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The Party's Over: *McCutcheon*, Shadow Parties, and the Future of the Party System

Joseph Fishkin and Heather K. Gerken¹

Shaun McCutcheon, the Alabama lawyer who successfully challenged a key provision of the Federal Elections Campaign Act (FECA), seems an unlikely ally of supporters of campaign-finance reform. They share neither his politics nor his lack of irony. McCutcheon, after all, supports Republican candidates by writing them checks in the amount of \$1776. Moreover, supporters of campaign-finance reform hardly want to hasten the Supreme Court's dismantling of the FECA. Yet McCutcheon's suit was heralded by some as a remedy for what ails our politics.

To understand this strange turn of events, one must view *McCutcheon v Federal Election Commission*² against the deep shifts taking place in American politics. These are strange times for the two dominant political parties. By some measures, the Democratic Party and the Republican Party are at the height of their power. Elected officials and the general public are more polarized than they have been in generations, and the polarization axis runs right between the parties' tents.³ Party identity is very powerful, capable of shaping the behavior of both voters and legislators.

Other measures suggest that the parties are weak, perhaps dangerously so, and may even be losing their grip on politics. "Outside" groups—groups that are neither official party entities nor candidate campaigns—have taken over a startling array of core party functions. These groups do not just run campaign ads. They mobilize voters, test messages, organize donors, maintain comprehensive voter databases, employ long-term campaign workers, and make major strategic choices in individual campaigns and across multiple races.⁴ State parties, once central to local

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² 134 S Ct 1434 (2014). See Part III.

³ See Part I. To be sure, there is plenty of intraparty disagreement these days, especially on the Republican side. But *intraparty* is the word. The "Tea Party" turned out not to be a party at all; it is simply a faction within the Republican Party. Actual third-party competitors to the two dominant parties are nowhere on the horizon, which strongly suggests that our party system is very stable.

⁴ See, for example, Joe Arnold, *American Crossroads Spending Big in Kentucky*, Whas11 Political Blog (Whas 11 Aug 27, 2010) (on file with authors); Edward-Isaac Dove, *OFA Embraces Tea Party Blueprint for August Push* (Politico July 23, 2010), online at <http://www.politico.com/story/2013/07/ofa-embraces-tea-party-blueprint-for-august-push-94601.html> (visited Dec 9, 2014); Derrick Harris, *Obama Seeks Data Scientists for Election Edge* (Gigaom Sept 19, 2011), online at <https://gigaom.com/2011/09/19/obama-seeks-data-scientists-for-election-edge> (visited Dec 9, 2014); Nick Judd, *Obama's Targeted GOTV on Facebook Reached 5 Million Voters*, Goff Says (TechPresident Nov 30, 2012), online at <http://techpresident.com/news/23202/obamas-targeted-gotv-facebook-reached-5-million-voters-goff-says> (visited Dec 9, 2014); Jeremy W. Peters, *Subtler Entry from Masters of Attack Ads* (NY Times May 22, 2012), online at <http://www.nytimes.com/2012/05/22/us/politics/new-crossroads-gps-ad-takes-a-soft-shot-at-obama.html> (visited Dec 9, 2014); Ken Thomas, *A Permanent Campaign? President Obama Will Turn His Re-election Organization into a Group to Back His Agenda* (NY Daily News Jan 18, 2013), online at <http://www.nydailynews.com/news/politics/obama-wages-permanent-campaign-article-1.1242364> (visited Dec 9,

and national campaigns, have become pale shadows of their former selves. The national parties are only somewhat stronger. Their bread-and-butter activities are increasingly being carried out by groups that exist outside the official party structure.

These two stories may seem contradictory, but keep in mind that the word *party* means something different in each one of them. The official party organizations and their various fundraising committees—what we will call the “official” party—are weak in the sense that outside groups have taken over many of their functions. But for reasons we will discuss, it is more useful to conceptualize a “party” as a group of networked interests that take different forms at different times.⁵ Viewed from this perspective, the outside groups are not lone wolves. They are deeply and durably aligned with one party or the other.⁶ Indeed, the largest and most important “outside” groups are run by consummate party *insiders*. That’s why we call these groups, taken together, *shadow parties*.⁷

The shadow parties have grown so muscular that we are even seeing what we term *shadow campaigns*. In the 2014 cycle, a majority of Senate races included a Super PAC spending unlimited funds on behalf of only one candidate.⁸ In a recent special election in Florida, the campaigns of the two congressional candidates controlled less than one-third of the total money spent on the election.⁹ Three-quarters of the money spent on behalf of a recent senatorial candidate in Mississippi was supplied by Super PACs.¹⁰ Political observers now muse openly about the possibility of candidates with empty campaign coffers outsourcing *all* campaign activities to such shadow party groups.¹¹

The shadow parties and the official parties, then, are deeply intertwined and properly understood as part of what we call the “the party writ large.” And the parties writ large retain a commanding grip on American politics.

Nonetheless, the explosive growth of outside groups poses a fundamental challenge to settled understandings of the parties and explains why many campaign-finance supporters saw a silver lining to Shaun McCutcheon’s suit. *McCutcheon* struck down the FECA’s *aggregate*

2014); Peter Wallsten and Tom Hamburger, *Conservative Groups Reaching New Levels of Sophistication in Mobilizing Voters* (Wash Post Sept 20, 2012), online at http://www.washingtonpost.com/politics/decision2012/conservative-groups-reaching-newlevels-of-sophistication-in-mobilizing-voters/2012/09/20/3c3cd8e8-026c-11e2-91e7-2962c74e7738_story.html (visited Dec 9, 2014).

⁵ See Part II.B.

⁶ For example, as of this writing in the 2014 cycle, nine out of the top ten Super PACs supported candidates of a single party. *Super PACs*, OpenSecrets.org (Center for Responsive Politics Dec 9, 2014), online at <https://www.opensecrets.org/pacs/superpacs.php> (visited Dec 9, 2014).

⁷ Heather K. Gerken, *Boden Lecture: The Real Problem with Citizens United: Campaign Finance, Dark Money, and Shadow Parties*, 97 Marq L Rev 903 (2014).

⁸ Editorial Board, *The Custom-Made “Super-PAC”*, NY Times A20 (Aug 4, 2014).

⁹ Michael Beckel, *Outside Groups Dwarf Candidate Spending in Florida Special Election: Less than One-third of Money Pumped into Race Controlled by Sink or Jolly*, Primary Source (The Center for Public Integrity Mar 6, 2014), online at <http://www.publicintegrity.org/2014/03/06/14337/outside-groups-dwarf-candidate-spending-florida-special-election> (visited Dec 9, 2014).

¹⁰ Philip Bump, *Coming Soon: A Campaign Run Entirely by Super PACs*, The Fix Blog (Wash Post July 28, 2014), online at <http://www.washingtonpost.com/blogs/the-fix/wp/2014/07/28/coming-soon-a-campaign-run-entirely-by-super-pacs/> (visited Dec 9, 2014).

¹¹ See, for example, *id.*

limits, which capped how much hard money *in toto* one donor could give to candidates and party committees in a given year. The crude version of the “silver lining” argument suggests that *McCutcheon* will shore up the parties against outside spenders.¹² The more nuanced argument—and the emerging conventional wisdom in the field—is that *McCutcheon* will level the playing field between the official party leaders and the shadow parties by allowing donors to pour more money into the official party structure.¹³ This shift in funding patterns, so the story goes, will strengthen the official party leadership and assure the official parties’ long-term health.

