

# ADDRESS

## OUTSOURCING POLITICS: THE HOSTILE TAKEOVER OF OUR HOLLOWED-OUT POLITICAL PARTIES

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### ABSTRACT

In 2016, both the Republicans and Democrats experienced efforts at hostile takeover of their presidential campaigns. On the Republican side of the ledger, the takeover was successful and ultimately yielded the presidency of Donald Trump. The Democratic effort, by a candidate who never actually joined the party, was beaten back only after a long and bruising primary campaign.

This Article examines some of the sources of weakness of contemporary political parties that leave them less able to control their internal party selection processes, and that further hamper their ability to govern effectively. The key insight is taken from a view of the political party as a firm, following the pioneering work of Ronald Coase, and then merges that onto the modern understanding of political parties as a precarious balance of the desires of the electoral faithful, the interests of the party apparatus, and the governance needs of the party's elected officials. In effect, this paper joins the economic insights of Coase to the political analysis of V. O. Key.

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Historically, American political parties managed divergent interests by control over three critical political functions: access to campaign funding, delivery of patronage governmental positions, and control over the nomination process. Each of these functions has been compromised by legal reforms over the past century. With the inability to internalize control over critical organizational functions, the various constituencies of the modern political party have the choice to “buy not make,” in the language of modern firm economics. Over time, the external option has changed the dynamic of politics, as evident in the last presidential election.

This Article does not offer a simply story of redemption through reform. The political party of old would strike modern sensibilities as insufficiently transparent and inclusive. But in the absence of the coordinating role of the party, politics becomes more atomized, rhetoric hardens, and governance becomes more complicated.

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I. INTRODUCTION

There is much to lament in the current state of politics and political parties. We find ourselves in a presidential election year in which the prevailing Republican candidate had little or no prior affiliation with the party. A similar fate nearly befell the Democrats with the second leading vote-getter having become a Democrat on the eve of the first primary and without the side benefit of ultimately winning the presidential election.

Neither party appeared to have a mechanism of internal correction. Neither could muster the wise elders to steer a more

conventional course. Neither could use its congressional leadership to regain control of the party through its powers of governance. Neither could lay claim to financial resources that would compel a measure of candidate loyalty. Neither could even exert influence through party endorsements. The parties proved hollow vehicles that offered little organizational resistance to capture by outsiders. And what was captured appeared little more than a brand, certainly not the vibrant organizations that are heralded as the indispensable glue of democratic politics. If indeed the “political parties created democracy and that modern democracy is unthinkable save in terms of the parties”<sup>1</sup> something seemed deeply remiss.

Turning back the clock to insights from eighty or so years ago may help understand some of the sources of our current party instability. The aim here is not to come up with a simple menu of options that will somehow restore political parties to a more robust sense of purpose—even if modern political science continually questions whether parties were ever as coherent as might appear in current nostalgic gaze. Rather, the goal is more narrowly to understand some of the factors that have contributed to the forms of current politics, and to examine specifically a few areas in which the current state of the law has contributed to weakening the traditional glue that had held parties together. The insights may perhaps be harnessed for assessing the wisdom of proposed future legal reforms, but they do not yield either a comprehensive account of American politics or a simple recipe for change.

In thinking about the state of American political parties, let me offer a personal observation from having participated in the 2008 and 2012 election efforts of President Obama. In 2008, then-Senator Obama was a decided outsider who became the party’s nominee only in June of that year. In the quick run-up to the election, Obama for America put together a national field operation, including campaign attorneys, across the country, with particular focus on the battleground states for that November. I served as one of the senior legal advisors to the campaign and worked extensively with the legal representatives in states around the country. I was not surprised that an outside candidate would not have a working command of the state party structure and would instead quickly organize a national operation based on the presidential campaign and its resources.

What did surprise me, however, was the 2012 campaign, where I again served as a senior legal advisor to Obama for America. With the benefits of Obama’s incumbency and what was

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1. E. E. SCHATTSCHEIDER, *PARTY GOVERNMENT* 1 (1942).

essentially a four-year run up to the re-election effort, I had expected that the 2012 campaign would be largely organized around the state political parties in conjunction with state and local election efforts. Notably, and with few exceptions, that was not the case. There were certainly more points of contact with state officials that helped smooth the voting process on Election Day and more time to litigate contested issues before Election Day. But in terms of organizational structure, the campaign was run through the presidential effort and not through the state parties.

Nor was this a quirk of the Democratic Party or the particulars of Obama for America. I am told that the same pattern held in the campaign of Governor Romney in 2012, even as he emerged from extended front-runner status in the Republican Party. Combining the observations from 2012 with the permeability of both parties to outsiders in 2016 leads to the subject of this Article. What accounts for the weakness of the national political parties at present? The presidential campaigns may serve as an initial focal point, but the problem exists across institutional domains. The distance of the parties from the operation of the presidential campaigns is also evident in the greater distance of the party leadership from the organization of legislative efforts. The exasperation over the dysfunctionality of Congress returns time and again to the absence of a leadership structure able to corral hot-headed members of the legislative caucus in order to just get things done—even on matters where there is reasonably broad agreement on the general contours of needed legislation. This is the process well captured by Richard Pildes in focusing not so much on polarization among political activists or even elected officials but on political fragmentation: “the external diffusion of political power away from the political parties as a whole and the internal diffusion of power away from the party leadership to individual party members and officeholders.”<sup>2</sup>

The main thrust of this Article is to examine the modern political party by analogy to the business firm, as an institution subject to various regulatory and transactional pressures, all of which help shape how the firm will be most effectively organized. Like all firms in the market domain, political party firms have to confront pressures to internalize some functions while outsourcing others. This “make or buy” decision is well understood in terms of economic actors, but is not appreciated in these terms in the political domain.<sup>3</sup> In the economic domain, the

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2. See Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 YALE L.J. 804, 809 (2014).

3. I have spent much time over the past 20 years examining the legal overlap in structural problems facing actors in both private and public law settings. See, e.g., Samuel

decision to integrate production has been understood for the past eighty years as heavily driven by the transaction costs associated with contracting out for goods or services, versus the corresponding transaction costs of supervision and coordination if matters beyond the core competencies of the firm are internalized.<sup>4</sup> One of the key variables in defining transaction costs is the role of government through matters such as regulation and taxation.

Applying the same analytic structure to political parties invites an inquiry into the legal constraints that may have contributed to the observed weakness of the current political parties. To do so requires first setting forth the appropriate understanding of the make-or-buy decision of market firms, and then, second, showing the parallels to the classic understanding of the multiple roles played by political parties. Curiously, at the same time as a transactional theory of the firm was being developed in economics, a corresponding theory of the integrated functions of political parties was being developed in political science.<sup>5</sup> The aim here is to harness these two insights and use them to look at some of the legal constraints that may have contributed to current party weakness.

A cautionary note is in order as to the scope of the claim. I intend to examine only three areas of law that have changed significantly over time: the ability of parties to raise money, the ability of party insiders to control the candidate nomination process, and the ability of parties to reward loyal workers with patronage. Translated to party activities, these are the fundraising ability of the party itself, the insider control of the political agenda and the nomination process, and the ability to induce loyalty to the party through the dispensation of patronage. My claim is not that this is an exhaustive list, or even that legal reforms are the most important factor in compromising the vitality of political parties. Rather, the argument is simply that these are contributing factors whose cumulative effect may be productively assessed by examining their impact on the viability of integrated political parties as ongoing firms.

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Issacharoff, *The Governance Problem in Aggregate Litigation*, 81 *FORDHAM L. REV.* 3165 (2013); Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 *STAN. L. REV.* 643 (1998). For those familiar with my earlier work, this present effort will be an unsurprising continuation of those efforts to a theory of political parties as firms.

4. Trevor L. Brown & Matthew Potoski, *Transaction Costs and Institutional Explanations for Government Service Production Decisions*, 13 *J. PUB. ADMIN. RES. & THEORY* 441, 443 (2003).

5. R. H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937).

Implicit in this discussion is the belief in the value of political parties, despite their uncertain pedigree in American law. Political parties are not mentioned in the United States Constitution, and the founding generation despaired of their becoming part of the American Republic.<sup>6</sup> Nonetheless, national parties began to form as early as the first contested presidential election in 1796, and parties of the modern form became thoroughly entrenched and institutionalized in the 1830s.<sup>7</sup> As they consolidated in the 19th century, the two major political parties came to define some elements of American democracy as we understand it even to this day.

Nonetheless, any contrast of contemporary politics with the past is not necessarily to a halcyon age in which all was right with American politics. Party politics dominated by backroom deals, well-lubricated with funds of sketchy provenance and reinforced by public employment of oftentimes scant public interest, is hardly a normatively compelling account of a healthy democracy. There was much to 19th century politics which does not correspond to contemporary realities: “For most of the nineteenth century, parties operated without any legal recognition or restriction. Party organizations, the descendants of local, elite clubs, chose their own nominating procedures and established their own bodies for internal governance.”<sup>8</sup>

We live in more democratically transparent times, and the image of the political parties as they emerged from the 19th century may seem aberrant, even shocking. But politics is dynamic and as the party organization falters, other actors emerge, from the lone-wolf candidate-entrepreneur to the rival special interest groups and private financiers of the Super PAC and related domains. The aim here is not to resolve the normative claim of how best to organize political parties, nor even to propose a reform agenda to restore party vitality. Rather it is to examine the ways in which some legal reforms have contributed to the current sorry state of political party organization. As Bruce Cain has well cautioned, eager political reformers too often ignore the institutional settings of politics at considerable peril to their desired aims.<sup>9</sup>

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6. See THE FEDERALIST NO. 9 (Alexander Hamilton), NO. 10 (James Madison); George Washington, Farewell Address (Sept. 19, 1796), *reprinted in* S. DOC. NO. 108-21 at 14 (2d Sess. 2004).

7. Jonathan Rauch, *How American Politics Went Insane*, ATLANTIC, <http://www.theatlantic.com/magazine/archive/2016/07/how-american-politics-went-insane/485570/> [<https://perma.cc/HA56-KCAA>].

8. Adam Winkler, *Voters' Rights and Parties' Wrongs: Early Political Party Regulation in the State Courts, 1886–1915*, 100 COLUM. L. REV. 873, 876 (2000).

