

**STRONGER
PARTIES,
STRONGER
DEMOCRACY:
RETHINKING
REFORM**

By Ian Vandewalker & Daniel I. Weiner

**BRENNAN CENTER
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at New York University School of Law

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STRONGER PARTIES, STRONGER DEMOCRACY: RETHINKING REFORM

Introduction

Political parties are a core ingredient of representative democracy.¹ A robust debate has recently developed, however, concerning whether organized parties can still provide the sorts of democratic benefits they traditionally supplied to our political system and, if not, what to do about it. This paper examines these questions from the perspective of campaign finance law. We ask whether there are changes that can be made to the rules governing party fundraising and spending that will enhance parties' democratic strengths without expanding the risks associated with unfettered money in politics.

Over the last century, parties have been changed, and some would say undermined, by significant legal and societal forces. These include the expansion of party nominating primaries, institutional shifts in Congress and state legislatures, and the emergence of television advertising as the key medium for political persuasion.² Today, elections are far more focused on individual candidates than on the parties. And in recent years, even the parties' important supporting role has been increasingly eclipsed, as financial resources have flowed outside formal party institutions to new, purportedly independent entities like super PACs.

Campaign finance law, many argue, has played an important role in these changes. In particular, the balance of power is said to have shifted more quickly away from parties in the last decade thanks to both the heightened fundraising restrictions in the Bipartisan Campaign Reform Act of 2002 (BCRA),³ also known as the McCain-Feingold law, and the Supreme Court's elimination of restrictions on purportedly independent non-party groups, most notably in *Citizens United v. FEC*.⁴ The resulting accelerated waning of organized parties is blamed for a host of problems, ranging from greater polarization and gridlock, to instability caused by the weakness of party leaders, to vanishing transparency in political spending, to declining participation by ordinary voters. One often-proposed solution is to allow parties to accept bigger checks: to deregulate party fundraising by repealing or significantly altering not only much of BCRA, but also the older framework of federal contribution limits and restrictions in place since passage of the original Federal Election Campaign Act (FECA) in 1974.⁵

Others dispute that the parties have been significantly weakened.⁶ They note that party committee fundraising has been relatively steady since BCRA, and contend that party leaders in Congress exert a historically high amount of control over their caucuses. This camp sees polarization and gridlock as the products of broader political forces, such as Americans' residential sorting by political views, to say nothing of strategic choices by party leaders. They question whether changes to campaign finance regulation can fix these problems, and are especially skeptical of many calls for deregulation.

This is an important debate, but it tends to obscure two threshold questions: *First*, what is a party? When practitioners in the field speak of parties, they are usually referring to the institutions

run by the traditional party establishments — e.g., the Democratic and Republican National Committees and the two major parties’ respective congressional committees, as well as the many state and local party committees. But a growing number of scholars argue for a broader conception of the parties as diffuse networks connected to a common brand, encompassing both established party organizations and a variety of other individuals and entities affiliated with them, including ostensibly independent but party-aligned super PACs and 501(c) nonprofit groups. Clarity on this point is important, because the broader one’s conception of the parties, the less it makes sense to think of them as competing with other political actors so much as themselves encompassing an array of competing interests. Since the various factions within parties differ in their democratic character — some include party activists and organizers while others are controlled by elite donors — the result of this intraparty competition has potentially significant effects on the parties’ contribution to the health of the republic.

Second, what is the ultimate goal of efforts to “strengthen” parties? For example, many argue that strengthening traditional party leaders will promote the stability and compromise necessary for divided government to function. Others advance different goals, like empowering the so-called party faithful (i.e. the party’s rank-and-file activists and volunteers) to make wider party networks more accountable to ordinary voters. While there is significant tension between such objectives, a common thread running through the arguments of many party-boosters is the need for parties to raise more money. Yet, as a consequence of the Supreme Court’s *McCutcheon v. FEC* ruling and the recent roll-back of national party contribution limits by Congress,⁸ party committees can already accept vastly larger contributions than they could just a few years ago. Such changes may have strengthened the parties in some sense, but they have not necessarily enhanced the attributes that make organized parties attractive as political actors.

Hanging over all such discussions, moreover, are familiar concerns about corruption and political misalignment. It has long been understood that large contributions to parties, like those to candidates, pose an inherent risk of *quid pro quo* corruption and its appearance. There are many examples in American history of corruption scandals in which the *quid* took the form of contributions to a political party. The more money a small class of wealthy donors can give to the parties, the greater the danger that the parties, dependent on those contributions, will sell policy outcomes in exchange. In addition, there is a growing body of evidence to suggest that the views of the donor class (which has always been small and unrepresentative of the public at large) have an outsized impact on policy decisions, creating misalignment between public opinion and policy outcomes. Too often, middle and working class voters already find themselves shut out of the policymaking process. Sweeping deregulation of party fundraising risks exacerbating such problems.

All of these concerns — especially the perennial threat of corruption — have driven decades of campaign finance regulation directed at the parties. One need not advocate wholesale abandonment of this traditional regulatory paradigm, however, to realize that the current system is not enough, especially in an era dominated by an activist Supreme Court majority hostile to many of its central components.

Ultimately, legitimate concerns about corruption and misalignment resulting from party fundraising must be balanced against the reality that party institutions *do* play a salutary role

in our democracy, one that risks being eclipsed in the new era of unlimited fundraising by both party-affiliated and truly independent outside groups. Not only do the parties offer a number of avenues for political engagement by their core supporters, they also continue to drive voter registration and turn-out efforts on a scale that few other political actors can replicate. As presently constituted, moreover, organized parties plainly are more transparent than the shadow parties and other outside groups competing with them for resources.

Whether the wholesale lifting of party contribution limits would enhance these positive attributes is an open question but, in any event, there are other ways to strengthen traditional party organizations that do not raise comparable corruption and misalignment concerns. We advocate for targeted reforms to *build up the institutional parties as meaningfully transparent organizations that function as engines of broad participation in politics*. This approach eschews complete deregulation of party fundraising, instead embracing other, more targeted measures to strengthen organized parties, including:

- Making public financing available to parties;
- Raising or eliminating coordinated spending limits and other limits on party contributions to candidates;
- Lessening federal regulation of state and local parties;
- Relaxing certain disclosure requirements whose burdens outweigh their benefits while strengthening others; and
- Relaxing certain restrictions on contributions to parties.

A thoughtful policy agenda combining one or more of these measures stands the best chance of producing a more inclusive, fair and transparent democracy. This is not intended as a single package of reforms, but rather as a set of discrete suggestions, and some combinations may not be desirable.⁹

This paper is in no way intended to be the final word on party financing reform, to say nothing of the larger challenges parties face. However, our hope is that it will provide a framework to guide the discussion of policies that will make the parties better at what they do best: facilitating ordinary citizens' engagement with the political process.

How Parties Benefit Our Democracy

Parties have long been considered an essential element of our democracy, offering ordinary citizens various avenues to participate in politics,¹⁰ providing informative cues to voters,¹¹ furnishing a majoritarian counterbalance to narrow special interest groups,¹² and acting as a moderating force responsive to public opinion in their pursuit of broad governing coalitions.¹³ The recent explosion in outside spending since *Citizens United* has also fostered a growing body of literature warning of the parties' decline relative to other political actors like super PACs and nonprofit 501(c) entities, and predicting a variety of negative consequences for our politics and government.¹⁴

To be sure, this positive narrative about the parties' role in our democracy is at least partly contested, notably with respect to the supposed link between weak parties and political polarization and gridlock.

Some commentators argue that stronger parties could continue to play a depolarizing role, through at least two mechanisms. First, parties with sufficient financial resources push their candidates to the center, by spending selectively on the campaigns of those candidates who toe the party line, which is by necessity moderate, since parties want to appeal to a broad range of voters.¹⁵ Second, in their quest to win elections and legislative majorities, parties support already-moderate candidates (especially those in competitive races) no matter what their actual positions.¹⁶ This gives candidates the freedom to compromise, knowing they will be protected by party money against attacks from ideological purists.¹⁷ The decline of the major parties, it is argued, has inhibited their ability to enable compromise and moderation in both of these ways.

But others counter that, at least recently, the parties themselves have helped to drive polarization, largely because their members and strongest supporters are more ideologically homogenous than they once were.¹⁸ For example, rather than blaming outside groups, several scholars have attributed recent gridlock in the federal government to strategic decisions by Republican leaders to engage in “constitutional hardball” in opposition to Democrats, in the hopes of political payoff in future elections.¹⁹ Others have argued that it is actually the Democratic Party establishment under President Obama that has most contributed to polarization by moving to the left.²⁰

This debate about the parties' effect on polarization is important, but it can sometimes obscure the other reasons we might prefer traditional party institutions to super PACs, nonprofit organizations, and other outside groups.

First, parties are relatively transparent.²¹ Federal law requires party committees to disclose the identities of all donors of more than \$200 and other financial information;²² many states have analogous rules.²³ And bans on contributions from corporations and unions ensure that most party money is traceable to an actual human being.²⁴ In contrast, just at the federal level, almost one-third of outside spending since *Citizens United* has come from “dark money” groups that do not disclose any of their contributors.²⁵

Second, parties are accountable. As repeat players who are run by elected officials and depend on a kind of brand loyalty among members of the public, the major parties are naturally concerned about their long-term reputations and credibility. Too often, outside groups, on the other hand, can pop up, spend millions without disclosing their donors, and disappear — often after trafficking in the sort of negative attacks that a candidate or party might deem too risky.²⁶

Third, parties continue to derive their funding from a broad donor base.²⁷ Outside groups, in contrast, are increasingly funded by a tiny coterie of mega-donors. Almost 60 percent of all super PAC spending since 2010, for instance, can be traced to just 195 individual donors and their spouses.²⁸

Finally, traditional party institutions remain to at least some degree grassroots-driven. Unlike mega-donor-driven super PACs and other outside groups, established party organizations offer ordinary citizens multiple avenues to engage with the political process, including through donating, volunteering, and attending events.²⁹ These same institutions, moreover, have longstanding expertise in registering voters and mobilizing them on election-day.³⁰ While outside groups are starting to develop their own voter registration and turnout operations,³¹ their ability to fully replicate this historic function of the parties remains in doubt.

In short, organized parties, while far from perfect, are still comparatively transparent, accountable and democratic institutions. And so the prospect of their decline should be a source for concern even for those who broadly favor regulating them.

The Parties in Decline?

But are the parties actually growing weaker? The narrative of political party decline as outside groups' spending mushrooms has become conventional wisdom among many scholars and practitioners. This trend is usually attributed to the one-two punch of: 1) BCRA, which placed stricter limits on party fundraising starting in 2003; and 2) the Supreme Court's deregulation of outside groups, culminating in 2010 when *Citizens United* paved the way for the creation of super PACs and other groups that can raise and spend unlimited funds on elections.³² These developments created a system in which party committee fundraising remains subject to contribution limits, while outside group fundraising is not. With their fundraising so handicapped, it is argued, the parties are too weak to provide the democratic benefits discussed above, which outside groups are ill-equipped to replicate.

At the outset, however, it bears remembering that the shift in power away from parties has far deeper roots than the events of the last two decades. Throughout the twentieth century, American elections became progressively more candidate-centered for a host of reasons. The adoption of primary elections gave party elites less control over nominees, and advances in communication technology allowed candidates to reach voters through advertising (especially on television) without needing armies of party operatives to go door to door.³³ In addition, there were power shifts in Congress and many state legislatures, and party loyalty became a less important source of clout than the development of an officeholder's own distinctive political brand.³⁴ By the end of the last century, in short, candidates were already the clear stars of the political scene, with parties taking on a supporting, albeit still important, role.

The question now is not whether parties can be restored to primacy; rather, it is whether changes to campaign finance law in the last decade will topple the party committees entirely from their place as the main vehicle for election spending other than candidates.

