COMMENTARY

THE PARTIES' STRUGGLES IN THE POLITICAL "MARKET": CAN REGULATION SOLVE THIS PROBLEM—SHOULD IT, AND IF SO, HOW?

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ABSTRACT

Professor Issacharoff has asked an important and probing question about the sources of the political parties' travails and the danger to them that their key functions will be "outsourced." He drives in the direction of an important point—that we would do well to concentrate on making parties within the electoral process function more effectively and efficiently, and judge legal reform from the perspective of whether it aids or hinders that objective. This is a program defined by a particular view of the role that parties *should* play. Although Professor Issacharoff's project does not involve reform recommendations, it follows that a reform responsive to his concerns would seek to move the parties closer to a more commanding, integrated role.

The difficulty facing such a reform program is chiefly one of accomplishing by law changes in political organization and practices exacerbated but not in the first instance caused by the legal regime. In considering what might be done for parties, the first question to be asked is one of the parties' current role and capacities, without baseline assumptions about what we would wish or insist that they be. The second question is the reform model that, without prejudgment, is most appropriate in sorting out the party role.

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A model appropriate to this purpose cannot be the one most in use for the better part of the post-Watergate period. Its goal has been to deter corruption, or the appearance of corruption in government. The alternative put forward here assumes that we will continue to have regulation for this purpose, but that there is also a place for *regulation of the electoral process itself,* to improve its efficient functioning. In the case of parties, this would mean reform with the aim to make it possible for parties to successfully play the role for which they *are* best suited, not the role we *prefer* for them.

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I. INTRODUCTION

Professor Issacharoff has asked an important and probing question about the sources of the political parties' travails and the danger to them that their key functions will be "outsourced."[1] He asks that we consider whether legal change has complicated the parties' capacity for integrating within its operations, as a firm might, its core programs. In the case of the parties, this would

1. *See generally* Samuel Issacharoff, *Outsourcing Politics: The Hostile Takeover of Our Hollowed-Out Political Parties*, 54 HOUS. L. REV. 845 (2017).

mean bringing together its electoral, governance, and ideological functions. Parties struggle in current conditions to determine on their own whether to "make or buy"—hold onto a function or have candidates go elsewhere for it. To illuminate the point, Professor Issacharoff imaginatively links Ronald Coase's theories of firm behavior to V.O. Key's classic formulation of the varied tasks parties perform.

Among the examples that Issacharoff provides of the ways that legal reforms add to the parties' challenges is campaign finance. He notes that in key respects the parties have been treated as actors like any other, limited in the manner in which they can support their candidates directly. They can provide money and work closely with them on spending it, but only within limits. They can dispense with the limits, but only at the price of making spending decisions independently of the candidates. One result is a form of "outsourcing:" candidates flock to Super PACs, and parties suffer a diminished role in the process.

Issacharoff drives in the direction of an important point—that we would do well to concentrate on making parties within the electoral process function more effectively and efficiently, and judge legal reform from the perspective of whether it aids or hinders that objective. His emphasis, however, is on efficiencies and the legal change required to achieve them in aid of a particular role for parties. He would like to see the parties strengthened if not restored to an ideal model.

This is a program, then, apparently defined by a particular view of the role that parties *should* play. We take the parties not as we have them, but as we would like them to be. Although Professor Issacharoff's project does not involve reform recommendations, it follows that a reform responsive to his concerns would seek to move the parties closer to the more commanding, integrated role. Regulatory change would consist of the imposition of limits on Super PAC activity and relief from limits for the parties.

The difficulty facing such a reform program is chiefly one of accomplishing bylaw changes in political organization and practices that have occurred for various and complex reasons exacerbated but not in the first instance caused by the legal regime. Without doubt, parties have faced challenges from Super PACs, and it is also clear that legal developments rightly cited by Professor Issacharoff, like the *Colorado Republican* cases,[2] may

2. FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431 (2001) (*Colorado Republican II*); Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604 (1996) (*Colorado Republican I*). *Colorado Republican I* established that a party could make

have made life still harder for them. In considering what might be done for parties, the first question to be asked is one of the parties' current role and capacities, without baseline assumptions about what we would wish or insist that they be. The second question is the reform model that, without prejudgment, is most appropriate in sorting out the party role.

A model appropriate to this purpose cannot be the one most in use for the better part of the post-Watergate period. It has been concerned with regulating the electoral process, before voter choice is made, to protect the government that follows. Its goal has been to deter corruption, or the appearance of corruption in government. The alternative put forward here assumes that we will continue to have regulation for this purpose, but that there is also a place for *regulation of the electoral process itself,* to improve its efficient functioning. In the case of parties, this would mean reform with the aim of removing "electoral market" distortions and allowing this market to better determine the roles of the primary actors, including the parties. In other words, this reform program would aim to make it possible for parties to successfully play the role for which they *are* best suited, not the role we *prefer* for them.

II. THE QUESTION: WHAT "PARTIES" DO WE HAVE?

It is generally appreciated that we do not have, and have not for many decades had, parties on the classical "mass party" model. The relationship of the parties to the candidates is not a controlling one in which the party leadership can determine party nominees and direct their campaigns, nor can the party count on stable, widespread party self-identification within the electorate. Different conceptions of the transformed role of parties have therefore vied for acceptance.

One of these is John H. Aldrich's notion of the "party-in-service," which draws its strength from providing what it can to satisfy the common interests of autonomous, ambitious partisan politicians.[3] The politicians benefit in various ways from association with the party, including the usefulness of the party "brand" and the avenue parties provide for ballot placement. In the end, however, the candidates are tied to the parties primarily through what the parties can do to advance their aims.

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unlimited expenditures on behalf of their candidates, provided that the party did so independently—without coordinating the expenditure with their candidates. 518 U.S. at 608. *Colorado Republican II* upheld the limits on expenditures that the parties did make on a coordinated basis. 533 U.S. at 465.

3. JOHN H. ALDRICH, WHY PARTIES?: A SECOND LOOK 299–310 (2011).

Quite different from this view is that of the "UCLA" school, which emphasizes the party as a network of interests and sources of funding that includes but goes well beyond the formal institutional party structure. The "party" is seen as a "coalition[] of 'policy demanders,'" composed of party organizations, interest groups, policy activists and even allied media outlets.[4] Here the candidate is more a "coalition manager[]," encouraging more entrants and coordinating the various groups active within the network.[5]

Adding to the uncertainty of the role of parties is the volatility of party self-identification within the electorate. It has been said that the fastest growing party in the United States is the independent "party," and the rise in the share of the electorate identifying itself as "independent" suggests that there is truth to the claim.[6] Some public opinion survey research experts and scholars question whether this independence should be taken at face value. They point to the "lean" among independent voters in the direction of one party or the others.[7] It remains a marked fact of political life, however, that while American politics exhibits strong partisan cleavages, this is not to say that their source is the same as the partisan divide associated with the mass parties of the 19th century. It appears, too, that this independence is especially pronounced in the millennial generation as the next generation of voters to which the party must appeal, and from which party ranks will have to be filled.[8]

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4. David Karol, *American Political Parties: Exceptional No More*, *in* SOLUTIONS TO POLITICAL POLARIZATION IN AMERICA 208, 209 (Nathaniel Persily ed., 2015).

5. *See, e.g.*, *id.* at 208–17 (Nathaniel Persily ed., 2015). Karol writes that parties in this view "are seen *not* chiefly as formal structures dominated by office seekers but as coalitions of 'policy demanders.'" *Id.* at 209.

