

# THE FAILURES OF FEDERAL CAMPAIGN FINANCE PREEMPTION

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\* J.D. 2016, New York University School of Law; Executive Editor, *Journal of Legislation and Public Policy* (2015-2016). The views expressed herein are not necessarily those of the author's employer or clients. My thanks to Professors Robert Bauer, Sally Katzen, and Samuel Issacharoff for their invaluable comments and guidance during the drafting process, as well as to Amanda Sterling for her thoughtful suggestions. Thanks also to the *Journal of Legislation & Public Policy* staff for their excellent editorial work.

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### INTRODUCTION

Congress's decision to preempt state regulation of federal elections is a poor one—both as a matter of policy and as an issue of federalism. As a public policy matter, it is dangerous to entrust elected officials with the exclusive power to design the very rules that will govern their own elections. Doing so is an invitation to legislative self-dealing and entrenchment. But the preemption of state regulation is also deficient as a matter of preemption doctrine. The federal campaign finance system, as it exists now, lacks the attributes courts normally associate with preemptive regulatory schemes. There is no overwhelming national interest that requires a uniform federal solution. States can, and have, regulated in this field without obstructing the federal goal of fighting corruption. Most importantly, federal preemption prevents states from crafting customized solutions that address corruption or the appearance thereof under the unique pressures and concerns each state faces.

This paper is not an argument for stricter or laxer regulations. It is not my intention to make a contention about whether states (or the nation) would be better served by any specific set of regulations. Rather, it is an argument about *who* should be making those choices, and whether the blanket preemption mandated by Congress, and enforced by the Federal Election Commission (FEC) and the courts, is a good fit for campaign finance doctrine. Part I of this paper will lay out the basics of preemption doctrine and demonstrate how federal campaign finance regulation evolved from a system of cooperation with the states to preemption of state laws. Part II will argue that preemption is inappropriate for campaign finance doctrine, given the poor legislative justification for the express preemption clause and the absence of either a compelling national interest in uniformity or the threat of thwarting a federal interest. Finally, Part III will discuss the systemic benefits likely to follow from removing the preemptive blan-

ket, and address some concerns about how a system of parallel federal-state regulation could work.

## I.

### PREEMPTION AND THE HISTORY OF CAMPAIGN FINANCE REGULATION

Over the course of the twentieth century, campaign finance regulation has evolved from joint state-federal cooperation to total federal preemption. Congress's earliest forays into election regulation involved setting simple, broad standards for expenditure limits and banning certain, particularly egregious behaviors. Most prominently, these early efforts explicitly authorized the states to regulate federal elections so long as they did not directly conflict with federal regulations. It was the perceived excesses and illegal "slush funds" of the 1972 election—particularly those in support of President Nixon—which led Congress to pass the Federal Election Campaign Finance Act (FECA).<sup>1</sup> This legislation helped increase disclosure and control the flood of money being poured into federal campaigns, at least temporarily. At the same time, however, FECA created a sprawling preemption regime that effectively stripped states of any power to significantly regulate how their congressional elections were funded. In doing so, Congress upended both the previous order of joint state-federal campaign regulation and the traditional presumption against federal preemption. This Part will outline the general background of federal preemption of state laws and discuss the role of preemption in the history of campaign finance regulation. It will examine how Congress crafted the preemption provision, and how the FEC and the courts have interpreted the provision in the subsequent five decades.

#### A. *Preemption Generally*

Congress's laws inherently supersede those of the states by virtue of the Supremacy Clause.<sup>2</sup> This hierarchy is a critical component of the federal structure—without this core understanding, courts (and ordinary citizens) would not know whether to follow federal or state law when the two conflict. However, congressional *preemption* of state

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1. John Blake, *Forgetting a key lesson from Watergate?*, CNN (Feb. 4, 2012), <http://www.cnn.com/2012/02/04/politics/watergate-reform/>.

2. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

laws goes further than this simple conflict supremacy.<sup>3</sup> When Congress acts to preempt state laws, it moves to displace state laws that do not actively conflict with a federal provision.<sup>4</sup> Put another way, preemption involves a legislative determination that the federal rules should be the *only* rules governing the topic.

Preemption of state law can be demonstrated in three distinct ways. The first, referred to as express preemption, occurs when Congress includes an express preemption provision in legislation (as it did in FECA).<sup>5</sup> The second, known as field preemption, is by implication—preemption is “compelled [if] Congress’s command is . . . implicitly contained in [a law’s] structure and purpose.”<sup>6</sup> Courts find preemption appropriate where Congress has indicated its intent to “occupy the field” of regulation, thus leaving no room for state regulation, or if the issue is of such overwhelming federal character that state regulation would be inappropriate.<sup>7</sup> Finally, the third form of preemption, known as obstacle preemption, exists where courts find that a state law frustrates the underlying purposes of federal law or regulatory scheme.<sup>8</sup> This can occur even if compliance with both state and federal law is technically possible.<sup>9</sup>

### B. *Federal Regulation of Campaign Finance: From Cooperation to Preemption*

Congress’s authority to regulate campaign finance—indeed all aspects of American elections—is rooted in the Elections Clause.<sup>10</sup> The clause creates a hierarchy of authority when it comes to election regulation: states are expressly granted the power to regulate the “times, places, and manner” of both state and federal elections—unless

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3. See Stephen Gardbaum, *Congress’s Power to Preempt the States*, 33 PEPP. L. REV. 39 (2005) (discussing the distinction between supremacy and preemption).

4. *Id.* at 43–46.

5. 52 U.S.C. § 30143 (formerly codified as 2 U.S.C. § 453).

6. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

7. *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 204 (1983) (quoting *Fid. Fed. Sav. & Loan Ass’n v. De la Cuesta*, 458 U.S. 141, 153 (1982)).

8. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

9. Many overviews of preemption also include “conflict preemption,” which occurs where compliance with both federal and state law proves impossible. See, e.g., *Pac. Gas & Elec. Co.*, 461 U.S. at 204. As discussed above, this may be more of an inherent feature of the Supremacy Clause itself, rather than preemption doctrine. See Gardbaum, *supra* note 3. At any rate, I am not suggesting state law should be able to conflict with or supersede federal campaign finance law, as that would be both unconstitutional and unworkable as a federal structure. I am concerned with laws that could operate harmoniously with FECA. See *infra* Section II.A.

10. U.S. CONST. art. I, § 4.

Congress passes an overriding law.<sup>11</sup> The Elections Clause serves as both a grant of authority to state and federal lawmakers, as well as its own sort of miniature Supremacy Clause.<sup>12</sup>

State regulation of federal elections, even concurrent to federal regulations, is by no means an unheard of concept, nor one that is inconsistent with the Constitution. In the first place, the Elections Clause intrinsically assumes this structure exists—the alternative construction would require Congress to constantly be updating or repealing federal laws in response to changing laws in the states. But if there was any ambiguity, the Supreme Court approved this parallel structure more than 100 years ago in *Ex parte Siebold*.<sup>13</sup> The Court stated that concurrent federal and state regulations are only unconstitutional where “the subject-matter is one of a national character, or one that *requires* a uniform rule.”<sup>14</sup> Absent either of those conditions, there is no inherent federalism conflict “as to prevent their forming a harmonious system perfectly capable of being administered and carried out as such.”<sup>15</sup>

In fact, for much of the twentieth century, Congress allowed states to regulate federal elections in tandem with federal regulations, even initially waiting for states to take the lead.<sup>16</sup> Between 1911 and 1971, Congress enacted three federal regulations, all of which left room for state action.<sup>17</sup> In 1911, Congress enacted the first federal expenditure ceilings for House and Senate elections.<sup>18</sup> This law specifically authorized states to pass and enforce laws that did not directly conflict with federal requirements.<sup>19</sup> This explicit authorization was repeated and reinforced in the next major piece of campaign finance legislation, the Federal Corrupt Practices Act of 1925, which both strengthened disclosure requirements and extended existing bans on

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11. *Id.*

12. See *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2256–57 (2013) (“When Congress legislates with respect to the ‘Times, Places and Manner’ of holding congressional elections, it necessarily displaces some element of a pre-existing legal regime erected by the States.”).

13. *Ex parte Siebold*, 100 U.S. 371 (1879).

14. *Id.* at 385 (emphasis added).

15. *Id.* at 386.

16. See Anthony Johnstone, *Recalibrating Campaign Finance Law*, 32 *YALE L. & POL’Y REV.* 217, 220 (2013) (“State legislatures began to regulate campaign finance around the turn of the twentieth century, and Congress soon followed.”).

17. See Lisa Babish Forbes, *Federal Election Regulation and the States: An Analysis of the Minnesota and New Hampshire Attempts to Regulate Congressional Elections*, 42 *CASE W. RES. L. REV.* 509, 519–20 (1992).

