

THE BRAVE NEW WORLD OF PARTY CAMPAIGN FINANCE LAW

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The Article challenges calls for the deregulation of party campaign finance as part of the ongoing transformation of federal campaign finance law under the Roberts Court. First, on the legal front, the Article presents a new constitutional approach to campaign finance corruption that builds on the basic premise that what can be plausibly exchanged between an individual contributor and individual officeholder, can be plausibly exchanged between a contributor and a group of officeholders, who agree to coordinate. This intuition about collective quid pro quo corruption stays faithful to the basic conception of quid pro quo exchange as its defining harm, just as the Roberts Court insists, but allows for pragmatic sensibilities about a campaign finance system in which officeholders and candidates are thoroughly interconnected by party ties. Second, on the policy front, the Article engages normative appeals to deregulate party campaign finance and centralize campaign finance in the parties as a response to the rise of Super PACs and other outside groups. I skeptically assess the consequences of deregulating party campaign finance and argue that campaign finance law should rediscover central concerns about distributional representation, rather than focusing too narrowly on the balance of power among party elites.

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INTRODUCTION

Jim Bopp, the conservative campaign finance lawyer coordinating the ongoing deconstruction of the federal campaign finance system, predicted confidently in a recent interview that “[w]e’re in the endgame, ‘It’s already begun.’”¹ It is hard to argue with him. A Rehnquist Court that routinely upheld campaign finance regulation against constitutional challenges has given way to a Roberts Court that consistently strikes down nearly every kind of campaign finance regulation it has reviewed, from aggregate contribution limits, to restrictions on corporate electioneering, to public financing.² This methodical dismantling of campaign finance law, orchestrated by the tag team of Jim Bopp and Justice Anthony Kennedy, has narrowed the government’s regulatory interest in campaign finance to little more than restrictions on candidates and parties. Now, their crosshairs may target one of the final remaining categories of regulation—restrictions on party-related campaign finance.

Given the Roberts Court’s skepticism about campaign finance regulation, it might seem inevitable that judicial deregulation of party campaign finance ends up a final piece in Jim Bopp’s putative endgame. Indeed, as I will explain, the constitutional analysis that would authorize party-sponsored Super PACs also could well prove an existential threat to campaign

¹ James Bennet, *The New Price of American Politics*, ATLANTIC, Oct. 2012, at 66, 68.
² See *infra* Part I.

finance reform, leaving almost nothing left of the federal campaign finance system in the end. Arguments that did not gain traction with the Rehnquist Court are finding their audience with the Roberts Court intent on cabining the government's anticorruption interest to a very narrow view of quid pro quo exchange.

However the Roberts Court proceeds, a strict view of quid pro quo corruption under *Buckley v. Valeo*³ does not necessarily compel the deregulation of party campaign finance. This Article presents a simple extension of the Court's approach to quid pro quo corruption that would encompass the regulation of party campaign finance.⁴ The Court's paradigmatic framing of quid pro quo exchanges envisions them occurring in pairwise fashion between an individual contributor and individual officeholder, with officeholders each acting alone and exclusively positioned to offer the necessary quids in exchange for campaign money. The Article builds on the basic premise that what can be plausibly exchanged between an individual contributor and individual officeholder can similarly be exchanged between a contributor and a *group* of officeholders who agree to cooperate. To the extent that the government can regulate the risk of the former quid pro quo exchange at the individual level, the government should be able to reasonably regulate the risk of the latter quid pro quo exchange involving a group of officeholders acting together at a collective level.

In fact, the contemplation of group-level quid pro quo better maps the realities of campaign finance where the major parties pervasively coordinate both campaign finance and lawmaking. The Court's conception of corruption, in which individual candidates and officeholders operate entirely in isolation from others, is absurdly simplistic given the major parties' comprehensive involvement in nearly every aspect of American politics. The major parties are constituted at their core by candidates and officeholders and have as their *raison d'être* the efficient coordination of their candidates' and officeholders' campaign finance and lawmaking activity. The formal party committees regulated by campaign finance law are essentially a collection of party candidates and officeholders who largely raise the committees' funds, direct their spending, and coordi-

³ 424 U.S. 1 (1976).

⁴ See generally Michael S. Kang, *Party-Based Corruption and McCutcheon v. FEC*, 108 NW. U. L. REV. ONLINE 240, 240–45 (2014) (presenting initial thoughts for this direction as applied prospectively to *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014), since decided).

nate their activity with other aspects of party business. Even though group-level, party-mediated corruption does not characterize all of what parties do, just so, individual-level corruption does not necessarily characterize a great deal of what individual candidates and officeholders do. Nonetheless, the plausible risk of corruption provides a constitutional basis for the reasonable regulation of both.

The law of campaign finance currently does not track the potential for group-level, party-based corruption in today's politics. Part of campaign finance law's failure to track contemporary campaign finance is the ironic result of the Rehnquist Court's earlier *sympathy* for the government's interest in regulating campaign finance. By eagerly adopting broader expansions of the government's regulatory interest beyond the paradigm of quid pro quo corruption, the Rehnquist Court obviated the need to complicate the core conception of quid pro quo corruption. Now that the Roberts Court has rejected those broader expansions, the Roberts Court is retreating to a core conception of quid pro quo corruption that is disappointingly underdeveloped and does not track contemporary concerns about modern campaign finance. A group-based approach to quid pro quo corruption offers a new path forward for campaign finance law. It is a new path for either the Roberts Court, or more likely, a future Court less hostile to campaign finance reform and willing to build on intellectual groundwork set forth now only in dissent.

This Article demonstrates how such an approach would apply to several pressing issues of party campaign finance law the Roberts Court will soon confront. I explain that the federal prohibition on contributions by federal contractors, as well as similar state pay-to-play laws, rely implicitly on a group-level intuition about quid pro quo corruption. These prohibitions target a specific class of potential contributors with concrete private gains to be immediately realized through quid pro quo corruption. As such, the blanket prohibitions draw from the intuition that party relationships require broader prohibitions to cut off party-related campaign finance which might consummate quid pro quo deals through the party relationships intrinsic to federal lawmaking. I next revisit the federal prohibition on party soft money, which is under similar criticism and legal challenge as the federal pay-to-play law. I argue that the Rehnquist Court was justified in upholding the federal soft money ban but could have relied on a group-level theory of corruption more faithful to the original *Buckley* conception of quid pro quo

exchanges. Finally, I criticize the arrival of the party-sponsored Super PAC, at least as it has been introduced at the state level and advocated at the federal level. I explain that the constitutional analysis that might shield a party Super PAC from government restriction opts for reflexive formalism over a sensible understanding of the government's interest in campaign finance regulation. The same analysis could lead ultimately to campaign finance law that regulates only direct contributions to candidates themselves and almost nothing else.⁵

In the end, however, the push for deregulating party campaign finance might surprisingly be more political than constitutional.⁶ Not long ago, the policy question whether to deregulate party campaign finance would have been addressed on its merits within a larger context of a fully functional federal campaign finance system. But today, any policy question about campaign finance law occurs within a campaign finance system that already has been thoroughly deregulated under the Roberts Court. *Citizens United v. FEC* helped usher in the nearly complete deregulation of independent electioneering, free of source restrictions on corporations that had applied for nearly a century and of contribution limits on nonconnected committees since the Federal Election Campaign Act (FECA) amendments.⁷ Following such rapid transformation of the campaign finance ecosystem, political consensus about the proper direction of regulation has dissolved.

The normative case now for the traditional campaign finance regulation of parties is far less clear than it was within the comprehensively regulated system of not long ago. Today, commentators from the political left and right are pushing for deregulating party campaign finance based on the shifting balance of power between the major parties and outside groups, including nonconnected Super PACs and 501(c) organizations

⁵ This sort of formalism already prevails, at least so far, as applied to the use of Super PACs for preliminary campaigning by formally undeclared presidential candidates. See *infra* subpart III.C.

⁶ We have already seen this in recent omnibus legislation. See Russell Berman, *The Most Corrupting Campaign-Finance Provisions Ever Enacted*, ATLANTIC (Dec. 10, 2014), <http://www.theatlantic.com/politics/archive/2014/12/Campaign-Finance-Rider-Hidde-Inside-Congress-New-Spending-Bill/383629/> [<http://perma.cc/Q8NN-JFZX>] (criticizing congressional privatization of party fundraising for the national party conventions).

⁷ See generally Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1, 14–21, 27–40 (2012) (narrating this transformation of campaign finance law surrounding *Citizens United*).

deregulated since *Citizens United*.⁸ These outside groups boast nearly unlimited fundraising capacity but come without the same level of political accountability and responsibility as the major parties. Commentators hope that giving party committees similar fundraising capacity through deregulation would increase their influence vis-à-vis outside groups and reverse the decentralization of party politics in this Super PAC era.⁹ So too, the formal party committees might exploit their deregulation to reposition themselves more firmly in the center of today's campaign finance world that has shifted centrifugally so far in the direction of outside groups. Centralizing campaign finance back in the formal parties might moderate partisan polarization against countervailing sources of fragmentation and ideological extremism.

The normative concern with this analysis is that it may focus too heavily on this balance of power among political actors to the neglect of important distributional concerns about representation. It is difficult to believe that deregulating the parties to engage in the same type of courting and solicitation of the very wealthy as Super PACs will do much to mitigate the ongoing distributional shift of the campaign finance system toward the interests of the very wealthy. A worrisome empirical literature is documenting how the democratic system appears to respond overwhelmingly to the stratified preferences of the wealthiest Americans, who also happen to account for the preponderance of campaign financing.¹⁰ Allowing parties to engage in deregulated campaign finance, focused on fundraising ever larger amounts from the same very wealthy donors, may do more good than harm in this sense. A party Super PAC, for instance, could encourage parties to behave more Super PAC than party, given the influence and ideological preferences of the few wealthy donors on which it would depend.

Part I of the Article presents the Rehnquist Court's approach to campaign finance law and the anticorruption interest. It explains how the Rehnquist Court failed to develop a

⁸ See *infra* subpart III.C; see also KENNETH P. VOGEL, *BIG MONEY: 2.5 BILLION DOLLARS, ONE SUSPICIOUS VEHICLE, AND A PIMP—ON THE TRAIL OF THE ULTRA-RICH HIJACKING AMERICAN POLITICS* 181 (2014) (noting that the 2012 elections were the first in which outside groups spent more, \$2.5 billion, than the major parties, at \$1.6 billion combined).

⁹ See Kang, *supra* note 7, at 55 ("Deregulation of contributions to candidates and parties might make them relatively more attractive to political sponsors, who thus might contribute directly rather than underwrite independent expenditures by outside groups.")

¹⁰ See *infra* subpart II.B.

richer conception of quid pro quo corruption, relying on alternate theories of corruption to uphold campaign finance regulation. This failure became a vulnerability that the Roberts Court has exploited in rolling back much of the Rehnquist Court's campaign finance jurisprudence. Part II introduces the path not taken by the Rehnquist Court—a group-level theory of quid pro quo corruption that provides a constitutional basis for government regulation of modern party campaign finance. Part III then applies this group-level theory of corruption to three controversies over party campaign finance: pay-to-play laws, party soft money, and party-sponsored Super PACs. Finally, Part IV describes, assesses, and challenges the normative case for deregulating party campaign finance. It criticizes the case for deregulation as too focused on the balance of power among elite political actors and neglectful of the distributional inequalities of the current campaign finance system.

I

THE CAMPAIGN FINANCE LAW OF THE REHNQUIST COURT, AND THEN THE ROBERTS COURT

*Buckley v. Valeo*¹¹ set the terms for campaign finance law that endure today, and the first thirty years of campaign finance law under *Buckley* are largely a story of judicial deference. After sorting out the basic parameters of campaign finance law, the Court generally upheld a growing body of campaign finance regulation within those broad parameters and beyond.¹² In *Buckley* itself, the Court decided the constitutionality of the comprehensive system of campaign finance regulation enacted by Congress in its 1974 amendments to FECA.¹³ The Court ruled that campaign finance actually constituted First Amendment expression and association, rather than mere expressive conduct, and therefore applied the First Amendment to its regulation under FECA. However, the Court also critically decided that the government held “a sufficiently important interest” in the prevention of quid pro quo corruption, and the appearance thereof, to support certain forms of campaign finance regulation against constitutional challenge.¹⁴

Under this framework, the Court upheld FECA's contribution limits but struck down as unconstitutional FECA's com-

¹¹ 424 U.S. 1 (1976).

¹² See *infra* notes 22–25 and accompanying text.

¹³ Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 1.

¹⁴ *Buckley*, 424 U.S. at 25.

plementary limits on expenditures. The Court reasoned that contribution limits imposed “only a marginal restriction upon the contributor’s ability to engage in free communication”¹⁵ and served the anticorruption interest “without directly impinging upon the rights of individual citizens and candidates to engage in political debate and discussion.”¹⁶ Following this reasoning, the Court upheld the contribution limits as serving “weighty interests . . . sufficient to justify the limited effect” of the FECA contribution limits by regulating actual exchanges with candidates that raise the strongest worry about a quid pro quo agreement.¹⁷

By contrast, the Court applied strict scrutiny to FECA’s expenditure limits and struck them down. It explained that expenditure limits “impose significantly more severe restrictions on protected freedoms of political expression and association.”¹⁸ Expenditure limits, by directly limiting how much any speaker can spend on campaign speech, “necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.”¹⁹ What is more, expenditure limits restrict independent expenditures that, as the Court saw it at the time, do not present risks of actual or apparent corruption comparable to large contributions. The Court contrasted independent expenditures from contributions to candidates, in that “[t]he absence of prearrangement and coordination of an expenditure with the candidate . . . alleviates the danger that expenditures will be given as a *quid pro quo*”²⁰

This basic framework from *Buckley* survived almost four decades of constitutional litigation. The result, at least until the Roberts Court, was a general policy of judicial deference to the government in campaign finance law within these broad parameters.²¹ For thirty years following *Buckley*, the Court upheld every type of contribution limit whose constitutionality it was asked to adjudicate.²² Not only did the Court uphold

¹⁵ *Id.* at 20–21.

¹⁶ *Id.* at 58.

¹⁷ *Id.* at 29.

¹⁸ *Id.* at 23.

¹⁹ *Id.* at 19.

²⁰ *Id.* at 47.

²¹ Different constitutional rules, however, apply outside of direct democracy. See *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 786–95 (1978) (striking down a Massachusetts statute prohibiting banks and corporations from campaigning for or against ballot measures that did not materially impact their business).

²² See Nathaniel Persily, *Fig Leaves and Tea Leaves in the Supreme Court’s Recent Election Law Decisions*, 2008 SUP. CT. REV. 89, 109–10 (“From *Buckley* v

contribution limits, it specified that a contribution limit could be unconstitutionally too low only if it “was so radical in effect as to render political association ineffective, drive the sound of a candidate’s voice below the level of notice, and render contributions pointless.”²³ Likewise, the Court routinely upheld different forms of campaign finance disclosure under *Buckley*’s robust endorsement of disclosure as means for combating corruption and informing voters.²⁴ Of course, the Court also struck down expenditure limits so consistently under *Buckley* that campaign finance reformers ceased legislating them in any straightforward fashion.²⁵

Although *Buckley* has survived for decades, few decisions have been subject to greater pressure.²⁶ *Buckley*’s identification of anticorruption as the prerequisite government interest for campaign finance regulation has received particular pressure.²⁷ The constitutional focus on anticorruption has channeled legal justifications for campaign finance regulation even while much of the political impetus for campaign finance regulation is driven by equality considerations.²⁸ As a practical matter, it is no secret that campaign finance reform is motivated in important part by worries about the translation of economic inequality into political inequality.²⁹ For those concerned about money’s influence in politics, the legal restriction of money in the electoral process checks the disproportionate influence of the wealthy and reinforces democratic norms of political equality.³⁰ But *Buckley* expressly rejected a govern-

Valeo until *Randall v. Sorrell*, contribution limits appeared almost untouchable by the Supreme Court.” (footnotes omitted)); Kathleen M. Sullivan, *Introduction to Symposium: Law of Democracy*, 18 STAN. L. & POLY REV. 234, 236 (2007) (noting that *Randall v. Sorrell*, 548 U.S. 230 (2006), represented the first time that the Court struck down a contribution limit as too low to survive First Amendment challenge).

²³ *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 397 (2000).

²⁴ *See Buckley*, 424 U.S. at 66–68.

²⁵ *See Randall v. Sorrell*, 548 U.S. 230, 237–39 (2006).

²⁶ *See* Samuel Issacharoff, *Market Intermediaries in the Post-Buckley World*, 89 N.Y.U. L. REV. ONLINE 105, 105 (2014) (remarking that “*Buckley v. Valeo* is extraordinarily stable for such an unpopular decision” (footnotes omitted)).

²⁷ *See id.* at 108–09.

²⁸ *See* Strauss, *infra* note 29.

²⁹ *See* David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1371–80 (1994) (identifying equality as the motivating interest for campaign finance reform).

³⁰ *See* Richard Briffault, *On Dejudicializing American Campaign Finance Law*, 27 GA. ST. U. L. REV. 887, 914 (2011) (“Political equality is undermined when some individuals or interest groups with greater private wealth than others can draw on those resources to make more extensive appeals to the electorate than can those with fewer resources.”); Cass R. Sunstein, *Political Equality and Unintended Circumstances*, 94 COLUM. L. REV. 1390, 1392 (1994) (endorsing a campaign finance

ment interest in “equalizing the relative ability of individuals and groups to influence the outcome of elections,” another principle from *Buckley* that has endured since.³¹ There is thus a fundamental tension between an important part of the democratic justifications for campaign finance regulation and the legal justifications necessary to defend it against constitutional attack in court.

During the Rehnquist Court, this tension mediated a steady expansion of what campaign finance regulation was permissible under the anticorruption interest. Once the campaign finance landscape settled after *Buckley*, the Rehnquist Court generally upheld regulation under various elaborations on the core government interest in the prevention of quid pro quo corruption.³² The clearest example of the Court striving to reconcile equality concerns with the anticorruption interest was *Austin v. Michigan Chamber of Commerce*.³³ There, the Court upheld a Michigan prohibition on corporate expenditures, modeled after the analogous FECA provision, by affirming the government’s interest in preventing “a different type of corruption in the political arena” than the usual quid pro quo discussed in *Buckley*.³⁴ The Court explained that the state law in *Austin* checked the “corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form.”³⁵ In other words, the Court upheld the law based on its effect of leveling out wealth disparities, abetted by the advantages of incorporation, that potentially diverge from the actual distribution of public opinion in the citizenry.³⁶ This interpretation of the government’s anticorruption interest departed markedly from the core *Buckley* concern about quid pro quo exchanges and swung obviously toward equality con-

interest in preventing the wealthy from “translat[ing] their wealth into political influence”).

³¹ 424 U.S. 1, 48 (1976).

³² See Richard L. Hasen, *Rethinking the Unconstitutionality of Contribution and Expenditure Limits in Ballot Measure Campaigns*, 78 S. CAL. L. REV. 885, 887–90 (2005) (describing the Rehnquist Court’s deference to government in campaign finance).

³³ 494 U.S. 652, 658–59 (1990).

³⁴ *Id.* at 659–60.

³⁵ *Id.*

³⁶ See Elizabeth Garrett, *New Voices in Politics: Justice Marshall’s Jurisprudence on Law and Politics*, 52 HOW. L.J. 655, 670–78 (2009) (disclosing as Justice Thurgood Marshall’s clerk during the *Austin* Term that his opinion articulated a government interest in campaign finance equalization but needed to disguise itself as a matter of anticorruption to command a Court majority).

cerns the Court had rejected earlier when presented with them more forthrightly in *Buckley* and *Bellotti*.³⁷

The Court embraced another extension of anticorruption in *McConnell v. FEC* to uphold federal prohibitions on party soft money.³⁸ Beginning in the 1980s, the national parties exploited a nuance in federal campaign finance regulation under which they could collect unlimited money from virtually any domestic source provided they spent it on so-called party-building and issue advocacy rather than express electioneering.³⁹ The parties' unrestricted collection of this soft money surged to the point that it constituted almost half the total money they collected in 2000.⁴⁰ In response, Congress enacted a federal ban that prohibited the national party committees from receiving and spending this soft money, requiring instead that all donations to the national party committees comply with federal restrictions previously applicable only to so-called hard money spent on express advocacy and campaigning.⁴¹

The Court upheld the soft money ban by relying heavily on the notion that the anticorruption interest encompassed the prevention of undue influence. The Court explained that "Congress' legitimate interest extends beyond preventing simple cash-for-votes corruption to curbing 'undue influence on an officeholder's judgment, and the appearance of such influence.'"⁴² Although the *McConnell* plaintiffs argued that the government did not prove a single instance of an actual quid pro quo in the record, the Court dismissed a narrow focus on quid pro quo exchanges as a "crabbed view of corruption."⁴³ Instead, the government was constitutionally entitled to address "more subtle but equally dispiriting forms of corruption" in "the danger that officeholders will decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions."⁴⁴ The danger of undue influence justified the restriction of soft money to the national parties, who themselves had sold access to party officeholders for soft money contributions.

³⁷ See *id.* (observing that Justice Marshall, author of *Austin*, was primarily motivated by equality concerns in the decision).

³⁸ 540 U.S. 93, 161 (2003).

³⁹ See Richard Briffault, *Soft Money Reform and the Constitution*, 1 ELECTION L.J. 343, 345 (2002).

⁴⁰ See *id.* at 347.

⁴¹ See *id.* at 343.

⁴² *McConnell*, 540 U.S. at 150 (quoting *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 441 (2001)).

⁴³ *Id.* at 152.

⁴⁴ *Id.* at 153.

By these turns, the Court elided the potential restrictiveness of the quid pro quo framework. The Rehnquist Court ostensibly held its ground on the exclusivity of the anticorruption interest as predicate to campaign finance regulation. It turned away explicit appeals to equality as constitutionally permissible interests for the government to pursue through regulation.⁴⁵ However, a Rehnquist Court basically sympathetic to the post-*Buckley* state of campaign finance reform stretched the anticorruption framework to permit regulation in a number of decisions where the fit was not intuitive. The Court expanded what the interest encompassed not only to distortion in *Austin* and undue influence in *McConnell*, but repeatedly in other key decisions as well.⁴⁶ The Court placed more emphasis on the government's interest in the prevention of not just actual corruption but its appearance.⁴⁷ And in the government's empirical substantiation of worries about the appearance of corruption, the Court applied a deferential standard to the proposition that restrictions on contributions help address them.⁴⁸ What is more, the Court earlier upheld contribution limits on donations even to nonconnected PACs that themselves could not engage directly in quid pro quo exchanges with their contributors.⁴⁹

The consequence of the Court's flexibility was that there was less need to press the outer limits of what the anticorruption interest might logically accommodate even when focused narrowly on quid pro quo exchanges. In other words, the government successfully defended regulation by convincing the Rehnquist Court to expand the definition of anticorruption beyond the core target of quid pro quo exchanges to encompass broader conceptions of corruption such as undue influence, distortion, and the appearance of corruption. This success made it less imperative for reformers to convince the Court to

⁴⁵ See *id.* at 226–29 (dismissing challenges to The Bipartisan Campaign Reform Act of 2002's (BCRA) indexed contribution limits as grounded in impermissible equality concerns).