6. *See, e.g.*, Jeffrey M. Jones, *Democratic, Republican Identification Near Historical Lows*, GALLUP (Jan. 11, 2016), http://www.gallup.com/poll/188096/democratic-republican-identification-near-historical-lows.aspx [https://perma.cc/A3VZ-D4KN] ("In 2015, for the fifth consecutive year at least four in 10 U.S. adults identified as political independents."); *see also A Deep Dive Into Party Affiliation: Sharp Differences by Race, Gender, Generation, Education*, PEW RESEARCH CENTER (Apr. 7, 2015), http://www.people-press.org/2015/04/07/a-deep-dive-into-party-affiliation/ [https://perma.cc/MLN5-44JJ] (noting that the share of self-proclaimed independents is "the highest percentage . . . in more than 75 years of public opinion polling").

7. *See, e.g.*, David A. Hopkins & Laura Stoker, *Partisan Voters, Partisan States: How the Rising Strength of Party and Ideology in the American Public Affects Aggregate Electoral Results*, ANN. MEETING OF THE AM. POL. SCI. ASS'N 7–8 (2012); *see also* Phillip Bump, *The Growing Myth of the 'Independent' Voter*, WASH. POST (Jan. 11, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/01/11/independents-outnumber-democrats-and-republicans-but-theyre-not-very-independent/ [https://perma.cc/9LCN-9EE5].

8. *See The Parties on the Eve of the 2016 Election: Two Coalitions Moving Further Apart*, PEW RES. CTR. (Sept. 13, 2016), http://www.people-press.org/2016/09/13/2-party-affiliation-among-voters-1992-2016/ [https://perma.cc/TF57-79A3] (finding more Americans ages 18–35 identify as Independents than those who identify as Democrats or Republicans).

Nothing more vividly illustrates the trend than the success in the 2016 presidential election cycle of two candidates, Donald Trump who won the GOP nomination and Bernie Sanders who mounted a strong challenge in the Democratic Party, neither of whom were life-long members of the parties whose nomination they were seeking.[9] Indeed, in Sanders' case, he switched from years as an Independent to a Democratic affiliation in order to run for president, and then, once the election ended, returned to being an Independent.[10] Perhaps this is the unusual case, but it is so striking that it could also be taken the other way—as a powerful, indeed clinching, demonstration of the larger point. The institutional parties were in no position to resist the Trump/Sanders candidacies, and indeed the Chairwoman of the Democratic Party *lost her job* when questions were raised about her impartiality in the race.[11]

For purposes of assessing the implications of Professor Issacharoff's or any other regulatory plan for the parties, it seems essential to adopt a realistic view of the nature of the party today. The first step is having a clear view of the institution that would be subject to regulation within a program of party reform. The institutional party is one with distinct organizational reform, authorized to speak for the party and with defined powers to act for its partisan membership.[12] It is clear in its self-identification as a party. Allied organizations within the party "network" cannot

9. *See* Peter Nicholas, *Bernie Sanders to Return to Senate as an Independent,* WALL STREET J. (July 26, 2016, 12:21 PM), http://blogs.wsj.com/washwire/2016/07/26/bernie-sanders-to-return-to-senate-as-an-independent/ [https://perma.cc/G8N6-2LTV]; Jessica Chasmar, *Donald Trump Changed Political Parties at Least Five Times: Report*, WASH. TIMES, (June 16, 2016), http://www.washingtontimes.com/news/2015/jun/16/donald-trump-changed-political-parties-at-least-fi/ [https://perma.cc/RMT3-2JTL].

10. Nicholas, *supra* note 9.

11. *See* Marc Caputo & Daniel Strauss, *Wasserman Schultz Steps Down as DNC Chair*, POLITICO (July 24, 2016, 11:22 AM), http://www.politico.com/story/2016/07/wasserman-schultz-wont-preside-over-dnc-convention-226088 [https://perma.cc/5R4M-EDP8] (noting specifically "criticism from progressives and Sanders' supporters that Wasserman Schultz and her team were hostile to his campaign from the start and had done their best to help Clinton win the Democratic nomination at the Vermont senator's expense").

12. The federal campaign finance laws identify the organizations at the national level that perform this institutional role: the national party committee, state party committees, and national committees of the party committed to the election of the candidates to the House and Senate. The "national committee" is defined to mean "the organization which, by virtue of the bylaws of a political party, is responsible for the day-to-day operation of such political party at the national level," whereas the "State committee" means "the organization which, by virtue of the bylaws of a political party, is responsible for the day-to-day operation of such political party at the State level." 52 U.S.C. § 30101(14)–(15) (Supp. II 2015). The congressional campaign committees are "political committees established and maintained by a national political party." 11 C.F.R. § 110.1(c)(2) (2016).

be the party in this sense and, for legal and other reasons, they would insist on this separation.[13]

The same parties that have a loose claim on loyal mass membership also have a limited role in the formulation of policy. By now there is well-settled doubt that the platform adopted by the parties at their national conventions have significant binding effect on legislators, candidates, or, for that matter, the broader public debate.[14] And the slippage on this front has become still clearer in recent years. Commentators have noted candidate reliance on the other organizations outside the formal institutional parties for the development and promotion of policy stances.[15]

What does remain for the parties is to provide the infrastructure funding and other resources for the support of their candidates.

Under neither model does it appear plausible, however, to plan for a restoration of institutional party "control" over the choice of candidates or the conduct of their campaigns. In both the cases—the "party in service" or the "networked" party—the institutional party remains a *choice* for candidates who are by and large shopping for that configuration or structure of support that works best for them. For these candidates, a reform that forces their hand—pushing them to buy from one source rather than another—puts them into an artificial situation and undermines the core goal: the candidate's own election.

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13. Neither media organizations nor tax-exempt organizations can, of course, acknowledge partisanship, much less membership within a political party network.

14. *See, e.g.*, Daniel DiSalvo & James W. Ceaser, *Do Party Platforms Still Matter?*, ATLANTIC (July 13, 2016), http://www.theatlantic.com/politics/archive/2016/07/party-platform-national-convention/491147/ [https://perma.cc/W3JC-6MMU] ("The significance of the platform, however, started to wane once candidates began to campaign openly for both the nomination and the election."); *see also* Suzy Khimm, *Do Party Platforms Really Matter?*, WASH. POST (Aug. 23, 2012), https://www.washingtonpost.com/news/wonk/wp/2012/08/23/do-party-platforms-really-matter/ [https://perma.cc/7DHW-Q8HT] (citing political scientist John Sides for the proposition that candidates can ignore whatever in the platform does not suit them, and that platforms are "not necessary to ensure" candidate responsiveness to the demands of party leadership, activists and interest groups).

15. *See, e.g.*, Sidney M. Milkis & John Warren York, Managing Alone: Barack Obama, Organizing for Action, and Policy Advocacy in the Digital Era 3 (Aug. 23, 2014) (unpublished manuscript), https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2485297 [https://perma.cc/R2C7-7EV9] (citing the "the erosion of the formal party organization" in supporting the policy development and promotion of the modern executive). As an example of candidate adjustments to party weakness, Milkis cites Organizing for Action, a social welfare organization exempt under § 501(c)(4) of the Internal Revenue Code that has been active on behalf of elements of President Obama's policy program. *Id.* at 38–39. "Think tanks" generally but not formally identified with partisan interests are additional examples of this policy activity outside the institutional party structure.

III. PROBLEMS WITH A PARTY-CENTRIC REFORM MODEL

Professor Issacharoff's view may favor reforms that force the parties in their current state into functions they are not well equipped for and that candidates do not wish them to play, or to play exclusively. The reasoning runs like this: the parties are not doing A or as much of A as they should. They should do A, and so we should create legal opportunities, if not pressures, to restore them to the conduct of A.[16] Whether a reform to bring about this result will work depends on why the parties are losing their grip on A. As Professor Issacharoff notes, legal complications may be one, not necessarily the entire, answer.[17] But the *solution* devised would be a legal one, because it is only through legal change that reform can be accomplished. If the diagnosis is wrong, and the loss of "make or buy" control over A is not predominantly a result of legal impediments, then we may be forcing the issue with legal change, and the parties will be engaged in A without gains in efficiency, or benefit to the candidates, or in the restoration of the party's classical role.