9. BRUCE E. CAIN, DEMOCRACY MORE OR LESS: AMERICA'S POLITICAL REFORM QUANDARY 6 (2015).

## II. THE POLITICAL PARTY AS A FIRM

A. *Make or Buy*

In 1937, Ronald Coase published his seminal work on *The Nature of the Firm*.<sup>10</sup> The signature contribution of this and much of Coase's work was to model economic behavior as conditioned by the transactions costs of operating in the real world. To the prevalent neo-classical model of marginal costs and benefits driving economic decision-making, Coase introduced a separate inquiry into how the transactional costs of bargaining, supervising, negotiating, searching and other such day-to-day necessities powerfully shaped the decision of economic firms to expand production, contract out for production or services, or even to stay in business.<sup>11</sup>

Firms must always decide whether to produce. The decision to engage in any of the economic activities of a firm, from subparts production to bookkeeping to janitorial services, follows from a decision to undertake the task internally rather than to contract out that necessity to another firm. Firms decide whether to specialize narrowly or to assume broad responsibility for their market ventures. Colloquially, this is the make or buy decision.

In principle, the market should set the price for goods and services and in the absence of transaction costs, such as monitoring of quality, the ability to buy or make should be fairly interchangeable. This is clearly not the case, as firms seek to control internally that which is within their core competencies and leave to market actors secondary activities, such as providing coffee and lunch. As Coase explained, "Within a firm, these market transactions are eliminated and in place of the complicated market structure with exchange transactions is substituted the entrepreneur-co-ordinator, who directs production. It is clear that these are alternative methods of co-ordinating production."<sup>12</sup> Accordingly, "the main reason why it is profitable to establish a firm would seem to be that there is a cost of using the price mechanism."<sup>13</sup> Responding to these transactional advantages means that "[a] firm becomes larger as additional transactions . . . are organised by the entrepreneur and becomes smaller as he abandons the organisation of such transactions."<sup>14</sup>

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10. Coase, *supra* note 5.

11. *Id.* at 390–91.

12. *Id.* at 388 (citation omitted).

13. *Id.* at 390.

14. *Id.* at 393.

Firms are constantly revisiting the decision to make or buy based on the costs of substitution of one function for another. Relying exclusively on price to control production has its costs, as developed extensively in the work of Oliver Williamson.<sup>15</sup> The basic insight is that price alone is an imperfect monitor of the quality of production. If a manufacturer depends heavily on product quality, the consequences of a drop in subpart quality will be borne only indirectly by those further down the supply chain. Such circumstances compel the decision to make rather than buy, even though that decision requires expenditure of firm capital and the need to monitor production internally.

On the flip side of the equation, shifting costs may result in functions that were once internalized being outsourced. Put simply, an increase in the transaction costs of internalizing production may increase the attractiveness of finding other institutional arrangements, as with the outsourcing of production to overseas suppliers, for example. Of critical importance for the present inquiry is a secondary observation by Coase as to the role that government regulation might play in shifting the decision to make or buy, or more precisely, to the advantages that might come from internalizing multiple functions within a single firm: "Another factor that should be noted is that exchange transactions on a market and the same transactions organised within a firm are often treated differently by Governments or other bodies with regulatory powers."<sup>16</sup>

For Coase, the critical issues in regulation were the level of taxes and other direct factors of production.<sup>17</sup> But in the era of a far more expansive set of government regulations, the point extends as well to all sorts of decisions affecting the efficient deployment of firm resources, including such matters as labor laws, environmental regulations, access to government contracts, and the broad spectrum of state involvement in economic decision-making.

Focusing on the role of government regulation as a transaction cost that determines at least in part the most efficient use of resources then leads to the next part of the inquiry. If political organizations are viewed as firms that operate in a market for political effectiveness, a corresponding Coasean analysis sheds light on the question of the advantages held by political parties over other actors in the electoral arena and over

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15. Oliver E. Williamson, *The Modern Corporation: Origins, Evolution, Attributes*, 19 J. ECON. LITERATURE 1537, 1540–42 (1981).

16. Coase, *supra* note 5, at 393.

17. *Id.*

the comparative advantages that political parties may have as integrated organizations.

*B. The Battleground Within the Party*

Roughly contemporaneous with Coase's groundbreaking writing on the nature of the firm came the first sustained inquiry in political science into the nature of the political party as an organization and of the divergent forces that were harnessed in the modern political party. In 1942, V. O. Key published his landmark work on the inherent conflict between the contending factions within political parties, *Politics, Parties, and Pressure Groups*.<sup>18</sup> Although the insights into the nature of the party stem from that publication, the foundations of Key's investigation into the factors that hold parties together as institutions can be found a decade earlier in his doctoral dissertation, making his inquiry truly a product of the same period as Coase's work.<sup>19</sup>

As framed by Nathaniel Persily and Bruce Cain, Key's great insight was to "disaggregate[] the simple description of 'party' into three components: the party-in-the-government, professional political workers, and the party-in-the-electorate."<sup>20</sup> While Key's writings are now routinely referenced in legal writing on politics,<sup>21</sup> the attention in legal scholarship to the precarious internal balance of political parties crystallized with a 2000 *Columbia Law Review* Symposium on Law and Political Parties.<sup>22</sup>

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18. V. O. KEY, JR., *POLITICS, PARTIES, & PRESSURE GROUPS* (1st ed. 1942).

19. Valdimer Orlando Key, Jr., *The Techniques of Political Graft in the United States* (1934) (unpublished Ph.D. dissertation, University of Chicago) (on file with University of Chicago Libraries).

20. Nathaniel Persily & Bruce E. Cain, *The Legal Status of Political Parties: A Reassessment of Competing Paradigms*, 100 COLUM. L. REV. 775, 778 (2000) (citations omitted) (citing V. O. KEY, JR., *POLITICS, PARTIES AND PRESSURE GROUPS* 163–65 (5th ed. 1964) [hereinafter KEY (5th ed.)]).

21. *E.g.*, Elizabeth Garrett, *Is the Party Over? Courts and the Political Process*, 2002 SUP. CT. REV. 95, 98–99; Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and Republicans from Political Competition*, 1997 SUP. CT. REV. 331, 351; Samuel Issacharoff, *Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition*, 101 COLUM. L. REV. 274, 279 n.14 (2001); Michael S. Kang, *The Hydraulics and Politics of Party Regulation*, 91 IOWA L. REV. 131, 166 (2005); Nancy L. Rosenblum, *Political Parties as Membership Groups*, 100 COLUM. L. REV. 813, 818 (2000); David Schleicher, "Politics as Markets" *Reconsidered: Natural Monopolies, Competitive Democratic Philosophy and Primary Ballot Access in American Elections*, 14 SUP. CT. ECON. REV. 163, 212 (2006); Lauren Hancock, Note, *The Life of the Party: Analyzing Political Parties' First Amendment Associational Rights when the Primary Election Process Is Construed Along a Continuum*, 88 MINN. L. REV. 159, 167 n.51 (2003).

22. Persily & Cain, *supra* note 20, at 778. For one of the earlier endeavors, see Daniel Hays Lowenstein, *Associational Rights of Major Political Parties: A Skeptical Inquiry*, 71 TEX. L. REV. 1741, 1743, 1757 (1993).

As its name implies, the party-in-the-government may include elected politicians and executive party heads.<sup>23</sup> Key describes a popular conception of “a group which could be held accountable for the conduct of the government,” but he also describes smaller groups, such as “Democratic Representatives” and “Republican Senators.”<sup>24</sup> Key’s “professional political workers” constitute the group that staffs the political organization.<sup>25</sup> The “party-in-the-electorate” is formed of voters at-large who identify as party members.<sup>26</sup> According to Key, this group activates only on Election Day, but party views frame voters’ understanding of issues even in between election cycles.<sup>27</sup>

Starting from Key’s framework, the modern political party can be seen as an uneasy amalgam of electoral engagement, popular ideology, and governance. In this way, a model of political parties becomes much more complicated than one of corporations whose primary and unambiguous goal is to maximize profits.<sup>28</sup> The outside societal interest in corporate structuring is a generalized public interest in the efficient use of firm resources, an aim largely internalized into the wealth-maximization focus of the business firm. By contrast, proper party functioning is critical to the central public good of democratic self-governance. The public good dominates any particular consideration purely internal to the political party. As a result, no simple metric, such as efficiency, can fully integrate the internal momentary objectives to the overall public aims. Facing competing goals, parties must at times weigh difficult sacrifices. For example, achieving legislative or governance objectives may require exposing swing-district candidates to unpopular votes. This in turn requires considerations derived not so much from the Coasean concern for minimizing transaction costs but from the need to ensure loyalty and voice rather than exit from the parties.<sup>29</sup>

The public face of any political party is its candidates for office and particularly its successful candidates who hold office, and it is this portion of the party that is most vulnerable to organizational

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23. KEY (5th ed.), *supra* note 20, at 164.

24. *Id.*

25. *Id.* (providing as examples national committeemen, state central committees, county chairmen and organizational staffers).

26. *Id.*

27. *Id.*

28. Of course, corporations also confront complexity in the form of principal-agent problems, competing short- and long-term objectives, and uncertain payoffs for investment opportunities.

29. *See generally* ALBERT O. HIRSCHMAN, EXIT, VOICE AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1990 ed. 1970).

failure. This group foremost looks to winning elections, generally by hewing close enough to the center of the political distribution of voters, which is presented in the political science literature as the median voter theory of politics.<sup>30</sup> Depending on the particular constituency and the ultimate ambitions of the candidate, a wide variety of positions could ensue, even from nominal members of the same party. A candidate running in a swing district and one running in a gerrymandered district with little to fear from the other party would be pushed closer or further away from the national center of politics. Absent some organizational reason for cohesion, candidates would likely drift from a coherent set of policies or priorities.

The same lack of cohesion afflicts the party-in-the-electorate. Key conceived voter loyalty and partisanship as “a set of concentric circles,” with declining levels of enthusiasm at further distances from the core of highly engaged activists.<sup>31</sup> Most surveys of overall voter preferences reveal generally bell-shaped normal distributions of views, resulting in the unsurprising truism that the center is, well, centrist.<sup>32</sup> Even in our current polarized era, where the centers of the two main parties have pulled apart, the ideological distance between the parties tends to be less than in the more fractured preferences of parties operating in proportional representations systems, for example.<sup>33</sup> But the electorate has no way of presenting itself in the political system except on Election Day, and so the candidate positions and the party platform tend to be shaped by activists and donors who represent a far more polarizing constituency than the bulk of the electorate.<sup>34</sup>

Key incorporates his observations on the conflicts among professional political workers with a larger discussion of party organization. Though parties are commonly conceived as an ordered hierarchy, Key describes the successively broader

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30. See Roger D. Congleton, *The Median Voter Model*, in 1 THE ENCYCLOPEDIA OF PUBLIC CHOICE 382, 384 (Charles K. Rowley & Friedrich Schneider eds., 2004).