⁴⁶ See *infra* notes 47–48.

⁴⁷ See, e.g., *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 388–89 (2000) (noting that the prevention of the appearance of corruption is a “constitutionally sufficient justification”).

⁴⁸ See, e.g., *FEC v. Beaumont*, 539 U.S. 146, 155 (2003) (reasoning that deference to legislative choice is appropriate when Congress regulates campaign contributions); *McConnell*, 540 U.S. at 144–53 (summarizing the Court's empirical concerns about corruption); *Nixon*, 528 U.S. at 391–93 (noting that empirical evidence establishes the plausibility of corruption).

⁴⁹ See *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 195 (1981).

broaden what could be regulated strictly in the prevention of quid pro quo exchanges.

Of course, some of the campaign finance regulation upheld by the Rehnquist Court could not have been justified as furthering the prevention of quid pro quo exchanges. The Court's decision in *Austin* offers a good example.⁵⁰ The decision upheld a prohibition on corporate expenditures that were, by legal definition, independent of formal coordination or prearrangement with candidates.⁵¹ In the absence of a formal nexus between candidate and the expenditure, the case law held that the risk of a quid pro quo is minimized, at least compared to the risk presented by a formal contribution that the candidate directly receives him or herself.⁵² That said, it is entirely plausible as a realistic matter that expenditures present a risk of quid pro quo. Even nominally independent expenditures can be monitored and effectively reciprocated by candidates who understand what might be expected or appreciated by those footing the bill, regardless of the explicitness in the exchange.⁵³ Nonetheless, the Court's well-established skepticism about the quid pro quo risk presented by independent expenditures largely preempted the government from winning in *Austin* by arguing along those lines.⁵⁴

However, there were other important cases the Court decided on grounds beyond the quid pro quo framework but might have fit more narrowly within it.⁵⁵ The campaign finance regulation of the major parties, as I argue in the next Part, might have been justified in terms of the prevention of quid pro quo exchanges, at least of a particular sort. In this sense, campaign finance law did not exhaust the logical limits of what the government arguably could regulate within the quid pro quo framework. Ironically, this might have occurred not because the Rehnquist Court was skeptical about the limits, but precisely *because* its receptivity to more expansive approaches

⁵⁰ *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 667–68 (1990).

⁵¹ *Id.*

⁵² See Garrett, *supra* note 36, at 671–73 (explaining the doctrinal challenge in extending the government's anticorruption interest to corporate independent expenditures given *Buckley's* reasoning that independent expenditures raised little corruption risk).

⁵³ See Daniel R. Ortiz, *The Unbearable Lightness of Being McConnell*, 3 ELECTION L.J. 299, 301 (2004) (“[T]here is no reason to believe that a candidate would feel much less beholden to someone who has expended sums on her behalf than to someone who has given her money directly.”).

⁵⁴ See 494 U.S. at 659–60.

⁵⁵ See *infra* text accompanying note 57.

obviated the need to exhaust those limits to justify existing regulation.

Consider for example the Rehnquist Court's approach to party soft money in *McConnell*. On the one hand, the potential risk of corruption from soft money contributions to political parties might seem too obvious to deny. The major parties nominate, support, and coordinate their candidates under common party labels that effectively organize the American political landscape.⁵⁶ The major parties, as the Court has acknowledged, enjoy a "special relationship and unity of interest" with their candidates and officeholders.⁵⁷ Campaign contributions received by the party committees will be spent in support of their party candidates, who stand to benefit and know the party's contributors. For exactly this reason, the national party committees and their officeholders collaborated extensively to raise nearly a billion dollars in combined soft money during a presidential election cycle shortly before the Bipartisan Campaign Reform Act of 2002 (BCRA) prohibited it.⁵⁸ In exchange for soft money donations, the national party committees sold donors special access to their officeholders and literally offered menus listing prices for different levels of access.⁵⁹ This outright sale of access, along with extensive evidence of soft money earmarking for specific candidates and of officeholder involvement with soft money fundraising, led the Rehnquist Court to conclude that soft money contributions were likely to create actual or apparent indebtedness for federal officeholders, regardless how soft money was restricted in use.⁶⁰

Still, the technical application of the Court's quid pro quo framework to contributions received by a political party, as opposed to candidates and officeholders themselves, was hardly straightforward. Contributions received by candidates and officeholders could be most clearly characterized as a potential basis for quid pro quo exchange, but the soft money ban, as Justice Kennedy noted in dissent, "[did] not regulate federal candidates' or officeholders' receipt of *quids* because it

⁵⁶ See Richard Briffault, *Political Parties and Campaign Finance Reform*, 100 COLUM. L. REV. 620, 639 (2000) ("The candidate is typically a member of the party, has been active in the party, and, once nominated, bears the party label, uses the party's place on the ballot, and necessarily benefits from the loyalty and support of party activists.").

⁵⁷ *McConnell v. FEC*, 540 U.S. 93, 145 (2003).

⁵⁸ *Id.* at 145–48.

⁵⁹ *Id.* at 150–51.

⁶⁰ *Id.* at 155.

d[id] not regulate contributions to, or conduct by, candidates or officeholders.”⁶¹ The national party committees received the soft money gifts as a formal matter, regardless whether they ultimately benefitted candidates and officeholders. And as a further technical point, the party committees did not hold public office or have direct access to government authority that it can trade in prohibited quid pro quo exchanges with contributors.⁶² Even if the party committees were intimately intertwined with their candidates and officeholders, and collaborated with them to raise soft money for their express benefit, and sold special access to them as the primary means of inducing donors to contribute, the party committees were the official recipients of the soft money, not the candidates and officeholders.

Under the myopic framework of quid pro quo corruption, the party committees thus insulated their candidates and officeholders from soft money exchanges with donors. The party committees themselves had never been understood, as a matter of campaign finance law, to be legally capable of engaging in the type of quid pro quo exchanges that triggered the government’s anticorruption interest. No matter how intuitive the case for regulating soft money campaign finance, the Court’s simplistic conception of quid pro quo corruption only between individual officeholder and contributor complicated the constitutional justification for the BCRA soft money ban.

For all these reasons, the Court felt compelled to uphold regulation of soft money on constitutional bases beyond the prevention of quid pro quo corruption. In *McConnell*, the Court explained that “Congress’ legitimate interest extends beyond preventing simple cash-for-votes corruption to curbing ‘undue influence on an officeholder’s judgment.’”⁶³ Rather than extend quid pro quo corruption to cover the intuitive case against soft money, the Court instead applied its novel theory of undue influence to uphold the federal prohibition. The Court extended the government’s regulatory interest to “the danger that officeholders will decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder.”⁶⁴ So stated, the Court defined the prevention of

⁶¹ *Id.* at 299 (Kennedy, J., concurring in part and dissenting in part).

⁶² See Issacharoff, *supra* note 26, at 110–11 (“Parties do not govern and are poor vehicles for *direct* quid-pro-quo corruption.”).

⁶³ *McConnell*, 540 U.S. at 150 (quoting *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 441 (2001)).

⁶⁴ *Id.* at 153.

undue influence by the potential for subjective obligation or indebtedness because restricting campaign finance regulation to “straight cash-for-votes transactions” would “render Congress powerless to address more subtle but equally dispiriting forms of corruption.”⁶⁵ This flexible approach broke from the core conception of quid pro quo corruption at the heart of *Buckley*.⁶⁶

In this way, the Rehnquist Court upheld campaign finance regulation, such as the soft money ban, by introducing new constitutional grounds for government intervention, rather than elaborating the basic conception of quid pro quo corruption and exploring analytical extensions. The evolution of campaign finance law followed a kind of path dependence once it departed from quid pro quo exchanges as a nonexclusive core harm. When constitutional challenges presented a complicated fit with that core harm, the Rehnquist Court permitted itself to adopt ancillary doctrine more removed from that core harm than might have been doctrinally necessary.

This approach by the Rehnquist Court became a liability under the Roberts Court. Once Chief Justice John Roberts and Justice Samuel Alito replaced Chief Justice William Rehnquist and Justice Sandra Day O'Connor, the Court abruptly switched course on campaign finance law. Consistent government deference under Chief Justice Rehnquist shifted to systematic dismantling of the FECA campaign finance regime under Chief Justice Roberts. The replacement of two Republican appointees for another two resulted in a transformation of campaign finance law as the Court invalidated campaign finance regulation in a long series of decisions.⁶⁷ Justice Kennedy's earlier dissents in cases like *McConnell* and *Austin* articulated his disagreement with the Rehnquist Court's willingness to stray from quid pro quo corruption as its lodestar for

⁶⁵ *Id.*

⁶⁶ See *Buckley v. Valeo*, 424 U.S. 1, 26–27 (1976).

⁶⁷ See generally *McCutcheon v. FEC*, 134 S. Ct. 1434, 1462 (2014) (striking down the federal aggregate contribution limit); *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2829–30 (2011) (striking down Arizona's public campaign financing system); *Citizens United v. FEC*, 558 U.S. 310, 372 (2010) (striking down the federal prohibition on corporate expenditures and electioneering); *Davis v. FEC*, 554 U.S. 724, 744–45 (2008) (striking down the Millionaire's Amendment); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 481–82 (2007) (invalidating the application of the federal prohibition on corporate electioneering as applied to issue advocacy that was not unmistakably the functional equivalent of express advocacy); *Randall v. Sorrell*, 548 U.S. 230, 261–63 (2006) (striking down Vermont's contribution and expenditure limits).

questions of campaign finance law.⁶⁸ His “crabbed view of corruption” from those dissenting opinions on the Rehnquist Court ascended from the minority to leading a cohesive five-justice majority on campaign finance law.⁶⁹

In *Citizens United v. FEC*,⁷⁰ Justice Kennedy’s majority opinion made absolutely clear that the Roberts Court is focusing more narrowly than ever on quid pro quo corruption to bound the government’s interest in campaign finance regulation. *Citizens United* overruled *Austin* and struck down federal prohibitions on corporate independent expenditures and electioneering under the First Amendment.⁷¹ Justice Kennedy’s majority opinion explained that *Buckley* limited the government’s anticorruption interest to only the prevention of quid pro quo corruption.⁷² So defined, Justice Kennedy reasoned that independent expenditures could not be restricted, regardless of their corporate source.⁷³ Independent expenditures, by definition, do not involve a financial exchange with a candidate or officeholder, nor involve prearrangement or coordination with candidates or officeholders. Because quid pro quo corruption is defined by an exchange of quids with a candidate or officeholder, Justice Kennedy clarified without qualification that “independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.”⁷⁴

As for alternative theories of corruption from *McConnell* and *Austin* as bases for regulating corporate electioneering, *Citizens United* flatly overruled them as obviously inconsistent with the defining corruption harm of quid pro quo. Addressing *McConnell*, Justice Kennedy explained that “[i]ngratiation and access . . . are not corruption.”⁷⁵ Quoting his own dissent in *McConnell*, he insisted that “[r]eliance on a ‘generic favoritism or influence theory . . . is at odds with standard First Amendment analyses because it is unbounded and susceptible to no limiting principle.’”⁷⁶ Addressing *Austin*, Justice Kennedy likewise dismissed the Rehnquist Court’s antidistortion approach,

⁶⁸ See *infra* notes 204–208 and accompanying text.

⁶⁹ *McConnell*, 540 U.S. at 152.

⁷⁰ 558 U.S. 310 (2010).

⁷¹ See *id.* at 362–68.

⁷² See *id.* at 359.

⁷³ See *id.* at 360.

⁷⁴ *Id.* at 357.

⁷⁵ *Id.* at 360.

⁷⁶ *Id.* at 359 (quoting *McConnell v. FEC*, 540 U.S. 93, 296 (2003) (Kennedy, J., dissenting)).

identifying “a different type of corruption” grounded in equality,⁷⁷ as detached from the quid pro quo framework and “not well reasoned.”⁷⁸

The Rehnquist Court’s approach in splintering off alternative theories of corruption made it easier for the Roberts Court to quickly transform the campaign finance system just by restoring the tight focus of the government’s regulatory interest to quid pro quo corruption. The Roberts Court’s embrace of Justice Kennedy’s narrow framing of the anticorruption interest was therefore tidy and parsimonious, faithfully returning to *Buckley*’s core concern uncomplicated by misguided diversions from the straightforward quid pro quo.⁷⁹ In the brave new world of campaign finance law, the Roberts Court was spared the necessity of slowly unraveling bit by bit what might have been a denser, richer conception of quid pro quo corruption, one that might have achieved the same results within the quid pro quo framework. Put aside the question whether a greater jurisprudential challenge for Justice Kennedy and the Roberts Court would have been a net good or bad. The point is that the Rehnquist Court’s approach was ironically encouraged by the Rehnquist Court’s sympathy for campaign finance reform, perhaps quite avoidably. In the following Part, I offer an example of the jurisprudential path not taken in this regard—a doctrinal approach working within the quid pro quo framework but capacious enough to support a wider range of campaign finance regulation than the current understanding of quid pro quo corruption seems to allow.

II

PARTY CAMPAIGN FINANCE AND A THEORY OF GROUP-LEVEL CORRUPTION

In this Part, I offer a new approach to corruption that remains faithful to the basic conception of the quid pro quo exchange as its defining harm, but allows pragmatic flexibility to accommodate realistic sensibilities about a campaign finance system where officeholders and candidates are thoroughly interconnected by their party relationships. The traditional notion of quid pro quo corruption has been unrealistically restricted to a dyadic framework in which concerns about

⁷⁷ *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990).

⁷⁸ *Citizens United*, 558 U.S. at 363.

⁷⁹ See Bradley A. Smith, *McCutcheon v. Federal Election Commission: An Unlikely Blockbuster*, 9 N.Y.U. J.L. & LIBERTY 48, 57 (2015) (“Thirty-five years of chipping away at this standard was washed away.”).

money in politics are limited to individual contributors and individual officeholders pairing off in isolation from the rest of their political world. Instead, the major parties pervade both American campaign finance and policymaking. Parties entwine donors, candidates, and officeholders in cohesive networks that raise plausible corruption worries about party-related campaign finance. Even though this approach to party campaign finance is unlikely to be adopted by the Roberts Court, it sets an intellectual foundation for a future Court less hostile to campaign finance regulation, much as Justice Kennedy's dissents from the Rehnquist Court set the foundation for the Roberts Court's subsequent reversal.

A. The Corruption Risk in Party Campaign Finance

Political corruption can be played as a team sport. In fact, corruption at its finest was historically played as a team sport in the form of party machine politics. The old-fashioned party machines constituted enormous teams of city politicians, organizers, and constituents who cooperated in a complicated economy of patronage, votes, and money that dominated politics for decades.⁸⁰ In the classic formulation, the party machine stayed in power by exchanging government benefits and patronage for the labor of party loyalists.⁸¹ The party bosses and loyalists together ran a well-oiled operation for providing government benefits (of various sorts) to pay for the electoral campaigns and community subsidies necessary to get out the vote and win elections.⁸² The party machine was an ongoing team effort, cemented by party loyalty and mutual benefit.

Our modern major parties operate quite differently today than the archetypal party machine. The outright graft, reliance on patronage, and basic malfeasance of the traditional party

⁸⁰ See generally JOHN M. ALLSWANG, *BOSSSES, MACHINES, AND URBAN VOTERS: AN AMERICAN SYMBIOSIS* 3–35 (1977) (providing an overview of political machine politics); STEVEN P. ERIE, *RAINBOW'S END: IRISH-AMERICANS AND THE DILEMMAS OF URBAN MACHINE POLITICS, 1840–1985*, at 1–23 (1988) (providing the same).

⁸¹ See James Q. Wilson, *The Economy of Patronage*, 69 J. POL. ECON. 369, 372–79 (1961) (articulating this basic exchange theory of machine politics); see also ALLSWANG, *supra* note 80, at 150–51 (using Chicago as an example of the importance of government employment to the voter base); ERIE, *supra* note 80, at 86–91 (describing the machine economy of patronage jobs and votes); TERRY GOLWAY, *MACHINE MADE: TAMMANY HALL AND THE CREATION OF MODERN AMERICAN POLITICS* 154–56 (2014) (outlining the transactional nature of machine politics).

⁸² See, e.g., ALLSWANG, *supra* note 80, at 73–77; ERIE, *supra* note 80, at 86–89 (describing the parties' patronage of the private sector); see generally VIRGIL W. PETERSON, *BARBARIANS IN OUR MIDST: A HISTORY OF CHICAGO CRIME AND POLITICS* 155–76 (1952) (describing Chicago machine collaboration with organized crime).

machine, as practiced by Tammany Hall and others, are greatly diminished even in urban politics from their heyday.⁸³ Civil service reform, campaign finance regulation, and television, among many other things, have altered how politicians get elected, win the loyalty of activists, and collect the necessary campaign resources to win office. A series of political reforms covering virtually all elements of politics, coupled with the overarching shift of parties from vehicles of mass mobilization to vehicles for modern technological campaigning, have radically changed how money is raised and used in politics.⁸⁴ But what has not changed is the importance of money in politics. Today's politics still demand large-scale campaign finance to fund the expensive apparatus of modern campaigning in a hyper-competitive and partisan political environment.⁸⁵ While the most egregious forms of money-related corruption are less present today than ever before, as many have observed,⁸⁶ American politics are dogged by the nagging sense that campaign money may be more important than ever, with concomitant concerns about its potential for corruption.

The major parties have always offered crucial advantages of coordination and teamwork in American politics. Each major party consolidates a sprawling political coalition, internally allied by common political and ideological goals, under a shared public label that signals their overlapping intentions and interests. Each party comprises officeholders and candidates for office who see common interest in working together to achieve certain shared electoral and policymaking goals. Their affiliation and nomination under the party label signals a will-

⁸³ See generally OLIVER E. ALLEN, *THE TIGER: THE RISE AND FALL OF TAMMANY HALL* 260–83 (1993) (detailing the fall of the Tammany Hall machine in New York); GOLWAY, *supra* note 81, at 286–308 (detailing the same).

⁸⁴ See MARTIN SHEFTER, *POLITICAL PARTIES AND THE STATE: THE AMERICAN HISTORICAL EXPERIENCE* 86–94 (1994) (cataloguing the structural changes in the party system starting in the 1960s); Kay Lawson, *How State Laws Undermine Parties*, in *ELECTIONS AMERICAN STYLE* 240, 251 (A. James Reichley ed., 1987) (examining the effect of state laws on campaign finance).

⁸⁵ See, e.g., Russ Choma, *Final Tally: 2014's Midterm Was Most Expensive, with Fewer Donors*, CTR. FOR RESPONSIVE POLITICS (Feb. 18, 2015), <https://www.opensecrets.org/news/2015/02/final-tally-2014s-midterm-was-most-expensive-with-fewer-donors/> [<http://perma.cc/9J3W-AZRT>] (describing the escalating cost of campaign financing).

⁸⁶ See WILLIAM J. BENNETT, *THE DEATH OF OUTRAGE: BILL CLINTON AND THE ASSAULT ON AMERICAN IDEALS* 71 (1998) (“[I]n general, politics today is less corrupt than perhaps at any point in American history.”); JOHN STEELE GORDON, *HAMILTON’S BLESSING* 183 (2010) (“[O]ur politics are cleaner today than they have ever been before”); Norman J. Ornstein, *Doing Congress’s Dirty Work*, 86 *GEO. L.J.* 2179, 2180 (1998) (noting the belief that “politics today is much cleaner, maybe cleaner than ever”).

ingness to cooperate and find mutual advantage in the party's collective success. What is more, the party label coordinates supporters who wish to advance the party's shared goals by supplying the party's officeholders and candidates with votes and resources,⁸⁷ including campaign contributions. The party maintains this permanent apparatus of professional expertise, volunteer labor, campaign financing, and voters that pervades every level of American politics and dominates electoral competition for federal, state, and local office in every state.⁸⁸ The party apparatus helps its candidates to gain public office, where they are expected to coordinate their efforts to achieve the party's policymaking goals.

During the early to middle Twentieth Century, the party apparatus's support of its officeholders and candidates came perhaps most importantly in the form of volunteer support and guaranteed blocs of votes, often secured by patronage.⁸⁹ Electoral politics during this period were strongly party centered, locally governed, and profoundly hierarchical, ruled by party bosses who decided party affairs such as nominations in proverbial smoke-filled rooms.⁹⁰ Parties commanded voter loyalties through their familiar party label that signaled their policy commitments and through the promise of material support.⁹¹

⁸⁷ See Pamela Johnston Conover & Stanley Feldman, *Candidate Perception in an Ambiguous World: Campaigns, Cues, and Inference Processes*, 33 AM. J. POL. SCI. 912, 916 (1989) (describing how voters infer from party affiliation).

⁸⁸ See generally PETER L. FRANCA ET AL., *THE FINANCIERS OF CONGRESSIONAL ELECTIONS: INVESTORS, IDEOLOGUES, AND INTIMATES* 69–98 (2003) (describing the campaign donation solicitation process); PAUL S. HERRNSON, *CONGRESSIONAL ELECTIONS: CAMPAIGNING AT HOME AND IN WASHINGTON* 7–39 (6th ed. 2012); SETH E. MASKET, *NO MIDDLE GROUND: HOW INFORMAL PARTY ORGANIZATIONS CONTROL NOMINATIONS AND POLARIZE LEGISLATURES* 1–22 (2009) (using California as a case study of the influence exerted by local party organizations).

⁸⁹ See JOHN H. ALDRICH, *WHY PARTIES?: THE ORIGIN AND TRANSFORMATION OF POLITICAL PARTIES IN AMERICA* 180–86 (1995) (describing the involvement of amateur activists in elections); RONALD J. HREBENAR ET AL., *POLITICAL PARTIES, INTEREST GROUPS, AND POLITICAL CAMPAIGNS* 175 (1999) (describing the mobilization efforts of national and local party organizations); SHEFTER, *supra* note 84, at 82 (noting the advent of mass-mobilization efforts during the New Deal era).