18. Federal Corrupt Practices Act of 1911, ch. 33, § 2, 37 Stat. 26–29 (1911).

19. *Id.* § 2, 37 Stat. 29.

corporate contributions.<sup>20</sup> Over the next half century, Congress continued to tweak the edges of campaign finance regulation, closing loopholes and adjusting reporting requirements, but maintaining room for joint federal-state regulation.<sup>21</sup>

The transition to federal preemption began when Congress crafted the Federal Election Campaign Act of 1971 (which was actually passed in 1972).<sup>22</sup> Section 403 of the Act contained two clauses: The first stated that nothing in the Act invalidated state laws that did not directly conflict with federal rules. This was a fairly standard reiteration of states' power to regulate under the Supremacy Clause, and merely a codification of the status quo.<sup>23</sup> The second clause, however, shifted the regulatory balance toward federal powers. It stated "no provision of State law shall be construed to prohibit any person from taking any action authorized by this Act or from making any expenditure . . . which he could lawfully make under this Act."<sup>24</sup> With that provision, Congress stripped the states of the power to set lower expenditure limits, or to limit the types of campaigning or advertising candidates could engage in. This had an immediate and dramatic impact; several states had pre-existing restrictions that imposed more stringent requirements on their legislators.<sup>25</sup> However, the Act did leave some room for state regulation—areas of law that Congress had not addressed, such as public financing or coordination, were still fair game for the states, provided state regulation did not forbid behavior that was explicitly authorized under federal law.<sup>26</sup>

Unsatisfied with numerous aspects of the Act, Congress passed a series of amendments in 1974 that imposed new contribution limits, among other changes.<sup>27</sup> These amendments included a significant change to the preemption provision, substantially broadening the scope of preempted state law. Congress replaced the limited 1971 language with a more sweeping declaration of federal preemption: "The provisions of this act, and of rules prescribed under this act, supersede and preempt any provisions of state law with respect to election to

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20. Federal Corrupt Practices Act of 1925, ch. 368, 43 Stat. 1070 (1925).

21. See *Weber v. Heaney*, 793 F. Supp. 1438, 1445 (D. Minn. 1992), (summarizing changes to campaign finance law), *aff'd*, 995 F.2d 872 (8th Cir. 1993).

22. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972).

23. *Id.* § 403.

24. *Id.*

25. 92 CONG. REC. 43,397 (1971) (statement of Rep. Udall); *id.* (statement of Rep. McKay).

26. See Forbes, *supra* note 17, at 521.

27. Federal Election Campaign Act of 1974, Pub. L. No. 93-443, § 301, 88 Stat. 1289 (1974).

federal office.”<sup>28</sup> With that change, Congress potentially swept the entire field of campaign finance law, including areas Congress had not specifically addressed, under a federal preemptive umbrella. Although Congress has since made numerous amendments to FECA, it has not substantively altered this blanket requirement.<sup>29</sup> Subsequent interpretation and enforcement of FECA’s preemptive scope was thus left to the newly created Federal Election Commission and the courts.

### C. Federal Preemption in the FEC

Created by the 1974 Amendments to FECA, the FEC is the agency exclusively responsible for regulating the federal campaign finance regime.<sup>30</sup> As part of its mandate, the FEC has adopted a broad and aggressive view of FECA’s preemptive scope. The Commission enacted regulations that lay out areas of election law that are preempted, including organization and registration of committees, disclosure requirements, and limits on contributions and expenditures.<sup>31</sup> It has also issued numerous Advisory Opinions consistently interpreting the preemption clause extremely broadly. The FEC first directly preempted a specific state law in Advisory Opinion 1978-66, when it ruled that a California provision prohibiting contributions by lobbyists to state elected officials was preempted.<sup>32</sup> The requestor was a California State Assembly member running for the House of Representatives; because of his federal status, the FEC ruled that the ban could not apply to him, since Congress had occupied the field with regard to sources of contributions for federal campaigns.<sup>33</sup>

While the FEC’s interpretation in Advisory Opinion 1978-66 is reasonable in light of the Act’s legislative history, there are competing alternatives. Recall that FECA’s preemption provision applies to laws “with respect to elections to Federal office.”<sup>34</sup> Because the California law discussed above primarily governed the relationship between *current, state-elected* officials, one could interpret that law as not being “with respect to” federal candidates—the fact that a state official happened to be an elected official has no bearing on the law’s applicability. The ban is triggered by a candidate’s state office, not his pursuit of

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28. *Id.* (codified at 2 U.S.C. § 453, transferred as amended to 52 U.S.C. § 30143).

29. As part of the Bipartisan Campaign Reform Act (BCRA), Congress created an exception to allow state parties to use state funds for headquarters and offices. 52 U.S.C. § 30143(b) (2002).

30. 52 U.S.C. § 30106 (1997).

31. 11 C.F.R. § 108.7(b) (2002).

32. Dannemeyer, FEC Advisory Op. No. 1978-66 (Sept. 19, 1978).

33. *Id.* (citing H.R. REP. NO. 93-1433 (1974) (Conf. Rep.)).

34. 52 U.S.C. § 30143(a) (formerly codified as 2 U.S.C. § 453).

federal office, and was created to avoid the appearance of bribery in state affairs. Such an interpretation would allow the state law to exist in harmony with the federal campaign finance structure—the state law would not create any loopholes in the federal scheme, as it only imposed further restrictions on contributions. Yet the FEC chose an interpretation that stripped California of some of its state anti-corruption protections. This early application of FECA’s preemption provision is a classic example of the FEC choosing the most restrictive interpretation available.

Over the next four decades, the FEC continued to broadly interpret FECA’s preemption provision. The FEC ruled FECA preempted state regulations over a wide swath of activities including public financing for congressional candidates,<sup>35</sup> push-polling disclosure requirements,<sup>36</sup> and anti-littering warnings.<sup>37</sup> Like Advisory Opinion 1978-66, discussed above, the latter two opinions dealt with state laws that were not designed to target federal candidates; they applied to all campaigns in the state and were designed to address concerns that could be classified as state administrative or police issues. The push-polling measure was designed to protect state citizens from fraud and misleading advertising, while the anti-littering ordinance was concerned with quality of life issues. Neither implicated concerns about contributions or corrupting influence in federal elections. In contrast, the Minnesota public financing system for congressional candidates considered in Advisory Opinion 1991-22 certainly addressed those issues, but it did so in a field Congress had completely failed to regulate. FECA provides public financing for presidential candidates, but is silent on the issue of public financing for congressional candidates.<sup>38</sup> Again, given the expansive language of both Section 30143 and the Act’s legislative history, these are valid interpretations of FECA’s preemptive sweep—but it must be recognized that they are broader than is *required* by the plain language of FECA.

It is the rare exception where the FEC does not find state law preempted; I have been able to locate only two areas to date. The first involves the transfer of funds from a candidate’s state campaign committee to her federal committee—in such cases, state law restrictions and requirements on such committees and contributions remain in ef-

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35. Minn. Indep. Republican Party, FEC Advisory Op. No. 1991-22 (Oct. 7, 1991).

36. Greenberg Quinlan Rosner Research, Inc., FEC Advisory Op. No. 2012-10 (Apr. 27, 2012).

37. Archer, FEC Advisory Op. No. 1981-27 (July 2, 1981).

38. 26 U.S.C. § 9001 (2016).



fect.<sup>39</sup> State committees cannot avoid state regulations simply by tangentially implicating a federal purpose or committee, then invoking FECA's preemption clause.

The other exception involves paying for "walking-around services." FECA does not preempt a state law prohibiting payment for a variety of services on Election Day (including distribution of campaign literature and "communicating a voting preference").<sup>40</sup> There is no explanation as to why the FEC chose to spare this particular regulation from preemption. The decision is particularly baffling as the Advisory Opinion cites to the Act's clause that preempts "limits on . . . expenditures regarding Federal candidates,"<sup>41</sup> which this regulation clearly involves. Perhaps the FEC regarded regulation of *types* of campaign expenditures distinct from *quantities* of expenditures, the latter being subject to FEC regulation. If so, this is inconsistent with the FEC's interpretation of its authority to preempt state regulations of contributions—in such cases, it has regulated both limits on quantities of contributions,<sup>42</sup> and types or sources.<sup>43</sup> At any rate, Advisory Opinion 1980-47 appears to be a dead-letter; it has only been cited twice in subsequent opinions, and never since 1988.<sup>44</sup>

In sum, the FEC has staked out an aggressive position regarding federal preemption of state regulations. Whether this position is driven solely by a broad reading of FECA's preemption language or by other factors, it has resulted in a tight grip on federal campaign finance regulation.

#### D. Federal Preemption in the Courts

Unlike the FEC, the courts seem more willing to narrow FECA's preemptive scope. Specifically, they have not been willing to read the

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39. Davis, FEC Advisory Op. No. 1978-20 (May 31, 1978) (state law requiring permissions from contributors to transfer funds not preempted). At the same time, contributions from the state committee to the federal one must still be reported under FEC regulations, and under certain conditions the state committee would need to be registered as a federal PAC. See Shaffer, FEC Advisory Op. No. 1985-02 (Feb. 22, 1985). Additionally, all funds transferred from the state committee to the federal must comply with FEC sourcing and limit rules. *Id.*

40. Conroy, FEC Advisory Op. No. 1980-47 (May 13, 1980).

41. *Id.*

42. 11 C.F.R. § 110.1 (2002).

