreme Court took away the power of the legislative veto [in Buckley v. Valeo], Congress could have overturned commission regulations allowing soft money – but it didn’t. It could have passed a law overruling the

FEC – but it didn't. Congress was content to let the FEC do what the lawmakers didn't want to do themselves."<sup>75</sup> The New York Times refused to call it soft money, instead referring to it as sewer money.

Reminiscent of the 1944 election under the new Hatch Act and eerily similar to the list of prominent large donations noted by Louis Overacker, the 1988 presidential election saw soft money donations to Republicans of \$100,000 by Donald Trump, Mel Sembler, Joseph Zappala (the latter two later becoming ambassadors to Australia and Spain, respectively, and the former the leading contender at this writing for the 2016 Republican presidential nomination) plus corporate contributions of over \$100,000 from US Tobacco, RJ Reynolds Industries, Occidental Petroleum and Atlantic Richfield, just to name a few, and \$503,263 from Nicolas Salgo, a former ambassador to Hungary. The Democratic Party had its share of wealthy donors too, receiving \$100,000 contributions from Robert Bass, Marvin Davis and Richard Dennis, just to name a few.

### **Bundling**

This is the perfect vehicle to get around spending caps in terms of a special interests gaining "undue influence" with a candidate. Although the money is disclosed in the campaign reports, it is not reported as "bundled" money, which makes it hard to trace and which is why Reformers and especially the New York Times hate bundling so much. As noted earlier, in recent years, the media and public pressure has been sufficient to essentially force presidential campaigns to "voluntarily" disclose the names of their bundlers. However, this is a niche issue that only Reformers care about and

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<sup>75</sup> Jackson, Brooks, *Broken Promise: Why the Federal Election Commission Failed*, Priority Press Publications, 1990, page 45.

about which the public is not only largely unaware but there is almost no way to explain it to them, or why they should care.

### **Federal Election Commission**

With the advent of soft money, huge political donations of up to \$1 million again became a staple in national politics. Funds from business corporations and labor unions, illegal for decades in federal campaigns, flowed into party coffers to finance voter drives benefitting candidates for the House, the Senate and the White House. The Washington Post calls it a scandal, and the New York Times calls the big gifts “sewer money”<sup>76</sup> (as opposed to soft money). The section above about soft money covers the topic quite well regarding the fungibility of money, but it should be noted that, “party officials conceded that a lot of donors gave directly to state parties, which were subject only to varying state disclosure requirements. Still, enough information emerged to establish beyond doubt that the FEC’s inaction had allowed big money back into presidential politics...(and it was estimated that in 1988)...that Republicans had raised about \$22 million in soft money while Democrats took in \$23 million.”<sup>77</sup>

### **PACs with parents**

Unlike independent PACs like the NRA or Sierra Club, which must necessarily spend a certain amount of their contributions in raising money and paying overhead, PACs with parents (such as corporate and labor PACs) can devote nearly 100% of their donations to political uses as the law allows their overhead and fundraising costs to be

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<sup>76</sup> Jackson, Brooks, *Broken Promise: Why the Federal Election Commission Failed*, Priority Press Publications, 1990, page 1.

<sup>77</sup> *ibid.*, p. 54.

absorbed by the parent. Thus, it is never entirely known how much money has been spent on or by the PAC.

## **Polling**

A neat trick for Congressmen that flies under the radar is to have polling done by an outside group and then wait 2 weeks to receive the data because the information will be “stale” by that time. By “leaking” stale information, a donor (PAC, corporation, union, fat cat), can ingratiate themselves with a Congressman and simultaneously avoid contribution caps, disclosure and due to the fungibility of money, can have the poll done privately and quietly. That donor can then still donate the \$2700 directly to the campaign and additional sums to other party and non-party entities. If done by a different group every couple of months between elections, Congressional candidates (Incumbents and challengers alike) are kept up to speed on issues back in the district and the various donors are kindly remembered when the time come. This also allows the Congressman to save their own campaign budget for other things or specific polling much closer to the election. This is a win-win-win for all involved – except the public which is again left in the dark.

## **The Bipartisan Campaign Reform Act of 2002**

All of the money from the “soft money” era of 1980-2002 did not just disappear. Candidates and their surrogates just set up separate committees, either under 527 of the IRS Code or under one of the provisions in the 501(c) category. The increase of 527s was so foreseeable and predictable that Harold Ickes started setting them up in fall of 2002. As noted above, setting up separate committees is a time honored tradition that began during the Publicity Act of 1910, continued through the Hatch Act of 1940 and was not just some new innovation done to get around BCRA. This is why it was not

only foreseeable that it would be done but also goes a long way in making the case that the Reformers were possibly exploited by those writing the laws. The soft money from 1980-2002 did not go away but rather went to other places and the total monies in politics continued to increase. The former soft money also now goes to states and also gets traded for hard dollars between various entities.

Thus, after FECA gained some traction on the intractable fungibility issue, with BCRA and its aftermath, the fungibility problem is not only back but growing. It is arguably the biggest problem in campaign finance today. Clearly the reformers again miscalculated as noted by one of the premier political journalists in the country, David Broder, who wrote in 2004 that Reformers “did not anticipate that the ban would simply divert the flow of big contributions into other channels.”<sup>78</sup> The political professionals certainly anticipated it and I do not think I am overstating it when I say that anybody who did not see that one coming knows nothing about politics or the history of campaign finance reform over the last century.

With the complexity of political entities under Section 527 of the IRS Code and other entities under Section 501 of the IRS Tax Code, different reports are made to different governing entities at different times. Thus, it is possible to either avoid disclosing entirely or to disclose months after the election or even the following year ones political contributions or to arrange one’s affairs in order to be as confusing as possible.

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<sup>78</sup> Broder, David, “What McCain-Feingold Didn’t Fix,” *The Washington Post*, May 20, 2004; Page A29 <http://tinyurl.com/36wkm>

### Execution Failure #3 - Transparency

Prior to its introduction both parties discouraged independent money-raising committees and there was a conspicuous trend toward centralization in the field of party finance...The Hatch Act reversed that trend. By multiplying money-raising agencies, and in some cases driving them underground as well, it has led to concealment and evasion.

– Louise Overacker  
*Presidential Campaign Funds*

The terms transparency and disclosure mean the same thing and are used interchangeably. As has been noted previously, early reformers called this Publicity and many thought that Publicity should be privileged over Prohibitions (limits on sources and amounts and the myriad of laws and regulations). As usual, Louise Overacker states it best “once we have real publicity, the question of “how much” is ‘too much’ may safely be taken out of courts of law and left to courts of public opinion.”<sup>79</sup> However, six of the seven major federal campaign finance reforms contained both prohibition and publicity provisions and it is a central theme of this dissertation that “by trying to dash furiously in opposite directions we have arrived nowhere.”<sup>80</sup>

To paraphrase Senator Howard Baker of Watergate Committee fame, “what does the public know and when do they know it?” Prior to 1907, nobody knew anything. From 1907 until Watergate and FECA, despite the passage of five major campaign finance reform pieces of legislation, very little was known and most of that was only known *after* the elections and after great effort by scholars, the media and numerous Congressional committee investigations (usually partisan driven). Louise Overacker details the extraordinary efforts she had to make to locate and obtain records that had been

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<sup>79</sup> Overacker, Louise, *Presidential Campaign Funds*, Boston University Press, 1946, at 47.

<sup>80</sup> *ibid.*, p. 25.

stacked in closets, basements and which were not in any sort of order or in any sort of standardized format and which were quite incomplete in her seminal work, *Presidential Campaign Funds*.<sup>81</sup>

In the modern era, however, the single biggest success of campaign finance reform has been in giving the public a glimpse at how campaigns are financed and “who pays our political bills – and why.”<sup>82</sup> Because of FECA, most campaign contributions and expenditures are made public before the elections and they get tremendous media coverage. While there is not a lot of evidence that the public pays much attention to this, the information is readily available and in the age of the Internet, much of it is available in real time. Having said this, the publicity/transparency battle is far from over and as will be examined below, the tide has started shifting back towards more secrecy and less transparency.

Let’s be clear – political actors really do not want transparency. Pundit Michael Kinsley once famously opined that in Washington DC, “A gaffe is when a politician (accidentally) tells the truth.”<sup>83</sup> To date, nobody has actually made the ultimate transparency gaffe, but actions speak louder than words. A review of the laws, the forms, the filing deadlines, the Leadership PACs, the Super PACs, the 501(c)(4) organizations, the trade organizations and even the Senate’s paper filings, makes clear that politicians pay lip service to the notion of transparency but clearly prefer to conduct their business in the dark. Even though so-called Publicity was the original goal of

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<sup>81</sup> Overacker, Louise, *Presidential Campaign Funds*, Boston University Press, 1946,

<sup>82</sup> *ibid.*, p. 45.

<sup>83</sup> [http://www.barrypopik.com/index.php/new\\_york\\_city/entry/a\\_gaffe\\_is\\_when\\_a\\_politician\\_tells\\_the\\_truth\\_kinsley\\_gaffe/](http://www.barrypopik.com/index.php/new_york_city/entry/a_gaffe_is_when_a_politician_tells_the_truth_kinsley_gaffe/)

campaign finance reform, there has rarely ever been true transparency on the federal level.

The first few acts had so little enforcement mechanisms that few bothered to comply with the publicity and those reports that were filed were seldom accurate and even more seldom saw the light of day. Only with the passage of FECA in the 1970s with the requirement of one centralized committee per candidate and specific forms to file with the Federal Election Commission did campaigns become even somewhat transparent. But even still, transparency has been issue and continues to become a bigger issue with each passing year and passing reform whether it be the complexity of the forms, soft money and issue ads, the hybrid ads Bush ran in 2004, the growth of 527s and then the explosion of Super PACs and 501(c)(4) organizations.

Let's take a look at how Transparency has failed in execution.

### **The Tillman Act of 1907**

Ironically, the Tillman Act was passed after the “concealment and evasion” of corporate contributions was revealed. In the wake of the scandal that led to the Tillman Act, the first grassroots organization was formed demanding campaign finance reform, the National Publicity Law Organization (NPLO), which sought a law demanding the disclosure of party contributions and expenses. This is reflected in the concerns of Perry Belmont, former chairman of the New York Democratic Party, who fathered the idea of disclosure. When called a liar and challenged about the sources of Party money, Belmont called their bluff and disclosed the sources of the money. Belmont believed

that “publicity would serve a three-fold purpose of protecting the public interest, the honest collector and the contributor who had no ulterior motive.”<sup>84</sup>

Belmont also said, “...I prefer to depend upon publicity for the purity of elections rather than the criminal law” (Belmont 1927, xxxviii). Notwithstanding the NPLO and its efforts, Tillman Act was passed without any disclosure requirements. The Tillman Act, named for South Carolina Democrat Ben “Pitchfork” Tillman, contained no enforcement mechanism or penalties and compliance was essentially nil.

### **The Publicity Acts of 1910 and 1911**

This law simply required the treasurer of a political committee to disclose contributions and expenses of House campaigns within 30 *after* the general election. However, as this only applied to political committees operating in two or more states, the only committees effectively covered were the national political parties and their congressional committees (Corrado 1997; Thayer 1973). However, as Larry Sabato explains, “the law sounded better than it read” (Sabato, 1996, 12). The ban on corporate giving had loopholes, the disclosure rules still continued to apply to political committees operating in two or more states, the candidate’s only requirement as to spending limits was what he actually knew about, the Supreme Court ruled in 1921 (*Newberry v. United States*, 256 US 232), that Congress could not regulate party primaries<sup>85</sup>, and the enforcement mechanisms were virtually nonexistent. Reports were not standardized, were not audited, there were still many exempted items that did not have to be reported,

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<sup>84</sup> Overacker, Louise, *Presidential Campaign Funds*, Boston University Press, 1946, page 21.

<sup>85</sup> This had a big impact in the South where the Democratic Party had such total domination that all virtually elections were determined in the primaries

there was no real public access and there was no authority to compel compliance (Smith 2001; Sabato 1996).

However, the Democrats regained control of the House and picked up seats in the Senate in the November election. They and the reformers sought to strengthen the original Publicity Act by requiring reporting of contributions and expenditures before the elections. In an attempt to kill the bill, Republicans in the House and the Senate offered poison pill amendments to strengthen the reforms. However, these tactics backfired. The 1911 Publicity Act passed and extended the reporting requirements to Senate races, primaries and conventions, required disclosure before and after the elections, and capped expenditures for campaigns at \$5000 for a House seat and \$10,000 for a Senate seat (Corrado 1997; Ornstein 1997).