Count us as skeptical. *McCutcheon* will surely allow some funds that would have flowed to outside groups to seep back into the official party structure. But for the reasons outlined in Part III, we expect this effect to be very modest.¹⁴

Moreover, the crude argument—pitting “outside” funders against “the parties” and mourning the weakness of the latter—fundamentally misdiagnoses the problem. Money has always influenced politics, and donors have always had a role to play in the party writ large. More importantly, the money has shifted toward groups that are outsiders in name only; these groups work hand in glove with the official party elites, and the parties writ large remain powerful. The real problem with the growth of shadow parties has less to do with the “strength” or “weakness” of the official parties relative to outside groups and more to do with who exercises power *within* the parties writ large. What we are witnessing is not outside spenders pulling power away from the parties but an intraparty battle for the heart and soul of the party writ large.

Although we see this battle as an intraparty fight, its likely outcome is one that “small-d” democrats ought to find disquieting. Parties are, of course, competitors in the democratic arena. But they are also democratic arenas unto themselves. For most of the twentieth century, a great deal of democratic contestation took place within the dominant political parties rather than between them. As democratic arenas, the parties have been important sites of pluralist competition, providing activists and interest groups many pathways for influencing politics.

The shift toward shadow parties threatens to flatten the party structure and inhibit pluralist politics. Money isn’t just shifting from one place to another within the party writ large; it is shifting from one type of institution to another, quite different type of institution. Both official parties and shadow parties are recognizably Democratic or Republican, but their structure is different. Compared to the official parties, the shadow parties are more hierarchical and less porous. Shadow parties are closed to most and controlled by few. They lack the many nodes of influence that have been used in the past by those who wish to influence party politics. We are especially concerned that the shift to the shadow parties will permanently squeeze out the *party faithful*—the activists and highly engaged citizens who serve as a bridge between everyday citizens and political elites—and largely eliminate their already-diminished role within the party writ large. The shift toward shadow parties thus raises important questions about the future of American politics. It also raises some fundamental normative questions about who *ought* to control political parties.

¹² See Part II.

¹³ See Part III.

¹⁴ See Part III.

The Article proceeds in four parts. Part I describes what was legally at stake in *McCutcheon*. Part II situates *McCutcheon* against the broader background of American party politics. Specifically, we examine what we believe to be two deeply intertwined phenomena: the weakness of the official parties and the strength of the parties writ large. Part III explains why *McCutcheon* is unlikely to have anything but a modest effect on current trends. Part IV explains why we should be less worried about the future of the official parties or their leadership and more concerned about the vibrant intraparty politics that the official parties once facilitated.

I. MCCUTCHEON'S CHALLENGE

Midway into the 2012 election cycle, Shaun McCutcheon found himself in a bind. He had already donated a total of \$33,088 to sixteen Republican candidates, but he wanted to donate to twelve others as well as to a handful of GOP committees.¹⁵ The FECA, however, placed limits not just on the amount a single individual could contribute to a single candidate or party committee (the “base limits”),¹⁶ but on the amount any individual donor could contribute in the aggregate (the “aggregate limits”).¹⁷ McCutcheon and the Republican National Committee (RNC) brought a First Amendment challenge to the aggregate limits. The three-judge district court rejected the claim, which eventually made its way to the Supreme Court.

Supporters of campaign-finance reform harbored little hope that the Supreme Court would uphold the aggregate limits. McCutcheon's suit was coming on the heels of a series of cases in which a five-justice majority had systematically dismantled important parts of the FECA. *Citizens United* was, of course, the marquee case.¹⁸ Nominally about corporate spending, the decision called into question any regulation not narrowly calibrated to address the narrowest forms of corruption, perhaps only quid-pro-quo corruption.¹⁹ “Ingratiation and access,” Justice Kennedy proclaimed, “are not corruption.”²⁰ The ruling quickly led a lower court to lift other restrictions on independent spending and thereby gave birth to the Super PAC.²¹

In the wake of *Citizens United*'s ruling on corruption, the *McCutcheon* merits briefs all but wrote themselves. McCutcheon and the RNC insisted that the aggregate limits burdened the freedom of association and expression and could not be justified as a limit on quid-pro-quo corruption.²² As long as McCutcheon stayed within the base contribution limits for each candidate and committee, they argued, there was no danger of corruption.

¹⁵ *McCutcheon v Federal Election Commission*, 893 F Supp 2d 133, 136 (DDC 2012).

¹⁶ 52 USC § 30116(a)(1); 11 CFR § 110.1–110.3.

¹⁷ The limits, for 2013–2014, were up to \$48,600 to federal candidates and up to \$74,600 to other political committees including the national party committees. See 52 USC § 30116(a)(3); 11 CFR § 110.5.

¹⁸ *Citizens United v Federal Election Commission*, 558 US 310 (2010).

¹⁹ *Id.* at 359.

²⁰ *Citizens United*, 558 US at 360.

²¹ *Speechnow.org v Federal Election Commission*, 599 F3d 686 (DC Cir 2010). As Bob Bauer has pointed out, the blame for the “shadow parties” cannot be laid solely at the feet of *Citizens United*. Bob Bauer, *The Troubles of Political Parties and Misreadings of Citizens United*, *More Soft Money Hard Law* (June 2, 2014), online at <http://www.moresoftmoneyhardlaw.com/2014/06/troubles-political-parties-misreadings-citizens-united/> (visited Dec 9, 2014). They are the product of long-standing trends in campaign finance that date back at least to the ban on soft money, perhaps even to *Buckley* itself. *Id.*

²² Brief for Appellant Shaun McCutcheon, *McCutcheon v Federal Election Commission*, No 12-536 (US filed May 6, 2013) (available on Westlaw at 2013 WL 1927677); Brief on the Merits for Appellant Republican National

In response, the government downplayed the First Amendment interests and reminded the Court that *Buckley v Valeo* grants Congress more leeway to regulate contribution limits, like those challenged by McCutcheon, than expenditure limits.²³ It also emphasized that the aggregate limits were intended to prevent circumvention of the base limits, an argument that had gotten considerable traction with the lower court.²⁴ Both the government and several amicus briefs—most notably one drafted by the Campaign Legal Center²⁵—sketched out various scenarios in which a donor could circumvent the base limits by writing multiple checks to multiple PACs or by writing one large check to a Joint Fundraising Committee, which would then parcel out the funds among various committees and candidates. Advocates warned that a single donor could write a check for as much as \$3.6 million dollars while still adhering to the base limits.