⁹⁰ Joseph Fishkin & Heather K. Gerken, *The Party's Over: McCutcheon, Shadow Parties, and the Future of the Party System*, 2014 SUP. CT. REV. 175, 185; see Scott C. James, *Patronage Regimes and American Party Development from 'The Age of Jackson' to the Progressive Era*, 36 BRIT. J. POL. SCI. 39, 48–50 (2005) (comparing the parties' organization to a machine); Richard Jensen, *The Last Party System: Decay of Consensus 1932–1980*, in *THE EVOLUTION OF AMERICAN ELECTORAL SYSTEMS* 203, 210–11 (1981) (noting the expansion of parties' influence from local to state and national elections).

⁹¹ See generally ALDRICH, *supra* note 89, at 266–69 (explaining the demise of the mass modern party); WALTER DEAN BURNHAM, *CRITICAL ELECTIONS AND THE MAIN-SPRINGS OF AMERICAN POLITICS* 95–96 (1970) (distinguishing “militarist” party politics from modern “mercantilist” politics); SHEFTER, *supra* note 84, at 36–60

Party candidates thus relied heavily on the parties to elevate their candidacies through the party's endorsement and nomination. Candidates had little direct access to voters other than labor-intensive, face-to-face politics at the retail level. Only the major parties could mobilize large numbers of supporters and voters through their standing infrastructure during this age before mass media technology. The party was the star, not the candidates. Candidates earned their party support through consistent loyalty and service within party hierarchies controlled by party bosses.⁹²

Television and radio advertising rapidly destabilized this state of party politics starting in the 1960s.⁹³ Television and radio advertising allowed candidates the potential to communicate directly with the electorate, with or without the party's endorsement. It provided a channel for communication with voters, who might respond to a candidate's personal and political charms even if the candidate had not earned his or her way up the party hierarchy.⁹⁴ The opportunity to bypass the party hierarchy grew larger and larger as television and radio advertising reached an increasing number of voters and the reach of new technology spread through the American public. What is more, corresponding changes to the party nomination systems from boss-dominated caucuses to direct primary election fed the growing importance of reaching voters directly through television by the 1980s.⁹⁵ Political scientists observing these trends lamented the decline of American political parties as the rise of candidate-centered politics replaced the party-centered politics of yore.⁹⁶

Worry about the decline of American parties, of course, was premature. The major parties, as they have consistently throughout our history, adapted to the changed circumstances

(comparing party organizations' practices in European countries and the United States).

⁹² See THOMAS COLLIER PLATT, *THE AUTOBIOGRAPHY OF THOMAS COLLIER PLATT* 501–03 (Louis J. Lang ed., 1910) (“A political organization should be conducted upon the simplest principles of business. Merit and devotion should be rewarded. Demerit and treachery should be condemned and examples made of those guilty of them.”).

⁹³ See ALDRICH, *supra* note 89, at 252–53 (describing the introduction of television and the corresponding shift to candidate-centered, media politics).

⁹⁴ See HREBENAR, *supra* note 89, at 176.

⁹⁵ See *id.* at 175–76 (describing the effects of moving to direct primary elections); Austin Ranney, *The Political Parties: Reform and Decline*, in *THE NEW AMERICAN POLITICAL SYSTEM*, 213, 243–47 (Anthony King ed., 1978) (explaining how television changed the relationship between voters and candidates).

⁹⁶ See, e.g., WILLIAM J. CROTTY & GARY C. JACOBSON, *AMERICAN PARTIES IN DECLINE* 3 (1980) (depicting the perceived deterioration of the major parties).

of American electoral politics. Parties have always offered as a critical resource to officeholders and candidates the capacity to coordinate immense numbers of politicians, activists, and voters over the long term as part of a standing infrastructure. The shape and form of the party infrastructure has changed many times as they adapted to modern circumstance, but the promise of coordination is always the same.⁹⁷ The modern circumstances of the television age required the currency of campaign money. Campaign finance was not central in the militarist, patronage-oriented party politics of a century ago because candidates mobilized voters to their side through their parties' grassroots operations.⁹⁸ However, in the television age, voters increasingly evaluated candidates through television. This development increasingly required candidates, whether backed by the party or not, to buy expensive television advertising for the necessary name recognition and positive reputation to win office.⁹⁹ This growing need for campaign money to buy the necessary television advertising created a correspondingly new role for the parties to play.¹⁰⁰

The parties became very good at building an infrastructure for the collection and disbursement of campaign money in support of their officeholders and candidates.¹⁰¹ The traditional parties of the earlier age of party-centered politics maintained a vast infrastructure of party volunteers and voters that they could mobilize quickly in support of their favored candidates. The modern parties of the television age instead cultivated a campaign finance infrastructure of professional fundraisers, loyal donors willing to fund the parties' candidates, and a system of recruiting and equipping those candidates with the nec-

⁹⁷ See Morris P. Fiorina, *Parties and Partisanship: A 40-Year Retrospective*, 24 POL. BEHAV. 93, 103 (2002) (describing Aldrich's conceptualization of parties as malleable institutions that politicians "invent and reinvent to solve problems that face them at particular times in history").

⁹⁸ See BURNHAM, *supra* note 91, at 95-97 (describing "militarist" party mobilization and the shift to a "mercantilist" party system); Daniel M. Shea, *The Passing of Realignment and the Advent of the "Base-less" Party System*, 27 AM. POL. Q. 33, 48 (1999) ("Money has always been important, but prior to party 'adaptation,' many activities were labor-intensive—such as door-to-door canvassing and literature drops.").

⁹⁹ Ranney, *supra* note 95, at 243-44.

¹⁰⁰ See *id.* at 245-47 (examining parties' adaption to changing campaign practices through the 1970s).

¹⁰¹ See Daniel J. Galvin, *The Transformation of Political Institutions: Investments in Institutional Resources and Gradual Change in the National Party Committees*, 26 AM. POL. DEV. 50, 57-69 (2012) (tracing this development in both the Republican National Committee and the Democratic National Committee).

essary expertise for television politics.¹⁰² The major parties became, as political science has well documented, mainly parties in service of candidates.¹⁰³ Today's parties now constitute a permanent "money-centered, technical" support system that links up campaign finance donors committed to the party cause with matching candidates likewise committed to the same goals.¹⁰⁴

Parties coordinate their officeholders and candidates, not only on the campaign side of financing and elections, but also on the policy side of legislative politics. Just as they always have, parties coordinate politicians once they are in office in their policymaking activity. Although politicians of the same party do not agree on every policy decision, they agree sufficiently to find common interest in coordinating support and opposition to different policies such that they believe they each come out ahead over the long run.¹⁰⁵ Of course, politicians have individual incentives to defect in specific cases where defying the party position would yield a discrete personal gain.¹⁰⁶ But the risk of losing party support, both in terms of electoral help and legislative cooperation later on, serves to discipline the party's politicians to toe the party line. Parties therefore

¹⁰² See Gregory Koger et al., *Partisan Webs: Information Exchange and Party Networks*, 39 BRIT. J. POL. SCI. 633, 636 (2009) (analyzing cooperative networking among party candidates, advocacy groups, and donors); MASKET, *supra* note 88, at 43–53 (describing the close interactions of these actors); see generally FRANCIA ET AL., *supra* note 88, at 73–99 (describing the parties' campaign finance infrastructure); Raymond J. La Raja, *State Parties and Soft Money: How Much Party Building?*, in *THE STATE OF THE PARTIES* 132, 136–46 (John C. Green & Rick Farmer eds., 4th ed. 2003) (detailing party campaign finance operations).

¹⁰³ See ALDRICH, *supra* note 89, at 260–74 (explaining the shift from mass parties to parties in service of candidates); Joseph A. Schlesinger, *The New American Political Party*, 79 AM. POL. SCI. REV. 1152, 1163–64 (1985) ("The high cost of campaigning today has made money gathering a central task for all political organizations."); Shea, *supra* note 98, at 41–44 (noting the "shift from community-based organizations to national, 'service-oriented' units").

¹⁰⁴ See Shea, *supra* note 98, at 56.

¹⁰⁵ See ALDRICH, *supra* note 89, at 33–37.

¹⁰⁶ See Randall L. Calvert, *Leadership and Its Basis in Problems of Social Coordination*, 13 INT'L POL. SCI. REV. 7, 8–18 (1992) (analyzing this basic problem of collective action); see also DAVID W. ROHDE, *PARTIES AND LEADERS IN THE POSTREFORM HOUSE* 93–105 (1991) (discussing collective action historically and explaining 1970s reform to House party rules to address it); Scott Ashworth, *Campaign Finance and Voter Welfare with Entrenched Incumbents*, 100 AM. POL. SCI. REV. 55, 66–67 (2006) (exploring candidates' competing incentives to please their constituents as opposed to outside supporters); David P. Baron, *Electoral Competition with Informed and Uninformed Voters*, 88 AM. POL. SCI. REV. 33, 44–45 (1994) (exploring the same).

must regularly “persuade, cajole, or coerce fellow party members to vote consistently with the designated party position.”¹⁰⁷

Campaign finance is a salient tool for the parties to do this important work. Parties first identify and recruit quality candidates who might otherwise go underfunded and then provide them with the necessary financing to be competitive.¹⁰⁸ Parties promise candidates their standing infrastructure to continue channeling the financial resources of wealthy supporters. Parties generally route their financing to marginal races where extra funding is necessary and that offer the greatest electoral payoff.¹⁰⁹ But parties also are free to leverage their party campaign finance, either directly from formal party committees or indirectly from party allied sources, to boost party influence over their internal direction and own candidates and officeholders. Parties can deploy their campaign financing to reward officeholders who have loyally advanced the party cause and withhold financing to discipline officeholders who have bucked the party in the past. In my own empirical work, coauthor Joanna Shepherd and I found that parties appear to influence judicial decision making by partisan judges in party-preferred ideological directions through party campaign finance.¹¹⁰

The notion that the parties can use the promise of campaign finance support as a carrot, and its withdrawal as a stick, to discipline their candidates flows naturally from basic intuitions about campaign finance. The fundamental worry about quid pro quo corruption is that the donor of campaign finance money can exchange it, explicitly or implicitly, for gov-

¹⁰⁷ KEITH KREHBIEL, *PIVOTAL POLITICS: A THEORY OF U.S. LAWMAKING* 197 (1998).

¹⁰⁸ See Bruce A. Desmarais et al., *The Fates of Challengers in U.S. House Elections: The Role of Extended Party Networks in Supporting Candidates and Shaping Electoral Outcomes*, 59 AM. J. POL. SCI. 194, 195–96 (2015) (“[P]arties arise because there are several political actors in pursuit of narrow policy objectives, who will rarely achieve success if they go it alone.”).

¹⁰⁹ See 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, 376–80 (1999); Timothy P. Nokken, *Ideological Congruence Versus Electoral Success: Distribution of Party Organization Contributions in Senate Elections, 1990–2000*, 31 AM. POL. RES. 3, 15 (2003); Jeffrey M. Stonecash, *Working at the Margins: Campaign Finance and Party Strategy in New York Assembly Elections*, 13 LEGIS. STUD. Q. 477, 483 (1988); Jeffrey M. Stonecash & Sara E. Keith, *Maintaining a Political Party: Providing and Withdrawing Party Campaign Funds*, 2 PARTY POL. 313, 376–80 (1996).

¹¹⁰ Michael S. Kang & Joanna M. Shepherd, *The Partisan Foundations of Judicial Campaign Finance*, 86 S. CAL. L. REV. 1239, 1276–81 (2013) [hereinafter Kang & Shepherd, *Partisan Foundation*]; Michael S. Kang & Joanna M. Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, 86 N.Y.U. L. REV. 69, 105–09 (2011).

ernment favors from the candidate in return.¹¹¹ In the case of party campaign finance, the party likewise might leverage its fundraising capacity to pressure its candidates to toe the party line, even when the candidates' individual preference might be to act otherwise.¹¹² What is more, one might expect that the greater the party's fundraising capacity, the greater the party's leverage over its candidates. Along these lines, parties seem to have expanded their influence during the 1990s when the legal capacity to raise unrestricted soft money elevated the party committees' importance to candidates who coveted that funding.¹¹³ For this reason, some commentators advocate the removal of campaign finance restrictions on parties' fundraising capacities expressly to strengthen the parties' hand.¹¹⁴ If parties gain greater capacity to raise money under reduced campaign finance restrictions, then the parties might have greater ability to coordinate the legislative agenda of its officeholders, curb self-interested behavior by maverick members inclined to buck the party, and reduce what those commentators see as harmful party polarization that has paralyzed federal lawmaking.

Party campaign finance is potentially pivotal because parties coordinate not only party fundraising and spending, but also the policymaking activity of party officeholders. Parties collectivize the fundraising from wealthy supporters necessary

¹¹¹ See *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985) ("The hallmark of corruption is the financial *quid pro quo*: dollars for political favors.").

¹¹² See Kevin M. Leyden & Stephen A. Borrelli, *Party Contributions and Party Unity: Can Loyalty Be Bought?*, 43 W. POL. Q. 343, 349–53 (1990) (finding that the Democratic Party rewards party loyalty more than the Republican Party); Michael Barber et al., *Party Loyalty and Campaign Contributions* 17 (June 21, 2014) (unpublished manuscript) (on file with author) (finding that the majority party rewards state legislative votes in support of the party with campaign financing). But see David M. Cantor & Paul S. Herrnson, *Party Campaign Activity and Party Unity in the U.S. House of Representatives*, 22 LEGIS. STUD. Q. 393, 402 (1997) ("Past party unity has no significant effect on the distribution of party assistance in campaign fundraising, communications, and campaign management."); Richard A. Clucas, *Party Contributions and the Influence of Campaign Committee Chairs on Roll-Call Voting*, 22 LEGIS. STUD. Q. 179, 188–93 (1997) (finding no evidence that greater party funding makes members more loyal to the party but that freshman members were somewhat more likely to vote with the chairman of their party's campaign fundraising committee).

¹¹³ See generally Anthony Corrado, *Party Finance in the 2000 Elections: The Federal Role of Soft Money Financing*, 34 ARIZ. ST. L.J. 1025, 1030–49 (2002) (describing the rise of party soft money during the period).

¹¹⁴ See *infra* Part IV; see also Marc E. Elias & Jonathan S. Berkon, *Commentary, After McCutcheon*, 127 HARV. L. REV. F. 373, 378–79 (2014) (explaining that *McCutcheon* has already spawned lawsuits and inquiries into the amount of contributions that political parties can collect).

to win elections and then link it to the parties' coordination of candidates' policymaking activity once elected to office. It is the promise that a party will execute on its policymaking agenda that draws investment from financial contributors who support that agenda.¹¹⁵ In other words, the party consolidates both the campaign finance and policymaking activity between party politicians and party financial contributors. The party facilitates a fundamental bargain in which the contributors agree to supply campaign financing and the party politicians generally commit to advance the party's shared policy aims.¹¹⁶

Typically we view the coordinating function of parties as normatively positive. E. E. Schattschneider went so far as to declare that "modern democracy is unthinkable save in terms of the parties."¹¹⁷ Parties derive their central importance by coordinating activity among a diverse, diffuse set of likeminded political actors who find mutual advantage in cooperation. Parties allow a rough, sprawling coalition of candidates, activists, and voters to identify commonality and advance their collective goals. In this spirit, parties enable individual officeholders to coordinate their policy activity without splitting their resources or splintering their bloc voting power, even when intracoalition disagreement threatens to distract them from their collective agenda. Through this process, parties simplify politics for the electorate by dividing up candidates and officeholders into opposing teams with opposing views on a key set of questions.¹¹⁸ This simplification effectively engages voters with manageable choices in the face of complexity and makes democratic accountability possible through elections by rewarding or punishing parties for their collective action.

Although we generally laud the brokering function that the parties play, the suspicion of corruption through the party that runs along the same lines has always lingered.¹¹⁹ In coordinating both campaign finance and policymaking for party supporters and candidates, the major parties work both sides of the

115 See Desmarais et al., *supra* note 108, at 196.

116 See *id.*

117 E. E. SCHATTSCHNEIDER, *PARTY GOVERNMENT* 1 (1942).

118 See BERNARD BERELSON ET AL., *VOTING: A STUDY OF OPINION FORMATION IN A PRESIDENTIAL CAMPAIGN* 183 (1954) ("[W]hat starts as a relatively unstructured mass of diverse opinions with countless cleavages within the electorate is finally transformed into, or at least represented by, a single basic cleavage between the two sets of partisans. . . . [D]isagreements are reduced, simplified, and generalized into one big residual difference of opinion.").

119 See *generally* NANCY L. ROSENBLUM, *ON THE SIDE OF THE ANGELS: AN APPRECIATION OF PARTIES AND PARTISANSHIP* 165–209 (2008) (narrating the history of Progressive antipartyism).

potential quid pro quo exchange that is the core concern of campaign finance law. The classic formulation of the quid pro quo exchange is the trade of a contribution by the supporter for a government favor by the recipient officeholder in return. Just as a single officeholder might trade his vote for a campaign contribution at the individual level, there has been historical anxiety that parties effectuate similar trades at the aggregate level. Parties might be able to collect contributions from supporters and promise to direct the votes of their party officeholders in return.

B. A Group-Level Theory of Quid Pro Quo Corruption

The major parties are critical mediating institutions in today's high-level campaign finance. The major parties centralize campaign finances for both their wealthiest supporters and their candidates and officeholders. The parties carefully cultivate relationships between wealthy supporters and officeholders, maintain a legal and administrative infrastructure for campaign finance, and distribute financial support efficiently across a wide slate of candidates. The parties serve their traditional role in coordinating a large network of supporters willing to help the party on an ongoing basis and then sustaining those contributors' loyalty over time on behalf of their candidates and officeholders. In this fashion, parties serve as a centralizing institution—a form of one-stop political shopping—through which their supporters know that they will have access to party officeholders and that their financial contributions will be directed toward the party cause with the greatest effectiveness.¹²⁰ For wealthy supporters willing to donate six-figure amounts each election cycle, the parties are essential brokers in high-level campaign finance, particularly at the federal level.

Indeed, the wealthiest, most generous individual contributors in politics tend to donate almost exclusively to one major party.¹²¹ For the 2012 federal election cycle, the Sunlight Foundation found that roughly 85% of the top 1000 donors

¹²⁰ See Richard Briffault, *Of Constituents and Contributors* 2015 U. CHI. LEGAL F. 29, 39-43 (2015) (explaining how party groups redistribute their donors' money to state parties, Super PACs, and candidates across the country in pursuit of the greatest electoral return).

¹²¹ See NOLAN McCARTY ET AL., *POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES* 160-62 (2006); Michael Barber, *Donation Motivations: Testing Theories of Access and Ideology* 8 (May 28, 2015) (unpublished manuscript) (on file with author) (finding that "individuals almost exclusively give to candidates from only one party").

gave at least 90% of their contributions to only one of the major parties.¹²² Less than 4% of those 1000 donors split their money on a roughly equal basis between the parties.¹²³ This partisanship of individual campaign finance activity is no surprise. Such high-level giving reflects the ideological intensity of these contributors that does not leave much room for bipartisan generosity.¹²⁴ It follows then the partisanship of the contributors might be expected to increase as the money contributed increases. All the twenty biggest individual contributors during the first three quarters of 2013 gave at least 95% of their donations to only one party.¹²⁵ Along the same lines, the 310 biggest contributors combined to donate almost \$50 million total through the first half of 2014, but 233 of those 310 contributors gave their money exclusively to one party.¹²⁶

To maximize their advantage, both major parties have developed the modern legal embodiment of party campaign finance coordination in their joint fundraising committees.¹²⁷ Joint fundraising committees serve as party clearinghouses for a collection of associated candidates, party committees, and other PACs to raise money jointly and simultaneously from high-level contributors.¹²⁸ The high-level contributor can write a single check and rely on the joint fundraising committee to

¹²² See Lee Drutman, *The 1000 Donors Most Likely to Benefit from McCutcheon—and What They Are Most Likely to Do*, SUNLIGHT FOUND. BLOG (Oct. 2, 2013, 8:00 AM), <https://sunlightfoundation.com/blog/2013/10/02/top1000donors/> [http://perma.cc/MG85-8KGC].

¹²³ See *id.*

¹²⁴ See Barber, *supra* note 121, at 8; cf. Adam Bonica, *Ideology and Interests in the Political Marketplace*, 57 AM. J. POL. SCI. 294, 306–08 (2013) (examining different PACs donation behaviors).

¹²⁵ See Sunlight Found. & Ctr. for Responsive Pol., *Most Likely to Exceed: Who's Poised to Double Down Post-McCutcheon*, SUNLIGHT FOUND. BLOG (Jan. 14, 2014, 11:00 AM), <https://sunlightfoundation.com/blog2014/01/15/most-likely-to-exceed-whos-poised-to-double-down-post-mccutcheon/> [http://perma.cc/4ZDK-DNUL].

¹²⁶ See Russ Choma et al., *Cracking the Contribution Cap: One in a Million Americans*, OPENSECRETS.ORG (Sept. 2, 2014), <http://www.opensecrets.org/news/2014/09/cracking-the-contribution-cap-one-in-a-million-americans/> [http://perma.cc/L5XU-YGCG].

¹²⁷ See, e.g., Desmarais, *supra* note 108, at 207 (“[T]he formal party committees . . . ‘orchestrate’ partisan strategy with PACs.”).

¹²⁸ See generally Robert K. Kelner, *The Practical Consequences of McCutcheon*, 127 HARV. L. REV. F. 380, 381 (2014) (explaining how a joint fundraising committee operates). Joint fundraising committees coordinate with top party officeholders and offer intimate access based on donor generosity to the party effort. See, e.g., VOGEL, *supra* note 8, at 111–18 (detailing tiers of access, based on donation size, that Romney Victory offered in 2012 to high-level donors, including one particular three-day weekend event in Deer Valley with Mitt Romney, John McCain, Jeb Bush, Karl Rove, Condoleezza Rice, and Reince Priebus, among others).

distribute the amount all at once across multiple party candidates and committees and in compliance with applicable legal requirements. The joint fundraising committee, governed by a specified allocation formula, therefore absorbs what would otherwise be the considerable transaction costs of broad party-based giving across scores of party-affiliated recipients. Joint fundraising committees raised more than \$1 billion for the major parties during 2012.¹²⁹ They have multiplied further in number since then, and in the absence of an aggregate contribution limit, can be set up to raise significantly more money than ever before.¹³⁰

The Court's traditional conceptualization of quid pro quo corruption includes virtually nothing about this substantial role of the major parties in campaign finance. The Court's conceptualization of quid pro quo corruption identifies it as arising primarily, and perhaps exclusively, between an individual contributor and individual candidate in a dyadic relationship. The contributor transacts with a lone candidate, trading a financial contribution for the candidate's preferential use of public office. However, it is impossible to square this impoverished view of the relationship between individual contributor and recipient with the rich party network that so much of high-level campaign finance is embedded within.

