

**A RISING ORESTAR:
THE EFFECT OF E-FILING AND E-DISCLOSURE ON
OREGON STATE CAMPAIGN FINANCE ENFORCEMENT**

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I. INTRODUCTION

To suggest that campaign finance law and the funding of American elections has changed over the past decade is a comedic understatement. Both congressional action such as the Bipartisan Campaign Reform Act¹ and court decisions such as *Citizens United*² and *SpeechNow.org*³ fundamentally altered the rules of funding federal and state elections. Donors and political groups responded to these doctrinal changes by creating SuperPACs and “dark money,” as the costs of federal elections continued to accelerate.⁴

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1. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81.

2. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

3. *SpeechNow.org v. Fed. Election Comm’n*, 599 F.3d 686 (D.C. Cir. 2010).

4. For a brief introduction to the increasing costs of American elections at the Federal level, see *The Money Behind the Elections*, CENTER FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/bigpicture/> (last visited Oct. 12, 2014).

Due to these changes, the academic discussion has largely shifted from debating the respective merits of aggressive “contribution limit” regimes versus more limited “disclosure” regimes⁵ to a more narrow question of what type of disclosure regimes we should have.⁶

However, when considering a law’s normative desirability, it is easy to forget to consider the way the law is enforced. The assumption that the law as enforced mirrors the law as written is not always true, as scholars of regulatory theory demonstrate time and again.⁷ Campaign finance law in particular seems ideally suited to a number of enforcement pathologies: while underenforcement may fail to deter potential violators,⁸ overenforcement may chill First Amendment rights.⁹ Indeed, practitioners and academics have almost universally criticized the Federal Elections Commission’s enforcement practices as woefully inadequate,¹⁰ draconian,¹¹ or both.¹²

Despite Justice Brandeis’s characterization of American states as laboratories for democracy,¹³ far less research has examined the

5. See generally Daniel Hays Lowenstein, *On Campaign Finance Reform: The Root of All Evil Is Deeply Rooted*, 18 HOFSTRA L. REV. 301, 322–29 (1989) (discussing influence from campaign contributions); see also Bruce E. Cain, *Moralism and Realism in Campaign Finance Reform*, 1995 U. CHI. LEGAL F. 111 (1995); Martin Shapiro, *Corruption, Freedom and Equality in Campaign Financing*, 18 HOFSTRA L. REV. 385 (1989) (exploring the ethics of campaign finance through two noted scholars).

6. See generally Richard L. Hasen, *Chill Out: A Qualified Defense of Campaign Finance Disclosure Laws in the Internet Age*, 27 J.L. & POL. 557 (2012); see also Richard Briffault, *Updating Disclosure for the New Era of Independent Spending*, 27 J.L. & POL. 683 (2012).

7. See, e.g., IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSFORMING THE DEREGULATION DEBATE* 19, 35–38 (1992) (discussing the concept of an “enforcement pyramid”).

8. See generally *No Bark, No Bite, No Point*, DEMOCRACY 21 (2002), <http://www.democracy21.org/uploads/%7BB4BE5C24-65EA-4910-974C-759644EC0901%7D.pdf> [hereinafter *Democracy 21*] (discussing the limitations of the Federal Election Commission); Scott E. Thomas & Jeffrey H. Bowman, *Obstacles to Effective Enforcement of the Federal Election Campaign Act*, 52 ADMIN. L. REV. 575, 577–78 (2000); see also Todd Lochner, Dorie Apollonio, & Rhett Tatum, *Wheat from chaff: Third-party monitoring and FEC enforcement actions*, 2 REG. & GOVERNANCE 216, 217 (2008).

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

10. DEMOCRACY 21, *supra* note 8, at 45.

11. Smith & Hoersting, *supra* note 9, at 145.

12. Todd Lochner & Bruce E. Cain, *The Enforcement Blues: Formal and Informal Sanctions for Campaign Finance Violations*, 52 ADMIN. L. REV. 629 (2000).

13. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 310–11 (1932).

enforcement of campaign finance at the state and local levels.¹⁴ This lacunae is unfortunate; whatever one's normative preferences are for campaign finance law, one should want to better understand how the actual mechanics of campaign finance enforcement affect the ability of regulatory agencies to pursue the law's objectives. Differences persist in states' campaign finance laws, but many similarities exist between state campaign finance enforcement agencies. For example, agency resources are scarce and many states find themselves facing huge discrepancies between the goals assigned to state agencies by legislation and the resources allocated to accomplish these goals.¹⁵ Furthermore, research suggests that campaign finance law itself is not always sufficient to alter the behavior of campaign contributors and spenders. The law's moral suasion may be trumped by the pragmatic, often immediate financial needs of campaigns,¹⁶ and the self-interested calculations of potential violators may favor lawlessness when the chance of detection is slim.¹⁷

However, it is disingenuous to use these enforcement difficulties as a justification to abandon all hope of creating a reasonably workable campaign finance regime. Indeed, examining how different states enforce their campaign finance law may provide insight into what types of policies work most effectively. This is especially true if recent technological developments have helped to alleviate resource constraints for campaign finance law enforcement agencies.¹⁸ New approaches, such as electronic filing (or e-filing, where regulated entities submit required documentation online rather than by paper copy), electronic disclosure (or e-disclosure, which creates publicly-available online databases of contributions and expenditures that the public may scrutinize), and automated auditing systems, have the potential to make enforcement more efficient. By the same token, the availability of new tools may impede, rather than improve, enforcement depending on the institutional environment in which the

14. While exceptions exist, they are either out-of-date or preliminary in nature. See MICHAEL J. MALBIN & THOMAS GAIS, *THE DAY AFTER REFORM: SOBERING CAMPAIGN FINANCE LESSONS FROM THE AMERICAN STATES* (1998). See also Todd Lochner, *Surveying the Landscape of State Campaign Finance Enforcement: A Preliminary Analysis*, 4 ELECTION L.J. 329 (2005).

15. MALBIN & GAIS, *supra* note 14, at 24–27.

16. A competitive candidate's ability to obey the law is constrained by the propensity of others to violate it.

17. MALBIN & GAIS, *supra* note 14, at 41–43.

18. See Hasen, *supra* note 6, at 559.

agency is situated and the incentives of actors within that environment.¹⁹

In this article, we provide a detailed assessment of Oregon's system of state campaign finance enforcement, paying particular attention to how the adoption of e-filing and e-disclosure affect the state's ability to identify and prosecute wrongdoing. Our purpose is two-fold: First, to shed light on the academic inquiry of how advances in technology exacerbate or cure well-known regulatory pathologies; and second, to provide insight to legislators and practitioners as to how the rules they create affect the ability of agencies to enforce the law in an effective and equitable manner. Our conclusions about Oregon's approach to campaign finance enforcement are cautiously optimistic. Contrary to our expectations, the implementation of e-filing and e-disclosure did not exacerbate one of the most common problems of campaign finance enforcement (the skew to trivial cases from third-party complainants), and seems to have helped the Oregon Elections Division deal more effectively with both low-level offenders and serious wrongdoers. It is, in short, a success. We are more skeptical, however, as to whether e-filing and e-disclosure will improve enforcement outcomes in other states. Oregon's disclosure-only approach to campaign finance law plays to the strengths of e-filing and e-disclosure, whereas these policies may compound presently-existing problems in contribution limit regimes.