For example, assume that a primary objective would be the one emphasized by Issacharoff—giving the party more control over candidates to enhance party discipline and perhaps even the parties' capacity to recruit the candidacies most consistent with the parties' electoral strategy.[18] The parties in question include the congressional campaign committees controlled by senior party leaders in the House and Senate. So it seems that this strategy of money-for-discipline has considerable promise: the channeling of more money to party organizations will put additional funds under the control of the very party leadership that can use it to whip their candidates into line.

In an electoral process that is candidate rather than party-centric, this manipulation of funding sources sets up a major conflict. Candidates, as office-seeking political entrepreneurs, do not always believe themselves to benefit from submitting to party direction in return for funds. In the first instance, they seek to control their own fortunes, to run their own campaigns.[19] While

16. Issacharoff, *supra* note 1, at 861.

17. *Id.* at 849.

18. *Id.* at 878–89.

19. The question of control over their message has become an acute one for candidates with the advent of the social and other new media and their rising significance in campaigns. *See* CONTROLLING THE MESSAGE: NEW MEDIA IN AMERICAN POLITICAL CAMPAIGNS 6 (Victoria A. Farrar Meyers & Justin S. Vaughn, eds., 2015) ("Although politicians and other participants in the process strive hard to control the political message, an increasingly democratic political discourse resulting from social media usage ensures that no public figures will be able to fully do so.") (internal citations omitted). And it is not only the new media that

the Issacharoff model would have the parties hold the funds as a condition of appropriate candidate behavior on tests, say, of party loyalty, it does not follow that the parties would stop there. They may choose to deploy the funds as a means of directing campaigns, their messages, ad buy strategies and the like. Candidates will resist this measure of control; they may believe that for all the capacities and experience the parties possess, there is prodigious talent outside the party institutions they would prefer to enlist. For candidates, providing the parties with leverage to control campaigns is not an efficient outcome, nor the qualitatively superior choice.

Candidates may also as a political matter prefer or even need to shop for support elsewhere—say, by seeking out interest group support or developing popularity on issues that would tend to make their online fundraising successful.[20] They may decline to pay the political cost of being too close to the party establishment, not enough their "own" person. Obviously, this tension may arise in some races and not others, but it is sure in this day and age to arise.

Of course, if the party chooses to make room for this candidate independence or "entrepreneurialism," it might well loosen its grip and just release the funds—so that it can win. Now the party simply holds the checkbook and awaits wire transfer instructions. A party domesticated in this fashion, doling out cash but without the power to direct campaigns or put conditions on their financing, is not being restored to its classical, fully integrated role.[21] The party is investing in races it can win rather than a party that is ideologically cohesive or amenable to discipline. We see something of this incentive to just win when parties recruit candidates significantly to the "left" or "right" of its standard ideological or issue position, or when they seek out self-funders who can relieve the parties of fundraising pressure (but at the expense of influence over these candidates who can pay their own way).

Professor Issacharoff is right that the current regulatory regime for parties, like the spending limits and especially the

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presents this challenge. So do the Super PACs and other forms of independent spending. *See* Karen Tumulty, *Super PACs' Spending Isn't Always Welcomed by Candidates They Support*, WASH. POST (Aug. 5, 2014), https://www.washingtonpost.com/politics/super-pacs-spending-isnt-always-welcomed-by-candidates-they-support/2014/08/04/ecc36ed6-18ed-11e4-9349-84d4a85be981_story.html [https://perma.cc/5ZLK-XWSU] (statement of Jeff Link, advisor to Senate nominee Rep. Bruce Braley) ("It's one of the major problems with the current campaign finance system. A candidate is no longer the loudest speaker in his or her own campaign.").

20. Issacharoff, *supra* note 1, at 868–70 (outlining how party finance reforms may push candidates to less regulated sources for funding).

21. One is reminded of one role of the state parties in the old "soft money" system, which was to receive funds raised by presidential candidates who controlled the money and its uses in support of get-out-the-vote and other field operations.

right-to-independent, unlimited spending sanctioned by the *Colorado Republican* decisions, makes little sense.[22] The jurisprudence governing party campaign finance seems confused—diverse in its regulatory objectives with the result that the rules push in different and conflicting directions. It suggests that parties are at once indispensable but also dangerous, and they are both unlike other political actors but should be treated just like them and entitled to declare "independence" from candidates for spending limits purposes.[23]

The core question for regulatory policy is what to do about this—to what end. It is in addressing this question that it is useful to turn to Super PACs for a consideration of the alternatives. Super PACs represent a major challenge to the parties: they can compete on favorable terms, free of the limits parties must live with or work around. Some of these PACs are the "single-candidate" kind devoted to particular candidates, while others have been described as the functional equivalent of parties—so-called "shadow parties"—operating in deregulated space.[24]

IV. SUPER PACS AND PARTIES: THE TRADITIONAL REFORM MODEL V. THE MARKET

One reform response, intended to help parties recapture and re-integrate their functions, would be to make it easier for parties to raise money and harder for candidates and party operatives to participate in a parallel Super PAC universe.[25] Here a program suggested by Professor Issacharoff's analysis could merge with the standard reform program, or it could move toward deregulated party campaign finance, or both. Candidates could be prohibited under coordination rules from helping Super PACs to raise money, or from having allies staff those PACs, or from any form of public signaling between candidate and PAC that would enhance the PAC's awareness of how it would best serve the candidate's campaigns.[26] At the same time, the parties could be empowered to

22. Issacharoff, *supra* note 1 at 862–65.

23. *See id.*

24. *See generally* Joseph Fishkin & Heather K. Gerken, *The Party's Over: McCutcheon, Shadow Parties, and the Future of the Party System*, 2014 SUP. CT. REV. 175.

25. *See, e.g.*, Kenneth P. Vogel & Seung Min Kim, *GOP Rider Would Boost Party Spending*, POLITICO (Nov. 25, 2015, 8:48 P.M.), http://www.politico.com/story/2015/11/congress-campaign-finance-cash-rider-216220 [https://perma.cc/EE8Q-UGGJ] (describing a 2015 funding bill provision proposal to eliminate limits to party spending in coordination with their candidates).

26. Legislative proposals include the Stop Super PAC-Candidate Coordination Act. *See* Press Release, Democracy 21, Explanation of Stop Super PAC-Candidate Coordination

spend more or unlimited money on candidate's campaigns without having to declare their "independence."[27] Perhaps, too, the limits on contributions *to* parties could be raised.[28]

One question would be the degree to which this reform program would be achievable. Deregulating party finance presents few problems in theory, but it is controversial on the same grounds—a concern with corruption or its appearance— that motivated the limits in the first place.[29] Without a change in the policy consensus on reform, or in the composition of the Supreme Court, the reform could collapse into a halfway measure. The limits on parties would be loosened; few of any consequence would or could be put on the Super PACs. The parties might have more capacity for competition with Super PACs, but the Super PACs would continue to loom large.

From a traditional reform perspective, this means just more money the candidates would chase from both sources. Moreover, not all parties compete on similar terms all the time. If one party appears to have the fundraising advantage, as was believed to be the case in the Republican Party throughout the 1980's and much of the 1990's, then candidates from the other party—and perhaps the party itself—would have additional incentives to seek out support from the Super PACs.[30] Certainly neither party would have reasons to disengage from Super PACs, which would constitute at a minimum "rainy day" funds.