### **The Federal Corrupt Practices Act of 1925**

Unbeknownst to almost everyone, the Republican Party had ended the 1920 election almost \$1.5 Million in debt. Oil tycoon Harry F. Sinclair had helped pay off this debt but the contribution to the party did not have to be disclosed because it was not made during an election year. When this and other abuses came to light, reformers were outraged. Again we see accidental disclosure leading to legislation, but in this case, unlike the Tillman Act, the FCPA did include disclosure requirements, however lame and unenforceable.

It attempted to consolidate all previous reforms under one roof and to expand the coverage in three major areas. First, it required disclosure every year (not just election years) and called for quarterly reports in addition to those just before and after the election.

However, because there were few enforcement mechanisms put into place, the law was essentially ignored. “To be sure, anyone, even a political amateur, could get around the limits and disclosure requirements of the feeble old Corrupt Practices Act of 1925.”<sup>86</sup> If contribution and expenditure reports were filed, they were not kept over two years and the House and Senate clerks made sure they were inaccessible. They were not required to be published, there was no particular format, there were virtually no penalties for noncompliance and since they applied to party committees, if the spending caps were adhered to at all - and they usually were not - they were still defeated by setting up multiple committees for the same campaign and/or taking multiple contributions for under \$100. Candidates still avoided filing reports by conspicuously avoiding “knowledge or consent” of things done on their behalf (Corrado 1997; Thayer 1973; Pollock 1926).

This is another instance where the same situation involves all three failures of execution – there was no enforcement of the contribution and expenditure limits, multiple committees were established due to the fungible nature of money and if reports were filed, they were incomplete, not in any particular format, inaccessible to the public and often destroyed within 2 years. Overacker notes that, “since no uniformity of reports is required, it is extremely difficult to assemble comparable data...(and)...secondly, no public officer is vested with the responsibility of examining the records and reporting violations to the Attorney General.”<sup>87</sup>

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<sup>86</sup> Jackson, Brooks, *Broken Promise: Why the Federal Election Commission Failed*, Priority Press Publications, 1990, page 2.

<sup>87</sup> *ibid.*, p. 23.

## The Hatch Act of 1940

After the 1944 Presidential election was over, the Gillette Committee, led by Senator Guy M. Gillette of Iowa, investigated campaign expenditures and was able to determine that notwithstanding the Hatch Act limitations, that, “money spent on behalf of Democratic candidates totaled close to \$6,000,000, and that the expenditures aiding the Republican candidate reached the impressive sum of \$14,941,000.”<sup>88</sup> While these sums were only pieced together with considerable time and effort, it was clear that the Democrats had exceeded the cap by more than double and the Republicans by an astounding five times the limit. “If the purpose of the Hatch Act was to limit to \$3,000,000 the *aggregate* expenditures of all political committees supporting the same presidential candidate, it failed to achieve that objective...If its purpose was that of *reducing* expenditures, it likewise failed lamentably.”<sup>89</sup>

She later blasts the Hatch Act further in what, again, would prove eerily prescient for future reform attempts:

The Hatch Act limitations were included in an act which purported to “Prohibit Pernicious Political Practices.” One might almost parody it to read: “An Act to Promote Pernicious Political Activities.” It defeats its own purpose by encouraging decentralization, evasion and concealment. Worst of all, it makes difficult if not impossible any publicity which is essential to full understanding of who pays our political bills – and why.<sup>90</sup>

## The Smith-Connally Act of 1943

As with the Hatch Act previously, it was not until after the elections that union political activity became public. The situation with labor unions is quite interesting and

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<sup>88</sup> *ibid.*, p. 34.

<sup>89</sup> Overacker, Louise, *Presidential Campaign Funds*, Boston University Press, 1946, pages 34-35. Italics in the original.

<sup>90</sup> *ibid.*, p. 45. Italics in the original.

prescient in several ways and was investigated by numerous House and Senate investigations, just as the Hatch Act was.

Overacker was savvy and prescient, the political actors savvy and innovative and as years went by the patterns repetitive. In the case of the Smith-Connally Act, “in spite of the sweeping prohibition...the clumsily drawn provision, even when added to the limitations of the Hatch Act, presented no barrier to trade unions bent upon throwing their full weight into the scales on the side of their chosen candidates. The 1944 election may well go down in history as a victory for PAC as well as F.D.R.”<sup>91</sup>

Overacker sums it up nicely and succinctly:

Our experience with the Hatch Act and Smith-Connally Acts demonstrates conclusively that present limitations do not limit and present prohibitions do not prohibit. Moreover, they tend to break down the effectiveness of the publicity which should be the guiding principle of any regulatory program...limitations are bound to defeat their own purpose by breaking down publicity, driving organizations underground, and facilitating evasions.”<sup>92</sup>

### **The Federal Election Campaign Acts of 1971 and 1974 (FECA)**

In 1971, Nixon cut a deal with Congress to delay FECA taking effect until April 1972 and thus the previous rules were legal until March 31. All parties were gobbling up large sums of money until the new law took effect and limited the sources and amounts. Nixon was forced to disclose a donation of \$1 million which was legal at the time, but once again, we see the accidental disclosure of large amounts of money leading to scandal and outrage.

“The reforms did not achieve all their objectives.... Nonetheless, the accomplishments of the reform coalition should not be discounted. There was a

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<sup>91</sup> *ibid.*, p. 57.

<sup>92</sup> *ibid.*, p. 65.

revolution in the disclosure of political information. Until the 1960s, there was little public knowledge about contributions. By 1974, that system had ended. The United States imposed some of the most stringent disclosure regulations in the world.”<sup>93</sup>

However this act did little to stem the growth in campaign spending:

The information gathered as a result of the new disclosure requirements revealed that total campaign expenses rose from an estimated \$300 Million in 1968 to \$425 Million in 1972. The growth in presidential campaign costs was especially significant: President Richard M. Nixon spent more than twice as much in 1972 as he did in 1968, while his Democratic opponent in 1972, George McGovern, spent more than four times what Hubert Humphrey did in 1968 - and was still outspent by a substantial margin.<sup>94</sup>

Thus the one exception to the usual patterns of failure, which was actually largely successful for several decades was, “the revolution in the disclosure of political information.”<sup>95</sup> While this too eventually was diminished by the innovations and adaptations of the political actors, we learned from Belmont, Pollock, Overacker and others that a driving force in all campaign finance reforms for the entire century has been Publicity, or as we call it today disclosure or transparency.

### **Independent Expenditures**

Originally banned by FECA but declared to be protected political speech by Buckley and subsequent cases, Independent Expenditures can either be transparent or not. If done by a political party with soft money, it is not particularly transparent in that

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<sup>93</sup> Zelizer, Julian, “Seeds of Cynicism: The Struggle over Campaign Finance, 1956-1974,” *The Journal of Policy History*, Vol. 14, No. 1, 2002, page 104.

<sup>94</sup> Corrado, Anthony. “Money and Politics: A History of Federal Campaign Finance Law.” In *Campaign Finance Reform: A Sourcebook*. Edited by Anthony Corrado, et al. Washington, DC: Brookings Institution Press, 1997, page 32.

<sup>95</sup> Zelizer, Julian, “Seeds of Cynicism: The Struggle over Campaign Finance, 1956-1974,” *The Journal of Policy History*, Vol. 14, No. 1, 2002, page 104.

you do not know what or whose dollars were used. This is another instance of the transparency issues implicating the enforcement and fungibility issues.

### **Soft Money**

Soft money is unregulated money by source or amount and while most soft money donations to political parties are disclosed, one never knows what the monies were specifically used for. This is another instance of the transparency issues implicating the enforcement and fungibility issues.

### **Bundling**

Bundling is specifically used to magnify the significance of a contribution and its source and is therefore designed specifically to not be transparent, except to the beneficiary. Reformers and the media, led by *The New York Times*, have successfully pressured presidential campaigns since 2004 to reveal its bundlers, but in the age of Super PACs, as was discussed in Chapter 1, bundlers are of far less importance and influence than they used to be. And, of course, the “victory” achieved in the revelation of the bundlers was a pyrrhic one because there is only one President, but there are 535 members of Congress plus tens of thousands of state elected officials and the public remains in the dark about these bundlers.

### **Federal Election Commission**

Brooks Jackson noted that even an amateur could get around the old Corrupt Practices Act, “whereas circumventing today’s Federal Election Campaign Act requires a multitude of lawyers to deal with the FEC. But the result is turning out to be the same: there is once more unlimited disbursement of special interest money without effective

disclosure.”<sup>96</sup> There are many reasons for this among which is that the forms are purposely complex and intentionally impenetrable. Additionally, the US Senate still files paper reports. In the digital age where most state and local candidates and all other Congressional candidates submit their financial reports electronically, the US Senate has passed its own rule allowing Senate candidates to file their reports to the Clerk of the Senate in paper form which then goes to the FEC and has to be input into digital format. This has the effect of delaying the public knowledge of the contents of the reports. Additionally, Congress files its final reports after the election, not before.

### **PACs with parents**

Unlike PACs like the NRA or Sierra Club, which must spend a certain amount of their contributions in raising money and paying overhead, PACs with parents (such as corporate and labor PACs) can devote nearly 100% of their donations to political uses as the law allows their overhead and fundraising costs to be absorbed by the parent. Thus, it is never entirely known how much money has been spent on or by the PAC. This is another instance of the transparency issues implicating the enforcement and fungibility issues.

### **The Bipartisan Campaign Reform Act of 2002 (BCRA)**

Transparency (Publicity), one of the critical goals of campaign finance reform has become and remains a growing problem post BCRA. “The reality, as Sen. Mitch McConnell (R-Ky.), a leading critic of McCain-Feingold, has argued, is that in a country like ours, with its constitutional guarantees and its welter of interests, it is virtually impossible to control the flow of money from the private sector into the political world.

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<sup>96</sup> Jackson, Brooks, *Broken Promise: Why the Federal Election Commission Failed*, Priority Press Publications, 1990, page 2.

Any regulatory scheme is likely to be quickly circumvented if it is not countermanded by the courts or the administrative agencies. The best one can hope is that new rules do not produce more unintended negative consequences than benefits. McCain-Feingold is flunking that test.”<sup>97</sup>

### **Conclusion**

By trying to dash furiously in opposite directions we have arrived nowhere.

--Louise Overacker  
*Presidential Campaign Funds*

This chapter has demonstrated the empirical failure of execution of campaign finance reform by cataloging many but not nearly all of a vast array of failures over a century and analyzing each of the seven failed pieces of federal legislation, but there are so many failures they had to be divided into three analytically distinct categories.

The continuing pattern of failure of execution began immediately after passage of the Tillman Act and continues to this day. During the entire time, the various political actors have exploited every vagueness, leaped through every loophole (often ones they created legislatively) and generally taken advantage of every opportunity to exploit the system and weakness in the law. This chapter has charted the course of the political actors as they have adapted to the legislation, regulation and litigation.

Even by mid-century, one had to ask whether or not the early Congressional attempts at campaign finance reform began a pattern of failure that would last throughout the century. There is evidence that this is the case and that some of the early reformers and scholars actually were the only ones to capture the essence of the

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<sup>97</sup> Broder, David, The Washington Post, “What McCain-Feingold Didn’t Fix,” May 20, 2004, <http://tinyurl.com/36wkm>

problem and how to deal with it. In fact, in 1946, Louis Overacker presciently noted regarding the Hatch Act that, “the present limitations have little more than a nuisance value,”<sup>98</sup> and “evidence of the ineffectiveness of these limitations is overwhelming.”<sup>99</sup> By 2002, Julian Zelizer admitted that FECA “did not achieve all their objectives”<sup>100</sup> as campaign costs soared, soft money and Independent Expenditures allowed the wealthy and special interests to spend unlimited funds, candidates became beholden to PACs and “by forcing politicians to seek smaller contributions from a broader base of supporters, moreover, fund-raising became even more important than in previous decades.”<sup>101</sup> Primo and Milyo noted in 2006, “in fact, it is not an exaggeration to state that most of the consequences of campaign finance law since the 1970s have been unintended rather than the result of careful planning.”<sup>102</sup>

The big question, however, is how well the various campaign finance reforms have actually worked. For example, did they cut the money in politics? Did they cut the influence of special interests? Did they make campaign finance more transparent? Did they cut the amount of labor money or corporate money or fat cat money? After a century of reforms, it is fair to say that we still have not solved the issues of enforcement, fungibility and transparency and the unintended consequences are happening with increasing frequency as we are already seeing at the beginning of the 2016 presidential race. Rather than fulfilling the promise of reformers to limit the role of

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<sup>98</sup> Overacker, Louise, *Presidential Campaign Funds*, Boston University Press, 1946, page 40

<sup>99</sup> *ibid.*, p. 44.