The oral argument was unusual in that real-world politics intruded on the justices' consideration of the abstract First Amendment issue at hand. The circumvention problem proved to be the focal point of the argument, with the justices playing out or resisting the hypotheticals put forward in the briefs.²⁶ Even more interestingly, the advocates and the justices discussed the uneven playing field that now existed for the parties and outside funders and speculated that lifting the aggregate ban would prevent the parties from being, in the words of RNC lawyer Bobby Burchfield, "marginalized by outside forces."²⁷

The Court ultimately sided with McCutcheon and the RNC. Chief Justice Roberts wrote a plurality opinion, which was joined by Justices Scalia, Alito, and Kennedy,²⁸ and Justice Breyer drafted a dissent joined by Justices Ginsburg, Sotomayor, and Kagan. Justice Thomas supplied the majority's fifth vote, suggesting in his concurrence that *Buckley's* framework, which applies more searching scrutiny to limits on expenditures than limits on contributions, should be overturned so that all campaign-finance regulations would be subject to strict scrutiny.²⁹

Roberts, however, found that there was no need to apply strict scrutiny to the contribution limits in this case because the aggregate cap failed even the less exacting test required by *Buckley*.³⁰ He dismissed most of the rationales offered by the government in short order. Roberts gave a little more attention to the argument that the aggregate limits were needed to avoid

Committee, *McCutcheon v Federal Election Commission*, No 12-536 (US filed May 6, 2013) (available on Westlaw at 2013 WL 1923314).

²³ Brief for the Appellee, *McCutcheon v Federal Election Commission*, No 12-536 (US filed July 13, 2013) (available on Westlaw at 2013 WL 3773847).

²⁴ *McCutcheon*, 893 F Supp 2d at 139–40.

²⁵ Brief of the Campaign Legal Center, AARP, Asian Americans Advancing Justice, Asian American Legal Defense and Education Fund, Common Cause, Citizens for Responsibility and Ethics in Washington, the League of Women Voters of the United States, Progressives United and Public Campaign as Amici Curiae in Support of Appellee, *McCutcheon v Federal Election Commission*, No 12-536 (US filed July 25, 2013) (available on Westlaw at 2013 WL 3894870).

²⁶ Transcript of Oral Argument, *McCutcheon v FEC*, 134 S Ct 1434 (2014) (No 12-536) (available on Westlaw at 2013 WL 5845702).

²⁷ *Id* at 20.

²⁸ *McCutcheon*, 134 S Ct at 1434.

²⁹ *Id* at 1464 (Thomas concurring).

³⁰ *Id* at 1437 (plurality).

circumvention of the base limits, but ultimately concluded that, given the other protections in place, the aggregate limits were an unnecessary “prophylaxis-upon-prophylaxis.”³¹ Roberts closed his opinion by offering a ringing endorsement of *Citizens United*’s narrow conception of the corruption rationale. In response to the dissenters’ worries that large donations would buy the “gratitude” of the parties, Roberts insisted that gratitude was not a form of corruption but merely reflects the shared interests and common beliefs that fuel party politics.³²

McCutcheon dashed the hopes of those who had argued that the Court did not intend *Citizens United* to limit the definition of corruption to quid-pro-quo corruption. Chief Justice Roberts laid that claim to rest not just by quoting the relevant portions of *Citizens United* but also by doubling down. “Ingratiation and access . . . are not corruption,” he wrote: “They embody a central feature of democracy—that constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns.”³³ Put differently, the influence that donors may gain over both parties and individual candidates is not corruption; it is democracy. Donors are key “constituents” to whom the parties and candidates *ought* to “be responsive.”

The fact that the Court used such broad language to strike down contribution limits, once thought to be all but immune from challenge, sent a frisson through the reform community. Law professor Justin Levitt perfectly captured reformers’ mood in the wake of *McCutcheon*: “Those who support limits see the Court right now as the T. rex from ‘Jurassic Park,’” with everyone asking “What’s next? ‘Just don’t move. He can’t see us if we don’t move.’”³⁴

What made *McCutcheon* unusual is that even as it felled yet another provision of the FECA, it earned begrudging praise from some supporters of campaign-finance reform, who argued that *McCutcheon* might help solve what they see as the core problem in American politics: weak parties. To understand why *McCutcheon* garnered praise from such unlikely circles, it is crucial to situate the case in the context of the massive changes that the party system has undergone in recent years.

II. THE PARTIES—BOTH WEAK AND STRONG

As we noted in the Introduction, the parties have undergone substantial changes in recent years and now can be characterized as both weak and strong, depending on how one sees the “party.” And how one sees the “party,” in turn, determines whether or not *McCutcheon* has a silver lining from the point of view of campaign finance reformers.

A. The Strength of the Parties Writ Large

³¹ Id at 1444.

³² *McCutcheon*, 134 S Ct at 1461.

³³ Id at 1441.

³⁴ Adam Liptak, *Ruling’s Breadth Hints that More Campaign Finance Dominoes May Fall*, A14 NY Times (Apr 4, 2014).

Party identity is quite powerful today. Federal office holders now vote with their parties much more consistently than they did in prior decades.³⁵ The reason why is not hard to discern. The divide between the parties—in terms of both ideology and actual voting patterns—is the deepest it has been for a century.³⁶ Being a Democrat or a Republican really means something today. During the postwar era, liberal northeastern Republicans and conservative Southern Democrats stretched the fabric of each party’s big tent. Now the tents are smaller, and there is far more space between them.

Voters, too, are more ideologically polarized. Like their representatives in Congress, voters have coherently sorted themselves by ideology, with nearly all liberals becoming Democrats and nearly all conservatives becoming Republicans.³⁷ With moderates in both parties rarer and with the Republican Party in particular moving dramatically to the right, the differences between Democrats and Republicans are clearer to voters than they have been for several generations.³⁸ Much has been made of the rise of “unaffiliated” voters, who officially refuse to call themselves Democrats or Republicans. But most of these voters are in fact strongly attached to one party or the other—they just don’t say so when asked their party affiliation.³⁹

³⁵ See, for example, Michael Barber and Nolan McCarty, *Causes and Consequences of Polarization*, in Jane Mansbridge and Cathie Jo Martin, eds, *Negotiating Agreement in Politics: Report of the Task Force on Negotiating Agreement in Politics* 19–21 (American Political Science Association 2013) (describing a “steady and steep increase” in party-line voting and polarization since the 1970s).

³⁶ Keith T. Poole and Howard Rosenthal, *Ideology and Congress* 319 (Transaction 2d ed 2007). Poole, Rosenthal, and several other scholars have recently expressed similar concerns. See Scott A. Frisch and Sean Q. Kelly, eds, *Politics to the Extreme: American Political Institutions in the Twenty-First Century* (Palgrave 2013); Sean M. Theriault, *Party Polarization in Congress* (Cambridge 2008); Keith Poole, Howard Rosenthal, and Chris Hare, *Polarization is Real (and Asymmetric)*, *The Monkey Cage* (May 15, 2012), online at <http://themonkeycage.org/2012/05/15/polarization-is-real-and-asymmetric/> (visited Dec 9, 2014). For instance, the most moderate Republican is now considerably more conservative than the most moderate Democrat. Nolan McCarty, Keith T. Poole, and Howard Rosenthal, *Political Bubbles: Financial Crises and the Failure of American Democracy* 52 (Princeton 2013). See also Richard Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 Cal L Rev 273 (2011).

³⁷ See generally Matthew Levendusky, *The Partisan Sort: How Liberals Became Democrats and Conservatives Became Republicans* (Chicago 2009) (describing this phenomenon); Michael Dimock, et al, *Political Polarization in the American Public: How Increasing Ideological Uniformity and Partisan Antipathy Affect Politics, Compromise, and Everyday Life*, Pew Research Center Report (Pew Center 2014), online at <http://www.people-press.org/files/2014/06/6-12-2014-Political-Polarization-Release.pdf> (visited Dec 9, 2014).

