
Feckless: A Critique of Critiques of the Federal Election Commission

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Introduction

In this Article, I examine criticisms of the Federal Election Commission (“FEC” or “the Commission”)—which tend to blame the Commission for the substantive failures of campaign finance reform¹—and find the critiques wanting. The tendency to blame the substantive shortcomings of campaign finance reform on the FEC suggests that it is an administrative law problem rather than a political or policy problem. I suggest, instead, that the failure of reform is due less to poor enforcement than to disagreement among experts on the effects of money in politics and, even more fundamentally, disagreements over first principles in the electorate, Congress, and the courts about the desirability and constitutionality of regulation. This small insight has importance beyond the case of the FEC because there is growing political pressure to solve other electoral disputes—most notably gerrymandering—by placing them under the control of independent administrative agencies.

Campaign finance reform and the modern administrative state were birthed in the same household. Both were born from a dislike (if not a

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¹ “Campaign finance reform” is the euphemism traditionally used as a noun to describe a highly regulated system for financing political campaigns (or, increasingly, any discussion of public affairs) or as a verb to describe legislative efforts to increase the amount or severity of such regulation. More properly, we would call it “campaign finance regulation.” I bow to the conventions of the day, however, and in this Article will refer generically to regulation of political spending and contributions as “campaign finance reform.” See *Campaign Finance Regulation*, BALLOTPEdia, <https://perma.cc/E3SH-DC27>.

distrust) of the ordinary political system and a concern about efforts by “special interests” to influence government policy through electoral support of or opposition to candidates for political office. As Professor Thomas G. West states, “Progressive intellectuals were deeply suspicious of government by the people, except when the people and their elected representatives were kept far from the actual day-to-day operation of government.”² Progressives argued that funds spent on public persuasion and lobbying by the “money power” corrupted both the electorate and representative bodies. The result was to distort government policies in ways contrary to the real interest of the people—a real interest determined not by those “corrupted” votes, but by Progressive intellectuals.³ In response, the first wave of Progressives sought to concentrate government power in the hands of impartial experts, immune from such pressure and guided only by “true” public opinion.⁴ Campaign finance reform—in the form of restrictions on private spending to shape opinion, and ideally with government-financed campaigns—would prevent corruption of the electorate and the legislature.⁵ Administrative agencies—insulated from political pressure—would assure government by experts in the science of public administration.⁶ Campaign finance reform was thus both a product of Progressive ideology and a perceived necessity to achieve Progressive goals.

Nevertheless, Congress was slow to create a separate administrative agency to deal with campaign finance issues. The first true federal “campaign finance” law, the Tillman Act, was passed in 1907.⁷ Various

² Thomas G. West, *Progressivism and the Transformation of American Government*, in *THE PROGRESSIVE REVOLUTION IN POLITICS AND POLITICAL SCIENCE: TRANSFORMING THE AMERICAN REGIME* 13, 19 (John Marini & Ken Masugi, eds., 2005).

³ JOHN SAMPLES, *THE FALLACY OF CAMPAIGN FINANCE REFORM* 45 (2006) (quoting HERBERT CROLY, *THE PROMISE OF AMERICAN LIFE* 23 (1964)).

⁴ *See id.* at 53.

⁵ *Id.* at 64.

⁶ *See id.* at 53. For a fuller discussion of the Progressive vision and the centrality of that vision to campaign finance reform efforts, see *id.* at 42–80.

⁷ Pub. L. No. 59-36, 34 Stat. 864 (1907) (codified as amended at 52 U.S.C. § 30118 (2012)) (prohibiting contributions by federally chartered corporations and national banks).

other laws and amendments were added in 1910,⁸ 1911,⁹ 1925,¹⁰ 1935,¹¹ 1939,¹² 1943,¹³ 1947,¹⁴ and 1972.¹⁵ But it was not until the passage of the 1974 Federal Election Campaign Act (“FECA”) Amendments that Congress created a specific agency to administer and enforce campaign finance laws.¹⁶ Substantively, the 1974 FECA Amendments were typically described with terms such as “unprecedented,” “sweeping,” and “comprehensive.”¹⁷ But as significant as those substantive behavioral changes were, many saw the “establishment of an ‘independent, nonpartisan Federal Elections Commission’” as “the most significant reform that could emerge from the Watergate scandal” of 1972.¹⁸ In short order thereafter, a majority of states enacted new regulations and created new agencies to administer and enforce them, often modeled on the FECA Amendments.¹⁹

⁸ Publicity Act, Pub. L. No. 61-274, 36 Stat. 822 (1910) (requiring disclosure of campaign spending in US House races).

⁹ 1911 Amendments to the Publicity Act, Pub. L. No. 62-32, 37 Stat. 25, 28 (extending mandatory disclosure to US Senate races).

¹⁰ Federal Corrupt Practices Act, Pub. L. No. 68-506, 43 Stat. 1070 (1925), *repealed by* Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3, 20 (1972).

¹¹ Public Utility Holding Company Act of 1935, Pub. L. No. 74-333, § 12(h), 49 Stat. 803 (repealed 2005) (prohibiting contributions by utilities).

¹² Hatch Act, Pub. L. No. 76-252, 53 Stat. 1147 (1939) (codified as amended at 5 U.S.C. §§ 7321-26 (2012)) (prohibiting contributions by most federal employees).

¹³ War Labor Disputes (Smith-Connally) Act, Pub. L. No. 78-89, § 9, 57 Stat. 163, 167-68 (1943) (prohibiting union contributions).

¹⁴ Labor Management Relations (Taft-Hartley) Act, Pub. L. No. 80-101, § 304, 61 Stat. 136, 159-60 (1947) (codified as amended at 52 U.S.C. § 30118 (2012)) (prohibiting independent expenditures by corporations and unions).

¹⁵ Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 52 U.S.C. § 30104 (2018)).

¹⁶ Pub. L. No. 93-443, 88 Stat. 1280-88 (1974) (codified as amended at 52 U.S.C. §§ 30106-09 (2018)).

¹⁷ See, e.g., Anthony J. Gaughan, *The Forty-Year War on Money in Politics: Watergate, FECA, and the Future of Campaign Finance Reform*, 77 OHIO ST. L.J. 791, 791 (2016) (“sweeping”); Kirk J. Nahra, *Political Parties and the Campaign Finance Laws: Dilemmas, Concerns and Opportunities*, 56 FORDHAM L. REV. 53, 54 (1987) (“comprehensive”); Fred Wertheimer & Randy Huwa, *Campaign Finance Reforms: Past Accomplishments, Future Challenges*, 10 N.Y.U. REV. L. & SOC. CHANGE 43, 45 (1980) (“unprecedented”).

¹⁸ ROBERT E. MUTCH, CAMPAIGNS, CONGRESS AND COURTS: THE MAKING OF FEDERAL CAMPAIGN FINANCE LAW 87 (1988) (quoting S. REP. NO. 93-981, at 564 (1974)).

¹⁹ See MICHAEL J. MALBIN & THOMAS M. GAIS, THE DAY AFTER REFORM: SOBERING CAMPAIGN LESSONS FROM THE AMERICAN STATES 5-6 (1998). For a sense of where state regulation stood prior to the 1970s, see generally *Loophole Legislation—State Campaign Finance Laws*, 115 U. PA. L. REV. 983 (1967).

Despite the burgeoning volume of law and the creation of new enforcement agencies over the past half century, the goals of campaign finance reform have remained largely unfulfilled. As I wrote in 1996:

Between 1977 and 1992, congressional campaign spending increased by 347%. Congressional election contributions by political action committees (PACs) increased from \$20.5 million in 1976 to \$189 million in 1994. Since 1974, the number of federal PACs has increased from 608 to over 4500. House incumbents, who in 1976 outspent challengers by a ratio of 1.5 to 1, in 1992 outspent challengers by almost 4 to 1. Meanwhile, incumbent reelection rates reached record highs in the House in 1984 and 1988, before declining slightly in the 1990s.²⁰

At that time, I added that the reason for the substantive failure was simple: “at their core, reform efforts are based on faulty assumptions [about how money influences politics] and are, in fact, irretrievably flawed.”²¹ Nearly a quarter century has passed, including another major federal reform effort,²² and few would argue that campaign finance reform has improved on its substantive success in the interim.²³

In that earlier essay I did not, however, address another possible scapegoat—the mechanism for enforcement of the campaign finance laws. Early on, as the failures of the 1974 FECA Amendments became apparent, architects and supporters of a heavy regulatory hand cast aspersions on the agency created in the legislation (the FEC). Over time, this has hardened into a claim that the FEC was “structured to be ineffective”²⁴ or “designed to fail.”²⁵ In other words, the failure of campaign finance reform was alleged to be a failure of enforcement, rather than inherent tensions or failures in the substance of the law.

These criticisms of the FEC as an enforcement agency aside, there is little reason to believe that campaign finance reform enterprise would have been (or will be) more successful if a different or restructured agency were placed in charge of enforcement. To the extent most proposals for

²⁰ Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049, 1050–51 (1996) (citations omitted).

²¹ *Id.* at 1051.

²² Bipartisan Campaign Reform Act (“BCRA”) of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered sections of 36 and 52 U.S.C.). The BCRA is often referred to as “McCain-Feingold” after its primary Senate sponsors.

²³ Bradley Jones, *Most Americans Want to Limit Campaign Spending, Say Big Donors Have Greater Political Influence*, PEW RESEARCH CTR. (May 8, 2018), <https://perma.cc/YVB2-4WH3>.

²⁴ PROJECT FEC, NO BARK, NO BITE, NO POINT. THE CASE FOR CLOSING THE FEDERAL ELECTION COMMISSION AND ESTABLISHING A NEW SYSTEM FOR ENFORCING THE NATION’S CAMPAIGN FINANCE LAWS 7 (2002), <https://perma.cc/58Q4-4THG>.

²⁵ Michael M. Franz, *The Devil We Know? Evaluating the Federal Election Commission as Enforcer*, 8 ELECTION L.J. 167, 167 (2009); Andy Kroll, *Republican Election Commissioners Just Released Key Legal Documents—Nearly a Decade Too Late*, MOTHER JONES (Feb. 24, 2017), <https://perma.cc/4X58-7WFH>.

reform would ameliorate some sore point of regulatory enforcement, they would also create problems of their own. Many of the supposed design defects of the FEC are not bugs but features—and features of Progressive ideology at that. Adopting many of the proposed reforms would, in fact, cost the reform enterprise the popular support and legitimacy that would be needed for the “rigorous” and “robust” enforcement that the FEC’s critics hope to see.

Of course there are other alleged culprits in the reform community’s narrative, most notably the Supreme Court.²⁶ But the presence of these other factors merely emphasizes that a different enforcement mechanism would do little to solve the alleged problems. Far from being “designed to fail,” the FEC is designed for credibility. The problems of campaign finance reform are not something that can be resolved by administrative law and legal structure.

In Part I of this Article, I briefly examine the history of the establishment of the FEC and key considerations that shaped its form and structure. Part II critiques the critiques of the FEC, and Part III reviews common proposals to reform the Commission. I close with a few thoughts on what the perceived failures of the FEC may mean for election administration in areas other than campaign finance.

I. Partisanship, Campaign Finance Regulation, and Creation of the FEC

In this Part, I discuss the creation of the FEC, focusing in Section A on the problem of partisanship in election administration and campaign finance regulation, and in Section B on how and why Congress designed the FEC to address the problem.

A. The Problem of Partisanship

A central challenge for the first wave of Progressives was to remove public administration from the sordid workings of politics while somehow retaining democratic control—or at least a veneer of democratic control—over government policy. The answer of the early Progressives

²⁶ See generally J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609 (1982). The Court has regularly found campaign finance laws to be proscribed by the First Amendment. Some of the more important decisions include *McCutcheon v. FEC*, 572 U.S. 185 (2014); *Citizens United v. FEC*, 558 U.S. 310 (2010); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007); *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604 (1996); *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765 (1978); *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam).

was to have the legislature set forth broad aims of public policy and then cede the substantive details and implementation of those policies to the executive, or to “independent” agencies with substantial independence from even the elected executive. Once removed from the need for horse-trading and freed from the baleful effects of lobbying, impartial bureaucrats who were protected from politics by civil service reforms would simply develop and implement policy in accordance with these broad mandates, basing public policy on principles of expertise and social science.²⁷ Policymaking was seen as similar to science or engineering—skilled administrators would reach the “best” answer or outcome. These bureaucracies would be constrained only by the broadest of “intelligible principles” laid out by Congress to define the goals of regulation.²⁸ Congress, in turn, would be accountable to voters only for its decisions to address or not address perceived problems, the general direction of broad policy, and assuring that agencies were funded.²⁹

The unique nature of election administration causes particular problems even for the idealized version of this expert model. In most substantive areas of regulation, the electorate can make a broad determination as to whether or not the administration is serving its needs and desires. Voters may not grasp the details or the reasons for success or failure, but they can broadly hold an administration or legislature accountable for failures. If an administration’s antitrust policies are failing to enhance market competition in a way that benefits consumers, for example, those consumers will feel that impact and vote against the party in power, even if they have little knowledge of the details of antitrust policy. Similarly, if the Environmental Protection Agency has adopted policies that impact jobs more than the public is willing to tolerate, or, in the opposite direction, fail to protect the environment to the extent that the public would like, voters will move against the incumbent party. In this way, it is possible, at least in theory, to harmonize the notion of expert administration with popular control of government.³⁰

In the administration of elections, however, “the political control model falters.”³¹ Elections are intended to be a check on the regulatory process. But election administration directly affects election results in a way that regulation in other substantive areas does not. As Professor

²⁷ See JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 155 (1966); Joseph B. Eastman, *The Place of the Independent Commission*, 12 *CONST. REV.* 95, 100–01 (1928).

²⁸ See *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

²⁹ See *id.* at 411–13.

³⁰ Whether this really is effective in practice is not my point.

³¹ Jennifer Nou, *Sub-Regulating Elections*, 2013 *SUP. CT. REV.* 135, 178–79 (2014).

Jennifer Nou states, “the very source of legitimacy for the agency action is a function of the agency action itself,” and agency actions may directly “reflect partisan efforts to distort signals of voter approval and disapproval.”³²

Decisions on election administration, no matter how mundane or neutral on the surface, are likely to have partisan consequences affecting electoral outcomes—often quite predictable partisan consequences.³³ Furthermore, the temptation for legislators to manipulate the law for partisan gain is especially strong.³⁴ It is not necessary, however, for lawmakers to engage in conscious manipulation of the law. Laws governing campaigns and elections are likely, over time, to exert at least a modest bias in favor of incumbents and the ruling party. Lawmakers’ self-interest will tend to make them see laws exerting a pro-incumbent bias as fair and reasonable, and laws that make their reelection more difficult as being inherently unfair. Given these partisan effects, it is perhaps unsurprising that recent years have seen considerable dust-ups over such traditionally mundane agency decisions such as verifying and updating voter registration lists³⁵ or the location and number of polling stations and voting machines.³⁶

This problem is even more pronounced in campaign finance regulation. Most election administration decisions are bounded by clear law which spells out, for example, the hours the polls are to be opened; the method of voting; whether some form of voter ID is required, and if so, what documents satisfy the requirement; how ballots are to be handled and counted; and how candidate names are listed on the ballot.³⁷ Further, even at the legislative level, broad consensus and physical and budgetary realities considerably narrow the choices available to the legislature.³⁸ No legislature is going to limit its voting hours to noon to 3:00 p.m. No legislature is going to require all ballots to be cast at a single polling

³² *Id.* at 179; see also MAURICE C. SHEPPARD, *THE FEDERAL ELECTION COMMISSION: POLICY, POLITICS, AND ADMINISTRATION* 117 (2007).

³³ See, e.g., Susan Crabtree, *Calif. Begins Removing 5 Million Inactive Voters on Its Rolls*, REAL CLEAR POL. (June 20, 2019), <https://perma.cc/3TZU-CULD>.

³⁴ See *Loophole Legislation—State Campaign Finance Laws*, *supra* note 19, at 992.

³⁵ Crabtree, *supra* note 33.

³⁶ See Sam Levine, *Officials Defend Plan to Close Almost All Polling Places in Majority Black Georgia County*, HUFFPOST (Aug. 17, 2018, 3:51 PM), <https://perma.cc/ULJ6-AMK7>.