In Part II, below, we provide some necessary background by summarizing the literature on regulatory enforcement pathologies, particularly with regards to campaign finance enforcement. We also provide a brief summary of Oregon's campaign finance enforcement system. In Part III, we describe our study and findings—to our knowledge, the only empirical assessment available of Oregon's system. In Part IV, we conclude with a brief discussion and offer suggestions for future research.

II. CAMPAIGN FINANCE ENFORCEMENT & OREGON

A. *Campaign Finance Enforcement*

Any discussion of campaign finance enforcement must begin with the most prominent and most studied agency, the Federal Election Commission (FEC). The FEC is a regulatory agency that

19. See Lochner, Apollonio, & Tatum, *supra* note 8, at 229.

goes by many titles in the academic community: A few choice appellations are “muzzled watchdog,” “toothless tiger,” “The Little Agency that Can’t,” and the “Failure-to-Enforce Commission.”²⁰ The question is not if the FEC is ineffective; rather, it is *why* this regulatory agency is ineffective. This is where scholars differ; some blame the institutional structure of the agency itself, while others attribute agency problems to the behavior of the six FEC Commissioners.

The first argument suggests that FEC failure was inevitable because Congress wanted it so. Members of Congress never intended to undermine their fundraising capacity, and they designed an agency that structurally lacked the power necessary to have any sort of efficient policing effect.²¹ The FEC faces deadlocks as the result of the composition of its committee, which consists of three Republicans and three Democrats.²² It has lengthy enforcement procedures with numerous stages for appeal that results in year-long cases for the most routine of matters.²³ The FEC lacks significant sanctioning ability—save for the modest penalties that can be imposed under its Administrative Fines Program—the agency can only attempt to negotiate an administrative settlement or file a civil lawsuit against a respondent where the process begins anew.²⁴

However, other observers suggest that even if the FEC had an efficient agency structure, the six FEC commissioners still would not aggressively enforce the law. This variant of the classic capture theory suggests that the FEC commissioners may feel obligated to legislators when deciding cases²⁵ and thus favor incumbent politicians.²⁶ FEC failure is less a story of an agency hamstrung by legislative design, and more a story of clientelism and willful protectionism based on party loyalty. Not all share this view; Smith

20. DEMOCRACY 21, *supra* note 8, at 5.

21. See generally Lauren Eber, Note, *Waiting for Watergate: The Long Road to FEC Reform*, 79 S. Calif. L. Rev. 1155 (2006) (detailing the effects of the Watergate scandal on the pressure for FEC reform); see also Michael M. Franz, *The Devil We Know? Evaluating the Federal Election Commission as Enforcer*, 8 ELECTION L.J. 167 (2009) (examining the FEC’s tools of enforcement); Thomas & Bowman, *supra* note 8 (arguing that when underfunded and bound by overly-complex law, the FEC will continue to struggle).

22. DEMOCRACY 21, *supra* note 8, at 9.

23. Thomas & Bowman, *supra* note 21, at 584–91.

24. DEMOCRACY 21, *supra* note 8, at 14.

25. BROOKS JACKSON, *BROKEN PROMISE: WHY THE FEDERAL ELECTION COMMISSION FAILED* 59 (1990).

26. Franz, *supra* note 21, at 171.

and Hoersting instead argue that the FEC actually overenforces the law by uncompromisingly prosecuting inexperienced or small violators and by interpreting its authority to regulate campaign finance in a manner that far exceeds its own constitutional authority.²⁷

Whichever view is correct, Smith and Hoersting make the valuable point that critics' claims of FEC failure may be driven as much by their ideological views of campaign finance law itself as by the actual enforcement practices of the FEC (a charge to which those authors themselves likely are subject). If the benchmark against which reformers judge the FEC is a world in which issue ads are strictly limited and corporations are prohibited from engaging in independent expenditures, the FEC will appear inept regardless of what it does. But the FEC obviously does not have the power to enforce unconstitutional laws. Instead of tying one's analysis of regulatory efficacy to one's normative opinions of campaign finance law, it is better to consider what makes for effective regulatory enforcement more generally and determine whether those conditions exist for a given regulatory body.

Effective regulatory enforcement depends on the ability of the agency to both monitor regulatees and to impose appropriate sanctions for any violations discovered.²⁸ We thus focus on two issues: First, problems resulting from an agency overreliance on third-party monitoring; and second, problems resulting from the inability of an agency to correctly calibrate sanctions. As for monitoring, resource constraints can limit the ability of enforcement agencies to identify a substantial portion of all violators. Agencies that employ resource intensive command-and-control style monitoring in particular usually are able to examine only a small sample of potential violators.²⁹ Consequently, many regulatory agencies rely on "third-party" monitoring, whereby private groups or citizens report potential wrongdoings of others to the agency—restaurant patrons' complaints about health code violations are a classic example.

The difficulty with third-party monitoring is that these private parties usually report the most obvious, and hence least significant, infractions.³⁰ Not every obvious violation is trivial, of course, but

27. Smith & Hoersting, *supra* note 9, at 167.

28. Lochner & Cain, *supra* note 12, at 630–31.

29. Matthew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 167–69 (1984).

30. Todd Lochner, *Overdeterrence, Underdeterrence, and A (Half-Hearted) Call for A*

short of insider whistleblowers it is rare when informal observers detect purposeful and fraudulent efforts to evade the law. How problematic third-party skew will be depends not only on the institutional environment in which the agency operates, but also the incentives of the third-parties themselves. When all parties in question belong to a cartel, or when action against one would facilitate action against the others, third-party monitoring may not exist at all. One would instead expect collusion.³¹ But when the interests of third-parties are diametrically opposed to the interests of those they monitor, one would expect to see extremely robust—if not overzealous—monitoring. The zero-sum game of modern two-party politics is an example of a regulatory space in which one would expect to see considerable third-party efforts to detect and report the wrongdoings of one's political opponents.³²

Were agency resources unlimited, overzealous third-party monitoring would be a nuisance, requiring the agency to address more trivial or nonmeritorious violations. In reality, the skew towards low-level violations typical of third-party monitoring absorbs agency resources, potentially leaving serious violators undetected and unsanctioned.³³ Just how serious an enforcement pathology this becomes is an empirical question dependent on a variety of factors. It is enough for present purposes to note that policies and enforcement strategies that increase third-party monitoring are not always wise.

In addition to effective monitoring, regulatory agencies also must appropriately calibrate penalties in order to effectively sanction violators.³⁴ Violations occur for a variety of reasons (some purposeful, others accidental) and result in differing levels of harm. As regulatory theorists such as Ayres and Braithwaite note, agencies therefore must create incrementally severe punishments for incrementally severe crimes.³⁵ Inadvertent violators who commit trivial offenses probably do not need to be civilly or criminally

Scarlet Letter Approach to Deterring Campaign Finance Violations, 2 ELECTION L.J. 23, 26 (2003).

31. See generally Jill Esbenshade, *The Social Accountability Contract: Private Monitoring from Los Angeles to the Global Apparel Industry*, 26 LAB. STUD. J. 98 (2001) (arguing the necessity of a system level change to remove collusion and improve worker's rights in the apparel industry).

32. Lochner, Apollonio, & Tatum, *supra* note 8, at 229–30.

33. *Id.* at 225.