43. Dannemeyer, FEC Opinion, *supra* note 32.

44. See Wieder, FEC Advisory Op. No. 1988-21 (May 16, 1988); United Telecom PAC, FEC Advisory Op. No. 1982-29 (Apr. 30, 1982). In Wieder, the FEC simply cited to Conroy to show that Dannemeyer was apposite because it discussed limits on expenditures while the current issue was one of contribution limits. Wieder, at 4 n.5.

phrase “with respect to Federal elections” quite so broadly.<sup>45</sup> For example, the Second Circuit has ruled that a state action alleging a corporate board’s mismanagement of federal political action committee (PAC) funds was not preempted by FECA, despite the fact the donations in question went to federal candidates.<sup>46</sup> The court ruled that the complaint was based on a state cause of action (waste of corporate assets) that had nothing to do with federal elections (or any elections, for that matter).<sup>47</sup> Even in the electoral context, courts have displayed a willingness to push the boundaries of preemption back a bit. In *Reeder v. Kansas City Board of Police Commissioners*, the Eighth Circuit ruled that a state law banning police officers from making political contributions was not preempted by FECA.<sup>48</sup> While it acknowledged the preemption provision could encompass the state ban, the court opted for an alternative reading: that FECA primarily regulated candidate behavior (filing, disclosure, etc.) and only regulated non-candidate behavior to the extent that FECA expressly forbid certain kinds of contributions (unions, corporations, foreign nationals).<sup>49</sup> Thus a state regulation walling off further contribution sources or affecting behavior of non-candidates or political organizations is not preempted. This approach would appear to open the door to an interpretation of FECA that would allow states to regulate above and beyond the FECA strictures in a range of areas, including contribution limits and public financing—it captures the road not taken by the FEC.

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45. Courts will often examine how far Congress intended preemption to reach, even when confronted with an express preemption provision. See *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008) (“If a federal law contains an express pre-emption clause . . . the question of the substance and scope of Congress’ [sic] displacement of state law still remains.”); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (“The purpose of Congress is the ultimate touchstone.”).

46. *Stern v. Gen. Elec. Co.*, 924 F.2d 472 (2d Cir. 1991). The plaintiff had previously filed a complaint with the FEC that GE/PAC had violated FECA because its expenditures went to candidates not facing opposition—thus the contributions were actually for lobbying, rather than electoral purposes. The FEC dismissed the complaint on the grounds that PACs were not forbidden from using expenditures to “lobby,” so long as those funds were spent in connection with a federal election and were raised in the proper manner. *Stern v. Gen. Elec. Co.*, FEC M.U.R. 2682, at 7 (1988), [http://www.fec.gov/disclosure\\_data/mur/2682.pdf](http://www.fec.gov/disclosure_data/mur/2682.pdf).

47. *Stern*, 924 F.2d at 475 (“The narrow wording of this [preemption] provision suggests that Congress did not intend to preempt state regulation with respect to non-election-related activities.”). Other circuits have reached similar conclusions. See, e.g., *Janvey v. Democratic Senatorial Campaign Comm., Inc.*, 712 F.3d 185, 200 (5th Cir. 2013) (ruling FECA did not preempt state anti-Ponzi scheme law that “happens to apply to federal political committees in the instant case”).

48. 733 F.2d 543 (8th Cir. 1984).

49. *Id.* at 545.

However, there are several mitigating factors that must temper this analysis. For one, *Reeder* is not as unequivocal as it initially appears. The panel based its decision to read FECA narrowly in part on FECA's legislative history—during the debate, two senators specifically discussed and confirmed that “any State law regulating the political activity of State or local officers or employees is not preempted [or] . . . superseded.”<sup>50</sup> As a result, it is unclear how compelling the court would have found its alternative, narrow reading of FECA absent that plain statement. Indeed, the Eighth Circuit itself later limited *Reeder*, describing it as a situation “close to the boundaries of the domain preempted by FECA,” and held the case inapplicable to situations where the regulation at issue more directly governs candidate behavior.<sup>51</sup> Meanwhile, a number of courts have ruled on more “core” campaign regulations and have found them all preempted.<sup>52</sup>

Additionally, even when courts believe FECA's preemption scope is ambiguous, they will often defer to the FEC's interpretation.<sup>53</sup> Under the *Chevron* doctrine, when an agency has interpreted an ambiguous statute it administers, courts must defer to the agency's interpretation.<sup>54</sup> This is true even in cases where the agency itself is determining the preemptive scope of its statute.<sup>55</sup> Because, as discussed above, the FEC nearly always finds a state law preempted, this effectively locks in a highly preemptive regime.

## II.

### FIELD PREEMPTION IS NOT JUSTIFIED FOR CAMPAIGN FINANCE REGULATION

For better or for worse, the FEC and, to a perhaps lesser degree, the courts, have interpreted FECA's preemption clause broadly, block-

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50. *Id.* at 545–46 (quoting 120 CONG. REC. 34,386 (Oct. 8, 1974)).

51. *Weber v. Heaney*, 995 F.2d 872, 875–76 (8th Cir. 1993) (affirming preemption of state public financing scheme for congressional candidates); *see also* N.H. Attorney Gen. v. Bass Victory Comm., 166 N.H. 796, 810 (2014) (cabining *Stern* and *Janvey* off as cases involving issues “peripheral” to campaign finance laws).

52. *See, e.g.*, *Bunning v. Kentucky*, 42 F.3d 1008 (6th Cir. 1994) (state registration requirements); *Weber*, 995 F.2d 872 (congressional public financing); *Bass Victory Comm.*, 166 N.H. at 810 (push-polling disclosure requirements). *But see* *Dewald v. Wrigglesworth*, 748 F.3d 295, 300 (6th Cir. 2014) (describing what exactly FECA preempts as “a classic open question”).

53. *See Teper v. Miller*, 82 F.3d 989, 996–98 (11th Cir. 1996); *Weber v. Heaney*, 793 F. Supp. 1438, 1454–56 (D. Minn. 1992), *aff'd*, 995 F.2d 872 (8th Cir. 1993).

54. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

55. *See Teper*, 82 F.3d at 998 (quoting *City of New York v. FCC*, 486 U.S. 57, 64 (1988)) (“[I]f the agency's choice to pre-empt represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it.”).

ing states from regulating federal elections to a significant degree. But a more fundamental question remains: Is the preemption clause necessary in the first place? Both the courts and the FEC have looked to whether Congress intended to preempt various aspects of state law, but neither have explored whether preemption is actually appropriate for the regulatory scheme generally.

In one sense, this is only proper—whether Congress has the power to expressly preempt state campaign finance regulations is not in question. But this simple acceptance of congressional intent papers over questions about whether such broad preemption is good policy, or good federalism. Because the ability of states to experiment and form their own local policies is so critical to our structure of federalism,<sup>56</sup> we should hope that the preemption regime created by FECA provides sufficient justification to move away from the normal order of concurrent federal and state authority. If Congress can preempt state law simply by saying so without any justification, this creates opportunities for congressional self-dealing and improper aggregation of federal power.

This Part proceeds in four sections. Section A lays out a specific subset of state regulations that could potentially exist concurrent to the FECA regime. Next, Section B discusses the presumption against preemption in the context of Elections Clause cases. Section C examines Congress's stated explanations for why they opted to preempt state regulation across the board and evaluates whether they provide sufficiently strong rationale to remove states' regulatory power. Finally, Section D then examines whether FECA, by virtue of its structure, objectives, and requirements, requires preemption to function effectively. In both Sections C and D, the evidence demonstrates that field preemption is inappropriate in the campaign finance realm.

#### A. *Types of Reform Considered in this Paper*

This paper focuses on three specific types of regulation that states might seek to layer on top of the FECA structure: 1) lower contribution limits for House and Senate races; 2) restrictions on contributions from certain classes of potential contributors, such as lobbyists, state contractors, or non-state citizens; and 3) voluntary public financing for

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56. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

congressional candidates.<sup>57</sup> Although the logic of this paper's analysis covers a wider range of potential reforms, I have chosen to focus on these options for two main reasons: First, all three exist in various states for state and local races. While the specifics vary, as a theoretical matter all three types of reforms have been implemented, challenged in court, and generally pass constitutional muster. Second, compliance with both these rules and federal rules poses no direct conflict problems. Neither lower contribution limits nor restrictions on certain contributors authorize behavior that is otherwise banned under federal law. Some public financing programs for candidates may be on murkier ground—for instance, does a large block grant triggered by a small group of individual donors count as contributions from those donors? From the entire citizenry of a district? Of the state?<sup>58</sup> But a small-donor matching system, such as the one in New York City,<sup>59</sup> or a voucher system, such as that recently implemented in Seattle,<sup>60</sup> would fill a public financing gap in the federal regime without running afoul of federal contribution limits or interfering with the FEC's individual reporting requirements. The rest of Parts II and III will analyze the preemption regime with an eye toward these specific reforms.