³⁷ See PRINCIPLES OF THE LAW OF ELECTION ADMIN.: NON-PRECINCT VOTING AND RESOLUTION OF BALLOT-COUNTING DISPUTES §§ 103 cmt. a, 104 cmts. d & e, 106 cmt. a, 110 reporters’ note (AM. LAW INST., Revised Tentative Draft No. 1, 2016).

³⁸ See *id.* § 104, reporters’ note.

location in the state. In fact, there is remarkably little variance in state laws pertaining to election administration. Much of traditional election administration truly is about efficiency and organization under clear, bright-line rules.³⁹

Campaign finance, however, is different. Although the Supreme Court has conceded to regulation of campaign finance under the “Times, Places and Manner” and spending clauses of the Constitution,⁴⁰ strictly speaking, campaign contributions and spending are not part of election administration at all.⁴¹ Whereas an election cannot be carried out without some regulation or rules as to the time in which ballots will be accepted, the places they will be accepted, the manner in which they are cast and counted, and so on, the regulation of campaign contributions and spending is independent of the election.⁴² An election can be held with or without any regulation of campaign contributions and spending or the speech those contributions fund, and once a decision is made to regulate, the choices available to legislators and regulators are almost boundless. Whereas the definition of voting is reasonably clear, there is no agreement as to what speech can or should even be considered “campaign” speech. As Justice Holmes put it in his dissent in *Gitlow v. New York*,⁴³ “[e]very idea is an incitement.”⁴⁴ Was a particular speech or advertisement intended to influence an election?⁴⁵ Is a claim “false,” or merely campaign hyperbole, honest if wishful thinking, or possibly a prediction of what might happen?⁴⁶

Nor is there any agreement as to what the substantive standards should be. Campaign funding systems in the United States run the gamut

³⁹ See David C. Kimball et al., *Helping America Vote? Election Administration, Partisanship, and Provisional Voting in the 2004 Election*, 5 ELECTION L.J. 447, 450 (2006).

⁴⁰ *Buckley v. Valeo*, 424 U.S. 1, 90–91 (1976) (per curiam); *Ex parte Yarbrough*, 110 U.S. 651, 660–64 (1884).

⁴¹ See Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. PA. J. CONST. L. 1, 12 (2010); Bradley A. Smith, *Separation of Campaign and State*, 81 GEO. WASH. L. REV. 2038, 2060 (2013).

⁴² Smith, *supra* note 41, at 2060.

⁴³ 268 U.S. 652 (1925).

⁴⁴ *Id.* at 673 (Holmes, J. dissenting).

⁴⁵ See, e.g., *FEC v. Wis. Right to Life*, 551 U.S. 449, 465–66 (2007); *FEC v. Christian Action Network, Inc.*, 110 F.3d 1049, 1060–61 (4th Cir. 1997); *FEC v. Cent. Long Island Tax Reform Immediately Comm.*, 616 F.2d 45, 52–53 (2d Cir. 1980) (en banc) (per curiam); see also Morgan Gstalter, *Watchdog Files Hatch Act Complaint Against Kellyanne Conway for Comments on Dem Candidates*, THE HILL (May 8, 2019, 8:17 AM), <https://perma.cc/4Y4A-7V95> (detailing controversy over whether comments by White House aide constituted partisan advocacy under the Hatch Act).

⁴⁶ See, e.g., *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 152, 163 (2014).

from publicly funded campaigns to entirely privately funded campaigns,⁴⁷ state regulatory systems range from disclosure with no limits on contributions or spending to heavily defined and regulated systems, and everything in between.⁴⁸ Academics and theorists have argued the question for years across the same broad spectrum of possible options.⁴⁹ With an almost endless array of legislative and administrative choices, it is a simple matter for a knowledgeable legislator or administrator to create a system that is neutral on its face, but highly predictable in its partisan impact.⁵⁰ “[Campaign finance r]eform, like war, is politics by other means.”⁵¹

For all these reasons, there has been in the United States a marked favoritism toward assigning regulation and enforcement of campaign finance to “independent” agencies. While the FEC is the most visible campaign finance regulatory agency, it is by no means unique. No fewer than thirty-five states also employ independent agencies as primary players in campaign finance rulemaking, administration, and enforcement, with thirty-three of those using multi-member commissions.⁵²

⁴⁷ See Bill Turque, *Evidence Suggests That Switching to Publicly Funded Elections Is Rarely a Game-Changer*, WASH. POST (Sept. 25, 2014), <https://perma.cc/6NKW-FRF3>.

⁴⁸ See Brian Cruikshank, *Disclosure and Reporting Requirements: Overview*, NAT’L CONF. ST. LEGISLATURES (July 17, 2015), <https://perma.cc/R2UR-FNJZ>; Brian Cruikshank, *Public Financing of Campaigns: Overview*, NAT’L CONF. ST. LEGISLATURES (Feb. 8, 2019), <https://perma.cc/7RPD-8537>.

⁴⁹ See, e.g., John McCain & Russ Feingold, *A Better Way to Fix Campaign Financing*, WASH. POST (Feb. 20, 1996, 9:42 AM), <https://perma.cc/AV7G-LG5S>.

⁵⁰ See Smith, *supra* note 41, at 2089 (“It is not necessary to believe that legislators intentionally seek to alter election outcomes in a particular way to see the dangers of campaign regulation . . . ‘Those in power, even giving them the benefit of the greatest good will, are inclined to believe that what is good for them is good for the country.’” (quoting *McConnell v. FEC*, 540 U.S. 93, 262–63 (2003) (Scalia, J., concurring in part and dissenting in part))); Bradley A. Smith, *Some Problems with Taxpayer-Funded Political Campaigns*, 148 U. PA. L. REV. 591, 606–07 (1999).

⁵¹ Allison R. Hayward, *Revisiting the Fable of Reform*, 45 HARV. J. ON LEGIS. 421, 470 (2008) (concluding an exhaustive history of *United States v. UAW-CIO*, 352 U.S. 567 (1957)). Professor Hayward notes, “[a]t each step, reform was a way to capitalize on public sentiment and restrict political rivals’ access to financial resources, using little debated legislative vehicles and parliamentary skill.” *Id.* at 422.

⁵² See *State Campaign Finance Agencies*, BALLOTPEdia, <https://perma.cc/G3NT-MG2C>. Most were first created in the 1970s and 1980s, shortly after creation of the FEC. See *id.*

B. *Congress's Attempt to Solve the Problem: Creation of the Federal Election Commission*

Prior to the passage of FECA, campaign disclosure reports were required by law to be filed with the Clerk of the House of Representatives (for House candidates) and the Secretary of the Senate (for Senate candidates).⁵³ Enforcement of this law and the few other federal campaign finance laws on the federal books was left to the Department of Justice ("DOJ").⁵⁴ The DOJ rarely brought enforcement actions, however, in large part because it tended to lose when it did. Repeatedly, the DOJ prosecutions foundered on the shoals of the First Amendment and vaguely-worded statutes.⁵⁵ By the mid-1960s, some perceived a chicken-and-egg problem: violations had become "so universal" and bipartisan that the DOJ did not think it could successfully prosecute without appearing overly selective and political, and so it rarely prosecuted.⁵⁶ With prosecutions rare, the theory went, violations became more universal and widespread.⁵⁷ Thus, pressure grew for the creation of an independent agency that would not be timid, yet whose non-partisan legitimacy could not be criticized.

In 1971, the Senate voted 89–2 to establish an independent, non-partisan Federal Election Commission to enforce campaign finance restrictions, consisting of six members evenly divided between Republicans and Democrats.⁵⁸ But the proposal was squelched in the House, led by the opposition of powerful Administration Committee

⁵³ Federal Corrupt Practices Act, Pub. L. No. 68-506, § 307(a), 43 Stat. 1070, 1072 (1925), *repealed* by Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3, 20 (1972).

⁵⁴ *Cf.* § 314, 43 Stat. at 1074 (permitting the DOJ to enforce the Act with fines and imprisonment).

⁵⁵ See *United States v. CIO*, 335 U.S. 106, 120–24 (1948) (finding that the Federal Corrupt Practices Act—a forerunner to FECA—did not reach the activity in question and would have raised constitutional questions if it had); *United States v. Painters Local Union No. 481*, 172 F.2d 854, 856 (2d Cir. 1949) (dismissing a similar action in reliance on *CIO*); *United States v. Constr. & Gen. Laborers Local Union No. 264*, 101 F. Supp. 869, 876–77 (W.D. Mo. 1951) (same). The government's best result came in *United States v. UAW-CIO*, 352 U.S. 567, 591–93 (1957). The lower court had blocked prosecution on the grounds that the allegations did not constitute a violation of the Federal Corrupt Practices Act; the Supreme Court reversed, but it noted the "ambiguous statute." *Id.* at 589. On remand, the jury found the defendants not guilty. Hayward, *supra* note 51, at 463.

⁵⁶ Trevor Potter, *Money, Politics, and the Crippling of the FEC: A Symposium on the Federal Election Commission's Arguable Inability to Effectively Regulate Money in American Elections*, 69 ADMIN. L. REV. 447, 451 (2017).

⁵⁷ See *id.*

⁵⁸ See BROOKS JACKSON, *BROKEN PROMISE: WHY THE FEDERAL ELECTION COMMISSION FAILED* 25 (1990); MUTCH, *supra* note 18, at 83.

Chairman Wayne Hays, who doubled as Chairman of the Democratic Congressional Campaign Committee.⁵⁹ Hays's opposition to the creation of any new enforcement authority emphasized the fear of partisan enforcement. Hays and the House Democrats simply did not trust a commission appointed by President Nixon to be truly bipartisan and even-handed in its enforcement.⁶⁰

By the time Congress considered major amendments to FECA in 1974, however, the Senate Watergate Committee had declared that creation of an independent, non-partisan commission would be "the most significant reform that could emerge from the Watergate scandal."⁶¹ Public pressure finally brought Hays on board.⁶² In practical terms, Republicans wanted an independent commission because otherwise mandatory public disclosures were under the authority of the Clerk of the House and Secretary of the Senate, both under long-time and seemingly unbreakable control of the Democrats.⁶³ Democrats wanted an independent agency because otherwise enforcement of the new contribution and expenditure limits in the amended law would be left to the Nixon administration, now tainted by the Watergate scandal.⁶⁴ What is clear is that both parties feared the possibility of partisanship in enforcement: neither was eager to have campaign finance restrictions—even simple disclosure—that would be enforced by an agency under partisan control of the other party.

Thus the indispensable ingredient in the FEC's creation was its bipartisan makeup. The Commission would be set up such that neither party could gain control. Not only would the Commission have a bipartisan makeup, but a bipartisan vote would be needed for action. Further, lest a powerful chair be able to dominate the Commission, tilting its deliberations and policies to favor one party despite the 3-3 partisan affiliation of commissioners, the FEC was established as a truly collegial body, with no permanent chair and only weak authority to the office of chairman.⁶⁵

Congress further recognized the potential for investigations and even random audits to be utilized as political public relations weapons by those

⁵⁹ JACKSON, *supra* note 58, at 23, 25.

⁶⁰ See *id.* at 25.

⁶¹ S. REP. NO. 93-981, at 564 (1974).

⁶² MUTCH, *supra* note 18, at 87.

⁶³ See *id.* at 83-84.

⁶⁴ *Id.* at 86-87.

⁶⁵ See 52 U.S.C. § 30106(a)(5) (2018).

outside the Commission.⁶⁶ Therefore, Commission investigations were to remain secret until completed,⁶⁷ and the Commission's mechanism for resolving disputes emphasized voluntary conciliation rather than lawsuits and courtroom drama.⁶⁸

These two features were, in fact, classic Progressivism—insulation from partisanship and avoidance of traditional judicial procedures, which emphasized due process for defendants.⁶⁹ They were considered an essential part of both depoliticized public administration and the FEC's legitimacy.⁷⁰ Yet the FEC structure soon became a sore point for those who felt that the 1974 FECA Amendments were failing to live up to their promise. The perceived failures of campaign finance law are regularly laid at the feet of the Commission, and as a result, the country's most visible independent agency directly charged with administering some aspects of campaigns and elections has been the subject of withering attacks for literally decades. The FEC has been derided with such terms as, the "Failure to Enforce Commission," the "Little Agency That Can't," a "lapdog," a "toothless watchdog," a "watchdog without a bite," "FEC-less," "pathetic," and "nuts."⁷¹ In short, it is regularly suggested that the failures of campaign finance regulation are in fact failures of administrative rather than substantive law—specifically, failures to design an effective enforcement agency rather than inherent difficulties in the substantive undertaking. That analysis is wrong.

⁶⁶ See Mutch, *supra* note 18, at 96–97 (discussing the concern that random audits would "imply[] irregularities in the[] campaigns" of those selected). Concern that the mere allegation of campaign violations would become a political weapon has proven to be well-founded. See, e.g., *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 165–66 (2014) (discussing how allegations of violating Ohio's election laws are used to "gain a campaign advantage without . . . having to prove" the violation (quoting Brief for the Attorney General of Ohio as Amicus Curiae Supporting Respondents, at 7)).

⁶⁷ 52 U.S.C. § 30109(a)(4)(B), (12)(A).

⁶⁸ *Id.* § 30109(a)(4)(A)(i).

⁶⁹ See RONALD J. PESTRITTO & TAYLOR KEMPEMA, *THE BIRTH OF DIRECT DEMOCRACY: WHAT PROGRESSIVISM DID TO THE STATES* 4 (2014), <https://perma.cc/77A6-8SAT>.

⁷⁰ See U.S. GOV'T ACCOUNTABILITY OFFICE, *MANAGEMENT REVIEW OF THE FEDERAL ELECTION COMMISSION: EXECUTIVE SUMMARY* 5, 8 (1999), <https://perma.cc/832H-LAUR>; Ryan Patrick Phair & Laurel E. Shanks, *Political Finance and Corrupt Practices*, in *INTERNATIONAL ELECTION PRINCIPLES: DEMOCRACY AND THE RULE OF LAW* 347, 365 (John Hardin Young, ed., 2009).

⁷¹ Scott E. Thomas & Jeffrey H. Bowman, *Obstacles to Effective Enforcement of the Federal Election Campaign Act*, 52 ADMIN. L. REV. 575, 577–78 (2000); Lauren Eber, Note, *Waiting for Watergate: The Long Road to FEC Reform*, 79 S. CAL. L. REV. 1155, 1155–56 (2006).

II. Critiquing the FEC

In order to ensure that the FEC would not become a weapon of partisan politics, the FEC was created with a number of unusual, though not (for the most part) unique features. But from its inception, advocates of expansive campaign finance regulation, and an aggressive approach to enforcement, argued that structural features of the Commission left it insufficiently powerful for what they considered its mission to be.⁷² Over time, this disappointment hardened into a claim that the Commission was “structured to be ineffective” from the start.⁷³ In this Part, I examine these critiques. Criticisms have generally fallen into three categories. The first set of critiques attacks the FEC for its perceived domination by Congress; the second blames the alleged failures of the FEC on its bipartisan structure; and the third focuses on the enforcement procedure and powers (or lack thereof) granted to the Commission. This Part examines each of these critiques in turn.

A. *Domination by Congress*

One prominent critique is that the FEC has been dominated by Congress, through both formal, statutory means and informal practices and norms. In this Section, I examine both claims.

1. Formal Control Through Statute

The argument that campaign finance regulation has failed because the FEC is dominated by Congress is a prominent claim of “reform” literature.⁷⁴ The idea is that Congress—a primary regulatory target of the law—is no more interested in hostile regulation than most private industries. Congress therefore set out to make certain regulation would

⁷² See FRED WERTHEIMER & DON SIMON, *THE FEC: THE FAILURE TO ENFORCE COMMISSION 4-5* (2013), <https://perma.cc/4KYG-99US>.

⁷³ PROJECT FEC, *supra* note 24, at 7–8; see also Amanda S. La Forge, Comment, *The Toothless Tiger—Structural, Political and Legal Barriers to Effective FEC Enforcement: An Overview and Recommendations*, 10 ADMIN. L.J. AM. U. 351, 358 (1996). For a handy list of name-calling directed at the FEC, see PROJECT FEC, *supra* note 24, at 5.