34. AYRES & BRAITHWAITE, *supra* note 7, at 35–39.

35. *Id.*

sanctioned. Instead, the best course of action is for the agency to educate those wrongdoers in order to deter future lawlessness.³⁶ Ayres and Braithwaite conceptualize an “enforcement pyramid” with a broad base of agency education and warning letters designed to allow agencies to quickly and easily dispel with trivial violations, moving to mid-level sanctions such as administrative penalties and civil suits, tapering to a very small apex of resource-intensive enforcement strategies such as criminal suits and delicensing procedures.³⁷ By dispensing with low-level violators quickly, agencies can conserve resources and focus on more egregious and recalcitrant lawbreakers.³⁸

There are several limits to the enforcement pyramid approach, however. First, this strategy works best in an environment of long-term, stable regulator-regulatee relationships. As Scholz notes, iterative interactions with repeat players allows agencies to credibly ratchet-up sanctions as needed.³⁹ It is far more difficult to predict and deter potential wrongdoings of “one off” regulatees.⁴⁰ Second, the enforcement pyramid strategy was largely envisioned to deal with regulatees of modest or moderate complexity who have some degree of face-to-face interactions with regulators; strategies that make sense for the local restaurant or meat-packing plant may not work for transnational banks.⁴¹ Third, the enforcement pyramid’s emphasis on calibrating sanctions to the penalty assumes that the signal a given penalty is meant to have is in fact the signal received by the regulatee. This is not always the case. For example, a regulator may intend to send a message of leniency by imposing a modest fine, but the regulatee may view the fine in a moralistic rather than utilitarian light and thus perceive it to be extremely draconian.⁴²

Fourth, and most important for present purposes, is the relationship between monitoring strategies and sanctioning strategies.

36. *Id.*

37. *Id.*

38. *Id.*

39. John T. Scholz, *Cooperation, Deterrence and the Ecology of Regulatory Enforcement*, 18 L. & SOC’Y REV. 179, 185–93 (1984).

40. *Id.* at 188.

41. See Cristie Ford, *Prospects for Scalability: Relationships and Uncertainty in Responsive Regulation*, 7 REG. & GOVERNANCE 14 (2013) (discussing the practical limitations of responsive regulation in its original content as the complexity and scale of the industry increases).

42. Julien Etienne, *Ambiguity and Relational Signals in Regulator-Regulatee Relationships*, 7 REG. & GOVERNANCE 30, 41 (2013).

Stated simply, more sanctioning options do not necessarily produce better enforcement.⁴³ In the face of persistent criticism noted above,⁴⁴ the FEC, in 2000, adopted two new programs, the Alternative Dispute Resolution (ADR) program and the Administrative Fines (AF) program, to improve its enforcement capability. Previously, many low-level offenses, such as late reporting violations, were not penalized at all because the FEC did not have the resources to pursue these claims under its standard enforcement procedures. The ADR and AF programs allowed these low-level offenses to be concluded more expeditiously—cases that previously ended in no sanctions now ended with the equivalent of a parking ticket type of fine.

If one accepts the enforcement pyramid thesis, these changes should have helped the FEC to conserve its resources and pursue more serious offenders. In fact, they did not help at all in this regard. The FEC's adoption of these new sanctions for low-level violations created further incentives for third parties to over-report one another (a small hit to the opposing party's campaign war chest is better than none at all), and the resulting volume of non-meritorious claims drained agency resources.⁴⁵ Ultimately, the FEC's effort to more efficiently sanction low-level violators resulted in an increase of reports of trivial infractions that no level of efficiency could overcome.

But it is too simplistic to note the failings of the FEC and conclude that all campaign finance enforcement agencies are doomed to fail. Technologies have changed since 2000, and the various experiences of different states provide useful case studies against which to test prevailing regulatory theories. We now turn to a discussion of Oregon's system of campaign finance enforcement.

B. The Oregon Case Study

Oregon is an outlier in the world of state campaign finance regimes for two reasons. First, unlike most states, which regulate the total amount of contributions that individuals, parties, and PACs may give to candidates (contribution limit regimes), Oregon is one of only four states—along with Missouri, Utah, and Virginia—that relies on a disclosure-only approach (disclosure regimes).⁴⁶ Oregon's

43. See *supra* pp. 76–77.

44. See *supra* notes 10–12 and accompanying text.

45. See *supra* note 19 and accompanying text.

46. *Contribution Limits: An Overview*, NAT'L CONF. OF ST. LEGISLATURE (October 3,

campaigns, PACs, and independent spenders in state elections are not restricted by contribution or expenditure limits; transactions simply must be disclosed to the Oregon Elections Division.⁴⁷ Second, Oregon law greatly restricts the discretion of the Elections Division, which enforces campaign finance law, to impose penalties. Analogous to the federal sentencing guidelines, Oregon law has created a penalty matrix that establishes clear, uniform penalties for similar offenses,⁴⁸ ostensibly making outcomes predictable to potential violators.⁴⁹ Unlike, for example, the Fair Political Practices Commission of California, which as an agency enjoys significant discretion in determining penalties,⁵⁰ the Oregon penalty matrix largely removes such discretion from the Elections Division.

The history of campaign finance reform in Oregon largely represents a paring down of limitations and simplification of enforcement procedures. From 1908 to 1973 Oregon limited both contributions and expenditures,⁵¹ but between 1973 and 1994, a series of laws, ballot measures, and court cases stripped away these limitations. In 1973, Oregon's legislature enacted a reform package geared towards controlling expenditures.⁵² The next year, Warren Deras filed suit against the Secretary of State, challenging the constitutionality of the reforms. In *Deras v. Meyers*, the Oregon Supreme Court found both the legislation's spending limits and independent expenditure restrictions unconstitutional.⁵³ The U.S. Supreme Court echoed the unconstitutionality of spending limits the following year in the landmark decision *Buckley v. Valeo*.⁵⁴

Reformers responded in 1994 with Measure 9, which established contribution limits to both candidates and PACs, limited what PACs could give to candidates, set voluntary spending limits, and banned

2011), <http://www.ncsl.org/legislatureselections/elections/campaign-contribution-limits-overview.aspx>.

47. OR. REV. STAT. § 260.200 (2013).

48. OR. ADMIN. R. 165-13-0010 app. A (2014).

49. Ford, *supra* note 41, at 26; *see generally* Etienne, *supra* note 42 (describing ideal regulator-regulatee relationships that include specific signals and interactions used to minimize ambiguity).

50. Lochner, *supra* note 14, at 341–42.

51. Kappy Eaton, *Campaign Finance Reform in Oregon*, LEAGUE OF WOMEN VOTERS OF OR., Fall 2004, at 1–2, *available at* <http://voteoregon.org/files/pdf/CFR2004.pdf>.

52. *Id.*

53. *Deras v. Meyers*, 535 P.2d 541, 551 (Or. 1975).