Moreover, Super PACs serve purposes that parties and their candidates might be unable for political and operational reasons to pursue. The Super PAC as an "independent" entity might, for

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Act (H.R.425) (Jan. 22, 2015), http://www.democracy21.org/legislative-action/press-releases-legislative-action/explanation-of-stop-super-pac-candidate-coordination-act-h-r-425/ [https://perma.cc/KU8Q-CGV9].

27. The case for eliminating the limits on party-candidate coordinated spending has been made in various quarters. See generally Repealing the Limitation on Party Expenditures on Behalf of Candidates in the General Election: Before the S. Comm. on Rules & Admin., 110th Cong. (2007) (statement of Thomas E. Mann, Senior Fellow, Brookings Institution) (testimony on bill to eliminate party coordinated spending limits); PETER J. WALLISON & JOEL M. GORA, BETTER PARTIES, BETTER GOVERNMENT: A REALISTIC PROGRAM FOR CAMPAIGN FINANCE REFORM (2009).

28. *See* Ray LaRaja & Brian Schaffner, Want to Reform Campaign Finance and Reduce Corruption? Here's How., WASH. POST (Oct. 26, 2015), https://www.washingtonpost.com/news/monkey-cage/wp/2015/10/26/want-to-reform-campaign-finance-and-reduce-corruption-heres-how/ [https://perma.cc/MP3C-CHPV] (proposing substantial increase in contributions to parties); see also IAN VANDEWALKER & DANIEL I. WEINER, BRENNAN CTR. FOR JUST., STRONGER PARTIES, STRONGER DEMOCRACY: RETHINKING REFORM 14 (2015) (proposing targeted relief from limit for certain party organizations and functions).

29. VANDEWALKER & WEINER, *supra* note 28, at 9.

30. Seth Gitell, *The Democratic Party Suicide Bill*, ATLANTIC, http://www.theatlantic.com/magazine/archive/2003/07/the-democratic-party-suicide-bill/378549/ [https://perma.cc/3XBS-83ED].

example, engage in the "negative message" which the party and the candidate would prefer to see "outsourced"—and plausibly denied as their own message.[31] It is also a convenient mechanism for training and maintaining in place additional talent not available to the established parties.

This is one problem with the efficacy of reform focused on expanding party resources while subjecting Super PACs to more restrictive regulation. The politics of this style of reform presents another. Using regulation to privilege the parties, and therefore strengthening their hand in the competition with the "outside," shapes the politics of candidate recruitment and advocacy. A party controlling funds through incumbent leadership will make choices with the aim of enhancing the prospects of victory. But there is no reason to believe that other considerations will not bear on those choices, including the politics the party leadership can live with. It is, after all, an aim of the reform in question to enhance party control of its own fortunes and enable it to instill more discipline within its ranks. Party leadership will take into account when it can have political preference, including the demands of ideological or programmatic uniformity, in encouraging and supporting candidacies. And except in unusual cases, their obligation is to support the incumbents.

All this might be for the best if it was agreed that the chief reform objective is to limit candidate choice and enhance party control, and the costs previously identified were acceptable in achieving this objective. There is another consideration, painful for advocates for a reinvigorated party. *What if candidates and parties are better off under this arrangement, because it is an arrangement that has evolved out of the demands of contemporary politics—even if certain features of that arrangement are byproducts, largely unintended, of changes in the regulatory regime?*

The suggestion here is that there is a difference between a conscious program of strengthening the parties without concern for the preferences of candidates and at the expense of independent actors, and the goal of what might be called

31. *See* Bob Bauer, *Super PAC: The Law and the Politics*, MORE SOFT MONEY HARD LAW (Jan. 5, 2016), http://www.moresoftmoneyhardlaw.com/2016/01/super-pac-law-politics/ [https://perma.cc/6NJN-KHLJ] (discussing the role of Super PACs as negative advertising amplifiers); *see also* David A. Graham, *The Incredible Negative Spending of Super PACs—in 1 Chart*, ATLANTIC (Oct. 15, 2012), http://www.theatlantic.com/politics/archive/2012/10/the-incredible-negative-spending-of-super-pacs-in-1-chart/263643/ [https://perma.cc/QD2R-C5D9] (noting the amount of Super PAC spending in the 2012 election cycle on negative advertisements far outweighed advertisements promoting a candidate).

market-based reforms, that takes the regulatory landscape as it is and strives to make it work better and more transparently. An alternative is to consider regulation, or de-regulation, as needed to remove gross inefficiencies in the operation of the electoral process—to enable candidates to deliver their messages cost-effectively and with adequate resources, and for voters to receive them with an adequate degree of disclosure about the sponsors of those messages. Under this view, the gains in the overall operation of the system, judged by its efficiency, navigability and capacity for meeting the need for innovation and choice, is the central concern. It is not weighted too much in any one direction by a view of who should win or lose under the best-functioning arrangement.

Campaign finance scholarship has concerned itself with politics-as-market in other ways. Most prominently, Professor Issacharoff and Pildes have written about the similarity of democratic politics to structured markets in certain respects: their concern has been the potential for anti-competitive behavior producing what they call "lockup."[32] So they have called upon courts to examine the "background structure of partisan competition" to address anticompetitive behavior and effects.[33] Another, more sweeping critique of contemporary campaign finance jurisprudence takes it to task for reflecting a crude neoliberal market theory that claims that unregulated or lightly regulated politics will generate a "smooth flow of accurate information" unaffected by "cognitive errors, strange preferences for risk, unquantifiable utility functions, externalities, and maybe even old-fashioned barriers to competition."[34]

The "market" analysis urged here does not evaluate the operation of politics so much from the "outside" with particular goals in mind, but more from the "inside" with a focus on how that market serves the established and legitimate interests of candidates, parties and other political actors. It takes seriously that what Issacharoff and Pildes refer to as a "well-functioning political process" includes one in which these actors can pursue their goals—and compete—efficiently and effectively. This conception of the politics-as-market is compatible with other regulation from the "outside" to address, for example, anti-competitive behavior. But it is primarily aimed at rationalizing the market as it operates to

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

33. *Id.* at 648.

34. Timothy K. Kuhner, *Citizens United as Neoliberal Jurisprudence: The Resurgence of Economic Theory*, 18 VA. J. SOC. POL'Y & L. 395, 410 (2011).

facilitate—or impede—the efficient allocation and accessibility of resources and the capacity of the actors, such as political parties, to function in roles shaped by the broader forces within the political culture.

The first step is to expose market malfunction. This should not be too difficult, as it is the subject of virtually ceaseless commentary. Candidates are rushing about to raise huge sums of money (and those who are not keen on fundraising may choose not to run the first place).[35] Campaign funding is divided between limited candidate "coordinated"' finance and "independent" spending without limit: The parties are found straddling the line, with parties divided between candidate and independent wings. As a result, candidates can communicate with some party officials and staff (in the candidate or "coordinated" wing of the party) and not with others (in the "independent" wing).[36] As noted, some organizations in the independent wing are described as "shadow parties," others represent ideological and other interests not defined by partisan programs or affiliations.

Yet the candidates are not barred from contact with the independent wing: they can show up at independent committee events, such as Super PAC events: they may make remarks, and leave, and all the money raised is then spent independently and without limit on their behalf.[37] And there is some question about the extent to which they can use their "pre-candidacy" period to encourage the formation of these committees and recruit their friends to staff and run them, and then allocate to these PACs major campaign functions normally conducted by candidate campaign committees.[38]

The voters are left to make sense of all this. The independent committees must advise of their independence from the candidates, including those independent committees run by candidate allies and funded in part on the strength of their

35. Ezra Klein, *The Most Depressing Graphic for Members of Congress*, WASH. POST (Jan. 14, 2013), https://www.washingtonpost.com/news/wonk/wp/2013/01/14/the-most-depressing-graphic-for-members-of-congress/ [https://perma.cc/XD7U-4WVM] (citing advice from party committee that its members devote four hours a day to raising money).