⁷⁴ See JACKSON, *supra* note 58, at 26–31; PROJECT FEC, *supra* note 24, at 71–80; Colloquy, *Federal Election Commission Panel Discussion: Problems and Possibilities*, 8 ADMIN. L.J. AM. U. 223, 235–37 (1994) (comments of Elizabeth Hedlund); Potter, *supra* note 56, at 453–54; Note, *Eliminating the FEC: The Best Hope for Campaign Finance Regulation?*, 131 HARV. L. REV. 1421, 1430–31 (2018). Similar criticism has also come from those more skeptical of reform. See John R. Bolton, *Government Astride the Political Process*, REGULATION, July/August 1978, at 47–50.

either be minimal or beneficial to incumbents. There is certainly some evidence for this in the Commission's early history. As originally created, the FEC was structured with a number of features that "appear[] to have been a grudging acquiescence to the form of independence while retaining as much congressional control as possible."⁷⁵

Hays, the Democratic Chairman of the House Administration Committee, strongly opposed creation of an independent agency.⁷⁶ In Hays's view, campaign finance practices were an internal disciplinary matter for Congress itself, similar to other ethics violations.⁷⁷ Ethical lapses brought disrepute on the entire Congress.⁷⁸ They were not, therefore, a proper object for use in partisan warfare. Even after accepting some type of commission as inevitable, Hays envisioned an enforcement system similar to that existing prior to 1974, when campaign disclosure reports were filed with the Clerk of the House and Secretary of the Senate.⁷⁹ He favored a collegial, bipartisan body consisting of the Clerk of the House and the Secretary of the Senate, along with four members appointed by congressional party leaders.⁸⁰ A seventh member would be the comptroller general,⁸¹ who is the head of the Government Accountability Office (a legislative agency serving Congress) and appointed to a single, fifteen-year term by the President, from a list compiled by congressional leaders from both parties.⁸² But the post-Watergate zeitgeist demanded, at least politically, a new, independent agency, for nothing spells congressional action like a new bureaucracy.

The eventual compromise was a six-member Commission, consisting of three members from each major party. Two—one Republican and one Democrat—would be appointed by the President, and one each would be appointed by the majority and minority leaders in each house of Congress,⁸³ but "all would . . . be confirmed by both houses of Congress."⁸⁴

⁷⁵ MUTCH, *supra* note 18, at 87–88.

⁷⁶ *Id.* at 83.

⁷⁷ *See id.* at 83–84.

⁷⁸ *See* 99 CONG. REC. 2,399–2,400 (1953) (statement of Sen. Morse) ("I simply say that [the recommended disclosure law] would be helpful as a preventative so far as the financial operations of public officials are concerned when such operations tend to bring discredit either upon a great party or upon the Government as a whole.").

⁷⁹ *See* MUTCH, *supra* note 18, at 83–84.

⁸⁰ *Id.* at 87. The Clerk and Secretary are, of course, appointed by each House.

⁸¹ *Id.*

⁸² 31 U.S.C. § 703(a)–(d) (2018).

⁸³ MUTCH, *supra* note 18, at 87.

⁸⁴ *Id.*

This appointments process was unique among federal agencies,⁸⁵ and in *Buckley v. Valeo*,⁸⁶ the Supreme Court held that it violated the Appointments Clause of the Constitution, which requires officers of the United States to be nominated by the President and confirmed by the Senate.⁸⁷

Following *Buckley*, in 1976, Congress reconstituted the Commission.⁸⁸ As in 1974, concern about partisan domination was at the forefront of Congress's thinking. As Democratic Senator Alan Cranston of California put it:

We must not allow the FEC to become a tool for harassment by future imperial Presidents who may seek to repeat the abuses of Watergate. I understand and share the great concern expressed by some of our colleagues that the FEC has such a potential for abuse in our democratic society that the President should not be given power over the Commission.⁸⁹

Congress retained the six commissioner format—still with three Republicans and three Democrats—but the commissioners would now be nominated by the President and confirmed by the Senate.⁹⁰ Additionally, the Secretary of the Senate and Clerk of the House would serve on the Commission as non-voting members.⁹¹ The presence of these two officers during the FEC's discussions of enforcement and regulatory matters was certainly intended to make sure Congress had more than the usual say in the Commission's deliberations⁹²—or, at a minimum, a pretty good idea of what the FEC was considering in terms of regulatory and enforcement policy at the earliest possible moment.

From its inception, the FEC was given rule-making authority, but initially all proposed regulations had to be submitted to Congress and were subject to a one-house veto by either chamber.⁹³ Unlike the Commission's original, unique appointments process, legislative veto provisions were common in the 1970s, as Congress sought to assure

⁸⁵ *Id.*

⁸⁶ 424 U.S. 1 (1976) (per curiam).

⁸⁷ *Id.* at 126–32.

⁸⁸ Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475, 475–502 (codified as amended at 52 U.S.C. §§ 30106–30109 (2018)).

⁸⁹ FEC, LEGISLATIVE HISTORY OF THE FEDERAL ELECTION CAMPAIGN ACT AMENDMENTS OF 1976 (1977), <https://perma.cc/L2S3-YTZX>.

⁹⁰ Federal Election Campaign Act Amendments, § 101(a)–(b).

⁹¹ *Id.* § 101(a)(1).

⁹² JACKSON, *supra* note 58, at 28.

⁹³ *Id.*

political control and accountability over the burgeoning administrative state.⁹⁴

It seems clear that the continued inclusion of the Secretary of the Senate and Clerk of the House as non-voting members after the Commission was reconstituted in 1976—as well as the legislative veto—were intended to assert a degree of congressional control over the FEC. And to the present day, both of these features are regularly set forth as examples of how “Congress designed the FEC to fail,”⁹⁵ and often form a critical part of the ongoing narrative accounting for the failure of FECA to cleanse American politics of the influence of money.⁹⁶ Yet the idea that alleged ongoing failures of the FEC as an enforcement agency can be laid at the doorstep of the legislative veto, or the appointments process and presence of congressional officers as non-voting members, is increasingly far-fetched with each passing year. The legislative veto was abolished with the Supreme Court’s decision in *Immigration & Naturalization Service v. Chadha*⁹⁷ in 1983, and the Secretary of the Senate and Clerk of the House were removed from their ex-officio roles on the Commission after the D.C. Circuit Court of Appeals held, in 1993, that even their non-voting participation was unconstitutional.⁹⁸ That these criticisms of the FEC structure are still raised decades after each was abolished⁹⁹ suggests that many of the FEC’s critics are living in a sort of time warp.

2. Informal Control

In addition to these attacks on the FEC’s early structure, however, critics have complained that Congress has exercised excessive control over the Commission through more traditional channels of oversight and engagement in the selection of commissioners. Specifically, it is suggested that Congress has dominated the FEC’s appointments process and used

⁹⁴ See, e.g., *INS v. Chadha*, 462 U.S. 919, 967 (1983) (White, J., dissenting) (“Today the Court . . . sounds the death knell for nearly 200 other statutory provisions in which Congress has reserved a ‘legislative veto.’”); Antonin Scalia, *The Legislative Veto: A False Remedy for System Overload*, REGULATION, November/December 1979, at 19, 19 (“[T]here are now well over a hundred examples of the legislative veto on the statute books . . .”).

⁹⁵ PROJECT FEC, *supra* note 24, at 8.

⁹⁶ See, e.g., *id.* at 11–13, 15, 71–72; JACKSON, *supra* note 58, at 27–29; WERTHEIMER & SIMON, *supra* note 72, at 4; Potter, *supra* note 56, at 453–54; Eber, *supra* note 71, at 1165–66.

⁹⁷ 462 U.S. 919 (1983).

⁹⁸ *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 827 (D.C. Cir. 1993), *cert. dismissed* 513 U.S. 88 (1994).

⁹⁹ See, e.g., Potter, *supra* note 56, at 453–54.

legislative retaliation, micromanagement, bullying, and threats to exercise informal control over the agency.

a. *Excessive Sway Over Appointments*

Although *Buckley v. Valeo* dispatched with any formal congressional role in appointments to the FEC (beyond the constitutionally-mandated Senate consent), critics of the FEC argue that Congress has retained far too great a say in the selection of commissioners. As one report claimed:

[A]lthough the President is formally required to nominate all FEC commissioners, in practice, the White House and Congress have divided the Commission up in the same way contemplated by the original statute. This has resulted in two FEC commissioners controlled by the White House, two by the Senate leadership, and two by the House leadership. . . For the four congressional seats, the majority and minority party leaders in both chambers of Congress take turns sending to the President the names of the individuals they want appointed to the FEC. In practice, the President almost invariably accepts the names submitted . . . even when he is personally opposed to the proposed nominee.¹⁰⁰

It is hard to know what to make of this criticism, divorced as it is from political reality. Most independent federal agencies have a cap on the number of seats that may go to members of any one political party, with the effect that the party not in control of the White House holds a certain number of seats on the commission.¹⁰¹ This is, as we have seen, a legacy of the Progressive roots of administrative law.¹⁰² That being the case, senators from the party not holding the White House still have considerable say in the appointment of “their party’s” commissioners. Prior to the abolition of the filibuster for nominees in 2013, a united party with even forty-one votes in the Senate could block any presidential nominee.¹⁰³ When a President nominates someone to a seat designated for the opposition party, it is expected that the opposition’s congressional leaders will reject any nominee they consider unfavorable, giving considerably less deference to the President than when the President chooses a member of his own party. If they did not, the bipartisan composition of independent agencies, such as the Federal Communications Commission, the Securities and Exchange Commission, the Federal Trade Commission, the

¹⁰⁰ PROJECT FEC, *supra* note 24, at 60; *see also* MUTCH, *supra* note 18, at 104–06; Frank P. Reiche, *Weakness of the FEC*, in MONEY, ELECTIONS, AND DEMOCRACY: REFORMING CONGRESSIONAL CAMPAIGN FINANCE 237, 239–40 (Margaret Latus Nugent & John R. Johannes, eds., 1990).

¹⁰¹ *See* Brian D. Feinstein & Daniel J. Hemel, *Partisan Balance With Bite*, 118 COLUM. L. REV. 9, 17–22 (2018).

¹⁰² *See id.* at 17.

¹⁰³ *Id.* at 30.

FEC, and many others would become a sham. Presidents could simply stack the deck with persons who did not reflect differing views on the matter, or who only nominally—or even fraudulently—claimed affiliation with the opposition party.¹⁰⁴

This congressional influence in appointments—particularly appointments from the opposition party—is not unique to the FEC. The largest study of presidential appointments to cross-party seats found that even when a minority party was unable to filibuster the President's nominees from the opposite party, appointees drawn from that minority party tended to strongly reflect the party.¹⁰⁵ Congressional leaders from the non-presidential party routinely send recommendations to the President to fill seats on bipartisan boards, and those requests are regularly accorded respect.¹⁰⁶ A president can, of course, insist on his own nominee, or request alternative names from the opposition party's congressional leadership. At this point, whether the President or the congressional opposition gets its way or some compromise is reached will depend on the importance of the issue to each side, the unity of the congressional party behind its leader's choice (especially in the Senate), and any other bargaining issues on the table—including tangentially related or even unrelated legislative issues and appointments.¹⁰⁷ Indeed, even when a president is appointing members of his own party to such bipartisan agencies, he will typically find it beneficial to confer with congressional leadership. There is a reason why such appointments are called patronage, and presidents will use the tools at their disposal—including patronage—to gain congressional support for other priorities.

These realities aside, even the veracity of the criticism—"the President almost invariably accepts the names submitted"—is challenged by the very report in which it appears.¹⁰⁸ That report goes on to discuss several FEC appointment negotiations in which congressional leaders were unsuccessful in getting their choices placed on the Commission.¹⁰⁹

¹⁰⁴ See *id.* at 29–30.

¹⁰⁵ *Id.* at 59–63.

¹⁰⁶ *Id.* at 63–66.

¹⁰⁷ Feinstein & Hemel, *supra* note 101, at 65.

¹⁰⁸ PROJECT FEC, *supra* note 24, at 60.

¹⁰⁹ See *id.* at 61–65 (discussing the unsuccessful efforts by Republican Senate leader Bob Dole to obtain a presidential nomination for Edwina Rogers and Rusty DePass and Democratic President Bill Clinton's re-nomination of Commissioner John McGarry to a Democratic seat in 1997, despite complaints from the Democratic Senate leadership); *id.* at 66–69 (discussing the Author's nomination in 1999–2000 and the extensive and hard-nosed bargaining between the President and Senate leaders over the appointment).

But to the extent this characterization of FEC appointments is true, it would seem to be tilting at windmills. Confirmation battles and congressional interest in presidential appointments are nothing new and hardly peculiar to the FEC. In short, the Progressive vision of scientific administration aside, no way has yet been found to eliminate politics from the selection of appointees, and the lack of unanimity among experts has assured partisan wrangling.

b. *Legislative Retaliation, Micromanagement, Bullying, and Threats*

Another reason given for the FEC's alleged failure is that, the appointments process aside, the Commission has simply been dominated and cowed by Congress. It is certainly true that Congress reacted sharply to what it considered to be overreach by the FEC in the agency's early days. But these episodes do not illustrate flaws with the FEC structure—at least not as compared to any other agency—so much as difficulties with the Progressive vision of policy devised by experts and divorced from political accountability.

There is no better example than the first regulation written by the FEC. The regulation placed limits and reporting requirements on what were formally known as “congressional ‘office accounts.’”¹¹⁰ These funds—labeled “slush funds” by critics—were raised outside of candidate campaigns and were used for travel, constituent services, and the like.¹¹¹ A strong case can be made that such funds have a considerably greater potential for corrupting members than normal campaign funds. Nevertheless, such funds “had never before been regarded as part of campaign funds.”¹¹² It is hard to imagine that the Congress that passed the Federal Election Campaign Act thought it was opening up these accounts—which were not used for campaigning—to regulation. Even the FEC's General Counsel at the time, John Murphy, later wrote, “[t]he imposition of limits [on office accounts] . . . was from the outset legally questionable.”¹¹³ Pre-*Chadha*, Congress used its legislative veto to void the regulation.¹¹⁴

¹¹⁰ MUTCH, *supra* note 18, at 88–89.

¹¹¹ *Id.* at 89.

¹¹² *Id.*

¹¹³ John G. Murphy, Jr., *The Federal Election Commission: A Rebuttal*, REGULATION, September/October 1978, at 42, 50.

¹¹⁴ See MUTCH, *supra* note 18, at 89.

Another early example of Congress overriding the FEC was the program of random audits. As we have seen, prior to the creation of the FEC, campaign finance reports were filed with the Secretary of the Senate and the Clerk of the House.¹¹⁵ The former audited all reports for accuracy—the latter audited none.¹¹⁶ Both approaches made sense in light of the circumstances. Each policy removed both chance and discretion as to which campaigns would be audited, thereby eliminating allegations, justifiable or not, of favoritism and partisanship in the selection of audited committees.¹¹⁷ The Secretary, with just thirty-three campaigns per cycle, chose all—the Clerk, facing a much greater burden with 435 campaigns per cycle, chose none.¹¹⁸

The 1974 FECA Amendments gave the FEC responsibility for a far more complex law, with far more entities required to report.¹¹⁹ Realistically, auditing all regulated parties was impossible. The FEC instead launched a program of random audits.¹²⁰ The program of random audits was extremely unpopular with members of Congress, who not only resented being audited when no accusations of wrongdoing had been leveled against them, but who also felt that—as a practical matter—the very fact of being audited tended to give voters the impression that they had engaged in wrongdoing.¹²¹ Ultimately, Congress responded by stripping the FEC of random audit authority in 1979.¹²²

Whether the lack of continuing random audits has a major effect on enforcement and compliance is questionable. After all, the Commission still audits committees, just not on a random basis. Since the odds of a random audit would be extremely low in any case, there is little reason to believe random audits would deter bad behavior. Instead, the trigger for audits is now based on a complex, internal formula in which violations, late and erroneous reports, and other irregularities increase the odds of an

¹¹⁵ *Id.* at 84.

¹¹⁶ *Id.* at 95.

¹¹⁷ *See id.* at 95–96.