The wealthiest high-level contributors can transact with their party collective as much as they deal individually with any particular candidate. High-level contributors are ready to donate on a wholesale level, spreading their money across many party-related candidates and committees, above and beyond any single recipient's maximum permissible contribution. In almost every case, these contributors want to invest in their party beyond any particular candidate or officeholder and are cultivated by the party as a long-term source of financial support.¹³¹ This financial support is effectively shared among party candidates and officeholders, all of whom have a mutual interest in maintaining the contributors' continued investment and support. Of course, not every party candidate will neces-

¹²⁹ See Ctr. for Responsive Pol., *Joint Fundraising Committees*, OPENSECRETS.ORG, <https://opensecrets.org/jfc/> [<https://perma.cc/BDL6-KNEV>].

¹³⁰ See Eliza Newlin Carney, *Costly Midterms Fuel Hundreds of Joint Fundraising Committees*, ROLL CALL BLOG (May 28, 2014, 1:59 PM), <http://blogs.rollcall.com/beltway-insiders/fundraising-campaign-committee-kay-hagan-mitch-mcconnell/> [<http://perma.cc//KKT4-2XDK>].

¹³¹ See Fishkin & Gerken, *supra* note 90, at 186 (explaining that "most major donors have a more straightforward agenda that befits a polarized age: they want their side to win").

sarily benefit from every high-level contributor's financial support. But in the nature of a party as a durable, ongoing alliance, candidates and officeholders understand that they will benefit individually over the long run when the party prospers collectively and garners high-level supporters. The party helps collectivize campaign finance to their mutual benefit over the full run of coordinated party activity. Party candidates and officeholders, particularly the party leadership invested in the party's collective welfare, therefore track high-level contributors' financial support and try to reciprocate that generosity with access and informal influence to party officeholders, if nothing else.

For this reason, it is easy to imagine the possibility of quid pro quo corruption collectively at the party level. Under the traditional conception of quid pro quo corruption, campaign finance law contemplates that individual officeholders may engage in quid pro quo exchanges with contributors. If a corrupt officeholder is willing to engage in a quid pro quo exchange, then a group of such corrupt officeholders might be willing to make similar exchanges as a group. They can coordinate action to satisfy their contributor and share the larger pot of proceeds they can secure as group. Parties, at their core, are cartels of individual officeholders who regularly coordinate both their campaign finance and policymaking activity for their mutual benefit.¹³² Just as they facilitate coordination on both fronts for good, they also allow at least the possibility of coordination on both fronts for corruption—the two sides of the quid pro quo exchange. This is not to say that obvious corruption occurs all the time or even at all regularly, as I explain further below. Nonetheless, the mechanisms of common partisanship provide familiar, reliable bonds of political trust and teamwork that can also serve as the foundation of such cooperation, at least among those so willing.

The general concern about collective, party-based corruption is far from new. Similar party-related concerns have echoed throughout American political history and most recently undergirded worries about party soft money in *McConnell*.¹³³ The Rehnquist Court agreed there that the national party committees served as the mediating institution through which candidates and donors transacted their campaign fi-

¹³² See ALDRICH, *supra* note 89, at 269–74 (explaining these dynamics from a formal perspective).

¹³³ *McConnell v. FEC*, 540 U.S. 93 (2003).

nance relationships.¹³⁴ As the Court saw it, “candidates and donors alike have in fact exploited the soft-money loophole, the former to increase their prospects of election and the latter to create debt on the part of officeholders, with the national parties serving as willing intermediaries” for channeling soft money.¹³⁵ With the party committees brokering this virtual exchange, the Court believed that “[i]t is not only plausible, but likely, that candidates would feel grateful for such donations and that donors would seek to exploit that gratitude.”¹³⁶ Party committees in this soft money system therefore bonded major donors with party candidates and officeholders, facilitating those campaign finance relationships beyond the applicable individual contribution limits on those candidates and officeholders through the trusted stewardship of the party leadership. Richard Briffault explained at the time that the parties’ campaign finance operations relieved major donors of the need to “reach out to multiple individual members of Congress” and instead “centralize[d] and focus[ed]” campaign finance for them through the parties’ active management.¹³⁷ The corruption danger was “not so much that the parties will act as conduits . . . but rather that the process of party fundraising will give large donors special relationships with the party’s fundraisers—who are also the leaders of the party—in government.”¹³⁸ Significant donors effectively transacted with major government officeholders, who constituted the party’s leadership and were predisposed to give them a sympathetic hearing.

Of course, the party, writ large, is a sprawling coalition encompassing a wide diversity of allied political actors, including major party donors as regular financial sponsors of the party’s mission.¹³⁹ In this sense, the broader party transcends its formal legal manifestations and adapts its campaign finance practices to best achieve its collective political ends under applicable regulation.¹⁴⁰ When the broader party is united in purpose, as it is during a general election in support of the

¹³⁴ See *id.* at 131.

¹³⁵ *Id.* at 146.

¹³⁶ *Id.* at 145.

¹³⁷ Briffault, *supra* note 56, at 651.

¹³⁸ Briffault, *supra* note 39, at 356.

¹³⁹ See Desmarais, *supra* note 108, at 196; Kang & Shepherd, *Partisan Foundations*, *supra* note 110, at 1260–66.

¹⁴⁰ See Michael S. Kang, *The Hydraulics and Politics of Party Regulation*, 91 IOWA L. REV. 131, 144 (2005) (“[A] political party should not be understood as a discrete, identifiable entity. The party may manifest itself in various legal forms, for instance a party committee, a party convention, or in the person of a party candidate.”).

party nominee, the party acts hydraulically in concert across different campaign finance vehicles to channel money to the best available opportunities as law and politics dictate.¹⁴¹ For this reason, it is easy to overstate the practical distinction between so-called “outside groups” closely allied with the party coalition on one hand and the formal party committees under the control of major party candidates and officeholders on the other hand, at least with the party that is internally aligned in purpose.¹⁴² The broader party can morph to allocate money most efficiently from major donors to the party-aligned vehicles best adapted to serve the party’s agenda and exploit regulatory gaps, whether it is through a candidate’s own committee account, a party committee, or a nominally nonconnected group such as a Super PAC or 501(c) organization.¹⁴³

That said, the formal party to be regulated in campaign finance is almost always a party campaign finance vehicle that is largely under the control of major party candidates and officeholders and therefore directly implicates concerns about quid pro quo corruption.¹⁴⁴ Politicians are the core players in the party coalitions who articulate the party’s mission before the electorate, run for office, and execute the party’s policy agenda once in government power. Contributions made directly to accounts under their personal control offer the most direct connection between the donor and the officeholders in position to reciprocate the favor. Such contributions bear the greatest chance of gaining officeholders’ indebtedness or gratitude and have been so recognized by the Court’s campaign finance decisions. Even though the Court is wrong to hold as a matter of law that the risk of quid pro quo corruption from independent expenditures and issue advocacy is entirely non-existent, the Court is correct that contributions to candidates

¹⁴¹ See, e.g., Richard Briffault, *Super PACs*, 96 MINN. L. REV. 1644, 1672–82 (2012) (discussing single-candidate Super PACs during the 2010, 2011, and 2012 elections).

¹⁴² See Joseph Fishkin & Heather K. Gerken, *The Two Trends That Matter for Party Politics*, 89 N.Y.U. L. REV. ONLINE 32, 40–43 (2014) (describing the interconnectedness of outside groups and campaign leadership); see also Kang, *supra* note 140, at 156–59 (describing earlier but similar interconnectedness between party organizations and 527 groups under BCRA).

¹⁴³ See, e.g., Keith E. Hamm et al., *Independent Spending in State Elections, 2006–2010: Vertically Networked Political Parties Were the Real Story, Not Business*, 12 FORUM 305, 314–17 (2014).

¹⁴⁴ See Raymond J. La Raja, *Richer Parties, Better Politics? Party-Centered Campaign Finance Laws and American Democracy*, 11 FORUM 313, 316 (2013) (arguing against treatment of “all groups in the [party] network as undifferentiated party members” because the “formal party organization is different from interest groups”).

and officeholders generally pose the most salient risk of *quid pro quo* corruption.¹⁴⁵ Candidates and officeholders do benefit from other forms of financial spending on their behalf, such as independent expenditures by outside groups, but their attention and indebtedness is attenuated by comparison, at least dollar for dollar. Candidates and officeholders naturally value direct control over campaign finance resources and prefer contributions into accounts they actively manage over other, less direct forms of financial support.¹⁴⁶

The Court traditionally regarded party campaign finance as only an indirect source of potential corruption of candidates and officeholders. The Court has viewed the major parties as aligned with party candidates and officeholders, but importantly, as meaningfully separate and distinct from candidates and officeholders for campaign finance purposes.¹⁴⁷ The Court understood the formal parties as special interest groups invested in the advancement of the party and therefore having “an especially strong working relationship with their candidates.”¹⁴⁸ For this reason, the Court recognized the government’s interest in preventing the party from selling access to candidates and officeholders by virtue of this special relationship with them.¹⁴⁹ At the same time, however, the Court rejected “a metaphysical identity” between party candidates and the party committees, dismissing the notion that “the party, in a sense, ‘is’ its candidates.”¹⁵⁰ Instead, the Court assiduously regarded the formal party committees as independent from candidates and officeholders for campaign finance purposes. The Court thus diligently defined the formal party committees’ right to engage in expenditures in support of party candidates as roughly identical to the corresponding right of nonconnected interest groups.¹⁵¹ In this sense, the Court explained that party committees are not “in a unique position” compared to individuals and other PACs in relation to party candidates and

145 See Kang, *supra* note 7, at 44–45 (developing this relative comparison).

146 See *FEC v. Nat’l Conservative PAC*, 470 U.S. 480, 498 (1985) (“[T]he absence of prearrangement and coordination undermines the value of the expenditure to the candidate, and thereby alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.”).

147 See Fishkin & Gerken, *supra* note 90, at 185–86.

148 *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 448 (2001).

149 See *id.* at 442.

150 *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 622–23 (1996).

151 *Id.*

officeholders, at least from the standpoint of campaign finance.¹⁵²

The Court failed to grasp that contributions to the formal party committees are virtually direct payments to party candidates and officeholders. While the broader party as a political coalition has a wide array of resources across its diverse membership, the formal party committees are themselves just campaign finance entities under the control of the party politicians.¹⁵³ Of course, the major party coalitions encompass many important players beyond their candidates and officeholders, but the formal party committees themselves do not have any serious grassroots involvement and are not in any sense teeming microcosms of these larger party coalitions.¹⁵⁴

The national party committees are merely legal entities created almost entirely for campaign finance purposes, largely dominated by, managed by, and composed of party candidates and officeholders. For instance, four of the six major party committees at the federal level—both major parties' Senate Campaign Committees and Congressional Campaign Committees—are composed entirely of federal officeholders and have the singular purpose and function of assisting party candidates win election rather than express any independent ideological voice.¹⁵⁵ Contributions to the party committees are not merely donations to a coalition group that happens to enjoy a close relationship to the party's candidates. Contributions to the party committees are donations to bank accounts that a lead-

¹⁵² *Colo. Republican*, 533 U.S. at 435.

¹⁵³ See, e.g., Kate Andrias, *Hallowed-Out Democracy*, 89 N.Y.U. L. REV. ONLINE 48, 48–49 (2014) (“The Democratic and Republican Senatorial and Congressional Campaign Committees have, for many years, been national fundraising organizations, organized and controlled by senior federal elected officials, with no grassroots base.”).

¹⁵⁴ See Fishkin & Gerken, *supra* note 90, at 208 (noting the differences between the party coalition and its campaign finance entities); Suzy Khimm, *The Obama Gap*, NEW REPUBLIC (June 25, 2015), <https://newrepublic.com/article/122062/obama-gap-case-study-electoral-failure> [<https://perma.cc/XWH5-7UBK>] (“Democratic Party committees . . . ‘have become communications machines, and they’ve gotten away from being organizing machines.’” (quoting Democratic Party operative Steve Schale)).

¹⁵⁵ See *McConnell v. FEC*, 540 U.S. 93, 155 (2003); Shea, *supra* note 98, at 41–50 (describing the development of “service-oriented parties”). The Democratic and Republican National Committees are broader based in the sense that, by my count, roughly half of their official membership consist of officeholders and candidates, but they nonetheless serve the predominant function of serving and supporting candidates. See Galvin, *supra* note 101, at 57 (“[T]hough [these party committees] once controlled politicians and subordinated their ambitions to the needs of the collectivity, the national committees now play a supportive role, offering resources and services to candidates who seek their help.”)

ership group of candidates and officeholders control and manage for their collective purposes.¹⁵⁶ The party committees are not simply in a position to provide access to the party candidates and officeholders; they *are* the party candidates and officeholders in a meaningful sense.¹⁵⁷

C. The New Case for the Regulation of Party Campaign Finance

The case for group-level corruption intuitively follows from the theory of individual-level quid pro quo corruption. Just as an individual officeholder can engage in a quid pro quo exchange, so too might a group of officeholders engage in a quid pro quo exchange as a club. As an extreme example for purposes of clarity, a club of officeholders might decide that they can accomplish more as a unified group and have more to sell if they offer their votes together as a bloc. They agree to coordinate their action and offer their bloc support to contributors willing to provide campaign finance donations in exchange. The club of officeholders would agree to aggregate these donations and share money to the mutual benefit of club members. Provided the club members were confident that the money would be spent to their mutual benefit, they should not care particularly where the money gets deposited. What matters is the strength of their mutual benefit and their confidence in the club leadership. The money might be deposited in a club account that their leadership controls, or deposited in their various individual accounts to be squared up later to ensure fair distribution. If the club members agree to engage in this type of quid pro quo arrangement with contributors, it is analytically identical to prohibited quid pro quo exchanges by individual officeholders with individual contributors. This type of group-level quid pro quo exchange requires coordination across officeholders, but it is quid pro quo corruption nonetheless.

Party relationships offer the most plausible framework within which the potential for this type of group-level corruption can build. The relationships of trust, cooperation, and teamwork within the major parties are already pervasive and constantly exercised among officeholders on both ends of any hypothetical quid pro quo exchange—campaign finance fundraising and policymaking activity. Party candidates and of-

¹⁵⁶ See Andrias, *supra* note 153, at 48–49.

¹⁵⁷ See *id.*

officeholders already coordinate their campaign finance and policymaking activity along party lines nearly every day of their political lives. Frances Lee has argued that today's officeholders and candidates are motivated by a predominant norm of "teamship" under which officeholders view their fates as inextricably bound up with their party's collective fortunes to a historically uncommon degree.¹⁵⁸ As a result, the same party relationships of trust, cooperation, and teamwork between sympathetic officeholders of the same party offer perhaps the most promising seed for any effort at group-level quid pro quo, whether it is freestanding or ongoing.¹⁵⁹

Granted, only a fraction of party activity among officeholders might be characterized as anything even approaching this sort of group-level quid pro quo. Just as most campaign finance and policymaking activity of individual officeholders should not be characterized as engaging in individual-level quid pro quo exchanges, the same is the case for party activity and group-level quid pro quo. However, just as the plausibility of individual-level quid pro quo exchanges gives rise to a government interest in their prophylactic prevention, the equivalent plausibility of group-level corruption should give rise to a government interest in the reasonable regulation of party-mediated campaign finance.

Any theory of group-level corruption inherits the theoretical and normative complications of individual-level corruption. If you do not support campaign finance regulation to combat individual-level quid pro quo corruption, you are not any more likely to support regulation to combat group-level corruption, but the analytical structure of the arguments for and against regulation remain basically the same. Critics of campaign finance law argue that campaign finance regulation targeting quid pro quo corruption is simply redundant of bribery laws¹⁶⁰—a charge that the Court decisively dismissed.¹⁶¹ Critics also argue that the risk of quid pro quo corruption is overblown and empirically unsubstantiated.¹⁶² Still others argue

¹⁵⁸ See generally FRANCES E. LEE, BEYOND IDEOLOGY: POLITICS, PRINCIPLES, AND PARTISANSHIP IN THE U.S. SENATE 49–73 (2009) (finding that greater party conflict among contemporary Republicans and Democrats is not only based on ideology but also increased coordination among the parties).

¹⁵⁹ See *id.*

¹⁶⁰ See *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 428 (2000) (Thomas, J., dissenting) (criticizing contribution limits as massively overinclusive when "[b]ribery laws bar precisely the *quid pro quo* arrangements that are targeted").

¹⁶¹ See *Buckley v. Valeo*, 424 U.S. 1, 27–30 (1976).

¹⁶² See Stephen Ansolabehere et al., *Why is There so Little Money in U.S. Politics?*, 17 J. ECON. PERSPECTIVES 105, 117–27 (2003); Bradley A. Smith, *Faulty*

that the government's interest in the prevention of quid pro quo corruption boils down essentially to speech equalization or the imposition of a particular normative understanding of the democratic process.¹⁶³ All these criticisms apply to a theory of group-level corruption with no less force because they apply generally to any theory of campaign finance law based on the prevention of quid pro quo corruption. Recognizing the theoretical possibility of group-level corruption does not change the basic analytical premises of this debate or the basic quid pro quo framework itself. Across the individual- and group-level versions of quid pro quo corruption, the notion of the hypothetical quid pro quo exchange remains constant, as well as the democratic theory for its regulation with all its strengths and weaknesses.

It is true that a group-level quid pro quo requires coordination among more actors than an individual-level quid pro quo. Individual-level quid pro quo exchanges can be executed by a solitary wrongdoer without any additional need to cooperate or communicate with other officeholders. As the number of involved officeholders in a quid pro quo exchange increases, the challenges of coordination increase as well. Group-level quid pro quo exchanges involve more than a single officeholder and therefore require at least two or more officeholders to cooperate, understand each other, and act in some sort of concert. What is more, the risk of detection only increases as the club expands. As a result, group-level quid pro quo exchanges seem plausible only when the benefits to the officeholders and contributors are larger than they need to be for a comparable individual-level exchange. As the scale of the hypothetical deal increases, the costs increase for the officeholders such that the payoff must be higher to justify those higher costs.

However, it is difficult to reconcile a principled position of concern about individual-level corruption with absolute dismissiveness about any conceivable government measure to combat group-level corruption. Recognition of the greater coordination costs and lesser likelihood of group-level corrupt exchanges can be dialed into the calibration of campaign finance regulation. In other words, regulation of group-level corruption should properly be less intrusive and set at higher dollar thresholds. A lighter regulatory touch for such regulation is

Assumptions and Undemocratic Consequences of Campaign Finance Reform, 105 YALE L.J. 1049, 1067-71 (1996).

¹⁶³ See Strauss, *supra* note 29, at 1385-87; Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 633, 671-75, 678-82 (1997).

appropriate, and should be constitutionally required, because group-level corruption is far less likely at lower dollar figures that do not reflect the higher costs described above for officeholders. The tailoring of regulation must and should account for these practical differences between individual- and group-level corruption.

Nonetheless, if the risk of individual-level corruption is large enough to justify a federal contribution limit of \$2600 on candidates,¹⁶⁴ there surely must be grounds for regulation at *some* higher dollar figures on group-level campaign finance as well. An individual contribution of \$2600 does not seem very much money in a federal campaign finance system that spent roughly \$7 billion in the 2012 election.¹⁶⁵ There surely must be some form of government regulation comparably justified by a similarly worrisome risk of group-level quid pro quo corruption, however less likely it may seem relative to individual-level corruption. For some, the comparison may simply underscore the disutility of base contribution limits on individual officeholders at their current dollar thresholds. Even so, the broader point is that it is difficult to sustain the constitutional permissibility of current regulation predicated on individual-level corruption without admitting the argument for some appropriate level of regulation based on group-level concerns.

Group-level corruption does not require the wholesale corruption of a major party. Wholesale capture of a major party would be quite difficult, if not impossible, because of the size and internal diversity of the major party coalitions. Through a Madisonian lens, the major parties encompass so many candidates and officeholders who collectively aggregate the interests of so many different constituents across their broad coalitions that party politics necessarily dilute any particular interest within that complex mix.¹⁶⁶ Although they are bonded by ideo-

¹⁶⁴ See *McCutcheon v. FEC*, 134 S. Ct. 1434, 1442 (2014).

¹⁶⁵ *Tarini Parti, FEC: \$7 Billion Spent on 2012 Campaigns*, POLITICO (Jan. 31, 2013, 10:26 PM), <http://www.politico.com/story/2013/01/7-billion-spent-on-2012-campaign-fec-says-087051> [<http://perma.cc/43X3-C7EU>]. The price of buying an important officeholder's gratitude is suggested by ambassadorships handed to campaign finance bundlers without a foreign service or foreign policy background. See Michael Beckel & Chris Zubak-Skees, *Wanna Be Ambassador of Argentina*, SLATE (Feb. 7, 2014, 7:34 PM), http://slate.com/articles/news_and_politics/politics/2014/02/map_of_ambassador_posts_given_to_obama_s_top_fundraisers_noah_bryson_mamet.html [<http://perma.cc/JDC3-6TLU>] (estimating \$500,000 as the entry price among President Obama's nominees for ambassadorships).

¹⁶⁶ See, e.g., Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 YALE L.J. 804, 839 (2014)

logical compatibility, the American major parties in the prevailing first-past-the-post election system are so diverse internally that swinging party policy too far in any direction is checked by intraparty competition over the party's policymaking agenda. In *FEC v. Colorado Republican Federal Campaign Committee*, the Tenth Circuit dismissed worries about corruption through the party committees because it believed that parties "represent a broad-based coalition of interests" and thus are "simply too large and too diverse to be corrupted by any one faction."¹⁶⁷

The possibility of group-level quid pro quo corruption described above is most likely to be party-based corruption, mediated or facilitated by trusted party relationships, rather than the wholesale purchase of an entire party's officeholding roster. Group-level corruption does not require the corruption of every officeholder of a major party across a wide swath of policymaking to be worrisome. The major parties comprehensively involve themselves in nearly every aspect of electoral politics at the national and state levels such that institutionalized relationships of trust, cooperation, and teamwork supply a useful framework within which group-level corruption is plausible among certain subgroups of particularly likeminded copartisans.¹⁶⁸ The major parties provide thick networks and party subgroups where certain officeholders' interests are sufficiently intertwined and whose trustworthiness has been mutually well established. Indeed, the pervasiveness of party linkages and relationships in national and state politics belie any assumption that concerns about quid pro quo corruption are plausible at only the individual level, between lone officeholders and contributors without any party linkage.

What is more, campaign contributors interested in quid pro quo-like exchanges typically need not purchase the assistance of an entire major party to accomplish their ends or to

(explaining that, by aggregating so many interests, parties "dilute the role of money").

¹⁶⁷ 213 F.3d 1221, 1231 (10th Cir. 2000).