### *B. The Elections Clause and the Presumption Against Preemption*

In the election context, state regulations are not afforded the presumption of non-preemption normally granted to other regulations. In most preemption cases, a court begins with the assumption that federal laws do not supersede state laws unless Congress has made that intent clear.<sup>61</sup> This is rooted in the core idea that states are, in many respects, independent sovereigns with all of the police powers that come with

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57. I am deliberately exempting state regulation of presidential campaigns from this discussion. National-level races implicate significantly stronger national interests in uniformity and federal regulation; requiring candidates to comply with regulatory regimes in multiple states simultaneously is likely impractical. This paper's analysis is limited to races that occur within, and candidates beholden to, a single state jurisdiction.

58. Because the potential for a small, highly motivated interest group to qualify their candidate is significantly increased under such a system, it might actually raise a greater fear of *quid pro quo* corruption.

59. *Matching Fund Program: How it Works*, N.Y.C. CAMPAIGN FIN. BD., <http://www.nyccfb.info/program/how-it-works> (last visited Mar. 17, 2016).

60. See Russell Berman, *Seattle's Experiment with Campaign Funding*, ATLANTIC (Nov. 10, 2015), <http://www.theatlantic.com/politics/archive/2015/11/seattle-experiments-with-campaign-funding/415026/>.

61. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (Courts "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress").

such independence.<sup>62</sup> However, the Supreme Court has ruled that when Congress legislates based on the powers granted to it in the Elections Clause, that presumption does not exist, for two reasons.<sup>63</sup> First, the very structure of the Elections Clause *presumes* congressional action based on the Elections Clause overrides a state legal regime.<sup>64</sup> The Elections Clause states the “Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time . . . *make or alter such Regulations.*”<sup>65</sup> Consequently, laws based on the Elections Clause inherently modify state election systems. The second reason is that regulation of federal elections is not considered one of the states’ “traditional police powers.”<sup>66</sup> Federal elections only exist because of the *federal* constitution—therefore states have no pre-existing interest or right to regulate them.<sup>67</sup>

One should not take this argument too far, however. Just because a state law does not enjoy a presumption against preemption does not mean that the federal rule must be the end word in regulation. In *Arizona v. Inter Tribal Council of Arizona*, the statute in question required states “accept and use” a federally-designed voter registration form.<sup>68</sup> The court ruled that Arizona could not require the application be accompanied by proof of citizenship, as that would impose a requirement above and beyond what the federal rules mandated.<sup>69</sup> In short, the federal government had issued an affirmative directive that states are obliged to follow.

Most campaign finance law differs from this model in a key respect: campaign finance regulation is directed at *individual* or *private* behavior, rather than state action. FECA limits the amount that individuals or organizations may contribute, imposes reporting requirements on candidates, and regulates how various private actors can interact and coordinate within the electoral ecosystem. There are few directives a state must obey, positive or negative, other than the pre-

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62. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

63. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2256–57 (2013).

64. *Id.*

65. U.S. CONST. art. I, § 4 (emphasis added).

66. *Inter Tribal Council of Ariz.*, 133 S. Ct. at 2257.

67. *Id.*; see also *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 802 (1995) (citing 1 J. Story, *Commentaries on the Constitution of the United States* § 627) (“[T]he states can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the constitution does not delegate to them. . . . No state can say, that it has reserved, what it never possessed.”).

68. *Inter Tribal Council of Ariz.*, 133 S. Ct. at 2251.

69. *Id.*

emption clause's requirement to stay out of the way.<sup>70</sup> Thus a state choosing to impose the types of laws this paper considers on top of the federal structure would not violate any command directed at them to do (or not do) anything. Additional requirements such as lower contribution limits do not implicate the supremacy concerns at work in *Inter Tribal*.<sup>71</sup>

### C. *Congress Did Not Put Forward Sufficient Justification to Preempt State Regulation*

As discussed above, the passage of FECA in 1972 (and the 1974 Amendments) represented a significant departure from the historical norm. Prior to FECA, federal law coexisted alongside state regulatory regimes. FECA introduced the first, weaker form of express preemption, preventing states from setting lower expenditure limits than the federal standards. In the 1974 Amendments, Congress dramatically expanded the preemption provision to supersede all state regulation “with respect to election to federal office.”<sup>72</sup> However, an examination of the legislative histories of both pieces of legislation reveals little as to why Congress felt it was so important to break with the established order of federal-state cooperation.

The legislative history of the original 1971 Act includes only two references to the preemption clause. The first is upon introduction of the preemption amendment by Representative Udall. In his explanation, Representative Udall confirms that the purpose of the amendment is to prevent states from setting lower expenditure limits.<sup>73</sup> Representative Udall's sole explanation is that candidates should be allowed to spend up to federal limits “without regard to a lot of old,

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70. Of course, the broad scope the FEC and courts have given the preemption clause has obviated the need for Congress to pass laws directed at limiting state action. In our hypothetical world without the preemption clause, Congress may choose to proscribe state action in various ways; for example, Congress could eliminate state bans on lobbyist donations by passing a law stating “No one may be restricted from contributing to federal candidates due to the donor's lobbyist status.” While this national blanket ban would (in the opinion of the author) implicate the same policy and tailoring concerns the preemption clause currently does, there is no argument that such a law would not preempt the states from banning lobbyist contributions.

71. Registration requirements would need to be carefully crafted to avoid running afoul of the Constitution's Qualification Clauses. U.S. CONST. art. 1, §§ 2–3. While the Elections Clause delegates extensive authority to the states to regulate “procedural mechanisms” for federal elections, it does not allow states to impose restraints on who is qualified to run above and beyond the Constitution's requirements. See *Cook v. Gralike*, 531 U.S. 510, 523 (2001).

72. 52 U.S.C. § 30143 (formerly codified as 2 U.S.C. § 453).

73. 92 CONG. REC. 43,396 (Nov. 30, 1971) (statement of Rep. Udall).

obsolete State Acts.”<sup>74</sup> The second reference occurred during a discussion on January 19th, 1972 between Representatives Hays and Bingham.<sup>75</sup> Representative Bingham rises to ask if Section 403 would prohibit states from passing laws that set lower contribution or expenditure limits; Hays confirms that it would.<sup>76</sup> Representative Hays justifies this feature by stating that, if states were allowed to set lower limits, it would “forcibly vitiate the intent of this bill, and therefore [such laws] are not valid.”<sup>77</sup>

Neither of these explanations are compelling policy reasons for forcibly wrenching the power to regulate elections away from the states. Representative Hays does not elaborate on the intent of the bill, rendering his explanation cursory and unsatisfying. Representative Udall’s rationale of freeing congressional candidates from outdated laws, aside from appearing blatantly self-serving, is directly refuted by his colleague, Representative McKay of Utah. Illustrating how Representative Udall’s amendment would double the expenditure limits in Utah, Representative McKay announces he is compelled to oppose it because “[m]y state is one of those that have [sic] been a bit more progressive . . . on this issue.”<sup>78</sup> This statement indicates that a number of states were actively debating these issues and updating their laws to strike the policy balances they believed were most appropriate for their specific circumstances. States were (and remain) more than capable of sweeping aside their “old, obsolete” laws on their own initiative.

The legislative history of the 1974 Amendments contains significantly more discussion about the preemption provision. Most prominently, the House Committee Report contains a bold statement that “[i]t is the intent of the committee to make certain that Federal law is construed to occupy the field . . . and that the Federal law will be the sole authority under which such elections will be regulated.”<sup>79</sup> Other elements of the legislative history make it clear that Congress intended FECA’s preemptive scope to be broad and far-reaching.<sup>80</sup> These

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74. *Id.*

75. 92 CONG. REC. 320 (Jan. 19, 1972) (statement of Rep. Hays).

76. *Id.*

77. *Id.*

78. 92 CONG. REC. 43,397 (Nov. 30, 1971) (statement of Rep. McKay).

79. H.R. REP. NO. 93-1239, at 10–11 (1974). At least one court has found this seemingly definitive statement ambiguous because subsequent text possibly narrows the focus of the paragraph solely to disclosure requirements. *Weber v. Heaney*, 793 F. Supp. 1438, 1448 (D. Minn. 1992), *aff’d*, 995 F.2d 872 (8th Cir. 1993).

80. *See Weber*, 793 F. Supp. at 1449–1451 (recounting the legislative history and debates of the 1974 Amendments).



pieces of evidence, however, merely define what the intent of Congress *was*, not why it believed such a policy desirable or justified.