That BCRA has had some impact in this regard is relatively clear. While the national parties have been subject to contribution limits since the 1970s, for many years they had the capacity to raise "soft money" — funds outside the limits and prohibitions of the FECA — to use for certain purposes, including generic advertising, voter registration and "get out the vote" (GOTV) activities.³⁵ BCRA banned the use of soft money. To prevent circumvention of that ban, moreover, the law also instituted restrictions on state and local party fundraising for activities connected to federal elections (such as voter registration and GOTV) that also impact state and local races.³⁶

Although the parties were able to replace soft money with revenue raised under contribution limits, BCRA halted the dramatic upward trend in party fundraising that had been taking place under the soft money system.³⁷ As a result, according to election lawyers Neil Reiff and Don McGahn, party revenue has not been able to keep up with the cost of campaigns, leaving the parties at a competitive disadvantage.³⁸ Reiff and McGahn note that the toll on state and local party organizations — especially smaller ones — has been particularly severe.

To be sure, the current fundraising advantage of outside groups over parties was not part of BCRA's original design. As enacted, the law coupled new party regulations with stronger limits on outside spending, including a prohibition on corporate and union “electioneering communications,” ostensibly issue-related communications referencing candidates by name in the run-up to an election.³⁹ But this part of BCRA was stripped away by the Roberts Court, beginning in 2007 with *FEC v. Wisconsin Right to Life*.⁴⁰ The controlling justices in *WRTL* carved a huge exemption into BCRA's limitations for ostensibly independent ads not containing “express advocacy” (explicit calls to vote for or against a candidate) or its “functional equivalent.”⁴¹

Several years later, *Citizens United* finished what *WRTL* started, striking down all limits on putatively independent expenditures by corporations (and implicitly unions).⁴² Citing this reasoning, the United States Court of Appeals for the District of Columbia Circuit eliminated *all* federal contribution limits as applied to organizations that purport only to make independent expenditures. That decision, coupled with a series of misguided rulings and sustained gridlock at the Federal Election Commission, led to the creation of super PACs and the rise of other, even more shadowy organizations that can raise unlimited funds to influence voters.⁴³

Thanks to these decisions, outside spending in federal elections has skyrocketed. While total federal election spending in 2012 was about double the total from 2000, reported outside spending *increased by a factor of 20*.⁴⁴ Outside groups spent almost \$2 billion between 2010 and 2014 — more than two-and-a-half times what they spent in the previous 18 years.⁴⁵ Almost a third — more than \$600 million — has come from dark-money groups who disclose none of their donors.⁴⁶ Congress, the FEC, and other federal agencies like the Internal Revenue Service and the Securities Exchange Commission could mitigate at least some of the consequences of these trends, but so far have done nothing.⁴⁷

The same Supreme Court that made possible this new reality with respect to outside spending has largely refrained, at least until recently, from deregulating party committees. The same year it decided *Citizens United*, the Court summarily affirmed a lower court decision upholding BCRA's prohibition on soft money fundraising⁴⁸ — although, as discussed below, last year's *McCutcheon v. FEC* is likely to benefit parties.

It is no surprise, then, that while outside spending has skyrocketed, traditional party committee spending has remained mostly flat.⁴⁹ Data from the Campaign Finance Institute shows the dramatic shift in spending power in House and Senate elections.⁵⁰ Over four election cycles from 2006 to 2012, party committee independent expenditures hovered slightly under a quarter of a billion dollars in each cycle. In 2006 and 2008, the parties spent several times more than outside groups on independent expenditures. In 2010, outside group spending shot up to \$195 million, nearly catching up to the parties. By 2012, outside groups easily overtook

the parties; their spending in congressional elections was twice as high as party expenditures at almost half a billion dollars. The trend appears to be continuing: in competitive Senate races in 2014, outside groups spent almost four times what the party committees spent.⁵¹

Commentators have blamed stagnant party committee spending relative to that of outside groups for a host of problems, including declining political participation,⁵² polarization and gridlock,⁵³ and waning transparency.⁵⁴ Such arguments are often melded with calls to change the way formal party fundraising is regulated, such as by doing away with or significantly raising the contribution limits on parties.⁵⁵ As explained below, however, it is not necessarily accurate to think of “the parties” as consisting only of formal party organizations. Before turning to the issue of reform, it is necessary to address the threshold question of what exactly a party is.

What is a Party?

When political practitioners discuss “the party” they usually mean the constellation of committees making up their party’s legal apparatus — entities like the Democratic and Republican National Committees, the party congressional committees, and state and local party committees.⁵⁶ The much-remarked upon “decline” of parties relative to other political actors applies to them.

A growing number of scholars, however, argue that parties are made up of far more than the institutional party organizations, and that it is better to think of them as complex networks, including both the formal party structure and an array of “shadow party” organizations run by those connected to party leadership.⁵⁷ Under this view, many super PACs, dark-money entities, and other types of outside groups are actually components of the party network.

A perfect example of this phenomenon is the Senate Majority PAC, a super PAC that was the biggest non-candidate, non-party spender in 2014’s most competitive Senate races.⁵⁸ Senate Majority PAC’s stated objective is a Democratic majority in the Senate; it spent money in the same races the Democratic Senatorial Campaign Committee prioritized; it is run by people with longstanding and close ties to Sen. Harry Reid (D-Nev.), leader of the Senate Democrats; and Reid has reportedly solicited donations for the group.⁵⁹ The group has also recently become embroiled in the ethics scandal surrounding Sen. Robert Menendez (D-N.J.). Donations to the shadow party are alleged to be one of the things of value used by Dr. Salomon Melgen to bribe Menendez.⁶⁰

Another top spender in the midterms were two Republican-aligned sister groups founded by Karl Rove, the dark-money nonprofit Crossroads GPS and the super PAC American Crossroads, which spent approximately \$48 million in the 2014 cycle.⁶¹ Both groups have consistently backed Republicans, are run by a former longtime aide to Senate Majority Leader Mitch McConnell, and are associated with the Republican brand.⁶²

These examples illustrate a broader point, one made by, among others, the noted election lawyer and prolific commentator Bob Bauer: the questions of how healthy the parties are, and what should be done to mend them, are inextricably linked with one’s definition of “party.”⁶³ While traditional party committees may be struggling to compete, the parties as branded networks of affiliated interests are by some measures stronger than ever.⁶⁴

Critically, however, competition for resources does not take place solely between the parties and other actors; it also happens *within* party networks themselves. This intraparty competition interests us as much as competition between party committees and other entities, because many party-aligned groups suffer from a number of the same deficiencies (lack of transparency, reliance on a small coterie of mega-donors, etc.) as their truly independent counterparts. Whether party committees ought nevertheless to be remade in their image depends on a second question: what is the actual goal of reform?

What is the Goal of Reforms to Strengthen Parties?

Advocates for strengthening parties tend to offer a variety of justifications. Some argue that party organizations should be strengthened to enhance the marketplace of ideas and foster greater electoral competition.⁶⁵ Others point to the fact that party committees are transparent and, as longstanding institutions with established brands, relatively accountable for their political activities.⁶⁶ Still others note that it is traditional party organizations that have shown the most inclination to invest in voter engagement and encourage participation by the grassroots.⁶⁷ Finally, as noted above, stronger parties are often portrayed as mechanisms for improved governance, exerting a stabilizing influence by discouraging extremism and political fragmentation.⁶⁸ This last argument usually focuses specifically on empowering party leaders who, the argument goes, have as their primary goal to organize winning coalitions, making them more amenable to political compromise than most insurgents.⁶⁹

There is plainly significant tension between such varying objectives. A common thread running through the arguments of most party boosters, however, is money, specifically the assertion that parties with more money will provide more of whatever benefit is being discussed.

If money alone is the benchmark, however, there is a reasonable argument that the work of reform is mostly done. The Supreme Court's 2014 decision in *McCutcheon v. FEC* eliminated aggregate contribution limits on how much an individual donor can give to all political committees (including both candidate and party committees) over a two-year cycle.⁷⁰ Before *McCutcheon*, an individual donor could give no more than \$74,600 to all party committees in a given election cycle. Afterward, that same donor could give a combined \$1.2 million to all the national and state committees of either party, which are then permitted to transfer unlimited funds among themselves.⁷¹

In addition, the new campaign finance provisions passed late last year in the continuing resolution omnibus, or "CRomnibus," budget deal allow national party committees to raise large sums for certain purposes, including conventions, building funds, and legal proceedings.⁷² The new CRomnibus limits effectively allow the national parties to collect checks from individual donors that are several times larger than what was legal after *McCutcheon*. Both parties moved almost immediately to take advantage of these new limits.⁷³ Although the use of these funds is supposedly restricted, the fungibility of money means that the new limits will very likely free up additional cash for new election spending.⁷⁴

In total, for the 2016 cycle, a single individual donor can give more than \$2.5 million to the state and national committees of one party. That is roughly 35 times higher than what the same donor could give at the beginning of 2014.⁷⁵ And of course, that total does not include the unlimited funds that shadow party organizations can raise.

But will these changes actually enhance the specific benefits that parties are supposed to afford the political system? Take party leaders. Allowing national party organizations to raise more funds could strengthen party leaders to some degree. But leaders must now compete with mega-donors for influence within their party networks — donors who still have the option of favoring truly independent outside groups with narrower agendas if party leaders fail to do their bidding.⁷⁶ If the goal was truly to strengthen party leaders, and only them, a different package of reforms might have been preferable.

Moreover, other experts reject strengthening party leaders entirely as an underlying goal. Legal scholars Joseph Fishkin and Heather Gerken, for example, suggest that the real reason to strengthen institutional parties is to enhance political pluralism and accountability, by empowering the parties' rank-and-file members (the so-called party faithful).⁷⁷ It is the party faithful, they contend, who hold the elite accountable to ordinary voters, an especially critical function in an era of networked parties whose other institutions, such as super PACs, are dominated by mega-donors.⁷⁸ In this respect, *McCutcheon* and CRomnibus do not seem to help at all. If anything, lifting party contribution limits could end up compounding the damage from *Citizens United* by further sidelining the party faithful, whose views are often very different from those of the party's elite wealthy backers. These recent changes have also lessened the clout of small donors, bringing us back toward the conditions of the soft money era, when both parties relied primarily on a handful of major funders.⁷⁹

For these and other reasons, Thomas Mann and E.J. Dionne argue forcefully in a recent paper that redirecting large contributions “to the parties will not improve either the responsiveness or the efficiency of the political system.”⁸⁰ In fact, it is fair to ask whether wholesale deregulation of party fundraising could actually undercut the attributes of parties that make them attractive as political actors.

The Risks of Corruption and Misalignment

Fears of undercutting the parties' more democratic characteristics are an outgrowth of the traditional case for limiting contributions to party committees, which focuses on the related risks of corruption and political misalignment. Party fundraising, especially from large donors, can foster both the reality and appearance of *quid pro quo* corruption, which undermines the integrity of our democratic institutions. Big-money fundraising by the parties also raises broader concerns about policy being driven by the preferences of the elite political donor class rather than the electorate as a whole, an already well-documented phenomenon that would only be exacerbated by further deregulation.

The *quid pro quo* corruption risk inherent to party fundraising has been recognized for decades. Parties and their candidates and officeholders have long been understood to be inextricably linked.⁸¹ Thanks to this unity of interests, the degree of gratitude a candidate is likely to feel to a large party contributor may not be so different than the degree of gratitude she would feel to a large contributor to her own campaign, especially in cases where the candidate and party are collaborating in their fundraising efforts. This spirit of cooperation extends, as law professor Michael Kang has noted, to “both ends of any hypothetical quid pro quo exchange — campaign finance fundraising and policymaking activity.”⁸² It can also transcend any one officeholder's conduct. Instead, a group of officeholders can accept donations and spend them

to the mutual benefit of all members of the group, in exchange for the group's entire bloc of votes — conduct amounting to a type of “group-level corruption.”⁸³

In short, parties cannot be thought of as simply another flavor of civic group. They are, in many respects, governmental actors in their own right, creating the risk that party contributions, like candidate contributions, will be exchanged for policy.