Less engaged voters may not have become much more polarized during this time, but the more engaged and attentive voters are now much more closely aligned with their party on the issues than they have been before. See Alan I. Abramowitz, *The Disappearing Center: Engaged Citizens, Polarization, and American Democracy* (Yale 2010). Even so, it appears that the polarization is greater among officeholders than it is among voters. See Joseph Bafumi and Michael C. Herron, *Leapfrog Representation and Extremism: A Study of American Voters and Their Members in Congress*, 104 Am Pol Sci Rev 519 (2010).

³⁸ These polarizing changes took place on both sides, but they were asymmetric in magnitude: by almost every measure, Republicans moved further right than Democrats moved left. Thomas E. Mann and Norman J. Ornstein, *It’s Even Worse Than it Looks: How the American Constitutional System Collided With the New Politics Of Extremism* (Basic 2012); Barber and McCarty, *Causes and Consequences of Polarization* at 21 (cited in note 35) (describing increased polarization as “far from symmetric” and “largely driven by changes in the positioning of the Republican Party”).

³⁹ This is not a new point, but its salience only increases as the number of independent voters continues to rise. See, for example, Bruce E. Keith, et al, *The Myth of the Independent Voter* 4 (California 1992) (explaining that the vast majority of nominally independent voters in fact lean strongly one way or the other—and vote that way). See also

The ideological polarization of the parties is not just the reason why the parties *look* strong; it is the reason why they *are* strong. While the parties are always fighting out internal disagreements, no major issues genuinely cut across party lines today (the way, for instance, that civil-rights issues did in the 1960s).⁴⁰ As a result, there is little room for intraparty cleavage and few footholds available to third parties.⁴¹

To get a full sense of the changes parties have undergone, it is useful to recall what party coalitions looked like thirty years ago in a less polarized environment. Democrats had to accommodate Southern conservatives. Republicans had to accommodate Northeastern liberals. At the national level, both parties had to pander to a noisy menagerie of constituencies and interest groups that made up their coalitions. These constituencies needed attention and rewards to shore up their enthusiastic participation—and they got them, because exit was often a real possibility. But even when exit was unlikely, these groups were important sources of campaign energy, manpower, and funding; it was critical to keep them enthusiastic. Add to that the vagaries of state and local variation in party membership, and the parties had to contend with plenty of internal disagreement.

We do not mean to offer a romantic view of the parties of yore. In many ways, they were far less democratic than today's parties. Even decisions as important as selecting presidential nominees were often made by party insiders in proverbial smoke-filled rooms. But even those smoke-filled rooms were arguably sites of coalition building and small-d democracy. A system that gave power to state and local party bosses was far from optimal,⁴² but these power brokers did represent different geographic constituencies with different priorities, all seeking what they needed from the national parties.

The unruly menagerie of constituencies that constituted the parties of the past has been replaced by something different: large numbers of ideologically committed donors, candidates, officeholders, and engaged voters. This shift is the natural result of polarization. The parties are far apart on policy issues, and their leaders and members harbor a fair amount of animosity toward the other side.⁴³ Intraparty disagreement persists, but the battle lines dividing the parties are much sharper and starker than any internal cleavages.

It is worth dwelling for a moment on the critical role large donors play in today's coalitions. Ideological donors are as important a part of the party writ large as the people they choose to oversee how their money is spent—like Jim Messina, the campaign manager of the

Dimock, et al, *Political Polarization* at 83–85 (cited in note 37) (explaining why it makes sense to classify many “independents” as “partisan leaners”).

⁴⁰ Barber and McCarty, *Causes and Consequences of Polarization* at 22 (cited in note 35) (describing “the pronounced reduction in the dimensionality of political conflict” because “[m]any issues that were once distinct from the party-conflict dimension have been absorbed into it”).

⁴¹ Civil libertarians may be the one obvious issue-based constituency that remains up for grabs. In the post-9/11 era, this group has had reasons to be leery of whichever party is in the White House. But even civil libertarians show no signs of posing a third-party threat—far from it. Instead, this issue has only spawned candidates in party primaries, a fact that underscores the parties' strength.

⁴² Compare with E.E. Schattschneider, *Party Government* 170–86 (Holt, Reinhart and Winston 1942).

⁴³ Dimock, et al, *Political Polarization* (cited in note 37).

Obama 2012 campaign who now runs Organizing For Action (OFA) or Karl Rove, the former Bush campaign strategist who now runs the various Crossroads groups. To be sure, some large donors today have their own issue agendas. Think of Tom Steyer, who is emerging as a major donor on the Democratic side. He wants Democrats to put more emphasis on the issue of climate change,⁴⁴ and he has recently been described as one of the “billionaire oligarchs [who] are becoming their own political parties” by the usually understated headline writers of the *New York Times*.⁴⁵ But most major donors have a more straightforward agenda that befits a polarized age: they want their side to win. They may have strong views about which candidates ought to prevail in primaries, and they surely have views about intraparty disagreements. But *as between* the two parties, there is no question where they side. Because the parties *as brands* are so strong, and their identities are so clear, it makes little sense to think of these donors as standing outside the party looking in. They are standing *inside* the party as we understand it.

B. The Weakness of the Official Parties and the Burgeoning Power of the Shadow Parties

If the party writ large is now strong and relatively united, the official party apparatus is weak. This is so because a “party” is not merely a formal structure. Instead, as the most sophisticated work on parties shows,⁴⁶ a party today is best understood as a loose coalition of diverse entities, some official and some not, organized around a popular national brand. The official party organization is part of it, but so too are independent entities—not just shadow parties, but groups like the NRA, the teachers’ unions, and the Heritage Foundation. Officeholders are also part of this coalition, as are donors and activists. All are part of the *party writ large*, and all may pull the party in different directions.

⁴⁴ See Andrew Restuccia and Kenneth Vogel, *Tom Steyer Struggles to Find Big-Money Donors*, Politico (July 16, 2014), online at <http://www.politico.com/story/2014/07/tom-steyer-donor-struggle-109016.html> (visited Dec 9, 2014) (discussing how even though Steyer has not managed to recruit many outside donors other than himself for his NextGen Climate Action PAC, the scale of his proposed spending has, as on supporter put it, “sent a wave through campaigns”).

⁴⁵ Jim Rutenberg, *How Billionaire Oligarchs Are Becoming Their Own Political Parties*, NY Times MM26 (Oct 19, 2014).