54. *Buckley v. Valeo*, 424 U.S. 1, 39–59 (1976).

contributions to candidates from corporate and union treasuries.⁵⁵ These changes resulted in a 72% decrease in general election candidate spending from the year before,⁵⁶ but this victory was short-lived. *Vannatta v. Keisling* overturned Measure 9's contribution limits and ban on corporate and union donations, leaving only the voluntary spending limits intact.⁵⁷ Attempts at reform have continued,⁵⁸ but the Oregon Supreme Court's message has been clear: Spending and contribution limits will not pass constitutional scrutiny.⁵⁹

As the substance of campaign finance law shifted from a contribution limit regime to a disclosure regime, the Elections Division's penalty structure became increasingly deterministic. From 1997 to 2002, penalties for late and amended filings were assessed on a case-by-case basis with only loosely tiered penalty platforms and statutory maximum penalties constraining agency discretion.⁶⁰ From 2002 to 2008, the agency continued to enjoy moderate discretion, and seems to have set penalties largely based on the number of the lawbreaker's previous offenses.⁶¹ Additionally, 2002 also saw the establishment of a new administrative policy—a waiver for penalties of less than \$50, designed to conserve agency resources for dealing with non-trivial campaign finance law violations.⁶² In 2010, a combination of administrative and legislative changes gave the penalty matrix its current structure, in which penalty amounts are based on the size and lateness of unreported transactions and on the tardiness of filed forms.⁶³ Over time, the penalty matrix has been given more structure while penalties have decreased in size.⁶⁴

55. Eaton, *supra* note 51, at 2.

56. *Id.* at 3.

57. *Vannatta v. Keisling*, 931 P.2d 770 (Or. 1997).

58. Kari Chrisholm, *Oregon Supreme Court Considers Arguments in Campaign Finance Reform Case*, BLUEOREGON (Jan. 10, 2012), <http://www.blueoregon.com/2012/01/oregon-supreme-court-hears-campaign-finance-case/>.

59. *Vannatta*, 931 P. 2d at 791.

60. OREGON SECRETARY OF STATE, ELECTIONS DIVISION, CAMPAIGN FINANCE MANUAL (2002) (maintaining discretionary penalty rules consistently with the 1998–2000 editions).

61. OREGON SECRETARY OF STATE, ELECTIONS DIVISION, CAMPAIGN FINANCE MANUAL (2008) (maintaining the same rule as the 2002, 2004, and 2006 editions of the manual).

62. OREGON SECRETARY OF STATE, ELECTIONS DIVISION, CAMPAIGN FINANCE MANUAL 91 (2002).

63. OR. ADMIN. R. 165-13-0010 app. A (2013).

64. For example, the maximum penalties for late and amended transactions changed dramatically in just two years. *Compare* OREGON SECRETARY OF STATE, ELECTIONS

At the same time penalties were becoming more routinized, the Oregon Elections Division moved towards both e-filing and e-disclosure. In 2000, campaigns that raised or spent \$50,000 or more were required to file reports electronically.⁶⁵ This initial foray into e-filing eventually culminated in a modest system of e-disclosure in 2005,⁶⁶ and the creation of ORESTAR, Oregon's online disclosure database, in 2007.⁶⁷ ORESTAR serves two purposes. First, it improved the previous systems of e-filing and e-disclosure. All campaigns must now file electronically, and it has become much easier to review the filings of others campaigns electronically. Second, ORESTAR facilitates agency auditing. ORESTAR is able to identify late and insufficient filings and refer these low-level violations to the state agency. Additionally in 2005, the Elections Division began to require campaigns to provide supporting documentation for a small number of reported transactions (not more than eight).⁶⁸ For example, if the electronically submitted contribution report listed a \$280 donation from Sally, these "spot checks" would require supporting documentation such as a cancelled check in order to prove the accuracy of the contribution report data. ORESTAR helped to routinize these transaction audits by randomly selecting transactions for which documentation would be requested. Not only does this randomization prevent claims of partisan auditing and agency bias, but it also allowed the Elections Division to verify a larger sample of reports. In 2010, the agency began using ORESTAR to select 10% of committees and then to select 1% of those committees' transactions for verification, in addition to a lighter documentation requirement for all other committees.⁶⁹

Given the theoretical and empirical accounts of regulatory enforcement discussed above,⁷⁰ what might we expect to see from

DIVISION, CAMPAIGN FINANCE MANUAL (2008) (featuring a 100% penalty of transaction amount), *with* ELECTIONS DIVISION, OREGON SECRETARY OF STATE, CAMPAIGN FINANCE MANUAL (2010) (featuring a 10% penalty of transaction amount).

65. OREGON SECRETARY OF STATE, ELECTIONS DIVISION, CAMPAIGN FINANCE MANUAL 45 (2000).

66. *Grading State Disclosure 2005: The State Disclosure in Oregon*, CAMPAIGN DISCLOSURE PROJECT (Oct. 26, 2005), <http://campaigndisclosure.org/gradingstate2005/or.html>.

67. H.R. 3458, 69th Gen. Assemb., Reg. Sess. (Or. 2005).

68. 2005 Or. Laws Ch. 809.

69. OREGON SECRETARY OF STATE, ELECTIONS DIVISION, CAMPAIGN FINANCE MANUAL 61 (2010).

70. *See supra* notes 7–12, 31–46 and accompanying text.

Oregon's system of campaign finance enforcement? First, we expect that the implementation of e-filing and e-disclosure will result in increased third-party monitoring. If campaigns are expected to disclose their contributions and expenditures expeditiously via the Internet, and if such information is readily available to political opponents, we expect the costs of third-party monitoring to decrease appreciably and the amount of such monitoring to increase concomitantly. Second, we have mixed expectations about how e-filing and e-disclosure will affect the quality of third-party complaints. By making more information available, it is possible that third-party monitors are less likely to advance non-meritorious claims that lack factual basis. But perhaps more information simply encourages third-parties to become even more pedantic when examining their political opponents' behavior. Third, consistent with the only empirical evidence available on third-party monitoring in the context of campaign finance enforcement (the experience of the FEC), we expect that the increase in third-party monitoring will impede the Oregon Elections Division's ability to pursue more serious offenders. Precisely because the Elections Division will confront more third-party complaints—meritorious or otherwise—agency officials will have comparatively fewer resources to pursue more serious offenders.

In short, we think it very likely that Oregon's move towards e-filing and e-disclosure will exacerbate, rather than ameliorate, the pathologies that campaign finance enforcement agencies now face. A summary of our expectations is provided below in Table 1.

Table 1: Overview of Expectations for Oregon Case Study

Dynamic	Expectation
Frequency of third-party monitoring	Increase
Quality of third-party complaints	Mixed
Agency ability to target serious offenders	Impaired

III. THE EXPERIENCE OF E-FILING AND E-DISCLOSURE IN OREGON

To analyze Oregon's approach to campaign finance enforcement—the first such empirical analysis, to our knowledge—we looked at all campaign finance investigations, meritorious and

otherwise, filed in the state from 1996-2012.⁷¹ Campaign finance enforcement records were collected directly from the Oregon Elections Division. We received information on 9,022 unique cases, including data on who initiated the case, a description of the alleged nature of violation, dates for when the case was opened and closed, and a description of the case's disposition.⁷² We also obtained case files—correspondence between the Elections Division and the alleged offender—to correct for substantial missing data in these records. Table 2 provides an overview of our data.