The corruption risk arising from the unique role of parties in American politics has been evident throughout our modern history. Many notorious scandals involved donations to parties in circumstances that raised a strong suspicion of an exchange for government favors. Examples include the Teapot Dome⁸⁴ and Democratic campaign-book⁸⁵ scandals of the early twentieth century and the Nixon-era “milk money”⁸⁶ and ITT⁸⁷ scandals. The Clinton White House faced scrutiny over DNC contributions from Chinese interests, which were potentially connected to waivers the administration gave to satellite companies using Chinese rockets.⁸⁸ More recently, there have been intimations that a wealthy Ecuadorian family received favorable immigration treatment after donations to a joint fundraising committee that benefitted the DNC and state Democratic Party committees.⁸⁹

Party donations that are suggestive of *quids* for government action have occurred at the state level as well. Gov. Chris Christie (R-N.J.), for instance, has faced criticism for his party fundraising from investment advisors seeking to do business with his state. Several investment firms landed nine-figure pension investment deals around the same time their executives made large contributions to the Republican Governors Association (RGA) and state and federal party committees.⁹⁰ Christie was in the leadership of the RGA over the period in question, and the association spent heavily on his gubernatorial campaigns. Likewise, in Connecticut, the CEO of a large state contractor solicited his employees to give to the state Democratic Party expressly for the purpose of benefiting Gov. Dannel Malloy; contributions directly to Malloy would have been prohibited by the state's pay-to-play law.⁹¹

Beyond explicit bribery and apparent *quid pro quo* exchanges, moreover, large donations to political parties often provide wealthy donors with significant access to and influence over those in power.⁹² There are numerous examples of the parties peddling such access and influence in exchange for party donations, such as: the “President's Club” programs of the Kennedy and Johnson presidencies, in which donations of \$1,000 or more to the Democratic Party purchased the opportunity to have dinner with the president,⁹³ Clinton-era practices like allowing large DNC donors to spend the night in the Lincoln Bedroom,⁹⁴ as well as both parties' pervasive use of access to top elected leaders as a fundraising tool today.⁹⁵

The specter of the parties peddling access and influence in exchange for large party donations points to a second overarching concern related to party fundraising: its capacity to drive misalignment between citizens and their government. Because parties are so integral to governing, big-money party fundraising — like big-money candidate fundraising — can help to create a disconnect between the policies enacted by the government and those favored by the electorate. A recent detailed study of the influence of campaign contributions on legislative activity in the states found that “the effect is equal on influence whether the legislator is spending time raising money for his own election campaign or raising money for his caucus.”⁹⁶ Large contributions, especially from repeat donors, foster relationships

between elected officials and donors that confer advantages on the donor when public policy is made.⁹⁷

Other recent examinations of misalignment by political scientists have shown evidence that state parties are more responsive to the policy preferences of the wealthy than low-income citizens.⁹⁸ Researchers have also identified correlations between the policy preferences of members of Congress and their donors, as opposed to the voters they represent.⁹⁹

In short, even if allowing parties to raise more money in large donations would in fact enhance certain of their positive attributes, those benefits must be balanced against the risks associated with making the parties more dependent on a smaller class of wealthy funders.

The soft money experience of the 1990s and early 2000s is illustrative of the kind of dependence that can arise. Before BCRA, when the national parties could raise money outside FECA's limits and prohibitions for many purposes, approximately 46 percent of party revenue came from contributions of \$20,000 or more.¹⁰⁰ In 1998, less than 2,000 donors gave 78 percent of all soft money.¹⁰¹ In 1996, the Democratic National Committee raised almost \$25 million — 20 percent of its \$122 million in soft money — from just 168 individuals.¹⁰² Corporations and unions also took advantage of soft-money accounts, especially heavily regulated companies. For example, Microsoft, inactive in politics until it was hit with an antitrust suit, gave six-figure contributions to each party in the final three pre-BCRA cycles, hitting a high of \$1.9 million for the Republicans in 2002.¹⁰³

Even many of BCRA's critics have acknowledged that its passage was motivated by legitimate concerns, which — for a time — it did help to address.¹⁰⁴ Inasmuch as the broad-based, relatively democratic and transparent characteristics that BCRA fostered in parties remain some of their chief selling points, a return to the soft-money era could be profoundly problematic.¹⁰⁵

Engines of Democratic Participation

So what is the alternative? If we are to avoid exacerbating the risks of corruption and misalignment while strengthening the parties' democracy-enhancing capacities, where should the focus be? As discussed, the recent shift in resources away from traditional party organizations toward outside groups has taken place as much within as outside of broader party networks. It is the party committees that have traditionally functioned as engines of democratic participation, both in terms of their own internal structure and the resources they devote to fostering broader political participation. A reform agenda focused on strengthening these institutions through targeted measures could also reinforce many other benefits of strong parties, including those, like stability and competition, extolled by skeptics of regulation. Thus, while such an agenda is unlikely to satisfy everyone, it should encompass significant common ground.

As “sites of democratic mobilization and engagement,”¹⁰⁶ traditional party organizations provide opportunities for large numbers of people to be active in politics. Party committees, especially at the state and local level, offer multiple points of entry to the political process for ordinary citizens.¹⁰⁷ Driven in part by contribution limits, they must attract vast numbers of contributors and volunteers. They also offer grassroots political activists a natural home for organizing and coalition-building. Shadow-party groups do not share these participatory features because, like other outside groups, they tend to be controlled by small groups of insiders, expert consultants, and mega-donors.

The contrast can be clearly seen in the difference between fundraising for party committees and shadow-party super PACs. For example, the two biggest non-candidate spenders of the most competitive Senate races in 2014 were a party committee, the Democratic Senatorial Campaign Committee (DSCC), and its affiliated shadow super PAC, the Senate Majority PAC. The DSCC took in 44 percent of its contributions from small donors of \$200 or less, while Senate Majority PAC received less than one tenth of one percent of its funds from small donors.¹⁰⁸ Of the \$46 million that Senate Majority PAC spent in total, \$36 million came from just 23 donors who each gave half a million dollars or more, according to FEC data. The average itemized Senate Majority PAC contribution of over \$170,000 was more than 127 times larger than that of the DSCC.¹⁰⁹

Even more importantly, traditional party organizations have historically played a key role in getting voters to the polls on Election Day, and they continue to be experts at voter registration and get-out-the-vote activities.¹¹⁰ In a time of historically low turnout, the parties' capacity to mobilize ordinary voters is one of their most important democratic functions.¹¹¹ While there are reports that shadow party groups are trying to replicate some of these voter registration and GOTV functions,¹¹² there is no indication that they can fully do so.

Despite these downsides, shadow parties appear increasingly ascendant. As two of BCRA's leading critics, Robert Kelner and Raymond La Raja, pointed out last year, "[i]n some critical respects, the parties are becoming dependent on outside groups, ceding power to organizations that operate with little or no disclosure and that often have narrow political agendas."¹¹³ Gerken and Fishkin, who have not been similarly critical of BCRA, nevertheless agree that "[w]hat were once relatively porous, diffusely organized official parties are being displaced by hierarchical, closed shadow parties beholden almost entirely to donors."¹¹⁴

The need to halt and reverse this trend is an area of common ground for both skeptics and proponents of campaign finance regulation. Measures to strengthen institutional party organizations as engines for grassroots political participation will not satisfy those who would like to see party organizations largely or entirely deregulated. But such measures will boost those organizations, often by removing legal constraints on their operations. The remainder of this paper will explore specific policies that could be enacted to strengthen the parties to enhance their ability to foster democratic participation.

Possibilities of Reform

As we argue above, a reform agenda that seeks to accentuate the democracy-building attributes of formal party institutions without unduly exacerbating the risks of corruption and misalignment should attract support across the ideological spectrum.¹¹⁵ While our conversations with diverse scholars and practitioners in the field revealed a range of views, there was more common ground than might otherwise be expected. The following recommendations are based in part on these conversations, as well as the Brennan Center's own longstanding policy analysis.

Enact Targeted Public Financing: The best way to increase the resources of the institutional parties without exacerbating the risks of corruption and misalignment is to empower small donors with matching public funds.

A system of party financing in which small private contributions are multiplied and matched by public funds would give the parties a powerful incentive to rely on a broad base of contributors rather than a few wealthy benefactors.¹¹⁶ For example, donations of up to \$500 could be matched on a five-to-one basis, making them worth as much as \$3,000 to the recipient committee. The institutional parties would be rewarded for soliciting civic participation by as many Americans as possible.¹¹⁷ And party supporters, knowing their contribution is matched, would be more likely to give.¹¹⁸

Public financing would add to party committees' bank accounts, which should be welcomed by those who believe that richer parties will engender political competition, transparency, accountability, and voter mobilization. Furthermore, because party leaders will control the money, their ability to use finances to exert a moderating influence will be strengthened, without leaving average Americans from all walks of life out of the picture.

Public financing for parties is the norm in democracies around the world.¹¹⁹ It promises the advantages of the successful candidate financing systems in place from Arizona to New York City, where candidates have been freed from the pressure to please big donors to fund their campaigns.¹²⁰ In fact, public financing for parties has an advantage over candidate-based systems, in that it ensures that the great majority of funds will go to competitive races, since that is where parties focus their efforts.

By making relatively small contributions more valuable, a matching system would alleviate both corruption and misalignment concerns. Less reliance on large contributions from a handful of wealthy donors would mean fewer incentives for elected leaders to perform special favors and systematically skew policy.

It must be noted that there is some evidence from candidate contributions that small donors are highly ideological, leading some to worry that greater dependence on them might exacerbate political polarization and associated gridlock.¹²¹ The evidence as to whether small donors are especially polarized relative to the donor class as a whole is mixed, however.¹²² Moreover, the type of public financing system proposed here would give a large swath of the electorate an incentive to participate, potentially expanding beyond the class of small donors that has already been studied. New York City's system, for example, has broadened the donor base for participating candidates, encouraging more contributions from communities that traditionally do not contribute to campaigns.¹²³ And because the parties have enduring brands that discourage them from diverging too far from public opinion, an infusion of cash from even very ideological small donors is less likely to drive them toward the extremes than might be the case with individual candidates.

Public financing alone is certainly no cure-all for the problems plaguing our campaign finance system. To be effective, it requires certain other conditions — including reasonable, fully enforced contribution limits — to incentivize participation. But where such conditions are present, small donor public financing could potentially strengthen party committees financially while rewarding them for engaging a large portion of the public but without exacerbating the corruption and misalignment concerns that party fundraising often engenders. If anything, by broadening the party donor base, public financing positively counteracts those risks, resulting in a healthier democracy.

Lift or Eliminate Limits on How Much Parties Can Contribute to Their Own Candidates, Including Limits on Coordinated Spending: Another way to strengthen traditional party organizations is to raise or eliminate limits on their ability to contribute to their own candidates, including through coordinated spending.