<sup>100</sup> Zelizer, “Seeds of Cynicism: The Struggle over Campaign Finance, 1956-1974,” *The Journal of Policy History*, Vol. 14, No. 1, 2002, page 104.

<sup>101</sup> *ibid.*, p. 104.

<sup>102</sup> Primo, David M. and Jeffrey Milyo, “Campaign Finance Laws and Political Efficacy: Evidence from the States,” *Election Law Journal*, Volume 5, Number 1, 2006, page 35.

money in elections and add transparency to the system and to restore public trust in government, our campaign finance laws do almost exactly the opposite - they enable the role of money, foster secrecy and promote distrust.

The profound empirical failures that necessitated the division into three analytical categories of failure continue to endure. None has ever been fully solved and likely never will, at least as long as we stay on the course we are on. Chapter 4 addresses some potential reasons for this and some potential resolutions. Belmont noticed in 1905 that Publicity was better than Prohibition, as did Overacker in 1946 when she said, “once we have real publicity, the question of “how much” is “too much” may safely be taken out of courts of law and left to courts of public opinion.”<sup>103</sup> Nevertheless, due to the fungibility of money, the enforcement and transparency issues were never successfully dealt with until FECA centralized political committees in the 1970s - something Overacker had been calling for since the 1940s: “Really effective limitation of expenditures in a presidential campaign, or of contributions to that campaign, presupposes complete centralization of the collection and distribution of funds in the hands of a single national agency.”<sup>104</sup>

Enforcement failed entirely from 1907 until the 1970s, was marginally successful for several years but has become lax in recent years as the FEC has faced budget cuts and partisan deadlocks which have created untenable delays in their proceedings and as political actors have discovered and exploited loopholes, whether created by legislation, regulation or litigation. Transparency was slightly more successful pre-FECA

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<sup>103</sup> Overacker, Louise, *Presidential Campaign Funds*, Boston University Press, 1946, page 47.

<sup>104</sup> *ibid.*, p. 46.

than Enforcement because Enforcement was a complete failure and Transparency was never successful in real time but only after elections and only after multiple extensive Congressional investigations as well as those of private watchdog groups and tenacious researchers like Louise Overacker.

Transparency was resolved somewhat with FECA in the 1970s and 1980s as was enforcement, but to a lesser degree. Because a handle was gained on those two, fungibility became less of an issue. But we were barely into FECA (as amended by Buckley) when cracks started to appear, first with Independent Expenditures and then soft money, issue ads, then with a cascade of other events as the “ingenuity of campaign fund collectors”<sup>105</sup> was challenged allowing “a guiding genius...(to)...route these contributions where they were needed.”<sup>106</sup> Again, Overacker hit the nail on the head more than three decades earlier, noting that “limitations can only serve the doubtful purpose of challenging the ingenuity of campaign fund collectors and perhaps also of giving the voter the illusion that this “great unsolved problem” has been solved.”<sup>107</sup>

Post-FECA, transparency has been the single most successful reform, although Congress has done all it could to make its financial disclosures as impenetrable as possible whether it be by having difficult to read forms or in the case of the Senate, to file paper reports to the Clerk of the Senate to then be filed with the FEC where they have to be input, thus delaying the disclosure until the election is over. However, post-BCRA, transparency has become less and less successful due to the proliferation of

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<sup>105</sup> Overacker, Louise, *Presidential Campaign Funds*, Boston University Press, 1946, page 47.

<sup>106</sup> *ibid.*, p. 37.

<sup>107</sup> *ibid.*, p. 47.

527s, 501c organizations and Super PACS. While campaigns and political parties continue to file their reports, a large and growing percentage of the money is spent through other entities, some of which do not even report to the FEC but rather to the IRS and their filings are not due until well after the election and often the following year.

Due to the fungible nature of money, the fungibility issue can not only never be resolved, but has worsened as the transparency and enforcement issues have worsened. Ironically, the early laws called for transparency but there was no way to enforce them while today there are enforcement laws in effect but the fungibility issues not only hinder (if not entirely obscure) the transparency but also impede enforcement. As has been shown, this is true for a variety of reasons: the planned ineffectiveness of the FEC, the limited budget of the FEC, multiple reporting agencies besides the FEC - the IRS, the SEC, state divisions of elections, setting up non-profit corporations in multiple states. Most of these vehicles were similar to the ones used early in the 20<sup>th</sup> century, just refined and updated to evade refined and updated laws and regulations.

There have been endless failures of execution, often scandal driven, and always partisan driven. But most reforms have failed quickly and for similar reasons. There are failures of enforcement, fungibility and transparency, all leading to a never-ending series of unintended consequences. There is some overlap in the categories in that some problems of enforcement lead to lack of transparency or the fungibility of money leads to a lack of transparency, and vice versa. The fungibility of money allows for a lack of transparency which adds to the problem of enforcement. It's the Catch-22 of politics which is just one of many reasons this has been such a tough nut to crack.

How do we know failure from not-failure. It depends on whether you are a Reformer or an incumbent. Based on the stated goals of the Reformers and that for 100 years they have been on offense and driving the debate, campaign finance reform on the federal level has failed. But, if you are an incumbent or a political party or a special interest or a corporation, union or fat cat, then campaign finance reform is an example of not-failure, which is why for the first time the Reformers are clearly playing defense.

I've also suggested that the nature of the problem has been misunderstood, the goals too varied and ill-defined and thus the remedies have not worked. The argument is simple: what were the goals of campaign finance reform? Broadly speaking, it was to limit the role of money in politics. It's only logical that if the proposed cure fit the diagnosed malady, something positive would have happened. Though the patterns of failure go back and have been obvious for a century, they have been even more apparent in recent years in the aftermath of McCain-Feingold and Citizens United as the "devastating legacy" and "incoherence" have been virtually impossible to ignore.

If these campaign finance reforms were going to work, wouldn't they have worked by now? Chapter 3 has highlighted and explored in detail the empirical failures of execution which have plagued all major federal campaign finance reform legislation. Chapter 2 began to dig into the failures of definition via the intellectual failures. Chapter 4 will continue exploring the failures of definition and look at the theoretical failures.

## CHAPTER 4 UNINTENDED CONSEQUENCES AND THE THEORETICAL PATTERNS OF FAILURE

### **Introduction**

Chapters 2 and 3 laid the foundation for and made the case for the intellectual and empirical patterns of failure of federal campaign finance reform. After 100 years of campaign finance reform, our policies have failed in both execution and definition. The research question was what went wrong? We've only partially answered this question so far. This chapter will integrate these two forms of failure and explore the how and why these patterns of failure lead me to believe that there is something deeper going on and try to look beyond the proximate causes and look at the root causes.

A critical assumption of this dissertation is that a fundamental misdiagnosis has led to the patterns of failure both intellectually and empirically over a century and in all seven federal campaign finance laws. If what we were doing was correct, wouldn't something have worked? My prognosis is that since what we have been doing for 50-100 years has not been successful, unless we change course, we'll be having the same arguments over the same issues 50-100 years from now. Election lawyer Bob Bauer made this case eloquently in early 2015:

The debate is stuck, and one reason is that a number of interested observers are dedicated to fighting the same arguments heard since the 1970s. Political spending is to be reduced and the prohibition on corporate spending restored. Independent spending is to be curtailed because some of it is suspect, gutted by disreputable, if not invariably illegal, forms of coordination. Political discourse is being poisoned by attack advertising. And, of course, there is too much "dark money" and disclosure law should be strengthened against it.<sup>1</sup>

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<sup>1</sup> Bauer, Robert, "Disclosure in a 21<sup>st</sup> Century Reform Program," February 2, 2015, MoreSoftMoneyHardLaw.com.

The only thing I disagree with Bauer about is the time frame. I think he does not go back far enough and have marshaled evidence going back over 100 years that demonstrates that we have actually been “dedicated to fighting the same arguments” since the early 1900s and that we have essentially been dealing with the proximate rather than the root causes of the problem of money in politics. To reiterate, the argument is not that money in politics is not a problem because it most assuredly is; rather the issue is how we are going to deal with it and we have not dealt with it very well. Perhaps the best indicator of how far afield we have strayed since the original campaign finance reforms were enacted comes from one of the more recent and controversial cases. In 2010, in the Citizens United case, it was observed that:

Campaign finance regulations now impose “unique and complex rules” on “71 distinct entities.”<sup>2</sup> These entities are subject to separate rules for 33 different types of political speech.<sup>3</sup> The FEC has adopted 568 pages of regulations, 1,278 pages of explanations and justifications for those regulations, and 1,771 advisory opinions since 1975. In fact, after this Court in *WRTL* adopted an objective “appeal to vote” test for determining whether a communication was the functional equivalent of express advocacy, the FEC adopted a two-part, 11-factor balancing test to implement *WRTL*’s ruling.<sup>4</sup>

What makes the above quote even more interesting is when it is juxtaposed with the First Amendment, which reads: “Congress shall make no law abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”<sup>5</sup>

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<sup>2</sup> See Appendix A.

<sup>3</sup> See Appendix B.

<sup>4</sup> *Citizens United v FEC*, 558 U.S. 310 (2010), page 23

<sup>5</sup> United States Constitution, First Amendment.

In this chapter, I will approach the issue of root vs. proximate causes from three different directions. First, using the path dependency literature, I will trace the initial misdiagnosis which has led to the patterns of failure to the Progressive Era. However, for a variety of reasons, the Progressives had a Hobbesian choice, so the failure is not the fault of the Progressives but of those who came after them who either failed to notice it or chose to do nothing about it. Second, I will discuss several of the Supreme Court cases which have not only repeatedly pointed out some of the failures, but which have led either directly or indirectly to many of the pattern of failures. Third, having previously discussed the intellectual and empirical patterns of failure, I will briefly discuss some of the unintended consequences brought about by the misdiagnosis, faulty premises, flawed legislation and Supreme Court opinions.

### **Path Dependency**

Preexisting institutions create constituencies for their preservation that typically force reformers with new goals to build upon rather than dismantle these structures. The resulting path dependence limits the optimality of reform.

-Eric Schickler  
*Disjointed Pluralism*

There is a hole in the academic and legal literature addressing the underlying assumptions and fundamental premises upon which 100 years of reform are based. Most of the academic work is empirical and descriptive and is within the paradigm of the modern regulatory state and the types of studies that social scientists do in this regard – comparative or time-bound studies of regulatory schemes, critiques of one reform or another, calls for more or a different type of reform, proposals for public financing or vouchers, or the like. There is little recognition that layer upon layer of new bureaucratic and regulatory structure is built upon a foundation and edifice that are already suspect –

it accepts the underlying premise that campaign finance must be reformed and so one scheme after another is attempted in hopes of making a difference. There is little historical perspective, no re-examination of the underlying premises that led to the misdiagnosis that led to the inevitable failure of the reforms. The desire by reformers to reform and social scientists to quantify has missed the bigger picture.

The empirical study of how campaign finance reform has played itself out is essentially functionalist, as though the historical trajectory of the campaign finance reform project were purposive or other alternatives unavailable, “...(A) dynamic of increasing returns may have locked in a particular option even though it originated by accident, or the factors that gave it an original advantage may have long since passed away. *Rather than assume relative efficiency as an explanation, we have to go back and look*” (Pierson 2000, 264; italics in original). I argue that what is plaguing the project is its theoretical failure and thus what is really needed is an entirely new theoretical basis.

I argue that a functionalist approach to campaign finance reform is inadequate and incorrect and will draw upon the path dependency literature to flesh out my case and as a way to think about the historical trajectory of campaign finance reform (Orren and Skowronek 2004; Hacker 1998; Lieberman 1998; Skocpol 1994; Skowronek 1982). Path dependency posits that there are “critical junctures” or “triggering events” which set the course for the future (much like a tree trunk), that, once engaged upon, become difficult to turn back from. There can be many reasons for this, for example, the costs of entry or the exit costs, and once those costs are paid, one enters into a dynamic of increasing returns which then make it even harder to turn back. Pierson notes that as

“these effects begin to accumulate, they generate a powerful virtuous (or vicious) cycle of self-reinforcing activity” (Pierson 2000, 253).