¹⁶⁸ This sort of team coordination occurs among contributors as well. For example, the American Israel Public Affairs Committee (AIPAC) carefully selected residents in each congressional district to serve as point people and funneled contributions through them as bundlers to build up their influence with their congressperson. See Connie Bruck, *Friends of Israel*, NEW YORKER, Sept. 1, 2014, at 50, 54. As one former AIPAC member explains, "AIPAC has to teach people discipline—because all those people who are giving five thousand dollars would ordinarily want recognition. The purpose is to make the [selected resident] into a big shot—he's the one who has all this money to give to the congressman's campaign." *Id.* (internal quotations omitted).

raise serious normative concerns about corruption. The assistance of just enough officeholders' help, on just the discrete set of policymaking actions necessary to accomplish what might be reasonably limited aims, is optimal from the standpoint of cost and political risk. Group-level corruption therefore can be party based, or party mediated, among a limited number of collaborating candidates and officeholders, linked by preexisting party relationships, without needing to draw on the entire party's help and collusion.

D. A Path Not Taken, and the Potential Way Forward

The doctrinal advantage of a group-based theory of corruption, from the standpoint of *stare decisis*, is that it fits well inside the Court's traditional understanding of *quid pro quo* corruption. The recent development of the Court's campaign finance jurisprudence has precipitously narrowed the scope of permissible regulation since its apex in *McConnell*.¹⁶⁹ Led by Justice Kennedy, the Court has identified the *Buckley* core conception of *quid pro quo* corruption as the sole doctrinal justification for regulation beyond basic disclosure and thus put in constitutional jeopardy all regulation upheld previously under other justifications.¹⁷⁰ Determining grounds for doctrinal justification under the core conception of *quid pro quo* corruption is therefore critical for any road forward for campaign finance regulation under the law as the Roberts Court now charts it.

Along these lines, a group-based theory of corruption builds on, rather than diverges from, the Court's core conception of *quid pro quo* corruption. It is merely the aggregate application of what begins as a dyadic framework of *quid pro quo* corruption between contributor and officeholder, inheriting all the strengths and weaknesses that the Roberts Court tolerates for an individual contributor and individual officeholder. The basic notion of *quid pro quo* exchange remains essentially unchanged as the core harm, adjusting only the number of officeholders that plausibly can participate in the underlying understanding. The proposition that officeholders might cooperate with each other in this way is grounded in the fact that their cooperation in both campaign finance and policymaking is thoroughly mediated by party relationships whose function is the constant coordination of party members in both

¹⁶⁹ *McConnell v. FEC*, 540 U.S. 93 (2003).

¹⁷⁰ *See Citizens United v. FEC*, 558 U.S. 310, 359 (2010).

these primary spheres of American politics. It accommodates the basic fact that party candidates and officeholders hardly ever act entirely in isolation from one another and are rarely unaffected by their party relationships in any meaningful sense.

A group-based theory of quid pro quo corruption can replace as constitutional justification alternative theories for campaign finance regulation that have been discarded by the Roberts Court. Even as the Roberts Court turns away from what it sees as the excesses of the Rehnquist Court on campaign finance law, a group-based theory of quid pro quo corruption might serve as stronger ground for the constitutionality of party-related campaign finance regulation where the worry about aggregate corruption is cognizable.

One recent case where a group-based theory of corruption might have supported the constitutionality of campaign finance regulation is *McCutcheon v. FEC*.¹⁷¹ In that case, Republican activist Shaun McCutcheon challenged the federal aggregate contribution limit that set a maximum cap on total contributions by a single individual in a federal election cycle.¹⁷² McCutcheon had contributed to sixteen Republican candidates for federal office, all three national Republican Party committees, and several other conservative PACs for the 2011-2012 federal election cycle.¹⁷³ McCutcheon complied with every individual contribution limit applicable to those donations, but McCutcheon still wanted to donate to at least a dozen more candidates in the same federal cycle.¹⁷⁴ However, he was barred from doing so, not by any individual contribution limit, but by the federal aggregate contribution limit that restricted the total amount one individual can contribute during that election cycle to \$117,000.¹⁷⁵ Additional contributions during the same cycle would have put him over the then-applicable aggregate cap, which he decided to challenge.¹⁷⁶

The Supreme Court struck down the aggregate cap in *McCutcheon* as inconsistent with its narrow framework for quid pro quo corruption.¹⁷⁷ As the Court saw it, the only corruption interest to be considered was dyadic, between the individual contributor on one hand and individual officeholder on the

¹⁷¹ 134 S. Ct. 1434 (2014).

¹⁷² *Id.* at 1443.

¹⁷³ See *McCutcheon v. FEC*, 893 F.Supp. 2d 133, 136 (D.D.C. 2012).

¹⁷⁴ *Id.*

¹⁷⁵ See *id.*

¹⁷⁶ *McCutcheon*, 134 S. Ct. at 1443.

¹⁷⁷ *Id.* at 1462.

other hand. This corruption interest was addressed by the individual contribution limit already capping the maximum that McCutcheon could give any particular candidate or officeholder.¹⁷⁸ The aggregate contribution limit, though, blocked McCutcheon at the aggregate maximum from giving even a single dollar to any other candidate. It was hard for the Court to understand how the aggregate limit permitted maximum donations to seventeen candidates, but even a single dollar to an eighteenth candidate could be prohibited outright on anticorruption grounds beyond the aggregate limit.¹⁷⁹ As the Court saw it, there was little sense from an anticorruption standpoint for restricting what a contributor could give one candidate based on what the contributor had donated previously to others.¹⁸⁰ The constitutional analysis of quid pro quo corruption could be judged only candidate by candidate, each candidate independent of others, such that contributions to one candidate could not alter the risk of corruption for any others.

But obviously they just might. Contributors who operated near or at the aggregate limit were already donating six-figure amounts to influence federal elections and typically, as I have described, contributed those amounts almost exclusively to one party or the other.¹⁸¹ Such contributors, like Shaun McCutcheon himself, are often party activists, committed to one major party's cause and invested in the party's success.¹⁸² Their relationship is as much with the party, or at least the party leadership, as it is with each individual candidate they support. They are valued by the party as prominent, important supporters who are likely to continue contributing on a regular basis and are thus cultivated as partners by the party with preferential access and influence. When they donated to multiple candidates up to what was then the applicable aggregate

¹⁷⁸ *Id.* at 1452 (noting that “Congress’s selection of a \$5,200 base limit indicates its belief that contributions of that amount or less do not create a cognizable risk of corruption”).

¹⁷⁹ *Id.* at 1451 (posing the parallel question why “it is perfectly fine to contribute \$5,200 to nine candidates but somehow corrupt to give the same amount to a tenth”).

¹⁸⁰ *See id.* at 1452.

¹⁸¹ *See supra* notes 173–74 and accompanying text.

¹⁸² *See, e.g.,* Mary Orndorff Troyan, *Alabama GOP Donor Challenges Limits*, USA TODAY (Aug. 9, 2013), <http://www.usatoday.com/story/news/politics/2013/08/09/Alabama-gop-donor-challenges-limits/2634671> [<http://perma.cc/8CCF-KM2G>] (quoting Alabama Republican Party Chairman Bill Armistead saying that McCutcheon “wanted to make a difference, and do whatever it takes to help the party achieve its goal”).

limits, they did so as party sponsors who intended to back the party on a wholesale basis and transacted with it as their collective counterparty.

In this sense, the aggregate limit served a parallel purpose in guarding against aggregate, party-based corruption as the individual contribution limit serves in guarding against individual-level corruption. The individual contribution limit has been upheld as a measure to check the risk of quid pro quo exchange with an individual officeholder by limiting the maximum amount of money that a contributor can transfer to the officeholder. The limit may not eliminate the risk of quid pro quo corruption, but by capping the maximum exchange, the limit puts a ceiling on the magnitude of the possible quid pro quo. Just so, the aggregate contribution limit arguably served a parallel purpose for high-level contributors who transact with the party on a wholesale basis. High-level contributors hope to transfer large amounts of money to the party by parceling out many individual contributions to many of the party's candidates. In *McCutcheon's* case, it would have been to almost thirty candidates in the absence of the aggregate limit.¹⁸³ Indeed, in the case of a well-organized joint fundraising committee, high-level contributors may donate in the spirit of supporting the party's collective effort without necessarily knowing a great deal about the individual recipients allocated their money.

The aggregate limit capped this total amount per election cycle that a high-level contributor can transfer to the party as a whole. By doing so, the aggregate limit served to address the most extreme concerns about high-level contributors gaining the same type of leverage over the party as the individual limit ostensibly prevents at the individual level over particular candidates. Even if one estimates the risk of this type of party-based corruption to be minimal, the aggregate limit could have been calibrated to a justifiably high enough amount where the associated risk is equivalent to the risk of corruption addressed at the individual level by the \$2600 individual contribution limit.¹⁸⁴

The Court's decision in *McCutcheon*, however, did not turn on any theory of aggregate, group-level corruption. Indeed, the government relied mainly on a theory of anticircumvention in

¹⁸³ See *McCutcheon*, 134 S. Ct. at 1443.

¹⁸⁴ See Issacharoff, *supra* note 26, at 110 ("Does anyone really think that it makes a difference in terms of corruption whether the limits are set at \$2700 or \$27,000?").

its briefing of the case.¹⁸⁵ The government argued that even after a contributor had donated the maximum permissible amount to a particular candidate under the individual contribution limit, the contributor might be able to funnel more money to the same candidate in the absence of an aggregate limit.¹⁸⁶ Without the aggregate limit, the contributor might be able to circumvent the individual contribution limit by donating to other candidates and committees who would transfer the contributor's money back to the original candidate in excess of the original individual limit. This circumvention-based argument by the government had the great advantage of being grounded in the basic dyadic framework of *quid pro quo* corruption insisted upon by the Roberts Court.¹⁸⁷ It justified the aggregate limit based on the familiar risk of *quid pro quo* corruption from direct exchanges between a large-dollar contributor and a particular candidate or officeholder. The risk allows the government to cap those direct exchanges, as well as otherwise coordinated expenditures, in the interest of anticorruption. Because individual contribution limits were constitutionally permissible for this reason, the government argued that the aggregate limit was therefore also constitutionally permissible as a backstop to prevent circumvention of those individual limits.¹⁸⁸ The Court, though, rejected the government's anticircumvention arguments because it did not see sufficient basis for such worry about circumvention, which at least a few Justices considered wildly overblown.¹⁸⁹

The government did discuss the role of the major parties during the *McCutcheon* oral argument, despite little mention of it in its briefing.¹⁹⁰ Solicitor General Don Verrilli observed in his oral argument about the party collectivization of campaign finance that "every candidate is going to get a slice of the money, and every candidate is going to know that this person who wrote the multimillion dollar check has helped, not only the candidate, but the whole team, and that creates a particular sense of indebtedness."¹⁹¹ Verrilli argued that this coordi-

¹⁸⁵ See *McCutcheon*, 134 S. Ct. at 1457–58.

¹⁸⁶ *Id.*

¹⁸⁷ See *id.* at 1450 (explaining that "Congress may target only a specific type of corruption—'*quid pro quo*' corruption").

¹⁸⁸ See *id.* at 1442.

¹⁸⁹ See *id.* at 1452–56 (calling these worries "divorced from reality" and "highly implausible").

¹⁹⁰ See *id.* at 1460 (noting that the government "shifted its focus from Buckley's anticircumvention rationale" at oral argument).

¹⁹¹ Transcript of Oral Argument at 39, *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014) (No. 12-536).

nation and teamwork meant that “every officeholder in the party is likely to be leaned on by the party leadership to deliver legislation to the people who are buttering their bread.”¹⁹² But this party-related argument was not the focus of the government’s briefing, and perhaps for good reason. The Court had never adopted or articulated such a theory nor even seriously been presented with it. When the Court considered the role of the major parties in campaign finance, it regarded them as allied with candidates but analytically separate and distinct from their officeholders and candidates for campaign finance purposes.¹⁹³ As a result, the Court concentrated mainly on the role that parties might play as conduits of money to and from candidates in a similar vein as the *McCutcheon* anticircumvention theory, where parties are allied abettors of candidates but not themselves literal aggregates of individual candidates.¹⁹⁴

To be blunt, there is little reason to suspect that the Roberts Court itself would adopt such a theory of group-level corruption. In its plurality opinion in *McCutcheon*, the Roberts Court addressed Verrilli’s party-based arguments without any hint of sympathy. The plurality opinion interpreted Verrilli to argue that “there is an opportunity for corruption whenever a large check is given to a legislator, even if the check consists of contributions within the base limits to be appropriately divided among numerous candidates and committees.”¹⁹⁵ Under this argument, the aggregate limit “ensure[s] that the check amount does not become too large.”¹⁹⁶ The plurality acknowledged that “[o]f course a candidate would be pleased with a donor who contributed not only to the candidate himself, but also to other candidates from the same party, to party committees, and to PACs supporting the party.”¹⁹⁷ But even after admitting that party-related campaign finance can create indebtedness, the plurality rejected the proposition that this risk of indebtedness justified the aggregate limit.¹⁹⁸

The *McCutcheon* plurality turned largely to consequentialist grounds for doing so. The plurality explained that such an extension of the quid pro quo framework to the party context would “target[] as corruption the general, broad-based support

¹⁹² *Id.* at 39–40.

¹⁹³ *See, e.g.*, *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001); *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604 (1996).

¹⁹⁴ *See* 533 U.S. at 431; 518 U.S. at 604.

¹⁹⁵ *McCutcheon*, 134 S. Ct. at 1460.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 1461.

¹⁹⁸ *Id.* at 1462.

of a political party.”¹⁹⁹ The plurality did not reject the notion that party-related campaign finance can create the type of gratitude or indebtedness upon which quid pro quo exchanges rest, but it instead offered only that there is “a clear, administrable line between money beyond the base limits funneled in an identifiable way to a candidate—for which the candidate feels obligated—and money within the base limits given widely to a candidate’s party—for which the candidate, like all other members of the party, feels grateful.”²⁰⁰ The plurality therefore seemed not to distinguish individual and party-related aggregate corruption, acknowledging risks of both, except to shelter party-related campaign finance activity as a matter of administrability and to restrict the government’s anticorruption interest on prudential grounds. The plurality explained only that doing otherwise would “dramatically expand government regulation of the political process.”²⁰¹

Although the Roberts Court is exceedingly unlikely to adopt any extension of the basic quid pro quo framework, this is not to concede that a future Supreme Court will never adopt any extension of the quid pro quo framework. The dramatic reversal of campaign finance law, which I have previously called the end of campaign finance law as we knew it, occurred after the replacement of just two Justices who were ideologically moderate on campaign finance with two who are aggressively hostile to campaign finance regulation.²⁰² As a realist matter, the tide of campaign finance law could shift just as quickly back toward the government deference that reigned for two decades during the Rehnquist Court. A future Court, one more predisposed toward campaign finance regulation than the current one, still would need to deal with Court precedent that now has significantly narrowed the government’s regulatory interest and focused it squarely on quid pro quo corruption.²⁰³ From this perspective, legal theories that start from the core conception of individual quid pro quo corruption but build logi-

199 *Id.* at 1460.

200 *Id.* at 1461.

201 *Id.*

202 See Adam Liptak, *Former Justice O’Connor Sees Ill in Election Finance Ruling*, N.Y. TIMES, Jan. 26, 2010, at A18 (reporting retired Justice O’Connor’s disagreement with *Citizens United* and the Roberts Court’s direction on campaign finance law); Jeffrey Rosen, *Why I Miss Sandra Day O’Connor*, NEW REPUBLIC (July 1, 2011), <http://newrepublic.com/article/politics/91146/Sandra-day-o-connor-supreme-court-alito> [<http://perma.cc/5FKH-Y5DA>] (reporting the same).

203 See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 349 (2010) (observing that the government was forced to abandon *Austin’s* antidistortion rationale in light of the Roberts Court’s direction on campaign finance).

cally outward to support regulation are particularly valuable. In other words, even a future Court sympathetic to campaign finance regulation will need to draw on creative extensions on quid pro quo corruption if it wants to retrofit constitutional justifications under the Roberts Court precedent and preserve any of today's regulatory apparatus.

Any such future effort would need to begin now, if only in dissent under the Roberts Court. One need look only to Justice Kennedy's dissents in earlier campaign finance decisions under the Rehnquist Court for a model. Justice Kennedy was a consistent dissenter from the Rehnquist Court's general deference to the government in campaign finance law, and his dissenting opinions provided the intellectual groundwork for the Roberts Court's subsequent reversal in course. In *Austin*, Justice Kennedy protested in dissent that "the danger of a political *quid pro quo* is insufficient" to uphold any restriction of independent expenditures.²⁰⁴ He argued that "[c]andidate campaign contributions are subject to greater regulation because of the enhanced risk of corruption," while by contrast "independent expenditures pose no such risk."²⁰⁵ Again in *McConnell*, Justice Kennedy pressed in dissent for what the majority there dismissed as a "crabbed view of corruption,"²⁰⁶ arguing once more that "only a single definition of corruption has been found to identify political corruption successfully and to distinguish good political responsiveness from bad—that is *quid pro quo*."²⁰⁷ In Justice Kennedy's view, the government's interest in preventing corruption therefore "only justifies regulating candidates' and officeholders' receipt of what we can call the 'quids' in the *quid pro quo* formulation."²⁰⁸ When the Court's personnel turnover shifted Justice Kennedy from dissent to the leading voice on campaign finance law, Justice Kennedy drew heavily from his earlier dissents as foundation for his majority opinion in *Citizens United v. FEC*. His majority opinion was a virtual carbon copy of his *McConnell* dissent, citing and quoting from it extensively, in overruling both *Austin* and *McConnell* because "independent expenditures do not lead to, or create the appearance of, *quid pro quo* corruption."²⁰⁹

204 *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 703 (1990) (Kennedy, J., dissenting).

205 *Id.* at 702 (Kennedy, J., dissenting).

206 *McConnell v. FEC*, 540 U.S. 93, 152 (2003).

207 *Id.* at 297 (Kennedy, J., concurring in part and dissenting in part).

208 *Id.* at 292 (Kennedy, J., concurring in part and dissenting in part).

209 *Citizens United v. FEC*, 558 U.S. 310, 360 (2010).

I have written elsewhere to criticize Justice Kennedy's campaign finance jurisprudence across these cases as well as others,²¹⁰ but the relevant point here is that the remarkable reversal of campaign finance law during Justice Kennedy's tenure sprouted from dissents setting the groundwork for what later ascended to the majority. Just so, any future reversal of the Court's direction on campaign finance law under new personnel would likewise draw strength from a similar process of consistent dissent that patiently charts the path for that course correction. In this sense, development of campaign finance theory that will not draw five votes from the current Roberts Court is far from a waste of time and intellectual energy. Development of theory, such as a group-based theory of quid pro quo corruption, should account for doctrinal opportunity under current law to move in a different direction later on and simply bide its time. The group-based theory of quid pro quo corruption might not only represent a previous path not taken; it might identify the road forward for campaign finance law as well.

III

THE NEXT CONSTITUTIONAL CHALLENGES FOR PARTY CAMPAIGN FINANCE

This Part analyzes three pending constitutional challenges to significant aspects of party-related campaign finance law whose de-regulation has been proposed in at least some quarters: (1) pay-to-play laws; (2) party soft money; and (3) party-connected Super PACs. These challenges hinge upon judicial willingness to adopt the logic of a group-based theory of quid pro quo corruption, and the constitutional stakes are surprisingly high. Depending on how courts approach these cases, the constitutional results could end with the nearly total deregulation of party campaign finance.

A. Pay-to-Play Laws

The federal prohibition on campaign finance contributions by government contractors is the federal version of a common state and municipal regulation known as a pay-to-play law.²¹¹ Pay-to-play laws impose prohibitions on individuals in the regular business of seeking a government contract on the theory

²¹⁰ See, e.g., Kang, *supra* note 7, at 24–27; Michael S. Kang, *After Citizens United*, 44 IND. L. REV. 243, 248–54 (2010).

²¹¹ See 2 U.S.C. § 441c (2012); see also 17 C.F.R. § 275.206(4)–5 (2013) (regulating political contributions by SEC-registered investment advisers).

that they constitute a class of potential contributors at particular risk of engaging in quid pro quo exchanges with government officials.²¹² Certain government officeholders are potentially in positions to influence decisions on government contracts and thereby reciprocate their campaign contributions with a concrete, timely payoff by helping them win government work on favorable terms. The outright prohibition on contributions is restrictive but justified by the immediacy of the corruption risk with this limited class of prospective contributors seeking discrete, private gain from business with the federal government.²¹³

The constitutional vulnerability of the federal pay-to-play law, challenged in *Wagner v. FEC*,²¹⁴ is its breadth. A federal pay-to-play law bars any person who contracts with the federal government from contributing, directly or indirectly, to “any political party, committee, or candidate for public office or to any person for any political purpose or use.”²¹⁵ State and municipal pay-to-play laws are sometimes, but not always, more calibrated, limiting the prohibition on contributions only to officeholders in a position of direct decision-making authority with respect to the relevant contractor. In *Green Party of Connecticut v. Garfield*, for instance, the Second Circuit upheld a Connecticut pay-to-play law barring contributions to officials in the same government branch that had jurisdiction over the relevant contractor’s bids.²¹⁶ The federal pay-to-play law makes no such distinctions, barring contributions to “any political party, committee or candidate,” and thus prohibits contributions even to candidates for offices that command no direct authority over the contractor’s business.²¹⁷

In *Wagner v. FEC*, the plaintiffs attacked this potential overbreadth. The plaintiffs distinguished previous judicial decisions sustaining state and local pay-to-play laws “because the connection between the contract award and the contribu-

²¹² See Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118, 139–40 (2010).

²¹³ See *id.* at 126–28 (presenting the case for regulation based on “clientelist” concerns rather than the traditional prevention of corruption).

²¹⁴ 793 F.3d 1 (D.C. Cir. 2015) (en banc), *affg* 717 F.3d 1007 (D.C. Cir. 2013).

²¹⁵ 2 U.S.C. § 441c(a).

²¹⁶ 616 F.3d 189 (2d. Cir. 2010).

²¹⁷ 2 U.S.C. § 441c(a). Federal contractors, however, may make independent expenditures, which the federal prohibition does not cover. See Laurence D. Laufer & Rebecca Moll Freed, *Independent Expenditures: A Mechanism for Bribery in the Procurement Process?* N.J. LAW., Feb. 2013, at 41 (criticizing the same underinclusiveness under New Jersey’s pay-to-play law).

tion was much closer than it is in the federal system.”²¹⁸ Federal elected officials—the President, Vice President, and Congress—play “no direct role in awarding contracts” in the federal system.²¹⁹ What is more, the plaintiffs contended that the prohibition was overinclusive in banning contributions to political parties, which “have no possible role in federal contracting today.”²²⁰ Of course, the plaintiffs were correct in a formal sense that federal officials, including the President, have no direct legal control over contracting decisions decided by executive agencies. This focus on the officeholding recipient of the contribution mirrors the dyadic focus of the Court’s quid pro quo corruption framework. The common question is whether the specific recipient of a contribution is in position to directly reciprocate the favor, except that the plaintiffs’ pay-to-play analysis contemplates a quite specific payoff and therefore limits the corruption risk to recipients who can individually execute that specific payoff.