¹¹⁸ *Id.*

¹¹⁹ The 1974 Amendments vastly expanded the number of entities required to report through its expansive definition of “political committee” and its requirement that even entities that did not meet that definition file “independent expenditure reports.” It also required more reports, and more extensive reports, than the law had previously required. For reporting requirements, see 52 U.S.C. § 30104 (2018).

¹²⁰ MUTCH, *supra* note 18, at 96.

¹²¹ *See id.* at 97.

¹²² Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, § 311(b), 93 Stat. 1339, 1363–64 (1980) (codified as amended at 52 U.S.C. § 30111 (2018)). Robert Mutch tells the legislative history in considerable detail. *See* MUTCH, *supra* note 18, at 94–99.

audit.¹²³ Given that experienced players understand this concept without (in all but a few cases) knowing the formula, it may be that the current system causes filers to be more careful and accurate in reporting.¹²⁴ Even if random audits would be beneficial, it is difficult to ascribe to random audits the importance they receive in FEC criticism literature.¹²⁵ With literally thousands of political committees in existence, only a small percentage are audited each cycle, and these audits rarely reveal major or intentional violations.

Critics cite a number of other examples as having cowed the FEC. These include Congress's long-time insistence on having reports initially filed with the Secretary and Clerk and transmitted to the FEC, rather than directly filed with the FEC;¹²⁶ bluster at oversight hearings;¹²⁷ and denial of the Commission's full budget requests.¹²⁸ But Congress's insistence on having reports initially filed with its own officers has no substantive effect on the content of the reports, typically delays public dissemination by one to two days, and seems more like a point of institutional pride—or perhaps patronage—than intimidation.¹²⁹ And neither of the last two items—blustery oversight hearings and budget squabbles—are at all unique to the FEC.¹³⁰

The evidence here is both sparse and entirely anecdotal. For example, Trevor Potter, a commissioner from 1991 to 1995, claims that, with the 1979 legislative revocation of random audit authority, “[a] message was clearly being sent.”¹³¹ He further relates that, “I can recall being at the Commission and suggesting that we do something, and having a Commissioner or staffer say to me, ‘remember random audits!’”¹³² His clear suggestion is that a traumatized Commission despaired of taking any steps to improve enforcement, lest it step on congressional toes.

¹²³ See Bradley A. Smith & Stephen M. Hoersting, *A Toothless Anaconda: Innovation, Impotence and Overenforcement at the Federal Election Commission*, 1 ELECTION L.J. 145, 152 (2002).

¹²⁴ See *id.* at 170.

¹²⁵ *Eliminating the FEC: The Best Hope for Campaign Finance Regulation?*, *supra* note 74, at 1431.

¹²⁶ PROJECT FEC, *supra* note 24, at 72.

¹²⁷ See MUTCH, *supra* note 18, at 89; PROJECT FEC, *supra* note 24, at 73.

¹²⁸ PROJECT FEC, *supra* note 24, at 74–78.

¹²⁹ See *e.g.*, *Federal Election Commission Panel Discussion: Problems and Possibilities*, *supra* note 74, at 241 (comments of Lawrence Noble).

¹³⁰ See Sam Batkins, *A Reply: The Regulatory Budget Takes Form*, 1 ADMIN. L. REV. ACCORD 115, 118 (2016); Cristian R.C. Kelly, Note, *Full of Sound and Fury: Curbing the Cost of Partisan Opportunism in Congressional Oversight Hearings*, 90 N.Y.U. L. REV. 253, 265–66 (2015).

¹³¹ Potter, *supra* note 56, at 454.

¹³² *Id.*

Perhaps this was the state of things during Commissioner Potter's tenure. I can only state that during my five-year tenure on the Commission a decade later, I never heard such a comment or anything like it. Others familiar with the FEC likewise have not admitted to being, or observing others being, cowed into submission. Asked in 1979 if the FEC was "reluctant to deal with matters affecting incumbents," former Commissioner Neil O. Staebler (1975–77) answered, "No. Just the reverse. The FEC consciously braces itself against the danger that it might seem to favor incumbents"—adding that the Commission "strenuously resisted" efforts by individual members to influence the Commission's work.¹³³ Another participant in the Commission's early years, General Counsel John G. Murphy, Jr., argued after leaving the Commission that "the [C]ommission, far from taking a dive at the first sign of officeholder displeasure, has persistently sought to read the law in a fashion that minimizes the inherent electoral edge enjoyed by incumbents."¹³⁴ Near the end of her long tenure at the FEC, the Commission's last original member, Joan Aikens, was nonplussed in discussing the Commission's relationship with Congress: "Nobody likes the IRS because they regulate you. We are in the same position with candidates who become members of Congress."¹³⁵

Indeed, an alternative explanation for regular expressions of congressional anger might be precisely that the Commission has not been supplicant to Congress. The late Senator John McCain, for example, regularly railed against the Commission ("corrupt") and individual commissioners, notably Democrat Ellen Weintraub ("a political apparatchik") and me ("a right-wing ideologue").¹³⁶ Such attacks and threats indicate that the Commission is not doing congressional bidding—it has not been cowed into submission.

Similarly, it is doubtful, for example, that House Appropriations Committee Chairman Robert Livingston decided to launch an investigation of the FEC in 1995—one example of budgetary intimidation

¹³³ Nathan J. Muller, *Reflections on the Election Commission: An Interview with Neil O. Staebler*, REGULATION, March/April 1979, at 33–34.

¹³⁴ Murphy, *supra* note 113, at 50.

¹³⁵ Jeanne Cummings, *Louisiana Republican Gives Election Panel a 'No' Vote*, WALL ST. J., Dec. 15, 1997, at A24, <https://perma.cc/Z28G-UCT5>.

¹³⁶ Jill Lawrence, *McCain: Campaign Needs to Move Beyond Vietnam*, USA TODAY, Aug. 26, 2004, at A09. Ironically, barely two years earlier, McCain had placed a "block" on numerous judicial nominees, demanding that President Bush make a recess appointment placing Ellen Weintraub on the Commission. Richard A. Oppel, Jr., *McCain Plans Bid to Force Election Panel Appointment*, N.Y. TIMES, June 25, 2002, at A19, <https://perma.cc/7H22-P55U>.

cited by Project FEC¹³⁷—because he thought that the FEC was sufficiently supplicant to Congress. If Livingston’s intention was to intimidate the FEC, however, it is doubtful that he succeeded. In fact, as Project FEC itself notes, the Livingston report was never officially released and, according to the Wall Street Journal, it was “summarily dismissed as inadequate.”¹³⁸ Meanwhile, the following year, the Appropriations Committee approved a 12% increase in the FEC’s budget, albeit with some funds earmarked for technology improvements and an independent audit of the Commission.¹³⁹ That independent audit ultimately concluded that the FEC was “a competently managed organization with a skilled and motivated staff,” and made a number of recommendations, some since signed into law.¹⁴⁰ If Livingston’s motive was intimidation or micromanagement, rather than an improved FEC, it would seem his efforts failed miserably.

On the enforcement side, the most detailed study, of over 1,300 enforcement matters from 1996 to 2006, found that the FEC did not reflect a pro-incumbent bias, as would be expected if the FEC were truly cowed by Congress.¹⁴¹ Rather, the Commission’s vote patterns “specifically suggest that the FEC fails as an agency designed, as critics cynically suggest, to do incumbents and national parties the least harm.”¹⁴²

In short, the idea that the Commission is inefficient because commissioners lack the gumption to hold up under congressional threats and to engage in serious enforcement of the law simply has little support beyond a small number of unsubstantiated anecdotal recollections.

Though over the years the FEC has had numerous squabbles over its budget—what federal agency has not?—since Bob Livingston’s 1995–96 scrutiny the FEC’s budget has grown from \$31.65 million for fiscal year 1998 to \$71.25 million for fiscal year 2019¹⁴³—an increase more than double

¹³⁷ PROJECT FEC, *supra* note 24, at 79.

¹³⁸ *Id.*; Cummings, *supra* note 135.

¹³⁹ Cummings, *supra* note 135.

¹⁴⁰ Press Release, FEC, Independent Audit Report on FEC Submitted to Congress (Jan. 29, 1999), <https://perma.cc/Z4E7-TQYU>. Notably, the audit recommended establishing an Administrative Fines program for routine reporting violations. *See id.* This was established by Congress later that year. *See* Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, § 640, 113 Stat. 430, 476–77 (1999).

¹⁴¹ *See* Franz, *supra* note 25, at 181.

¹⁴² *Id.* at 183.

¹⁴³ FEC, ANNUAL REPORT 1998 4 (1999), <https://perma.cc/T8KP-YRPV>; FEC, FISCAL YEAR 2019 CONGRESSIONAL BUDGET JUSTIFICATION 2–3 (2018), <https://perma.cc/R6JN-884D>.

the rate of inflation.¹⁴⁴ If we go back to the first full budget of the FEC as reconstituted after the decision in *Buckley v. Valeo*, the FEC's budget has grown by nearly 250%, after accounting for inflation.¹⁴⁵ Thus, the notion that Congress has caused the agency to wither through budget constraints also seems unlikely.¹⁴⁶

B. *FEC Structure*¹⁴⁷

Perhaps no criticism of the FEC is more predominant than the criticism that its structure assures an ineffective agency. This criticism focuses on two aspects: (1) the 3–3 split of commissioners between the two major parties,¹⁴⁸ and (2) the lack of a strong, permanent chairman, since the commissioners instead elect one of their members for a one-year term each year.¹⁴⁹

¹⁴⁴ See Morgan Friedman, *The Inflation Calculator*, WESTEGG, <https://perma.cc/37MH-WEN6>.

¹⁴⁵ See FEC, ANNUAL REPORT 1977 44 (1978) (detailing a budget of \$6.17 million for fiscal year 1977).

¹⁴⁶ See Maurice A. Sheppard, *The Federal Election Commission: An Analysis of Administrative Behavior* 63–64 (Dec. 2000) (Ph.D. dissertation, Western Michigan University) (“Variations in the FEC’s annual budget should explain some variations in the agency’s initiation of enforcement investigations over time. . . . because annual administrative agency budgets traditionally do not experience significant fluctuations, the relationship between the FEC’s annual budgets and its initiation of MURs maybe minimal.”).

¹⁴⁷ This Section is an adaption of my testimony before the Senate Committee on Rules and Administration. See *Before the S. Comm. on Rules & Admin.* 108th Cong. (2004) (opening statement of Bradley A. Smith, Chairman, FEC) [hereinafter Smith Opening Statement], <https://perma.cc/8DBV-WJP5>.

¹⁴⁸ 52 U.S.C. § 30106(a)(1) (2018). Although in theory a Libertarian or other third party member could be appointed, none has ever seriously been contemplated. At least one declared independent has served, but his alignment with one of the major parties is not questioned. Commissioner Stephen Walther is an independent, but he previously served as counsel to Democratic Senate Leader Harry Reid in Reid’s 1999 election recount. See Ed Vogel, *Recount Not Expected to Unseat Reid*, LAS VEGAS REV.-J., Nov. 10, 1998, at 1A. Walther was appointed on Reid’s recommendation to Republican President George W. Bush, as a “Democratic commissioner[.]” *Senate Confirms New FEC Commissioners, Ending Long Partisan Standoff*, POLITICO (June 24, 2008, 8:15 PM), <https://perma.cc/NZ78-CKN6>. Reid had previously sought a judgeship for Walther, a “longtime political supporter” of Reid. Carri Geer, *Senator Makes Familiar Appeal*, LAS VEGAS REV.-J., Dec. 11, 1999.

¹⁴⁹ 52 U.S.C. § 30106(a)(5).

1. The Six-Member, Bipartisan Commission

The FEC's 3-3, bipartisan makeup is at the core of almost all structural criticism of the FEC. The structure is not unique, but it is unusual.¹⁵⁰ According to the FEC's critics, "[d]rift and deadlock are built in";¹⁵¹ the FEC suffers from "gridlock" and lack of "coherent policymaking";¹⁵² the structure is "a recipe for stalemate";¹⁵³ and the FEC is "crippled by *regular* 3-3 splits"¹⁵⁴ due to a structure that "effectively incorporates gridlock into the enforcement process."¹⁵⁵ Critics typically seek to shrink the Commission to three or five members, or expand it to seven, to avoid these "deadlocks."¹⁵⁶ There is a certain facial appeal to this criticism. Given that four votes are necessary for the FEC to take action,¹⁵⁷ a cynical view of the process suggests a situation in which Republicans block any enforcement against their members, and Democrats do the same when complaints are filed against their side.¹⁵⁸

At the outset, the accusation may prove too much. If we cannot count on commissioners to vote except along party lines, we have to doubt whether a Commission with an odd number of members could ever function as other than a tool of partisan politics. The argument that a 3-3 bipartisan Commission is doomed to "gridlock" undermines the entire project of campaign finance regulation. It suggests that there is no expertise, only politics, and regulation is less about good government than about kneecapping one's political opponents.

But let us take the claim on its own terms. Is it even true? According to a report by the office of former Commissioner Ann M. Ravel, in 2016,

¹⁵⁰ Other federal agencies with an even number of commissioners are the Election Assistance Commission, 52 U.S.C. § 20923(a)(1) (2018), and the United States International Trade Commission, 19 U.S.C. § 1330(a) (2018).

¹⁵¹ Thomas E. Mann, *The Federal Election Commission: Implementing and Enforcing Federal Campaign Finance Law*, in *CAMPAIGN FINANCE REFORM: A SOURCEBOOK* 316 (Anthony Corrado et al. eds., 1997).

¹⁵² DANIEL I. WEINER, *FIXING THE FEC: AN AGENDA FOR REFORM* 3-4 (2019), <https://perma.cc/4DUJ-LDEY>.

¹⁵³ PROJECT FEC, *supra* note 24, at 9.

¹⁵⁴ Potter, *supra* note 56, at 456.

¹⁵⁵ La Forge, *supra* note 73, at 359.

¹⁵⁶ See Eber, *supra* note 71, at 1172-73; see also PROJECT FEC, *supra* note 24, at 39.

¹⁵⁷ See 52 U.S.C. § 30106(c) (2018). For this reason, although I use the designation "3-3" in the discussion that follows, any time less than a full complement of commissioners voted, due to vacancies or recusals, I include 3-2 and 3-1 votes among the designation "deadlocked."

¹⁵⁸ Eber, *supra* note 71, at 1172; La Forge, *supra* note 73, at 359.

the FEC “deadlocked” on 30% of enforcement matters.¹⁵⁹ Commissioner Ravel’s report came on the heels of two other reports—one by the advocacy group Public Citizen and the other by the Congressional Research Service—finding “deadlocks” in over 20% of Commission votes on enforcement matters in 2013 and 2014, respectively.¹⁶⁰ A major study of advisory opinions found “deadlocks” on just 3.7% of requests from 1977 through 2012, but over 6% every year but one between 2006 and 2012, rising to 20% in the last year of the study.¹⁶¹ Of course, ending up in tie votes on one-fifth to one-third of all matters is hardly perpetual “gridlock.” But these are not insubstantial numbers either, suggesting some weight behind the “deadlock” theory.

There is, however, substantial controversy over these numbers. An analysis released by Republican FEC commissioners in September of 2016 found that the FEC had “deadlocked” on just 14% of votes during the first nine months of the calendar year.¹⁶² Commissioner Ravel argued that the Republican tally included non-substantive votes, such as approval of meeting minutes and internal staff issues.¹⁶³ Commissioner Lee E. Goodman, however, argued that in 2014 the Commission “deadlocked” on just 7% of all matters and on 14% of “all substantive matters (i.e., votes cast on enforcement matters, audits, advisory opinions and the like).”¹⁶⁴ Since the Commissioners did not release the basis for their dueling statistics, it is difficult to referee.

¹⁵⁹ OFFICE OF COMM’R ANN M. RAVEL, FEC, DYSFUNCTION AND DEADLOCK: THE ENFORCEMENT CRISIS AT THE FEDERAL ELECTION COMMISSION REVEALS THE UNLIKELIHOOD OF DRAINING THE SWAMP 9 (2017) [hereinafter DYSFUNCTION AND DEADLOCK], <https://perma.cc/F6SH-NE5H>.