31. KEY (5th ed.), *supra* note 20, at 212.

32. See, e.g., Morris P. Fiorina, *Has the American Public Polarized?*, HOOVER INSTITUTION 10–12 (Sept. 14, 2016), [http://www.hoover.org/sites/default/files/research/docs/fiorina\\_finalfile\\_0.pdf](http://www.hoover.org/sites/default/files/research/docs/fiorina_finalfile_0.pdf) [https://perma.cc/22JK-8LU7].

33. See, e.g., Jay K. Dow, *A Comparative Spatial Analysis of Majoritarian and Proportional Elections*, 20 ELECTORAL STUD. 109, 111 (2001); F. A. HERMENS, *DEMOCRACY OR ANARCHY? A STUDY OF PROPORTIONAL REPRESENTATION* 16 (reprt. 1972); KEY (5th ed.), *supra* note 20, at 220 (“[T]he diversity of pressures from within the party upon the leadership drives it toward moderation. . . . The situation generates a radically different sort of imperative for the leadership than does the context in which party leaders of a multiparty system operate: they may be driven to accentuate the separatism of their electoral following.”).

34. Fiorina, *supra* note 32, at 2–5.

geographical party units—"layers of organization"—as seized with independent electoral interests; cooperation cannot be coerced.<sup>35</sup> The role of national committee chairmen in setting policy can provoke conflict with other components of the party, including congressional leadership, i.e., the party-in-the-government.<sup>36</sup> Unsurprisingly, Key observed that strong electoral prospects for candidates drive greater organizational discipline and cohesion whereas weakness can lead to muted support or outright defection within the party organization, anticipating the concept of organizational exit as used today.<sup>37</sup> Even writing in the mid-twentieth century, Key observed significant upheaval and conflict in party organizations, as machine systems came under pressure from candidate- and personality-driven factions.<sup>38</sup>

Lack of cohesion also threatens the effectiveness of elected representatives, Key's party-in-the-government. Just as candidates may move across a range of issues and positions depending on their personal ambitions and the particular needs of their constituencies, so too do those candidates once in office bring with them competing agendas. In theory, there are so many competing interests, and such inconsistency in potential political outcomes depending on control of the agenda setting what is presented in what form, that there is a risk of complete incoherence to the legislative process. For political scientists like Bruce Cain, the legislative process is where the rubber hits the road. The various rules and power structures that control Congress can serve to amplify majority party power and compel compromises.<sup>39</sup> The problem of cycling of preferences, the great insight of Kenneth Arrow and the ensuing study of public choice theory,<sup>40</sup> threatens to collapse the capacity of any legislative body charged with policy leadership. The need for coordination is apparent, with the Supreme Court long ago observing that parties

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35. KEY (5th ed.), *supra* note 20, at 316 ("[C]ollaboration comes about, to the extent that it does come about, through a sense of common cause rather than by the exercise of command.").

36. *Id.* at 323.

37. *Id.* at 331.

38. *Id.* at 341 ("Tightly managed statewide party organization has become exceptional and has been largely replaced by a fractionalized system of personal and factional cliques of professionals within each party."). Key links this decentralizing upheaval to both a decline in patronage, disruptive new mass media technologies, and the adoption of direct primaries. *Id.* at 342. Those factors have only intensified in the intervening period.

39. CAIN, *supra* note 9, at 134–35 (identifying the majoritarian consolidation of power in the House and antimajoritarian "holds, unanimous consent, and cloture rules" in the Senate).

40. See Dennis C. Mueller, *Public Choice: An Introduction*, in 1 THE ENCYCLOPEDIA OF PUBLIC CHOICE 32 (Charles K. Rowley & Friedrich Schneider eds., 2004).

emerged “so as to coordinate efforts to secure needed legislation and oppose that deemed undesirable.”<sup>41</sup>

Despite the great academic search for examples of cycling, it never seemed to happen very much in Congress.<sup>42</sup> In theory every amendment could trigger a shift in preferences, meaning that, whereas A is preferable to B, the consideration of C makes B preferable, even if C is the losing option.<sup>43</sup> And so it is when D is offered up as yet another option, and on and on. The simplest reason “we do not see cycling of positions” is that the party hierarchy serves to coordinate message and preferences for the party-in-the-government, just as it does among the candidates. With strong committee structures, rewards in the form of pet projects for constituencies or earmarks, not just any measure can get to the floor. Just as planets do not spin out of orbit, so too the gravitational force of the party organization reins in the tendencies toward entropy. In politics as in physics, energy is required to conquer entropy.

To give a concrete example, consider the fate of Senate Bill 1 in every Texas legislative session. By Senate rules, every bill must be taken up in order unless the order is altered by a three-fifths vote of the Senate.<sup>44</sup> Senate Bill 1 is the first bill introduced and at each legislative session it has no content. It is merely a parliamentary blocking device that in practice means that nothing will come to the Senate without an affirmative act of the Lieutenant Governor, who historically has been the most powerful political official in the state.<sup>45</sup> There is no cycling of preferences because the agenda is set by one individual wielding the collective power of the dominant party.<sup>46</sup>

41. Ray v. Blair, 343 U.S. 214, 221 (1952).

42. See Bernard Grofman, *Public Choice, Civic Republicanism, and American Politics: Perspectives of a “Reasonable Choice” Modeler*, 71 TEX. L. REV. 1541, 1558–59 (1993). For some examples of cycling in legislative settings, see William H. Riker & Steven J. Brams, *The Paradox of Vote Trading*, 67 AM. POL. SCI. REV. 1235, 1246–47 (1973).

43. For example, consider a situation where there are 19 voters on an issue with three choices. 8 voters prefer option B the most, followed by option C, and then option A (B>C>A). 6 voters prefer option C, followed by option A, then option B (C>A>B). Finally, 5 voters prefer option A, followed by option B, followed by option C (A>B>C). Here, it is difficult to model what choice would win in a vote. A is preferred over B by 11 out of 19 voters, C is preferred over A by 14 out of 19 voters, and B is preferred over C by 13 out of 19 voters. For a further illustration of this example, see Jan Kok, Clay Shentrup & Warren Smith, *Condorcet Cycles*, RANGEVOTING.ORG, <http://rangevoting.org/CondorcetCycles.html> [<https://perma.cc/6KKP-FRAP>].

44. See Senate Rule 5.13, [http://www.senate.state.tx.us/\\_assets/pdf/SenateRules85.pdf](http://www.senate.state.tx.us/_assets/pdf/SenateRules85.pdf) [<https://perma.cc/WH4K-M93R>].

45. See House Research Organization, Tex. House of Representatives, *How a Bill Becomes Law: 84th Legislature*, HOUSE RES. ORG. (Feb. 26, 2015), <http://www.hro.house.state.tx.us/pdf/focus/hwbill84.pdf> [<https://perma.cc/E6J7-W2NP>] (“The Senate traditionally lodges a “blocker” bill at the top of the calendar.”).

46. Ben Philpott, *Why Is the Lieutenant Governor the Most Powerful Office in Texas?*

On this view, the party provides coherence to politics, disciplines candidates not to stray too far from the party message, offers a mechanism for the ineffectual center to be protected from the extremes within each party, and maintains the ability to govern effectively. Key attributes the moderating influence of parties to their diversity of constituent interests; electoral success on the national stage requires not deviating too far from the party's center of gravity toward any particular interest, even if catering to particular interests is advantageous at a local level.<sup>47</sup> This is quite an undertaking. While the mass of the electorate would have great difficulty organizing itself, the same cannot be said of candidates, officeholders, and the party activists. Each one of these groups necessarily bristles at the restraints imposed by the party and threatens to go it alone or withdraw its support. Yet somehow the party perseveres, through organizational assistance, financial support, rewards to the faithful—in other words, by wielding its organizational energy so it remains the center of authority. And it does so, as noted by John Aldrich, primarily in the service of the capacity to govern through elected officials.<sup>48</sup>

### C. Coase Meets Key

Oddly, there appears to be no scholarly tradition of integrating the insights from the marginal cost economics of the firm to the institutional structure of political parties. Scholars have recognized that the weakness in political parties gives space to interest groups to assert themselves, noting that, in the words of Schattschneider, “[P]ressure groups thrive on the weaknesses of the parties.”<sup>49</sup> But insights that could be garnered from the

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*And Who Wants that Power?*, KUT 90.5 (Oct. 16, 2014), <http://kut.org/post/why-lieutenant-governor-most-powerful-office-texas-and-who-wants-power> [<https://perma.cc/CK78-WJGA>] (“The lieutenant governor appoints all the committee chairs of the committees in the Senate, determines where the bills are going to be sent and to what committees and the timing.” (quoting Sherri Greenberg)).

47. KEY (5th ed.), *supra* note 20, at 219 (“[T]he makeup of each party also restrains the zeal of the leadership in the advocacy of the cause of any single element within the party. Leaders in congressional districts may be extremists . . . nevertheless, that segment of the party leadership with a national outlook—fundamentally those concerned with victory in presidential elections—must keep in view all elements within the party.”).

48. JOHN H. ALDRICH, *WHY PARTIES? THE ORIGIN AND TRANSFORMATION OF POLITICAL PARTIES IN AMERICA* 4 (1995).

49. See Katherine Krimmel, *The Efficiencies and Pathologies of Special Interest Partisanship* 5 (June 22, 2015) (unpublished manuscript) (on file with author) (quoting E. E. Schattschneider, *Pressure Groups Versus Political Parties*, ANNALS AM. ACAD. POL. & SOC. SCI., Sept. 1948, at 18). Professor Krimmel's doctoral dissertation appears to be the first effort to take seriously the Coasean insights into the nature of a firm for the role of political parties. Professor Krimmel focuses on the ability and incentives for political parties to outsource communication functions to interest groups as a contributing factor to the polarization of political parties at present.

merger of transactional cost economics with the integrity of political parties seems to have been lost in the jurisdictional divide between economics and political science. Yet Key's critical contribution of the party as a precarious balance among competing functions and constituencies points directly to some systematic analysis of how parties respond to the cost of internal organization imposed by different legal regimes, technologies, and other transformative factors. As Elizabeth Garrett noted, Key's insights lead to further points of fissure beyond the three core constituencies of the party:

There are subparts within each of these elements, further complicating the analysis and providing additional, occasionally contending forces. Take, for example, the party organization. Not only are there layers of organizations because of federalism and separation of powers, but party leaders are a different group from professional campaign consultants, who may affiliate with a party or an ideology but are, in the end, paid political guns who may also work for candidates affiliated with other parties. Separate from both these groups are political activists, whose volunteered time and energy are important to the party organization, but who may be more committed to specific ideological goals than to the overriding objective of party leaders: gaining party control of government.<sup>50</sup>

A transactional approach to the party would view each of these constituencies as part of a make-or-buy continuum of potential organizations. As a general matter, the party leadership holds an inevitable advantage in the battle for control of political parties. The mass of the party-in-the-electorate is disabled by a collective action problem in organizing for its interests—usually center-leaning.<sup>51</sup> The candidates would historically have been disabled without the endorsement and organizational resources of the party. And the party-in-the-government could not govern effectively and deliver on its campaign promises without the party providing coherence to the legislative agenda.