The critical juncture for campaign finance reform was in the Progressive Era at a time when there were “two organizational beasts...famously known for dangerous concentrations of power – one political, one economic...the party bosses with their machines and the robber barons with their trusts” (La Raja 2008, 33). This brought the tension between the Progressive Era vision and the century old vision of the Founders to the forefront and on the issue of campaign finance reform, the Founders vision was discarded in favor of that of the Progressive Era. Ironically, and ironies and unintended consequences abound in campaign finance reform, the reformers feared concentrations of power just as Madison suggested they should, but to avoid one set of concentrated powers, they made a tragic turn and “locked in a particular option even though it originated by accident” (Pierson 2000, 264).

Pierson tells us that “large consequences may result from relatively small contingent events” (Pierson 2000, 251). Sometimes “they determine paths – national trajectories – along which alternatives for change in the future are limited by changes made in the past (Orren and Skowronek 2004, 101). Path dependency theory helps us to illustrate the critical juncture faced when the concentrated powers of political parties and corporations met the concentrated powers of the federal government. Though “the factors that gave it an original advantage may have long since passed away,” the historical trajectory was set and the tension between the Founding and Progressive visions was forever tilted in favor of the Progressives, a turn of events I argue was

instrumental in the ultimate failure of the campaign finance reform project (Pierson 2000, 264).

The policy failures have been of both types – in execution and in definition. I am challenging the entire federal campaign finance reform paradigm and questioning the reasoning and logic of the system because I think it is an intellectual dead-end. I seek to ask a more fundamental question – what were the goals of the enterprise and did we achieve those goals. If we have properly identified the problem and spent 100 years solving it, we should have some empirical findings that it has succeeded in some way. My contention is that it has failed on almost all counts and has done so because there was never a proper premise underlying the enterprise, i.e., it was doomed to failure from the outset because it was ill-conceived. It was also poorly executed, but under my theory it would not have succeeded no matter how well it was executed because it had a serious, and fatal, theoretical flaw.

I argue that we have completely misdiagnosed the problem, are thus prescribing the wrong remedy and are somehow shocked that the patient is not cured. Perhaps it is time to begin again at our beginnings and re-check our premises.

### **The Supreme Court**

Where the Reformers have been pretty consistent in their critiques, complaints and calls for reform but have failed to construct a compatible and workable structure for reform and put all the pieces together holistically or historically (a failure of definition), the Supreme Court has suffered from a different form of intellectual failure. It is to be expected that various political actors will have their agendas – Madison explained this to

us in detail in Federalist 10.<sup>6</sup> The rules of the political battlefield are persuasiveness and votes. There is no political requirement of intellectual honesty or consistency. Though this is technically true of the Supreme Court as well, if any political actors or institution is expected to display these qualities, it would be the Supreme Court.

However, in the modern era, the Supreme Court has sometimes displayed a shocking inability to keep their eyes on the ball. Numerous articles and books have been written documenting the decline in First Amendment jurisprudential standards by the Supreme Court. There are often little or no evidentiary requirements to prove a case; too much deference given to Congress, especially on matters of fundamental individual rights (not to mention their self-serving election interests); intellectual laziness and inconsistency with the Court's own precedents; and they have lessened their own standards on strict scrutiny.

Congress cannot resist the temptation to legislate in their own interests and the Supreme Court has not always been up to the intellectual challenge of monitoring the self-interest of Congress in setting the rules for the election to Congress and at times has deferred to the "special expertise of members of Congress on the issue."<sup>7</sup> This oversimplifies something that is actually very complicated and indeed is a delicate balance. While Congress can cherry-pick their issues, the courts can only hear an actual case or controversy<sup>8</sup> and there are, of course, the separation of powers in addition to the checks and balances. Additionally, where Congress is not constrained by its precedents, the

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<sup>6</sup> Madison, James, John Jay and Alexander Hamilton, *The Federalist Papers*, Penguin Press, 1987.

<sup>7</sup> Smith, Bradley A., "McConnell v. Federal Election Commission: Ideology Trumps Reality, Pragmatism," *Election Law Journal*, Vol. 3, No. 2, 2004, at 349.

<sup>8</sup> United States Constitution, Article III, Section 2, Clause 1.

Courts are often constrained by their own precedents not to mention the changing times, personnel and issues it must confront. Thus, some of their “incoherence” can be explained away.

Legal scholar Richard Hasen has accused the Supreme Court of being doctrinally incoherent, ruling too narrowly in some cases (*Shrink*) but ruling too broadly in others (*Citizens United*). At times, they have shown incredible deference to Congress in an area where Congress needs oversight or at least skepticism, sometimes being deferential to the point of absurdity (accepting as evidence polls, newspaper articles and anecdotal evidence) in an area where there is clearly an inherent and obvious conflict of interest by Congress. At other times they have been less deferential and inconsistent on types of evidence and the level of scrutiny of Congress. When the Court defers to Legislative intent when Legislative intent is clearly re-election, the Court is negligent in its constitutional oversight role.

In this section, I will use the works of Richard Hasen and others to review Supreme Court cases from *Buckley* through *McCutcheon*, focusing mainly on *Buckley*, *McConnell* and *Citizens United*. Hasen is one of the most prolific writers and experts on campaign finance reform and his withering criticism of the Supreme Court will be analyzed and there will be much to agree with as well as much to disagree with. Let's start with the disagreements.

Hasen's chief claims against the Supreme Court are essentially that it is inconsistent and thus doctrinally incoherent. In many ways this is hard to contest, but there are many reasons this may be the case or an unfair criticism or both. First, campaign finance reform itself is often inconsistent and incoherent. This is not only due

to the nature of man but also the changing times, the changing personnel in Congress and the new adaptations and innovations to the last reform. Second, there is also changing personnel on the Supreme Court. Third, it is an easy criticism to say that campaign finance doctrine is incoherent, but this same criticism could just as easily be made about Court doctrine on religious issues, search and seizure, the commerce clause and other areas of Court rulings. In other words, the Supreme Court does not get to choose the facts of the specific cases that come their way, thus First amendment law, Second amendment law, search and seizure law (among others) are all somewhat incoherent in terms of being able to draw a straight line or having a “bright line” test.

A good example of this are the post-BCRA cases – McConnell, Davis, Wisconsin Right to Life, Citizens United and McCutcheon. McConnell held that the Bipartisan Campaign Finance Reform Act (BCRA – commonly known as McCain-Feingold) was facially constitutional. This meant that based on the plain language of the Congressional legislation, BCRA had met its constitutional mandate. However, the other cases were specific, fact based cases and controversies that arose over time and were ruled on by the court in an “as-applied” manner. Thus, while the statute had originally been held facially sufficient in McConnell, in the specific factual circumstances presented by Wisconsin Right to Life, the Davis Millionaire’s Amendment Case, Citizens United and McCutcheon, parts of BCRA were held unconstitutional. Whether this is inconsistency and incoherence by the Court is in the eye of the beholder but the Court could only rule on the case before it.

Additionally, over the course of several decades, going back to at least Buckley in 1976, the Supreme Court has been very consistent on two core issues – free speech

and equality. Notwithstanding the legislation Congress passed and notwithstanding the various cases that have come before it, the Supreme Court has been very consistent in finding in favor of the First Amendment and its guarantee of the right of free speech, free association, freedom of the press and the right to petition government to redress grievances. While the level of scrutiny may vary depending on the case (or the circumstances within the case in the matter of Buckley), the Court has almost always erred on the side of more speech rather than less speech and against legislative attempts to either purposely squelch speech or inadvertently chill speech either through vagueness, prior restraint, incumbency protection or otherwise.

Regarding equality, the Court stated in Buckley “The concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment” (Buckley v Valeo, 424 US at 48-49). The court has been severely criticized by many for allowing inequality to reign, but has for the most part held to its principled stance that the First Amendment means what it says about free speech. Despite attempts by Congress and the media and the reformers to pass laws or lobby for laws that will “correct the current imbalance...of the...uneven playing field”<sup>9</sup> the Supreme Court has pretty consistently stuck to its quote above from Buckley – that the First Amendment does not allow the voices of some to be quieted in order to enhance the relative voice of others. In other words, they have erred on the side of countering speech with more speech, not eliminating speech; more robust speech, not less. Congress needs oversight, especially on the election of Congress where they have a clear conflict of interest and on the fundamental right of free speech.

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<sup>9</sup> Donnelly, David, Janice Fine and Ellen S. Miller, “Money and Politics,” Beacon Press, 1999, 10.

The Supreme Court has done a better job of protecting free speech rights than they have overseeing elections.

Richard Hasen has written a number of articles about the Buckley decision, which, in a split decision, determined part of FECA constitutional and part of it unconstitutional, but I will focus on “The Nine Lives of Buckley v. Valeo.” In this article, Hasen discusses the history of Buckley’s

origins...one story is that of good government reformers, especially the group Common Cause...who adopted a legislation and litigation strategy aimed at rooting out corruption among politicians... (and) ...the other story is that of skeptics of government power, including the American Civil Liberties Union...(who)...mistrusted campaign finance regulation, which they saw as a form of incumbency protection and government censorship. (Hasen 2011, 2)

While Hasen finds Buckley “an unlikely candidate for influence and longevity” (Hasen 2011, 1), he concludes that it has had staying power because it encapsulates a “compromise...(of)...the two competing visions...the Common Cause idea that money needs to be limited in politics to prevent corruption and preserve public confidence and the ACLU idea that government regulation of campaign money can squelch political expression and help incumbents” (Hasen 2011, 25-26).

Though the ACLU thought of FECA as “the mothership of government control of political funding and, therefore, political speech” (Hasen 2011, 10), Hasen refers to it as “the Rosetta Stone of American campaign finance jurisprudence for more than a generation” (Hasen 2011, 21). The chief reason it is controversial is because of its divergent treatment of contributions and expenditures, holding that limits on campaign contributions were constitutional because they could be corrupting, while also holding that limits on expenditures were unconstitutional because expenditures constitute core political speech protected by the First Amendment. The Court also held that only the

prevention of corruption and the appearance of corruption justified the infringement of free speech rights and that equalizing speech was not allowed under the First Amendment. Thus, the Court showed some deference to Congress but also carved out a narrow ruling in the areas of expenditures, the corruption rationale and in limiting “FECA’s reach only to cover advertisements containing express words of advocacy (such as Vote for Smith)” (Hasen 2011, 20).

Although it was a per curiam decision five different justices wrote dissenting opinions on one or more grounds, it “resulted in the distortion of Congress’ intent, imposed a regime on the nation that no Congress would ever have enacted, and most importantly, has created a campaign finance system abhorred by virtually all political participants” (Hasen 2011, 21), Buckley continues to stand the test of time. Hasen’s opinion may contain some hyperbole – of course incumbents want to limit spending, especially of challengers. This is why Congress has a conflict of interest and needs strict oversight by the Supreme Court on the fundamental right of free speech, especially political speech. Hasen continues on to review subsequent cases from *Shrink to Bellotti* to *Massachusetts Citizens for Life* to *Austin* to *Beaumont* to *McConnell* and notes that even over time and even with personnel changes and “despite the vast vacillation, the Court has never overruled any part of Buckley and each of these cases professed adherence to the teachings of Buckley (Hasen 2011, 25).

Contrasting Hasen’s take on Buckley’s surprising longevity in “The Nine Lives of Buckley v. Valeo,” is his highly critical assessment of the 2010 Citizens United case in “Citizens United and the Illusion of Coherence.” Noting that until Citizens United, the Supreme Court “had not overruled any of its campaign finance precedents” (Hasen

2011, 25), Hasen takes the Court to task for its very broad ruling in *Citizens United* while overruling *Austin v. Michigan Chamber of Commerce*.<sup>10</sup> *Austin* was overturned because it was seen as an outlier due to its holding that was seen as actually embracing the equality rationale that the Court had previously rejected in *Buckley*.

*Austin* was decided based on a “different type of corruption...the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporations political ideas” (Hasen 2011, 24). While relevant in the 1990s to the Rehnquist Court, it was no longer acceptable to the Roberts Court. In *Citizens United*, supporters saw this as the Court excising an outlier and getting campaign finance doctrine back in alignment with itself; opponents saw it as a court moving quickly to deregulate campaigns, thus ensuring continued political inequality.