¹⁶⁰ R. SAM GARRETT, CONG. RESEARCH SERV., R44319, THE FEDERAL ELECTION COMMISSION: ENFORCEMENT PROCESS AND SELECTED ISSUES FOR CONGRESS 9–10 (2015), <https://perma.cc/BLL2-DSUH> (finding a 24.4% “deadlock” rate on enforcement matters in 2014); Press Release, Pub. Citizen, Roiled in Partisan Deadlock, Federal Election Commission Is Failing 1 (2015), <https://perma.cc/3RNK-BSB2> (finding that the rate of “deadlocked” votes on proposed enforcement actions topped 10% each year from 2009 through 2014, the last year covered in the report, reaching a high of 22.5% in 2013).

¹⁶¹ Michael M. Franz, *The Federal Election Commission as Regulator: The Changing Evaluations of Advisory Opinions*, 3 U.C. IRVINE L. REV. 735, 750 (2013).

¹⁶² See Press Release, Matthew S. Petersen, Chairman, Caroline Hunter & Lee E. Goodman, Comm’rs, FEC, to NBC-4 (2016), <https://perma.cc/3SDA-MSUV>.

¹⁶³ DYSFUNCTION AND DEADLOCK, *supra* note 159, at 8.

¹⁶⁴ See Lee Goodman, *The FEC’s Problems Aren’t with the GOP*, POLITICO (May 10, 2015), <https://perma.cc/UE36-6BGA>.

This controversy continues.¹⁶⁵ In the summer of 2019, for example, the Committee on House Administration asked the Commission for data on the number of Matters Under Review (“MURs,” the FEC term for enforcement matters) in which the Commission had, at a meeting, taken at least one vote with a 3–3 or 3–2 result from 2012 through the date of the request.¹⁶⁶ To take the last full year of that period (2018), the Commission reported a whopping 59% of all MURs voted on in enforcement sessions had at least one tie vote.¹⁶⁷ But the number is wholly misleading. The Commission disposes of many matters on “tally,” meaning a majority of the Commission agrees with the recommendation of the General Counsel and no commissioner asks to have the matter placed on the agenda for a meeting.¹⁶⁸ In those cases, the Counsel’s recommendation is approved without the matter ever going on a Commission agenda.¹⁶⁹ Adding in tally votes dropped the percentage to 26%.¹⁷⁰ If one adds in cases handled through the Commission’s Administrative Fines and Alternative Dispute Resolution programs, the “deadlock” rate falls to just 12%.¹⁷¹ And this number includes matters with even a single “deadlock.”¹⁷² For example, a “deadlock” vote on whether to

¹⁶⁵ See GARRETT, *supra* note 160, at 10 (“Results from . . . analyses vary based on methodology, time period, and the types of votes studied.”). For example, in Garrett’s own 2009 study, he placed the “deadlock” rate in enforcement matters at 13% for the 12 months from July 2008 through June 2009 but noted that it would drop to 6% if all enforcement matters, including Administrative Fines and cases sent to the Commission’s Office of Dispute Resolution, were included in the total. R. SAM GARRETT, CONG. RESEARCH SERV., R40779, DEADLOCKED VOTES AMONG MEMBERS OF THE FEDERAL ELECTION COMMISSION (FEC): OVERVIEW AND POTENTIAL CONSIDERATIONS FOR CONGRESS 6 (2009), <https://perma.cc/79SS-M62D>.

¹⁶⁶ Letter from Zoe Lofgren, Chairperson, H. Comm. on H. Admin., to Ellen Weintraub et al., Chair, FEC (Apr. 1, 2019), <https://perma.cc/8KJU-2UYE>.

¹⁶⁷ FEC, RESPONSES TO QUESTIONS FROM THE COMMITTEE ON HOUSE ADMINISTRATION 22 (2019) [hereinafter RESPONSES TO QUESTIONS], <https://perma.cc/W2JS-B6NQ>.

¹⁶⁸ See *FEC-Glossary of Terms*, FEC, <https://perma.cc/V9TQ-4CAV>.

¹⁶⁹ See *id.*

¹⁷⁰ See Matthew S. Petersen & Caroline C. Hunter, *Attachment B*, in RESPONSES TO QUESTIONS, *supra* note 167, <https://perma.cc/93G4-9SML>.

¹⁷¹ See *id.* I calculated these percentages from the data provided to the House Administration Committee by Commissioners Petersen and Hunter, *id.*, and FEC enforcement statistics found by searching all Administrative Fines and Alternative Dispute Resolution cases closed between January 1, 2018 and December 31, 2018, using the Commission’s Enforcement Query system, see *FEC Enforcement Query System*, FEC, <https://perma.cc/N3RB-VCZ9>. That search found sixty-seven cases closed through the Alternative Dispute Resolution system and 193 closed through Administrative Fines.

¹⁷² See Matthew S. Petersen & Caroline C. Hunter, *Attachment B*, in RESPONSES TO QUESTIONS, *supra* note 167, <https://perma.cc/93G4-9SML>.

offer “pre-probable cause conciliation,” followed by a majority Commission vote to continue to a “probable cause” finding,¹⁷³ would count in the 12% “deadlock” figure—but this is hardly indicative of an inability to take action against violators. Similarly a 3–3 vote against a token \$1,000 fine in a case involving an inadvertent violation, followed by a decision to merely send a warning letter, would count as a “deadlock”—as would a 3–3 vote against sending a warning letter, followed by a vote approving a \$1,000 (or higher) fine. But again, none of these examples indicate an inability to act. Thus we can assume that the ultimate figure for “deadlocks” on substantive matters probably remains below 10%.

Even this rate of “deadlocks” appears to be nothing more than a relatively brief aberration. Critics have propounded the “deadlock” theory for literally decades.¹⁷⁴ Yet during most of that time, the “deadlock” rate was quite low—far lower than the “deadlock” rates claimed by Commissioner Ravel or Public Citizen. By one independent, scholarly calculation, between 1996 and 2006, the FEC “deadlocked” on just 2% of votes on enforcement matters.¹⁷⁵ Similar low numbers have been the norm throughout the FEC’s history, even as complaints about “deadlock” and “stalemate” emanated from critics. A review of Commission votes from 1993 through 1999 found just 2.6% resulted in 3–3 or 3–2 votes.¹⁷⁶ Through the first six months of 2004, the Commission “deadlocked” on just 3.1% of substantive votes, and in 2003, on just 1%.¹⁷⁷ This low rate of tie votes throughout the Commission’s history—during which criticism of the bipartisan, six-member structure was all but identical to today’s criticism—suggests that the relatively high rate of “deadlocked” votes in the early part of the past decade was merely coincidental—much like the

¹⁷³ The Commission has a history of authorizing the General Counsel’s office to engage in settlement negotiations prior to the time-intensive step of preparing briefs for a formal “probable cause” finding by the Commission. This is typically done when it appears from the evidence that a probable cause finding is likely, especially when the respondent has conceded a violation. A respondent entering into pre-probable cause conciliation foregoes forcing the General Counsel to prepare a probable cause brief and the opportunity to prepare a formal response to that brief. See 52 U.S.C. § 30109(4)(A)(i) (2018). As a general rule, at this point in the proceedings, a respondent is likely to get a better “deal” on a negotiated settlement than if that respondent waits until after a probable cause finding is made.

¹⁷⁴ See PROJECT FEC, *supra* note 24, at 8, 49.

¹⁷⁵ See Franz, *supra* note 25, at 176.

¹⁷⁶ See Thomas & Bowman, *supra* note 71, at 591 n.88 (citing an internal review by the Commission in response to congressional inquiry); see also *Federal Election Commission Panel Discussion: Problems and Possibilities*, *supra* note 74, at 252 (comments of Lawrence Noble) (“I do not have the figures, but three-three splits occur in a very, very small number of cases.”).

¹⁷⁷ Smith Opening Statement, *supra* note 147, at 2 (citing internal FEC statistics).

proverbial “stopped clock” that gets the time right twice a day. Certainly it belies the notion that the FEC’s bipartisan structure makes “deadlock” inevitable or even likely.

Faced with actual data conflicting with the “perpetual deadlock” argument, the traditional response to the low numbers of “deadlocked” votes has been to argue that the Commission tended towards tie votes on “critical questions”¹⁷⁸ or “key questions.”¹⁷⁹ A somewhat more nuanced commentator argued that commissioners “usually deadlock” on “high-profile or novel cases,” but offered no evidence for that claim.¹⁸⁰ In fact, the evidence is not convincing. For example, Project FEC listed as examples of such “key” and “important” matters just eight FEC decisions over the decade preceding the issuance of its 2002 report. These included, among others, a decision by the FEC not to file an amicus brief in a state law case in Missouri and a 2001 decision not to appeal a Fourth Circuit Court of Appeals decision striking down an FEC regulation previously held unconstitutional—after appeal by the Commission—by the Courts of Appeals for the First, Second, and D.C. Circuits.¹⁸¹ It is hard to consider these examples “key” or “critical” questions leaving the regulated community without clear guidance. If these were among the eight most important “deadlocked” cases over a decade, that suggests that there is little support for the “key questions” argument. Rather, the argument seems to border on tautology—critics simply define a “key” case as any one in which the Commission “deadlocks.”

Yet there may be some truth to the “key questions” claim. The Commission probably is more likely to split down the middle where the substantive issue is highly contested and important enough that commissioners are less willing to compromise (i.e., where the matter is “controversial”).¹⁸² But is this a bug or a feature?

¹⁷⁸ *Federal Election Commission Panel Discussion: Problems and Possibilities*, *supra* note 74, at 252–53 (comments of Elizabeth Hedlund) (“When they do deadlock, however, it is always on critical questions of law.”).

¹⁷⁹ PROJECT FEC, *supra* note 24, at 9.

¹⁸⁰ WEINER, *supra* note 152, at 4.

¹⁸¹ See PROJECT FEC, *supra* note 24, at 9–12. Note, however, that the Missouri case did make its way to the Supreme Court, with potential ramifications for the constitutionality of federal law. See *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 384–85 (2000). The position Project FEC would have had the FEC take as an amicus ultimately prevailed in the Supreme Court anyway. The Fourth Circuit case is *Va. Soc’y for Human Life, Inc. v. FEC*, 263 F.3d 379, 392 (4th Cir. 2001). Other precedent on the regulation can be found at Allison R. Hayward & Bradley A. Smith, *Don’t Shoot the Messenger: The FEC, 527 Groups, and the Scope of Administrative Authority*, 4 ELECTION L.J. 82, 84–85 & n.22 (2005).

¹⁸² Potter, *supra* note 56, at 457.

If we are concerned about avoiding the appearance of partisanship or the weaponization of campaign finance law for political purposes, it is precisely on the most difficult facts or most highly contested propositions that the danger of abuse is greatest. Having an odd number of commissioners to put an end to 3–3 votes would raise serious questions about the legitimacy of the FEC in the most “politically volatile cases.”¹⁸³ If commissioners are experts, and the experts are evenly divided, it is hard to argue that failure to adopt the policy is a failure of the Commission. If, on the other hand, commissioners are mere politicians sent to represent their party’s electoral interests, the 3–3 vote is, in fact, an important safeguard against partisan abuse—as Congress intended. Indeed, the critics of the FEC who argue most vociferously for a “tiebreaking” commissioner regularly retreat behind the FEC’s bipartisan requirement to defend decisions they do like. For example, the Project FEC report, scathing in its criticism of the Commission and its 3–3 structure,¹⁸⁴ fended off Republican criticism that the Commission had been too partisan in certain enforcement matters by immediately noting, “none of these investigations could have gone forward without the vote of at least one Republican commissioner.”¹⁸⁵ It is hard to imagine a better endorsement of the FEC’s bipartisan structure.

But, in fact, there is broad agreement that “deadlocks,” even when they occur along party lines, are rarely about raw partisanship.¹⁸⁶ Rather, they reflect ideological differences amongst the commissioners, differences rooted in constitutional and statutory interpretation, in belief about the relative efficacy of different types of regulation, and in

¹⁸³ Todd Lochner & Bruce E. Cain, *Equity and Efficacy in the Enforcement of Campaign Finance Laws*, 77 TEX. L. REV. 1891, 1929 (1999); see also Goodman, *supra* note 164 (noting “[t]hat a percentage of votes break 3–3 is not a flaw of the agency but rather one of its most prudential features” and reviewing several high profile cases resulting in 3–3 votes).

¹⁸⁴ See PROJECT FEC, *supra* note 24, at 8–10, 53–56, 91.

¹⁸⁵ *Id.* at 78.

¹⁸⁶ See, e.g., MUTCH, *supra* note 18, at 103–04 (“If we have differences, it’s usually over interpretation of the law, not due to partisanship.”) (quoting former Commissioner Max L. Friedersdorf); WEINER, *supra* note 152, at 3; *Federal Election Commission Panel Discussion: Problems and Possibilities*, *supra* note 74, at 228 (comments of Lawrence Noble) (“[T]he disagreements among the commissioners . . . are ideological. There is disagreement to the extent to which politics should be regulated. There is disagreement . . . about the extent to which grass roots activity is being hurt by all the regulation.”); Lochner & Cain, *supra* note 183, at 1929; but see Franz, *supra* note 25, at 182–83 (finding a “clear partisan pattern” in dissenting votes on the Commission). However, Franz’s finding relates only to the probability of a dissenting vote—not to the Commission majority’s actual finding. As Franz’s analysis also found, “deadlocked” votes are rare. See *id.* at 176. This would seem to show a mild bias in favor of party but demonstrate the wisdom of having a bipartisan body.

philosophy about the proper role of bureaucracies.¹⁸⁷ The complaint is less about “gridlock” than about division over policy. That is to say, would-be reformers claim to care about “gridlock,” but what they really want is for the FEC to agree with their preferred ideological and legal conclusions when writing regulations or adjudicating complaints. They want to win.

3–3 votes are rarely problematic from a standpoint of agency efficiency or effectiveness. As a practical matter, 3–3 votes on enforcement matters are decisive and readily understood by the parties—the matter does not go forward.¹⁸⁸ And while a 3–3 vote failed to garner a majority (thus possibly giving it less precedential weight, to the extent consistency matters), such a vote still serves as a precedent.¹⁸⁹ Critics of the Commission’s enforcement record tend to complain when the agency does not vote to pursue actions they believe should be pursued. But it has never been explained why a 3–3 vote terminating proceedings is worse than a hypothetical commission with an odd number of members voting 3–2 or 4–3 to terminate proceedings.¹⁹⁰

The possibility of a tie vote is more troublesome on the regulatory side of the ledger. A tie vote on an Advisory Opinion request, for example, may leave regulated parties uncertain about their obligations under the law, yet still potentially subject to prosecution for violations.¹⁹¹ Yet again, the impact can be overstated. A “deadlocked” vote on a decision not to amend or repeal a regulation means the regulation remains in effect; a “deadlocked” vote on a proposed new regulation means it does not take effect.¹⁹² A problem really only arises, then, when a statutory change by Congress or a court decision upsetting the regulatory regime makes an existing regulation unenforceable or demands the issuance of new guidance. It does not minimize the importance of these situations to note that they are relatively rare. And again, the trade-off is between “deadlock,” and hence lack of guidance, and the potential weaponization

¹⁸⁷ See *Federal Election Commission Panel Discussion: Problems and Possibilities*, *supra* note 74, at 228 (comments of Lawrence Noble).

¹⁸⁸ See, e.g., *FEC v. Nat’l Republican Senatorial Comm.*, 966 F.2d 1471, 1476, 1478 (D.C. Cir. 1992) (upholding FEC’s dismissal of an enforcement matter based on a 3–3 “deadlock” and citing *Democratic Cong. Campaign Comm. v. FEC*, 831 F.2d 1131 (D.C. Cir. 1987) for the proposition that “when the Commission deadlocks 3–3 and so dismisses a complaint . . . the three Commissioners who voted to dismiss . . . constitute a controlling group for purposes of the decision”).

¹⁸⁹ On the role of consistency in administrative law, see Yoav Dotan, *Making Consistency Consistent*, 57 ADMIN. L. REV. 995, 1008–29 (2005).

¹⁹⁰ See Smith & Hoersting, *supra* note 123, at 160.