Limits on party contributions to candidates are a longstanding feature of federal campaign finance law and the laws of a number of states. Since the Supreme Court decided *Buckley v. Valeo*¹²⁴ in 1976, moreover, it has been axiomatic that spending coordinated with a candidate is a form of contribution to that candidate; thus, spending coordinated between parties and their own candidates is limited.¹²⁵ The principal justification for such measures is that they are necessary to prevent party committees from being used by others, such as individuals or PACs, to circumvent candidate contribution limits.¹²⁶

Such anti-circumvention concerns remain legitimate, especially in cases where contributions to traditional party committees are subject to very high or no limits. Thus, for example, we do not recommend allowing national party committees to use funds raised pursuant to the new, much higher CRomnibus contribution limits to pay for coordinated expenditures. Nor do we think it would be advisable to lift federal coordinated spending limits before addressing the Federal Election Commission's pervasive enforcement failures, including its virtually complete failure to enforce laws restricting coordination between outside groups and both candidate and party committees.¹²⁷

Where traditional party committees themselves are subject to reasonable, fully-enforced contribution limits, however, limiting how they can spend their money in support of their own candidates makes less sense, especially in an era of unlimited fundraising by party-affiliated outside groups.¹²⁸ Not only do such limits inhibit party committees' ability to spend their money effectively, they also make grassroots organizing more difficult, for example by making it harder for parties to share their email and fundraising lists. And while federal law permits candidates to make unlimited cash and in-kind transfers to parties,¹²⁹ candidates may be reluctant to give lists and other resources to the parties because, once such resources are in the hands of a party committee, coordinated spending limits will restrict how much candidates can benefit from them.

Lifting coordinated spending limits could foster greater cooperation between candidates and traditional party organizations. That would give the latter a distinct advantage over shadow parties, who must maintain at least some separation between themselves and the candidates they support, bestowing greater leverage on funds comprised of a far greater percentage of small donations. Freeing party organizations from restrictions on coordinated spending — which is often defined according to legal standards that can be difficult to interpret and apply — could also alleviate a significant administrative and compliance burden.¹³⁰ And because all money spent would still have been raised pursuant to hard money limits, the additional corruption and misalignment risks would be small.

Conceivably, measures to raise or eliminate limits on party contributions to candidates could be cabined in certain ways to encourage even more grassroots participation, for example, by applying the new rules only to funds raised in small-dollar increments or only to spending for activities like voter registration and GOTV, as opposed to ads.¹³¹ These limitations could

further encourage broad participation, expanding the role of party committees as agents of civic engagement. Even without such conditions, however, lifting coordinated spending and other limits on what parties can contribute to their own candidates may make sense where a reasonable and fully-enforced framework of party contribution limits is in place.

Roll Back Federalization of State and Local Party Activities: A third avenue for reform is to relax some of BCRA's federalization of state and local party activities.

BCRA's passage was prompted in significant part by the excesses of soft-money fundraising by national party committees like the DNC and RNC. Because state and local party activities frequently impact federal races, however, Congress deemed it necessary to apply federal campaign finance law to their activities in a number of circumstances.¹³² As a consequence, even activities substantially related to state and local elections — including voter registration drives and GOTV activities — are considered federal election activity (FEA) and must be paid for with federally-compliant funds.¹³³ Because federal law tends to impose more restrictions than the laws of most state and local jurisdiction, state and local party fundraising has been burdened, making it harder for these parties to keep pace with the rising cost of elections.¹³⁴

One way to lighten the regulatory burden on state and local parties is to narrow BCRA's definition of FEA.¹³⁵ One option would be to exclude the most common tools of grassroots, retail politics, such as slate cards, volunteer phone-banks, and door-to-door canvassing.¹³⁶ While such activities unquestionably benefit federal candidates, and therefore raise corruption concerns, their tendency to foster greater engagement on the part of both party activists and ordinary voters may be sufficient to justify lighter regulation. Another option is to raise the monetary threshold at which state and local party committees become federal PACs,¹³⁷ which was never indexed to inflation and thus is now substantially lower in real terms than it was when enacted. Tellingly, the six members of the Federal Election Commission, who otherwise agree on little, unanimously voted to recommend this change to Congress.¹³⁸ Like raising or eliminating limits on party contributions to candidates, such targeted deregulation of state and local parties could help them to play a greater role in mobilizing ordinary citizens, without significantly exacerbating corruption and misalignment concerns.

Raise Contributor Disclosure Thresholds: A fourth reform to strengthen parties would be to loosen certain disclosure requirements, even as others are strengthened.

“Effective disclosure,” as the Supreme Court held in *Citizens United*, advances vital First Amendment interests by allowing voters “to make informed decisions and give proper weight to different speakers and messages.”¹³⁹ Nevertheless, one of *Citizens United's* most troubling legacies has actually been a tidal wave of dark-money spending by outside groups that do not disclose their donors, including a number of shadow party groups. Our entire political system, including the parties, would be healthier if such loopholes were closed.¹⁴⁰

At the same time, at the federal level, traditional party committees, unlike many shadow parties, must disclose all donors who gave more than \$200 — the threshold established in the original FECA, which was inexplicably not indexed to inflation.¹⁴¹ And unlike super PACs and 501(c) organizations, party committees cannot accept corporate donations, which can obscure the source of the money.¹⁴² Thus, even as policymakers work to ensure greater disclosure from

outside groups, relaxation of disclosure requirements for traditional party organizations might also be appropriate.

In particular, as both Spencer Overton and Mark Schmitt have suggested, policymakers should consider exempting more small donors from disclosure.¹⁴³ While disclosure of large contributions and expenditures facilitates a more informed citizenry, there is some evidence that disclosure of small donations can discourage donors from giving, acting as a barrier to entry in politics.¹⁴⁴ And requiring small donors to be disclosed places significant recordkeeping and reporting burdens on grassroots-driven organizations like the traditional party committees (to a much greater degree than is true with respect to shadow parties, which often have only a handful of major donors to disclose).

To be sure, there are legitimate reasons to require disclosure of even small donors.¹⁴⁵ Nevertheless, at least at the federal level, disclosure thresholds could be raised significantly (to, say, \$1000 cumulatively per election cycle) without greatly increasing the *quid pro quo* corruption risk or depriving the public of critical information about a candidate's major backers — especially if aggregate reporting (for example by employer, industry, and geographic location) were still required. Indeed, such a change would simply recognize that the original thresholds put in place by Congress in the mid-1970s are now worth substantially less in real terms due to inflation.

Index Contribution Limits and Consider Other Reforms: Finally, while we do not recommend lifting party contribution limits at this time, certain modest reforms may be appropriate. For example, such limits should always be indexed to inflation and not applied to transfers from candidates (as is already the case at the federal level).¹⁴⁶

Policymakers could also consider broader measures to raise party contribution limits for specific party activities that enhance grassroots participation, such as voter registration and GOTV. Voter mobilization accounts with higher contribution limits could balance the corruption and misalignment concerns raised by large contributions with the guarantee that the money will be spent engaging the public. A targeted lift of contribution limits would, like the other reforms proposed above, give the parties more resources to do their most important work: stimulate participation.

We are nevertheless hesitant to advocate further significant increases to the federal party contribution limits at this time. First, without effective enforcement, selectively higher limits are an invitation to circumvention. Until the FEC improves its enforcement record, the agency cannot be trusted to ensure that parties will not employ accounting tricks and other tactics to get around restrictions placed on the use of funds from higher-limit accounts. Moreover, thanks to the CRomnibus rollback and the Supreme Court's *McCutcheon* decision, party committees can already raise very large sums of money.¹⁴⁷ We are not ready to say that the benefits of adding yet more high-limit accounts on top of the CRomnibus accounts would outweigh the additional corruption and misalignment risks. Once the excesses of CRomnibus and the FEC's structural problems are addressed, new higher-limit voter mobilization accounts may become a viable policy option.

Conclusion

In *McConnell v. FEC*, its landmark decision upholding most of BCRA, the Supreme Court famously noted that “[m]oney, like water, will always find an outlet.”¹⁴⁸ The Court’s point was not that campaign finance laws are futile, but that it is imperative for such laws to evolve as circumstances warrant. Notwithstanding the profound jurisprudential and societal changes that have taken place since *McConnell* was decided, this basic insight is as true now as it ever was.

For much of the post-*Buckley* era, culminating in BCRA’s 2002 passage, campaign finance law focused on the dangers of unfettered party fundraising and, in doing so, sometimes failed to take full account of the central role that traditional party organizations play in mobilizing ordinary citizens to participate in politics. The problems associated with this one-sided approach have grown more acute thanks to the Roberts Court, which swept away limits on many non-party organizations, to the benefit of shadow-party super PACs and 501(c) entities dominated by mega-donors. This paper has sought to offer ideas on how to restore a degree of balance, without losing sight of the legitimate goals BCRA and other laws limiting party committee fundraising were intended to serve.

Importantly, our proposals do not depend on overturning *Citizens United* or other recent decisions by the Roberts Court. The Court has contributed to, but it is not solely responsible for, the widening gulf between the wealthiest donors, whose clout is greater now than at any time since Watergate, and the rest of an increasingly disengaged citizenry. Enhancing the most democratic and participatory facets of party politics is critical under the Court’s current jurisprudence, but it would still be important if the Court were more deferential to legislative efforts to reign in money’s influence on the electoral process.

To be sure, more inclusive parties will not fix all of our democracy’s problems. But they are one component of a healthier political system. This is a point of common ground across the ideological spectrum, one that has the potential to serve as the basis for a practical and achievable reform agenda in the near term.

ENDNOTES

- 1 E.E. Schattschneider put the point in stark terms with his often-quoted pronouncement: “modern democracy is unthinkable save in terms of the parties.” E.E. SCHATTSCHNEIDER, *PARTY GOVERNMENT* 1 (1942).
- 2 See, e.g., JOHN H. ALDRICH, *WHY PARTIES? A SECOND LOOK* 256-57, 280-85 (2011).
- 3 Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, §§ 101-02, 304, 116 Stat. 81, 81-87, 97-100.
- 4 558 U.S. 310 (2010).
- 5 Federal Election Campaign Act of 1971, Pub. L. No. 92-225, §§ 203-07, 86 Stat. 3, 9-11 (1972).
- 6 See THOMAS E. MANN & E.J. DIONNE, JR., *THE FUTILITY OF NOSTALGIA AND THE ROMANTICISM OF THE NEW POLITICAL REALISTS* 15-19 (2015), <http://www.brookings.edu/research/reports2/2015/06/futility-nostalgia-romanticism-new-political-realists-mann-dionne> (summarizing the debate and arguing that the parties have not been weakened by campaign finance regulation).
- 7 *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014).
- 8 Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. 113-235, 128 Stat. 2130, 2772-73 (2014) (creating new accounts for national party committees with higher contribution limits).
- 9 For example, as discussed further below, combining an increase in contribution limits with the elimination of coordinated spending limits would pose too a great risk of circumvention of the candidate contribution limits. Likewise, lax enforcement — as currently exists at the federal level — renders many targeted deregulatory reforms unworkable in practice, and should not be undertaken until robust enforcement of remaining laws can be guaranteed.
- 10 See, e.g., Douglas D. Roscoe & Shannon Jenkins, *Changes in Party Structure and Activity, 1980-2008*, in *THE STATE OF THE PARTIES: THE CHANGING ROLE OF CONTEMPORARY AMERICAN PARTIES* 287, 295-96 (John C. Green et al. eds., 2014) (discussing local parties’ use of volunteers).
- 11 BRUCE E. CAIN, *DEMOCRACY MORE OR LESS* 77 (2015); JOHN H. ALDRICH, *WHY PARTIES? A SECOND LOOK* 47 (2011).

- 12 See, e.g., Nolan McCarty, *Reducing Polarization by Making Parties Stronger*, in SOLUTIONS TO POLITICAL POLARIZATION IN AMERICA 136, 143 (Nathaniel Persily, ed., 2015) (“Strong political parties have autonomy from and bargaining advantages over special interest groups.”); Michael A. Fitts, *The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process*, 136 U. PA. L. REV. 1567, 1603-07 (1988).