36. FEC, COORDINATED COMMUNICATIONS AND INDEPENDENT EXPENDITURES (Jan. 2015, http://www.fec.gov/pages/brochures/indexp.shtml [https://perma.cc/6F6W-9F7G].

37. *See* FEC, AO 2015-09, Advisory Opinion on Activities Conducted by Super PACs, Single-Candidate Committees, 527 Organizations, Candidates and Prospective Candidates (Nov. 13, 2015), http://www.fec.gov/pages/fecrecord/2015/december/ao2015-09.shtml [https://perma.cc/3MTR-KVFJ] (regarding the Senate Majority PAC and House Majority PAC).

38. *See* Brent Ferguson, *Candidates and Super PACs: The New Model in 2016*, BRENNAN CTR. FOR JUST. 2–4, https://www.brennancenter.org/sites/default/files/analysis/Super_PACs_2016.pdf [https://perma.cc/54HV-S569].

association with the candidate. By law, they cannot include the candidate's name in their own advertisements.[39] For their part, candidates must accept responsibility for their own communications, including stating in their own voices on TV and radio advertising that they "approved" the running of the ad: the objective here was to have them think twice before agreeing to run "negative" ads they would have to take responsibility for.[40] But they do not similarly have to accept responsibility for the ads of committees they coaxed into existence and help fund. Nor has all this complexity resulted in success in achieving regulatory objectives. The "stand by your ad" disclaimers required by federal law have not changed advertising tone or content.[41]

Improving the operation of this "system" is itself a reform, and it does not call by its terms, necessarily, for more or less regulation as an "either-or" proposition. It shifts the question more to *what kind* of regulation makes sense. A reform program to address these ills should not be confused with one that is intended to make campaigns more "competitive" or more "positive," or parties more powerful and capable of performing in an ideal role.

V. ELEMENTS OF A PROPERLY FUNCTIONING POLITICAL "MARKET"

A market-based reform shifts the focus to goals of efficiency, capacity for encouraging innovation, and openness to entry (and hence effective competition), along with transparency as a tool for furthering the successful pursuit of all of these objectives. So, more specifically, we assume that we would want the system to at least produce:

- No artificial restrictions on the quality of candidates, meaning candidates who answer the requirements of

39. 52 U.S.C. § 30102(e)(4) (Supp. II 2015).

40. 52 U.S.C § 30120(d)(1)(A)–(B) (Supp. II 2015). For the purposes behind "stand by your ad," see generally Nicholas Stephanopoulos, Comment, *Stand by Your First Amendment Values—Not Your Ad: The Court's Wrong Turn in* McConnell v. FEC, 23 YALE L. & POL'Y REV. 369, 375–76 (2005).

41. Stephanopoulos suggests that the provision had an effect on the tone of advertising. *See id*. at 376. Others seeking to measure the impact have not detected a change. *See* Michael M. Franz, Joel Rivilin, & Kenneth Goldstein, *Much More of the Same: Television Advertising Pre- and Post-BCRA*, *in* THE ELECTION AFTER REFORM: MONEY, POLITICS, AND THE BIPARTISAN CAMPAIGN REFORM ACT 146 (Michael J. Malbin ed., 2006) (finding that in the first election cycle after the enactment of the requirement, the evidence suggested that it "had only [a] marginal effect on [ads'] content"). Campaign professionals also saw no impact. *See* Robert F. Bauer, *A Report from the Field: Campaign Professionals on the First Election Cycle under the Bipartisan Campaign Reform Act*, 5 ELECTION L.J. 105, 118 (2006) ("All told, the stand by your ad provision did not affect the total amount or effect of negative advertising in the campaign.").

a diverse and informed debate and from among whom would emerge capable public officials (openness to entry);

- Fair opportunity for adequate campaign funding, reflected in a reasonable expectation that in some relation to the candidate's message and the quality of his or her campaign, candidates can raise what they need to compete but would not be overwhelmed by fundraising pressures (efficiency and openness to entry);
- Flexibility within the system to allow for competition among candidates, parties, consultants and others to experiment with and develop effective avenues for voter contact and persuasion (efficiency and innovation); and
- Sufficient availability of information about the candidates, parties and other actors to allow voters to understand who is standing for or against which policies or positions, which is an objective consistent with the desire most candidates have to "control" the communication of their message so that they have some prospect of defining for the voter what they stand for.

These objectives are in various respects interrelated. By enhancing efficiency, we would make gains in openness to entry: candidates are more likely to take on the ardors of candidacy if they know they can establish an organization and fund it with maximum efficiency. The notion of efficiency is the least complicated: the candidate should be able to assemble support quickly and with lowest possible investment resulting in the highest possible return. The candidate spared time in raising money addresses a salient concern over the course of a time-limited election cycle with the immovable deadline of Election Day. Some candidates may like to raise money, of course, but the question is whether they should have the choice, and even a skeptic about the values of baby-kissing and hand-shaking and mass rallies and debates can concede that it should at least be an option for the candidate to prefer these to the endless dialing of numbers on a "call sheet" of prospective high-dollar donors.

It might be expected that the traditional reform school would object that this set of considerations, if weighted too heavily, is an argument for full deregulation. If the candidate could raise all her money from two or three donors, then the system would be at its most efficient, if all that matters was the time the candidate had to invest in gaining the return. In thinking about system reform,

however, we have to select efficiency goals within certain accepted parameters established in the law and repeatedly validated by the Supreme Court in *Buckley* and since.[42] Congress can decide, as it has, that it is too risky to allow candidates to depend on only the largesse of a few well-heeled supporters or interests. The law provides for contribution limits and source restrictions, and in addition, transparency rules designed in part to aid in enforcing them.

It is the improved functioning of the marketplace *within* this system of limits, and not as a means of upending it, that reform could be aimed at achieving. Whether we can grant that efficiency could be a factor in deciding whether the limits now in place might be adjusted upwards without a loss in anti-corruption security. The limits have clearly introduced significant inefficiencies into the congressional process: they force candidates to spend more time raising funds, and this is time spent with mainly the well-to-do segment of the population. The limits could be reformed to alleviate these pressures. But that is a different question than the one of whether we ought to have no limits at all.

Candidates do not alone benefit from market reform. The donors who contribute to campaigns might respond well to a state of affairs in which the campaigns spend less of their money on fundraising staff and events and other operational requirements, and more on putting out the campaign "message" and investing directly in programs like get-out-the-vote programs that increase the prospects of victory. And critics of the current system who fear the corruptive effects of undue dependence on donors or the cost to political equality would have to applaud these other gains from a simple focus on efficiency. For if the system as reformed enlarges the candidate pool and reduces the incentive to recruit the wealthy, and if it enables them to devote more time to developing and putting out a message, then we have a campaign process that meets many of the often-cited reform objectives directed to the quality of campaigns, and not only their insulation from corrupting pressures and influences.

The focus of the concentration on a well-functioning market is not only on what might be done to improve the candidates' yield from her own fundraising. It should also take into account how to better facilitate the working relationship of the candidate to

42. *See* Buckley v. Valeo, 424 U.S. 1, 3–5 (1976) (establishing a framework for constitutional analysis within which the Court upheld provisions limiting individual contributions to campaigns, political committees, and associated public reporting requirements but struck down limits on expenditures by candidates from their own personal funds, on total spending by campaigns, and on expenditures made independently of candidates).

the party, or of the candidate to other allies. The campaign is not, of course, the only entity seeking to influence the outcome of the election. The party is committed to a favorable outcome for its candidates, as are specific organized interests with enduring ties to the candidate and the party. The well-known "coordination" controversies revolve around these relationships, because the issue there is posed as one of illicit subsidies.[43] Does the candidate, by coordinating with allies, receive for all practical purposes contributions that, like any other, should be subjected to the limits?[44] But again, even within these limits, the objective of the "market" reform under consideration here is to maximize the efficiencies, within these limits, of these important allied relationships.