In Coasean terms, the transactional costs of overseeing disparate entities would be too great for any individual politician to stray too far from the party. Instead of agreeing with the party whip on support for one piece of legislation in order to achieve a private concern, each congressman would have to reach out to enough other congressmen to get the requisite 218 members to support the bill. As well captured by Seth Masket:

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50. Garrett, *supra* note 21, at 99 (footnotes omitted).

51. Kang, *supra* note 21, at 167.

Quite simply, a partyless legislature is a collective action nightmare. Having to cobble together a winning coalition on every bill one cares about is nearly impossible, ensuring that incumbents will fail to enact much of the agenda on which they ran for office and will fail to deliver redistributive benefits to their district.<sup>52</sup>

The transaction costs of repeating this across all legislation disciplined the members to the party historically, as well as the credible threat by the party to retaliate for defection from the core legislative agenda. Similarly, the ability of the party to reward its activists with both access and positions in government keeps centripetal forces at bay. And finally, the party's authority in who gets to speak as a candidate of the party disciplines the message in the electoral arena.

Further following Coase leads to viewing the party's role not as static, but as a dynamic process in which the various constituencies are deciding whether to continue to accept the constraints of the party or set off on their own. There are endless sources of discontent within a political party, and everyone from voters to activists to candidates to incumbent officeholders are always evaluating whether they are better off setting off on their own, crossing the aisle, or just withdrawing altogether from politics. For those committed to the political enterprise, the question is whether putting up with the inevitable frustration within the party is worth it, or whether independence or an alternative institutional arrangement is superior. In other words, the various constituencies within the party are searching for an optimal equilibrium between making or buying. That is what the Coasean perspective on marginal trade-offs adds to Key's insights about the multiple party constituencies.

It has always been possible for independent entrepreneurs, whether candidates themselves or outside interest groups, to engage politics outside the framework of the political party. Independents from Teddy Roosevelt to Ross Perot have engaged at the presidential level, and likely turned the outcome from one major party candidate to another. But only the unitary organization within the party can translate political activism into election results and the prospect of actually governing. Treating the party as a contractual partner to be discarded at will means foregoing the benefits available through the unitary party organization.

Specifically, the question presented here is what happens if the benefits available through a unified party organization are

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52. SETH E. MASKET, *THE INEVITABLE PARTY: WHY ATTEMPTS TO KILL THE PARTY SYSTEM FAIL AND HOW THEY WEAKEN DEMOCRACY* 18 (2016).

compromised by changes in the legal rules governing politics. Viewed as a firm whose dimensions are altered by transaction costs, political parties and their various constituencies would be expected to respond to altered efficiencies from maintaining activity within the party as opposed to outside the party. The chief efficiency gain of political parties is their ability to coordinate among the competing constituencies and in turn to deliver to each a superior ability to realize goals than could be achieved by going it alone. This efficiency gain is potentially challenged across two different dimensions. First, it may be that candidates conclude that the party franchise is too weak or too unenforceable and may decide to set off on their own contrary to the party elders. We may think of this as the strategy of a Ted Cruz, a person claiming the Republican brand, but defiantly refusing to be disciplined by it.<sup>53</sup> Alternatively, it may be that entire categories of erstwhile party activities may be performed more effectively outside the party. The best example of this is when constraints on party fundraising make Super PACs a better vehicle for channeling campaign finances.<sup>54</sup>

In what follows, I turn to three examples of altered regulatory environments in which the advantages enjoyed by parties historically have been compromised by changes in the legal status of parties. The three domains are party access to funds, party control over government jobs, and party control over candidate nominations. The argument is neither that these changes alone were decisive in weakening political parties, nor that they were necessarily bad reforms. Rather it is to cast them in the analytic frame of party weakening reforms whose cumulative effect plays out on the contemporary political stage. Looked at prescriptively, it may be that “stronger parties—or parties stronger in certain dimensions—ironically might be the most effective vehicle for enabling the compromises and deals necessary to enable more effective governance despite the partisan divide.”<sup>55</sup>

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53. Theodore Schleifer & Stephen Collinson, *Defiant Ted Cruz Stands by Refusal to Endorse Trump After Being Booed During Convention Speech*, CNN (July 22, 2016, 12:14 PM), <http://www.cnn.com/2016/07/20/politics/ted-cruz-republican-convention-moment/> [<https://perma.cc/WHL5-WVCK>].

54. See SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY* 544–50 (5th ed. 2016).

55. Pildes, *supra* note 2, at 809–10.

III. REGULATORY INCENTIVES UNDER  
CAMPAIGN FINANCE LAWS

Trying to tread lightly into the domain of campaign finance is a fraught undertaking. The battle lines have long since hardened on whether money is speech, whether limiting expenditures is like burning books, and even on whether *Citizens United* is the *Dred Scott* of our time. The point of this venture is not to engage the substance of campaign finance law but to frame a part of the campaign finance debate in terms of the practical effects that different forms of funding politics have on the prospects of political parties. I take as the point of departure the insight that Pam Karlan and I offered up a number of years ago concerning the hydraulic quality of money in politics: like water, money will seek its own level and restrictions on its flow in one direction will soon generate other outlets.<sup>56</sup>

Campaign donors tend to be more ideologically polarized than the electorate at-large.<sup>57</sup> Following Keys, however, the party should be a mediating large tent whose primary consideration is the electability of its slate of candidates and of their subsequent capacity to government. In a recent study, Professors La Raja and Schaffner find that a party-centered finance system tends to blunt the polarizing effect of ideological donors and candidates because parties have “the potential to dampen the tendency to elect highly ideological candidates who will not necessarily receive financial support from the political party.”<sup>58</sup> But the trend in campaign finance reform has been not to channel money to the parties, but to try to limit the amount of money available and, by extension, the role of money altogether.<sup>59</sup> With unfortunate similarity to the drunk searching for the lost car keys under the streetlight, reform attention turns to those domains that are most readily subject to restrictive regulation, most notably both parties and candidates.

The jurisprudential point of departure here is not *Buckley v. Valeo*, or its permutations into the precarious distinctions between contributions and expenditures, but a series of cases emerging from the 1986 Senate campaigns in Colorado. In these cases, the Court confronted the relation between the Colorado Republican

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

57. Carroll Doherty, *7 Things to Know About Polarization in America*, PEW RES. CTR. (June 12, 2014), <http://www.pewresearch.org/fact-tank/2014/06/12/7-things-to-know-about-polarization-in-america/> [<https://perma.cc/GR5F-SZ3B>] (finding higher rates of political donations amount “ideologically consistent” partisans).

58. RAYMOND J. LA RAJA & BRIAN F. SCHAFFNER, *CAMPAIGN FINANCE AND POLITICAL POLARIZATION: WHEN PURISTS PREVAIL* 59 (4th ed. 2015).

59. Issacharoff & Karlan, *supra* note 56, at 1717–18.

party and the party's eventual candidate for an open Senate seat. For a majority of the Court, a political party was found to be just another electoral actor, no different in kind from any other supplicant seeking to curry favor with an actual or potential officeholder.<sup>60</sup> Accordingly, in *Colorado Republican I*, the Court found no violation of the campaign finance laws when the state Republican party attacked the Democratic nominee—but only on the bizarre grounds that, because the attack ads aired before there was a formal Republican nominee, there could have been no coordination.<sup>61</sup> As Justice Kennedy noted in concurrence, “It makes no sense . . . to ask, as FECA does, whether a party's spending is made ‘in cooperation, consultation, or concert with’ its candidate.”<sup>62</sup> The answer, per Justice Kennedy, not only is likely yes, but should be yes and should have offered a measure of constitutional protection to the party.<sup>63</sup> The Court then compounded the injury in *Colorado Republican II* in holding that where a party acts in concert with its candidates, its expenditures may be treated as de facto contributions from the party to the candidate, no different from the contribution from any other private actors, and subject to the same restrictions to avoid the risk of a pass-through to the candidate.<sup>64</sup>

In following the elusive trail of corruption and circumvention, the Court lost sight of the complex institutional forms of politics in two ways. First, parties are not merely potential conduits for money. Parties do not serve simply as a pass-through to launder illicit quid-pro-quo contributions to officeholders. Parties, as institutional actors, have organizational aims of their own—a critical insight from Key on the struggle for control among the competing constituencies of the party.<sup>65</sup> Second, the Court assumed away any hydraulic pressures that would cause funds to flow to other actors outside the regulated domain. Here the Court acted in the manner of naïve regulators who presume the singularity of their covered domain and take no account for the displacement of economic activity that will simply seek out less regulated environs to pursue the same aims.

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60. See *FEC v. Colo. Republican Fed. Campaign Comm. (Colorado Republican II)*, 533 U.S. 431, 455 (2001); *Colo. Republican Fed. Campaign Comm. v. FEC (Colorado Republican I)*, 518 U.S. 604, 614 (1996) (recognizing protection of party independent expenditures so long as not coordinated with any candidate).

61. *Colorado Republican I*, 518 U.S. at 623 (resolving as applied challenge to avoid broader constitutional issue).

62. *Id.* at 629.

63. *Id.* at 629–30 (finding that party activity and spending on behalf of candidate is the heart of party political engagement).

64. *Colorado Republican II*, 533 U.S. at 465.

65. See KEY (5th ed.), *supra* note 20, at 163, 166–67.

Colorado provides an interesting further example of the dislocations caused by reducing the financial resources of the parties. In 2002, the same year as the major federal reform effort, Colorado voters passed Amendment 27, which drastically reduced the amount of money candidates could raise, but which targeted parties more directly. In effect, Amendment 27 sidelined the parties in state legislative elections in the same fashion as the federal election laws at issue in the *Colorado Republican* cases. Parties were limited to spending only \$18,000 to support state senate candidates and \$13,000 for the state house—as opposed to unlimited sums before the amendment.<sup>66</sup> Even more significant, the amount that any individual could give to a party was reduced from \$25,000 to \$3,000.<sup>67</sup> As usual, the argument in favor was the need to promote transparency and curb the influence of special interests.<sup>68</sup>

When gay rights and other cultural issues began to occupy the attention of the legislature, four wealthy liberal activists formed a Section 527 organization dubbed the “Roundtable” to try to steer state politics.<sup>69</sup> Move begat countermove and soon conservative independent expenditure outfits began to occupy the political space vacated by the Republican party, just as the Roundtable began to act as the de facto liberal party.<sup>70</sup> As a result, “Colorado’s political elites increasingly began to see the Roundtable’s 527s as the locus of Democratic Party activity and the formal party as something of an atavistic relic.”<sup>71</sup> The same occurred on the Republican side of the ledger.