Table 2: Overview of Oregon Campaign Finance Enforcement Cases

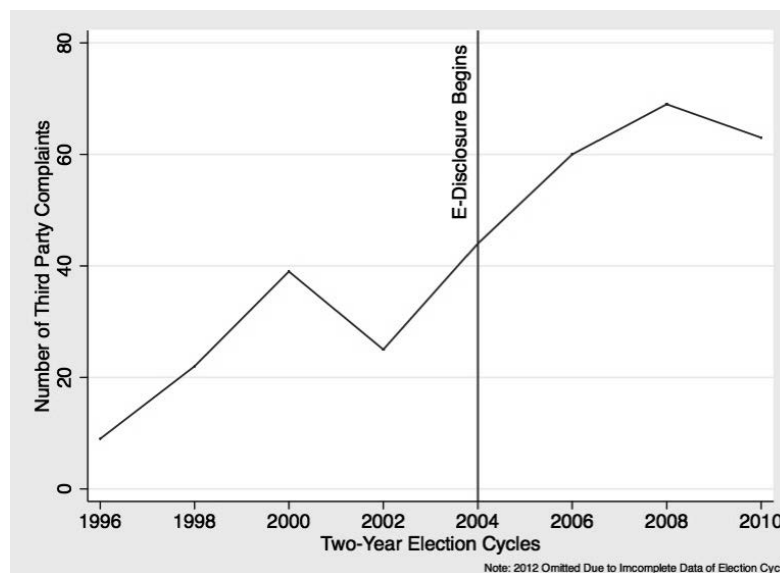
Number of Cases by Complaint Origin	
Oregon Election Division	8,651
Third-Parties	371
Number of Cases by Nature of Violation	
Undetermined	17
Personal Use	24
Contributions in a False Name	17
Failure to File Statement of Organization	141
Failure to File a Timely and/or Accurate Report	9,198
No Illegality Alleged	9
Disclaimer Violations	2
Number of Cases by Disposition	
No Credible Allegation	43
No Violation Found	297
Violation Found but No Penalty Imposed	6,200
Administrative or Civil Penalty	2,412
Criminal Referral	2
Undetermined	40
Not Yet Resolved	28

71. We analyze all data in two-year intervals, corresponding to Oregon's election cycles and the January publication of Oregon's Campaign Finance Regulation Manual in odd-numbered years.

72. See Table 2.

To test our first hypothesis that a shift toward e-filing and e-disclosure would yield an increased frequency of third-party monitoring, we analyzed who initiated every campaign finance enforcement complaint. As predicted, the move towards e-filing and e-disclosure has increased the number of third-party complaints referred to the Oregon Elections Division. A graph of the increase is displayed in Figure 1.

Figure 1: Advancements in E-disclosure Have Led to Increased Third-Party Monitoring



Our prediction is confirmed, for the total number of annual third-party complaints increased from about ten in 1996 to over sixty by 2008. Using 2004 as the marker for the start of e-disclosure, we find that the increase in the number of third-party complaints is significant.⁷³ The sharp discontinuity at this juncture suggests that the increase cannot be explained simply due to the fact that elections have become more expensive over time and there are consequently more discrete events (a greater number of contributions, more groups filing Statements of Organization, etc.) that potentially could violate the

73. Analyzing the complaints in two-year election cycles before and after 2004 (n=9), we found a statistically significant difference (t= -3.6, p=0.01).

law.⁷⁴

It is important to differentiate between the questions of *what percentage of all transactions result in third-party complaints* and the present question of *how many third-party complaints will the Elections Division be required to analyze in a given year?* The latter question is more important for purposes of enforcement efficacy, because its answer affects how finite agency resources will be allocated. Insofar as the Elections Division has had fairly constant resources over the period of our study,⁷⁵ the creation of e-filing and e-disclosure has required the agency to spend more of its resources devoted to investigating this rising number of third-party complaints.

Whether this outcome is desirable depends, of course, on the merits of the complaints themselves. We turn now to our second hypothesis on the quality of third-party complaints. As previously noted, regulatory theorists are concerned about the potential of third-party monitoring to skew agency agendas towards the investigation of trivial complaints.⁷⁶ In the context of campaign finance regulation theorists are especially concerned that third-party monitoring may be used strategically by political opponents either to swamp an agency's investigative resources or to unfairly target competing candidates with non-meritorious allegations of wrongdoing.⁷⁷ To test this concern, we analyzed all third-party complaints with known dispositions.

We are interested in whether there was an increase in frivolous complaints due to third-party monitoring. We define a frivolous complaint as any complaint wherein the Elections Division finds no credible allegation of violation or no evidence of violation. Complaints with no credible allegation of violation include those where the alleged behavior simply was not a crime, or because the complainant did not follow the applicable administrative rules. Forty-three third-party cases fall into this category, all of which were the result of third-party monitoring. Complaints with no evidence of violation include all cases where the Elections Division could not find

74. See, e.g., Jeff Mapes, *Oregon House candidates spend at record pace; total legislative campaign spending reaches nearly \$23 million*, OREGONIAN, Nov. 17, 2012, http://www.oregonlive.com/mapes/index.ssf/2012/11/oregon_legislative_races.html.

75. From 1997 to 2011, the Elections Division has had between fifteen and seventeen fulltime equivalent employees and has received between ~\$4 million and ~\$6.5 million in state funds. See OR. LEGISLATIVE FISCAL OFFICE, ANALYSIS OF THE LEGISLATIVELY ADOPTED BUDGET (2011).

76. See Lochner, *supra* note 30.

77. See Lochner, Apollonio, & Tatum, *supra* note 8, at 230.

sufficient evidence of guilt or because evidence was uncovered that proved the complaint non-meritorious.

The results of our analysis are offered in Table 3. Put simply, e-filing and e-disclosure did not significantly affect the probability that a third-party complaint lacked merit—over half of these complaints were frivolous prior to these changes in policy, and roughly half of these complaints are still frivolous today. In the context of campaign finance regulation, third-party monitors have less-than-spectacular track records. Table 3 shows some variation in frivolous claims from year to year, but these are not statistically significant trends either before or after the development of e-disclosure in 2004.

Table 3: The Development of E-disclosure has Not Increased Thrid-Party Frivolous Complaints

Election Cycle	Frivolous Complaints
1996	6 (67%)
1998	11 (50%)
2000	25 (64%)
2002	17 (68%)
2004	20 (45%)
2006	42 (70%)
2008	31 (45%)
2010	34 (54%)
2012	26 (48%)

We were somewhat surprised by this result, as we thought third-party monitoring might be improved by the disclosure of information. E-disclosure should make complaints a more straightforward process, with less guesswork required by outside groups and individuals. Either a political opponent filed on time, or she did not; either the numbers on her contribution forms properly sum, or they do not. There are fewer reasons to make non-meritorious claims when the evidence to refute or support the claim is so easily accessible online. Why, then, did the switch towards e-filing and e-disclosure not meaningfully improve the quality of third-party complaints?

Our qualitative review of roughly 170 such claims suggests a possible answer. The cost of filing a complaint is slight, so third-parties continue to make speculative allegations even when better information is available. Consequently, the Elections Division may

close the case without penalty either because the alleged action did not occur, or because the action did occur, but was not, in fact, illegal. For example, after the implementation of ORESTAR, third-party monitors made an increasing number of non-meritorious “Statement of Organization” violations claims—third-parties simply made incorrect allegations that a given individual or group was legally required to file such paperwork. Regardless of how transparent the system becomes, third-parties will continue to bring claims of questionable merit so long as doing so is relatively costless. If you throw enough allegations out, maybe something will stick. Implementation of e-filing and e-disclosure did not materially affect the costs to third-parties for bringing meritless complaints, so such behavior continues.