While the traditional post-Watergate reform program does not entirely disregard these concerns with the operation of the political market, they are secondary. Its more urgent priorities are measures to protect against corruption, or to enhance the realization of equality values. If regulation is shaped and emphasized for these purposes without regard for the how the system can function well as a market, then distortions in its operation are inevitable.

The answer from the reform traditionalist is that this, in a word, is untrue—that if the system allows for more equality and is less prone to corruption, then it will be a better market. To question this proposition is not to say that there is an absolute trade-off of, say, efficiency and anti-corruption considerations. As earlier noted, the starting point for the discussion is that there are core prohibitions and requirements within the *Buckley* regime that will still remain in place as a practical political or normative matter. In recent decades, however, the preoccupation has largely been with the system's shortcomings measured by these anti-corruption or egalitarian goals, or on the part of reform skeptics, by the cost of these goals in free speech and association.[45] The net effect of this struggle has been to compound the inefficiencies, limits to innovation, effective restrictions on entry and cloudy transparency. Looking after *these* costs has received considerably less attention.

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43. *See generally* Michael D. Gilbert & Brian Barnes, *The Coordination Fallacy*, 43 FLA. ST. U. L. REV. 399, 406–13 (2016) (defining the coordination controversy and analyzing alleged quid pro quo relationships between candidates and donors).

44. 11 C.F.R. § 109.21 (FEC rule defining coordination rules for public communications).

45. *See generally* Richard Briffault, *The Political Parties and Campaign Finance Reform*, 100 COLUM. L. REV. 620, 666 (2000) (concluding that the goal of campaign finance reform is to "liberate the parties from corrupting influences").

And still less attention has been paid to the ways that these costs enter into a negative feedback loop with the anti-corruption and equalitarian focus of traditional reform. With inefficiency comes more fundraising, and more potential for donors to gain access. With unnecessary limits on entry comes more recruitment of self-funders, or of candidates who are comfortable devoting more time to fundraising than to direct contact with voters. With barriers to innovation comes the prospects of unnecessary and growing inefficiencies that affect the nature of fundraising and campaigning, pushing it more to the old, backroom style associated with risky or disreputable behaviors. And with reduced transparency, we have voters less able to sort out messages, and candidates are confronted with difficulties in clearly signaling their positions and commitments.

VI. THE "PROBLEM" OF THE SUPER PAC AND THE PARTIES: RECONSIDERATION

It is within this context that, as an example of this view of reform, the special issues presented by Super PACs in relation to parties and candidates might be considered. The Super PAC is undoubtedly a legal milestone in campaign finance. The basics are simple: a political committee operating independently of candidates and parties can freely receive and spend money to support specific candidates. There is no question that it can do this. The law of Super PACs, while from the perspective of its critics disturbingly permissive, is largely settled.[46] The result, it is widely accepted, has been damaging to the political parties, and some Super PACs are seen to be moving in the direction of assuming most of the functions of parties, including not only expensive on-air appeals but also the "ground game" conducted to motivate voters to appear at the polls.[47]

As is so often the case in campaign finance, the result is a tangle of hopelessly competing claims and arguments. The Super PACs are accused of helping to unravel the campaign finance system, or praised for enhancing First Amendment rights, or damned for their role in corrupting government, or cheered for offering a vitally important vehicle for outsiders challenging

46. *See* Citizens United v. FEC, 558 U.S. 310, 314 (2010) (affirming the legal basis for Super PACs by holding that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption").

47. *See, e.g.*, David Gura, *Outside Groups Are Moving onto Political Parties' Turf*, MARKETPLACE (Nov. 3, 2014, 12:44 PM), http://www.marketplace.org/2014/11/03/elections/outside-groups-are-moving-political-parties-turf [https://perma.cc/NR2B-VCHL].

insiderism in politics.[48] The distance between these positions can be measured by the belief on the part of those who worry about this development that nothing short of a constitutional amendment can redress the harm.[49]

The standard approach begins with the assumption that any new rule, if a reform, should split the PAC from the candidate. Behind this assumption is another: that the primary objective of any reform is to enforce to the maximum degree possible the contribution limits. The candidate should be denied in all conceivable ways the benefit of the PAC's activities. To this end the reforms most favored would provide for ample regulatory discretion to prevent, or root out and punish, any apparent advantage passing from the PAC to the candidate. An example of a proposal built to this specification is the American Anti-Corruption Act (AACA), a reform community proposal that would consider a candidate to have coordinated with a PAC if he or she "publicly or privately" approves of the PACs organization or spending.[50]

By now the experience with this regulatory program confirms that it is mostly futile, at least to the extent that it is focused on eradicating the advantages to campaigns of these PACs. At the most aggressive point on the range of potential regulatory alternatives, the constitutional barriers seem insurmountable. It is difficult to imagine that a candidate having no other contacts or communications with a PAC can be deemed to have "coordinated" with it by a mere statement of approval of its organization or operation. Suppose a candidate is asked: "Does Super PAC X correctly state your position on Social Security?" Under the AACA proposal, coordination occurs if the candidate says, "Yes: it is the view I have been stressing all along." The likelihood of a legal penalty constitutionally attaching to speech in these circumstances seems remote.

The regulation at this point might switch strategies and attack more systematic forms of collusion. The contemporary

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48. *See generally* James A. Kahl, Citizens United*, Super PACs, and Corporate Spending on Political Campaigns: How Did We Get Here and Where Are We Going?*, FED. LAW., June 2012, at 40, 43 (discussing the varied responses to *Citizens United* and Super PACs).

49. See, for example, Move to Amend, an organization advocating for a constitutional amendment to reverse *Citizens United*. MOVE TO AMEND, https://movetoamend.org/ [https://perma.cc/C4B7-DZZB]. The 2016 Democratic Presidential nominee has embraced an amendment as an answer to the decision. *See* Benjamin Oreskes, *Clinton Pledges Constitutional Amendment to Overturn Citizens United Ruling*, POLITICO (Jul. 16, 2016, 1:28 PM), http://www.politico.com/story/2016/07/hillary-clinton-citizens-united-225658 [https://perma.cc/F37E-8QNU].

50. *See The American Anti-Corruption Act*, REPRESENT.US, http://anticorruption act.org/wp-content/uploads/AACA_Full_Provisions.pdf [https://perma.cc/596N-ZUX7].

experience with these rules is that they may complicate and raise the cost to candidates of engaging with their supporters. But they do not, and could not, stop candidates from seeking out or encouraging "independent" support. They will simply devise means of encouraging these organizations without coordinating their specific expenditures. They hire lawyers, and they do less directly—and less efficiently—what the rules forbid them to do directly.

Moreover, the overall effect is to discourage candidate accountability for the operation of these PACs and to present to the public a blurred picture of who is acting for the candidate with her authorization, and who can claim authentic "independence." What we have now is an elaborate charade. The PAC is independent but the candidate may appear at its events and speak favorably about its work; the PAC must present in its disclaimers on public communications that it is not "authorized" by the candidate, an avowal that is technically correct but politically and practically meaningless. The parties meanwhile claim that the PACs are harmful to their operations but whether through "shadow parties" or through party personnel who take charge of these PACs, their presence in the Super PAC world is pronounced.