Returning to the main theme of this Article, the Court in the *Colorado Republican* cases compromised one of the competitive advantages that parties have in the race for campaign funding. The integration of access to voters, candidates, and officeholders allowed parties a privileged position as political actors, and there were significant returns to scale of being able to coordinate all of these functions inside the party viewed as a firm. Once the party was no longer able to raise money to support its candidates on any basis distinct from any other contributor and once the interaction between party and candidate was limited by a principle of

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66. Legis. Council of the Colo. Gen. Assembly, *2002 Ballot Information Booklet* (Sept. 10, 2002), <http://www2.cde.state.co.us/artemis/gamonos/ga49502internet/ga49502-9internet.pdf> [<https://perma.cc/HF85-MS77>].

66. *Id.*

67. *Id.*

68. MASKET, *supra* note 52, at 36.

69. *Id.* at 38–39.

70. *Id.* at 40.

71. *Id.* at 41–42.

non-coordination, the logic of internalizing the candidate's campaign within the political party dissipated. In Coasean terms, there was no longer a manifest advantage to making as opposed to buying from outside vendors.

Even with the constraints from *Colorado Republican I* and *II*, the parties were able to recover an edge in the 1990s. The weaker restrictions on campaign contributions to state parties allowed another of the constituencies identified by Beth Garrett to play a stronger role. First the Democrats and then the Republicans figured out how to channel national funding activities through state parties, who would in turn transmit the money raised up to the national parties<sup>72</sup>—a contrived transformation of non-federal funds into clean federal dollars, a practice remarkably similar to money laundering. Even the going terms of a 15% charge by the state parties looked like standard rates for money laundering.<sup>73</sup> And so were born the White House sleepovers, the rides on Air Force One, and the golfing weekends with Republican House leaders<sup>74</sup> (alas, there are no presidential prerequisites for the party out of power).

No doubt, the perception of access for sale could not have been worse.<sup>75</sup> But amid the stench, the soft money period of the 1990s restored a unifying role to the national parties and lent coherence to the party messages. Again, this was not an unalloyed good as it drove to the government shutdown of 1995<sup>76</sup> and then the essentially straight-line party voting on the impeachment of President Clinton.<sup>77</sup> Nonetheless, channeling money through the

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72. See Stephen Ansolabehere & James M. Snyder, Jr., *Soft Money, Hard Money, Strong Parties*, 100 COLUM. L. REV. 598, 614–15 (2000).

73. See *id.* at 606–07 (roughly 15% held back by state parties); PETER REUTER & EDWIN M. TRUMAN, CHASING DIRTY MONEY: THE FIGHT AGAINST MONEY LAUNDERING 36 (2004) (“Experienced investigators refer to a general price range of 7 to 15 percent for laundering for drug dealers, but some reports are inconsistent with such estimates.”).

74. See Andy Kroll, *Follow the Dark Money*, MOTHER JONES (July/Aug. 2012), <http://www.motherjones.com/politics/2012/06/history-money-american-elections> [<https://perma.cc/RKX2-HFVU>].

75. See, e.g., Stephen Labaton, *House Aide Links a Top Lawmaker to Embezzlement*, N.Y. TIMES (July 20, 1993), <http://www.nytimes.com/1993/07/20/us/house-aide-links-a-top-lawmaker-to-embezzlement.html?smid=tw-share>; Press Release, Former Delegate Fauntroy Is Charged, Agrees to Plead Guilty (Mar. 22, 1995), [https://www.justice.gov/archive/opa/pr/Pre\\_96/March95/153.txt.html](https://www.justice.gov/archive/opa/pr/Pre_96/March95/153.txt.html) [<https://perma.cc/9QG U-B63B>].

76. KEVIN R. KOSAR, CONG. RESEARCH SERV., 98-844 GOV. SHUTDOWN OF THE FEDERAL GOVERNMENT: CAUSES, EFFECTS, AND PROCESS 2 (2004), <http://archives.democrats.rules.house.gov/archives/98-844.pdf> [<https://perma.cc/2THG-TX4L>].

77. *How the Senators Voted on Impeachment*, CNN (Feb. 12, 1999, 12:51 PM), <http://www.cnn.com/ALLPOLITICS/stories/1999/02/12/senate.vote/> [<https://perma.cc/B5N5-GDZZ>].

parties meant that parties emerged as the centerpieces of politics<sup>78</sup> and, as with the Contract with America,<sup>79</sup> gave a national coherence to electoral politics—with warts and all.

Despite the role of *Citizens United* in the public imagination as the placeholder for the rise of unaccountable money in the political system, the history points to several shocks to politics as usual in the 2000s as having provided the impetus for the emergence of political funding outside the parties. The first is the passage in 2002 of the Bipartisan Campaign Reform Act (BCRA), known after its sponsors as the McCain-Feingold Act.<sup>80</sup> The Act targeted soft money accumulation by the parties and, after being upheld by the Supreme Court in *McConnell v. FEC*,<sup>81</sup> effectively shut down the flow of campaign funds through the state political parties. But, as anticipated by the hydraulics account, new outlets emerged for political donations outside the candidates and parties. Between 2000 and 2008, independent expenditures in the federal domain increased by at least 425%,<sup>82</sup> a broader version of what occurred in Colorado at the state level. The losers were the political parties, most notably the state parties.<sup>83</sup> The winners were what Joey Fishkin and Heather Gerken call the shadow parties, ranging from the independent expenditure outfits to the self-sustaining campaigns of individual candidates.<sup>84</sup>

One of the early shocks to the system came in the presidential election of 2004. That year the Democratic Primary

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78. For example, much of the “Republic Revolution” of 1994 was driven by a united attack by the Republican Party on Bill Clinton’s healthcare reform and perceived liberalism. See Stuart Rothenberg, *How High the Wave? Don’t Just Think 1994; Think 1974, 1958, 1982*, INSIDE ELECTIONS (Oct. 26, 2006, 12:02 AM), <http://insideelections.com/news/article/how-high-the-wave-dont-just-think-1994-think-1974-1958-1982> [https://perma.cc/BB9M-2BD2].

79. Jeffrey B. Gayner, *The Heritage Lectures: The Contract with America: Implementing New Ideas in the U.S.*, HERITAGE FOUND. 1–2 (1995), [http://s3.amazonaws.com/thf\\_media/1995/pdf/hl549.pdf](http://s3.amazonaws.com/thf_media/1995/pdf/hl549.pdf) [https://perma.cc/R3FZ-VFLM].

80. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002); Robert Kelner & Raymond La Raja, Opinion, *McCain-Feingold’s Devastating Legacy*, WASH. POST (Apr. 11, 2014), [https://www.washingtonpost.com/opinions/mccain-feingolds-devastating-legacy/2014/04/11/14a528e2-c18f-11e3-bcec-b71ee10e9bc3\\_story.html?postshare=6571486243964249&tid=ss\\_tw&utm\\_term=.47ef21cd605b](https://www.washingtonpost.com/opinions/mccain-feingolds-devastating-legacy/2014/04/11/14a528e2-c18f-11e3-bcec-b71ee10e9bc3_story.html?postshare=6571486243964249&tid=ss_tw&utm_term=.47ef21cd605b) [https://perma.cc/6HT5-85UF].

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

82. In the 2000 election cycle, the Center for Responsive Politics reports that independent expenditures totaled \$33,763,452, across all federal elections. The 2008 total was \$143,630,578, representing a 425% increase. Ctr. for Responsive Pol., *Total Outside Spending by Election Cycle, Excluding Party Committees*, OPENSECRETS, [http://www.opensecrets.org/outsidespending/cycle\\_tots.php?cycle=2014&view=Y&chart=N](http://www.opensecrets.org/outsidespending/cycle_tots.php?cycle=2014&view=Y&chart=N) [https://perma.cc/P2A6-CH55].

83. 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).

84. Joseph Fishkin & Heather K. Gerken, *The Two Trends that Matter for Party Politics*, 89 N.Y.U. L. REV. ONLINE 32, 35 (2014).

was not held until the end of July. Through the course of a contested primary season, John Kerry had exhausted his war chest by early July and would not be eligible for federal funds until after the nomination.<sup>85</sup> For all practical purposes, the Kerry campaign went silent in July.<sup>86</sup> During that month George Soros raised over \$20 million, much of it his own money, through Move On, America Coming Together, and other entities formed independently of the Democratic Party.<sup>87</sup> Until Kerry's formal nomination, the presidential campaign was given over to a private organization that maintained formal separation from not only the Democratic Party but even from the presidential candidate himself.<sup>88</sup> Clearly what could be done for one month could then be the model for an outsourced component of any presidential campaign.

What began to change after 2008 was the organizational form of outsourced campaign funding away from both traditional PACs and even 501(c)(4) organizations that are supposedly furthering civic engagement:

Although some Super PAC funds come from corporations and unions, the vast majority have been provided by wealthy individuals who, well before *Citizens United*, were permitted to spend unlimited sums independently, but were subject to a federal statutory limit of \$5000 on the amounts they could give to the federal PACs that expressly support or oppose federal candidates.<sup>89</sup>

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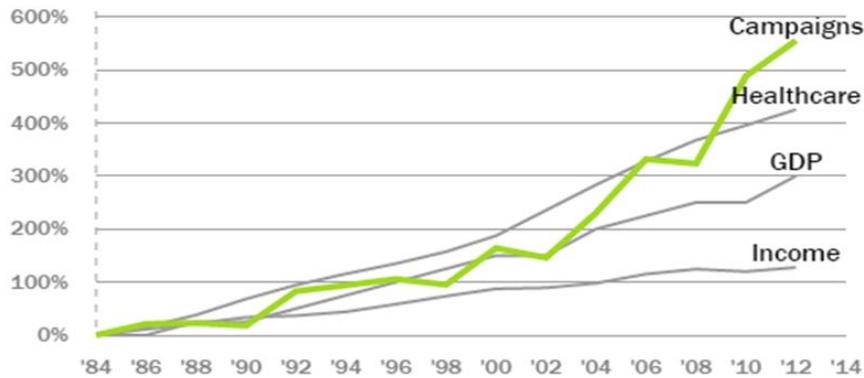
85. Michael J. Malbin, *A Public Funding System in Jeopardy: Lessons from the Presidential Nomination Contest of 2004*, in *THE ELECTION AFTER REFORM: MONEY, POLITICS, AND THE BIPARTISAN CAMPAIGN REFORM ACT 219*, 237–42 (Michael J. Malbin ed., 2006).