- 13 E.g., BRUCE E. CAIN, DEMOCRACY MORE OR LESS 77 (2015); Neil Reiff & Don McGahn, *A Decade of McCain-Feingold*, CAMPAIGNS & ELECTIONS, Apr. 16, 2014, <http://www.campaignsandelections.com/magazine/us-edition/445782/a-decade-of-mccainfeingold.shtml>; Raymond J. La Raja, *Why Soft Money Has Strengthened the Parties*, in INSIDE THE CAMPAIGN FINANCE BATTLE 69 (Anthony Corrado et al. eds., 2003).

- 14 E.g., Ray La Raja & Brian Schaffner, *Want to Reduce Polarization? Give Parties More Money*, WASH. Post, July 21, 2014, <http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/07/21/want-to-reduce-polarization-give-parties-more-money/>; Neil Reiff & Don McGahn, *A Decade of McCain-Feingold*, CAMPAIGNS & ELECTIONS, Apr. 16, 2014, <http://www.campaignsandelections.com/magazine/us-edition/445782/a-decade-of-mccainfeingold.shtml> (pointing to rising outside spending as justification for party deregulation).

- 15 See, e.g., Robert Kelner & Raymond La Raja, *Opinion: 10-year-old Ruling Led to Campaign Cash Profusion*, THE RECORD (N.J.), Apr. 14, 2014, <http://www.northjersey.com/opinion/opinion-10-year-old-ruling-led-to-campaign-cash-profusion-1.981084>; John Samples, *‘Soft Money’ Aids Democracy*, CATO INSTITUTE (Sept. 30, 2000), <http://www.cato.org/publications/commentary/soft-money-aids-democracy>. The empirical evidence on whether parties actually behave this way is mixed. One study from 1990 found that the level of party support affected members’ voting records. Kevin M. Leyden & Steven A. Borrelli, *Party Contributions and Party Unity: Can Loyalty Be Bought?*, 43 W. POL. Q. 343, 351-52 (1990). A 2014 study of state legislatures found that members are rewarded for loyalty with financial support when the party is in the majority. Michael Barber et al., *Party Loyalty and Campaign Contributions*, Paper presented at the Center for the Study of Democratic Politics Money in Politics Conference, Princeton University (May 16, 2014), http://michaeljaybarber.com/s/Barbe_Canes-Wrone_Godbout-final.pdf. Studies of Congress, on the other hand, find no or minimal effects. David M. Cantor & Paul S. Herrnsen, *Party Campaign Activity and Party Unity in the U.S. House of Representatives*, 22 LEG. STUDIES Q. 393 (1997); Stephen Ansolabehere & James M. Snyder, Jr., *Soft Money, Hard Money, Strong Parties*, 100 COLUM. L. REV. 598, 611-12 (2000).

- 16 Timothy P. Nokken, *Ideological Congruence Versus Electoral Success: Distribution of Party Organization Contributions in Senate Elections, 1990-2000*, 31 AM. POL. RES. 3 (2003); David F. Damore & Thomas G. Hansford, *The Allocation of Party Controlled Campaign Resources in the House of Representatives, 1989-1996*, 52 POL. RES. Q. 371 (1999).
- 17 Ray La Raja & Brian Schaffner, *Want to Reduce Polarization? Give Parties More Money*, WASH. POST, July 21, 2014, <http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/07/21/want-to-reduce-polarization-give-parties-more-money/>.
- 18 See, e.g., Lee Drutman, *Can Unlimited Contributions to Political Parties Really Reduce Polarization*, WASH. POST, June 23, 2015, <http://www.washingtonpost.com/blogs/monkey-cage/wp/2015/06/23/can-unlimited-contributions-to-political-parties-really-reduce-polarization/> (responding to argument by La Raja and Schaffner).
- 19 Jacob S. Hacker & Paul Pierson, *Confronting Asymmetric Polarization*, in SOLUTIONS TO POLITICAL POLARIZATION IN AMERICA 59, 60 (Nathaniel Persily, ed., 2015) (collecting examples like increased use of filibuster, government shut down, and refusal to confirm executive appointments); Thomas B. Edsall, *Would Stronger Parties Mean Less Polarization?* N.Y. TIMES, Oct. 21, 2014, <http://www.nytimes.com/2014/10/22/opinion/would-stronger-parties-mean-less-polarization.html> (quoting political scientist Thomas Mann describing Republicans as engaging in a strategy of opposing President Barack Obama “even when he takes a position previously advocated by conservatives”); Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273 (2011).
- 20 See, e.g., Peter Wehner, *Have Democrats Pulled Too Far Left?*, N.Y. TIMES, May 27, 2015, <http://www.nytimes.com/2015/05/27/opinion/have-democrats-pulled-too-far-left.html>.
- 21 See Raymond J. La Raja, *Richer Parties, Better Politics? Party-Centered Campaign Finance Laws and American Democracy*, 11 FORUM 313, 324 (2013).
- 22 52 U.S.C. § 30104.
- 23 *State Campaign Finance Disclosure Requirements 2015-2016 Election Cycle*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/Portals/1/documents/legismgt/elect/StateCampaignFinanceDisclosureRequirementsChart2015.pdf> (last updated July 17, 2015).
- 24 See, e.g., 52 U.S.C. § 30118(a).

- 25 According to data collected by the Center for Responsive Politics for non-party outside spending over the 2010, 2012, and 2014 cycles. *See Outside Spending by Group*, CENTER FOR RESPONSIVE POLITICS, <https://www.opensecrets.org/outsidespending/summ.php?disp=O>. Significant spending by groups that disclose only some of their donors means that less than half of non-party outside spending comes from fully transparent groups. *Id.*
- 26 *See, e.g.*, Jonathan Weisman, *Tax-Exempt Group's Election Activity Highlights Limits of Campaign Finance Rules*, N.Y. TIMES, July 16, 2012, <http://www.nytimes.com/2012/07/17/us/politics/hope-growth-and-opportunity-shows-limits-of-disclosure-rules.html>; Kim Barker & Theodor Meyer, *What Happens When a Dark Money Group Blows Off IRS Rules? Nothing.*, PROPUBLICA, Apr. 25, 2014, <http://www.propublica.org/article/what-happens-when-a-dark-money-group-blows-off-irs-rules-nothing>; Chris Megerian, *Two Groups that Used Secret Political Donations Haven't Paid Penalties*, L.A. TIMES, Jan 16, 2014, <http://articles.latimes.com/2014/jan/16/local/la-me-secret-money-20140117>. Negative attack ads are not, to be sure, the unique province of outside groups. When candidates and parties run such ads, however, stronger disclaimer and disclosure requirements foster at least a measure of accountability.
- 27 For example, the DNC and RNC both typically take in between a quarter and half of their individual contributions from small donors of \$200 or less. *National Party Committees' Receipts, 1999-2014*, CAMPAIGN FINANCE INSTITUTE, http://www.cfinst.org/pdf/historical/Donors_Party_National_2000-2014.pdf.
- 28 DANIEL I. WEINER, BRENNAN CENTER FOR JUSTICE, *CITIZENS UNITED FIVE YEARS LATER 5* (2015), <https://www.brennancenter.org/publication/citizens-united-five-years-later>.
- 29 *See, e.g.*, Joseph Fishkin & Heather K. Gerken, *The Party's Over: McCutcheon, Shadow Parties, and the Future of the Party System*, 2014 SUP. CT. REV. 175, 205 (2014).
- 30 *See* LARRY J. SABATO & HOWARD R. ERNST, *ENCYCLOPEDIA OF AMERICAN POLITICAL PARTIES AND ELECTIONS* 162-63 (2007).
- 31 *See, e.g.*, Trip Gabriel, *'Super PACs' Take on New Role: Organizing Voters*, N.Y. TIMES, July 7, 2015, <http://www.nytimes.com/2015/07/08/us/politics/super-pacs-take-on-new-role-organizing-voters.html>.
- 32 *See, e.g.*, Paul Blumenthal, *Citizens United, McCain-Feingold Fueled Congress' Shutdown Politics*, HUFFINGTON POST, Oct. 16, 2013, http://www.huffingtonpost.com/2013/10/16/citizens-united-shutdown_n_4108252.html (arguing that BCRA weakened the official party committees).

- 33 L. SANDY MAISEL & MARK D. BREWER, *PARTIES AND ELECTIONS IN AMERICA: THE ELECTORAL PROCESS* 379 (6th ed. 2012); *see generally* MARTIN P. WATTENBERG, *THE DECLINE OF AMERICAN POLITICAL PARTIES 1952-1996* (1998).
- 34 *See* JOHN H. ALDRICH, *WHY PARTIES? A SECOND LOOK* 256-58 (2011).
- 35 *See* Trevor Potter & Glen Shor, *Lessons on Enforcement from McConnell v. FEC*, 3 ELECTION L.J. 325, 326-28 (2004) (describing the development of the soft-money system).
- 36 52 U.S.C. § 30125(a)-(b).
- 37 Robert Kelner, Covington & Burling, *The Truth About National Political Party Fundraising*, INSIDE POLITICAL LAW (July 31, 2012), <http://www.insidepoliticallaw.com/2012/07/31/the-truth-about-national-political-party-fundraising>.
- 38 Neil Reiff & Don McGahn, *A Decade of McCain-Feingold*, CAMPAIGNS & ELECTIONS, Apr. 16, 2014, <http://www.campaignsandelections.com/magazine/us-edition/445782/a-decade-of-mccainfeingold.html> (arguing against the soft money ban).
- 39 Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, §§ 203-04, 211-12, 116 Stat. 81, 91-94.
- 40 551 U.S. 449 (2007).
- 41 *Id.* at 469-76 (Roberts, C.J., controlling opinion).
- 42 *Citizens United*, 558 U.S. at 365. In fact, many supposedly independent expenditures permitted by the Court actually are not independent of candidates or parties according to any common-sense meaning of the word. *See* CHISUN LEE, BRENT FERGUSON & DAVID EARLEY, BRENNAN CENTER FOR JUSTICE, *AFTER CITIZENS UNITED: THE STORY IN THE STATES* (2014), <https://www.brennancenter.org/publication/after-citizens-united-story-states>; DANIEL P. TOKAJI & RENATA E.B. STRAUSE, *THE NEW SOFT MONEY* 63-69 (2014), <http://moritzlaw.osu.edu/thenewsoftmoney/wp-content/uploads/sites/57/2014/06/the-new-soft-money-WEB.pdf> (discussing cooperation between campaigns and outside groups).
- 43 *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010); *see also* FEC Advisory Opinion No. 2010-11 (Commonsense Ten), July 22, 2010, <http://saos.fec.gov/aodocs/AO%202010-11.pdf>; Daniel I. Weiner, *The FEC Deadlocks (Again) on Dark Money*, BRENNAN CENTER FOR JUSTICE, Aug. 1, 2014, <http://www.brennancenter.org/blog/fec-deadlocks-again-dark-money>.