All in all, this regulatory structure puts all the participants through a great deal of unnecessary motion and leaves the public largely at sea about what it all is supposed to mean. And it is not an answer, indeed it is a mistake, to denounce the outcome as a product of "loopholes" endangering the system of candidate contribution limits. The Super PAC is a fully legal vehicle for the support of candidates. It functions within the protections provided by the courts in *Speechnow*[51] and *Citizens United,*[52] and the FEC has undertaken to set out rules for its relationship to candidates. These PACs file with that agency reports of their receipts and expenditures.

Much energy is being devoted to treating them as a "loophole" that, with enough effort, can be put out of business or less useful or attractive to candidates. Beyond any statutory or regulatory reforms, of course, are the constitutional options: a Court that reverses itself on *Citizens United,* or a constitutional amendment.

Is the choice then this stark—a constitutional amendment, or the usual standoff between traditional reform and anti-reform positions? Is there a reform within the system that by correcting for market distortion, promotes efficiency and other functional

51. Speechnow.org v. FEC, 599 F.3d 686 (D.C. Cir. 2010).

52. Citizens United v. FEC, 558 U.S. 310 (2010).

benefits within the system? Any such alternative takes at its starting point that Super PACs are here to stay and that what we have now in the way of regulatory framework functions poorly.

VII. THE MARKET REFORM ALTERNATIVE

Rather than hope for regulation that aims to wish away Super PACs, raising costs to all concerned with minimal yield in anti-corruption policy, the world of Super PACs could be taken "as it is" and regulation could be designed to make the market in which these organizations operate work better. The objective might be to have the rules fitted more to the arrangement within which they must operate, allowing them also to sort out for the various actors the functions they are best equipped to perform.

For candidate Super PACs, this would mean that the candidates could associate more freely with the Super PACs and would have to be accountable to the public for this choice. This association does not mean control: the candidates could not organize and run these PACs, and they could not coordinate specific PAC expenditures. This is the key distinction: association with and support for the PAC, which we have anyhow, and control which, by the holding of *Buckley* (and in any exercise of commonsense), makes it impossible to distinguish the PAC "expenditure" on behalf of a candidate from a "contribution" to that candidate.[53] The *Buckley* Court took "independent" to mean that the specific spending was done without coordination or consultation with the candidate.[54] Rightly or wrongly, it assumed that the contribution question was determined by whether for all practical purposes the spending for a particular communication was the candidate's own. She, the candidate, could decide how much was spent on which ads and when, and she was in effective control of the content so that the ad matched tightly the candidate's strategic requirements. But a candidate could embrace a Super PAC and have no such control, and this is largely the state

53. *See generally* Richard Briffault, *Coordination Reconsidered*, 113 COLUM. L. REV. SIDEBAR 88, 101 (2013) (concluding that single-candidate Super PAC spending "flouts *Buckley's* contribution/expenditure distinction.").

54. *See* Buckley v. Valeo, 424 U.S. 1, 45–47 (1976). There the Court stated very clearly that the issue was not the overall connection or association between candidate and organization, but the coordination of specific spending for the benefit of the candidate:

> Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.

Id. at 47.

of affairs in which the most sophisticated and influential of these PAC operate today.

The association of a candidate with a Super PAC also does not require a candidate to raise large sums from individual donors, another standard reform concern reflected in the prohibition on candidate solicitations of "soft money"—money outside the limits and source restrictions of federal campaign finance law.[55] Under current law, the candidate attending a Super PAC fundraising event as a speaker or honored guest cannot "solicit" money on a one-on-one basis, or through an explicit appeal to a larger audience.[56] But the candidate is there, visible to the prospective donors, and the intent of the appearance at a fundraising event is unmistakable. The questions this raises—including the reasonable doubt about the very utility of a rule so structured—are not present where a candidate can indicate broad association with a PAC but never appears at a PAC-sponsored event in the same room with its donors.

If the regulatory objective were to be reconceived in these terms, it would be possible to imagine a requirement that the candidate and the Super PAC formally disclose the association. The candidate would be required to note it on its filings with the Federal Election Commission, and perhaps to do so on the campaign website with a link to the PAC's own website, or to the related Federal Election Commission records of the PAC's reports. The Super PAC would have a similar obligation. In both cases, a *political* relationship already known to exist would be acknowledged, as a requirement of federal law.

The same disclosure would be required through the candidate's and the PAC's "disclaimers" by which the sponsor of a public communication is identified as having paid for it, together with a further statement of whether a candidate authorized it. In the case of the Super PACs, the disclaimer would note specifically that the PAC paid for a communication and that it is a PAC operating in support of Candidate X with the approval of that candidate.

Note that the disclaimer would not state that the specific communication was "authorized" by the candidate. This degree of interaction around a specific expenditure would remain prohibited. But the candidate's association with the Super PAC—his or her decision to embrace its support—would be both permissible, as it is today, *and* a matter of public record.

There are questions to be addressed, as there always are, about the design of this reform. How would the candidate know

55. *See* 52 U.S.C. § 30125(e)(1)(A).

56. *See* 52 U.S.C. § 30125(b)(2)(C).

that an independent committee was forming or poised to launch public communications? This seems simple enough in the case of a committee forming as a single-candidate Super PAC:[57] it could provide notice to the candidate when registering with the FEC. Many critics of Super PACs are most concerned with those operating for a single candidate, and so the notice requirement for these cases would seem to present little practical problem and cover the most controversial of these PAC activities. If the measure were to extend to other PACs, a different notice requirement, triggered by the intent to make expenditures, would have to be devised. A separate set of issues is raised by a candidate's wish to withdraw approval after it has been given.

Certainly in the case of single-candidate Super PACs, this transparency measure could be implemented in place of the allowance now for candidates to speak at fundraising events of Super PACs on the condition that they do not solicit any contributions beyond those conforming to federal dollar limits. The notion behind the current rule is that candidates cannot be barred from speaking at such an event, but must be prohibited from conducting one-on-one solicitations of donors who then give large sums that would raise the risk, or the appearance of the risk, of a corruptive exchange. Under current rules, the candidate can say that she is only soliciting up to $5,000 per donor, or a statement to that effect can be distributed in writing at the event.[58] It is all nonsense and everyone present knows it. The candidates' presence is important to the PAC as a branding exercise, to establish the association, but also to facilitate precisely what the Super PAC is in business to do: raise money outside the contribution limits.

With a transparency program that permits formal association, the Super PAC accomplishes the "branding" without putting the candidate in the false position of attending events in person on the pretense that she is there only to raise money in small amounts. It also works to avert the one-on-one contact with large donors that will also present the risk or appearance of a corrupting the candidate. Now a fundraising event must take place without the candidate, but the donors remain aware, at a distance, that the candidate has embraced the PAC's activities. The candidate is just kept out the room where it happens.

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57. *See* Briffault, *supra* note 53 at 95 (focusing on the specific reform issues presented by the single-candidate Super PAC).

58. FEC, AO 2011-12, Advisory Opinion on Fundraising by Candidates, Officeholders and Party Officials for Independent Expenditure-Only Political Committees (June 30, 2011), http://saos.fec.gov/aodocs/AO%202011-12.pdf [https://perma.cc/9W6P-35KH].

Of course, a candidate may choose not to associate with the Super PAC. In that case, the Super PAC would have to indicate that the candidate declined the association: "Paid for and authorized by X, which is not a committee approved by Candidate Y." The candidate in turn would be required to note in FEC reporting and on the campaign website that he or she has been made aware of X and does not support it. This clears the candidate of the association for political purposes and it would also be useful information to prospective donors to the PAC.

It could be asked whether a candidate might disingenuously disavow the association and still look to benefit from the PAC's activities. Certainly the legal stakes will have been raised for the candidate if he chooses this course. Engagement with the PAC through any means—e.g. signaling to associates that she would like them involved with the PAC—raises the risk of a disclosure violation. Under this proposal, moreover, the candidate cannot have it both ways as she may under current law: she cannot attend a PAC fundraising event while disclaiming association. The candidate is then stuck with both the legal risks of trying to have it both ways and an impediment to the branding that donors would depend on in deciding whether to make a contribution.