86. *Id.*

87. Cf. Ctr. for Responsive Pol., *Moveon.Org Spending by Cycle*, OPENSECRETS, <https://www.opensecrets.org/pacs/lookup2.php?strID=C00341396&cycle=2004> [<https://perma.cc/V4U2-KVYR>] (outlining Move On's total receipts during the 2004 cycle).

88. Dan Balz & Thomas B. Edsall, *Democrats Forming Parallel Campaign*, WASH. POST (Mar. 10, 2004), <http://www.washingtonpost.com/wp-dyn/content/article/2004/03/10/AR2005040309958.html> [<https://perma.cc/P3XJ-CDLSJ>].

89. Richard Briffault, *Super PACs*, 96 MINN. L. REV. 1644, 1645 (2012).

*Percent Growth in Cost*<sup>90</sup>

While the rise of Super PAC and 501(c)(4) spending has been well chronicled,<sup>91</sup> less attention has been given to another systemic shock from 2008: the decision of President Obama to forego public funding altogether. As a result of both intensive and innovative fundraising, the Obama campaign had roughly three times the resources in the general election as did the McCain campaign.<sup>92</sup> Roughly one-quarter of the Obama fundraising came from small donors, totaling about \$200 million—about the same amount of money as available to McCain in the general election.<sup>93</sup> The

90. Michael Scherer, Pratheek Rebala & Chris Wilson, *The Incredible Rise in Campaign Spending*, TIME POL. (Oct. 23, 2014, 11:39 AM), <http://time.com/3534117/the-incredible-rise-in-campaign-spending/> [<https://perma.cc/7TMC-2GSA>]; see also Ctr. for Responsive Politics, *Outside Spending*, OPENSECRETS, <http://www.opensecrets.org/outsidespending/> [<https://perma.cc/6P53-4XSG>].

91. See, e.g., *id.* at 1672, 1674–75 (providing an overview of the law of Super PACs and their role in recent campaigns); Terence Dougherty, *Section 501(c)(4) Advocacy Organizations: Political Candidate-Related and Other Partisan Activities in Furtherance of the Social Welfare*, 36 SEATTLE U. L. REV. 1337 (2013) (summarizing the treatment of 501(c)(4) organizations and their political activities); Michael S. Kang, *The Year of the Super PAC*, 81 GEO. WASH. L. REV. 1902 (2013) (discussing the influence of Super PACs in the 2012 presidential election cycle); Garrick B. Pursley, *The Campaign Finance Safeguards of Federalism*, 63 EMORY L.J. 781 (2014) (tracing the rise of Super PACs and their weakening of federalism); Bradley A. Smith, *Super PACs and the Role of “Coordination” in Campaign Finance Law*, 49 WILLAMETTE L. REV. 603 (2013) (describing the rise of Super PACs and the anti-coordinating requirements); Molly J. Walker Wilson, *Financing Elections and “Appearance of Corruption”: Citizen Attitudes and Behavior in 2012*, 63 CATH. U. L. REV. 953 (2014) (reviewing the rise of Super PACs and their effect on voters’ perceptions of political corruption).

92. In the 2008 cycle, Barack Obama raised approximately \$750 million from donors, while John McCain raised roughly \$238 million from donors. Tahman Bradley, *Final Fundraising Figure: Obama’s \$750M*, ABC NEWS (Dec. 5, 2008), <http://abcnews.go.com/Politics/Vote2008/story?id=6397572&page=1> [<https://perma.cc/V999-TKEZ>].

93. Twenty-four percent of Barack Obama’s \$746.1 million in contributions in the 2008 cycle (pre-nomination and general election contributions combined) came from donors who gave less than \$200. Press Release, Campaign Fin. Inst., All CFI Funding Statistics

Obama for America strategy revealed that a presidential campaign could raise large amounts of money (assisted by the rise in individual contributions under BCRA<sup>94</sup>) outside the party structure. Even more significant, the small contributions showed that technology had lowered the transaction costs of dealing directly with what Key would term the party-in-the-electorate without any intermediation by the party apparatus. Not surprisingly, small donor appeals have been the hallmark of the two major party outsider candidates in 2016: Sanders and Trump.<sup>95</sup>

Certainly the rise of new technologies cannot be attributed to legal intervention. But the combined effects of recent reforms have been to hamper the ability of parties to raise money and to push hard dollars to the candidates independently, or to direct major funding of politics outside the regulated domain altogether. The new campaign finance regime “puts individuals and relatively small coalitions on a fairly equal footing with political parties.”<sup>96</sup> As La Raja and Schaffner show, money mediated through parties tempers the ardor of the more polarizing contributors, and disciplines the candidates to the governance message of the party.<sup>97</sup> Neither the funders nor the candidates risked going it alone so long as the party controlled campaign resources, could maintain the discipline of the party apparatus, and controlled candidate access to the nomination process. Removing party organization of campaign resources was a significant step in eroding this entire organizational framework.

Without the integrative power of the party and the efficiency of political integration that party politics could deliver, the different components of the party could look to contract for the apparatus they needed or seek the nomination outside the customary party structures. Indeed, as was seen with the Koch brothers in 2016, outsiders could even hold beauty pageants to

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Revised and Updated for the 2008 Presidential Primary and General Election Candidates (Jan. 8, 2010), [http://www.cfinst.org/press/releases\\_tags/10-01-08/Revised\\_and\\_Updated\\_2008\\_Presidential\\_Statistics.aspx](http://www.cfinst.org/press/releases_tags/10-01-08/Revised_and_Updated_2008_Presidential_Statistics.aspx) [<https://perma.cc/79K3-6W5W>].

94. The BCRA raised the individual contribution limit to candidate committees to \$2,000 and indexed it to inflation with the 2015–2016 limit coming to \$2,700 per election. Press release, FEC, FEC Chart: 2015–2016 Campaign Cycle Contribution Limits (Mar. 20, 2015), <http://www.fec.gov/press/press2015/pdf/20150320release.pdf> [<https://perma.cc/87PR-KLYU>].

95. See Nicholas Confessore & Nick Corasaniti, *Small Donations Help Trump Cut Fund-Raising Gap*, N.Y. TIMES, Aug. 3, 2016, at A1, A12 (“Mr. Trump has the potential to be the first Republican nominee whose campaign could be financed chiefly by grass-roots supporters pitching in \$10 or \$25 apiece, echoing the success of Senator Bernie Sanders of Vermont during the Democratic primary.”).

96. CAIN, *supra* note 9, at 202.

97. LA RAJA & SCHAFFNER, *supra* note 58, at 59.

shop for suitable candidates.<sup>98</sup> Even in the absence of these external forces, however, the party infrastructure cannot necessarily block a candidate who bypasses the party and appeals directly for support in the electorate, to wit, President Trump. Further, an outsider capturing the party in the electorate then has tremendous leverage to compel the party in government to knuckle under—a complete inversion of the internal party relations of a bygone era.<sup>99</sup>

#### IV. THE DEMISE OF PATRONAGE

Historically, the prospect of public employment was the glue that held together the party apparatus, particularly at the local level. Following Key, patronage was “the response of government to the demands of an interest group—the party machine—that desires a particular policy in the distribution of public jobs.”<sup>100</sup> Patronage promoted party coherence by maintaining loyalty—at a price—for those who might diverge from the party’s platform.<sup>101</sup> Patronage provided the party with the disciplined organization necessary to win the primary, “[a]nd if one controls the primary, he has gone a long way toward controlling all.”<sup>102</sup> American political parties leveraged patronage to ensure that the ideological fringe of their parties remained within the parties,<sup>103</sup> or even to

98. See Fredreka Schouten, *2016 GOP Hopefuls Gear up for ‘Koch’ Primary*, USA TODAY (July 29, 2015, 2:59 PM), <http://www.usatoday.com/story/news/politics/elections/2016/2015/07/29/charles-koch-donors-meeting-california/30803357/> [<https://perma.cc/Q6L7-8K6U>] (“GOP candidates are headed to California to tout their conservative credentials in person before [the Kochs] and . . . hundreds of wealthy donors . . . [The candidates] will participate in question-and-answer sessions during the gathering of about 450 contributors who have pledged to spend nearly \$900 million ahead of the 2016 election.”).

99. Karen Yourish, Larry Buchanan & Alicia Parlapiano, *More Than 160 Republican Leaders Don’t Support Donald Trump. Here’s When They Reached Their Breaking Point.*, N.Y. TIMES (Oct. 9, 2016), [https://www.nytimes.com/interactive/2016/08/29/us/politics/at-least-110-republican-leaders-wont-vote-for-donald-trump-heres-when-they-reached-the-ir-breaking-point.html?smid=tw-share&\\_r=0](https://www.nytimes.com/interactive/2016/08/29/us/politics/at-least-110-republican-leaders-wont-vote-for-donald-trump-heres-when-they-reached-the-ir-breaking-point.html?smid=tw-share&_r=0) [<https://perma.cc/33GV-V4JF>].

100. KEY (5th ed.), *supra* note 20, at 348.

101. V. O. KEY, JR., *POLITICS, PARTIES, & PRESSURE GROUPS* 402–03 (4th ed. 1958) [hereinafter KEY (4th ed.)]; Frank J. Sorauf, *The Silent Revolution in Patronage*, in *URBAN GOVERNMENT* 308, 309–10 (Edward C. Banfield ed., 1961). The standard narrative that patronage promotes party cohesion has been challenged, including by Carolyn Warner who argues that patronage instead may result in a lack of cohesion where members’ primary allegiance to the party is material gain rather than ideological unity and where individual politicians themselves take credit for patronage distributed by the party. Carolyn M. Warner, *Political Parties and the Opportunity Costs of Patronage*, 3 *PARTY POL.* 533, 540–41 (1997). In the heyday of the city machines, the pull of material benefit appears to have trumped these countervailing considerations.