⁴⁶ In legal academia, Dan Lowenstein and Michael Kang have been the leading scholars arguing for this view. See Michael S. Kang, *The Hydraulics and Politics of Party Regulation*, 91 Iowa L Rev 131 (2005); Daniel Hays Lowenstein, *Associational Rights of Major Political Parties: A Skeptical Inquiry*, 71 Tex L Rev 1741 (1993). A number of political scientists have made the case for a broader view of parties. See, for example, Kathleen Bawn, Martin Cohen, David Karol, Seth Masket, Hans Noel, and John Zaller, *A Theory of Political Parties: Groups, Policy Demands and Nominations in American Politics*, 10 Perspectives on Polit 571 (2012); Marty Cohen, David Karol, Hans Noel, and John Zaller, *The Party Decides: Presidential Nominations Before and After Reform* 15 (Chicago 2008) (viewing parties “as larger coalitions that include not only top leaders but activists, fund-raisers, interest groups, campaign technicians, and others”); Gregory Koger, Seth Masket, and Hans Noel, *Partisan Webs: Information Exchange and Party Networks*, 39 BJ Pol Sci 633 (2009); Richard M. Skinner, Seth Masket, and David Dulio, *527 Committees, Formal Parties, and Party Adaptation*, 11 Forum 137, 138 (2013); Richard M. Skinner, Seth E. Masket, and David A. Dulio, *527 Committees and the Political Party Network*, 40 Am Pol Res 60 (2012); Paul S. Herrnson and Justin H. Kirkland, *The Dollars and Cents of Party Campaign Networks* (conference paper, Conference on Political Networks in an Interdisciplinary World, 2013), online at <http://www.polinetworks.org/uploads/papers/DollarsCentsOfPtyCampFinNtwkst.pdf> (visited Dec 9, 2014). For a recent study on spending in state elections confirming this view, see Keith E. Hamm, Michael J. Malbin, Jaelyn J. Kettler, and Brendan Glavin, *Independent Spending in State Elections, 2006–2010: Vertically Networked Political Parties Were the Real Story, Not Business*, 12 Forum 305 (2014).

The official party leadership—particularly that of the Republican Party—has grown weaker in recent years. Party leaders are not the only ones setting the party’s agenda, and they sometimes struggle to bring votes to the table when they need to cut a deal or strike a compromise.⁴⁷ The travails of Speaker Boehner illustrate the problem. His caucus will vote in lockstep with the NRA but not with him.

The rise of the shadow parties has deepened the problem for the official leadership on both sides of the aisle. The nominal party heads have never been the only ones who steer the ship, but now the shadow parties are taking over so many of the official parties’ traditional functions—not only buying ads, but hiring campaign workers and running GOTV efforts—that they are gaining enormous influence over the party’s message, the party’s positions, and even the make-up of the party’s coalition. Outside groups have always played some role in this process, to be sure. But now they are not just nibbling around the edges by buying ads for this or that race. They are controlling large amounts of political funds and carrying out core party activities on the ground.

These trends are evident even at a granular level. Just as many of the functions of political parties have now been outsourced to shadow parties, an increasing number of individual candidate campaigns are ceding major functions to “outside” groups. To a layman’s ears, it may seem paradoxical that a group whose sole purpose is to elect a particular candidate is not part of the “campaign.” But as a legal matter, as long as there is no formal coordination between the candidate’s campaign and the outside group, this type of *shadow campaign* is permissible. Shadow campaigns, in short, reproduce in miniature the story of shadow parties.

One way to show how important shadow parties and shadow campaigns have become is simply to follow the money, to borrow a phrase from *All the President’s Men*.⁴⁸ Money is the oxygen of campaign politics, and it is plainly flowing toward the shadow parties, not the official ones. Super PACs did not exist in 2008, and 501(c)(4)s played a negligible role during that campaign. Both types of groups were major players in 2012,⁴⁹ and although they appear to have spent less in the 2014 midterm election year than they did in the 2012 presidential election year, it is clear that their influence is growing.⁵⁰ The flow of money is one of the main reasons some are worried about the hollowing out of the official parties.⁵¹ Those worries are often tied up with

⁴⁷ See, for example, Gary W. Cox and Matthew D. McCubbins, *Legislative Leviathan: Party Government in the House* (California 1993); Keith Krehbiel, *Pivotal Politics: A Theory of U.S. Lawmaking* 80–82 (Chicago 1998); Barbara Sinclair, *Unorthodox Lawmaking: New Legislative Processes in the U.S. Congress* 82 (Praeger 1977); Robert L. Peabody, *Party Leadership Change in the United States House of Representatives*, 61 *Am Pol Sci Rev* 675 (1967); Randall B. Ripley, *The Party Whip Organizations in the United States House of Representatives*, 58 *Am Pol Sci Rev* 561 (1964).

⁴⁸ *All the President’s Men* (1976).

⁴⁹ Super PACs and 501(c)(4)s, standing alone, spent more than \$860 million in 2012, according to FEC filings. *Outside Spending*, OpenSecrets.org (Center for Responsive Politics), online at https://www.opensecrets.org/outsidespending/fes_summ.php?cycle=2012 (visited Dec 9, 2014).

⁵⁰ Super PACs and 501(c)(4)s reported spending \$464 million through December 6, 2014. *Outside Spending*, OpenSecrets.org (Center for Responsive Politics), online at https://www.opensecrets.org/outsidespending/fes_summ.php?cycle=2014 (visited Dec 9, 2014).

⁵¹ See Part III.

larger debates about the breakdown of the political process as a whole. Some even worry that the parties are losing their ability to govern because the *official* parties are becoming so weak.⁵²

It should now be clear why we resist the crude version of this story—as a fight between “outside” spenders and the parties.⁵³ These so-called outsiders are consummate party insiders. They have just directed their funds to different places and housed themselves in different institutions, which means that they relate to the official party leadership in a different manner than they once did. We have called the Super PACs and 501(c)(4)s on each side *shadow parties* precisely because we want to convey that they are tightly networked and closely aligned with the official party.

The law has had a fair amount to do with this change. Of course, that is nothing new. Indeed, what we are seeing today bears a strong resemblance to what happened in Wisconsin during the first half of the twentieth century. When Wisconsin imposed substantial limits on the ability of the parties to carry out core functions like electioneering and raising money, party elites did not stop pushing the parties’ agenda. Instead, they abandoned the official party structure and joined private “statewide voluntary committees.” These private associations provided the institutional sites for party leaders to do all the electioneering and fundraising they wished to do on the party’s behalf.⁵⁴

Super PACs and nonprofits are now playing the role of Wisconsin’s voluntary committees. They receive large amounts of campaign money that cannot be given directly to candidates or to parties because the base contribution limits still apply.⁵⁵ When Super PACs were unleashed after *Citizens United* and *Speechnow*, a close reader of the judicial opinions could be forgiven for assuming that these independent groups would be truly *independent*—funded by wealthy donors with agendas that might or might not dovetail with the parties’ agendas. Instead, independent groups have found ways to work hand-in-glove with the candidates and parties they support.

⁵² See *id.*

⁵³ See, for example, Matthew Cooper, *Justices Poised to Rule on Citizens United 2*, Newsweek (Mar 6 2014), online at <http://www.newsweek.com/justices-poised-rule-citizens-united-2-231175> (visited Dec 9, 2014) (noting that “some observers have argued that the removing the limits would be good for democracy, allowing more money to go to parties and less to shadowy outside groups”); Napp Nazworth, *Analysis: Supreme Court's Campaign Finance Decision Is Not the End of Democracy*, Christian Post (Apr 3, 2014), online at <http://www.christianpost.com/news/analysis-supreme-courts-campaign-finance-decision-is-not-the-end-of-democracy-117305/> (visited Dec 9, 2014) (“Looking at the big picture, the overall impact of these laws and court decisions has been to give more power and influence to outside groups while diminishing the role of political parties.”).