The debate on the floor of the House is more illuminating. In response to a proposed amendment that would allow states to set lower expenditure limits than the federal caps, several House members argued for a broad, comprehensive preemption measure because they felt that, if Congress allowed states to regulate in one area, it would have to allow it across the board.<sup>81</sup> But this is clearly not the case—Congress is more than capable of preempting certain state actions but not others,<sup>82</sup> or creating regulatory floors on top of which states can regulate.<sup>83</sup> Another argument was raised by Representative Koch: Congress, as a national body, should be subject to uniform rules.<sup>84</sup> But this ignores the reality that, because each congressperson runs from an individual district or state, the need for national unity, whether in spending limits or reporting requirements, is slight.<sup>85</sup> A more valid concern was raised by Representative Thompson, who raised the possibility that a state overwhelmingly controlled by one party might pass legislation aimed at hurting the opposition party—the implication being that the federal legislators would be more likely to strike an appropriately non-partisan balance.<sup>86</sup> While this may be a legitimate concern, it assumes the interests of state partisans align with their federal counterparts in ways that may not be true.<sup>87</sup>

#### D. FECA's Structure Does Not Require Implied Preemption to Function

In contrast to their treatment of express preemption clauses, courts have developed fairly elaborate (albeit convoluted) standards for evaluating whether a state law is preempted by implication. As

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81. See 93 CONG. REC. 7895 (Aug. 8, 1974) (statement of Rep. Hays) (“So, on the subject of preemption . . . it is a little like pregnancy—you either are or are not; you cannot be partway.”); *id.* at 7896 (statement of Rep. Frenzel) (“If we want preemption of reports, we certainly ought to have the preemption of the whole electoral process.”).

82. See, e.g., *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190 (1983) (preempting nuclear safety requirements, but not economic viability requirements).

83. See William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547, 1566 (2007).

84. 93 CONG. REC. 7898 (Aug. 8, 1974) (statement of Rep. Koch) (“[P]reemption is essential. We are all national legislators. We get the same salary. . . . We have the same duties and obligations and the legislation we are passing today should apply equally to everyone.”).

85. See *infra* Section II.B.1.

86. 93 CONG. REC. 7896 (Aug. 8, 1974) (statement of Rep. Thompson).

87. I address this argument more fully in Section III.A, *infra*.

part of this analysis, courts look for at least one of two key features that would indicate when state law must be preempted for the federal regime to function properly. First, courts determine whether the federal interest in a uniform national structure is so overwhelming that it is clear that states should not be allowed to modify the federal regulatory structure.<sup>88</sup> Second, courts will look to see if the state regulation in question, while not directly conflicting with the federal rule's requirements, still serves as an obstacle to frustrate the greater federal purpose.<sup>89</sup> This Section will evaluate whether state regulation of contribution limits, restricted classes, or public financing would trigger either of these concerns.<sup>90</sup>

### *1. There Is No Overwhelming Interest in a Uniform National Structure*

During the legislative debate, some congressmen expressed a desire for a uniform national system that would treat all senators and representatives equally.<sup>91</sup> The logic underlying this position is that federal legislators serve the national interest, and so should be subject to national rules. But this claim ignores the reality that representatives are elected by, and responsible to, citizens of specific states, who have their own values, conditions, and concerns. Senators from Vermont run under very different financial and electoral conditions than those in California, and presumably would need to guard against different influences and sources of corruption. As one commentator aptly noted, “[t]he heart of campaigning is, and always has been, within the home state.”<sup>92</sup> Certainly we should set rules that treat candidates within each state the same, and perhaps create national floors that ensure all candi-

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88. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947).

89. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

90. As part of a traditional implied preemption analysis, courts will also determine whether Congress created a sufficiently pervasive regulatory scheme such that it clearly intended to occupy the field. *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 204 (1983) (citing *Fid. Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982)). Because this paper is concerned with the justification for preemption rather than the preemptive intent, I omit this section of the analysis. I will note that while FECA and the FEC's regulations are extensive and complex, they feature several gaps that indicate there is significant room for state regulation. For instance, FECA contains no provisions for congressional public financing. Additionally, the FEC has frequently proven slow to address new developments and changes in technology—its long-stalled delay in issuing regulations to address Bitcoin and other cryptocurrencies is one such example. The FEC's inability to address questions of coordination between super PACs and candidates, especially those who are technically “testing the waters,” is another.

91. *See, e.g.*, 93 CONG. REC. 7898 (Aug. 8, 1974) (statement of Rep. Koch).

92. *See Forbes, supra* note 177, at 537.

dates are adhering to some bare minimum of anti-corruption measures. But the candidates from low-population, rural states are already subject to significantly different campaign experiences and interest pressures than those in densely-populated, urban states, regardless of their financing regimes. Imposing a national campaign finance standard does nothing to address those underlying differences between legislators once they reach office.

This is not to say there is *no* national interest in avoiding corruption of federal legislators. Improper influence over even a small number of legislators can have dramatic effects for citizens of all fifty states—even if those legislators’ constituents have little interest in a specific issue. For example, imagine Congress is considering raising mileage standards on cars, which industry experts believe would impact manufacturer profits and employment. While the outcome of the debate may have massive implications for industrial states such as Michigan and Ohio, states like Vermont and Maine will not feel the economic pinch or benefit—so their legislators can possibly cast votes either way without serious electoral repercussions. Industry or environmental operatives could potentially exploit weak campaign finance laws in states like this to gain improper influence while the corrupted legislators pay little political cost. Federal standards help ensure this sort of “shopping” behavior doesn’t become too significant of a problem.<sup>93</sup>

This is a common problem in state regulation—industries that produce negative externalities set up shop in states with the lowest level of regulation, potentially evading and impacting states that have higher levels of regulation.<sup>94</sup> The federal government’s most common response to this tactic is to create a federal floor, establishing minimum criteria, and allow states to ratchet up regulations on top of it.<sup>95</sup> This ensures the worst and most troubling externalities are prevented, while allowing states to design schemes that impose higher standards or address state-specific concerns. Federal campaign finance regulation is similarly better designed as a floor. As will be discussed below, allowing states to regulate *on top of* federal restrictions does not injure the congressional objective of preventing corruption.<sup>96</sup> Here the national interest is served just as well by a floor, rather than a ceiling, on

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93. Cf. Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1370–72 (2006) (arguing “uniform minimum standards” can be used to prevent “spillover” effects from state experimentation).

94. See Buzbee, *supra* note 83.

95. *Id.* at 1552.

96. See *infra* Part III.

campaign finance regulations—ensuring all candidates comply with a baseline of protection, then allowing states to tailor specific solutions to their individual concerns.

## 2. *State Regulation Does Not Serve as an Obstruction of the Federal Purpose of Campaign Finance Regulation*

Even when compliance with both federal and state laws is technically possible, courts will find the state law preempted if it frustrates the underlying federal purpose.<sup>97</sup> For example, the Nuclear Regulatory Commission (NRC) and the Department of Energy set safety standards for nuclear power plants. If California passed stricter safety standards, on the surface this would not create a conflict—compliance with California’s stricter standards would also satisfy the laxer federal standard. But critically, the federal standards aren’t established *just* to promote safety—the federal rules are in place to *promote* safe nuclear power. In other words, the NRC sets its safety standard at the level it believes will be safe, while encouraging the use of nuclear power as a viable economic option. The federal standard thus represents a policy decision balancing economic factors against safety factors. California’s additional regulations would thus upset that balance, and potentially make nuclear energy cost prohibitive—thus frustrating the broader federal purpose.

The threat of states upsetting a federal balancing of factors—often between economic and safety or health factors—is a common thread throughout the Supreme Court’s obstacle preemption jurisprudence.<sup>98</sup> By contrast, all campaign finance regulations have a single, overriding purpose: eliminating the existence or appearance of corruption from the political process.<sup>99</sup> It is difficult to imagine how the laws proposed in this paper, layered on top of the federal regime, would *increase* the risk (or appearance) of corruption. Certainly, if a state imposed higher contribution limits or reduced restrictions on federal contractors, that would risk increasing the appearance of corruption. But such a law would directly conflict with federal campaign limits or disclosure, and be preempted under simple conflict preemption principles under the Supremacy Clause. Meanwhile, state or local rules that

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97. See *Wyeth v. Levine*, 555 U.S. 555 (2009) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

98. See, e.g., *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000) (allowing car makers to choose from a menu of safety options maximized both safety and economic viability).

99. See *Buckley v. Valeo*, 424 U.S. 1 (1976); see also *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014).

imposed *lower* limits, restricted registered lobbyists and contractors from making contributions, or expanded public financing would at worst have no impact on public perception (or reality).<sup>100</sup> Thus the unitary federal purpose remains undisturbed.

It wasn't always this way. At various times, both Congress and the Court have recognized a range of purposes for campaign finance regulation that included elements that arguably could be thwarted by additional state regulations. For instance, in *Austin v. Michigan Chamber of Commerce*, the Court ruled that the state's interest in preventing exertion of "unfair[ ] influence" was sufficient to restrict corporate independent expenditures.<sup>101</sup> One could view such an interest as an effort to create a more level playing field or otherwise broadly control or regulate the political marketplace.<sup>102</sup> If Congress had this "leveling" purpose in mind when it passed FECA, or in enacting future legislation, the argument for preemption becomes much stronger. If Congress intended to level the field in a specific way, a state's additional regulation could thwart that purpose by "retilting" it—just as a state's additional safety regulations could foil the NRC's goal of *promoting* the use of safe energy, as in the example above.