102. Key, *supra* note 19, at 78.

103. Compare MICHAEL KAZIN, *THE POPULIST PERSUASION: AN AMERICAN HISTORY* 288 (1998) (discussing how American political parties ideologically adapted in order to avert challenges by third parties), with MARTIN & SUSAN TOLCHIN, *TO THE VICTOR . . . POLITICAL*

forge alliances with third parties where local law favored their existence.<sup>104</sup> Particularly in times of political ferment, patronage loyalists “will impose fewer constraints on the party’s flexibility in terms of policy and organizational innovation” compared to activists who are motivated by ideological or social goals.<sup>105</sup> Per Bruce Cain, patronage represents the “necessary transaction costs for a decentralized and dispersed political system,” critical building blocks for both compromise and coalitions.<sup>106</sup>

Moreover, patronage allowed the integration of an expanding electorate and new immigrants into democratic politics.<sup>107</sup> In the words of Carl Russell Fish, “[t]he true cause for the introduction of the spoils system was the triumph of democracy.”<sup>108</sup> The party apparatus served to educate the expanded electorate and enable it to meaningfully exercise its voice in policymaking.<sup>109</sup> Patronage, in turn, served as the necessary means to fund this party apparatus, supplementing limited party funds.<sup>110</sup> Permitting this type of de facto public funding of political parties prevented politicking from becoming the exclusive prerogative of the rich, who without funding assistance would be the only ones able to engage in such an endeavor full time.<sup>111</sup>

The big-city patronage machines spawned a distinct type of politics based on a huge apparatus.<sup>112</sup> One account of George Washington Plunkitt, the consummate Tammany Hall ward boss, well captures real-life political parties a century ago:

Everybody in the district knows him. Everybody knows where to find him, and nearly everybody goes to him for

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PATRONAGE FROM THE CLUBHOUSE TO THE WHITE HOUSE 300–02 (1971) (portraying New Deal programs as patronage disguised as ideological concessions in order to “neutralize and incorporate the disaffected groups”).

104. See BRUCE F. BERG, *NEW YORK CITY POLITICS: GOVERNING GOTHAM* 165, 253 (2007).

105. Wolfgang C. Müller, *Party Patronage and Party Colonization of the State*, in *HANDBOOK OF PARTY POLITICS* 189, 191 (Richard S. Katz & William Crotty eds., 2006).

106. CAIN, *supra* note 9, at 159.

107. LEON D. EPSTEIN, *POLITICAL PARTIES IN WESTERN DEMOCRACIES* 105, 110 & n.25 (1979); CARL RUSSELL FISH, *THE CIVIL SERVICE AND THE PATRONAGE* 156 (1905). Patronage also served to democratize not only voters but the public service. By introducing the “spoils system” for federal employment Jackson aimed to “democratize public service by expanding the class of persons eligible for public positions, ensuring bureaucratic responsiveness to the popular will, and limiting the extent to which corruption developed during lengthy tenure in office might taint the public service.” *Developments in the Law—Public Employment*, 97 HARV. L. REV. 1611, 1624 (1984).

108. FISH, *supra* note 107, at 156.

109. *Id.*

110. *Id.* at 156–57; KEY (5th ed.), *supra* note 20, at 348.

111. FISH, *supra* note 107, at 156–57.

112. EPSTEIN, *supra* note 107, at 106 (citing HAROLD F. GOSNELL, *MACHINE POLITICS: CHICAGO MODEL* (1937)).

assistance of one sort or another, especially the poor of the tenements.

He is always obliging. He will go to the police courts to put in a good word for the “drunks and disorderlies” or pay their fines, if a good word is not effective. He will attend christenings, weddings, and funerals. He will feed the hungry and help bury the dead.

A philanthropist? Not at all. He is playing politics all the time.

Brought up in Tammany Hall, he has learned how to reach the hearts of the great mass of voters. He does not bother about reaching their heads. It is his belief that arguments and campaign literature have never gained votes.<sup>113</sup>

Patronage provided the structural support necessary to maintain the hierarchy of the machine.<sup>114</sup> The party boss used patronage as an inducement to his ward committeemen to garner their loyalty<sup>115</sup> and to incentivize performance. As one Chicago ward leader exhorted his field captains seeking promotion, “Carry your precinct or you not only won’t get it, but you’ll lose your job altogether.”<sup>116</sup> And the stakes were substantial; there were more than 450 patronage jobs per congressional district available in Chicago.<sup>117</sup>

Whatever the benefits, patronage could not shake the association with graft, as Chicago well exemplifies. Defending patronage on the basis of the benefits it provided to the parties risked allowing that a political party should be able to appropriate government resources for its own benefit. Not surprisingly, patronage is most commonly perceived as a form of political corruption. Indeed, even a commentator so sensitive to the structure of political parties as V. O. Key included patronage in his Ph.D. dissertation as among forms of political graft, which he defined as the misappropriation of public resources to further private or party ends.<sup>118</sup> Pushed to the extreme, patronage-besotted

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113. WILLIAM L. RIORDON, *PLUNKITT OF TAMMANY HALL* 90–91 (E. P. Dutton & Co., Inc. 1963) (1905).

114. KEY (5th ed.), *supra* note 20, at 337 (“Patronage is an important factor in building up lines of command and in establishing internal cohesion and discipline in the machine.”).

115. James Q. Wilson, *The Economy of Patronage*, 69 J. POL. ECON. 369, 373 (1961). Wilson describes the conflict inherent in different uses of patronage: maintaining boss’s power, controlling elected officials, maximizing the vote, and attracting party workers. *Id.* at 371.

116. KEY (5th ed.), *supra* note 20, at 338 (quoting CARROLL HILL WOODY, *THE CHICAGO PRIMARY OF 1926: A STUDY IN ELECTION METHODS* 8 (1926)).

117. Wilson, *supra* note 115, at 372 (noting that there were only 115–120 jobs available in New York at the same time).

118. Key, *supra* note 19, at 5, 10.

parties are less defined by any public or ideological purpose and compete in elections only to secure the benefits of government patronage.<sup>119</sup>

Beginning with the Civil Service reforms of the Progressive Era, and continuing through the Hatch Act of 1937, political currents began to turn against the patronage machines. The Pendleton Act of 1883<sup>120</sup> required that positions that fell within the scope of the federal “classified service” be filled by competitive examination and established the United States Civil Service Commission to oversee the Act.<sup>121</sup> The Act also impaired the ability of parties to house politically active members in the bureaucracy by prohibiting civil service members to “coerce the political action of any person or to interfere with any election.”<sup>122</sup> An amendment in 1907 gave that prohibition more bite by forbidding civil service employees from taking “active part in political management or in political campaigns.”<sup>123</sup> The Hatch Act of 1939 extended these prohibitions on political involvement, previously applicable only to members of the classified service, to all executive branch and agency employees with the exception of certain high-level officials.<sup>124</sup>

A similar current took hold at the state and local level. Between 1880 and 1894, New York City and then New York State mandated public hiring through competitive examinations.<sup>125</sup> Similar reforms were adopted in cities throughout the country. An empirical study of municipal civil service reform found that adoption was fastest where required by the state, namely, in New York, Massachusetts, and Ohio.<sup>126</sup> But even where the state provided no such mandate, over 60% of cities in the study’s sample adopted reforms between 1880 and 1935.<sup>127</sup>

In 1934 when Key wrote his dissertation, he commented that “[t]he patronage system has served, and still serves, as the principal method of consolidating into a cohesive mass the politically effective sector of the population.”<sup>128</sup> By the time the fourth edition of

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119. RIORDAN, *supra* note 113, at 89.

120. Pendleton Act (Civil Service), ch. 27, 22 Stat. 403 (1883).

121. KEY (4th ed.), *supra* note 101, at 390 (discussing the implications of civil service reform with respect to patronage).

122. *Id.*

123. *Id.* at 391.

124. *Id.* at 391–92.

125. BERG, *supra* note 104, at 251.

126. Pamela S. Tolbert & Lynne G. Zucker, *Institutional Sources of Change in the Formal Structure of Organizations: The Diffusion of Civil Service Reform, 1880–1935*, 28 ADMIN. SCI. Q. 22, 28–29 (1983).

127. *Id.*

128. Key, *supra* note 19, at 396.

*Politics, Parties & Pressure Groups* was published in 1958, his portrayal of the modern import of patronage in maintaining party unity had considerably weakened.<sup>129</sup> The effectiveness of patronage as a party unifier waned over the first half of the twentieth century as civil service reforms reduced the number of patronage jobs available and government-provided social services took the place of those provided by the local precinct captain.<sup>130</sup> In a preface to *Plunkitt of Tammany Hall*, Terrence McDonald referred to Plunkitt's writing as "not a set of timeless maxims for practical politics but an invaluable record of public political views on the verge of oblivion."<sup>131</sup> The civil service reforms took aim at the inefficiencies of a patronage system, but they also undermined the economic foundations of the big city, immigrant-run machines.<sup>132</sup>

The Supreme Court then got in the act in 1976 with *Elrod v. Burns*.<sup>133</sup> The case arose from Cook County, effectively ground zero of patronage in America, and concerned a group of Republican patronage appointees who were either fired or about to be fired when political control shifted to the Democrats.<sup>134</sup> Per Justice Brennan, the Court found that firing public employees for their political affiliation violated the First Amendment, notwithstanding the political provenance of their patronage appointments.<sup>135</sup> As against the potential impact on political parties, the Court held:

[W]e are not persuaded that the elimination of patronage practice or, as is specifically involved here, the interdiction of patronage dismissals, will bring about the demise of party politics. Political parties existed in the absence of active patronage practice prior to the administration of Andrew Jackson, and they have survived substantial reduction in their patronage power through the establishment of merit systems.<sup>136</sup>

At the very least, the Court thought that "[p]atronage dismissals . . . are not the least restrictive alternative to achieving the contribution they make to the democratic

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129. KEY (4th ed.), *supra* note 101, at 375 ("The spoils system has not been eradicated and state and local services on occasion are shot through with patronage abuses, but for the country as a whole organizational cohesion born of a shared anxiety about job security is probably not what it was a half century ago.")

130. *See id.* at 375–76.

131. Terrence J. McDonald, *Preface* to WILLIAM L. RIORDON, *PLUNKITT OF TAMMANY HALL* viii (Terrence J. McDonald ed., Bedford Books of St. Martin's Press 1994) (1905).

132. Tolbert & Zucker, *supra* note 126, at 23.

133. 427 U.S. 347 (1976).

134. *Id.* at 350.

135. *Id.* at 372.

136. *Id.* at 369.

process.”<sup>137</sup> In sum, Justice Brennan wrote that “any contribution of patronage dismissals to the democratic process does not suffice to override their severe encroachment on First Amendment freedoms,”<sup>138</sup> which are also “essential to a meaningful system of democratic government.”<sup>139</sup>

In *Rutan v. Republican Party of Illinois*, Justice Scalia challenged that the Court’s “categorical pronouncement reflects a naive vision of politics and an inadequate appreciation of the systemic effects of patronage in promoting political stability and facilitating the social and political integration of previously powerless groups.”<sup>140</sup> For Justice Scalia,

[T]he statement that “political parties have already survived” has a positively whistling-in-the-graveyard character to it. Parties have assuredly survived—but as what? As the forges upon which many of the essential compromises of American political life are hammered out? Or merely as convenient vehicles for the conducting of national Presidential elections?<sup>141</sup>

In Justice Scalia’s view, this decline of the party could be combatted by the patronage system:

What the patronage system ordinarily demands of the party worker is loyalty to, and activity on behalf of, the organization itself rather than a set of political beliefs. He is generally free to urge *within the organization* the adoption of any political position; but if that position is rejected he must vote and work for the party nonetheless.<sup>142</sup>

#### V. TAKING NOMINATIONS AWAY FROM THE PARTY

Just as control over public employment and other benefits provided the operational drive of the parties, the main disciplining device enjoyed by political parties has been the capacity to ensure that any candidate for office be committed to its core political agenda. In turn, “[h]e who can make the nominations is the owner of the party.”<sup>143</sup> But that power has been increasingly pulled from the party hierarchy. The Supreme Court placed the causal responsibility for replacing “the caucuses

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137. *Id.*

138. *Id.* at 373.