The underlying questions about quid pro quo corruption in *Wagner* thus parallel those in *McCutcheon*, even if the pay-to-play law appears quite different from the aggregate contribution limit. In *McCutcheon*, the Court viewed quid pro quo corruption as potentially occurring only on a pairwise basis between an individual contributor and an individual candidate who will be in a direct position to pay back the contributor by virtue of his or her public office.²²¹ The *Wagner* plaintiffs, in supplemental briefing, drew from *McCutcheon* to argue that “contributions [from the contractor] to federal candidates and committees might create feelings of gratefulness in the recipients,” but that the government’s anticorruption interest simply did not apply if “the recipients do not award contracts.”²²² As I have already argued, this type of dyadic analysis from *McCutcheon* too narrowly focuses on the recipient as the sole conceivable counterparty in the plausible quid pro quo and misses the political interconnectedness among candidates and officeholders.²²³ Of course, the President and key members of Congress do not need direct control over specific contracting decisions to

²¹⁸ Brief for Plaintiffs-Appellants at 45, *Wagner v. FEC*, 717 F.3d 1007 (D.C. Cir. 2013) (No. 12-5365).

²¹⁹ *Id.*

²²⁰ *Id.* at 47.

²²¹ See *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014) (describing quid pro quo corruption as the “direct exchange of an official act for money”).

²²² Supplemental Brief for Plaintiffs at 9, *Wagner v. FEC*, 717 F.3d 1007 (D.C. Cir. 2013) (No. 13-5162).

²²³ See *supra* subpart II.D.

have ample means of potential influence over them. A group-level conception of quid pro quo corruption, as opposed to the Court's dyadic approach, accounts for the intense interconnectedness of public officeholders, at least those from the same major party, that generates countless opportunities for reciprocation through political allies far beyond the set of specific decisions that any single officeholder officially controls.²²⁴

For the same reason, a group-level conception of corruption is relevant to the federal pay-to-play prohibition on contributions to party committees. Again, the formal party committees have no direct control over government decisions and do not themselves hold any public office. However, the party committees are composed of and directed by officeholders and candidates. It would be myopic not to see the party committees as bound up with officeholders and candidates as I have explained. Party-mediated corruption involving government contractors is not at all hypothetical. Indeed, the federal pay-to-play statute itself originated from the famous "Democratic campaign-book racket" of the 1930s.²²⁵ Democratic Party agents coerced government contractors to buy quotas of worthless political books from the party as a price of entry, scaled to the value of work a respective contractor obtains from the federal government.²²⁶ The district court and later the D.C. Circuit in *Wagner* cited the campaign-book racket, as well as recent corruption scandals involving government contractors at the state and local level, as sufficient grounds for the pay-to-play law.²²⁷ As the district court put it, "Congress need not roll back its longstanding ban and wait for a scandal to arise in order to provide evidence that § 441c prevents corruption."²²⁸

The broad federal contribution ban across all candidates, officeholders, and party committees implicitly acknowledges the pervasive interconnectedness among party politicians that make narrow prohibitions in this context almost certainly un-

²²⁴ See LEE, *supra* note 158, at 71–73.

²²⁵ See *Wagner v. FEC*, 901 F. Supp. 2d 101, 107–08 (D.D.C. 2012) (discussing the book racket as the impetus for the federal pay-to-play law); see also MICHAEL J. WEBBER, *NEW DEAL FAT CATS: BUSINESS, LABOR, AND CAMPAIGN FINANCE IN THE 1936 PRESIDENTIAL ELECTION* 70–77 (2000) (recounting the Democratic Convention Book scandal of 1936).

²²⁶ See *Wagner*, 901 F. Supp. 2d at 108.

²²⁷ *Id.* at 109.

²²⁸ *Id.*; see also *Wagner v. FEC*, 793 F.3d 1, 9 (D.C. Cir. 2015) ("As the Supreme Court has recognized, 'no data can be marshaled to capture perfectly the counterfactual world in which' an existing campaign finance restriction 'do[es] not exist.'" (quoting *McCutcheon v. FEC*, 134 S. Ct. 1434, 1457 (2014)) (alteration in original)).

derinclusive. There are good policy reasons to craft pay-to-play prohibitions more narrowly in light of First Amendment and other prudential considerations, but if these prohibitions are to have any effectiveness, it is perfectly sensible to permit the government a measure of broader discretion as a practical safeguard against corruption concerns.²²⁹ The breadth of the federal law serves as a common sense prophylactic measure that should be upheld for this specific class of potential contributors for whom the party-related corruption risk is obviously heightened.

B. Party Soft Money

There have been nostalgic calls for the restoration of party soft money since the BCRA banned it more than decade ago. Even after the soft money ban was upheld in *McConnell*, the Republican National Committee (RNC) persisted with unsuccessful constitutional challenges, the last one decided right after *Citizens United*.²³⁰ However, the powerful signals from the Roberts Court about its eagerness to reverse the course of campaign finance law certainly gives new life to the restoration of party soft money, whether by constitutional challenge or congressional reversal.

The last major challenge to BCRA's party soft money ban was *RNC v. FEC*, decided just months after *Citizens United* in 2010.²³¹ The D.C. District Court upheld the prohibition on the national party committees from soliciting, receiving, or directing to another person any funds that are not subject to the contribution limits, source restrictions, and disclosure requirements applicable to contributions under federal campaign finance law.²³² Following *Citizens United*, commentators, including myself, expected the soft money ban eventually to be struck down,²³³ but the Supreme Court summarily affirmed,

²²⁹ See Issacharoff, *supra* note 212, at 141–42.

²³⁰ See *RNC v. FEC*, 698 F. Supp. 2d 150 (D.D.C. 2010), *aff'd* 130 S. Ct. 3544 (2010).

²³¹ *Id.*

²³² *Id.* at 160 (upholding the constitutionality of 2 U.S.C. § 441i(a)(1)).

²³³ See Kang, *supra* note 210, at 252–53 (anticipating challenges to restrictions on party soft money); Adam Liptak, *Supreme Court Affirms a Ban on Soft Money*, N.Y. TIMES, June 29, 2010, <http://nytimes.com/2010/06/30/us/politics/30donate.html> [<https://perma.cc/SN62-7BAC>] (quoting Richard Hasen's dismissal of summary affirmance in *RNC v. FEC* as "only temporary good news for those who think the soft-money ban is an important anticorruption component of federal campaign finance law"); Nathaniel Persily, *The Floodgates Were Already Open*, SLATE (Jan. 25, 2010, 2:30 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2010/01/the_floodgates_were_already_open.html

perhaps unwilling to revisit so immediately the public controversy raised by *Citizens United*.²³⁴

The RNC offered a clever argument in its litigation that was ultimately unsuccessful before the D.C. District Court but nonetheless well crafted to the Roberts Court's narrow approach to corruption. The RNC mounted an as-applied challenge disclaiming any use of federal candidates to solicit soft money and any assistance to soft money donors "in obtaining preferential access to federal candidates or officeholders."²³⁵ Taken at face value, the RNC's stipulation seemed calculated to evade the Court's rationale for upholding the BCRA soft money ban in *McConnell*. There, the Court had predicated its ruling in part on evidence that the parties had sold access to federal officeholders and candidates in exchange for soft money donations, therefore implicating the government's rightful interest in preventing undue influence.²³⁶ But as the D.C. District Court acknowledged, "[t]o the degree that the FEC argues that large contributions to the national parties are corrupting and can be limited because they create gratitude, facilitate access to, or generate influence, *Citizens United* makes clear that those theories are not viable."²³⁷

Instead, the D.C. District Court upheld the soft money prohibition based on "the inherently close relationship between parties and their officeholders and candidates."²³⁸ It explained that *McConnell*'s affirmation of the soft money prohibition did not rest exclusively on a theory of access and undue influence, but also was based on the Court's determination that "there was no meaningful separation between the national party committees and the public officials who control them, because the national committees were run by, and largely composed of, federal officeholders and candidates."²³⁹ This "unity of interest" with the national parties, articulated in *McConnell*, meant that "federal officeholders and candidates may value contribution to *their national parties*—regardless of how those contributions ultimately may be used—in much the same way they

[<http://perma.cc/ZQ2B-SQR2>] ("Given the tone of *Citizens United*, we should expect a bold response [in RNC].").

²³⁴ RNC v. FEC, 130 S. Ct. 3544 (2010).

²³⁵ 698 F. Supp. 2d at 155.

²³⁶ See *McConnell v. FEC*, 540 U.S. 93, 153–54 (2003).

²³⁷ 698 F. Supp. 2d at 158.

²³⁸ *Id.* at 159.

²³⁹ *Id.* at 159 (quoting *McConnell*, 540 U.S. at 155) (internal quotation marks omitted).

value contributions to *their own campaigns*.”²⁴⁰ For this reason, even after *Citizens United* narrowed the government’s anticorruption interest, the D.C. District Court reasoned that “contributions to national parties have much the same tendency as contributions to federal candidates to result in *quid pro quo* corruption or at least the appearance of *quid pro quo* corruption.”²⁴¹

This reading of *McConnell* trades heavily in a group-level understanding of *quid pro quo* corruption. The national party committees were “inextricably intertwined with federal officeholders and candidates” because they were controlled by them and aligned almost exclusively in service to them.²⁴² As a result, there was no necessary distinction in kind, at least from the standpoint of *quid pro quo* corruption, between exchanges with the party committees and exchanges with the candidates themselves. The D.C. District Court, though, was uncertain about the robustness of its interpretation of *McConnell*. It explained that the “*McConnell* opinion is ambiguous on the question whether the ‘unity of interest’ between national parties and their candidates and officeholders was an independently sufficient rationale for the Court to uphold the blanket ban on soft-money contributions.”²⁴³ As I explained earlier, the Court had not embraced this “unity of interest” in the past. Indeed, the bulk of the Court’s reasoning in *McConnell* focused less on unity of interest than on the selling of access and resulting undue influence of soft money donors. It is, nonetheless, this slender reed from *McConnell*, based effectively on an aggregate-level understanding of *quid pro quo* corruption, upon which the party soft money ban may depend.

Justice Kennedy’s dissent in *McConnell* made no such concession about the potential for *quid pro quo* corruption through party campaign finance. Justice Kennedy’s notion of *quid pro quo* corruption depends on the existence of some exchange with the contributors, as opposed to expenditures that simply benefit the candidate or officeholder without his or her participation.²⁴⁴ For this reason, he restricted his opinion in

²⁴⁰ *Id.* (emphasis in original).

²⁴¹ *Id.* (emphasis in original).

²⁴² *McConnell*, 540 U.S. at 155 (quoting 148 CONG. REC. H409 (Feb. 13, 2002) (statement of Rep. Shays)).

²⁴³ 698 F. Supp. 2d at 160 (emphasis in original).

²⁴⁴ *McConnell*, 540 U.S. at 290 (Kennedy, J., concurring in part and dissenting in part) (“The principal concern, of course, is the agreement for a *quid pro quo* between officeholders (or candidates) and those who would seek to influence them.”).

Citizens United explicitly to the impermissibility of government regulation of independent expenditures.²⁴⁵ *Citizens United* explicitly left open the question of the regulability of contributions to candidates and parties that, by definition, involved an exchange or transfer of money.²⁴⁶ However, Justice Kennedy has not made entirely clear the degree to which he believes exchanges with party committees, as opposed to candidates and officeholders themselves, potentially implicate a risk of quid pro quo corruption. In *McConnell* itself, Justice Kennedy was focused on blasting the majority's ruling that access peddling by the parties constituted actionable quid pro quo corruption. In his view, the soft money ban "does not regulate federal candidates' or officeholders' receipt of *quids* because it does not regulate contributions to, or conduct by, candidates or officeholders."²⁴⁷ If this is correct, then Justice Kennedy is unlikely to waver from the view that soft money does not raise a corruption risk because in his judgment, it does not constitute direct receipt of money by candidates or officeholders.

Although I maintain that party soft money regulations can be constitutionally justified as a means of combating quid pro quo corruption, preemptive legislative adjustment of restrictions on soft money might be a smart political concession nonetheless. Soft money, unlike so-called hard money, is restricted in its permissible use by the recipient, whether it is a party committee or otherwise.²⁴⁸ Soft money is collected outside the usual strictures of the federal campaign regulation that apply to hard money used to fund express advocacy.²⁴⁹ The FEC originally authorized the collection of soft money for use mainly on "party building" activity, including voter registration, get-out-the-vote activities, and general administration, rather than for federal electioneering.²⁵⁰ As such, the FEC considered soft money spending for state and local election efforts as beyond its regulatory authority over federal elections. Once authorized, though, the party national committees dramatically expanded their involvement with soft money during the 1990s,

²⁴⁵ *Citizens United v. FEC*, 558 U.S. 310, 365–66 (2010).

²⁴⁶ *Id.* at 362.

²⁴⁷ *McConnell*, 540 U.S. at 299 (Kennedy, J., concurring in part and dissenting in part).

²⁴⁸ See Briffault, *supra* note 56, at 628–31.

²⁴⁹ See *id.*

²⁵⁰ See Corrado, *supra* note 113, at 1030–34 (narrating the historical evolution of party soft money).

both in sheer fundraising scale and utilization.²⁵¹ The party committees collected so much soft money to fund “sham issue advertising” so closely resembling hard money electioneering that Congress shut the door on soft money by passing BCRA in 2002.²⁵² But the basic limitations on soft money leave it somewhat less useful than hard money for electioneering purposes and channel its use toward party-building activity that advocates of strong parties should support, notwithstanding associated corruption concerns.

In other words, conditional legislative permission for the national party committees to raise soft money from individuals and coordinate with state and local parties along those lines might be a useful, if limited form of party deregulation. To limit the risk of corruption, deregulation of party soft money still would need to sensibly segregate it from electioneering advocacy and subject it to donation limits. Donation limits on soft money would be set above the hard money contribution limits but provide an upper bound nonetheless against the excesses of pre-BCRA soft money fundraising, especially if limited to individuals and not extended to corporations and unions.²⁵³ So cabined, soft money raised for legitimate party-building expenses might bolster party strength and build up grassroots infrastructure that seems to have eroded since BCRA’s passage, at least at the state and local party levels.²⁵⁴ Without question, money is fungible and will find certain ways around regulation, back toward the electioneering purposes that the

²⁵¹ See Richard Briffault, *The Future of Reform: Campaign Finance After the Bipartisan Campaign Reform Act of 2002*, 34 ARIZ. ST. L.J. 1179, 1182–1183 (2002).

²⁵² See Kang, *supra* note 7, at 3–4; see also Briffault, *supra* note 251, at 1182–85 (presenting the blueprint for BCRA regulation of party soft money).

²⁵³ See Raymond J. La Raja, *Breaking Up the Party: How McConnell Downsizes Partisan Campaigns*, 3 ELECTION L.J. 271, 274–75 (2004) (reporting that soft money donors in 1998, before BCRA, averaged less in soft money donations than hard money donors averaged in hard money contributions). However, a problem with soft money before BCRA was that a small number of rich donors also donated massive amounts of soft money as well. See Stephen Ansolabehere & James M. Snyder, Jr., *Soft Money, Hard Money, and Strong Parties*, 100 COLUM. L. REV. 598, 607 (2000) (explaining that 18,000 different donors gave soft money in 1998 but 11% of them gave almost 80% of the aggregate total); Briffault, *supra* note 39, at 346 (reporting that approximately \$300 million in soft money in 1999–2000 came from just 800 donors).

²⁵⁴ See Andrias, *supra* note 153, at 48–50 (criticizing the “hollowed-out” parties and noting the larger absence of participatory institutions); Fishkin & Gerken, *supra* note 90, at 204 (lamenting the deterioration of the parties’ role in democratic mobilization and engagement); Issacharoff, *supra* note 26, at 109–10 (arguing that state-level party infrastructure no longer exists and must be “created on the fly” for national campaigns).

major party committees currently prioritize. Before BCRA, roughly 45% of party soft money went to issue advertising.²⁵⁵ This was the problem that BCRA was intended to address, even at the cost of cutting off funds for party building. Still, roughly 55% of soft money went to pay for party-oriented activities such as voter registration, get-out-the-vote drives, direct mail, telephone banks, administration, and fundraising expenses, mainly at the state and local level.²⁵⁶ State and local parties, which perform the bulk of this grassroots outreach, relied heavily on soft money transfers from the national committees before BCRA and have struggled without it.²⁵⁷

At a time when campaign finance law is already trending quickly toward deregulation by Court mandate, a strategic concession that channels party campaign finance in a normative preferable direction and retains important restrictions is worth consideration. Party soft money presents a lesser risk of corruption if it can be regulated on sensible terms and directed toward party mobilization and engagement of ordinary voters—a mission they generally have increasingly neglected in pursuit of bigger fish.²⁵⁸

C. Party Super PACs

Almost unnoticed in the daily news coverage of campaign finance since *Citizens United* was the arrival of the first party-sponsored Super PAC at the state level. It is surprising that this development went overlooked by campaign finance law commentators and practitioners, because party-sponsored Super PACs, if protected by federal courts as a constitutional matter, would represent the near total collapse of campaign

²⁵⁵ See Herbert Alexander, *The Political Process After the Bipartisan Campaign Reform Act of 2002*, 2 ELECTION L.J. 47, 47 (2003); Briffault, *supra* note 251, at 1185. What is more, soft money at the local level presents its own set of corruption concerns. See, e.g., N.Y. COMM'N TO INVESTIGATE PUB. CORRUPTION, PRELIMINARY REPORT, Dec. 2, 2013, at 37–39 (discussing so-called party “housekeeping” accounts); COMMON CAUSE/N.Y., THE LIFE OF THE PARTY: HARD FACTS ON SOFT MONEY: “HOUSEKEEPING” ACCOUNTS IN NEW YORK STATE, May 2013, at 13–26 (explaining that “housekeeping” accounts at the state and local levels of New York State enable wealthy special interest groups to influence elections and policymaking).

²⁵⁶ See Alexander, *supra* note 255, at 47; see also Ansolabehere & Snyder, Jr., *supra* note 253, at 617 (estimating quantitatively at the time that a federal soft money ban would reduce national turnout more than two percentage points).

²⁵⁷ 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 92, 99–100 (2014) (documenting the drop in state party financing since BCRA).

²⁵⁸ See Kang, *supra* note 7, at 50–52 (discussing the major parties’ increasing focus on high-level campaign finance at the expense of grassroots mobilization).

finance law. A federal decision that the government cannot require a party-sponsored Super PAC to abide by contribution limits and source restrictions would very likely involve constitutional reasoning that leaves hardly anything of the campaign finance system that existed before the Roberts Court. Such a decision would leave in place only the bare core of that system—the basic regulation of candidate contributions and disclosure.

How did we get our first party Super PAC at the state level? In May 2014, the Colorado Republican Party established an independent expenditure-only committee, commonly known as a Super PAC, after a declaratory order from Secretary of State Scott Gessler, a fellow Republican, opined to its legality under state campaign finance law.²⁵⁹ The state party stipulated that it would appoint the committee membership of the party Super PAC, serve as the Super PAC's parent corporation, require the Super PAC to follow the party bylaws, and solicit funds for the Super PAC.²⁶⁰ However, the state party promised that it would not actively manage the Super PAC's operations nor direct its campaign spending, to avoid formal coordination with the Super PAC and to preserve the independence of its expenditures.²⁶¹ The Colorado Republican Party sued in state court for a declaratory judgment under Colorado law and promptly won summary judgment, unopposed by the state, for its Super PAC to receive uncapped donations to fund independent expenditures.²⁶²

The constitutional case for the party-sponsored Super PAC is straightforward after *Citizens United*²⁶³ and *SpeechNow.org v. FEC*.²⁶⁴ The Republican National Committee pressed the same case at the federal level before abruptly withdrawing its

²⁵⁹ See Eli Stokols, *Secretary of State: Colorado GOP Can Form Fundraising Super PAC*, FOX NEWS 31 (Feb. 6, 2014, 8:06 PM), <http://kdvr.com/2014/02/06/colorado-gop-gets-green-light-to-form-fundraising-super-pac/> [<http://perma.cc/V2XQ-W8BH>]. It seems that the state party actually established an independent expenditure-only committee more than a year earlier, in August 2012, on the advice of Gessler. See Petition for Declaratory Order at 4, Matter of the Colo. Republican Party's Request for a Declaratory Order Concerning Party Indep. Expenditure Comms. (2013). The earlier committee, however, was funded entirely by hard money transfers from the state party subject to applicable state law restrictions, and thus enjoyed none of the regulatory advantages of a Super PAC vis-à-vis a standard political committee that makes candidate contributions.

²⁶⁰ Order on Motion for Summary Judgment at 3–4, Colo. Republican Party v. Gessler (D. Colo. Sept. 30, 2014) (No. 2014-CV-31851).

²⁶¹ *Id.* at 4.

²⁶² See *id.* at 5.

²⁶³ 558 U.S. 310 (2010).

²⁶⁴ 599 F.3d 686 (D.C. Cir. 2010).

claims in *RNC v. FEC* for the time being. As the RNC argued in that lawsuit, *Citizens United* established unequivocally that independent expenditures do not raise the specter of quid pro quo corruption. Then, *SpeechNow.org* extended that logic to strike down as unconstitutional contribution limits applicable to nonconnected committees that use their campaign funding exclusively to engage in their own independent expenditures.²⁶⁵ These Super PACs qualified for freedom from contribution limits because of their insulation from candidates and the resulting absence of any quid pro quo risk that would justify restriction. The Republican National Committee claimed, mirroring the Colorado Republican Party's arguments, that they deserve regulatory parity with nonconnected committees provided it too ensures that its Super PAC refrains from engaging candidates with contributions and formal coordination.²⁶⁶ The RNC admitted that it would make contributions and coordinate with its candidates, but like nonconnected groups, it promised to segregate its Super PAC fundraising and accounts from its main operations out of which it would engage its candidates.²⁶⁷

From the perspective of a group-level theory of quid pro quo corruption, it would be absurd if the government could not impose contribution limits upon a party-sponsored Super PAC under these circumstances. It is simply astounding to suppose that the Super PAC run by the national party committee is meaningfully independent from the party itself, and that the party's candidates are entirely free from the associated risk of corruption, because it operates out of a different pocket on the same pair of pants. The RNC cannot credibly claim any meaningful insulation from its candidates given its pervasive connection to them as its reason for being. However, the RNC's claims draw life from the Court's earlier decisions recognizing the party committees' constitutional right to engage in nominally independent expenditures. Those decisions, as the RNC astutely cites, ruled that not even a party committee could be presumptively regarded as coordinated with candidates to justify a special restriction on independent expenditures.²⁶⁸

²⁶⁵ See *id.* at 698.