- 44 *The Money Behind the Elections*, CENTER FOR RESPONSIVE POLITICS, <https://www.opensecrets.org/bigpicture/>; *Total Outside Spending by Election Cycle, Excluding Party Committees*, CENTER FOR RESPONSIVE POLITICS, http://www.opensecrets.org/outsidespending/cycle_tots.php. The outside spending comparison does not count unreported dark money due to a lack of data.
- 45 DANIEL I. WEINER, BRENNAN CENTER FOR JUSTICE, *CITIZENS UNITED FIVE YEARS LATER 4* (2015), <https://www.brennancenter.org/publication/citizens-united-five-years-later>.
- 46 *Id.* at 7.
- 47 *Id.* at 7-9.
- 48 Republican Nat'l Cmte. v. FEC, 698 F. Supp. 2d 150 (D.D.C. 2010) (three judge court), *summarily aff'd*, 130 S. Ct. 3544 (2010).
- 49 See Robert Kelner, Covington & Burling, *The Truth About National Political Party Fundraising*, INSIDE POLITICAL LAW (July 31, 2012), <http://www.insidepoliticallaw.com/2012/07/31/the-truth-about-national-political-party-fundraising>.
- 50 *Historical Stats*, CAMPAIGN FINANCE INSTITUTE, <http://www.cfinst.org/data/historicalstats.aspx> (compare figures from “Political Party Contributions, Coordinated and Independent Expenditures for Congress, 1976-2012” with “Non-Party Independent Expenditures in House and Senate Elections, 1978-2012”).
- 51 IAN VANDEWALKER, BRENNAN CENTER FOR JUSTICE, *ELECTION SPENDING 2014: OUTSIDE SPENDING IN SENATE RACES SINCE CITIZENS UNITED 5* (2015), <https://www.brennancenter.org/publication/election-spending-2014-outside-spending-senate-races-citizens-united>. A study of competitive House races in 2012 found that outside groups outspent the parties by a small margin, \$89 million to \$80 million. SUNDEEP IYER, BRENNAN CENTER FOR JUSTICE, *POST-ELECTION ANALYSIS: 2012 TOSS-UP HOUSE RACES* (2013), <http://www.brennancenter.org/publication/post-election-analysis-2012-toss-house-races>.
- 52 Raymond J. La Raja, *Richer Parties, Better Politics? Party-Centered Campaign Finance Laws and American Democracy*, 11 FORUM 313, 323 (2013) (“A major study of voter turnout indicates that its decline between 1960s and 1990s was significantly attributable to weaker efforts by parties to mobilize voters.”).
- 53 Richard Pildes, *How to Fix Our Polarized Politics? Strengthen Political Parties*, WASH. POST, Feb. 6, 2014. <http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/02/06/how-to-fix-our-polarized-politics-strengthen-political-parties/>.

- 54 Robert Kelner, Covington & Burling, *The Truth About National Political Party Fundraising*, INSIDE POLITICAL LAW (July 31, 2012), <http://www.insidepoliticallaw.com/2012/07/31/the-truth-about-national-political-party-fundraising>.
- 55 See, e.g., Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 YALE L.J. 804, 839 (2014) (suggesting, inter alia, raising caps on donations to parties); Raymond J. La Raja, *Campaign Finance and Partisan Polarization in the United States Congress*, 9 DUKE J. CONST. L. & PUB. POL'Y 223, 257-58 (2014) (arguing for a return to the soft-money system to strengthen parties). The Republican National Committee, the Republican Party of Louisiana, and others also initiated a lawsuit in 2014 seeking to allow the parties to operate non-contribution accounts that could accept contributions of unlimited size and make only independent expenditures — in a sense, in-house super PACs. Complaint, RNC v. FEC, 64 F. Supp. 3d 195 (D.D.C. 2014) (No. 1:14-cv-00853-CRC). The remedy sought would have instituted a regime similar to the soft-money system, with donors able to give unlimited amounts of money to be spent on certain types of campaign activity. In December 2014, the suit was voluntarily dismissed, but the Republican Party of Louisiana challenged the soft money ban again in 2015. See Kenneth P. Doyle, *New Challenge Filed to Party 'Soft-Money' Limits*, BLOOMBERG BNA, Aug. 4, 2015, <http://www.bna.com/new-challenge-filed-n17179934349/>.
- 56 Michael Kang, *The Hydraulics and Politics of Party Regulation*, 91 IOWA L. REV. 131, 142-43 (2005).
- 57 Joseph Fishkin & Heather K. Gerken, *The Party's Over: McCutcheon, Shadow Parties, and the Future of the Party System*, 2014 SUP. CT. REV. 175, 187 (2014) (“[A] party today is best understood as a loose coalition of diverse entities, some official and some not, organized around a popular national brand.”); Diana Dwyre & Robin Kolodny, *Political Party Activity in the 2012 Elections: Sophisticated Orchestration or Diminished Influence?*, in THE STATE OF THE PARTIES: THE CHANGING ROLE OF CONTEMPORARY AMERICAN PARTIES 207 (John C. Green et al. eds., 2014).
- 58 IAN VANDEWALKER, BRENNAN CENTER FOR JUSTICE, ELECTION SPENDING 2014: OUTSIDE SPENDING IN SENATE RACES SINCE *CITIZENS UNITED* 8 (2015), <https://www.brennancenter.org/publication/election-spending-2014-outside-spending-senate-races-citizens-united> (noting Senate Majority PAC spent \$47 million in 11 races, second only to the Democratic Senatorial Campaign Committee’s \$55 million).
- 59 IAN VANDEWALKER, BRENNAN CENTER FOR JUSTICE, ELECTION SPENDING 2014: 9 TOSS-UP RACES 17 (2014), <http://www.brennancenter.org/publication/election-spending-2014-9-toss-senate-races>.

- 60 See Matea Gold, *Menendez Indictment Marks First Big Corruption Case Involving a Super PAC*, WASH. POST, Apr. 2, 2015, http://www.washingtonpost.com/politics/menendez-indictment-marks-first-big-corruption-case-involving-a-super-pac/2015/04/01/f42f4aee-d8d9-11e4-8103-fa84725dbf9d_story.html.
- 61 *American Crossroads/Crossroads GPS*, CENTER FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/outsidespending/detail.php?cmte=American+Crossroads%2FCrossroads+GPS&cycle=2014>.
- 62 T.W. Farnam, *Head of Crossroads GPS Once a McConnell Aide, Now His Political Ally*, WASH. POST, Oct. 30, 2012, http://www.washingtonpost.com/politics/decision2012/head-of-crossroads-gps-once-a-mcconnell-aide-now-his-political-ally/2012/10/30/9f17ea2a-1329-11e2-ba83-a7a396e6b2a7_story.html.
- 63 Bob Bauer, *Defining the Parties Down*, MORE SOFT MONEY HARD LAW (May 8, 2014), <http://www.moresoftmoneyhardlaw.com/2014/05/defining-parties>.
- 64 THOMAS E. MANN & E.J. DIONNE, JR., THE FUTILITY OF NOSTALGIA AND THE ROMANTICISM OF THE NEW POLITICAL REALISTS 19 (2015), <http://www.brookings.edu/research/reports2/2015/06/futility-nostalgia-romanticism-new-political-realists-mann-dionne> (arguing that parties have not been weakened relative to outside spending, but rather have adapted to use outside groups as vehicles for their own spending).
- 65 Joel M. Gora, *Democracy Will Thrive Post-McCutcheon*, N.Y. DAILY NEWS, Apr. 2, 2014, <http://www.nydailynews.com/opinion/democracy-thrive-post-mccutcheon-article-1.1743508>.
- 66 E.g., Ray LaRaja & Brian Schaffner, *Want to Reduce Polarization? Give Parties More Money*, WASH. POST, July 21, 2014, <http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/07/21/want-to-reduce-polarization-give-parties-more-money/>.
- 67 Marc E. Elias & Jonathan S. Berkon, *After McCutcheon*, 127 HARV. L. REV. FORUM 373, 379 (2014).

- 68 See, e.g., Neil Reiff & Don McGahn, *A Decade of McCain-Feingold*, CAMPAIGNS & ELECTIONS, Apr. 16, 2014, <http://www.campaignsandelections.com/magazine/1705/a-decade-of-mccain-feingold>; Nathaniel Persily, *Bringing Big Money out of the Shadows*, N.Y. TIMES, Apr. 2, 2014, <http://www.nytimes.com/2014/04/03/opinion/bringing-big-money-out-of-the-shadows.html> (touting parties as an antidote to “[p]olitical polarization...fueled in part by the rise of independent,often undisclosed money”); Ray La Raja, *CRomnibus Pays Off for Parties*, MASSPOLITICSPROFS, Dec. 17, 2014, <http://blogs.wgbh.org/masspoliticsprofs/2014/12/17/cromnibus-pays-parties/> (pointing to the “unique role” of parties in helping to “aggregate diverse interests in the polity, frame electoral choices, and organize governing”); Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation and the Decline of American Government*, 124 YALE L.J. 804, 830 (2014) (arguing that parties must be strengthened to counter “political fragmentation,” which “has drained partisan elected leaders of much of the power to control, unify and discipline members of their own party”).
- 69 See, e.g., Nathaniel Persily, *Stronger Parties as a Solution to Polarization*, in SOLUTIONS TO POLITICAL POLARIZATION IN AMERICA 123, 126-27 (Nathaniel Persily, ed., 2015) (describing a pro-party approach designed to reign in extremists by seeking to “embolden party leaders and to increase their strength relative to extremist outside groups”).
- 70 134 S. Ct. at 1462 (plurality opinion).
- 71 52 U.S.C. § 30116(a)(4)-(5); see also *McCutcheon*, 134 S. Ct. at 1472 (Breyer, J., dissenting).
- 72 Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. 113-235, 128 Stat. 2130, 2772-73 (2014); see also Nicholas Confessore, *G.O.P. Angst Over 2016 Led to Provision on Funding*, N.Y. TIMES, Dec. 13, 2014, <http://www.nytimes.com/2014/12/14/us/politics/gop-angst-over-2016-convention-led-to-funding-provision.html>
- 73 Carrie Levine, *Capitalizing on a Political Contribution Cap Hike*, CENTER FOR PUBLIC INTEGRITY, Feb. 4, 2015, <http://www.publicintegrity.org/2015/02/04/16711/capitalizing-political-contribution-cap-hike> (giving examples of party contributions in excess of the old limits made just weeks after the new limits were passed by Congress).
- 74 The prospect of weak enforcement (the statutory language contains no definitions) is another concern. After all, soft money was supposed to be devoted to party building but the vast majority of it was spent on sham issue ads designed to influence elections. See CRAIG B. HOLMAN & LUKE P. McLOUGHLIN, BRENNAN CENTER FOR JUSTICE, *BUYING TIME 2000* 64 (2001), <http://www.brennancenter.org/sites/default/files/publications/Buying%20Time%202000.pdf>.

- 75 A small part of the increase over prior limits is due to the FEC's biannual inflation adjustment to some contribution limits.
- 76 See Robert K. Kelner, *The Practical Consequences of McCutcheon*, 127 HARV. L. REV. FORUM 380, 384 (2014) (suggesting that new fundraising vehicles enabled by *McCutcheon* may not be controlled by the parties but by “influential members of Congress or even by individual major donors”).
- 77 Joseph Fishkin & Heather K. Gerken, *The Two Trends that Matter for Political Parties*, 89 N.Y.U. L. REV. (ONLINE SYMPOSIUM) 32, 45 (2014).
- 78 *Id.* Similarly, Joel Gora and Peter Wallison argue for stronger parties to assist electoral challengers. PETER J. WALLISON & JOEL M. GORA, BETTER PARTIES, BETTER GOVERNMENT 106 (2009). While stronger party establishments could conceivably help general election challenges, however, they might have the opposite effect in primaries.
- 79 See MICHAEL J. MALBIN & SEAN A. CAIN, CAMPAIGN FINANCE INSTITUTE, THE UPS AND DOWNS OF SMALL AND LARGE DONORS 4 (2007), http://www.cfnst.org/books_reports/SmallDonors/Small-Large-Donors_June2007.pdf; Stephen Ansolabehere & James M. Snyder, Jr., *Soft Money, Hard Money, Strong Parties*, 100 COLUM. L. REV. 598, 607 (2000).
- 80 THOMAS E. MANN & E.J. DIONNE, JR., THE FUTILITY OF NOSTALGIA AND THE ROMANTICISM OF THE NEW POLITICAL REALISTS 5 (2015), <http://www.brookings.edu/research/reports2/2015/06/futility-nostalgia-romanticism-new-political-realists-mann-dionne>.
- 81 See, e.g., *McConnell v. FEC*, 540 U.S. 93, 145 (2003) (recognizing the “special relationship and unity of interest” between parties and their candidates); Michael S. Kang, *The Brave New World of Party Campaign Finance Law*, 101 CORNELL L. REV. (forthcoming 2015).
- 82 Michael S. Kang, *The Brave New World of Party Campaign Finance Law*, 101 CORNELL L. REV. (forthcoming 2015).
- 83 *Id.*
- 84 ROBERT E. MUTCH, BUYING THE VOTE: A HISTORY OF CAMPAIGN FINANCE REFORM 257 (2014) (one of the oilmen who procured government leases without competitive bidding had given a large amount to the RNC).