¹⁹¹ See WEINER, *supra* note 152, at 5. Weiner notes that “deadlocks” on Advisory Opinion Requests, which averaged 4.9% prior to 2008, rose to an annual average of 24.1% from 2008 to 2017. *Id.*

¹⁹² See PROJECT FEC, *supra* note 24, at 56.

of the Commission's rules on contentious points of law. Moreover, once again the agency's critics are left with the fact that they, too, agree that tie votes—thus taking no action—may be preferable to losing a vote. For example, it took the FEC nearly five years from the decisions in *Citizens United v. Federal Election Commission*¹⁹³ and *SpeechNow.org v. Federal Election Commission*¹⁹⁴—revolutionizing corporate ability to engage in campaigning and leading to the creation of “Super PACs,”—to merely repeal the obsolete regulations, and the FEC still has not passed regulations fully accounting for those decisions.¹⁹⁵ This creates special problems for “[p]olitical outsiders without the resources to hire expensive election lawyers” because the FEC’s interim guidance on the issue “would not be apparent” to such grassroots activists and outsiders.¹⁹⁶ But the primary reason for that has been the insistence of the most “pro-reform” commissioners that, as part of any regulatory update, the Commission adopt far-reaching and contentious new disclosure regulations not required by those court decisions.¹⁹⁷

In summary, even with the recent, and likely temporary, increase in “deadlocked” votes, the substantial majority of cases are decided by majority commission votes. When they are not, that is usually conclusive, particularly on the enforcement side. To a substantial degree then, the complaint of the FEC’s interlocutors is merely that they are not winning votes at the Commission—something that would surely be a common complaint for many organizations and persons at any regulatory agency, and hardly a sign of an ineffective structure. To the extent that the Commission’s regulatory function periodically stalls on the inability to reach a majority agreement, that, too, is often clear and decisive. When it is not, it must be weighed against the tradeoff in legitimacy gained by the Commission’s structure.

2. Lack of a Strong Chairman

In most federal, multi-member agencies, a single chairman is appointed by the President and given substantial power over the agency’s

¹⁹³ 558 U.S. 310 (2010).

¹⁹⁴ 599 F.3d 686 (D.C. Cir. 2010).

¹⁹⁵ See WEINER, *supra* note 152, at 2.

¹⁹⁶ *Id.*

¹⁹⁷ See Stephen Dinan, *FEC Deletes Unconstitutional Campaign Regulations, Embraces Citizens United*, WASH. TIMES (Oct. 9, 2014), <https://perma.cc/Q8B3-XXW8>.

budget, staffing, and internal procedures.¹⁹⁸ The FEC lacks such a presidentially-designated chairman. Rather, the statute calls for the commissioners to elect a chairman each year from among their ranks, to a one-year term.¹⁹⁹ The chairman typically serves as the Commission's spokesperson, presides over meetings, and has some added control over the Commission's agenda. Otherwise, however, the chairman has little added power.²⁰⁰

It has been suggested that, under this structure, "it has long been hard for even experienced observers to understand who is making critical operational decisions at the [FEC]."²⁰¹ While it is possible that a stronger chairman could improve agency efficiency—such as the speed for hiring senior staff²⁰²—there is little reason to believe that the lack of a powerful chairman has hindered the Commission in carrying out its enforcement and regulatory functions.²⁰³ The decision not to have a stronger chairman with hiring and budget authority may reflect the recognition that policy decisions themselves are made through budget allocation and staff decisions. Thus, what small efficiencies might be gained would, once again, come at some cost to the effort to assure a bipartisan agency.

C. *The FEC's Enforcement Process*

The final set of complaints about the FEC goes to the Commission's enforcement process. It appears that the agreed-upon adjective to describe that process is "cumbersome."²⁰⁴ Here again, the Commission's process is unusual, but not unique—it is modeled after the Equal Employment

¹⁹⁸ *E.g.*, Federal Trade Commission Act, 15 U.S.C. §§ 41–44 (2018) (FTC); Securities Exchange Act, 15 U.S.C. § 78d (2018) (SEC); The Communications Act of 1934, 47 U.S.C. §§ 151–155 (2006) (FCC).

¹⁹⁹ 52 U.S.C. § 30106(a)(5) (2018).

²⁰⁰ See PROJECT FEC, *supra* note 24, at 56.

²⁰¹ WEINER, *supra* note 152, at 7; see also La Forge, *supra* note 73, at 362.

²⁰² See, e.g., Dave Levinthal & Suhauna Hussain, *Five Years Ago, the FEC's Top Lawyer Resigned. No Permanent Replacement Has Yet Been Named*, CTR. FOR PUBLIC INTEGRITY (July 5, 2018), <https://perma.cc/D3RY-2R4D>. The difficulty in filling staff positions is certainly due in substantial part to commissioner disagreement. However, the Commission has noted a number of other factors, most notably under classification of the positions, that has narrowed the field of candidates. See FEC, LEGISLATIVE RECOMMENDATIONS OF THE FEDERAL ELECTION COMMISSION 2018 2 (2018), <https://perma.cc/2VPA-XTSS>.

²⁰³ See Smith & Hoersting, *supra* note 123, at 160–61.

²⁰⁴ PROJECT FEC, *supra* note 24, at 8; Kenneth A. Gross, *The Enforcement of Campaign Finance Rules: A System in Search of Reform*, 9 YALE L. & POL'Y REV. 279, 286 (1991); Lochner & Cain, *supra* note 183, at 1898; Thomas & Bowman, *supra* note 71, at 584; Eber, *supra* note 71, at 1170; La Forge, *supra* note 73, at 377.

Opportunity Commission's process.²⁰⁵ That process is geared toward attaining voluntary conciliation agreements with alleged violators.²⁰⁶

Pursuant to FECA, the FEC has exclusive jurisdiction over civil enforcement of FECA.²⁰⁷ When an alleged violation is brought to the Commission's attention, either through the filing of a complaint or by the Commission itself in the regular course of its duties, a notice is sent to the respondent or respondents, who have fifteen days to "demonstrate . . . to the Commission . . . that no action should be taken."²⁰⁸ If the Commission has "reason to believe" that an offense has been committed, it opens a MUR and launches an investigation.²⁰⁹ At the close of the investigation, the General Counsel may recommend that the Commission find "probable cause" that FECA was violated.²¹⁰ A probable cause brief is sent to the respondent, who has fifteen days to file a reply brief.²¹¹ If the Commission then finds probable cause, it is required to "attempt . . . to correct or prevent such violation by informal methods of conference, conciliation, and persuasion, and to enter into a conciliation agreement" with the respondent.²¹² If a conciliation agreement acceptable to the parties cannot be reached within thirty days, the Commission may then file suit in federal court, where, as plaintiff, it will bear the burden of proof at a *de novo* hearing.²¹³ If the Commission believes that a criminal violation of FECA—generally, a knowing and willful violation—may have occurred, it can refer the matter to the Department of Justice for criminal prosecution.²¹⁴

²⁰⁵ See *Federal Election Commission Panel Discussion: Problems and Possibilities*, *supra* note 74, at 241 (comments of Lawrence Noble); see also 42 U.S.C. § 2000e-4 (2018).

²⁰⁶ See *Federal Election Commission Panel Discussion: Problems and Possibilities*, *supra* note 74, at 251 (comments of Thomas O. Sargentich).

²⁰⁷ 52 U.S.C. § 30106(b)(1) (2018).

²⁰⁸ *Id.* § 30109(a)(1).

²⁰⁹ *Id.* § 30109(a)(2).

²¹⁰ *Id.* § 30109(a)(3).

²¹¹ *Id.*

²¹² *Id.* § 30109(a)(4)(A)(i).

²¹³ 52 U.S.C. § 30109(a)(6)(A). The entire procedure, including many of the necessary administrative steps that take place at the FEC, is described in detail by former Commissioner Scott E. Thomas and his longtime staff counsel, Jeffrey H. Bowman. See Thomas & Bowman, *supra* note 71, at 584–90.

²¹⁴ Shawna Thomas & Morgan Baskin, *The FEC Won't Be Able to Reform Super PACs Before 2020: That's Kind of Crazy*, VICE NEWS (Sept. 5, 2019, 8:44 AM), <https://perma.cc/N4YM-5XDF>.

The common complaint about the FEC's statutory enforcement process is that it takes too much time.²¹⁵ And timeliness is arguably at the heart of effective enforcement of campaign laws, since elections come with fixed dates and cannot easily be undone if a candidate's victory is aided by campaign finance violations.²¹⁶

The problem with that complaint is that there may be no way to have effective enforcement prior to an election—any enforcement process with even the most modest respect for due process simply takes too much time.²¹⁷ For example, a commonly proposed alternative to the FEC's structure is to have the agency utilize administrative law judges (“ALJs”) in the investigatory and probable cause stages, or completely through a final decision.²¹⁸ But ALJs actually add to the formality of the proceedings and the due process protections available to respondents and therefore “would almost certainly take longer than those of the status quo.”²¹⁹ ALJs hardly have a reputation for rapid enforcement in other agencies.²²⁰ As another point of comparison, the median time for disposition of all civil matters in federal district courts for the twelve months ending in March 2019 was over eleven months from filing and over twenty-seven months for a civil matter to actually go to trial.²²¹ The FEC's average time from receipt of complaint to disposition in calendar year 2018 was less than fifteen

²¹⁵ See *id.*; see also Kate Riley et al., *Elections in Peril with Decimated Federal Election Commission*, SEATTLE TIMES (Sept. 2, 2019, 12:01 PM), <https://perma.cc/A36Y-RPZC>.

²¹⁶ Federal courts are traditionally very hesitant to overturn election results absent “egregious” circumstances or clear evidence that the illegal activity altered the result. See *Bell v. Southwell*, 376 F.2d 659, 664–65 (5th Cir. 1967); see also *e.g.* *Pope v. County of Albany*, 687 F.3d 565, 582 (2d Cir. 2012); *Scheer v. City of Miami*, 15 F. Supp. 2d 1338, 1345 (S.D. Fla. 1998). State courts, too, are extremely reluctant to order elections. See, *e.g.*, *Putter v. Montpelier Pub. Sch. Sys.*, 697 A.2d 354, 359 (Vt. 1997); see generally Kenneth W. Starr, *Federal Judicial Invalidation as a Remedy for Irregularities in State Elections*, 49 N.Y.U. L. REV. 1092 (1974). Additionally, very few states provide any administrative process to overturn an election result or oust a victorious candidate absent the formal recount process. One exception is Arizona. See ARIZ. REV. STAT. ANN. § 16-942 (1998).

²¹⁷ *Federal Election Commission Panel Discussion: Problems and Possibilities*, *supra* note 74, at 225 (comments of Lawrence Noble); *Lochner & Cain*, *supra* note 183, at 1931.

²¹⁸ PROJECT FEC, *supra* note 24, at 42; Gross, *supra* note 204, at 287–89; La Forge, *supra* note 73, at 377–78.

²¹⁹ *Lochner & Cain*, *supra* note 183, at 1931.

²²⁰ See Smith Opening Statement, *supra* note 147, at 5 (providing examples of cases dragging on for many years under ALJs).

²²¹ UNITED STATES COURTS, FEDERAL COURTS MANAGEMENT STATISTICS, MARCH 2019 (2019), <https://perma.cc/7WWL-CXHA>.

months, with 62% of cases resolved in under fifteen months.²²² But the FEC enforcement figures are actually better than that appears, because those numbers only include MURs handled through the traditional enforcement process just described and not cases adjudicated through the FEC's Administrative Fines and Alternative Dispute Resolution programs, which are typically handled much more rapidly.

The Administrative Fines program, authorized by Congress in 2000 in response to the FEC's request, is just one of many steps taken by the agency to simplify and streamline the process. The program gives the FEC the authority to directly assess fines for routine reporting violations in a "parking ticket" manner, without going through the traditional enforcement process.²²³ In 2000, the Commission also created a voluntary Alternative Dispute Resolution program, which settles routine, small dollar violations outside of the often lengthy, formal enforcement process.²²⁴ Through these and other management measures, the Commission made substantial reductions in its case backlog and processing time in the early part of this century. These programs are not included in the data on the timeliness of FEC handling of complaints.²²⁵ The FEC has also taken regular steps to speed the process. Most notably, where more serious or complex violations nonetheless seem relatively clear, the Commission has long made considerable use of "pre-probable cause conciliation," reaching settlements without the time-intensive step of preparing briefs for a formal "probable cause" finding by the Commission.²²⁶ Another notable improvement was the FEC's adoption in 1993 of an Enforcement Priority System that has enabled it to better focus resources on more important cases.²²⁷

In the end, it is not at all clear that the FEC's traditional, statutory enforcement mechanism is a major problem, at least for timeliness. In

²²² See Memorandum from Lisa J. Stevenson, Acting Gen. Counsel, FEC, & Charles Kitcher, Acting Assoc. Gen. Counsel for Enf't, FEC, to FEC (May 7, 2019), <https://perma.cc/8MJG-FABU>. Unfortunately, the FEC memorandum does not report the median times, so the comparison is not precise. Still, it is clear that the numbers are not considerably different from those of the federal courts. An earlier independent review of MURs closed from 1991 to 1993 found that the FEC resolved 70.5% of matters within two years of filing the complaint. Lochner & Cain, *supra* note 183, at 1908 n.73, 1915.

²²³ Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, § 640, 113 Stat. 430, 476-77 (1999) (codified as amended at 52 U.S.C. § 30104 (2018)); see 11 C.F.R. § 111.30 (2000).

²²⁴ See Smith & Hoersting, *supra* note 123, at 149.

²²⁵ See Franz, *supra* note 25, at 172.

²²⁶ See FEC, GUIDEBOOK FOR COMPLAINANTS AND RESPONDENTS ON THE FEC ENFORCEMENT PROCESS 16-17 (2012) [hereinafter GUIDEBOOK FOR COMPLAINANTS AND RESPONDENTS], <https://perma.cc/K559-TGNA>.

²²⁷ See PROJECT FEC, *supra* note 24, at 21.

1994, the FEC's long-time General Counsel, Lawrence Noble, a highly respected figure in the "reform" community,²²⁸ disputed that notion, saying, "the requirement that the Commission bring the matter to federal district court—with the agency serving in essence as a civil grand jury—is not necessarily a bad thing."²²⁹

Nevertheless, the conciliation requirement does give respondents a considerable bargaining chip in dealing with complaints. As the FEC cannot assess fines in the first instance, respondents can insist on substantially reduced penalties, forcing the FEC to determine whether to accept the offer or to spend substantial resources to litigate the case in federal court.²³⁰

However, there are offsets here, too. Respondents have often been denied most basic due process rights during the FEC investigation and conciliation process.²³¹ For example, respondents in FEC proceedings are denied a meaningful opportunity to see evidence against them before the Commission finds "probable cause" to believe they have committed violations.²³² Respondents have no right to appear in person before the Commission votes to find "reason to believe" that a violation has occurred, which can lead to lengthy and intrusive investigations.²³³ Even at the subsequent "probable cause" stage, where the Commission's determination of wrongdoing is all but final, respondents (including their counsel) have no right to appear in person before the Commission.²³⁴ Meanwhile, at all stages, including probable cause hearings, the FEC's General Counsel is available to present and generally sell his

²²⁸ Noble served as the President of the Council on Governmental Ethics Laws from 1997 to 1998, and he received the 2000 COGEL Award for his "efforts to promote the highest level of ethical conduct amongst governmental officials and candidates." *Larry Noble*, SOURCEWATCH, <https://perma.cc/SRS7-WFG7>; see also PROJECT FEC, *supra* note 24, at 78. He later served as President and CEO of Americans for Campaign Reform. *Lawrence Noble*, U.S. NEWS & WORLD REP., <https://perma.cc/9NZH-WZ3R>.

²²⁹ *Federal Election Commission Panel Discussion: Problems and Possibilities*, *supra* note 74, at 242 (comments of Lawrence Noble). Noble suggested that budget and staffing were the key issues in effective enforcement. See *id.* at 248–50.

²³⁰ See Franz, *supra* note 25, at 170.

²³¹ Note, *The Federal Election Commission, The First Amendment, and Due Process*, 89 YALE L.J. 1199, 1220 (1980).