²⁶⁶ See Memorandum in Support of Plaintiffs' Motion for Summary Judgment at 15–24, *RNC v. FEC*, No. 14-cv-853 (D.D.C. July 14, 2014) [hereinafter Memorandum in Support].

²⁶⁷ See *id.* at 3–4, 7 (citing *SpeechNow.org*, 599 F.3d at 696).

²⁶⁸ See *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 618 (1996).

Under this logic, the RNC further proposed that its officials, themselves perhaps party candidates and officeholders, can legally solicit on behalf of its Super PAC unrestricted contributions specifically earmarked for express advocacy in support of particular party candidates.²⁶⁹ The underlying logic of the RNC's claim was that party committees are entitled to the same rights in campaign finance as nonconnected groups with literally no relationship with any candidates or officeholders.²⁷⁰ The party's pervasive connection to its candidates and officeholders, absent formal coordination, made no constitutional difference in the analysis. If the requirement of formal coordination was substantively meaningful, its decisive importance in the analysis might make more sense, but if there is anything on which campaign finance observers can widely agree, it is that the legal definition of formal coordination is entirely opaque at the moment and laughably easy to circumvent such as it currently stands.²⁷¹

A federal constitutional decision that tracks the RNC's case for party-sponsored Super PAC is therefore an existential threat to American campaign finance regulation. Such reasoning might restrict the government's interest in campaign finance regulation to restrictions on direct contributions to candidates for office, with little else beyond basic disclosure. Only that fundamental core of campaign finance activity—hard money donations received personally by candidates—is unmistakably within the government's interest in preventing “quid pro quo corruption” as the Roberts Court has defined it.²⁷²

²⁶⁹ See Memorandum in Support, *supra* note 266, at 6–14.

²⁷⁰ See *id.* at 17–29.

²⁷¹ See generally DANIEL P. TOKAJI & RENATA E. B. STRAUSE, *THE NEW SOFT MONEY: OUTSIDE SPENDING IN CONGRESSIONAL ELECTIONS* 63–71 (2014) (discussing the legal distinction between formal coordination and mere cooperation); Richard Briffault, *Coordination Reconsidered*, 113 COLUM. L. REV. SIDEBAR 88, 92 (2013) (“That spending by these [Super PACs in 2012] was considered legally independent of and not coordinated with the single candidates they support is proof enough of the inadequacy of our current law to deal with the Super PAC phenomenon.”); see also VOGEL, *supra* note 8, at 86–96 (noting the toothlessness of federal restrictions on coordination between Super PACs and candidate campaigns during the 2012 presidential primaries); Matea Gold, *It's Bold, but Legal: How Campaigns and Their Super PAC Backers Work Together*, WASH. POST (July 6, 2015), https://www.washingtonpost.com/politics/here-are-the-secret-ways-super-pacs-and-campaigns-can-work-together/2015/07/06/bda78210-1539-11e5-89f3-61410da94eb1_story.html [<http://perma.cc/Y5EY-793L>] (“The rules of affiliation are just about as porous as they can be, and it amounts to a joke that there's no coordination between these individual super PACs and the candidates.” (quoting Rep. David Price)).

²⁷² See *McCutcheon v. FEC*, 134 S. Ct. 1434, 1444–45 (2014) (“The primary purpose of FECA was to limit *quid pro quo* corruption and its appearance; that

Down this path, the Roberts Court would have struck down virtually all restriction of independent expenditures, regardless of the spender's identity—corporate, union, party, or otherwise—and would allow only the regulation of money literally transferred to a candidate.

Once down this path, it would be hard to understand how the government's anticorruption interest could support some of the current limits even on candidates, set as low as they are, without justifying any other material restriction on campaign finance activity. The FEC has long since denied permission for a U.S. Senator's leadership PAC to operate its own Super PAC,²⁷³ but perhaps a judicial revisit of that denial, deregulating even incumbent officeholders on a presumption of independence from themselves, would truly be a final move in the endgame of campaign finance law. Already in advance of the 2016 presidential election, politicians who all but formally declared their candidacies for their party's presidential nomination managed to conduct their early campaign activities through Super PACs.²⁷⁴ Another leap from this legal pretense of noncoordination between prospective candidates and their Super PACs, to open use of Super PACs by candidates for campaign purposes is not difficult to imagine.²⁷⁵

purpose satisfied the requirement of a 'sufficiently important' government interest."); see also *supra* Part I.

²⁷³ See FEC Advisory Op. 2011–21 (Dec. 1, 2011) (concluding that the Constitutional Conservatives Fund PAC, sponsored by a U.S. Senator, must collect all campaign funds subject to FECA regulation, including contribution limits and source restrictions on corporations and unions, even for its independent expenditures).

²⁷⁴ See Reid J. Epstein & Rebecca Ballhaus, *Roles of Presidential Super PACs Expanding*, WALL ST. J. (Apr. 30, 2015), <http://www.wsj.com/articles/roles-of-presidential-super-pacs-expanding-1430437766> [<http://perma.cc/4ZW3-GHB> P]; Matea Gold, *Why Super PACs Have Moved from Sideshow to Center Stage for Presidential Hopefuls*, WASH. POST (Mar. 12, 2015), https://www.washingtonpost.com/politics/once-the-sideshows-super-pacs-now-at-the-forefront-of-presidential-runs/2015/03/12/516d371c-c777-11e4-a199-6cb5e63819d2_story.html [<https://perma.cc/8H83-CWK2>].

²⁷⁵ See Nicholas Confessore, *Democrats Lay Groundwork to Expand Use of 'Super PACs'*, N.Y. TIMES, Sept. 14, 2015, at A1 (reporting plans to tighten relationship of Super PAC activity with candidates' formal campaigns); Trip Gabriel, *'Super PACs' Take on New Role, Organizing Voters*, N.Y. TIMES, July 7, 2015, at A1–A2 (reporting increasing use of Super PACs for traditional grassroots fieldwork); Joseph Tanfani & Seema Mehta, *Super PACs Stretch the Rules that Prohibit Coordination with Presidential Campaigns*, L.A. TIMES, Oct. 6, 2015, <http://www.latimes.com/nation/la-na-politics-superpacs-impact-20151005-story.html> [<http://perma.cc/KZ8C-W389>] (describing aggressive use of Super PACs for 2016 presidential primary campaigning); Paul Blumenthal, *How Super PACs and Campaigns Are Coordinating in 2016*, HUFFINGTON POST (Nov. 14, 2015) www.huffingtonpost.com/super-pac-cordination_us_5643f85e46045bf3def0273

IV

PARTY AS COUNTERWEIGHT, OR PARTY CO-OPTION?

A pivotal question in campaign finance law today is what to do, if anything, about party-related campaign finance. As I have argued, there is a discernible constitutional path for the continued regulation of party-related campaign finance, at least over the longer term, even under the current Court's doctrinal emphasis on quid pro quo corruption. But if the doctrinal case for a group-level theory of quid pro quo corruption is only prospective and tentative, the main threat to the regulation of party campaign finance might yet be normative resistance on policy, rather than constitutional grounds. Today, the normative case for the regulation of party campaign finance, even in its current longstanding form, is perhaps less certain than ever.

A. The Normative Case for Party Deregulation in the Super PAC Era

There is greater political resistance to the regulation of party-related campaign finance than there has been in quite a while, perhaps since *Buckley*. The case against the regulation of party-related campaign finance extends beyond the usual normative brief in favor of parties, described earlier, as critical mechanisms for interest aggregation that simplify politics and enable democratic accountability. It seizes upon the unraveling of the campaign finance system under the Roberts Court, whose narrowing scope of permissible regulation has fed a surge of campaign finance money flowing to outside groups, such as nonconnected Super PACs and 501(c) organizations.²⁷⁶ In the wake of court decisions deregulating campaign finance, outside groups now face significantly fewer restrictions than candidate and party committees who are still encumbered by the full regulatory panoply of contribution limits, source restrictions, and disclosure requirements. Super PACs, for instance, may not contribute to candidates and party committees, but if they restrict their campaign finance activity to independent expenditures, then they can fund their independent expenditures with unrestricted contributions from not

[<https://perma.cc/UB4Z-9WEV>] "The role of single-candidate super PACs has expanded exponentially in the 2016 presidential campaign.")

²⁷⁶ See Michael S. Kang, *The Year of the Super PAC*, 81 GEO. WASH. L. REV. 1902, 1907–13 (2013) (noting the rapid development of Super PACs following *Citizens United*).

only individuals, but also from corporations and unions.²⁷⁷ 501(c) organizations ostensibly cannot contribute to candidates and party candidates, nor make campaigning their “major purpose.” As such, they can claim not to qualify as regulated political committees under campaign finance law and therefore make independent expenditures without restriction, not even subject to basic campaign finance disclosure requirements.²⁷⁸

The differential regulation between candidates and party committees on the one hand, and nonconnected outside groups on the other hand, creates certain incentives for the direction of money toward nonconnected outside groups that face far less regulation. Campaign money in politics is fungible and tends to adapt to its regulation by finding less regulated outlets, like water finding its own level. This hydraulics of campaign finance suggests that new regulation complicates the flow of campaign finance money but often only channels the flow of money in different directions, through different recipients, rather than cutting off the flow of money altogether.²⁷⁹ Although the hydraulics of campaign finance have certainly played out with respect to new regulation like BCRA, the subsequent deregulation of campaign finance during the Roberts Court has produced what I have described as the “reverse hydraulics” of campaign finance.²⁸⁰ As campaign finance regulation has been peeled back recently, money has been channeled toward new opportunities opened up by the removal of those former legal restrictions.

After Roberts Court decisions cleared the way for the deregulation of outside groups sticking to independent expenditures,²⁸¹ gushers of money flowed to newly created Super PACs in a matter of months for the 2010 elections.²⁸² Eighty-three newly minted Super PACs quickly raised more than \$60 million for the 2010 elections.²⁸³ What is more, election spending by

²⁷⁷ See Briffault, *supra* note 141, at 1646–47 (discussing the characteristics of Super PACs and how they differ from other campaign finance vehicles).

²⁷⁸ See Richard Briffault, *Two Challenges for Campaign Finance Disclosure After Citizens United and Doe v. Reed*, 19 WM. & MARY BILL RTS. J. 983, 1007–08 (2011).

²⁷⁹ See Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1708–17 (1999).

²⁸⁰ See Kang, *supra* note 7, at 40–44.

²⁸¹ See Kang, *supra* note 276, at 1904–14.

²⁸² See *id.* at 1907.

²⁸³ See *2010 Outside Spending, by Group*, CTR. FOR RESPONSIVE POLITICS (2010), <https://www.opensecrets.org/outsidespending/summ.php?cycle=2010&disp=O&type=&chrt=P> [<http://perma.cc/2VQ4-L2GR>]; see also Kang, *supra* note 276,

all outside groups, including 501(c) organizations, increased dramatically from nearly \$70 million for the previous midterm elections in 2006 to more than \$300 million for 2010.²⁸⁴ By 2012, these trends only accelerated. Outside groups raised and spent more than \$1 billion for the 2012 elections, with roughly 1310 Super PACs raising more than \$800 million and accounting for more than \$600 million of the total spending.²⁸⁵

For this reason, a growing chorus of prominent commentators are now arguing for the deregulation of party campaign finance as a counterweight to the ascent of these well-funded outside groups.²⁸⁶ The basic argument is that the reverse hydraulics feeding campaign finance money to outside groups can be undone by deregulating the major parties from their current contribution limits and other restrictions. If campaign finance money is currently directed to Super PACs and 501(c) organizations because they are differentially less regulated than the formal party committees, then the deregulation of the party committees ought to induce a redirection of that money back to the parties. What is more, such a redirection of money to the major parties would reinvigorate the parties and candidates vis-à-vis the growing power of outside groups in campaign finance. Newly invigorated parties could counterbalance the ideological influence of these outside groups.

It is certainly true that the “party” can be conceptualized at vastly different levels of generality. The party writ large is a broad, far flung coalition of political actors that includes not

at 1907 (commenting on the amount of money raised by Super PACs leading up to the 2010 election).

²⁸⁴ See *Total Outside Spending by Election Cycle, Excluding Party Committees*, CTR. FOR RESPONSIVE POLITICS (2012), https://www.opensecrets.org/outsidesspend/cycle_tots.php [http://perma.cc/M53S-28RA].

²⁸⁵ See *2012 Outside Spending, by Super PAC*, CTR. FOR RESPONSIVE POLITICS (2012), <https://www.opensecrets.org/outsidesspending/summ.php?cycle=2012&chrt=V&type=S> [http://perma.cc/DGE4-L24K].

²⁸⁶ See Nathaniel Persily, *Strengthening Parties as a Solution to Polarization*, in *SOLUTIONS TO POLITICAL POLARIZATION IN AMERICA* 126–28 (Nathaniel Persily ed., 2015); Raymond J. La Raja, *Campaign Finance and Partisan Polarization in the United States*, 9 DUKE J. CONST. L. & PUB. POL’Y 223, 236–37 (2014); Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 YALE L.J. 804, 836–45 (2014); Nicholas O. Stephanopoulos, *Aligning Campaign Finance Law*, 101 VA. L. REV. 1425, 1425 (2015); Ray La Raja & Brian Schaffner, *Want to Reduce Polarization? Give Parties More Money*, WASH. POST (July 21, 2014), <http://washingtonpost.com/blogs/monkey-cage/wp/2014/07/21/want-to-reduce-polarization-give-parties-more-money/> [http://perma.cc/R5XA-QQRN]; see also PETER J. WALLISON & JOEL M. GORA, *BETTER PARTIES, BETTER GOVERNMENT: A REALISTIC PROGRAM FOR CAMPAIGN FINANCE REFORM* 52–57 (2009) (suggesting that eliminating restrictions on party campaign finance creates a more level political playing field).

only the formal party committees, officeholders, and candidates, but high-level party donors, party-allied interest groups, intellectual leaders and pundits, and even grassroots volunteers and sympathetic voters.²⁸⁷ This broadest conception of the party writ large as a sprawling network certainly includes outside groups such as Super PACs and 501(c) organizations aligned with one major party or the other.²⁸⁸ But commentators in favor of deregulating the major parties in campaign finance are focused narrowly on the “party” as represented by the formal party campaign finance entities, mainly the national party committees, and perhaps leadership PACs, and a few other types of party vehicles thoroughly regulated under federal campaign finance law.²⁸⁹ Deregulation could take various forms, from substantially higher contribution limits, to the reintroduction of party soft money, to party-sponsored Super PACs that could collect uncapped money from individuals, corporations, and unions for independent expenditures.

This distinction between the formal party committees and the party writ large is still a meaningful one. The former are directly controlled by the party leadership, while the broader party is a polyphonic network in which intraparty contestation over the party’s political direction occurs among a diversity of players.²⁹⁰ Worry about the rise of outside groups stems from the groups’ centripetal influence within this intraparty contestation for control. When there is little or no intraparty contestation about the party’s immediate goals, as during a general election, the broad party network unites across its diverse membership, from the party leadership to outside groups, against the common enemy. But when the party is politically divided, as during primary elections or over particular policymaking questions, Super PACs and 501(c) organizations can

²⁸⁷ See, e.g., Paul S. Herrnson, *The Roles of Party Organizations, Party-Connected Committees, and Party Allies in Elections*, 71 J. POL. 1207, 1209-16 (2009) (describing this multilayered composition of the party coalition).

²⁸⁸ See Kang, *supra* note 276, at 1923-27; see also SETH MASKET, CTR. FOR EFFECTIVE PUB. MGMT. AT BROOKINGS INST., MITIGATING EXTREME PARTNERSHIP IN AN ERA OF NETWORKED PARTIES: AN EXAMINATION OF VARIOUS REFORM STRATEGIES 3 (Mar. 2014), (characterizing the broader party as a “polycephalous creature with ambiguous boundaries” (citing Michael Heaney et al., *Polarized Networks: The Organizational Affiliations of National Party Convention Delegates*, 56 AM. BEHAV. SCIENTIST. 1654, 1654-76 (2012)).

²⁸⁹ See Kang, *supra* note 140, at 133-35.

²⁹⁰ See Kathleen Bawn et al., *A Theory of Political Parties: Groups, Policy Demands, and Nominations in American Politics*, 10 PERSP. POL. 571, 572-75 (2012).

fuel party dissension, exacerbate polarization, and fracture the formal party leadership's influence.²⁹¹

Richard Pildes champions the re-assertion of party leadership in an endowed lecture at Yale Law School published by the *Yale Law Journal*.²⁹² Pildes urges an institutionally and organizationally centered focus on "how political power gets mobilized, gets organized, and functions (or breaks down)."²⁹³ In this spirit, he argues that polarized fragmentation of the major parties is a crippling feature of today's national politics and asks "from where are sources of compromise and negotiation, deal-making, pragmatism, and the like most likely to emerge in such an overall polarized structure?"²⁹⁴ His answer is the party leadership.

Drawing upon political science, Pildes contends that party leaders tend to be ideological middlemen with internalized incentives to broaden the electoral appeal of their parties and broker effective governance across party lines.²⁹⁵ However, across a landscape of fragmented, polarized party politics, Pildes observes that "party leaders can play this role only if they have the tools and leverage to bring along their caucuses in the direction that [they] believe best positions the party as a whole."²⁹⁶ For this reason, he approves of the *McCutcheon* decision and proposes a further deregulation of party-related campaign finance by removing restrictions from coordination between party spending and candidates and significantly raising contribution limits on party committees.²⁹⁷ He claims that

²⁹¹ See Kang, *supra* note 276, at 1919–27 (explaining these dynamics and describing the role of Super PACs in the 2012 Republican primaries as illustration); see also Nicholas Confessore, *G.O.P. Donors Seek Early Call On '16 Nominee*, N.Y. TIMES (Dec. 8, 2014), at A1 (discussing the Republican Party's efforts to avoid a Super PAC-driven party split in 2016).

²⁹² Pildes, *supra* note 166, at 836–45. Pildes, however, does not believe that any fundraising and spending shift to outside groups has occurred as a result of a reverse hydraulic reaction to the Court's campaign finance decisions. *Id.* at 839–41.

²⁹³ *Id.* at 807.

²⁹⁴ *Id.* at 831–32.

²⁹⁵ *Id.* at 832; see also GARY W. COX & MATHEW D. MCCUBBINS, *LEGISLATIVE LEVIATHAN: PARTY GOVERNMENT IN THE HOUSE* 115–24 (2nd ed. 2007) (finding that party leaders internalize the party's collective interests); D. RODERICK KIEWIET & MATHEW D. MCCUBBINS, *THE LOGIC OF DELEGATION: CONGRESSIONAL PARTIES AND THE APPROPRIATION PROCESS* 47–55 (1991) (arguing that "potential agency losses are greatest when leaders' preferences are extreme or idiosyncratic"); DAVID TRUMAN, *THE CONGRESSIONAL PARTY* 65–72, 82–91 (1959) (exploring congressional voting behavior).

²⁹⁶ Pildes, *supra* note 166, at 833.

²⁹⁷ *Id.* at 836–45. Pildes separately also appears to support party Super PACs, discussed *infra*. See Richard Pildes, *Can Political party Super PACs Reduce Polari-*

parties donate twice as much to centrist candidates than to ideological extreme ones and thus are “a force for moderation compared to individual contributions,” which are ideologically motivated and highly polarized.²⁹⁸

I too have championed the role of the formal party leadership,²⁹⁹ and without question, the reverse hydraulics of campaign finance toward outside groups, and away from candidates and their party committees, has been normatively unfortunate in my view.³⁰⁰ Candidates and parties, not outside groups, appear on the ballot. They, not outside groups, are accountable to voters through elections and have the proper incentives to be responsible and truthful, even if those incentives do not always win out. Candidates and parties face the voters’ periodic judgment and need to win public approval, but for democratic accountability, candidates and parties must be empowered to publicly define, articulate, and defend their agendas. For all these reasons, a campaign finance system that channels money to outside groups fragments politics and distracts from a proper focus on candidates and the major parties, just as Pildes and others argue.

B. Co-optation over Counterweight

The question now is whether deregulation of party campaign finance will enable the major parties to serve as a counterweight to outside groups and other sources of party fragmentation, or whether the influx of new campaign money from the donor class will further co-opt the parties. Any theory that deregulation will boost the formal party leadership’s influence assumes that deregulation leads to the formal party committees collecting and spending more campaign finance money. The questions are where that new money comes from and whether increased contributions from those sources affects how the parties subsequently behave. It would be one thing if we could assume the parties will receive new money from new sources indifferent to its use and thus allow the parties to deploy it freely as the parties wish. But such an unrealistic assumption violates the overarching premise that campaign

zation?, WASH. POST (Sept. 26, 2014), <http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/09/26/can-political-party-super-pacs-reduce-polarization> [http://perma.cc/3JEK-WZ5N].

²⁹⁸ Pildes, *supra* note 166, at 829.

²⁹⁹ See Kang, *supra* note 140, at 160–70; Kang, *supra* note 7, at 44–52.

³⁰⁰ See Kang, *supra* note 7, at 44–52; Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 169 (2010) (criticizing the post-*Citizens United* multiplication of outside groups as a “dystopian universe”).

finance contributors, whether parties or individuals, care about how the money is used and thoughtfully deploy their money to achieve their strategic aims. If we assume that under deregulation the parties will strategically use new campaign finance money to gain greater leverage over their candidates and achieve certain ideological ends, we ought also to expect, one step further back, that the original sources of the parties' new money also will gain greater leverage over the parties.

Most, though not all,³⁰¹ of the proposed deregulation of party campaign finance would encourage the major parties to rely even more heavily on their wealthiest donors for financial support.³⁰² For instance, deregulation that legalizes a party Super PAC, or party soft money once again, allows parties to collect campaign money in larger chunks, beyond the current base limits, almost exclusively from very wealthy donors. So too is the basic advantage from higher contribution limits for party-related vehicles, and the elimination of the aggregate limit under *McCutcheon*.³⁰³ There are exceptions. Loosening regulations on party coordinated spending with candidates and public financing through party committees would free up party campaign finance without necessarily removing restrictions on receiving money from wealthy donors.³⁰⁴ Another proposal is raising limits on the party committees' own contributions to their candidates, which at least one study associates with lower polarization at the state legislative level.³⁰⁵ Apart from those spending-side exceptions, though, many of proposals for

³⁰¹ There are exceptions to this pattern. See *infra* notes 304–05 and accompanying text.