⁵⁴ The classic account is Frank J. Sorauf, *Extra-Legal Political Parties in Wisconsin*, 48 Am Pol Sci Rev 692 (1954) (describing the rise of private political organizations in Wisconsin during the twentieth century). See also Leon D. Epstein, *Politics in Wisconsin* 28–29 (Wisconsin 1958); Steven E. Schier, *New Rules, New Games: National Party Guidelines and Democratic National Convention Delegate Selection in Iowa and Wisconsin, 1968–1976*, 10 Publius 101, 104–05 (1980) (same). For similar takes on this history, see Seth E. Masket, *No Middle Ground: How Informal Party Organizations Control Nominations and Polarize Legislatures* 44 (Michigan 2011); Kang, *Hydraulics and Politics* at 147 (cited in note 46).

⁵⁵ See 52 USC § 30116(a)(3); 78 Fed Reg 8532 (2013) (setting inflation-adjusted contribution limits for the 2013–14 cycle; an individual can give a federal candidate \$2,600, the national party committee \$32,400, and so on).

In the 2012 presidential election, for instance, every serious candidate had a Super PAC wholly dedicated to electing that candidate and usually run by someone closely affiliated with the candidate. In 2014, an off-year election, there were at least 94 Super PACs supporting individual candidates.⁵⁶ While these groups and candidates carefully avoid legal “coordination,” they manage to do a lot of what any sane observer would call “coordination.”

Some of this “non-coordinated coordinating” is easily observed. Candidates and high-level campaign operatives often show up at Super PAC fundraisers, and they treat the Super PACs as arms of the campaign. Both the Super PAC donors and leadership are usually close to the candidates. In one memorable case during the 2014 cycle, a purportedly independent Super PAC working on behalf of a congressional candidate had only one donor—the candidate’s mother.⁵⁷ In the Romney 2012 operation, companies working for both the campaign and the independent Super PAC shared an office in Alexandria, and the founder of one of the companies was married to a deputy campaign manager—who also ran a consulting firm out of the same office suite.⁵⁸ This was no reason to worry about coordination, though. All of the family members involved in these two examples insisted that they never shared information.

Much of this “non-coordination coordinating” is more discreet but just as effective, as made clear by a new study by Dan Tokaji and Renata Strause.⁵⁹ Networks facilitate the hidden cooperation between candidates and outside donors by allowing information to be passed indirectly. One of those interviewed for the Tokaji/Strause study said, ““you hear things”” even if no one from the campaign ever speaks directly to an outside group.⁶⁰ Other times, messages are deliberately passed by a ““friend of a friend of a friend,”” to quote another insider.⁶¹

Political operatives also use public tools—the mechanisms and strategies that we often bless as “transparent”—to send signals to outsider spenders. The campaign leadership serves as “conductor(s)” as they signal their messaging strategy in surprisingly public ways. Campaigns issue press releases that they know the media won’t pick up, but outside groups will. Campaign operatives deliberately use journalists to send “smoke signals” to outsider funders. B-roll footage (high-resolution video clips) are embedded into the campaign website for outside groups to find. Donor lists are shared before they are disclosed to the Federal Election Commission in order to give supportive outside groups a leg-up on fundraising. Official party committees sometimes share key information such as polling data with one another. One particularly cheeky effort involved publishing GOP polling data via Twitter in a format legible only to those in the know.⁶²

⁵⁶ 2014 *Outside Spending, By Single-Candidate Super PAC*, OpenSecrets (Center for Responsive Politics Oct 25, 2014), online at <https://www.opensecrets.org/outsidespending/summ.php?chrt=V&type=C> (visited Dec 9, 2014).

⁵⁷ Editorial Board, *Custom-Made “Super-PAC”* (cited in note 8).

⁵⁸ Mike McIntire and Michael Luo, *Fine Line Between “Super PACs” and Campaigns*, NY Times A1 (Feb 26, 2012).

⁵⁹ Daniel P. Tokaji and Renata E.B. Strause, *The New Soft Money: Outside Spending in Congressional Elections* (Moritz 2014). This paragraph and the next are adapted from Heather K. Gerken, *The Political Thriller Published by the Moritz College of Law*, Election L Blog (June 18, 2014), online at <http://electionlawblog.org/?p=62416> (visited Dec 9, 2014).

⁶⁰ Tokaji and Strause, *New Soft Money* at 65 (cited in note 59).

⁶¹ Id at 66–67.

⁶² See Chris Moody, *How the GOP Used Twitter to Stretch Election Laws*, CNN (Nov 17, 2014), online at <http://www.cnn.com/2014/11/17/politics/twitter-republicans-outside-groups/> (visited Dec 9, 2014).

Such strategies enable candidate-specific Super PACs to coordinate without “coordinating,” running what amount to shadow campaigns on behalf of the party or candidate.⁶³

Not all Super PACs and 501(c)(4)s are closely tied to a single campaign.⁶⁴ Some support many candidates within the party and serve much like the parties’ fundraising wings. The Senate Majority PAC served this role for the Democrats in 2014. Other shadow party groups, particularly issue-based or ideologically-fueled organizations, serve a different function: operating as a faction within a party. Tom Steyer, Michael Bloomberg, and the Koch brothers have all funded such organizations. They don’t have much loyalty to official party insiders—they may even be prepared, in theory, to cross party lines. They are trying to seize more power over the party writ large, steering it in a different direction. These organizations also have plenty of strategies for communicating indirectly with candidates and elected officials. They score votes and publicly discuss the lists of candidates they are considering supporting or opposing, thereby making clear what candidates and elected officials must do in order to obtain or retain their support going forward. Such strategies—wholly permissible within the coordination rules—make it possible for shadow party groups unaffiliated with one specific candidate to wield significant influence over different parts of the party.

III. WHY *McCutcheon* WON’T SAVE THE PARTIES

Given this backdrop, it is a mistake to think *McCutcheon* will save “the party,” and we are skeptical even about the more nuanced claim that *McCutcheon* will shore up the official party leadership. As noted above, in the wake of the decision, many observers unsympathetic to the Court’s shredding of campaign-finance regulations found at least “a little hope” in *McCutcheon*.⁶⁵ The crude version of the claim⁶⁶—which was featured in the *McCutcheon* oral argument⁶⁷—was that *McCutcheon* would level the playing field between the parties and outside influences. This is fundamentally mistaken, because the fight for power and funding is, at bottom, an intraparty fight.

The more nuanced argument was, as political scientist Ray La Raja wrote immediately following the decision, that the ruling will help give “party leaders . . . more say in who runs for office.”⁶⁸ Journalists like David Brooks wrote that the decision “enables party establishments to

⁶³ The facts in this paragraph are all drawn from Tokaji and Strause, *New Soft Money* at 64–68 (cited in note 59), save the Twitter example discussed in note 62.

⁶⁴ The occasional Super PAC functions as a faction with a specific issue agenda. See, for example, NextGen Climate Action PAC (discussed in note 44). More often, Super PACs, nonprofits, and other shadow party groups are aligned with broad and influential factions within the core of the party, the way Karl Rove’s Crossroads groups are associated with the so-called “establishment” wing of the Republican Party. See sources cited in note 4.