Ironically, *Citizens United* has had the perverse unintended consequence and effect of creating political equality in some cases. Due to the rise of Super PACs and other non-party organizations which can accept unlimited contributions, candidates who cannot raise large sums from a broad base of supporters can still be competitive by having a few wealthy benefactors giving millions to their Super PAC. Again, this is not really anything new – millionaire philanthropist Stewart Mott personally funded the presidential candidacy of Eugene McCarthy against incumbent President Lyndon Johnson in 1968, eventually forcing Johnson out of the race.<sup>11</sup> Of course, FECA

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<sup>10</sup> 494 U.S. 652 (1990).

<sup>11</sup> [http://www.nytimes.com/2008/06/14/us/14mott.html?pagewanted=1&\\_r=0&hp](http://www.nytimes.com/2008/06/14/us/14mott.html?pagewanted=1&_r=0&hp)

outlawed exactly this type of campaign funding, but as has always happened, political actors have found a way to get money to their intended beneficiary.

Citizens United has been and continues to be a highly unpopular decision. In fact, several presidential candidates have made a campaign promise to reverse Citizens United if elected and the Democratic Party is using its unpopularity to raise money.<sup>12</sup>

### **Unintended Consequences Of The Patterns of Failure**

In fact, it is not an exaggeration to state that most of the consequences of campaign finance law since the 1970s have been unintended rather than the result of careful planning.

David M. Primo and Jeffrey Milyo,  
*Campaign Finance Laws and Political Efficacy*

Unintended consequences and ironies abound in campaign finance reform and are not just limited to the reactions of the political actors to the seven major pieces of federal campaign finance reform legislation. As has been noted many times, the overarching theme of campaign finance reform has been the various players always playing their role: The Reformers have been steadfast in promoting their reforms to the role of money in politics; the Supreme Court has been steadfast in its insistence on the constitutional protection of political speech; and the political actors have been steadfast in their attempts to “conceal and evade” and otherwise game the system to their advantage.

In fact, the Primo and Milyo quote above bears repeating, “it is not an exaggeration to state that most of the consequences of campaign finance law since the

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<sup>12</sup> EndCitizensUnited.com

1970s have been unintended rather than the result of careful planning.”<sup>13</sup> Perhaps unintended, but not necessarily unforeseen. Louise Overacker would not have been surprised or amused as many quotes earlier in this work confirm. Most political practitioners foresaw it including this author if only because of human nature and the law of cause and effect. While the list of unintended consequences could easily match (if not surpass) the empirical failures enumerated in Chapter Three, we will review a partial list of unintended consequences below, starting with the seven major federal campaign finance reforms.

### **The Tillman Act**

Corporations learned how to game the system and get money to candidates and parties despite the ban on direct contributions. For example, since the Tillman Act was toothless, many corporations did not even attempt to obey it while others gave bonuses and raises to employees who were told to donate to candidates. This is still done today and is called “giving in the name of another” and is a crime no matter who does it. The passage of the Tillman Act just began a practice that is still used today and while it was mentioned previously that the FEC caught a big fish in 2014 with bestselling author Dinesh D’Souza, most of the time those attempting to do it get away with it. Florida Congressman Vern Buchanan has been accused of it several times since first elected in 2006 and has always gotten away with it, largely due to the FECs inability to either focus on it, prove it or both.

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<sup>13</sup> Primo, David M. and Jeffrey Milyo, “Campaign Finance Laws and Political Efficacy: Evidence from the States,” *Election Law Journal*, Volume 5, Number 1, 2006, page 35.

### **The Publicity Acts of 1910-1911**

Because there were few if any enforcement mechanisms, few if any disclosure requirements, numerous ways around the laws and the legal requirement that any violation be “willful” and no central agency or authority to monitor any of the above, business went on as usual. Those candidates who tried to comply, did so by setting up multiple committees in multiple counties or districts to avoid the limits and disclosure requirements and also learned to “not know” about various contributions.

### **The Federal Corrupt Practices Act of 1925**

Because there were few if any enforcement mechanisms, very loose disclosure requirements, haphazard record keeping, irregular reporting forms and numerous ways around the laws and the legal requirement that any violation be “willful” and no central agency or authority to monitor any of the above, business went on as usual. Those candidates who tried to comply, did so by setting up multiple committees and knowingly not knowing about the other committees. For those who did disclose, they could count on the Clerk of the House or Senate to keep their records inaccessible and they were usually thrown out after two years.

### **The Hatch Act of 1940**

Political parties learned to disburse rather than concentrate their fundraising operations and set up separate committees in the states and laid the foundation for the modern day equivalent of Independent Expenditures and Super PACs.

### **The Smith-Connally Act of 1943**

Unions learned to develop one strategy for primaries and another for general elections as well as developing the first Political Action Committee. They also learned to

distinguish between political expenditures and educational expenditures, again laying the foundation for modern techniques, particularly 501(c)(4) organizations.

### **The Federal Election Campaign Acts of 1971 and 1974**

Political parties learned how to develop and exploit soft money, issue ads, permanent strategic relationships with PACs, coordination, Independent Expenditures, Bundling and trading hard money for soft money with state parties. Candidates also learned how to game the Presidential Matching Funds program.

### **Public Financing**

The elimination of private money in political campaigns has been a goal for reformers since Theodore Roosevelt called for it in his 1905 State of the Union speech. Of course, like many politicians caught in a campaign finance scandal, they propose a lot of things. His call was never seriously considered by Congress at the time and was never seriously considered again until the 1960s when incumbents were concerned about the cost of TV and the prospect about running against a self-funded candidate. Public financing did not pass then either, but did finally did pass in 1971 but only for Presidential elections and did not go into effect until the 1976 Presidential elections and only for presidential elections and has had mixed results since then. There have been several experiments in public financing in the states and cities and while not all were successful, they have had far more success than on the federal level.

From the beginning, the reformers wanted total public funding and no private money. It never passed until incumbents had a political need and even then only on a Presidential level. There has never been public support to expand it to cover Senate and House campaigns. In fact, the evidence, both in polling and in tax check-off form on tax returns, is that the public adamantly does not support using tax payer dollars to pay

for political campaigns. Even the temporary tax credit (from FECA until 1986) was controversial for two reasons – first, it was capped at \$50 of your first \$100 donation and the monies went into a general fund, meaning that Democrats were paying for Republican speech and vice versa. It was ended in 1986 as part of tax reform legislation, continuing another trend in campaign finance reform legislation. As noted earlier, some significant campaign finance reforms (the Hatch Act and the Smith-Connally Act) have been passed as riders to other legislation.

On the Presidential level though many candidates made use of public financing, and every major party nominee used it from 1976 through 1996. By 2000, candidates started bypassing the public funding because it did not provide enough money to run a national campaign. Louise Overacker first noted the discrepancy between wanting to limit campaign funding and still needing to educate voters back in 1946 when the limit per Presidential campaign was \$3,000,000.

However, even though Reformers have always sought full public financing for all elections, it has never taken hold for a variety of reasons, mainly the fact that the public does not support it. Zelizer has polling data showing 70% of the public against using tax dollars to fund political campaigns and in what resembles a sample of virtually the entire population, only 8% of individuals filing a tax return (and over 130 million individuals file each year) check the check off box to fund the Presidential Matching Fund. Ironically, reformer calls for public funding have increased at the time that public support has dropped the most. However, the bottom line is the same - public funding has been rejected by the voters, taxpayers and now the candidates.

Even when the Presidential funding was being used, it was still subject to manipulation by political actors as three short anecdotes will demonstrate. First, fringe candidate Lyndon LaRouche found a way to bilk hundreds of thousands of dollars from the system before he was caught and jailed.

Second, because the funds are dispersed on a first come, first serve basis, President Bill Clinton was able to claim almost all of the funds in the Trust Fund in his 1996 re-election campaign in which he was unopposed for the Democratic nomination. He raised all of his allowable monies in the summer of 1995 and was able to get all of his matching funds in January of 1996, which is when the first disbursement was made. Though there were 6-7 Republicans running, they were unable to raise the sums of the incumbent president running unopposed and were also competing against each other for every dollar raised. Consequently, they did not qualify as early or for as much in matching funds as Clinton did and thus he got all of the money and many Republicans were left wanting when the till ran dry in early 1996 while waiting for Americans to pay their taxes by April 15. This is just one little known, yet incredibly brilliant, strategic use of public funding.

The third example is regarding the Iowa and New Hampshire presidential caucuses and primaries, respectively. The FEC manages the Presidential Trust Fund and has specific amounts of money that they allow for each state regardless of the fact that a candidate has qualified for matching funds. Forgetting for a moment that this is micromanagement as it essentially directs how and what a candidate may spend on any particular state, the political actors respond appropriately. For Iowa, candidates often house their employees in neighboring states and have them commute to work in Iowa or

New Hampshire. Campaigns also buy TV time in neighboring states, knowing it will bleed into Iowa and New Hampshire. However, by doing this, they preserve their matching fund monies for those states.

Notwithstanding these anecdotal stories, the Reformers are still quite insistent that public funding of elections is the solution we have been waiting for and are genuinely perplexed as to why presidential candidates no longer use this source of funds.

### **Bundling**

Pioneered and perfected by Emily's List, bundling is a very sophisticated way of both staying within the contribution limits but also avoiding them and allowing candidates to know an interest group has maxed out in its contributions. A PAC, for example the trial attorneys, can give the maximum PAC contribution of \$5000 while also gathering individual contributions of \$2700 (or \$5400 per couple) from 20 different attorneys and their spouses and deliver all checks simultaneously. Thus, the lobbyist for the trial attorneys could walk in the door with checks totaling \$103,000, thus gaining access, favor and gratitude from a candidate for office.

Overacker and Belmont sought voluntary publicity believing public pressure would be enough. In 2004 and 2008, public pressure, led by the New York Times, led to the presidential campaigns voluntarily disclosing the names of their Bundlers. The public and voters for the most part yawned. In 2016, the presidential campaigns are again naming their bundlers, though with the advent of Super PACs, bundlers are far less important and have far less clout than before. Who needs a Bundler when a billionaire can start a Super PAC and personally put in several million dollars?

## **Soft Money**

Soft money was one of the largest and most controversial unintended consequences of campaign finance reform. It was created accidentally (an unintended consequence) by a Congressional act and an FEC ruling and at first the parties did not even know what had been created for them, but by the mid 1980s were using it to great effect and in the 1990s was when reformers started calling for its elimination. However, one of the largest unintended consequences ever began as a result of BCRA's elimination of soft money, which went to the political parties and was disclosed. With this elimination, came the advent of "dark money" which is undisclosed money and is explained below.

## **The Bipartisan Campaign Reform Act of 2002**

In Chapter 1, it was noted that Jeb Bush's Super PAC was charting new territory in allowing his Super PAC to take on tasks normally performed by the campaign. However, even this is nothing new as Overacker notes that "farming out the obligations of a national committee to a state committees with assurances that these bills will be met by loans from a fairy godfather...led to the suppression of important facts without altering the practices."<sup>14</sup> After BCRA banned parties from raising soft money, 527's proliferated as affiliated groups of the political parties (NRA, Right to Life, Focus on the Family among others on the Republican side and various Unions, the Trial Lawyers and Sierra club among others on the Democratic side) were delegated various tasks normally performed by the parties.

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<sup>14</sup> Overacker, *Presidential Campaign Funds*, Boston University Press, 1946, page 36.

All political actors learned how to develop 527s and 501(c)(4) organizations and the overreach of BCRA led to multiple successful Supreme Court cases which not only have shaken the foundations of campaign finance reform, but have also led to the development of Super PACs and thus inadvertently created the equality in politics that reformers have long sought.

### **Super PACs & Political Parties**

Equality is never far from the concerns of the Reformers. Super PACs have ironically created political equality and thus have had the perverse effect of leveling the playing field in the 2016 Presidential election as multiple candidates have billionaires supporting them, thus allowing them to stay in the race far longer than they otherwise might. Super PACs are also now proliferating on the Congressional and state levels, and are having the same effect of leveling the playing field, but certainly not in the way most reformers imagined.