³⁰² This has already been the case with respect to looser restrictions on party fundraising under the new Cromnibus campaign finance rules. See Matea Gold & Tom Hamburger, *Political Parties Go After Million-Dollar Donors in Wake of Looser Rules*, WASH. POST (Sept. 19, 2015), https://www.washingtonpost.com/politics/political-parties-go-after-million-dollar-donors-in-wake-of-looser-rules/2015/09/19/728b43fe-5ede-11e5-8e9e-dce8a2a2a679_story.html [<https://perma.cc/CTG4-WPTR>].

³⁰³ See, e.g., Matea Gold, *Wealthy Political Donors Seize on New Latitude to Give to Unlimited Candidates*, WASH. POST (Sept. 2, 2014), http://www.washingtonpost.com/politics/wealthy-political-donors-seize-on-new-latitude-to-give-to-unlimited-candidates/2014/09/01/d94aeefa-2f8c-11e4-bb9b-997ae96fad33_story.html [<http://perma.cc/3JEK-WZ5N>] (reporting that more than 300 individuals had contributed more than the former aggregate limit, through August 2014, for a combined total of \$50.2 million from those individuals up to that point).

³⁰⁴ See Pildes, *supra* note 166, at 833–45 (supporting both ideas); Lee E. Goodman, *A Time to Revive the Party*, WASH. EXAMINER, Nov. 16, 2015 (arguing for loosening restrictions on party grassroots activity and coordination with candidates without supporting deregulation of party fundraising).

³⁰⁵ See RAYMOND J. LA RAJA & BRIAN F. SCHAFFNER, *CAMPAIGN FINANCE AND POLITICAL POLARIZATION: WHEN PURISTS PREVAIL* 85–86 (2015).

party deregulation simply allow the parties to collect money in bigger chunks and thus encourage parties to depend even more on their wealthiest donors than they already do.³⁰⁶

The closest current approximation of a party-sponsored Super PAC is the Senate Majority PAC, which is operated by former senior staffers of Democratic Senate leader Harry Reid.³⁰⁷ Senate Majority PAC spent more than \$44 million for the 2014 midterm elections, \$19.3 million of which came in individual contributions of at least \$500,000, including a \$5 million contribution from Tom Steyer and \$4 million contribution from Fred Eychaner.³⁰⁸ Senate Majority PAC's average contribution, including all donors, was \$170,525, which far exceeded the average American household income of \$73,000.³⁰⁹ The Super PAC's defining advantage over the garden-variety political committee is its legal capacity to accept unlimited donations from the very rich. Super PAC campaign finance is a rich man's game, relying almost entirely on the generosity of ultra-wealthy men as their reason for being. Of more than \$600 million raised by Super PACs in the 2014 federal election cycle, roughly a third came from just forty-two individuals who averaged more than \$1 million in Super PAC donations for a midterm election.³¹⁰ Tom Steyer alone donated a total of almost \$74 million to Super PACs for the 2014 elec-

³⁰⁶ A recent actual example of such deregulation is the so-called Cronnibus Bill that increased the maximum amount an individual can contribute to each national party's three committees to \$1.5 million over a federal election cycle. See Hannah Hess, *Campaign Finance Provisions Causing 'Cronnibus' Heartburn*, ROLL CALL (Dec. 10, 2014), <http://blogs.rollcall.com/hill-blotter/campaign-finance-provisions-causing-cronnibus-heartburn/> [<http://perma.cc/LQK2-Q27L>].

³⁰⁷ See Pildes, *supra* note 166, at 842–43 (praising Super Majority PAC as a provisional surrogate for a Super PAC run directly by the Democratic Party).

³⁰⁸ See Matea Gold, *Top Harry Reid Advisers Build Big-Money Firewall to Protect Senate Democrats*, WASH. POST (Sept. 16, 2014), http://www.washingtonpost.com/politics/top-harry-reid-advisers-build-big-money-firewall-to-protect-senate-democrats/2014/09/16/16991381b6-3cdf-11e4-9587-5dafd96295f0_story.html [<http://perma.cc/C8H6-JCXH>]; Steve Tetreault, *Reid Has Plenty at Stake in Election*, LAS VEGAS REV. J., Nov. 1, 2014, <http://www.reviewjournal.com/politics/elections/reid-has-plenty-stake-election> [<http://perma.cc/WX6Q-6CGD>].

³⁰⁹ See Ian Vandewalker, *Outside Spending and Dark Money in Toss-Up Senate Races: Post-election Update*, BRENNAN CTR. FOR JUSTICE 2–3 (Nov. 10, 2014) <https://www.brennancenter.org/analysis/outside-spending-and-dark-money-toss-senate-races-post-election-update> [<http://perma.cc/9N7N-F4EQ>].

³¹⁰ See Fredreka Schouten & Christopher Shnaars, *Mega-influence: These 42 Dominate Super PAC Donations*, USA TODAY (Oct. 29, 2014), <http://www.usatoday.com/story/news/politics/2014/10/28/top-super-pac-donors-of-the-mid-terms-steyer-bloomer-singer-mercier/18060219/> [<http://perma.cc/PS9H-EKUH>]. The article notes that only one female donor gave more than \$2 million to Super PACs last cycle, former Senate candidate Linda McMahon. *Id.*

tions.³¹¹ It is no surprise then that the share of all campaign contributions made by the top .01% of the voting-age population has more than quadrupled over the past thirty years to more than 40%.³¹²

The hope that deregulating party campaign finance will reduce partisan polarization rests on a faith that the party leadership would resist the influence of these wealthy donors more than wealthy donors are able to redirect the leadership's priorities in the same process. The party leadership, through their party committees, would draw their new revenue from the same donor class that has funded the proliferation of outside groups in campaign finance and any resulting polarization from this decentralization of party politics.³¹³ Individual contributors who comprise the donor class are overwhelmingly wealthy and motivated by ideology in their campaign finance activity. While business groups tend to be motivated by access and donate to both parties, individual contributors donate almost exclusively to one major party, are themselves ideologically extreme, and contribute to candidates who are similarly extreme ideologically.³¹⁴ These wealthy contributors who are ideologically motivated and help fuel polarization through their campaign financing are the only individuals meaningfully affected by most imaginable forms of party deregulation.³¹⁵ The primary purpose of most forms of deregulation is to facilitate very large, effectively uncapped contributions from these few individuals who can afford large donations for political causes

³¹¹ See Katia Savchuk, *Billionaire Tom Steyer on Money in Politics, Spending \$74 M on the Election*, FORBES (Nov. 3, 2014), <http://onforb.es/1A5xS2R> [<http://perma.cc/PPN5-6L5U>].

³¹² See Adam Bonica et al., *Why Hasn't Democracy Slowed Rising Inequality?*, 27 J. ECON. PERSP. 103, 112, fig. 5 (2013).

³¹³ See Choma, *supra* note 85 (reporting that 2014 featured the most campaign spending ever for a federal midterm election but a decline in the total number of individual donors, which produced the highest all-time average individual contribution amount).

³¹⁴ See Bonica, *supra* note 124, at 301–07; Lee Drutman, *Are the 1% of the 1% Pulling Politics in a Conservative Direction?*, SUNLIGHT FOUND. (June 26, 2013, 8:15 AM), http://sunlightfoundation.com/blow/2013/06/26/1pct_of_the_1pct_polarization/ [<https://perma.cc/46U9-3UVU>]; Michael Barber, *Ideological Donors, Contribution Limits, and the Polarization of State Legislatures* 21–28 (Jan. 30, 2015) (unpublished manuscript) [<https://perma.cc/JFL7-2SFD>].

³¹⁵ See, e.g., Clyde Wilcox et al., *With Limits Raised, Who Will Give More?: The Impact of BCRA on Individual Donors*, in LIFE AFTER REFORM: WHEN THE BIPARTISAN CAMPAIGN REFORM ACT MEETS POLITICS 61, 69–79 (Michael J. Malbin ed., 2003) (reporting the ideological motivations of the wealthy donors effected by regulation of party campaign finance).

well beyond the wherewithal of most Americans.³¹⁶ What is more, any current changes to party campaign finance along these lines would occur at the very moment that this donor class has become more assertive in its control of its money for ideological, as opposed to straightforwardly partisan purposes.³¹⁷

The deregulation of party-related campaign finance may only accelerate this ongoing distributional and ideological lurch in American campaign finance toward the concentrated interests of the very wealthy. Deregulation of party-related campaign finance today would occur in a campaign finance system that has already been thoroughly deregulated, where fundraising and spending have already skyrocketed, and where the influence wielded by wealthy donors is unprecedented since *Buckley*. It is difficult to overstate the surging importance of very wealthy donors in this rapidly evolving system already skewed so far in favor of their interests. Martin Gilens, Larry Bartels, and a number of other political scientists have compellingly documented the extent to which the political system is almost singularly responsive to the stratified preferences of the richest Americans over their fellow citizens of ordinary means.³¹⁸ Gilens and Benjamin Page recently summarized these findings by concluding “economic elites and organized interest groups . . . play a substantial part in affecting public policy, but the general public has little or no independent influence.”³¹⁹ The overwhelming density of empirical findings make it difficult not to believe the political system is tilting precipitously toward the preferences of the wealthy. Old patronage-oriented parties spread their political spoils across wide party

³¹⁶ The first contributors to take advantage of the expanded opportunities to donate to the party committees under the Cronnibus provisions included Sheldon Adelson, David Koch, and Henry Kravis. See Kenneth P. Doyle, *Big GOP Donors Giving to New Accounts Congress Created to Help Political Parties*, BNA DAILY REP., May 26, 2015, at A-6.

³¹⁷ See Thomas B. Edsall, *Billionaires Going Rogue*, N.Y. TIMES (Oct. 28, 2012), <http://campaignstops.blogs.nytimes.com/2012/10/28/billionaires-going-rogue/> [<http://perma.cc/5WSN-GTHL>]; Jim Rutenberg, *Money Talks*, N.Y. TIMES, Oct. 19, 2014, at 30-32.

³¹⁸ See LARRY M. BARTELS, UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE 257–65 (2008); MARTIN GILENS, AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA (2012); JACOB S. HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS (2010); see also Nicholas Stephanopoulos, *Aligning Campaign Finance*, 101 VA. L. REV. 1425, 1425 (2015) (summarizing this literature and proposing campaign finance law be directed toward aligning policymaking with public opinion).

³¹⁹ Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSP. ON POL. 564, 572 (2014).

bases, but today's campaign finance-oriented parties appear to concentrate their returns near the very top of the economic pyramid, where it is least needed. Whatever the role of campaign finance law in setting political responsiveness, the additional removal of restrictions on party campaign finance may just accelerate the effects of Super PACs and other forms of deregulation in multiplying the political capacity of the very rich and their polarizing tendencies.³²⁰

For this reason, it is not clear that campaign finance deregulation would reduce partisan polarization or encourage ideological moderation, even if those are the desired aims.³²¹ The political science is ambivalent so far on whether party leadership are actually ideological middlemen as Pildes argues or, instead, are more extreme than their party median.³²² Because individual donors are ideologically motivated and highly polarized, party officeholders who are themselves ideologically ex-

³²⁰ See Nicholas Confessore & Jonathan Martin, *G.O.P. Race Starts in Lavish Haunts of Rich Donors*, N.Y. TIMES (Feb. 28, 2015), <http://www.nytimes.com/2015/03/01/us/politics/gop-race-starts-in-lavish-haunts-of-rich-donors.html> [<http://perma.cc/X4PC-DLFL>] (arguing that wealthy donors today have "the kind of influence and convening power once held by urban political bosses and party chairmen" in the presidential nomination process); Rutenberg, *supra* note 317, at 30–33, 51, 53.

³²¹ See THOMAS E. MANN & ANTHONY CORRADO, CTR. FOR EFFECTIVE PUB. MGMT. AT BROOKINGS INST., *PARTY POLARIZATION AND CAMPAIGN FINANCE*, 17 (2014); Fishkin & Gerken, *supra* note 142, at 39–46.

³²² Compare Pildes, *supra* note 166, at 832 (arguing that party leadership comprises ideological middlemen), with Bernard Grofman et al., *Congressional Leadership 1965–96: A New Look at the Extremism Versus Centrality Debate*, 27 LEGIS. STUD. Q. 87, 98 (2002) ("[P]arty leaders (in both parties) tend to be drawn from the part of the ideological spectrum where the greatest concentration of their members lies, the area beyond the median toward the party mode."); see also Eric Heberlig et al., *The Price of Leadership: Campaign Money and the Polarization of Congressional Parties*, 68 J. POL. 992, 993–95 (2006) ("[B]oth the elected leadership itself and the farm system for elected leaders are increasingly populated by ideologues."); A.J. McGann et al., *Why Party Leaders Are More Extreme than Their Members: Modeling Sequential Elimination Elections in the U.S. House of Representatives*, 113 PUB. CHOICE 337, 351–52 (2002) (finding that "party leaders tend to be more extreme than their median members . . ."). For a neutral assessment, see Douglas B. Harris & Garrison Nelson, *Middlemen No More? Emergent Patterns in Congressional Leadership Selection*, 41 PS: POL. SCI. & POL. 49, 51 (2008) (noting that leaders from the 107th to 110th Congress were equally likely to be middlemen as they were extremists); Stephen Jessee & Neil Malhotra, *Are Congressional Leaders Middlepersons or Extremists? Yes*, 35 LEGIS. STUD. Q. 361, 380–84 (2010) (finding that elected leaders are usually close to their party's ideological median but also display extremist tendencies). See also Stephanie Stamm, *Paul Ryan Would Be the Most Conservative House Speaker in Recent History*, NAT'L J. (Oct. 21, 2015), <https://www.nationaljournal.com/s/91166/paul-ryan-would-be-most-conservative-house-speaker-recent-history> [<https://perma.cc/L43G-2FSC>] (reporting that new House Speaker Paul Ryan has the most polarized DW-NOMINATE score among the last eleven speakers and ranks in the top quintile for conservatism in the House).

trème enjoy increasing advantages in fundraising and therefore exercise growing leverage because of their financial resources.³²³ One study even contends that this fundraising advantage actually imparts an edge to ideologues when it comes to party leadership selection, particularly as the emphasis on fundraising increases.³²⁴ Ideologues in party leadership have incentives not only to broaden the party's mainstream appeal, which does not seem the current priority of the Republican Party,³²⁵ but are also charged with actualizing the median preferences of their polarized, increasingly cohesive caucuses as a matter of conditional party government.³²⁶ Leadership devices such as the Hastert Rule help ensure that the majority party sticks together cohesively to advance the party's median preferences and blocks opportunities for a bipartisan legislative majority to cohere and win out.³²⁷ In this alternative telling, party polarization may have increased not because party leadership is weak right now, but perhaps because the party leadership represents ideologically cohesive, historically extreme caucuses and simply reflects the strength of those preferences toward increasingly polarized positions.³²⁸ This dynamic could be exacerbated by divided government, which makes party ac-

³²³ See Michael J. Ensley, *Individual Campaign Contributions and Candidate Ideology*, 138 PUB. CHOICE 221, 227 (2009) (finding that Republican and Democratic candidates could raise more money if they deviated from their respective parties' ideological centers); Heberlig et al., *supra* note 322; Bertram Johnson, *Individual Contributions: A Fundraising Advantage for the Ideologically Extreme?*, 38 AM. POL. RES. 890, 903–06 (2010) (noting the advantages candidates can obtain from appealing to ideologically extreme individual donors); Walter J. Stone & Elizabeth N. Simas, *Candidate Valence and Ideological Positions in U.S. House Elections*, 54 AM. J. POL. SCI. 371, 380–82 (2010) (finding that candidates have an electoral incentive to move ideologically away from their districts and speculating that this finding is linked to campaign contributions by ideologically extreme individual contributors).

³²⁴ See Heberlig et al., *supra* note 322, at 1002–04.

³²⁵ See generally THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM* 51–59 (2012) (criticizing the Republican Party's rightward shift and developing this argument).

³²⁶ See DAVID W. ROHDE, *PARTIES AND LEADERS IN THE POSTREFORM HOUSE* 105 (1991).

³²⁷ See generally Holly Fechner, *Managing Political Polarization in Congress: A Case Study on the Use of the Hastert Rule*, 2014 UTAH L. REV. 757, 764–66 (explaining that the Hastert Rule contributed to polarization and increased the ideological influence of the Tea Party).

³²⁸ See MANN & CORRADO, *supra* note 321, at 14 (“Parties today are strong in the electorate, strong in their vast organizational networks, and strong in government.”); see also *id.* at 18 (“Inadequate resources are among the least important problems facing party leaders in Congress on either side of the aisle.”). It may be that advocates of stronger party leadership today are simply nostalgic for bygone post-war bipartisanship that was itself historically exceptional. See Hahrie Han &

countability even more difficult for independent voters to sort out.³²⁹ As a result, how well deregulation of party campaign finance plays out in practice is a little difficult to predict and probably quite sensitive to the details.³³⁰

Even if deregulation of party campaign finance assigns the right balance of power among party actors, it neglects distributional equality concerns that were once a main focus of campaign finance policymaking.³³¹ Progressive and Democratic Party attention to equality concerns lost some currency in legal and political circles over the past twenty years as Democrats established rough parity with Republicans in campaign finance over the same period.³³² As a result, many commentators dismissed anxiety about Super PACs during the 2012 elections because it did not swing election outcomes one way or the other between the two major parties. Partisan advantage, or the lack of any, was a popular focus of attention, rather than the fact that very wealthy donors played an unprecedented role in the year of the Super PAC.³³³ Greater comfort among Democrats about big-money campaign finance has split traditional progressive support for regulation, which was once nearly uniform, and fed skepticism about prioritizing distributional concerns over intraparty and interparty balance of power.³³⁴ Today's Democrats are divided between traditional progressives who worry about campaign finance and support its regulation, and centrist Democrats who are comfortable with

David W. Brady, *A Delayed Return to Historical Norms: Congressional Party Polarization After the Second World War*, 37 BRIT. J. POL. SCI. 505, 507–12 (2007).

³²⁹ See Morris P. Fiorina, *An Era of Divided Government*, 107 POL. SCI. Q. 387, 408 (1992) (“In obscuring responsibility for government actions and the results thereof, divided control exacerbates the already serious problems of responsibility that are inherent in American politics.”).

³³⁰ See MASKET, *supra* note 288, at 13 (“[T]here is little reason to believe that a change in the campaign finance system would substantially hurt or help parties or change the voting behavior of the politicians they nominate.”).

³³¹ See Bruce E. Cain, *Reasoning to Desired Outcomes: Making Sense of McConnell v. FEC*, 3 ELECTION L.J. 217, 219 (2004) (“It has long been my opinion that a campaign finance reform without an open acknowledgement of equity considerations is inadequate.” (footnote omitted)).

³³² See, e.g., Peter Olsen-Phillips, *Revenge of the Democrats: Wealthy Liberals Top List of Super PAC Donors in 2014*, SUNLIGHT FOUND. BLOG (Oct. 24, 2014, 2:46 PM), <http://sunlightfoundation.com/blog/2014/10/24/revenge-of-the-democrats/> [<http://perma.cc/W932-DJNX>] (showing the increase in Super PAC contributions by Democrats).

³³³ See Kang, *supra* note 276, at 1916–19 (describing the lack of partisan advantage from Super PACs but also explaining the increased importance of the billionaire mega-donor who could fund a presidential campaign by himself).

³³⁴ See, e.g., VOGEL, *supra* note 8, at 55–76, 225–42 (reporting internal divisions in the Democratic Party and Democracy Alliance over economic and campaign finance issues).

high-level party campaign finance and worry more, along with their Republican counterparts, about the growing influence of outside groups in the Super PAC era.³³⁵ The split among Democrats manifests itself not only on issues of campaign finance, but more generally over issues of economic inequality and financial regulation.³³⁶

My concern here is less romantic whimsy about participatory politics than a basic representational worry that the structure of American politics is struggling to register the interests of average citizens and that further deregulation may go too far in exacerbating how poorly campaign finance law serves most Americans.³³⁷ Putting aside the constitutional analysis, purely as a policy matter, any deregulation of party campaign finance should proceed with its distributional impact as a more important normative priority.

CONCLUSION

Shortly after *Citizens United*, I wrote that the decision marked the end of campaign finance law as we knew it.³³⁸ I meant at the time mainly that the decision led a cascade of legal developments that had already begun transforming campaign finance law and practice. Over the longer run, though, the constitutional reasoning ultimately leading us down the doctrinal path to the party- or even candidate-connected Super PAC may prove my quip truer than I would have guessed. That said, this doctrinal path is not an inevitable one, even under the Roberts Court's campaign finance jurisprudence so far. The narrow dyadic framework for the Court's understanding of

³³⁵ See Molly Ball, *The Battle Within the Democratic Party*, ATLANTIC (Dec. 23, 2013), <http://www.theatlantic.com/politics/archive/2013/12/the-battle-within-the-democratic-party/282235/> [http://perma.cc/9U6C-L7SN]; Zachary A. Goldfarb, *More Liberal, Populist Movement Emerging in Democratic Party Ahead of 2016 Elections*, WASH. POST (Nov. 30, 2013), http://www.washingtonpost.com/politics/more-liberal-populist-movement-emerging-in-democratic-party-ahead-of-2016-elections/2013/11/30/6729a850-53a7-11e3-9e2c-e1d01116fd98_story.html [http://perma.cc/P5RH-3EVY]; David J. Lynch, *Inside the Democratic Party Split: Pragmatists Vs. True Believers*, BLOOMBERG POL. (Dec. 19, 2014, 5:00 AM), <http://www.bloomberg.com/politics/articles/2014-12-19/populists-press-democrats-to-ease-clintonera-embrace-of-bankers> [http://perma.cc/YJ5H-ZY7P]; see also Kate Andrias, *Separations of Wealth*, 18 J. CONST'L L. (forthcoming 2016) (manuscript at 19–25) (presenting the political science on the Democratic Party's rightward shift and its policy consequences).

³³⁶ See *supra* note 335.

³³⁷ See Stephanopoulos, *supra* note 318, at 1442–47 (arguing that the representational impact of campaign finance regulation should influence its constitutionality).

³³⁸ See Kang, *supra* note 7, at 21–27.

quid pro quo corruption can be extended to encompass the risk of group-level quid pro quo arrangements that would constitutionally support the regulation of party-related campaign finance. It is decidedly unlikely that the Roberts Court will deviate too sharply from Jim Bopp's planned endgame to adopt such an approach, but a future Court just might someday. The time is now for the intellectual groundwork leading to an alternative approach, one that builds on the basic quid pro quo analysis without absurd limitations on the government's compelling interest in effectively combating corruption.