- 85 *Wagner v. FEC*, No. 13–5162, ___ F.3d ___, 2015 WL 4079575, at *8 (D.C. Cir. July 7, 2015) (describing scheme in which Democratic Party representatives convinced government contractors to buy souvenir convention books at inflated prices “in proportion to the amount of Government business he had enjoyed”).
- 86 J. ANTHONY LUKAS, *NIGHTMARE: THE UNDERSIDE OF THE NIXON YEARS* 121–23 (1999) (some of the money pledged in exchange for dairy price supports went to an RNC fundraising dinner).
- 87 Ciara Torres-Spelliscy, *How Much Is an Ambassadorship?* 16 *CHAP. L. REV.* 71 (2012) (noting that ITT contributed to the 1972 Republican National Convention around the same time Nixon intervened to have an antitrust suit against the company settled); J. ANTHONY LUKAS, *NIGHTMARE: THE UNDERSIDE OF THE NIXON YEARS* 130–34 (1999).
- 88 ELIZABETH DREW, *THE CORRUPTION OF AMERICAN POLITICS: WHAT WENT WRONG AND WHY* 96, 106 (1999).
- 89 Frances Robles, *Ecuador Family Wins Favors After Donations to Democrats*, N.Y. TIMES, Dec. 16, 2014, <http://www.nytimes.com/2014/12/17/world/americas/ecuador-isaias-obama-campaign-robert-menendez-hillary-clinton.html>.
- 90 David Sirota, *Chris Christie’s Political Team Was in Direct Contact with Pension Overseer During Campaign*, INT’L BUS. TIMES, Aug. 15, 2014, <http://www.ibtimes.com/chris-christies-political-team-was-direct-contact-pension-overseer-during-campaign-1659108> (collecting examples of contributions coinciding with awards of pension investments); Lee Fang, *Pensiongate? Christie Campaign Donors Won Huge Contracts*, THE NATION, Mar. 18, 2014, <http://www.thenation.com/article/178862/pensiongate-christie-campaign-donors-won-huge-contracts>. Several businesses with state contracts also donated to the RGA under Christie’s leadership; donations by those business directly to Christie would apparently violate New Jersey’s pay-to-play law. David Sirota, *Chris Christie Raised Cash from New Jersey Contractors for Republican Governors Association*, INT’L BUS. TIMES, Nov. 3, 2014, <http://www.ibtimes.com/chris-christie-raised-cash-new-jersey-contractors-republican-governors-association-1717787>.
- 91 Jon Lender, *Election Agency Probes Legality of NU Chief’s Solicitation for Malloy*, HARTFORD COURANT, Feb. 1, 2014, http://articles.courant.com/2014-02-01/news/hc-lender-probe-nu-donations-0202-20140131_1_malloy-governor-dannel-p-nu-chief; Christine Stuart, *Election Regulators Call NU Solicitation ‘Egregious’*, CT NEWS JUNKIE, Sept. 16, 2014, http://www.ctnewsjunkie.com/archives/entry/election_regulators_call_nu_solicitation_egregious/. Other state contractors have also given to the state party. Mark Pazniokas, *Connecticut Democrats Return Questioned \$10,000 Contribution*, CONN. MIRROR, Dec. 12, 2013, <http://ctmirror.org/2013/12/12/connecticut-democrats-return-questioned-10000-contribution/>.

- 92 Referring to possible bad publicity due to big donors in the outside money context, one GOP operative said, “If they’re going to give a million, we’ll find a way to deal with them.” Kenneth P. Vogel, *Rise of the Showboat Donor*, POLITICO, May 27, 2014, <http://www.politico.com/story/2014/05/anthony-scaramucci-mega-donors-107091.html>.
- 93 SEAN J. SAVAGE, JFK, LBJ, AND THE DEMOCRATIC PARTY 155-57 (2004) (recounting use of the President’s Club program to benefit the DNC and organization of dinners by a television executive interested in protection against antitrust actions).
- 94 See *McConnell*, 540 U.S. at 150-52 (“The record in the present cases is replete with similar examples of national party committees peddling access to federal candidates and officeholders in exchange for large soft-money donations. . . . So pervasive is this practice that the six national party committees actually furnish their own menus of opportunities for access to would-be soft-money donors, with increased prices reflecting an increased level of access.”).
- 95 See, e.g., Jonathan Weisman, *G.O.P. Error Reveals Donors and the Price of Access*, N.Y. TIMES, Sept. 24, 2014, <http://www.nytimes.com/2014/09/25/us/republicans-corporate-donors-governors.html> (describing RGA and DGA documents revealing forms of access to elected officials available to donors of various amounts).
- 96 LYNDA W. POWELL, THE INFLUENCE OF CAMPAIGN CONTRIBUTIONS IN STATE LEGISLATURES: THE EFFECTS OF INSTITUTIONS AND POLITICS 153 (2012); see also *id.* at 62 (discussing benefits to individual legislators of raising money for their party).
- 97 ROBERT E. MUTCH, BUYING THE VOTE: A HISTORY OF CAMPAIGN FINANCE REFORM 40 (2014) (recounting testimony from the investigation of the 1904 life insurance scandal in which a senator testified that contributions put “candidates under more or less of a moral obligation not to attack the interests supporting”); LAWRENCE LESSIG, REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS — AND A PLAN TO STOP IT 107-14 (2011) (discussing importance of relationships as opposed to quid pro quo exchanges in the Washington influence industry); Nick Stephanopoulos, *Aligning Campaign Finance Law*, 101 Va. L. Rev. (forthcoming 2015).
- 98 Elizabeth Rigby & Gerald C. Wright, *Political Parties and Representation of the Poor in American States* (Apr. 6, 2011), https://rooneycenter.nd.edu/assets/40430/rigby_wright.responsivenesspaper_04_06_11.pdf (explaining the difference is greatest for Democratic organizations in states with high income inequality). The authors draw no conclusion about the cause of this differential responsiveness, but find evidence that the fact that the affluent are more likely to vote did not adequately explain their observations. *Id.* at 22.

- 99 Jesse H. Rhodes & Brian F. Schaffner, *Economic Inequality and Representation in the U.S. House: A New Approach Using Population-Level Data* (Apr. 7, 2013), <http://people.umass.edu/schaffne/Schaffner.Rhodes.MPSA.2013.pdf> (finding members of Congress are more responsive to the wealthy than their poor constituents); Michael Barber, *Representing the Preferences of Donors, Partisans, and Voters in the U.S. Senate* (Feb. 4, 2015), http://static1.squarespace.com/static/51841c73e4b04fc5ce6e8f15/t/54d24b75e4b00dd8790cf694/1423068021478/paper_poq_unblinded.pdf (finding that senators' ideological preferences reflect the preferences of the average donor better than any other group studied).
- 100 MICHAEL J. MALBIN & SEAN A. CAIN, CAMPAIGN FINANCE INSTITUTE, *THE UPS AND DOWNS OF SMALL AND LARGE DONORS* 4 (2007), http://www.cfinst.org/books-reports/SmallDonors/Small-Large-Donors_June2007.pdf. After BCRA's passage, the large contribution portion dropped to 20 percent.
- 101 Stephen Ansolabehere & James M. Snyder, Jr., *Soft Money, Hard Money, Strong Parties*, 100 COLUM. L. REV. 598, 607 (2000).
- 102 Seth Gitell, *Making Sense of McCain-Feingold and Campaign-Finance Reform*, THE ATLANTIC, July 1, 2003, <http://www.theatlantic.com/magazine/archive/2003/07/making-sense-of-mccain-feingold-and-campaign-finance-reform/302758/>.
- 103 *Top Soft Money Donors*, CENTER FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/bigpicture/softtop.php>.
- 104 Neil Reiff & Don McGahn, *A Decade of McCain-Feingold*, CAMPAIGNS & ELECTIONS, APR. 16, 2014, <http://www.campaignsandelections.com/magazine/us-edition/445782/a-decade-of-mccainfeingold.shtml>.
- 105 See Michael S. Kang, *The Brave New World of Party Campaign Finance Law*, 101 CORNELL L. REV. (forthcoming 2015) (“It is difficult to believe that de-regulating the parties to engage in the same type of courting and solicitation of the very wealthy as Super PACs will do anything to correct the ongoing distributional shift of the campaign finance system toward the interests of the very wealthy.”).
- 106 Joseph Fishkin & Heather K. Gerken, *The Party's Over: McCutcheon, Shadow Parties, and the Future of the Party System*, 2014 SUP. CT. REV. 175, 204 (2014).
- 107 *Id.*
- 108 IAN VANDEWALKER, BRENNAN CENTER FOR JUSTICE, *ELECTION SPENDING 2014: OUTSIDE SPENDING IN SENATE RACES SINCE CITIZENS UNITED* 8 (2015), <http://www.brennancenter.org/publication/election-spending-2014-outside-spending-senate-races-citizens-united>.

- 109 “Itemized” contributions are those of more than \$200 over an election cycle. While revenue from smaller contributions can be reported in bulk, donations of more than \$200 must be reported along with the donor’s name and other information. 52 U.S.C. § 30104(b)(3)(A).
- 110 See LARRY J. SABATO & HOWARD R. ERNST, *ENCYCLOPEDIA OF AMERICAN POLITICAL PARTIES AND ELECTIONS* 162-63 (2007).
- 111 Charlotte Alter, *Voter Turnout in Midterm Elections Hits 72-Year Low*, TIME, Nov. 10, 2014, <http://time.com/3576090/midterm-elections-turnout-world-war-two/>.
- 112 See, e.g., Trip Gabriel, *‘Super PACs’ Take on New Role: Organizing Voters*, N.Y. TIMES, July 7, 2015, <http://www.nytimes.com/2015/07/08/us/politics/super-pacs-take-on-new-role-organizing-voters.html>.
- 113 Robert Kelner & Raymond La Raja, *McCain-Feingold’s Devastating Legacy*, WASH. POST, Apr. 11, 2014, http://www.washingtonpost.com/opinions/mccain-feingolds-devastating-legacy/2014/04/11/14a528e2-c18f-11e3-bcec-b71ee10e9bc3_story.html.
- 114 Joseph Fishkin & Heather K. Gerken, *The Party’s Over: McCutcheon, Shadow Parties, and the Future of the Party System*, 2014 SUP. CT. REV. 175, 212 (2014).
- 115 Cf. THOMAS E. MANN & E.J. DIONNE, JR., *THE FUTILITY OF NOSTALGIA AND THE ROMANTICISM OF THE NEW POLITICAL REALISTS* 23 (2015), <http://www.brookings.edu/research/reports2/2015/06/futility-nostalgia-romanticism-new-political-realists-mann-dionne> (“Policy changes that significantly increase the number of voters and small donors while capping the amounts wealthy individuals can give would still provide an important counterforce to the plutocratic trends in our politics.”).
- 116 Other forms of public financing could also be considered. Richard Pildes has suggested grants to parties rather than matching small private donations. Richard H. Pildes, *Focus on Political Fragmentation, Not Polarization: Re-Empower Party Leadership*, in *SOLUTIONS TO POLITICAL POLARIZATION IN AMERICA* 146, 152, 155 (Nathaniel Persily, ed., 2015). Bruce Cain recommends experimenting with vouchers. Bruce Cain, *Two Approaches to Lessening the Effects of Partisanship*, in *SOLUTIONS TO POLITICAL POLARIZATION IN AMERICA* 157, 159-62 (Nathaniel Persily, ed., 2015).
- 117 See ADAM SKAGGS & FRED WERTHEIMER, *EMPOWERING SMALL DONORS IN FEDERAL ELECTIONS* 14-15 (2012), <http://www.brennancenter.org/publication/empowering-small-donors-federal-elections> (explaining benefits of a small-donor multiple-match public financing system for federal candidates).