However, recent decisions by the Supreme Court have established that preventing corruption, and specifically *quid pro quo* corruption, is the only legitimate rationale for restricting political

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100. It is an open question what evidentiary standard the Supreme Court uses (or should use) when evaluating the fit for campaign finance regulation. See Nabil Ansari, Note, *The Anti-Circumvention Rationale*, 19 N.Y.U. J.L.P.P. 417 (2016). It is conceivable that the Roberts Court, already skeptical of campaign finance regulations, would strike down a campaign finance restriction that could not demonstrate any positive impact. But that is a constitutional fit question, specific to an individual law, rather than one of preemption of a field.

101. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990); see also *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 256 (1986) (noting that "resources amassed in the economic marketplace" could provide corporations "an unfair advantage in the political marketplace"). For an example of Congress balancing other factors, consider the push to equalize rules and standing among the legislators themselves, discussed in Section II.A, *supra*.

102. See Richard L. Hasen, *Is "Dependence Corruption" Distinct from A Political Equality Argument for Campaign Finance Laws? A Reply to Professor Lessig*, 12 ELECTION L.J. 305, 307 (2013) ("I have long characterized this *Austin* interest as one not about corruption prevention but about promoting political equality."); William V. Luneburg, *Civic Republicanism, the First Amendment, and Executive Branch Policymaking*, 43 ADMIN. L. REV. 367, 405 (1991) ("[A]t a minimum, *Austin* accepts that wealth used to magnify the power of a political actor's speech presents a legitimate basis for state regulation, at least in some cases."); Bob Bauer, *Justice Scalia and Campaign Finance: A Puzzle (Part II)*, MORE SOFT MONEY HARD LAW (Feb. 23, 2016), <http://www.moresoftmoneyhardlaw.com/2016/02/justice-scalia-campaign-finance-puzzle-part-ii/>.

speech.<sup>103</sup> Thus, legislators may not consider any factors other than the interest in combatting *quid pro quo* corruption when it comes to campaign finance regulation. Consequently, campaign finance regulation simply does not involve the balancing of competing types of policy considerations that requires a national solution.<sup>104</sup>

Finally, a court's inquiry into obstacle preemption is performed on a case-by-case basis.<sup>105</sup> Even if an individual law could be crafted to somehow increase corruption, this is not a reason to remove states from the regulatory sphere entirely. Rather, courts would evaluate whether individual laws frustrate the federal purpose, in the same way they would evaluate whether compliance with both state and federal laws was impossible.

### III.

#### FEDERAL PREEMPTION OF CAMPAIGN FINANCE REGULATION IS A POOR POLICY CHOICE

Beyond simply being a clumsy fit for campaign finance regulation, preempting state regulation of federal elections imposes significant opportunity costs on the American political system. By restricting states from experimenting with campaign finance regulation, we limit their ability to function as “laboratories of democracy,” depriving the entire country of the potential fruits of experimentation. Preemption also creates significant opportunities for congressional self-dealing and entrenchment; state regulation presents opportunities to promote candidate responsiveness and competition. State regulation would allow states to harmonize their state and federal campaign finance regimes and close internal loopholes, subjecting governors and state representatives to the same requirements as federal senators and representatives. Finally, preemption prevents individual states from setting policies that best reflect local conditions and values.

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103. *Citizens United v. FEC*, 558 U.S. 310, 359 (2010) (“When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to quid pro quo corruption.”); see also *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014) (“Any regulation must . . . target what we have called ‘quid pro quo’ corruption or its appearance.”).

104. Individual regulations do require a balancing of the state interest in preventing corruption against the constitutional right to political speech. *Randall v. Sorrell*, 548 U.S. 230, 248–49 (2006) (“[C]ontribution limits that are too low can also harm the electoral process. . . .”). However, this is not a balance the federal legislature is uniquely or best suited to strike—constitutional judgments are ultimately the purview of the judiciary.

105. See *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (reviewing preemption claim “under the circumstances of this particular case”).

### A. Preemption Stifles Valuable Experimentation in the States

Justice Brandeis's adage considering states as "laboratories of democracy" where "novel social and economic experiments" occur is well known.<sup>106</sup> Indeed, the states' role in developing and testing new policies has become a core component of federalism and preemption jurisprudence.<sup>107</sup> True to form, a number of states (and smaller localities) have been actively experimenting on state election reform in a variety of ways.<sup>108</sup> But the FECA preemption regime prevents states from applying these lessons to regulations governing federal officials, depriving regulators in other states and at the federal level of valuable real-world data about what works and what doesn't. Although regulation of state-level races can provide some insight, the lessons learned from these experiences are not necessarily applicable to national races. For instance, media coverage of congressional races is significantly more intense, and congressional races potentially pull interest and money from outside groups, which may not be common in purely state level races. For instance, in 2014, outside groups spent \$468 million across thirty-six Senate races.<sup>109</sup> That same year, outside groups spent only \$142 million across thirty-six gubernatorial races.<sup>110</sup> The vastly greater spending by independent organizations in Senate races could pose different problems for regulators and demand different solutions—experimentation by the states could help find solutions to these unique challenges.

Decentralizing regulatory authority and empowering the states allows experimentation to develop the optimal enforcement agency structure, as well as policies. It is no secret that the FEC in recent years has become increasingly gridlocked and has generally been unwilling to aggressively pursue campaign finance violations or promulgate new regulations.<sup>111</sup> Reform advocates have put forward a variety

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106. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

107. See Buzbee, *supra* note 83, at 1618.

108. See BRENT FERGUSON, BRENNAN CTR. FOR JUSTICE, STATE OPTIONS FOR REFORM PG# (2015) (outlining various programs and reforms states have implemented in recent years); CHISUN LEE ET AL., BRENNAN CTR. FOR JUSTICE, AFTER *Citizens United*: The Story in the States PG# (2014) (discussing coordination rules and enforcement in the states).

109. IAN VANDERWALKER, BRENNAN CTR. FOR JUSTICE, ELECTION SPENDING 2014: OUTSIDE SPENDING IN SENATE RACES SINCE *Citizens United* 4 (2015).

110. Ben Weider, *Outside Spending Propelled Governors to Wins*, TIME (Nov. 5, 2014), <http://time.com/3558262/governors-elections-spending/>.

111. Just ask former Commissioner Ann Ravel. Eric Lichtblau, *F.E.C. Can't Curb 2016 Election Abuse, Commission Chief Says*, N.Y. TIMES, May 3, 2015, at A1; The Daily Show, *The Federal Election Commission: An Enormously Dysfunctional*

of proposals on how to make the agency more aggressive and efficient.<sup>112</sup> But any decision to reorganize a national regulatory agency can have dramatic consequences for campaigns across the country, possibly swinging the outcomes of elections themselves.<sup>113</sup> Creating a new agency structure poses significant risks—but those risks can be minimized if contained within a single state. Experimentation here could yield empirical evidence on how modifications impact the political ecosystem. At the same time, allowing states to pass concurrent or stricter regulatory schemes would allow them to bring their own enforcement processes into play, perhaps filling an enforcement gap created by partisan gridlock or agency capture.<sup>114</sup>

### B. Preemption Opens the Door to Congressional Self-Dealing and Entrenchment

The risk of legislative self-dealing is the most daunting problem in campaign finance regulation—indeed in all election regulation. Legislators have little incentive to change the rules that allowed them to get elected. Numerous commentators have criticized campaign finance rules as incumbent-protection schemes.<sup>115</sup> In his final State of the Union address, President Obama publicly recognized that allowing legislators to draw the geographical boundaries of their own districts gave them too much control over their political destiny.<sup>116</sup>

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Agency, COMEDY CENT. (Nov. 12, 2015), <http://www.cc.com/video-clips/t2knjp/the-daily-show-with-trevor-noah-the-federal-election-commission—an-enormously-dys-functional-agency>.

112. See 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 PG# (2002), <http://www.democracy21.org/uploads/%7BB4BE5C24-65EA-4910-974C-759644EC0901%7D.pdf>; see also H.R. 2931, 114th Cong. (2015).

113. Bob Bauer, *More Conflict at the FEC: The Question of Partisanship and the Problem of Finger-Pointing*, MORE SOFT MONEY HARD LAW (May 26, 2015), <http://www.moresoftmoneyhardlaw.com/2015/05/conflict-fec-question-partisanship-problem-finger-pointing/> (“An agency structured to provide each party with a check on the other will come to deadlock in [political] situations.”).

114. See Buzbee, *supra* note 83, at 1595–98 (outlining risks and limitations of unitary enforcement regimes); LEE ET AL., *supra* note 108.