Reformers have always been skeptical of political parties (and not without reason) and diminishing their influence has always been part of their agenda since the Progressive Era. In the aftermath of BCRA, this has backfired on them in ways most Reformers never saw coming. In fact, it is fair to say that the overreach of BCRA has the very foundation of the modern campaign finance regime on the verge of crumbling.

Rather than having some accountability to a political party, Super PACs and organizations are not accountable to anyone. While this may be beneficial to some, it is difficult to make the case that this is beneficial to voters or the public at large. Historically, political parties have given reason for concern. They were castigated by name by George Washington, addressed as factions in the famous Federalist 10 by James Madison (who chose to control rather than eliminate them), already corrupt by

the time of Andrew Jackson, first addressed legislatively by the Pendleton Act in the 1880s and leading to the assassination of an American President, James Garfield, and a compelling topic of academics, journalists, pundits and others throughout the 20<sup>th</sup> and now the 21<sup>st</sup> century. What to do with the parties is not only a perennial issue but also a double edged sword.

As La Raja makes clear in his article and book, *Small Change*, the authors of BCRA would have been wise to adopt a more Madisonian strategy of dealing with the parties rather than unleash what has been unleashed as BCRA has been dismantled due in part to it being disjointed. Again, a major contribution of this dissertation is to attempt to gather the evidence of the patterns of failure all in one place and attempt to bring some coherence to the incoherent world of federal campaign finance law.

### **More Time Spent on Fundraising**

Another complaint of Reformers is how much time politicians have to spend raising money. And since they believe that there is too much money in politics, they cut contribution limits which has the effect of forcing politicians to spend even more time raising money because, as Louise Overacker and Bradley Smith have told us, it costs money to educate an electorate as large as ours. Fundraising limits are a double edged sword – Reformers complain about how much time candidates must spend fundraising, but the perverse effect of limits on sources and amounts is that candidates must spend more time than ever raising money just to raise the same amount because the cost of campaigns is not going down. In other words, just because candidates are limited in what they can raise, this has no effect on the costs of direct mail, TV, radio, polling, salaries, and other campaign costs, all of which continue to rise as do the costs of most goods and services over time.

## **The Inconsistent, Incompatible, Changing Goals of the Reformers**

Ironically, the early calls were for publicity, not criminal law. In fact, the Reformers specifically wanted publicity and public opinion and not the criminal law to prevail. However, by the 1970s, the purpose of disclosure was to observe compliance with the regulations rather than transparency for transparency sake. Over time, the purpose of disclosure became dual – to accomplish both. However, the incoherence and overlapping of the regulatory laws and rules themselves became obstacles to the transparency that were sought for both reasons.

In other words, even transparency failed in its designed goal. Because campaign finance has become less than transparent, we can neither see what is going on or see if there is compliance. As has happened many times before, the Reformers have put the cart before the horse and failed to execute by failing to define. It should be apparent that disclosure and transparency for its own sake is or should be a higher value than disclosure to monitor compliance. This is a text book case where the regulations undermine transparency and actually incentivize non-compliance. This is clearly poorly designed policy. The modern program of using disclosure to monitor compliance with rules is just another in a long line of the patterns of failure.

## **Leadership Funds**

Due to non-competitive districts<sup>15</sup>, many incumbents are unopposed for re-election. All incumbents in both parties try to raise as much money as they can and if they go unopposed will give tens of thousands of dollars back to their political party to be used in other races. In this way, they can accomplish several goals. First, they have

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<sup>15</sup> Pundits claim that for a variety of reasons, including gerrymandering, that fewer than 60 of the 435 seats in the House of Representatives are truly competitive.

raised enough money to scare off competition. Second, they have ingratiated themselves to their party leaders thus enhancing their positioning for various committee chairmanships and key assignments in the next legislative term. Third, they have essentially given soft money to the party to be “earmarked” for one thing or another thereby enabling various donors, knowing this will happen, to get more money to their desired candidate through the vehicle of an unopposed candidate’s campaign fund.

### **Political Action Committees**

PACs have come full circle. In the early 20<sup>th</sup> century, they were unnecessary because campaign finance was in a state of nature. There were either no laws or no enforcement or disclosure, so it did not matter. PACs were originally created of necessity by labor unions after a Republican Congress passed the Smith-Connally Act, banning labor union contributions to political campaigns thus putting them on par with corporations, which had been banned from making direct candidate contributions since the Tillman Act in 1907.

In her analysis of the Smith-Connally Act, Louise Overacker discusses the legal options facing trade unions in determining how to comply with the law. This is discussed elsewhere in this work but suffice to say that her summary is on point, “the point, however, is both highly important and highly controversial, for if direct expenditures of trade unions are not “contributions” within the meaning of the Act, neither are direct expenditures of corporations.”<sup>16</sup> In FECA, PACs were codified by statute and while unions had been using them for years, corporations suddenly saw the benefits and corporate PACs began to flourish. There were 608 PACs in 1974 but over 4000 within a

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<sup>16</sup> Overacker, Louise, *Presidential Campaign Funds*, Boston University Press, 1946, page 60.

decade. The main reason for PACs was that neither unions or corporations could use treasury money for direct political expenditures. However, with the Citizens United decision in 2010, both were freed of these prohibitions. Thus, again, corporations and unions were afforded the same legal rights and again there was really no need for PACs, although they are still widely used strategically as another money vehicle.

### **Incumbency Advantage**

Another area where the Reformers were gamed, is the incumbency advantages which have been created and have metastasized and are now intractable. Creating a political class was the farthest thing from the minds of the Reformers as they sought to lessen the role of money, special interest advantage and corruption in politics. Entrenched, encrusted and intractable incumbency advantage is the exact antithesis of what the reformers wanted.

The list of unintended consequences is essentially endless as the politicians exploited the system, gamed the Reformers, gamed the Supreme Court, gamed the media and gamed their opposition. The things incumbents did to enhance and further entrench their advantage included the Millionaire's Amendment, expenditure limits, contribution limits, disclosure, the 30/60 day filing requirements of BCRA among others. They have defeated the Reformers and their desires for political equality by setting up an elite class of professional politicians and erecting such a bureaucratic minefield of hoops to jump through, that they have practically created an edifice which would be an illegal monopoly if set up in another industry. In other words, there are huge barriers to entry via the FEC and the need for accountants, attorneys, compliance costs and entry costs among others.

## Conclusion

The misdiagnosis was made in the Progressive Era but it is not the fault of the Progressives. The Progressive Era made many great reforms. To put this in perspective, the Progressive Era began about 100 years into the history of the United States and the intention was to tweak those matters that were showing their age. Among the great reforms of the Progressive Era were civil service reform, the secret ballot, the 17<sup>th</sup> and 19<sup>th</sup> amendments, and advances in direct democracy.

The reason it is not the fault of the Progressives, even though it happened during the Progressive Era, is for two reasons. First, they knew that they had a problem (with the concentrations of power and wealth in corporations and political parties) and knew it needed a resolution. They had a Hobbesian choice and it was not an easy call. That the Progressives chose to get the money out of politics seemed a rational choice at the time. Second, the blame falls with subsequent generations who never went back and checked or verified the premises of campaign finance reform in the wake of repeated failures of federal legislation.

While incumbent politicians had no incentive to change a system favorable to them, the Reformers did, but they followed their same script and even doubled down in their calls for more reforms and more restrictions. They never challenged their own premises that there was too much money in politics or that money was the corrupting influence in politics or even sought to determine why their previous efforts had failed. The media consistently took the side of the Reformers unquestioningly and thus perhaps in advertently served the interests of the political class rather than the public interest

It would seem that after the repeating patterns of failure that someone would have gone back to check the premises upon which these reforms were based. At some point, doesn't it seem rational to admit defeat and rethink the problem? To return to the medical analogy, if this were a real illness, we would have committed political malpractice and the patient would have died.

Perhaps there were some who were never that interested in reform at all. Perhaps the patterns of failure and consistent focus on proximate causes has not been by accident. We will take this up in Chapter 5.

## CHAPTER 5 OVERCOMING THE PATTERNS OF FAILURE

Rarely do we find men who are willing to engage in hard, solid thinking. There is an almost universal quest for easy answers and half-baked solutions. Nothing pains some people more than having to think.

--Dr. Martin Luther King, Jr.  
*BrainyQuote.com*

### **Introduction**

This dissertation has marshaled the historical evidence and shown that the patterns of failure of the federal campaign finance reform movement are unmistakable and irrefutable. Campaign finance reform has always existed on a shaky foundation and the twin pillars of the disclosure of contributions and expenditures and the regulation of sources and amounts flowing in and out of campaigns often work at cross purposes with each other rather than complement each other or work interactively. This dissertation has sought to demonstrate that this important issue has finally reached a tipping point and that the means in which campaign finance reform has been addressed has not only been self-defeating<sup>1</sup> but is undermining democracy. The evidence has demonstrated the failed premises and promises upon which campaign finance reform has been based, but to also show the unmistakable patterns of failure – intellectual, empirical and theoretical – that have been pervasive throughout a century of campaign finance reform. I will endeavor to suggest some possible solutions at the end.

Ironically, and ironies abound in campaign finance reform, the first reformer (Perry Belmont) and the first scholar (Louise Overacker) got it about right – Publicity, or

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<sup>1</sup> This is nothing new. In 1946, Louise Overacker noted, “The Hatch Act limitations...defeats its own purpose by encouraging decentralization, evasion and concealment.” Overacker, Louise, *Presidential Campaign Funds*, Boston University Press, 1946, pg 45.

as we now call it disclosure or transparency, seems more effective than Prohibitions, or as we now call it, laws and regulations limiting sources and amounts. Belmont discovered this upon being challenged on the accuracy of his records of contributions and expenditures<sup>2</sup> and called the bluff of his challengers by disclosing the numbers and proving his honesty. Overacker reached the same conclusion three to four decades later after studying the campaign finance reforms from the Tillman Act through the Hatch Act and seeing how politicians exploited the system in the real world.<sup>3</sup>

Since that time, the laws have only become more self-defeating and have only made the “problem” of money in politics worse. The legislation, regulation and litigation have been defeated in every case by political actors exploiting the system. One of the recurring themes of campaign finance reform and thus this dissertation is that the disclosure, or Publicity, laws have been rendered nearly negligible by the regulatory laws, or Prohibitions, built around them, almost completely undermining the transparency they seek. This problem has been growing exponentially since McCain-Feingold and the 2016 Presidential election cycle is on track to have the most “dark money” ever and it is possible it could surpass disclosed money. This was not what the campaign finance reform movement had in mind.

Rather than fulfilling the promise of the reformers to limit the role of money in elections and add transparency to the system and to restore public trust in government, our campaign finance laws do almost exactly the opposite – they enable the role of money, foster secrecy and promote distrust. As this historical record has repeatedly

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<sup>2</sup> Belmont was the Chairman of the New York Democratic State Committee in the early 1900s.

<sup>3</sup> See Chapters 2 and 3 of this dissertation for details of the extreme efforts she had to go to to gather the dusty, moldy, disorganized, non-uniform and incomplete paper records that had been stored in closets, basements, etc.

shown, we have made the same basic mistakes for a century in all 7 major federal campaign finance reform acts (starting with the Tillman Act, and continuing with the Publicity Act, the Federal Corrupt Practices Act, the Hatch Act, Smith-Connally/Taft-Hartley Acts, FECA and BCRA), often without even studying the history of previous reforms and noticing we were making the same mistakes.

While there has been a lot of study of how much money is in politics and where that money comes from and where it goes, there has been no systematic analysis of how it all hangs together or how and why it is all falling apart. While the good government reformers seek to eliminate, limit or at least control the role of money in campaigns, the de-regulate and disclose faction seeks to acknowledge that entities with interests before government will attempt to influence that government and that “sunlight is said to be the best of disinfectants.”<sup>4</sup> In this regard, the immovable object has met the irresistible force.<sup>5</sup>

This dissertation has shown that a confluence of factors have worked together to frustrate new campaign finance reform legislation, rendering most of it stillborn almost upon passage. While there are certainly legitimate constitutional issues involved, incumbents have used the cover of the constitution and the confusion engendered by the legislative, regulatory and judicial decisions to promote and protect a system favorable to them. The lack of a recent major scandal has allowed the status quo to prevail and recent litigation has both enabled and exposed the nature of our current

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<sup>4</sup> Brandeis. Louis D., *Other People's Money – and How Bankers Use It*, Seven Treasures Publications, 2009. Originally published in 1914 after first appearing as a series of articles in *Harper's Weekly*.