Perhaps this analysis is unfair to third-party monitoring. Although most of the cases brought by third-parties may be frivolous, it is possible that those that are meritorious involve exceedingly grievous offenses. Whistleblowers could report fraudulent schemes internal to the campaigns that otherwise never would have been unearthed. Additionally, some third-party monitors, such as political parties, may be highly sophisticated and knowledgeable groups that have the resources to investigate claims of wrongdoing and the reputational incentives not to “cry wolf.”⁷⁸

Such instances are rare in our dataset. To code for offense severity, we used amount of penalty as a proxy, a useful way for measuring severity when the regulatory agency in question has a set penalty amount for most violations. We then examined all cases in our dataset between 1996 and 2012 in which the assessed penalty was over \$1,000. The results are offered in Table 4. To their credit, third-party monitors were responsible for all five cases prior to 2004 in which the assessed penalty was over \$1,000. From 2004 onwards, as e-filing and e-disclosure were implemented, third-party monitors were responsible for initiating ten such cases. Although this is an increase in raw numbers, the ability of third-parties to bring serious cases did not improve as a proportion of all third-party complaints; although they brought a larger number of serious cases, it was a function of them bringing a larger number of cases more generally.

78. See Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC’Y REV. 95, 110 (1974) (discussing the incentives facing parties who frequently litigate claims). See generally Scholz, *supra* note 39 and accompanying text.

Table 4: The Development of E-disclosure has Minimal Effects on Third-Party Complaints Resulting in Penalties Over \$1,000

Election Cycle	Cases Ending In Penalties over \$1000
1996	1 (11%)
1998	0 (0%)
2000	3 (8%)
2002	1 (4%)
2004	5 (11%)
2006	2 (3%)
2008	2 (3%)
2010	1 (2%)
2012	0 (0%)

When we measure the seriousness of a case by nature of allegation, rather than by assessed penalty, a slightly different picture emerges. Using independent coders to determine the nature of allegation, we considered “personal use of campaign funds” and “contributions in a false name” as the two most egregious allegations. The former is the unique offense for which a candidate is personally responsible to pay a civil penalty, while the latter offense may result in prosecution by the Attorney General.⁷⁹

Third-parties made every single allegation of contributions in a false name over our time series, but only two of seventeen allegations resulted in penalty. While this constitutes a low percentage of meritorious allegations, the Elections Division failed to identify any of these serious violations. Third-parties also made the vast majority of personal use allegations. But unlike allegations of contributions in a false name, the Elections Division also made some allegations of personal use, allowing us to compare not only how many claims were made by each group, but also the reliability of such claims. Of twenty personal use allegations brought by third-parties, six resulted in penalties, whereas only one of the agency’s four allegations resulted in penalty. Third-parties, then, not only alleged more of these serious

79. OR. REV. STAT. § 260.993 (2009).

offenses, but they made more reliable allegations. Neither of these offenses should be obvious from filed forms, so it would be a stretch to attribute these trends to either e-filing or e-disclosure. That said, third-party allegations of these two serious offenses occurred predominantly after 2004 (ten were made prior to 2004, while twenty-seven were made after). This suggests that e-filing and e-disclosure accomplished their goals of turning opposition campaigns, candidates, and PACs into watchdogs for violations of varying severity.

In summary, the effect of e-filing and e-disclosure on the quality of third-party complaints is mixed. These technological advances did not improve the aggregate quality of third-party complaints. Both before and after the changes, a majority of allegations were meritless. In rare instances, however, third-parties did a better job than the Elections Division of uncovering serious legal violations such as personal use of campaign funds and contributions in the name of another—and these instances became somewhat less rare after the 2004 move to e-filing and e-disclosure.

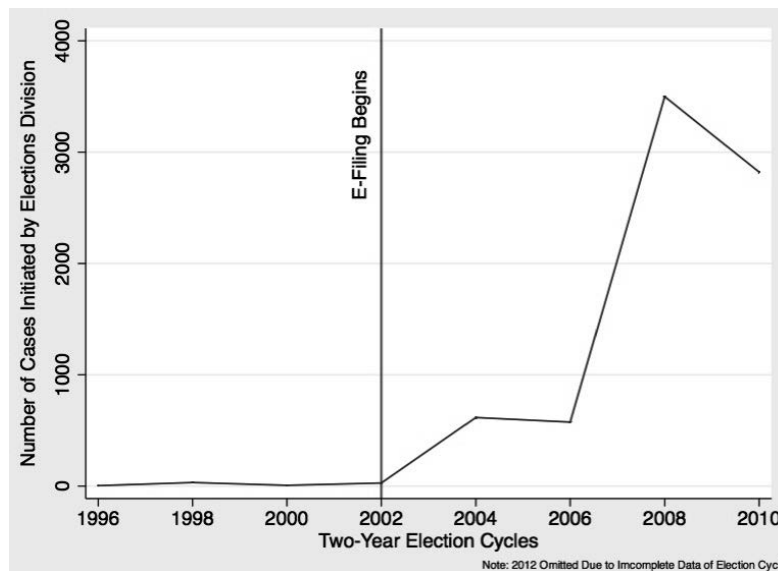
But how did these technological changes affect the ability of the Elections Division itself to enforce campaign finance law? Recall that previous literature on regulatory theory in general, and the experience of the FEC in particular, lead us to our third hypothesis: the increase in third-party monitoring caused by e-filing and e-disclosure would tax agency resources and impede the Election Division's ability to pursue the most serious offenders. However, it is important to remember that the increase in third-party complaints did not occur in a vacuum. As previously noted, electronic disclosure was coupled with e-auditing and other technological advancements courtesy of the ORESTAR system.⁸⁰ These new *technological* resources may very well enable the division to handle increased workload more efficiently.

The most obvious effect of the move to e-filing and e-disclosure on the Oregon Elections Division is the literally exponential increase in the number of cases initiated by the agency as displayed in Figure 2. Prior to the implementation of e-filing in 2002, the Elections Division initiated between four and thirty-two cases per election cycle. The effects of e-filing are delayed by two years (presumably as regulatees and regulators adapted to the new filing method), but by the 2004 cycle the number of cases initiated by the Elections Division increased to 614. When ORESTAR came online by 2008, the number

80. See *supra* note 67 and accompanying text.

of agency-initiated cases skyrocketed to 3,500. There was a decrease in the 2010 election cycle to just over 2,800 cases—perhaps there were fewer violations as contributors and campaigns became more familiar with the ORESTAR system and hence made fewer mistakes—but this number still dwarfs all pre-ORESTAR election cycles.