115. See Robert F. Bauer, *When “The Pols Make the Calls”*: McConnell’s *Theory of Judicial Deference in the Twilight of Buckley*, 153 U. PA. L. REV. 5, 15–16 (2004); Charles L. Cooper & Derek L. Shaffter, *What Congress “Shall Make” the Court Will Take: How McConnell v. FEC Betrays the First Amendment in Upholding Incumbency Protection Under the Banner of “Campaign Finance Reform,”* 3 ELECTION L.J. 223, 227 (2004); Samuel Issacharoff, *Throwing in the Towel: The Constitutional Morass of Campaign Finance*, 3 ELECTION L.J. 259, 264 (2004).

116. President Barack Obama, State of the Union Address (Jan. 13, 2016) (transcript available at <https://obamawhitehouse.archives.gov/the-press-office/2016/01/12/remarks-president-barack-obama-%E2%80%93-prepared-delivery-state-union-address>).



Indeed, examining the legislative history of the FECA preemption provision indicates its broad language was a particularly blatant example of legislative self-dealing. During the House debate over the 1974 Amendments, one of the primary arguments raised in support of broad preemption was that it would “get [Members of Congress] out of all these [local] reporting requirements.”<sup>117</sup> Legislators’ convenience and comfort should not be the primary driver of election regulatory policy—that’s practically the definition of self-dealing.<sup>118</sup> However onerous, redundant, or unnecessary local reporting requirements may be, the primary focus of election law and regulation should be what serves the broader public interest and instills confidence in constituents. Allowing states to impose restrictions on federal candidates removes, or at least mitigates, some of these biases by ensuring that at least one set of other players have a say in the system.

Of course, giving states regulatory power in this area is no panacea. State legislators will still have incentives to establish rules they believe will benefit their parties, even if they do not directly benefit themselves.<sup>119</sup> One feature of a purely federalized campaign finance system is that it may represent a sort of détente between the parties, a compromise that favors neither side. The 93rd Congress (which passed the 1974 Amendments) was Democratic, but had to deal with a Republican president.<sup>120</sup> In the subsequent twenty Congresses, one party has controlled the House, Senate, and presidency simultaneously only six times.<sup>121</sup> Divided government on the federal level is the norm, giving both parties incentives to compromise and devise a neutral system.<sup>122</sup> In this light, the federal campaign finance arrangement

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117. 93 CONG. REC. 7896 (Aug. 8, 1974) (statement of Rep. Frenzel); *see also id.* at 7895 (statement of Rep. Hay) (“[N]early every Member of this body asked us to . . . preempt State laws so all candidates would . . . live under one set of regulations.”).

118. To be fair, other arguments were raised in criticism of the amendment. *See supra* notes 83–86 and accompanying text. However, the majority of arguments focus on the specter of reporting requirements.

119. *See* Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 712 (1998).

120. Kathy Gill, *Visual Guide: The Balance of Power Between Congress and The Presidency (1945–2015)*, WIREDPEN (Nov. 4, 2014), <http://wiredpen.com/resources/political-commentary-and-analysis/a-visual-guide-balance-of-power-congress-presidency/>.

121. *Id.* By contrast, states appear much more subject to single-party control, at least in recent years. Craig Gilbert, *The Rise of One-Party Rule in the States*, MILWAUKEE WIS. J. SENTINEL (Aug. 3, 2013), <http://archive.jsonline.com/blogs/news/218243481.html>.

122. Congress also has numerous procedural safeguards (such as the filibuster) that make it different for even a temporarily unified legislature and executive to change the rules to benefit the majority.

has remained stable because it represents, for all its frustrations, the most workable compromise. After all, it has only been amended substantially once, during a time of divided government, in the Bipartisan Campaign Reform Act.<sup>123</sup>

Allowing states, particularly those controlled by a single-party, onto the playing field could upset this balance (if it exists). It is telling that in states where legislators draw congressional districts, they almost uniformly draw them to support their own party.<sup>124</sup> In recent years, Republican-controlled states have sought to enact strict voter identification laws, while Democratic states reject them.<sup>125</sup> Although both sides justify their moves with noble purposes, such as protecting ballot integrity or expanding the franchise, it is generally understood that these efforts are motivated by partisan concerns.<sup>126</sup> Similarly, single-party states might seek to pass campaign finance laws that they perceive will benefit their own party.<sup>127</sup>

That being said, the interests of state legislators do not perfectly mirror their federal counterparts—they are also influenced by incentives that may push them to adopt more neutral laws. Knowing there are no guarantees in politics, a savvy legislator would not support a

123. Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107–155, § 214(c), 116 Stat. 81. At the time of passage, Republicans held the House and Presidency; Democrats held the Senate. However, even at the time, critics on the Court argued BCRA was primarily a scheme for incumbent self-entrenchment. *See* McConnell v. FEC, 540 U.S. 93, 248 (2003) (Scalia, J., dissenting) (arguing BCRA was primarily an incumbent-protection scheme); *id.* at 306 (Kennedy, J., dissenting) (same); *see also* Bauer, *supra* note 115, at 26 (quoting Nixon v. Shrink Mo. Gov’t PAC, 528 U.S. 377, 402 (2000)) (arguing that courts must police against incumbents “insulat[ing] themselves from effective electoral challenge”). One must also consider the risk of bipartisan political lockup—the two major parties coming together to protect themselves against third parties, or even insurgents within their own party. *See* Issacharoff & Pildes, *supra* note 119, at 686 (“‘Stability-enhancing’ regulation, of course, can easily be another name for allowing state legislatures (comprised exclusively of Democrats and Republicans) to create practically unchallengeable two-party oligopolies.”).

124. Sean J. Young, *The Supreme Court Strikes a Blow Against Partisan Gerrymandering*, A.C.L.U.: SPEAK FREELY (July 1, 2015, 11:00 AM) <https://www.aclu.org/blog/speak-freely/supreme-court-strikes-blow-against-partisan-gerrymandering/> (“[I]n 2012, in states where Democrats controlled the process, their candidates won about 56 percent of the vote and 71 percent of the seats. In states where Republicans controlled the process, their candidates won roughly 53 percent of the vote but 72 percent of the seats.”).

125. William D. Hicks et al., *A Principle or a Strategy? Voter Identification Laws and Partisan Competition in the American States*, 68 POL. RES. Q. 18–33 (2015).

126. *See, e.g.*, Annie-Rose Strasser, *Pennsylvania Republican: Voter ID Laws Are ‘Gonna Allow Governor Romney To Win’*, THINKPROGRESS (Jun. 25, 2012), <http://thinkprogress.org/politics/2012/06/25/505953/pennsylvania-republican-voter-id-laws-are-gonna-allow-governor-romney-to-win/>.

127. *See* 93 CONG. REC. 7896, *supra* note 86 and accompanying text.

system he or she thought might eventually benefit the other party—while incumbents are primarily concerned with their immediate situation, state legislators can take the longer, systematic view and look ahead to a time when the other party may engage in techniques to promote entrenchment. Moreover, intra-party dynamics may push legislators further away from protectionism—if they ever plan to run for federal office, they will very likely have to defeat an incumbent from their own party.<sup>128</sup> Finally, even if state legislators are motivated entirely by a desire to help their own party, their efforts will not necessarily have significant effects: there is little research demonstrating that certain campaign finance regulations benefit one party or the other.

The instincts and impulses likely driving state legislators in this area are obviously hard to predict. Party entrenchment may become a more dominant concern. However, allowing Congress to be the sole regulator of federal elections presents concrete risks of legislative self-dealing and incumbent entrenchment.<sup>129</sup>

### C. *Preemption Prevents Tailoring to Meet Local Conditions*

Wisconsin is not California.<sup>130</sup> Arguing that candidates in the two states are subject to the same costs and campaigning norms is a dubious proposition at best. The sheer cost of campaigning in an expensive media market or a larger state can differ on orders of magnitude.<sup>131</sup> Many factors contribute to this cost difference, including the cost of media markets, competitiveness of races, and campaigning norms—some states emphasize media spending, while others value grassroots campaigning more heavily. The relative value of a federal maximum contribution of \$5,400 (or of outside spending greatly in excess of that) can make a huge impact in a rural, low-income state or

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128. William P. Marshall, *The Last Best Chance for Campaign Finance Reform*, 94 NW. U. L. REV. 335, 378 (2000).

129. The existence of referenda and initiative systems, particularly in western states, also mitigates against potential risk of state legislators promoting party entrenchment. *Id.* at 378–79.

130. *See, e.g.*, Monica Davey, *Wisconsin's Crown of Cheese Is Within California's Reach*, N.Y. TIMES, Sept. 30, 2006, at A1 (describing the deeply rooted tension between the states' cultures and histories through the lens of dairy farming).