139. *Id.* at 370.

140. 497 U.S. 62, 103–04 (1990) (Scalia, J., dissenting).

141. *Id.* at 106.

142. *Id.* at 109.

143. SCHATTSCHNEIDER, *supra* note 1, at 64.

of self-appointed legislators or other interested individuals” on “[d]issatisfaction with the manipulation of conventions.”<sup>144</sup> But the result of a primary-based system was to “allow candidates to appeal over the heads of voters. They have become a prime device for weakening party discipline.”<sup>145</sup>

The rise of the primaries for candidate selection was part and parcel of late 19th century efforts to thwart the power of political parties: “Party reforms sought to deprive local bosses of control over elections, and thereby diminish bosses’ ability to leverage their influence over electoral outcomes to secure post-election indebtedness and loyalty.”<sup>146</sup> Reforms proceeded as “state legislatures across the country adopted ‘Australian’ (i.e., state-printed, secret) ballot and party primary laws to regulate general elections, party nominating procedures, and the internal governance structure of parties.”<sup>147</sup> Between the 1890s and World War I, more than half the states had enacted laws requiring direct primary nomination of candidates for office.<sup>148</sup>

There was little legal resistance to the rise of the primary requirement. These reforms predate the Brandeis and Holmes dissents that auger the modern law of political liberties.<sup>149</sup> The challenges to the mandatory primary were brought in state court and the decisional law of the time saw parties not as rights-bearing entities capable of claiming liberty of association or expression but as “agents of the state, whose functions were intimately tied up to the machinery of the state.”<sup>150</sup> Further, “the election law jurisprudence of the time was fueled by profound distrust of party leaders, viewed to be corrupters of the electorate’s will.”<sup>151</sup>

In short order, the primary system spread across the country, though typically as part of a mixed system of selection.

By the end of 1915, the direct primary had become the most widely employed nominating system in the United States. All but three states (Connecticut, New Mexico, and Rhode Island) used it for selecting candidates to at least some

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144. Ray v. Blair, 343 U.S. 214, 221 (1952).

145. DANIEL H. LOWENSTEIN, RICHARD L. HASEN & DANIEL P. TOKAJI, *ELECTION LAW* 414–16 (5th ed. 2012) (discussing Ray v. Blair, 343 U.S. 214 (1952)).

146. Winkler, *supra* note 8, at 877.

147. *Id.* at 876.

148. Robin Miller, Annotation, *Constitutionality of Voter Participation Provisions for Primary Elections*, 120 A.L.R. 5th § 2 (2004).

149. See, e.g., *Olmstead v. United States*, 277 U.S. 438, 471 (1928) (Holmes, J., dissenting); *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring).

150. Winkler, *supra* note 8, at 879.

151. *Id.*

elective offices. Most of these forty-five states nominated virtually all offices in this way—78 percent of states in the east and 95 percent of western states did so.<sup>152</sup>

The direct primary set in motion a system pointing to the demise of the inherited model of the parties. Political scientists Jamie L. Carson and Jason M. Roberts posit that primary reform, along with many other reforms such as the Australian secret ballot, “ended the parties’ firm-like control over ballot access and effectively created a ‘market’ for candidate entry. With the demise of party control over the electoral machinery, the party subsidy on ballot entry was removed.”<sup>153</sup> Most provocatively, they write,

The direct primary essentially “neutered” political parties. Without direct control over nominations, parties could no longer determine the identity, loyalty, or quality of candidates appearing on the ballots under their name. As such, they could no longer effectively offer insurance to losing candidates as the number of party controlled positions rapidly diminished throughout the country. The cartel-like system of nominations was transformed into a political market, where individual, strategic politicians had to now make their own determination as to whether seeking a particular elective office was a worthwhile venture.

. . . .

For ambitious and strategic politicians, the incentive structure changed quite dramatically with the movement toward the direct primary. On the one hand, the loss of the party insurance mechanism increased the cost of candidate entry as the candidates themselves had to bear the full risk of running (i.e., they are now insuring themselves). Nevertheless, individuals now controlled their own electoral destiny.<sup>154</sup>

Even so, party leaders maintained considerable power over the vetting of candidates and over likely primary nominations by a variety of means, most notably through the ongoing role of the convention in selecting the party’s presidential nominee.<sup>155</sup> The events of 1968 set off changes relatively quickly, as “[t]he disastrous Democratic Convention of that year . . . set in train a series of events that led, eventually, to a report that

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152. ALAN WARE, *THE AMERICAN DIRECT PRIMARY: PARTY INSTITUTIONALIZATION AND TRANSFORMATION IN THE NORTH* 227 (2002).

153. JAMIE L. CARSON & JASON M. ROBERTS, *AMBITION, COMPETITION, AND ELECTORAL REFORM: THE POLITICS OF CONGRESSIONAL ELECTIONS ACROSS TIME* 35–36 (2013).

154. *Id.* at 43–44, 92–93.

155. WARE, *supra* note 152, at 251–52.

recommended reform of rules governing the selection of delegates.”<sup>156</sup> After 1972, party control of even the presidential nomination process diminished drastically. The reforms following this period occurred in both parties, resulting in today’s familiar system where: “A frontrunner emerges after the early primaries and all rivals then fall by the wayside; since 1972, there has always been one candidate in each party who has a clear majority of delegates committed to him by the start of the National Convention.”<sup>157</sup>

Paradoxically, the post-1968 reforms failed in their major objective of shifting the nomination power from the party apparatus to the party-in-the-electorate. Primaries, and even party caucuses, draw scant voter participation, with less than 20% of eligible voters participating, and at times shockingly few.<sup>158</sup> As a result, “[p]rimary races now tend to be dominated by highly motivated extremists and interest groups, with the perverse result of leaving moderates and broader, less well-organized constituencies underrepresented.”<sup>159</sup> By conferring decisional responsibility directly to the citizens, populist reformers create additional openings for media and interest groups to influence policy and electoral outcomes.<sup>160</sup> Not only is the party apparatus weakened, but even incumbent politicians—once virtually untouchable in primary elections—are vulnerable to money and activism only loosely tethered to the party. In bottom-line terms, “[e]veryone worries about being the next Eric Cantor.”<sup>161</sup>

Invariably, the loosening up of party controls over nomination weakens the hold of the party on not just candidates

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156. *Id.* at 252.

157. *Id.* at 253.

158. Drew Desilver, *So Far, Turnout in this Year’s Primaries Rivals 2008 Record*, PEW RES. CTR. (Mar. 8, 2016), <http://www.pewresearch.org/fact-tank/2016/03/08/so-far-turnout-in-this-years-primaries-rivals-2008-record/> [https://perma.cc/VV7L-3ZFA]. In Nevada, for example, Clinton won the 2008 state Democratic caucuses with fewer than 20,000 people participating, in a state with a population of 2.7 million. *See Election 2008 Nevada Caucus Results*, N.Y. TIMES (Jan. 19, 2008), <http://www.nytimes.com/elections/2008/primaries/results/states/NV.html>; Tim Richardson, *Nevada Falls to No. 8 in Population Growth*, L.V. SUN (Dec. 22, 2008, 10:35 AM), <https://lasvegassun.com/news/2008/dec/22/nevada-falls-no-8-population-growth/> [https://perma.cc/2EGV-EP66].

159. Rauch, *supra* note 7.

160. *See* CAIN, *supra* note 9, at 89 (“Voters compensate for [their] knowledge deficiency by relying heavily on electoral appeals and voting cues communicated by more ‘expert’ individuals and groups th[r]ough paid and unpaid media. Ballot box measures, consequently, give well-organized and well-resourced interest groups an additional avenue of influence beyond lobbying and donating to candidates.”).

161. Rauch, *supra* note 7 (describing Eric Cantor, “the Republican House majority leader who, in a shocking upset, lost to an unknown Tea Partier in his 2014 primary”). For other examples of successful incumbent challenges in primary contests brought about by ideological activists and low voter turnout, see CAIN, *supra* note 9, at 9.

but on elected officials: “Without direct control over nominations, . . . [t]he cartel-like system of party control in place during much of the nineteenth century gradually began to give way to a political marketplace that is more common in today’s largely candidate-centered electoral environment.”<sup>162</sup>

## VI. CONCLUSION

The demise of the political party is a common refrain in American political history. Many of the reforms of the Progressive Era were designed to kill off what Robert LaFollette termed the “impersonal, irresponsible, extra-legal” political machine.<sup>163</sup> At each stage, parties proved resilient and adapted to the changed legal environment. In LaFollette’s own Wisconsin, the centerpiece of the reform effort was the open primary movement, finally approved by citizen referendum in 1904. Within a decade, however, the parties had reasserted themselves through stronger command of the patronage system and other levers of power, with LaFollette himself proving to be a master of the darker political arts.<sup>164</sup>

Perhaps the apparent weakness of contemporary political parties is a phase that will pass, as has been true in the past. Perhaps. But parties are complex institutional actors that play an essential coordinating role in politics. Absent such a coordinating role, there is no particular reason for activists or funders or candidates or elected officials to harness themselves to the inevitable constraints of the party. There are many advantages to the scale of the modern political party, returning to the basic idea of the party as a political firm, but historically control over funds, government employment, and the ability to stand for office were the levers of party power. All have been compromised by legal reforms and, perhaps, we are witnessing the unraveling of the institutional form of American politics for the past two centuries.

At stake is far more than the candidacies of Trump or Sanders; Goldwater and McGovern were hardly inspired nominations at earlier times. Rather the unraveling of the integrative function of the parties means not only that the nomination process can spin out of control, but the coordination function of the unified firm is lost across the dimensions of party activity, most notably in governance. The dysfunctionality of

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162. CARSON & ROBERTS, *supra* note 153, at 143.

163. MASKET, *supra* note 52, at 133 (quoting La Follette in an 1897 address).

164. *Id.* at 147.

Congress today is in no small measure the product of weak political institutions unable to cohere the disparate actors of the political arena into the ultimate aim of democratic governance. Our political entrepreneurs have developed a taste for buying, not making.