⁶⁵ See, for example, Nathaniel Persily, *Bringing Big Money Out of the Shadows*, NY Times (Apr 2, 2014), online at <http://www.nytimes.com/2014/04/03/opinion/bringing-big-money-out-of-the-shadows.html> (visited Dec 9, 2014).

⁶⁶ See Part II.B and sources cited in note 53.

⁶⁷ Transcript of Oral Argument, *McCutcheon v FEC* at 42–43 (cited in note 26).

⁶⁸ Ray LaRaja, *The McCutcheon Decision Could Be Good News After All*, Monkey Cage Blog (Wash Post Apr 3, 2014), online at <http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/04/03/the-mccutcheon-decision-could-be-good-news-after-all/> (visited Dec 9, 2014). See also Richard L. Hasen, *How “The Next Citizens United” Could Bring More Corruption—But Less Gridlock*, Wash Post (Feb 21, 2014), online at http://www.washingtonpost.com/opinions/how-the-next-citizens-united-could-bring-more-corruption-but-less-gridlock/2014/02/21/a190d1c6-95ab-11e3-afce-3e7c922ef31e_story.html (visited Dec 9, 2014) (arguing that striking

claw back some of the power that has flowed to donors and ‘super PACs.’”⁶⁹ Law professor Rick Hasen observed, even more pointedly, that *McCutcheon* gives parties “more tools to control members scared of, or beholden to, Super PACs.”⁷⁰ Many of these commentators speculated that *McCutcheon* would thereby reduce political polarization and further responsible government. As La Raja opined in an op-ed anticipating *McCutcheon*, “[a]nyone who dislikes the current stalemate in Washington should want party organizations to control campaign money rather than shadowy outside groups.”⁷¹ “Blowing up the aggregate limits,” wrote Rick Hasen, “could help make our government somewhat more functional by strengthening party leaders in Congress and greasing the wheels toward compromise.”⁷² These arguments rest on the assumption that shadow parties are pushing the parties to extremes. If the same money flowed through the official parties, the argument goes, party leaders would be more likely to favor moderate positions and moderate candidates.⁷³

There is some truth to this. *McCutcheon* opens the sluices a little wider and lets large donors give more to the official parties and official campaigns. It seems clear that the official parties will receive some money that would otherwise have flowed to the shadow parties. The official parties can facilitate such donations by creating joint fundraising structures that allow donors to write one giant check to be divvied up among candidates, committees, and state parties, just as Justice Breyer noted in his dissent in *McCutcheon*.⁷⁴ As we write this, there is evidence that the Republicans, but not the Democrats, are already making a run at this strategy during the 2014 cycle.⁷⁵

But there are good reasons to question how far this argument can go. We predict that powerful shadow party organizations like OFA and Crossroads will not shut their doors and tell their donors to give instead to the Democratic National Committee or the RNC. There are several reasons for this. The simplest is that the shadow parties offer donors something the official parties cannot. Even setting aside the fact that 501(c)(4)s can guarantee donors anonymity⁷⁶—

down the aggregate limits could have the “surprising positive side effect” of “strengthening party leaders in Congress and greasing the wheels toward compromise”); Persily, *Bringing Big Money Out*, NY Times (cited in note 65) (arguing that *McCutcheon* will help “restore the balance between insiders (parties and candidates) and outsiders (corporations, unions, super PACs and other nonparty groups)”).

⁶⁹ David Brooks, *Party All the Time*, NY Times A27 (Apr 4, 2014).

⁷⁰ Hasen, *More Corruption—But Less Gridlock*, Wash Post (cited in note 68).

⁷¹ Ray La Raja, *The Supreme Court Might Strike Down Overall Contribution Limits. And That’s Okay*, Monkey Cage Blog (Wash Post Oct 9, 2013), online at <http://www.washingtonpost.com/blogs/monkey-cage/wp/2013/10/09/the-supreme-court-might-strike-down-overall-contribution-limits-and-thats-okay/> (visited Dec 9, 2014).

⁷² Hasen, *More Corruption—But Less Gridlock*, Wash Post (cited in note 67).

⁷³ See, for example, LaRaja, *The McCutcheon Decision*, (cited in note 68) (“Unlike the factional extremist groups within each party, members of Congress don’t have to worry about their own party organization attacking them for compromising on legislation.”).

⁷⁴ See *McCutcheon*, 134 S Ct at 1472–79 (Breyer dissenting).

⁷⁵ See Byron Tau, *GOP Launches New Big Money Effort* (Politico Aug 5, 2014), online at <http://www.politico.com/story/2014/08/republicans-targeted-state-victory-fundraising-109724.html> (visited Dec 9, 2014) (describing the Targeted States Victory Committee, a 2014 Republican official-party joint fundraising effort that solicits single checks reaching “nearly \$200,000” apiece, to be distributed to the national party and thirteen battleground state parties).

⁷⁶ See, for example, Paul S. Ryan, *Two Faulty Assumptions of Citizens United and How to Limit the Damage*, 44 U Toledo L Rev 585, 590 (2013).

something neither Super PACs nor the official parties can provide—a shadow party group offers its donors a degree of control and responsiveness that the official parties and official campaigns cannot. The official parties serve several masters. Many groups and individuals contribute to official parties and campaigns and thus have some say over the parties’ future direction. In the official party structure, large donors matter a lot, but they are not the only ones who matter. Shadow parties, in contrast, answer to their donors alone.

These facts, paired with the structure of the donor base, make it unlikely that *McCutcheon* will have a dramatic effect. To see why, we need to move away from simple dichotomies—the party elites versus ordinary members, donors versus voters—and instead, visualize several different strata of supporters within the party writ large.

[Insert diagram here]

At the bottom of the pyramid are the ordinary voters who support the party on election day. Occupying the next level of the pyramid are the party faithful. They are a lot like ordinary voters, with one key difference: they invest their time and energies in campaigns by volunteering, knocking on doors, showing up at caucuses, voting in primaries, raising small amounts of money, and even working full-time for campaigns.⁷⁷ Some work their way up the party food chain because they are so heavily involved in campaigns. Others interact regularly with the vast network of state and local party officials that becomes visible to us during the Iowa caucuses or the New Hampshire presidential primary but exist in every state. The party faithful are not party elites. No one will mistake them for Jim Messina or Karl Rove. Nonetheless, because of their work, the party faithful have a much better shot at influencing the party’s direction than disconnected, individual voters.

Many of the party faithful are also small donors; some even help bundle small donations. This gives the party faithful an additional avenue of influence. But it is not one that requires them to worry about campaign finance law. Campaign finance limits will not get in the way of small donors. To the contrary, any contribution limit low enough to affect this group would be struck down.⁷⁸ Indeed, campaign finance regulations can only *benefit* this group to the extent such regulations prevent their voices from being drowned out by folks higher in the pyramid.⁷⁹

Our present campaign finance regime affects only the next tier of the pyramid: large donors who might want to give even more than \$2,600 (or \$5,200) to a candidate or two in a

⁷⁷ We don’t mean to suggest here that the party faithful staff every aspect of the campaign’s GOTV efforts. While presidential campaigns or inspiring Senate campaigns garner lots of volunteers, more quotidian campaigns must depend more on hired staff.

⁷⁸ *Randall v Sorrell*, 548 US 230 (2006) (striking down a contribution limit of \$200–400).