Figure 2 Advancements in E-filing Have Led to Increased Elections Division Monitoring



In particular, ORESTAR appears to have accomplished its objective of effectively detecting instances of late and inaccurate filing by regulatees. Many of the violations detected by ORESTAR are assuredly low-level or unintentional. Just over 75% of them resulted in a disposition of “violation found but no penalty imposed,” suggesting that the offender mitigated the harm by promptly filing an accurate report and that the overall penalty would have been less than \$50.⁸¹ The fact that infractions discovered by ORESTAR do not usually result in heavy fines is consistent with a properly-functioning regulatory regime. Recall that the lowest level of the enforcement pyramid, and the one most frequently employed by regulators, is

81. OREGON SECRETARY OF STATE, ELECTIONS DIVISION, CAMPAIGN FINANCE MANUAL 67 (2012).

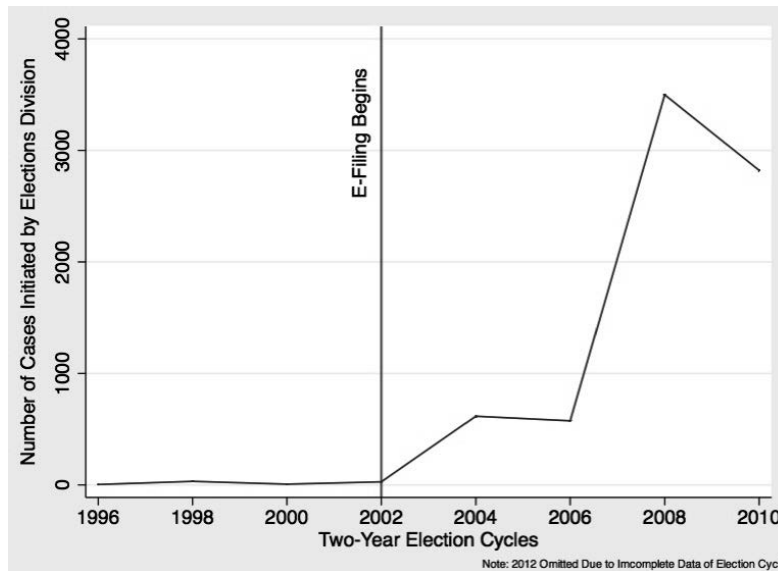
educating regulatees of their legal obligations by the use of warning letters.⁸² Finally, ORESTAR did not seem to face a significant “false positive” problem, as only 1.5% of ORESTAR-initiated claims resulted in a disposition of “no violation found.”

In addition to an increased number of agency-initiated complaints, the implementation of ORESTAR also led to a substantial shift in the timing of Oregon Elections Division-initiated cases. Prior to 2004, the bulk of Oregon Elections Division initiated cases occurred after the election. The largest frequency of cases occurred in June and December of even numbered years, consistently a month after the May primary and November general election. In the middle of our time series we see significant inconsistencies in when cases were opened. For some two-year intervals we see a greater number of cases opened in off-election years. Correspondence with the Oregon Elections Division revealed that this is due to the establishment of ORESTAR: the influx of cases initially led to a backlog, enabled by the fact that the Elections Division has two years to start the penalty process. By 2011, the Elections Division caught up and has since issued penalty notices as soon as they are processed, which is about a five month lag. Consequently, by 2012 the timing of SOS-initiated cases more closely resembles the timing of cases initiated by third-parties, where the bulk of cases directly precedes the general election. This increase in efficiency is also largely attributable to the technological advancements that allow the agency to review pre-election filings automatically in real-time.

We also see a sharp increase in the Oregon Election Division’s ability to enforce serious cases, once again defined as those resulting in assessed penalties over \$1,000.

82. AYRES & BRAITHWAITE, *supra* note 7, at 35–39; *see supra* text accompanying note 34.

Figure 3: Advancements in E-filing Coincide with the Imposition of More Serious Penalties by the Elections Division



The Elections Division went from 0 cases on record prior to 2004, to 135 afterwards. The implementation of e-filing and e-disclosure did not undermine the ability of the Elections Division to pursue more serious offenders, and in fact seems to have enhanced agency efficacy. This very unexpected outcome merits emphasis, particularly given the FEC's opposite experience.⁸³ E-filing and ORESTAR resulted in an explosion of claims brought by the Elections Division. When the FEC expanded its ability to deal with more trivial or straightforward legal violations, such as late filing offenses, this change did not enhance the ability of the agency to simultaneously pursue more serious offenders.⁸⁴ In essence, the FEC was spending so many of its resources responding to low-level claims that it could not adequately investigate more serious violations. In Oregon's case, however, the opposite occurred. The advent of e-filing and ORESTAR correspond to a significant increase in agency-initiated cases that resulted in a large fine. Nor are these larger fines merely a byproduct of changes to the penalty matrix itself—recall that

83. See *supra* notes 19, 45 and accompanying text.

84. AYRES & BRAITHWAITE, *supra* note 7, at 35–39.

over time, fines under the penalty matrix were made smaller, not larger.⁸⁵

Although we cannot prove this quantitatively, we suggest that the ability of Oregon's Elections Division to pursue both more low-level cases and more serious offenses simultaneously is due to two factors. First, the ability of the agency to dismiss infractions where the total fine is less than \$50 prevents the agency from being bogged down in trivial matters. True, agency officials will have spent time conducting the initial investigation, but they will not have to devote additional resources to demanding and ensuring that the offenders pay a bill of \$12. Oregon's approach potentially solves both the problem that critics have leveled against the FEC—that its sanctions of low-level offenders undermine agency efficacy⁸⁶ and possibly chill the exercise of First Amendment rights.⁸⁷

Second, the ability of the agency to gather information via ORESTAR and then conduct a spot-check of a randomized number of transactions provides an excellent mechanism for revealing the fraudulent activity associated with more serious offenses. E-filing, as presently practiced, is not *by itself* a good way of detecting truly fraudulent activity. In the absence of the agency's ability to examine the documents that underlie the numbers reported on the e-filing—bank records, copies of checks, etc.—there is no way to verify that the reported numbers are true. Similarly, the ability to conduct a field audit is far less effective without a system of mandatory e-filing, because it may require too many agency resources to construct the universe of transactions in which the fraudulent activity ultimately may be found. Together, however, e-filing and e-disclosure create an easily accessible universe in which randomized spot-checks may discover serious legal wrongdoing.

IV. DISCUSSION

Oregon's experiences with e-filing and e-disclosure have been positive overall. While trivial violations still make up the majority of third-party complaints, Oregon's law enforcement agency has shown that it is capable of handling the exponential increase of cases that resulted from the introduction of e-filing in 2004 and ORESTAR in

85. See *supra* note 64.

86. See *supra* notes 19, 45, 82 and accompanying text.

87. See Smith & Hoersting, *supra* note 9 and accompanying text.

2008. These technological changes, coupled with policies to ensure randomized audits and prompt resolution of trivial matters, allowed the Elections Division to handle this explosion of low-level offenses without sacrificing its ability to deal with more serious violators. But the effects of technological change do not occur in a vacuum, and Oregon's regulatory environment is quite different from that found in most other states. In particular, Oregon's campaign finance regime limits agency discretion at two crucial points in the enforcement process: First, in determining what constitutes a violation, and second, in determining the punishment for a given violation. Absent such limits on agency discretion, we speculate that the move to e-filing, and e-disclosure in particular, may not produce an outcome as desirable as Oregon's.

Consider agency discretion in determining what constitutes a violation. As one of only four disclosure-only state regimes, Oregon's laws allow for the examination of e-filing and e-disclosure in a comparatively simplistic regulatory context. Violations tend to be straightforward—they occur because parties file late or parties file inaccurately. But in a world of contribution limits, the laws that agencies are expected to enforce become much more complex. Presuming that contribution limits create incentives to run issue ads, when is the magic words test met?⁸⁸ Presuming that contribution limits create incentives to make independent expenditures, when does a contribution become coordinated?⁸⁹ How must corporations structure their contributions,⁹⁰ and how does the nature of the corporation affect the answer to that question?⁹¹

We take no normative position as to whether disclosure-only regimes are more or less desirable than contribution regimes. Rather,

88. See *Fed. Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) (holding that an independent-expenditure only applies when express advocacy of the election or defeat of a candidate for federal office is present using such words as “vote for” or “reject”).