<sup>5</sup> It should be noted that this framing intentionally leaves off those on either extreme – those who would only have public financing of all elections and those who would eliminate all disclosure; neither is a viable solution, but more germane, neither has a chance of passage.

system as the 2016 Presidential campaign gets underway. Political actors continue to play the money game and continue to be reelected and continue to occasionally support and/or oppose various campaign finance reforms.

### **Making the Case**

By trying to dash furiously in opposite directions we have arrived nowhere.

--Louise Overacker  
*Presidential Campaign Funds*

It ends up that almost everything that we have been told or think we know about campaign finance reform is incorrect. A century of federal campaign finance reform has largely failed because it was poorly executed and it was poorly executed because it was ill-conceived. However honorable the goals the Reformers may have had, the reforms were ill-conceived because the “problem” of money in politics was misdiagnosed and thus we have spent an entire century repeatedly enacting the same types of reforms. The patterns of failure are obvious when we look back and after a century of reform, the “problem” of money in politics is worse than ever.

While acknowledging that reform is difficult both to enact and execute (and even reforms seen as largely successful have unintended consequences) it is hard to argue that campaign finance reform has had many successes at all. In this regard, it has followed the path of most reforms, placing layer after layer of incompatible, inconsistent and failed or ill-conceived reforms on top of one another because the reforms are “inspired by competing motives, which engenders a tense layering of new arrangements

on top of preexisting structures.”<sup>6</sup> The few successes were short-lived or isolated to small cities or states.<sup>7</sup>

Chapter 1 enumerated the goals of the Reformers and began making the case that a century of reform has failed to achieve their goals. Nobody is happy with the state of campaign finance reform. I challenged the premises and promises and began marshaling the intellectual, empirical and theoretical evidence to dismantle, challenge and undermine them, suggesting that they focused on proximate rather than root causes.

Chapter 2 discussed the Intellectual Patterns of Failure by examining the ongoing tension between the Reformers own stated goals as well as what the Academic literature found. The Reformers were not wrong to be concerned about money in politics; rather they were short-sighted and in addition to maintaining their focus on proximate causes, failed to acknowledge the clear signals the Supreme Court continually sent regarding how fundamental the First Amendment guarantee of free speech is, especially political speech. The actual words of the Reformers are examined, but much of this tension is revealed through a plethora of academic literature, which critically analyzes the Reformers and their reforms as well as media reporting and editorials, which uncritically accepted the premises and promises of the Reformers and thus inadvertently aided and abetted the political class and the Reformers in their efforts, often at the expense of the public interest.

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<sup>6</sup> Schickler, Eric, *Disjointed Pluralism: Institutional Innovation and the Development of the U.S. Congress*, Princeton University Press, 2001, page 15.

<sup>7</sup> Donnelly, David, Janice Fine and Ellen S. Miller, *Money and Politics*, Beacon Press, 1999.

Chapter 3 examined the Empirical Patterns of Failure of all seven major federal pieces of campaign finance reform legislation and documented many of the failures of execution and their cause. In fact, there were so many, that they were placed into the categories of Enforcement, Fungibility and Transparency to encompass the enormity of the failures. A catch-all category of Unintended Consequences had to be added and was covered in Chapter 4. Again, most of these illustrated proximate rather than root causes of the century long failure.

Chapter 4 addressed the Theoretical Patterns of Failure and examined, explained and explored the root causes and elaborated on this by using the Path Dependency literature to trace the ultimate failure back to a “critical juncture” in the Progressive Era at which time a course was set that we are still following today. Often a breakthrough begins with a break-with. A key argument and critical assumption of this dissertation is that unless and until we start again at our beginnings and admit this theoretical error, in another 50 or 100 years we will be in the same position we find ourselves in today. While part of the title of this dissertation is “Re-thinking” campaign finance reform, by my lights, it seems that we’ve never really thought about it at all in a meaningful way, or in the historical context in which this work is trying to place it.

In brief, we got it backwards: rather than privileging the First Amendment’s guarantees of free speech, especially “political speech, speech that is central to the meaning and purpose of the First Amendment,”<sup>8</sup> we have tried to exempt political speech from the First Amendment or otherwise get around its restrictions and guarantees with laws, regulations and prohibitions. We have also tried to divorce

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<sup>8</sup> Citizens United v FEC, 558 U.S. 310 (2010), Slip Opinion, page 12.

campaign finance and money from the rest of politics and the electoral process as though they are not an inextricable part of the same whole.

The Supreme Court, though certainly not perfect or even always in a doctrinally coherent fashion (as demonstrated repeatedly in this dissertation) has nevertheless consistently struck down significant portions of campaign finance laws on Constitutional and First Amendment grounds. This has never deterred the Reformers from trying repeatedly and consistently to enact some version of the same types of reforms.

The primary goals were to limit the amount of money in politics and to disclose the money that is spent (in the immortal words of Louise Overacker, to get a “full understanding of who pays our political bills - and why.”<sup>9</sup>). Ironically, heading towards the 2016 presidential election, we not only have more money than ever in politics, but know less about where it comes from than ever.

Again, using the terminology of the Reformers of the early 20<sup>th</sup> Century, we privileged Prohibitions (laws, regulations and limits on sources and amounts) over Publicity (disclosure and transparency) and consequently got neither. We’ve gotten it backwards. To again quote the brilliantly prescient Louis Overacker, had we focused on Publicity rather than Prohibitions, “the question of “how much” is “too much” may safely be taken out of the courts of law and left to the courts of public opinion.”<sup>10</sup>

How have we gotten so far off course? We have proverbially gotten ourselves up to our ass in alligators and suddenly remembered that our task was to drain the swamp.

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<sup>9</sup> Overacker, Louise, *Presidential Campaign Funds*, Boston University Press, 1946, pg 45.

<sup>10</sup> *ibid.*, p. 47.

This saying has the benefit of being both literally and figuratively true and all puns and double entendres are sincerely intended.

It ends up that almost everything that we have been told or think we know about campaign finance reform (i.e., the conventional received wisdom) is incorrect. We've been told that the chief reasons to limit money in politics and to disclose those receipts and expenditures is that there is too much money in politics and that money corrupts. The animating logic and underlying premise of campaign finance reform is that, "at some level money must be corrupting the political process and that...if money be the root of all evil, reducing the amount of money in the system is the natural conclusion."<sup>11</sup> However, the evidence after 100 years of campaign finance reform does not confirm these underlying presumptions and premises. This is not to say that money is not a problem in politics – it most assuredly is. The issue, rather, is how to deal with it.

Placed in perspective, it's hard to argue that there's too much money in politics. Any way you calculate it – cost per vote in the two year cycle; cost per citizen in the two year cycle; dollars spent as a percentage of either GDP or the federal budget; dollars spent compared to the advertising budgets of various consumer products like soft drinks, fast food, beer, antacids,<sup>12</sup> automobiles – relative to the amounts of money spent on other things in life, the \$7 billion that will cumulatively be spent on campaigns and elections by all candidates, parties and other entities at all levels in the 2015-2016 cycle

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<sup>11</sup> Issacharoff, Frank, "On Political Corruption," 126 *Harvard Law Review* 118, 2010, page 118.

<sup>12</sup> <http://www.politifact.com/truth-o-meter/statements/2015/may/03/john-boehner/john-boehner-we-spend-more-money-antacids-we-do-po/>

is not a lot of money much less an “obscene”<sup>13</sup> amount or a “disaster for democracy,”<sup>14</sup> as alleged by many Reformers.

While \$7 billion spent biennially is a staggeringly large sum on the surface, when viewed in the context of a \$17 trillion annual GDP, a \$4 billion annual federal budget, the amounts spent annually in educating consumers (i.e., advertising) on the above mentioned products or that virtually every campaign dollar is voluntarily given and is, over time, about equally split between Democratic and Republican candidates and causes, it is difficult to make the case that “there’s too much money in politics,” or that the amounts spent educating voters (i.e., advertising) is “obscene” or a “disaster.” It is also worth noting that the ratio of campaign spending relative to GDP and the federal budget has been strikingly consistent for well over 50 years. “Real campaign spending has grown sharply, although somewhat more irregularly, over the last 120 years. However, campaign spending as a fraction of national income has shown no growth at all.”<sup>15</sup>

With a population of approximately 320 million people, the \$7 billion amounts to about \$21.88 per person for the entire two-year cycle. Placing this in perspective, it is difficult to argue that too much money is spent in politics or for democracy. In fact, since it is virtually impossible to argue that the American voter is over-informed, it is easier to make the case that there is too little money in politics. Ironically, another of the incompatible goals of the Reformers is to have less money in politics while

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<sup>13</sup> [http://www.huffingtonpost.com/peter-d-rosenstein/campaign-finance-reform\\_b\\_1187107.html](http://www.huffingtonpost.com/peter-d-rosenstein/campaign-finance-reform_b_1187107.html)

<sup>14</sup> Donnelly, David, Janice Fine and Ellen S. Miller, *Money and Politics*, Beacon Press, 1999, page xiii.

<sup>15</sup> Ansolabehere, Stephen, John M. de Figueiredo and James M. Snyder, Jr., “Why is there so Little Money in Politics?” *108 Journal of Economic Perspectives* 105, at 119 (2002)

simultaneously having a deliberative democracy of engaged and well informed voters (or put more simply, having less money for advertising but having smarter voters).

Another of the incompatible notions of the Reformers was to have lower contribution limits while simultaneously fretting about the amount of time candidates had to spend raising money.

Money is not the corrupting influence in politics. Human nature is largely at play as it is in all other areas of human life. We have laws in politics just like we have laws in every other aspect of our life and sometimes humans break the laws. This is why we have enforcement procedures and an entire law enforcement, prosecutorial and judicial system in place in all walks of life to deal with those who break our laws. Rather than money being the corrupting influence in politics, the evidence would suggest that it is undisclosed money in politics that is the corrupting influence. Why else would political actors go to so much trouble to avoid disclosure and transparency?

This dissertation is replete with examples from all seven major pieces of federal campaign finance reform legislation of the lengths that political actors will go to conceal their actions from the public. Just as human nature often tempts us towards corruption, it also tempts us to look for loopholes by which to game the system. Let's not conflate correlation with causation. Countless studies have failed to demonstrate a causal effect of money and votes and this dissertation has discussed the many reasons for this in multiple places. Having said that, however, it should be noted that while there is not strong evidence of vote buying, there is some strong evidence of lobbyists buying

access and thus obtaining stronger influence on agenda setting than the average citizen.<sup>16</sup>

There is more undisclosed “dark money” than ever, due to several factors. One is the Citizens United decision and its aftermath. A second is the “devastating legacy of McCain-Feingold.”<sup>17</sup> A third is the continual ignoring of many decades of Supreme Court doctrine on the fundamental nature of the First Amendment protections afforded to political speech by the Constitution. Finally, there has also been our unfortunate obsession with proximate rather than root causes leading to the passage of ill-conceived laws for over a century that are not only poorly executed, but which contain gaping loopholes which are then exploited by all political actors; political actors have made it clear that they will have their voices heard regardless of the law.

“Present limitations have little more than a nuisance value...evidence of the ineffectiveness of these limitations is overwhelming,”<sup>18</sup> and this has been the case since the first limits were imposed with the Publicity Act of 1911. All politicians and parties knew this even as they were writing the law, given the lack of enforcement language written into the laws. Though this is supposition on my part, it is rather difficult to make the case that the same legislators who are able to craft elaborate, detailed laws on many other subjects, anticipating and closing loopholes as they draft and enact, are incapable of doing the same in an area in which they actually have expertise –

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<sup>16</sup> Smith, Daniel A., Josh Brodbeck and Matthew T. Harrigan, Citizen and lobbyist access to Members of Congress: Who gets and who gives? *Interest Groups & Advocacy* (2013) 2, 323–342. doi:10.1057/iga.2013.11; published online 3 September 2013.

<sup>17</sup> La Raja, Raymond and Kelner, Robert, “McCain-Feingold’s Devastating Legacy,” *The Washington Post*, April 11, 2014.

<sup>18</sup> Louise Overacker, *Presidential Campaign Funds*, Boston University Press, 1946, page 40.

campaign finance and getting elected to office. Louise Overacker knew and documented this in the 1940s, noting, “they may have salved Puritan consciences; but they did not limit.”<sup>19</sup> While others have occasionally noticed this as well, this dissertation has marshaled and examined the evidence of the failure of the limits to limit from the Tillman Act through BCRA and to the present day.