²³² Respondents have only fifteen days to file a written request for the evidence against them after the Office of General Counsel notifies them of the Office's recommendation that the Commission find "probable cause" against them. See GUIDEBOOK FOR COMPLAINANTS AND RESPONDENTS, *supra* note 226, at 15–16. However, respondents also only have fifteen days to file a reply to the General Counsel's recommendation. *Id.* at 18.

²³³ Gross, *supra* note 204, at 286–87.

²³⁴ Rather, at least two commissioners must approve a request for a hearing. See GUIDEBOOK FOR COMPLAINANTS AND RESPONDENTS, *supra* note 226, at 19.

recommendation to find probable cause.²³⁵ Indeed, the General Counsel typically presents the Commission with a memorandum, which the respondent does not see (let alone respond to), summarizing and critiquing any reply brief.²³⁶ In other words, the General Counsel, acting as civil prosecutor before the Commission, presents the Commission with a brief that urges a finding of probable cause.²³⁷ The respondent has an opportunity for a reply brief. The General Counsel, now acting as the Commission's legal counsel, explains to the Commission why the brief of the General Counsel, acting as prosecutor, should prevail.²³⁸ As late as 2002, the Commission denied respondents the right to copies of their own deposition transcripts.²³⁹ Though these practices have been sharply criticized for depriving respondents of due process,²⁴⁰ including, at one time, by the American Bar Association,²⁴¹ they are within constitutional boundaries precisely because the FEC must, if a party refuses to settle, take that party to court, where full process will be available.²⁴² Thus the "cumbersome" process is a double-edged sword that regularly works to the detriment of respondents.²⁴³

This tradeoff of due process at the administrative stage in exchange for forcing the Commission to bear the burden of proof at trial if no settlement is reached is, in the end, extremely problematic for respondents. As a practical matter, very few respondents can afford to forego a conciliation agreement and force the Commission to court.²⁴⁴ Losing candidates typically have no funds to carry on an expensive legal struggle. Winning candidates do not want daily headlines of their trials for campaign finance violations to distract from reelection campaigns.²⁴⁵ Institutional players, too, will usually find it best to move on to the next

²³⁵ See *id.* at 5; Smith & Hoersting, *supra* note 123, at 155.

²³⁶ Smith & Hoersting, *supra* note 123, at 155.

²³⁷ See *The Federal Election Commission, The First Amendment, and Due Process*, *supra* note 231, at 1210.

²³⁸ See *id.*

²³⁹ See Smith & Hoersting, *supra* note 123, at 155; see also Gross, *supra* note 204, at 286.

²⁴⁰ See, e.g., Bolton, *supra* note 74, at 50–51; Kenneth A. Gross & Ki P. Hong, *The Criminal and Civil Enforcement of Campaign Finance Laws*, 10 STAN. L. & POL'Y REV. 51, 52 (1998); *The Federal Election Commission, the First Amendment, and Due Process*, *supra* note 231, at 1218.

²⁴¹ See Comm. on Election Law, *1981–1982 Annual Report*, in 19 A.B.A. SEC. ADMIN. L. ANN. REP. COMMITTEES 59, 59 (1982).

²⁴² See Gross, *supra* note 204, at 284–85.

²⁴³ See *The Federal Election Commission, the First Amendment, and Due Process*, *supra* note 231, at 1204–05.

²⁴⁴ See *id.*

²⁴⁵ See *id.* at 1205 n.38.

election. Political organizations with campaign finance charges hanging over them are damaged goods. Their endorsement or support may harm as much as help a candidate; fundraising may suffer.²⁴⁶ Thus, for the vast majority, conciliation is the ball game—95% or more of cases in which fines are assessed conciliate without going to court.²⁴⁷

In summary, once again it is not at all clear that the common diagnosis of a “feckless” FEC is correct.

III. Proposals for Reform: Mistaking Form for Substance

In Part II, I reviewed the most common complaints about the Commission’s structure and power and suggested that these are not so problematic as it may seem. Part III briefly examines in somewhat greater detail common proposals to reform or restructure the Commission. Given that the diagnosis seems to be incorrect, it is not surprising that the proposed administrative cures are unlikely to work.

The most common suggestion for reform of the Commission seems to be to add or subtract a member to reduce the possibility of “deadlocked” votes. In the most extreme version, a single chairman, appointed for a longer term than other commissioners, is given substantial power to run the FEC, including sole power, among other things, to appoint (and remove) the Commission’s Staff Director,²⁴⁸ prepare its budget, require any person to submit, under oath, written reports and answers to questions, issue subpoenas, and compel testimony.²⁴⁹

Recognizing that “deadlocks” and the lack of a strong chairman are substantially overstated problems, the inability to muster a clear majority can create, in some cases, an unhealthy uncertainty among the euphemistically named “regulated community.”²⁵⁰ But note that while this occasional added clarity would be of some modest assistance to those seeking to comply, it would do almost nothing to assuage the primary critics of the FEC, for whom the issue is the Commission’s alleged failures

²⁴⁶ See *id.* at 1221 n.117.

²⁴⁷ See Smith Opening Statement, *supra* note 147, at 6; see also *The Federal Election Commission, the First Amendment, and Due Process*, *supra* note 231, at 1205 n.39.

²⁴⁸ It should be noted that the Staff Director oversees the Commission’s audit division and Alternative Dispute Resolution program. FEC, ANNUAL REPORT 2000 33, 80 (2001). Thus the Staff Director, like the General Counsel, has direct oversight of a substantial portion of the Commission’s enforcement docket, where concern for bipartisanship is greatest. See Franz, *supra* note 25, at 172–73.

²⁴⁹ See H.R. 1, 116th Cong. § 6003 (2019).

²⁵⁰ See WEINER, *supra* note 152, at 2. Of course, some tie votes would still be possible, where commissioners were recused, otherwise unable to vote, or a seat was vacant.

to stem the flow and influence of money in politics. For example, it is clear in the 141-page report of Project FEC—still the seminal critique of the Commission—that the issue is not that the FEC “deadlocks,” but that it does not reach the substantive decisions favored by its critics. The report segues seamlessly from the indictment that “[i]ntense partisanship envelops almost every major decision the FEC’s commissioners make”²⁵¹ in one sentence to “[t]he politicization of FEC votes is also illustrated by cases where commissioners of both parties have joined together” in the next.²⁵² So the “problem” is both partisan “deadlocks” and bipartisan majority votes. The fact that the analysis always revolves around the Commission’s 3–3 votes leading to the “wrong” answer suggests that in actuality a “deadlocked” Commission should be preferable to one that votes against the critics’ substantive preference by a clear majority—at least to the extent that a tie vote leaves the issue on the table, or is easier to reverse in a later case.

In short, critics are too often seeking a procedural cure for a substantive complaint. Other proposals to alter the Commission’s makeup, such as added powers to the Chairman or the appointment of a “public” commissioner,²⁵³ suffer from the same defect. What these critics want is not a Commission—or a Commission Chairman—with more power. Rather, they want a Commission and a Chairman who will use the Commission’s powers in the manner that they would prefer.

Thus, while the argument is sometimes made that the FEC’s 3–3 structure undercuts the FEC’s status as a serious enforcement agency, in fact, it is more likely that the opposite is true—an agency subject to partisan domination, even in appearance, would likely lose all legitimacy precisely because it would be regulating the political process itself. But whatever the structure, the FEC will make substantive decisions, and some of those decisions will likely disappoint some observers.

Critics of the FEC as an agency are nearer the mark when they voice concerns about the agency’s statutory enforcement procedures, at least in the sense that the critique actually goes to the structure of the Commission. But again, it does not appear that the proposed solutions address the criticisms. The most common recommendation is that the

²⁵¹ PROJECT FEC, *supra* note 24, at 11 (quoting Benjamin Weiser & Bill McAllister, *The Little Agency That Can’t; Election-Law Enforcer Is Weak by Design, Paralyzed by Division Series*, WASH. POST, Feb. 12, 1997, at A1). As we have seen, the indictment that “partisan standoffs envelope almost every decision” is clearly erroneous by a large margin, even at the highest end of estimates in the years with the most “deadlocks.” See discussion *supra* Section II.B.1.

²⁵² PROJECT FEC, *supra* note 24, at 11.

²⁵³ See, e.g., JACKSON, *supra* note 58, at 65; WEINER, *supra* note 152, at 7.

FEC adopt the use of ALJs.²⁵⁴ But the primary initial beneficiaries would arguably be respondents themselves, who would gain added due process protections early in the enforcement process.²⁵⁵ Because timing and resources work against all but a few respondents forcing the FEC to court, the use of ALJs is unlikely to harm respondents, and it may actually work to the benefit of many.²⁵⁶ This is not a bad thing, but it certainly is not going to address the concerns that the FEC's enforcement lacks vigor. Moreover, ALJs cannot change the policy decisions made by the commissioners.²⁵⁷ And the track record of ALJs suggests that it is not even likely to speed up the process.²⁵⁸

The other most common recommendation is the reinstatement of random audits.²⁵⁹ It is doubtful, however, that random audits would change the agency's enforcement policies or outcomes—which, as we have seen, are the main source of complaint—or the public's perception of money in politics. Denied random audit authority, the FEC currently conducts audits based on an internal formula in which a variety of factors (e.g., findings of violations; late filed reports; erroneous or incomplete reports, and similar criteria) increase the odds of being audited.²⁶⁰ In this system, small campaigns and committees are likely to be audited disproportionately, as they may be more susceptible to making routine reporting errors or missing deadlines (thus triggering audits) due to their reliance on volunteer or less experienced personnel.²⁶¹ Thus, a shift to random audits might benefit small campaigns and focus more enforcement resources on larger campaigns.

The converse side is that under the current system, larger, more professional campaigns may take extra care to file accurate and timely

²⁵⁴ See, e.g., PROJECT FEC, *supra* note 24, at 40–43; Gross, *supra* note 204, at 287–89; Gross & Hong, *supra* note 240, at 52; La Forge, *supra* note 73, at 377–78.

²⁵⁵ See discussion *supra* Section II.C.

²⁵⁶ See Gross, *supra* note 204, at 289.

²⁵⁷ See, e.g., *Role of Social Security Administrative Law Judges: J. Hearing Before the Subcomm. on Courts, Commercial and Admin. Law of the H. Comm. on the Judiciary & the Subcomm. on Soc. Sec. of the H. Comm. on Ways & Means*, 112th Cong. 45 (2011) (statement of Michael J. Astrue, Comm'r, Social Security Administration), <https://perma.cc/6RZ5-8FQ9>.

²⁵⁸ See, e.g., OFFICE OF THE INSPECTOR GEN., SOC. SEC. ADMIN., NO. A-02-18-50298, MANAGEMENT CHALLENGE REPORT: FISCAL YEAR 2017 INSPECTOR GENERAL'S STATEMENT ON THE SOCIAL SECURITY ADMINISTRATION'S MAJOR MANAGEMENT AND PERFORMANCE CHALLENGES 3 (2017) (detailing "worsening timeliness and growing backlogs").

²⁵⁹ See, e.g., JACKSON, *supra* note 58, at 68–69; WEINER, *supra* note 152, at 8–9; Gross, *supra* note 204, at 290–91; La Forge, *supra* note 73, at 375–77.

²⁶⁰ See Gross, *supra* note 204, at 290; see also WEINER, *supra* note 152, at 8.

²⁶¹ See WEINER, *supra* note 152, at 8.

reports and to guard against unintentional violations of the law because they understand that these errors increase the chances of a full audit.²⁶² Such audits are an expensive undertaking even when, as usual, no added violations are found, and thus campaigns have a strong incentive to get their reporting correct. Substituting random audits—in which the odds of being audited will necessarily remain small—may reduce this incentive.

While a system that places less burden on smaller committees is arguably a good thing, it is not a concern I have found anywhere in the “FEC has failed” literature. Easing the burden on small committees does not seem to be what the FEC’s critics have in mind, except perhaps for critics from the right such as former National Security Advisor John R. Bolton,²⁶³ and disincentivizing accurate reporting hardly seems an improvement.

Similarly, arguments for greater budgetary independence seem off the mark.²⁶⁴ Certainly, almost any agency could do more with more money. However, given the growth in the FEC budget over the years, it is hard to give much credence to this purported reason for the FEC’s alleged failures over many decades.²⁶⁵ Most federal agencies—like most businesses and most households—can make a claim that they are underfunded. And it may even be true. But again, even in its most compelling form this is not a complaint about agency structure, but a complaint about congressional budget priorities.

For all this talk of the FEC, we should note that there are a number of things that the Commission does very well. It maintains an extensive program of public education for committees and other filers.²⁶⁶ The Reports Analysis Division provides extensive services to assist filers with reporting.²⁶⁷ The Commission has long administered the federal presidential campaign fund without complaint.²⁶⁸ But these are not the

²⁶² See *id.*

²⁶³ See Bolton, *supra* note 74, at 49; see also Smith & Hoersting, *supra* note 123, at 170–71.

²⁶⁴ See PROJECT FEC, *supra* note 24, at 43–44; WEINER, *supra* note 152, at 9.

²⁶⁵ See Dave Levinthal, *How Washington Starves Its Election Watchdog*, CTR. FOR PUB. INTEGRITY (May 4, 2016, 3:50 PM), <https://perma.cc/JGC9-UCNB> (charting the growth of the FEC’s annual budget from approximately \$18.8 million in fiscal year 1992 to approximately \$65.8 million in fiscal year 2014, while noting staffing level decreases during that time period); see also FEC, AGENCY FINANCIAL REPORT: FISCAL YEAR 2019 58 (2019), <https://perma.cc/6P8W-A588> (listing the FEC’s annual budget for fiscal year 2019 at \$75.55 million).

²⁶⁶ See *Trainings*, FEC, <https://perma.cc/9FF5-BJTA>.

²⁶⁷ See FEC, REPORTS ANALYSIS DIVISION (RAD), <https://perma.cc/WC65-MDS9>.

²⁶⁸ See, e.g., Marilyn W. Thompson, *The Dream is Dead: Can Taxpayer Money Save Presidential Campaigns?*, HARV. KENNEDY SCH.: SHORENSTEIN CTR. ON MEDIA, POL. & PUB. POL’Y (May 27, 2016,

type of policy items that the reform community cares about, so they are ignored as the agency is declared “dysfunctional.”

While the FEC is far from a perfect agency, the real complaint of its most prominent critics is not its procedures, structures, or ability to carry out its mission, but specific policy and enforcement decisions made by its commissioners.²⁶⁹ That the policy criticisms leveled at the FEC have remained remarkably stable as commissioners have come and gone over nearly half a century suggests that perceived consensus on the law, ostensibly revealed by public opinion surveys, may not be so great.²⁷⁰ That the criticism of Commission determinations of fact has also remained more or less constant through many years and commissioners may suggest that the FEC’s critics are over-reaching in their characterization of facts and what those facts mean under the law.

It is all well and good to ask such general questions as whether or not money has too much influence,²⁷¹ or whether too much is spent on campaigns,²⁷² or whether contribution limits should be lower.²⁷³ But pollsters rarely ask more detailed questions, such as how low contribution limits should be, or whether corporations should be involved in public affairs. When asked, the answers can be revealing. For example, in 2010, the Center for Competitive Politics, working with Professor Jeffrey Milyo of the University of Missouri, asked one thousand persons at what level political contributions became corrupting.²⁷⁴ The median response, for those who responded with a dollar amount, was \$10,000—four times the then federal limit.²⁷⁵ Polls have also consistently shown widespread disapproval of the Supreme Court’s decision in *Citizens United v. Federal*

6:00 AM) (“The bottom line is this system did exactly what it was supposed to do for more than two decades.” (quoting Interview by Marilyn W. Thompson with Fred Wertheimer, President, Democracy 21 (Feb. 18, 2016))), <https://perma.cc/ZZ4C-A9WG>.

²⁶⁹ See *supra* notes 251–253 and accompanying text.

²⁷⁰ Compare Bolton, *supra* note 74, at 47–50 (discussing concerns over congressional influence in the Commission’s decision-making in 1978), with Potter, *supra* note 56, at 453–54 (discussing concerns over congressional influence in the Commission’s decision-making in 2017).