89. See *Col. Republican Fed. Campaign Comm. v. Fed. Election Comm'n*, 518 U.S. 604 (1996) (holding that a campaign contribution given without any particular understanding with a specific candidate was not a coordinated contribution); see also *Fed. Election Comm'n v. Col. Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001).

90. See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) (stating that a corporation must create a PAC to use a separate segregated fund for political purposes).

91. See *Fed. Election Comm'n v. Mass. Citizens for Life*, 479 U.S. 238 (1986) (stating that a political corporation can use general funds if it is formed for the purpose of disseminating political ideas, it has no shareholders or other persons with a claim for its earnings, and it was not established as a business or labor union).

we make the somewhat obvious and uncontroversial observation that insofar as contribution regimes sweep more types of behavior into their purview, their agencies will have to deal with the very types of questions that the Supreme Court has grappled with continuously for the past three decades. Precisely because the answers to these questions are often ambiguous, and frequently contested, what the “law is” will be more indeterminate compared to disclosure-only regimes. This matters, for regulatory enforcement, for two reasons: First, there are simply more types of behavior for third-parties to complain about, and second, less sophisticated third-parties will be more likely to misunderstand these laws, leading to an increase in meritless claims. The development of e-filing and e-disclosure in Oregon resulted in an increase in third-party complaints, and we expect that a similar dynamic would occur, albeit at a much more exacerbated rate, in contribution regimes as well. Since many types of violations in contribution regimes are more ambiguous, and involve more discovery to substantiate, it will be more difficult for an agency enforcing contribution limits to efficiently process these complaints.⁹²

Furthermore, consider agency discretion in deciding how to set penalties. Oregon’s penalty matrices, as well as the Elections Division’s policy of waiving penalties of \$50 or less, constrains agency discretion and thereby streamlines the enforcement process. The agency generally must only determine guilt or innocence, as penalties are pre-assigned by the penalty matrix in the majority of cases. An agency with no such guidelines, however, must determine both guilt and an appropriate penalty. Three problems likely would result, the first being resource drain. Setting discretionary penalties may be practical in a world of several hundred cases a year, but in the world of e-filing and e-disclosure systems such as ORESTAR, which generate over a thousand allegations annually, this becomes a significant challenge to agency officials. Indeed, this is precisely why the FEC created its AF and ADR programs (with mixed results).⁹³

Second, allowing agencies discretion in setting penalties may itself increase the number of third-party complaints. Because of

92. For example, consider coordinated expenditures. Whether a political action committee has coordinated with a candidate usually cannot be determined merely by examining campaign reports. The agency must find out who in the campaign consulted with whom in the PAC, what was discussed, and whether that discussion met the standards for coordination.

93. *Lochner*, Apollonio, & Tatum, *supra* note 8, at 217.

potentially unclear standards and unpredictable outcomes, third-parties might make more allegations in the hope that large penalties will be assessed. One could argue that an agency vested with discretion would, in the face of a massive influx of cases, form an unofficial penalty matrix over time. Although this strategy would mitigate some effects of e-filing, it would be a matrix established by the agency without legislative consult or public knowledge, and its opaque nature may still incentivize overzealous third-party monitors. While an unofficial matrix would exist, it would only be followed at the discretion of the agents. With an uncodified set of rules, defendants could not confirm if they were equitably penalized.

This leads to the third problem of vesting agencies that enforce campaign finance regulations with the discretion to set penalty amounts—the possibility of perceived inequality. This point is independent of e-filing and e-disclosure, except insofar as those technological advances facilitate agency oversight, giving the agency a larger footprint in the regulated community. Claims of unequal treatment no doubt abound in most regulatory environments. But in the largely two-party, zero-sum environment of American politics, enforcement of campaign finance regulations invites accusations that agencies are targeting members of the opposing political party or showing undue leniency to members of their own.⁹⁴ Regardless of whether such accusations are true, they can delegitimize the agency, making it more difficult for agency officials to conduct their business as regulatees adopt a more arms-length approach to negotiation and mediation.

To be sure, there has been no shortage of criticism with the statutory guideline approach to criminal sentencing⁹⁵ (though by the

94. See, e.g., Franz *supra* note 21, at 179 (noting that “both incumbents and national party committees fare far better as respondents than challengers, state parties, corporations, or individuals.”); Symposium on *The Federal Election Commission*, 10 J.L. & POL. 235 (1994) (noting that the FEC is fundamentally a conflict of interest); Op-Ed., *When Election Regulators Are Mocked*, N.Y. TIMES, Apr. 13, 2013, http://www.nytimes.com/2013/04/14/opinion/sunday/the-federal-election-commission-is-mocked.html?_r=0 (“But this is the F.E.C, one of the sorrier federal agencies, where standoffs engineers by the three Republican commissioners on the six-seat panel have stymied efforts to write regulations and enforce them.”).

95. See generally KATE STITH & JOSE A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 5 (1998) (regarding to the introduction of federal sentencing guidelines, noting that “The rules themselves, which generally ignore individual characteristics of defendants, often seem to sacrifice comprehensibility and common sense on the altar of pseudo-scientific uniformity.”); Frank O. Bowman III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV 1328 (2001) (analyzing the

same token, there has also been legitimate concern with the unfettered exercise of prosecutorial discretion).⁹⁶ One may reasonably disagree as to where the penalty cut-off should be, bearing in mind that the empirical research on regulatory enforcement suggests that educating regulatees as to their legal responsibilities is often the best way to promote compliance for low-level violators.⁹⁷ We nonetheless recommend that enforcement regimes that employ e-filing and e-disclosure also consider a penalty matrix approach for the more common types of violations such as failure to file or late filing. Oregon's experience shows that these types of infractions also constitute the majority of third-party complaints, and research on federal campaign finance law suggests that failure to file or late filing also compose a significant portion of violations within contribution limit regimes.⁹⁸ We also recommend that other states adopt some form of the low-level penalty waiver found in Oregon, particularly if the move to e-filing and e-disclosure results in the expected increase in third-party complaints.

We readily admit, however, that our recommendations are based in part on speculation. Researchers interested in the effects of e-filing and e-disclosure on state campaign finance enforcement should examine two related questions. First, are the results in Oregon replicated in the other three disclosure-only states, or is Oregon's success due to other factors unique to the state? Second, are our concerns about the effects of e-filing and e-disclosure in contribution regimes substantiated by the data? Until then, we content ourselves with the fact that the transition to e-filing and e-disclosure in Oregon appears to be successful. The Elections Division has proved capable of dealing with a large influx of matters, many of them non-meritorious third-party complaints, in a fashion that is both equitable and expedient, while at the same time pursuing a greater number of more serious violators. In a regulatory world used to bad news, that's a pleasant surprise.

structural flaws of the federal sentencing guideline system).

96. See, e.g., William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001) (analyzing the political economy of prosecutorial behavior); see also KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (1969) (discussing the ethical and normative difficulties of unconstrained prosecutorial discretion in the United States).

97. See *supra* note 38 and accompanying text.

98. See *Lochner & Cain, supra* note 12, at 639.