“Prohibitions do not prohibit,”<sup>20</sup> and have not since the first prohibitive limits were imposed with the Tillman Act of 1907. Louise Overacker knew this in the 1940s as well and opined about the Hatch Act that although it “purported to “Prohibit Pernicious Political Practices...one might almost parody it to read, “An Act to *Promote* Pernicious Political Activities.”<sup>21</sup> Again, the chief purpose and contribution of this dissertation has been to document the ongoing patterns of failure of prohibitions not prohibiting and limits not limiting political actors from doing what they want to do.

Reforms on the local and state level have been more successful if for no other reason than community standards and because they are smaller jurisdictions with smaller electorates, there are fewer voters to educate and mobilize and this costs less. Additionally, it is far easier to mobilize a smaller community on the issue of money in politics than the entire nation. On the local level, candidates running are less experienced but by the time they run for federal office, they are either rich or professional politicians.

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<sup>19</sup> *ibid.*, p. 44

<sup>20</sup> *ibid.*, p. 65.

<sup>21</sup> Overacker, Louise, *Presidential Campaign Funds*, Boston University Press, 1946, pg 45. Italics in the original.

Though noble and honorable thoughts, it ends up that political equality, small donors, an engaged electorate and a deliberative democracy are largely myths at least on the federal level. We have created an elite political class that governs a large and increasingly disengaged electorate and while President Obama inspired a record number of small donations, this has proven to be the exception that proves the rule. While political engagement among elites has seemingly increased in recent years, few citizens will ever donate to a political campaign<sup>22</sup> and the IRS reports that by 2007, only 8.3% of taxpayers used the check-off box to contribute \$3 to the Presidential Campaign Trust Fund, even though that amount does not even come out of their pocket.<sup>23</sup> Ironically, this percentage roughly corresponds to with recent Congressional approval ratings.<sup>24</sup>

Finally, the Supreme Court has held on countless occasions that the First Amendment specifically includes Political Speech, not excludes it as some suggest,<sup>25</sup> including some 2016 Presidential candidates. President Obama, Hillary Clinton, Bernie Sanders and others have pledged to promote a constitutional amendment to overturn Citizens United: “I’d love a Constitutional Amendment to overturn Citizens United.”<sup>26</sup> There is even a website dedicated to this end - EndCitizensUnited.org. Political actors

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<sup>22</sup> Abramowitz, Alan, *The Disappearing Center: Engaged Citizens, Polarization and American Democracy*, Yale University Press, 2010, page 17.

<sup>23</sup> Weintraub, Ellen and Jason K. Levine, “Campaign Finance and the 2008 Elections: How Small Change(s) Can Really Add Up,” *St. John’s Journal of Legal Commentary*, Vol 24, Ed. 2, page 468.

<sup>24</sup> <http://www.gallup.com/poll/1600/congress-public.aspx>.

<sup>25</sup> <http://www.powerlineblog.com/archives/2014/06/democrats-try-to-repeal-first-amendment.php>.

<sup>26</sup> EndCitizensUnitedNow.org, August 14, 2015.

must play by the rules as they are at the time they run for office, but where the rubber hits the road is what they do when they are elected.

### **Conclusion**

We have met the enemy and he is us.

-Walt Kelly  
*Pogo*

This dissertation has made a powerful and compelling case about the Patterns of Failure of campaign finance reform. The goal was to shed light on the mistakes that have been made by detailing both the failures of execution as well as the failures of definition which have plagued the issue for more than a century. Another goal was to suggest that we finally start “Re-thinking” the issue before our democracy is completely undermined by our short-sighted laws and regulations. A final goal was to begin to make the case that many of these mistakes were not mistakes at all, but were quite possibly intended by those writing the laws. Regardless, they were and are definitely and continuously exploited by political actors.

It ends up that Belmont (the father of disclosure) and Overacker (the mother of all scholars) had it about right from the beginning. Belmont said that “contributions and expenditures in elections are public acts for public purposes”<sup>27</sup> and that publicity would serve, “the three-fold purpose of protecting the public interest, the honest collector and the contributor who had no ulterior motive.”<sup>28</sup> Overacker added that “once we have real publicity, the question of “how much” is “too much” may safely be taken out of the courts

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<sup>27</sup> Overacker, Louise, *Presidential Campaign Funds*, Boston University Press, 1945, page 20.

<sup>28</sup> *ibid.*, p. 21

of law and left to the courts of public opinion.”<sup>29</sup> We are left with the incompatible and fundamentally incoherent nature of two opposing forces: the First Amendment and the current state of campaign finance. We have two competing models of political free speech. On the one hand, we have the original model, the First Amendment, which reads:

Congress shall make no law abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.<sup>30</sup>

On the other hand, we have the new and improved 21<sup>st</sup> century model:

Campaign finance regulations now impose “unique and complex rules” on “71 distinct entities.”<sup>31</sup> These entities are subject to separate rules for 33 different types of political speech.<sup>32</sup> The FEC has adopted 568 pages of regulations, 1,278 pages of explanations and justifications for those regulations, and 1,771 advisory opinions since 1975. In fact, after this Court in *WRTL* adopted an objective “appeal to vote” test for determining whether a communication was the functional equivalent of express advocacy, the FEC adopted a two-part, 11-factor balancing test to implement *WRTL*’s ruling.<sup>33</sup>

What do we privilege – Publicity or Prohibition? The public is best served by Publicity, but political actors not only do not want Publicity, but affirmatively seek to create Prohibitions to enable themselves, harm political foes, gain political advantage and avoid Publicity. The media has inadvertently and perhaps negligently, by not understanding and not investigating, served the interests of the political class rather than the public interest. In short, the political actors have outsmarted the public, the

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<sup>29</sup> *ibid.*, p. 47.

<sup>30</sup> United States Constitution, First Amendment.

<sup>31</sup> See Appendix A.

<sup>32</sup> See Appendix B.

<sup>33</sup> *Citizens United v FEC*, 558 U.S. 310 (2010), Slip Opinion, page 23

media and the Reformers. Ironically, the only ones who have regularly understood the game were the Supreme Court and occasionally the Academics. The Supreme Court, which, despite its oft-times circuitous route and often doctrinally incoherent decisions, has consistently erred on the side of free speech while much of the academic literature has pointed out the flaws in the campaign finance laws but it has often been too narrowly focused on one law or an aspect thereof to capture the historical patterns of failure that I try to shed light on here.

A true democracy must have a free and unfettered debate. The question of how to do this is not even close to resolution. The history of campaign finance reform on the federal level for a century shows that every attempt to control the flow of political money has failed and most have failed miserably and failed from the beginning. As the nation, the economy and the government have grown, so have the monies spent by those who have something to gain or lose by regulation and taxation. In fact, we have seen that total campaign spending has consistently been less than 1% of federal spending which has hovered consistently around 20% of GDP for decades. The demands of a modern (small l) liberal welfare state and the regulatory needs of the consumer in a complex technological and information driven age ensure both the continued scope and responsibilities of the federal government and also the necessity of those effected trying to lobby and select it. The correlation is natural and the growth of both goes hand in hand.

As this dissertation has argued, rather than fulfilling the promise of the reformers to limit the role of money in elections and add transparency to the system and to restore public trust in government, our campaign finance laws do almost exactly the opposite –

they enable the role of money, foster secrecy and promote distrust. Money is an issue in politics, but it needs to be seen in the right context. Money has a place in politics, just as it does in every other aspect of our lives. The critical issue of campaign finance reform needs re-thinking and resolution sooner rather than later.

However, history suggests that a system that privileges publicity first and surrounds that with the appropriate minimal prohibitions would have a better chance of working than a system that privileges prohibitions surrounded by publicity provisions to ensure compliance with the prohibitions. Until we actually engage in hard, solid thinking and admit that our prescriptions have failed because we have misdiagnosed the nature of the problem, we are doomed to continue the patterns of failure we have seen for the last century.

APPENDIX A  
RULES IMPOSED BY FECA ON 70 DISTINCT ENTITIES

1. media organizations,
2. MCFL-corporations
3. PACs,
4. business corporations,
5. corporations without capital stock,
6. labor unions,
7. trade associations,
8. membership organizations,
9. unincorporated associations,
10. cooperatives,
11. LLCs,
12. partnerships,
13. sole proprietorships,
14. § organizations,
15. § 527 organizations,
16. federal government contractors,
17. federally chartered corporations,
18. national banks,
19. foreign nationals,
20. separate segregated funds,
21. non-multicandidate committees,
22. multicandidate committees,
23. affiliated committees,
24. connected committees,
25. non-connected committees,
26. leadership PACs,
27. national party committees (and organizations they establish, finance, maintain, or control),
28. congressional-party committees and separately the Democratic and Republican Senate Campaign Committees,
29. national party officials,
30. major parties,
31. minor parties,
32. new parties,
33. political-committee treasurers,
34. political committees with no treasurer,
35. national nominating conventions,
36. state or local conventions to nominate presidential or vice-presidential candidates,
37. state and local party committees,
38. organizations they establish, finance, maintain, or control, state and local candidates and officeholders,
39. Representative, Delegate or Resident Commissioner candidates and their committees,

40. Senate candidates and their committees,
41. campaign committee for national parties,
42. House and Senate campaign committees for special elections,
43. Presidential candidates,
44. Vice Presidential candidates and their committees,
45. federal candidates and officeholders,
46. Presidential primary election campaign committees,
47. Presidential general election campaign committees,
48. draft committees,
49. principal campaign committees,
50. authorized committees,
51. non-authorized committees,
52. affiliated committees,
53. leadership PACs,
54. convention delegate committees,
55. inaugural committees,
56. segregated funds for joint fundraising,
57. segregated funds for compliance costs,
58. segregated funds for "Levin" funds,
59. segregated funds for "electioneering communication" costs,
60. treasurers,
61. vendors,
62. agents,
63. candidates' personal funds,
64. bundlers,
65. collecting agents,
66. fundraising representatives,
67. conduits,
68. individuals,
69. volunteers,
70. and spouses.

APPENDIX B  
FECA UNIQUELY REGULATES 34 FORMS OF SPEECH

1. Contributions to authorized committees, non-authorized committees, candidate committees, presidential candidates, vice presidential candidates, Senate campaigns by the NRSC, DSCC, and national-, state- and local-party committees,
2. contributions by multi-candidate committees and individuals,
3. contributions through conduits,
4. earmarked contributions,
5. contributions solicited by corporations, unions, and their separate segregated funds,
6. contributions by, or solicited by, government contractors,
7. contributions in the name of another,
8. contributions in cash,
9. spending by candidate committees, presidential campaigns, presidential nominating conventions, national-party committees in connection with presidential campaigns, national- state-, and local-party committees in connection with House and Senate campaigns,
10. spending coordinated with a candidate, a candidate's committee, or a candidate's agent,
11. spending coordinated with a party committee,
12. coordinated communications,
13. coordinated party expenditures,
14. party coordinated communications,
15. republished campaign material,
16. spending that is not coordinated,
17. donations to and spending by inaugural committees,
18. donations and spending for state or local conventions to nominate presidential or vice-presidential candidates,
19. loans received and money spent by candidates,
20. Independent Expenditures, i.e., communications that expressly advocate a clearly identified candidate, with different requirements for those from 20 days to 1 day before an election and those more than 20 days before an election,
21. federal election activity, which includes certain voter registration, voter identification, get-out-the-vote, generic campaign activity and communications that promote, attack, support or oppose federal candidates,
22. money used to raise money for federal-election activity,
23. "Levin" money,
24. electioneering communications, i.e., broadcast ads that mention federal candidates before federal elections,
25. electioneering communications by s and 527s,
26. attribution or disclaimer requirements for communications through broadcasting stations, newspapers, magazines, outdoor-advertising facilities, mailings, or any other general public political advertising,
27. fraudulent misrepresentation of campaign authority by candidates or their agents,

28. nonfederal money,
29. money in connection with elections for office,
30. donations to 501(a)s and 501(c)s,
31. expenses allocated under 11 C.F.R. § 106 between/among/for: candidates, authorized presidential primary committees, campaign and non-campaign travel, polling, federal and nonfederal activities of national party committees, separate segregated funds and non-connected committees, party committees other than for federal election activity, party-committee phone banks,
32. events at public educational institutions,
33. debates, and
34. office buildings.

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