²⁷¹ See, e.g., Aliyah Frumin, *Money Has Too Much of an Influence in Politics, Americans Say*, MSNBC (June 2, 2015, 4:48 PM), <https://perma.cc/LF2R-D4RZ>.

²⁷² See, e.g., J.F., *Why American Elections Cost So Much*, THE ECONOMIST (Feb. 9, 2014), <https://perma.cc/XD9H-EJQ9>.

²⁷³ See Jones, *supra* note 23.

²⁷⁴ Jason M. Farrell & Nima Veisesh, *Public Perception and the “Appearance of Corruption” in Campaign Finance*, ISSUE REV. 2–3 (2011).

²⁷⁵ *Id.* at 3.

Election Commission.²⁷⁶ Yet a Gallup poll taken shortly before *Citizens United* found that 57% believed political contributions are a form of free speech protected by the Constitution.²⁷⁷ And, for example, another poll found that while most Americans opposed the decision in *Citizens United*, when asked if the government should have been able to prohibit *Citizens United* from showing the film “Hillary: The Movie”—censorship that a contrary holding would have permitted—most said it should not.²⁷⁸

In fact, the FEC is faced with a tension that may not exist elsewhere within the federal government; as the D.C. Circuit stated, “[u]nique among federal administrative agencies, the Federal Election Commission has as its sole purpose the regulation of core constitutionally protected activity.”²⁷⁹ Repeatedly federal and state courts have struck down or overruled on First Amendment grounds various FEC regulations, FEC interpretations of FECA, or provisions of FECA itself.²⁸⁰

Congress itself has had difficulty making tough policy choices regarding campaign finance. Perhaps no better example exists than the issue of “coordination.” Advocates of reform, unhappy with FEC regulations on coordination adopted in 2000,²⁸¹ argued for Congress to legislate new rules as part of the Bipartisan Campaign Reform Act of 2002 (“BCRA”).²⁸² Ultimately, however, Congress was unable to fashion its own rule. Instead, it settled for repealing the FEC’s regulation and telling the FEC to write another.²⁸³ Perhaps this is exactly what an expert, non-partisan agency is for. But when the FEC wrote a new rule, the pro-reform activists were still unhappy and “reform” members of Congress

²⁷⁶ See, e.g., Ashley Balcerzak, *Study: Most Americans Want to Kill ‘Citizens United’ with Constitutional Amendment*, CTR. FOR PUB. INTEGRITY (May 10, 2018, 11:45 AM), <https://perma.cc/28N4-TLAS>.

²⁷⁷ Lydia Saad, *Public Agrees With Court: Campaign Money Is “Free Speech”*, GALLUP (Jan. 22, 2010), <https://perma.cc/ZC7P-5U5S>.

²⁷⁸ Jeff Patch, *Poll on Citizens United Shows Support for Free Political Speech*, INST. FOR FREE SPEECH (Mar. 4, 2010), <https://perma.cc/VYA2-NXAC>.

²⁷⁹ *AFL-CIO v. FEC*, 333 F.3d 168, 170 (D.C. Cir. 2003).

²⁸⁰ See, e.g., L. PAIGE WHITAKER, CONG. RESEARCH SERV., R45320, *CAMPAIGN FINANCE LAW: AN ANALYSIS OF KEY ISSUES, RECENT DEVELOPMENTS, AND CONSTITUTIONAL CONSIDERATIONS FOR LEGISLATION* 7, 13–14 (2018), <https://perma.cc/3FGZ-DN4K>.

²⁸¹ See General Public Political Communications Coordinated With Candidates and Party Committees; Independent Expenditures, 65 Fed. Reg. 76,138 (Dec. 6, 2000) (codified at 11 C.F.R. pts. 100, 109–10).

²⁸² See Robert F. Bauer, *The McCain-Feingold Coordination Rules: The Ongoing Program to Keep Politics Under Control*, 32 *FORDHAM URB. L.J.* 507, 508–10, 512 (2005).

²⁸³ BCRA, Pub. L. No. 107-155, § 214(b)–(c), 116 Stat. 81, 94–95 (2002) (codified in scattered sections of 36 and 52 U.S.C.).

successfully sued in federal court trying to repeal the new rule.²⁸⁴ So the FEC—after some turnover in its membership—wrote a new rule.²⁸⁵ The congressmen sued again.²⁸⁶ Yet, unhappy as it was, Congress could not pull itself together to actually write legislation. The episode illustrates not only the ambivalence of Congress toward difficult questions of free speech and campaign funding, but also the unwillingness of the Progressive reform community to live with the decisions of the independent, expert agency when that agency’s “expert” decision conflicts with the reform advocates’ idea of good policy.²⁸⁷

If Congress is indecisive, it is perhaps because the public remains more ambivalent about campaign finance regulation than simple polls let on. From thirty thousand feet, it seems like a good idea. But when asked for specifics, support fades, even for such “non-controversial” aspects of the law as compelled disclosure of contributions.²⁸⁸ As I noted nearly two decades ago:

Complaints about the FEC’s failure “to enforce the law” assume not only that more “robust” or “vigorous” enforcement would be desirable, but that the law provides for such enforcement and is stifled only by the structure and lack of power and will at the FEC. In fact . . . [p]ublic opinion has not demanded, the Congress has not passed, and the courts have not accepted the constitutionality of many of the types of measures these advocates desire.²⁸⁹

In sum, disagreement about how far the law should reach does not indicate a failure of the enforcement mechanism adopted for the law actually passed. By suggesting that the problem is one of administrative structure, the FEC’s critics seek to bypass the difficult questions of policy and constitutional law that bedevil efforts to regulate money in politics, paper over the thinness of public support for their preferred policies, and through administrative intimidation, expand the reach of the law beyond that passed by Congress.

²⁸⁴ Shays v. FEC, 414 F.3d 76, 97, 100, 115 (D.C. Cir. 2005).

²⁸⁵ Coordinated Communications, 71 Fed. Reg. 33,190 (June 8, 2006) (codified at 11 C.F.R. pt. 109).

²⁸⁶ See Shays v. FEC, 528 F.3d 914, 917–19 (D.C. Cir. 2008).

²⁸⁷ For a discussion of these events and the legal issue, see Bradley A. Smith, *Super PACs and the Role of “Coordination” in Campaign Finance Law*, 49 WILLAMETTE L. REV. 603, 620–30 (2013).

²⁸⁸ See DICK M. CARPENTER II, DISCLOSURE COSTS: UNINTENDED CONSEQUENCES OF CAMPAIGN FINANCE REFORM 7 (2007) (finding that while 82% of respondents favored making contributor identities “available to the public,” only 40% agreed that “my name, address, and contribution amount should be posted on the Internet by the state,” and only 24% favored posting contributor employment information on the Internet).

²⁸⁹ Smith & Hoerstring, *supra* note 123, at 171.

Conclusion and a Cautionary Note

In a country that still places a high premium on free speech, regulating the money that funds political speech will always be a dicey proposition. Congress has often been unable or unwilling to make tough policy choices, delegating them—in the classic model of Progressive government—to an independent, bipartisan, expert agency: the FEC. But the FEC has, in turn, frequently disagreed with the Progressive reform community's politics, and even when it has agreed, the courts have often taken a different view.

Regulatory authorities may have expertise in campaigns, in the ways that campaigns and interest groups operate and spend money, and in the effect of political spending on public opinion and campaigns. Yet what we actually “know” about money in politics remains remarkably thin, perhaps because every election and every election cycle brings forth a new confluence of issues, candidates, technologies, and voter attitudes.²⁹⁰ Still, we can use what we do know to try to devise better rules. What expertise cannot really decide for us are the big questions.

What does it mean to be political equals? What is the meaning of political influence? If everyone had equal political influence, would anyone have any political influence? And if it were impossible to gain political influence, why would people participate in political life? Why are some sources of influence legitimate while other sources of influence are not, and what activities fall into which categories? What is “corrupt” legislative behavior? Does it include making promises to voters, individually or in groups? Does it include donors giving to candidates who support the policies the donors support? These are the types of questions that can never be answered definitively or categorically, and for which our temporary answers must be found through the political system (within which I include our constitutional structures and prohibitions). The problem is not the enforcement vehicle, but rather the problems—perhaps intractable problems—of the underlying substantive enterprise.²⁹¹

Just as there was a movement toward independent campaign finance enforcement agencies in the states in the 1970s, today there are growing calls among the chattering classes for non-partisan campaign

²⁹⁰ See BRADLEY A. SMITH, *Faulty Assumptions of Campaign Finance Reform*, in UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM 39, 48–49, 51 (2001).

²⁹¹ For a broad, skeptical view of campaign finance reform, see generally SAMPLES, *supra* note 3, at 1–2; SMITH, *supra* note 290, at 39–40; Lillian R. BeVier, *Campaign Finance Reform: Specious Arguments, Intractable Dilemmas*, 94 COLUM. L. REV. 1258, 1260 (1994).

administration.²⁹² This effort has, however, had surprisingly little success to date.²⁹³ The notable exception is a slow but steady movement toward non-partisan, independent commissions to take on perhaps the most difficult challenge of representational theory—the proper formula for geographic districting. Currently thirteen states use non-partisan commissions for redistricting, and three of them have adopted the commission model since the last redistricting based on the 2010 census.²⁹⁴ In the wake of the Supreme Court’s decision in *Rucho v. Common Cause*,²⁹⁵ political pressure to adopt non-partisan commissions is likely to intensify.

As with the regulation of money in politics, there are experts in redistricting—those who know the technical and legal side of the issue, others who have studied voting patterns, and the like. And there are those who have thought long and hard about the difficult questions of districting.²⁹⁶ What should be the goals of redistricting? Should lines be drawn to assure competitive races, or races in which candidates can feel relatively sure of reelection, thus reducing the costs of campaigning and

²⁹² See, e.g., J. MIJIN CHA & LIZ KENNEDY, MILLIONS TO THE POLLS: PRACTICAL POLICIES TO FULFILL THE FREEDOM TO VOTE FOR ALL AMERICANS 2, 4 (2014).

²⁹³ Daniel P. Tokaji, *America’s Top Model: The Wisconsin Government Accountability Board*, 3 U.C. IRVINE L. REV. 575, 576 (2013). I have chosen in this Article not to look closely at state models for campaign finance enforcement, but Professor Tokaji’s assessment of Wisconsin’s Government Accountability Board (“GAB”) as the country’s “Top Model” for non-partisan election enforcement (“a ray of hope”) has not worn well. *Id.* at 608. The GAB was abolished in 2016 after an audit by the state’s non-partisan Legislative Audit Bureau found that GAB failed to perform required duties in a timely manner as required by statute, did not follow its penalty schedule for campaign finance, committed lobbying and ethics violations, and had not effectively communicated all statutorily required administrative rules. See LEGISLATIVE AUDIT BUREAU, REPORT 14-4, GOVERNMENT ACCOUNTABILITY BOARD 50–52 (2014), <https://perma.cc/TL88-RS97>. GAB had also run into controversy for its role in Wisconsin’s “John Doe” campaign finance investigations with its attorneys accused of partisan behavior; several attorneys were eventually referred for disciplinary action or contempt proceedings. See Report of the Attorney General Concerning Violations of The John Doe Secrecy Orders at 64, 87, In the Matter of a John Doe Proceeding, No. 13JD11 (W.D. Wis. Dec. 5, 2017), <https://perma.cc/7T5C-FQUY>. The Wisconsin Supreme Court’s decision terminating the “John Doe” investigations as unlawful is *State ex rel. Two Unnamed Petitioners v. Peterson*, 866 N.W.2d 165, 179 (Wis. 2015). Wisconsin replaced GAB with two new agencies, an Elections Commission and an Ethics Commission, each of which were—contrary to the structure of the GAB—designed to mirror the FEC’s 3–3 bipartisan makeup. See WIS. STAT. §§ 15.61(1)(a), 15.62(1)(a) (2018).

²⁹⁴ See *Creation of Redistricting Commissions*, NAT’L CONF. OF ST. LEGISLATURES (Apr. 6, 2018), <https://perma.cc/AW6K-CTMN>. For the history of such commissions, see Bruce E. Cain, *Redistricting Commissions: A Better Political Buffer?*, 121 YALE L.J. 1808, 1813–21 (2012).

²⁹⁵ 139 S. Ct. 2484 (2019) (holding that partisan gerrymandering claims present political questions beyond the reach of the federal courts).

²⁹⁶ See, e.g., Justin Levitt, *Intent is Enough: Invidious Partisanship in Redistricting*, 59 WM. & MARY L. REV. 1993, 2047–50 (2018).

perhaps giving officeholders more leeway to stand firm for the common, long-term good, against momentary passions? What communities of interest should be included in a district? To what extent should such communities be split in order to assure geographic compactness? How do minority groups best gain influence—through controlling a small number of districts, or having influence in a larger number of districts? What should be the allocation of power between rural and urban areas? The list goes on and on, but ultimately, most of these questions—the truly hard questions about districting—are political questions. As Stanford Professor of Political Science Bruce Cain notes, “[i]t is hard to imagine a more complete effort to squeeze every ounce of incumbent and legislative influence out of redistricting” than the plan of the California Redistricting Commission, “[a]nd yet, the reaction to their plans became progressively more heated as the process wore on.”²⁹⁷

Of course, if we perceive that legislators are no longer even trying to answer these types of questions, but are redistricting entirely (or almost entirely) for simple partisan gain, then perhaps a non-partisan commission that is less accountable to voters is nonetheless preferable. But the idea that these political questions can be resolved by placing them in the hands of independent commissions is as chimerical as the idea that questions of political influence and corruption can be resolved through an independent campaign finance agency. The question of political partisanship will not go away, and creating ever-more Rube Goldberg-like selection methods will not resolve that problem.²⁹⁸

It may or may not be that for some questions of election administration, representation, and campaign finance, the least-worst solution is to turn them over to bipartisan or non-partisan officials or independent agencies. That is a discussion for another day.²⁹⁹ But as experience with the Federal Election Commission shows, the notion that non-partisan commissions can resolve fundamental questions of democracy is likely to lead to disappointment.

The harshest critiques of the FEC have mistaken substantive dilemmas of regulation for structural and procedural problems. Our attitudes towards public policy do, and should, shape our notions of the

²⁹⁷ Cain, *supra* note 294, at 1824, 1827.

²⁹⁸ See *id.* at 1829.

²⁹⁹ The argument for enforcement by traditional offices, elected or appointed, on a partisan basis (such as attorneys general, prosecutors, and legislative bodies themselves) is probably stronger than the Progressive paradigm thinks, at least when tempered by a properly downsized government and, as suggested by Professor Foley, a sense of public virtue. See Edward B. Foley, *Virtue over Party: Samuel Randall's Electoral Heroism and Its Continuing Importance*, 3 U.C. IRVINE L. REV. 475, 505 (2013).

proper structure and powers of any administration agency.³⁰⁰ A simple glance at public opinion polls would seem to show substantial majority support for “campaign finance reform.”³⁰¹ From this, critics of the FEC have argued that the FEC’s structure prevents it from being the type of “aggressive” enforcement agency necessary to fulfill these desires.³⁰² But a closer look tells us that bipartisan enforcement and respect for the First Amendment retain powerful holds on the public mind as well.³⁰³ Moreover, it is not only the structure of the FEC, but statutory and constitutional limitations on substance that have frustrated the policy preferences of regulatory advocates. Critics of the FEC’s structure and powers have proven unwilling to argue in a straight-forward manner for the tradeoffs they seek. Doing so would, in fact, be potentially dangerous—support for campaign finance regulation is strongest at the highest levels of generality, where trade-offs are not discussed. Arguing that there are no tradeoffs, only a system purposefully designed to frustrate the popular will, is good politics for pro-regulatory advocates.

In the end, however, it is disagreement over the merits of substantive law—in the public mind, in Congress, and most importantly, in the constitutional analyses of courts—rather than structural flaws in the FEC that have frustrated regulatory goals. These issues must be resolved through substantive politics, not administrative law.

³⁰⁰ See SHEPPARD, *supra* note 32, at 117.

³⁰¹ See, e.g., Jones, *supra* note 23.

³⁰² See Smith & Hoersting, *supra* note 123, at 151.

³⁰³ See PROJECT FEC, *supra* note 24, at 11; Saad, *supra* note 277.