131. In 2014, candidate spending on a single California congressional race (District 7) was \$9.5 million. *2014 Race: California District 07 Summary Data*, OPENSECRETS <http://www.opensecrets.org/races/summary.php?id=CA07&cycle=2014> (last visited Mar. 1, 2016). In the same year, candidates in seven Wisconsin House districts combined to spend \$11.2 million, with none of them spending more than \$3.5 million. *Wisconsin Congressional Races in 2014*, OPENSECRETS <http://www.opensecrets.org/races/election.php?state=WI&cycle=2014> (last visited Mar. 1, 2016).

district.<sup>132</sup> From a utilitarian perspective, decision-making by local and state governments provides the opportunity to meet these unique challenges in the most effective and narrowly tailored manner.<sup>133</sup> This is a positive free speech value under the Court's First Amendment jurisprudence. Because restrictions that might make sense for a small state like Vermont might be burdensome in a massive media market like California, allowing the states to narrowly target risky or corrupting behavior in light of the local economy or market is critical to the validity of a finance regulation.<sup>134</sup>

Perhaps most importantly, a national standard chokes off expressions of local values and self-determination. Local regulations are important expressions of a population and provide citizens with the opportunities to directly engage with issues and make decisions about the society in which they want to live.<sup>135</sup> Different states place different values on campaign spending itself. The population of one state might believe that more spending is the best way to sustain the marketplace of ideas and be content with the federal limits. Other states, however, might place higher emphasis on grassroots donations and citizen participation in elections, and wish to set lower contribution limits. Still others might believe in promoting the viability of indepen-

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132. The increasing prevalence of outside spending in low-income and (formerly) low-cost districts is a prime argument to allow increased state regulation of federal elections. One study has found that non-constituents already provide the majority of itemized individual contributions in federal elections. Richard Briffault, *Of Constituents and Contributors*, 2015 U. CHI. LEGAL F. 29, 32. When groups of wealthy donors begin spending money across state, or even district, borders, they threaten to interfere with how elected officials relate and respond to their constituents. Donors that are able to ignore local customs, or to flood local races with cash to promote a specific worldview, can undermine the core democratic principles of self-governance. See generally Todd E. Pettys, *Campaign Finance, Federalism, and the Case of the Long-Armed Donor*, 81 U. CHI. L. REV. DIALOGUE 77 (2014). The Supreme Court recently affirmed a decision that upheld BCRA's ban on foreign contributions in state and federal elections. *Bluman v. FEC*, 800 F. Supp. 2d 281 (D.D.C. 2011), *aff'd*, 132 S. Ct. 1087 (2012). The three-judge panel ruled that the government "has a compelling interest . . . in limiting the participation of foreign citizens in American democratic self-governance," and that contributions and express advocacy expenditures "are part of the overall process of democratic self-governance." *Id.* at 288. By making one's membership in the "political community" the linchpin of the issue, the court may have presented states with a viable argument to regulate contributions and spending coming from out of state. See Anthony Johnstone, *Outside Influence*, 13 ELECTION L.J. 117 (2014). States that are concerned about the effect of outside contributions or preservation of local values may wish to extend these protections to federal races as well.

133. Buzbee, *supra* note 83, at 1581.

134. *Compare Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000), with *Randall v. Sorrell*, 548 U.S. 230 (2006) (considering local conditions in evaluating a policy's constitutionality).

135. See Buzbee, *supra* note 83, at 1581.

dent or third-party candidates through public financing programs. These decisions all reflect values of specific populations that cannot be expressed under the preemption regime.<sup>136</sup>

*D. Preemption Prevents Effective Harmonization of State Laws*

Under the preemption regime, states have plenary authority to regulate state officials, but not federal candidates—but there is considerable overlap between those two groups. Many, if not most, federal candidates get their start in state level campaigns, and often hold state office during their runs for federal office. This dual role can create confusion on the part of candidates and donors, and in some situations can open loopholes that weaken or defeat legitimate state laws and interests. For example, many state and local jurisdictions have limits on the amount of money lobbyists or contractors can contribute to government officials with whom they have business ties; these measures are implemented to prevent the existence or appearance of *quid pro quo* corruption—the compelling interest for campaign finance restrictions.<sup>137</sup> However, under FECA’s preemption regime, those same lobbyists and contractors are free to donate the federal maximum to a state official’s *federal* campaign fund or PAC.<sup>138</sup> This application of federal preemption effectively defeats the legitimate anti-corruption efforts of the state for those officers who also entertain federal hopes, even if they don’t intend to run immediately.<sup>139</sup>

Professor William Marshall advanced the additional argument that harmonizing state laws with federal candidates has the potential to create new and inventive opportunities to regulate campaign finance, possibly without implicating the same First Amendment concerns raised by contribution limits and public financing.<sup>140</sup> States already regulate a number of other aspects of the electoral process that indirectly impact how federal candidates raise money and how much

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136. Cf. Steven G. Calabresi, “A Government of Limited and Enumerated Powers”: *In Defense of United States v. Lopez*, 94 MICH. L. REV. 752, 775 (1995) (arguing that promoting local tastes and values is a value of federalism).

137. See, e.g., *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721, 751 (2011).

138. See, e.g., *Wieder FEC Opinion*, *supra* note 44; *Welch*, FEC Advisory Op. No. 1993-25 (Mar. 15, 1994).

139. See also *Teper v. Miller*, 82 F.3d 989 (11th Cir. 1996). Georgia prohibited state legislators from accepting contributions during the legislative session in order to “prevent even the appearance of impropriety.” *Id.* at 993 (quoting Ga. Att’y Gen. Unofficial Op. U95-27 (1995)). The Eleventh Circuit ruled that FECA preempts this law with regard to those running for federal office during the state legislative session. *Id.* at 999.

140. Marshall, *supra* note 128, at 381–83.

money they will need for their campaigns, such as election dates, style of primary, and filing dates.<sup>141</sup> By also allowing states to directly regulate the financing of federal campaigns, they could experiment by designing holistic systems that adjust numerous factors at once, and tweak that design scheme as needed, thus producing ideal results.<sup>142</sup>

*E. Even Without Field Preemption, State Regulations Would Be Still Subject to Both Constitutional and Conflict Preemption Review*

Of course, state laws enacted to complement federal laws in this fashion must pass their own constitutional muster. They could not set contribution limits so low as to impermissibly stifle political speech, nor seek to cap expenditures simply because FECA does not. Public financing programs and restrictions must be truly voluntary, and must not impermissibly punish candidates for spending their own money, or for the actions of independent organizations. Disclosure rules could not infringe on donors' or organizations' rights of association. But this is nothing new—these requirements already apply to campaign finance regulations directed solely at state candidates, and federal courts have long examined state regulations for constitutional infirmities. There is no reason these (or similar) laws, applied to federal candidates, could not be similarly evaluated.

Moreover, removing the blanket preemption standard would not free state laws from the strictures of conflict preemption. No state law can render a federal law impotent, or make it impossible for those regulated to comply with both state and federal requirements. Courts could still be called upon to conduct a preemption analysis, as they have countless times before, in electoral and other contexts.<sup>143</sup> Nor is it immediately clear this would be more difficult to administer than the current presumption of preemption. Even under the existing regime, courts routinely must decide whether a given state law falls under the preemptive umbrella of Section 30143.<sup>144</sup>

While there would no doubt be initial rounds of litigation to determine whether these or other types of regulations would conflict with federal requirements, precedential case law would soon emerge to establish the general contours of what is permissible, as it would with any field of law. Indeed, an influx of litigation may be a feature, not a bug, of a decentralized campaign finance regime. Justice Ken-

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141. *Id.*

142. *Id.*

143. *See supra* Section I.D.

144. *See supra* Section I.D.

nedy has explicitly called for new campaign finance legislation and experimentation in order to allow the Court to reexamine the doctrine from different perspectives.<sup>145</sup> Allowing the states to experiment in this realm could provide that opportunity.

#### CONCLUSION

The rules of a political system can have a massive impact on the outcomes that system will produce. Choices about how candidates can raise money, who they can raise it from, and what they can spend it on have implications for candidate viability, incumbent advantages, and the electoral process. Given the immense range of values and considerations at stake—interest in reducing corruption, improving representative responsiveness, maximizing opportunity and access to unconventional candidates, to name a few—there is no clear “right” or “best” system. Rather, these decisions should reflect the values of the society supporting the system.

For the last four decades, Congress and the FEC have asserted near total dominion over these decisions. But campaign finance, as a doctrine, does not benefit from nor require exclusive federal control. There is no risk of states undermining federal law and no need for a single national scheme. Granting Congress sole policymaking power over its own elections invites legislative self-dealing and entrenchment, and provides little to no incentive to actually address perceived deficiencies, even those that large majorities of Americans wish fixed. Fighting corruption, or the appearance thereof, does not require a purely federal solution, nor is such a solution even particularly suited to the challenge. Each state presents a unique set of values and needs, and a one-size-fits-all approach makes for a poor fit. The existing federal rules contains substantial gaps which could be filled through state regulation and innovation. If our goal is to truly combat corruption and ensure faith in government, states should be allowed to experiment and partner with federal regulators and legislators to develop new solutions that use federal regulations as a baseline, not a ceiling. The current regime of blanket preemption should be abandoned.

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145. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 409 (Kennedy, J. dissenting) (2000); *see also* Marshall, *supra* note 128, at 391 (“[T]he unsettled constitutional law surrounding campaign reform favors experimentation.”).