Another concern could be that the notice that the candidate has approved the PAC enhances the corruptive potential of the independent expenditure. Nothing fundamental has changed, however, in the relation of committee to candidate: the expenditures of the one cannot be coordinated with the other. To the extent that the candidate could come to feel obligated by the expenditures on his behalf, he is really in no different position than when he benefits from support, however unanticipated or independent, provided by another source. There is always the risk of obligation, which is one of the complaints about the *Buckley* Court's analysis of corruption in this context. A reform by which candidates acknowledge their approval of the committee—coupled with a prohibition on direct contacts between the candidate and the PAC—supplies information to voters, obviates the need for the candidate to engage in "wink and nod" maneuvers, and keeps the candidate from direct engagement with the PAC and its donors.

What is the advantage to the parties? It certainly clarifies where candidates stand in relation to them and the Super PACs. In the 2016 presidential election, one candidate made an issue of the other's alleged involvement with a Super PAC. He judged this question to be important to the party's primary voters. Moreover, to the extent that parties are looking to allocate resources efficiently, a candidate's decision to seek funding outside the parties is helpful information that may guide the parties' choice to

give to the candidates truly dependent on them. Perhaps more importantly, the competition between Super PACs and parties might be brought more into the open and make it possible for parties to assess clearly how much ground they are losing and to explore the strategies for making it up. The parties have the opportunity to negotiate with the candidates over the choice of remaining inside or outside the party networks, which may help the parties to develop more innovative, successful means of answering the candidates' needs.

Parties remain at a disadvantage in being unable to raise money in the sums that Super PACs collect, and a regulatory program like this does not eliminate it. At the same time, under a market-centered reform, parties might compete where they possess evident strength: *their capacity for working closely with a candidate*, as a party truly "in service." This is what a Super PAC cannot do.

Here a deregulatory measure would be in order as part of this alternative reform approach. Right now, the party can spend without limit on operations but must recognize limits on expenditures coordinated with its candidates. Either the coordinated limits would be abolished across-the-board, or they would be made inapplicable to certain forms of party-candidate coordination, such as the sums parties spend to assist the candidates with infrastructure through programs to register voters or get out the vote. In neither case does the party take more money from a donor than the current limits allow. It can just spend more freely to achieve maximum effectiveness as a party-in-service.

On this point, Professor Issacharoff rightly singles out the harms from a party perspective of the *Colorado Republican* decisions establishing the right of parties to make independent expenditures.[59] Any enforced separation of party and candidate is unhealthy for candidate and party alike and introduces inefficiencies and disruptions into the political market. The elimination of the coordinated expenditure limits help to solve the problem. It would encourage the party to operate *as* a party and less like a Super PAC (at least to the extent that it is free from limits on what it can spend, though not on what it can receive).

It is not only as a party in service, strictly conceived, that the party would benefit from regulations reworked in this way. The networked party, as it enhances the party in service, shows that the two conceptions in practice are not incompatible: one enhances

59. Issacharoff, *supra* note 1, at 863–65.

the other. Within that networked party are the allies and expertise that a party can mobilize for the candidates' benefit, all of which the parties could make available to the candidates just because they can work closely with them. In sum: The parties' working relationship to the candidate is central to the value parties can offer that the Super PAC cannot.

VIII. DOCTRINAL BASIS FOR MARKET REFORMS

As previously noted, the standard reform model calls for the regulation of campaigns to accomplish a protection of government—regulation now for benefits later. This is true of the anti-corruption model, which is the basis for regulation, while those scholars and jurists appealing for restoration of the equality rationale ruled out by *Buckley* have a legitimate claim that they are taking a position on what is needed for the electoral process itself.[60] Even the equality rationale, however, looks ahead to government and assumes that full equality of participation is essential to the legitimacy of the electoral outcome and acceptance of the government leadership it produces.

The alternative argued for here is not incompatible with anti-corruption protections or measures to enhance political equality. It is more narrowly, but still importantly, concerned with the way the campaign process functions by analogy to a market, and it believes that there are serious costs to disregarding the costs of malfunction. Within a market that is more rationally structured and more efficiently operating— even within limits that secure anti-corruption or equalitarian goals—the prime actors, including the political parties, can locate the role they are best able to pay within the politics we have.

There is a doctrinal opening that can accommodate a move in this direction. The Court has recognized and applied in various circumstances a pure "informational interest," which is the interest of voters in information about campaign finance that would aid them in making voter and party choices. Here the Court has related the interest very specifically to the operation of a "political marketplace."[61] In *Citizens United*, the majority gave this interest special weight, concluding that it alone was sufficient to "justify" application of disclosure requirements to the

60. *See generally* RICHARD L. HASEN, PLUTOCRATS UNITED: CAMPAIGN MONEY, THE SUPREME COURT, AND THE DISTORTION OF AMERICAN ELECTIONS (2016).

61. *See* McConnell v. FEC, 540 U.S. 93, 197 (2003) (finding disclosure requirements important to a voter's interest in "mak[ing] informed decisions in the political marketplace").

advertisements at issue in the case.[62] "[T]ransparency," Justice Kennedy wrote for the Court, "enables the electorate to make informed decisions and give proper weight to different speakers and messages."[63]

The information interest does not just serve the voters in sorting out their ballot choices. The Court has related it to anti-corruption purposes within the umbrella of an "accountability" rationale.[64] It has also tended to view transparency as necessary to guard against forms of fraud, on the order of a consumer fraud definition of the interest.[65] Of course, in this case, the protection against fraud is really the flip side of the concern for information as an indispensable tool for assisting the voter in choosing among candidates. At any rate, while not clearly delineated, the informational interest connects in the Court's analysis to a vision of a political marketplace that, without transparency, cannot not function as it should.

This same marketplace requires attention in other respects, with transparency as one among a number of mechanisms. A requirement that the Super PAC-candidate association be transparent serves the informational interest but also links up with other measures, such as the elimination of party coordinated spending limits, to improve the operation of the political market. It may help guide the allocation of resources within the market to help the various actors make decisions about how to identify and then pursue their interests most successfully.

IX. CONCLUSION

For the political parties, the challenge of finding their way includes a fundamental decision of whether it matters to them whether they have an institutional role, or as organizations, can thrive within a network in which party-type resources are spreading broadly among activists, sympathetic media organizations, interest groups and even Super PACs operating as "shadow parties." There is without doubt in the account provided in this Article a bias—in favor of the notion of the "party in service" which captures the role that parties can indeed play as institutions with distinct organization,

62. *See* Citizens United v. FEC, 558 U.S. 310, 369–71 (2010).

63. *Id.* at 371.

64. *See, e.g.*, Doe v. Reed, 561 U.S. 186 (2010) (upholding state petition disclosure requirements because they promote transparency and political accountability, characteristics which the Court finds essential to a properly functioning democracy); *Citizens United*, 558 U.S. at 370 (finding disclosure provides vital information to voters to hold elected officials accountable).

65. *See* Bullock v. Carter, 405 U.S. 134, 145 (1972) (recognizing a state's interest in avoiding voter confusion and running orderly, legitimate elections).

staffs and funding. One reason is simply that it is difficult to speak of a political party in almost pointillist terms, emerging somehow from various distinct locations across the political canvass.

Moreover, only the party in service has anything to fear from the Super PACs. For advocates of the networked party, Super PACs are an option for the party, yet another association it can add to the network of allies. Then the question is whether they can survive it.

The party in service, however, does have to reckon with the Super PAC. The question then becomes whether to bring regulation to bear to decide the contest by tilting the competitive balance in one direction or the other, or by giving the market its say.