- 118 See SUNDEEP IYER, ELISABETH GENN, BRENDAN GLAVIN & MICHAEL J. MALBIN, DONOR DIVERSITY THROUGH PUBLIC MATCHING FUNDS (2012), <http://www.brennancenter.org/publication/donor-diversity-through-public-matching-funds> (finding that the small-donor matching system in New York City has advanced the diversity of campaign donors and encouraged engagement).
- 119 See generally Magnus Ohman, International IDEA, *Introduction to Political Finance*, in FUNDING OF POLITICAL PARTIES AND ELECTION CAMPAIGNS: A HANDBOOK ON POLITICAL FINANCE (Elin Falguera et al. eds., 2014), <http://www.idea.int/publications/funding-of-political-parties-and-election-campaigns/loader.cfm?csModule=security/getfile&pageID=64347>.
- 120 MICHAEL G. MILLER, SUBSIDIZING DEMOCRACY: HOW PUBLIC FINANCING CHANGES ELECTIONS AND HOW IT CAN WORK IN THE FUTURE 40-41 (2014); ANGELA MIGALLY, SUSAN LISS & FREDERICK A.O. SCHWARTZ, JR., SMALL DONOR MATCHING FUNDS: THE NYC ELECTION EXPERIENCE 13-16 (2010), <http://www.brennancenter.org/publication/small-donor-matching-funds-nyc-election-experience>. Although the existence of unlimited outside spending is still a potential avenue for large donor influence.
- 121 See, e.g., Richard H. Pildes, *Focus on Political Fragmentation, Not Polarization: Re-Empower Party Leadership*, in SOLUTIONS TO POLITICAL POLARIZATION IN AMERICA 146, 155 (Nathaniel Persily, ed., 2015) (expressing concern that matching small donations will “exacerbate polarization and fragmentation”). Inasmuch as polarization is an issue for matching funds, the effect may be possible to address in designing the public financing system. Examples like Michelle Bachman, who raised large amounts of money from small donations with polarizing rhetoric, tend to depend on out-of-state contributions. A public financing system can blunt this effect by only matching donations from in-state or in-district. See Adam Bonica, *Leadership, Free to Lead*, BOSTON REV., July 22, 2011, <https://www.bostonreview.net/bonica-small-donors-polarization>.
- 122 See THOMAS E. MANN & ANTHONY CORRADO, PARTY POLARIZATION AND CAMPAIGN FINANCE 15-16 (2014), http://www.brookings.edu/-/media/research/files/papers/2014/07/polarization-and-campaign-finance/mann-and-corrado_party-polarization-and-campaign-finance.pdf (summarizing evidence and arguing that small donors are unlikely to be more polarized than the large donors who currently dominate); Raymond J. La Raja & David L. Wiltse, *Don't Blame Donors for Ideological Polarization of Political Parties*, 40 AM. POL. RESEARCH 501 (Dec. 2012), at 519, 524. (“It appears that major donors (giving excess of US\$200) appear somewhat more ideological than small donors....”); Michael J. Malbin, *Small Donors: Incentives, Economies of Scale, and Effects*, 11 FORUM 385, 395-97 (2013) (critiquing arguments that small donors are especially polarized and noting that the incumbents from both parties with the most small-donor receipts were randomly distributed across their party’s ideological spectrum).

- 123 SUNDEEP IYER, ELISABETH GENN, BRENDAN GLAVIN & MICHAEL MALBIN, DONOR DIVERSITY THROUGH PUBLIC MATCHING FUNDS (2012), <http://www.brennancenter.org/publication/donor-diversity-through-public-matching-funds>.
- 124 424 U.S. 1 (1976).
- 125 52 U.S.C. § 30116(d)(4).
- 126 FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 451-52 (2001).
- 127 See Eric Lichtblau, *F.E.C. Can't Curb 2016 Election Abuse, Commission Chief Says*, N.Y. TIMES, May 2, 2015, <http://www.nytimes.com/2015/05/03/us/politics/fec-cant-curb-2016-election-abuse-commission-chief-says.html>; Fredreka Schouten, *Two FEC Officials Implore Agency to Curb 2016 Election Abuse*, USA TODAY, June 8, 2015, <http://www.usatoday.com/story/news/politics/elections/2016/2015/06/08/fec-commissioners-ravel-and-weintraub-petition-campaign-finance/28674981/>. Under these circumstances, we therefore do not endorse the recent proposal to eliminate party coordination restrictions as part of the appropriations process. See Paul Blumenthal, *Mitch McConnell Rider Could Roll Back Campaign Finance Laws*, HUFFINGTON POST, Dec. 1, 2014, http://www.huffingtonpost.com/2014/12/01/mitch-mcconnell-campaign-finance_n_6251380.html.
- 128 See ANTHONY J. CORRADO, MICHAEL J. MALBIN, THOMAS E. MANN & NORMAN J. ORNSTEIN, REFORM IN AN AGE OF NETWORKED CAMPAIGNS: HOW TO FOSTER CITIZEN PARTICIPATION THROUGH SMALL DONORS AND VOLUNTEERS 49 (2010), http://www.brookings.edu/~media/research/files/reports/2010/1/14-campaign-finance-reform/0114_campaign_Finance_reform.pdf (critiquing the current system of limited coordinated spending and unlimited independent spending); THOMAS E. MANN & E.J. DIONNE, JR., THE FUTILITY OF NOSTALGIA AND THE ROMANTICISM OF THE NEW POLITICAL REALISTS 23 (2015), <http://www.brookings.edu/research/reports2/2015/06/futility-nostalgia-romanticism-new-political-realists-mann-dionne> (noting that eliminating caps on coordinated party spending could be part of a constructive policy package).
- 129 52 U.S.C. § 30116(a)(4).
- 130 One interviewee cautioned, however, against creating a new, highly fact-dependent definition of “coordination” only for parties, such as the one proposed in 2014 by Senate Majority Leader Mitch McConnell, arguing that the confusion and uncertainty likely to result from having two different standards would outweigh any benefit, particularly for state and local party organizations. Telephone Interview with Neil Reiff, Founding Member, Sandler Reiff Lamb Rosenstein & Birkenstock (Feb. 12, 2015).

- 131 Michael Malbin has argued “the parties should be able to make unlimited coordinated expenditures – but only from contributions they raise from donors who give them \$1,000 or less.” Press Release, Campaign Finance Institute, CFI’s Malbin Calls for “A Third Approach” to Party Coordination, Dec. 8, 2014, http://www.cfinst.org/Press/PReleases/14-12-08/CFI%E2%80%99s_Malbin_Calls_For_%E2%80%9CA_Third_Approach%E2%80%9D_to_Party_Coordination.aspx. Spencer Overton has argued that the state has an interest in increasing political participation, distinct from the anti-corruption interest, and suggested allowing “parties to make unlimited coordinated expenditures in support of candidates but only from small donors who give \$200 or less.” Spencer Overton, *The Participation Interest*, 100 GEO. L.J., 1259, 1299-1300 (2012).
- 132 *McConnell*, 540 U.S. at 97 (“Recognizing that the close ties between federal candidates and state party committees would soon render § 323(a)’s anticorruption measures ineffective if state and local committees remained available as a conduit for soft-money donations, Congress designed § 323(b) to prevent donors from contributing nonfederal funds to such committees to help finance ‘Federal election activity’”).
- 133 There is an exception for “Levin” funds, but that it is rarely used. 52 U.S.C. § 30125(b).
- 134 Byron Tau, *Last Call for State Parties?*, POLITICO, Feb. 16, 2014, <http://www.politico.com/story/2014/02/last-call-for-state-parties-103559.html>; Neil Reiff & Don McGahn, *A Decade of McCain-Feingold*, CAMPAIGNS & ELECTIONS, Apr. 16, 2014, <http://www.campaignsandelections.com/magazine/us-edition/445782/a-decade-of-mccainfeingold.html>. Ironically, moreover, in one of the few states that has stricter limits for parties, advocates have argued that BCRA’s federalization of state and local party activities actually functions to preempt these more stringent laws. See Jon Lender, *Agency Sues to Force Democratic Party to Comply with Subpoena for Malloy Documents*, HARTFORD COURANT, Aug. 6, 2015, <http://www.courant.com/politics/hc-subpoena-enforcement-0807-20150806-story.html>.
- 135 See Michael J. Malbin, *McCutcheon Could Lead to No Limits for Political Parties — With What Implications for Parties and Interest Groups?*, 89 N.Y.U. L. REV. (ONLINE SYMPOSIUM) 92, 100 (2014) (suggesting removing federal contribution limits on state parties’ registration and GOTV activities).
- 136 These are examples of mechanisms that local parties use to engage ordinary citizens.
- 137 See 52 U.S.C. § 30101(4)(C).

- 138 See FEDERAL ELECTION COMMISSION, LEGISLATIVE RECOMMENDATIONS OF THE FEDERAL ELECTION COMMISSION 2013 (2013), <http://www.fec.gov/law/legrec2013.pdf>. We are indebted to Commissioner Lee Goodman for pointing this area of agreement out to us.
- 139 *Citizens United*, 558 U.S. at 371.
- 140 DANIEL I. WEINER, BRENNAN CENTER FOR JUSTICE, *CITIZENS UNITED FIVE YEARS LATER* 7 (2015), <https://www.brennancenter.org/publication/citizens-united-five-years-later>.
- 141 52 U.S.C. § 30104(b)(3)(A).
- 142 52 U.S.C. § 30118(a).
- 143 MARK SCHMITT, POLITICAL OPPORTUNITY: A NEW FRAMEWORK FOR DEMOCRATIC REFORM (2015), <https://www.brennancenter.org/publication/political-opportunity-new-framework-democratic-reform>; Spencer Overton, *The Participation Interest*, 100 GEO. L.J., 1259, 1300-01 (2012).
- 144 Raymond J. La Raja, *Political Participation and Civic Courage: The Negative Effect of Transparency on Making Small Campaign Contributions*, 36 POLITICAL BEHAVIOR 753 (2013) (describing survey responses indicating donors were less likely to give if they knew their names could be made public).
- 145 See e.g., *Nat'l Org. for Marriage v. McKee*, 669 F.3d 34, 41 (1st Cir. 2012) (disclosure of even relatively small donors can further the state's informational interests by "ensur[ing] that the electorate will have access to information regarding the driving forces backing or opposing" a candidate or ballot initiative); *Delaware Strong Families v. Attorney General of Delaware*, No. 14-1887, ___ F.3d ___, 2015 WL 4289460 (3d Cir. July 16, 2015) (same).
- 146 See 52 U.S.C. §§ 30116(a)(4), 30116(c).
- 147 The FEC's enforcement shortcomings play a role here as well, since the Commission cannot be relied upon to enforce the safeguards against circumvention of base contribution limits — like earmarking and anti-proliferation rules — that the *McCutcheon* plurality posited as alternatives to aggregate limits. See *McCutcheon*, 134 S. Ct. at 1455-56 (plurality opinion); Daniel I. Weiner, *McCutcheon's Anti-Circumvention Folly*, BRENNAN CENTER FOR JUSTICE BLOG, Apr. 9, 2014, at <http://www.brennancenter.org/blog/mccutcheon-anti-circumvention-folly>.
- 148 540 U.S. at 224.

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