⁷⁹ The Court’s deregulatory majority is often hostile to arguments about money “drowning out” other voices. But not always. See *Arizona Free Enterprise Club’s Freedom Club PAC v Bennett*, 131 S Ct 2806, 2808, 2822 (2011) (Roberts) (finding that it is a “substantial burden” on a candidate’s speech for the government to respond by subsidizing an opponent’s message that will “counter that speech”).

single cycle, but cannot do so because of the contribution limits.⁸⁰ This group comprises a surprisingly large number of donors. But this group was unaffected by the *aggregate* limits struck down in *McCutcheon*.

McCutcheon affects the next higher tier, those we might call *extra-large donors*. These donors, like Shaun McCutcheon, want to give six-figure amounts in a single cycle to a collection of official party entities and individual campaigns. It is difficult to determine exactly how many donors exist in this tier, but in 2012 we know that 646 donors hit the maximum.⁸¹ For this group, *McCutcheon* clearly makes a difference.

The real money in shadow parties today, however, comes from yet one tier higher: the *super donors* who spend tens of millions in a single election cycle. For these multimillionaires and billionaires—the Sheldon Adelsons and George Soroses—*McCutcheon* fades into the background once again. Even without aggregate limits, there is no way Adelson and his wife could have spent the \$98 million they spent in the 2012 cycle⁸² through official party entities. There are simply not enough candidates and state parties to absorb this amount while still complying with the contribution limits that remain in *McCutcheon*'s wake.

Spending on this order of magnitude necessarily involves the shadow parties, which offer significant benefits to donors in this tier. A shadow party group answers unambiguously to one and only one constituency: the donor who creates it. He retains the ultimate authority over both personnel and major strategic decisions. Donors in the tier below, like Shaun McCutcheon, cannot afford this kind of control and power. If someone like McCutcheon created his own shadow party group, it would have only a handful of employees, and it couldn't afford to pay for talent of the same caliber as a Karl Rove or a Jim Messina. But the highest tier of donors can afford these advantages and thus has little incentive to work within the official party where decisions get made by people who answer to constituencies other than the donor.⁸³

Those who are betting on *McCutcheon* to strengthen the official parties, then, are betting on one of two things. Either they think far more McCutcheons exist than we do, or they think that—contrary to the arguments we outlined above—the super donors will allocate a large percentage of their spending to the official parties.

It is too early to know who is right; it always takes time for donation patterns to catch up with the law. But the early results do not support those who think *McCutcheon* will make a large difference. The Republican joint fundraising committees are now aiming to raise amounts that

⁸⁰ 52 USC § 30116(a)(3); 78 Fed Reg 8532 (2013).

⁸¹ See Bob Biersack, *McCutcheon's Multiplying Effect: Why an Overall Limit Matters*, OpenSecrets (Center for Responsive Politics Sept 17, 2013), online at <https://www.opensecrets.org/news/2013/09/mccutcheons-multiplying-effect-why/> (visited Dec 9, 2014).

⁸² Theodor Meyer, *How Much Did Sheldon Adelson Really Spend on Campaign 2012?*, ProPublica (Dec 20, 2012), online at <http://www.propublica.org/article/how-much-did-sheldon-adelson-really-spend-on-campaign-2012> (visited Dec 9, 2014).

⁸³ Mark Schmitt doesn't state these conclusions as strongly as we do, but he has clearly been thinking along the same lines. Mark Schmitt, *Guest Post: McCutcheon, the Parties, and What Comes Next*, Hewlett Foundation Blog (Apr 21, 2014), online at <http://www.hewlett.org/blog/posts/guest-post-mccutcheon-parties-and-what-comes-next> (visited Dec 9, 2014).

are only a little higher than the old aggregate limits, while the Democrats have not bothered to form such joint fundraising committees at all.⁸⁴ Over time, this is likely to change; the official parties will exploit every possible fundraising opportunity. But we suspect that the parties' lackadaisical response to *McCutcheon* reflects an underlying reality: there just are not as many McCutcheons out there as some commentators have assumed. If so, the shadow parties and shadow campaigns will continue to grow in importance over the next election cycles, notwithstanding the elimination of the aggregate limits. What remains is to examine why this matters.

IV. INTRAPARTY PLURALISM AND THE ROLE OF THE PARTY FAITHFUL

A cynic might think that the rise of the shadow party does not matter at all to the structure of the party system. Money has always played an outsized role in American politics. Moreover, it has long shifted from one channel to another, taking different routes in response to changes in the regulatory scheme. Soft money was banned, and the money moved into “issue ads” and 527s.⁸⁵ Now it is flowing through Super PACs and nonprofits. As Sam Issacharoff and Pam Karlan memorably observed, there is a “hydraulics” to campaign finance, and money always finds its own level.⁸⁶ One might think that all we are witnessing now is the usual hydraulics of campaign finance, so it matters little whether the money flows through the official parties or the shadow parties.

Issacharoff and Karlan are right that closing off one outlet for money will send it down another, but it can matter which outlet the money travels down. Given the institutional differences between the official parties and the shadow parties, we think that the flow of money to the shadow parties is accelerating a deeper shift in the party system that was already underway.⁸⁷ Specifically, we think these new institutional arrangements are helping erase an underappreciated but important source of pluralism within the party system.

Returning to our pyramid, it is clear that people in every tier have views about the direction their party should take. These people may all be on the same team, but that does not mean they always agree. Who wins these disputes—who gets to steer the unwieldy and complex entity that we call the party writ large—will depend on which forms of influence have more weight. And that, in turn, depends on where the center of gravity lies within the party writ large.

In order to understand this point, it helps to begin with the normatively prior question: Who *ought* to steer the party? This is a surprisingly open question. Judges, of course, are loathe

⁸⁴ See Tau, *GOP Launches New Big Money Effort* (cited in note 75).

⁸⁵ These trends can be traced back to the 1990s, when previous rounds of deregulation created other ways for money to flow to the parties. Stephen Ansolabehere and James M. Snyder Jr., *Soft Money, Hard Money, Strong Parties*, 100 Colum L Rev 598, 605–06 (2000).

⁸⁶ Samuel Issacharoff and Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 Tex L Rev 1705 (1999).

⁸⁷ We take seriously the point made by Kate Andrias in a recent symposium that the party faithful's decline was occurring even before the rise of the shadow parties. Kate Andrias, *Hollowed-Out Democracy*, 89 NYU L Rev Online 48, 48–50 (2014). Nonetheless, we worry that the shadow parties are far more closed off to the party faithful than the official party, so the shift in money can only exacerbate this trend.

to offer any firm view on the topic. Political scientists tend to focus on what is, not on what ought to be. Their colleagues with a more normative bent—political theorists—have had surprisingly little to say on this particular subject, perhaps due to what Nancy Rosenblum has described as political theory’s strange aversion to party politics.⁸⁸ As a result, the field lacks a well-developed sense of who should steer the party ship.⁸⁹ Or to put the question another way: Who are a party’s real constituents?

The answer to this question depends on what parties are for. From one perspective, parties are valuable because they serve as *democratic arenas*. They give ordinary voters a way to participate in the political process at a crucial agenda-setting stage. Everyday citizens thus take part in a far deeper and richer form of democracy than they would if they showed up only at the very end of the process, when the general election is held and there is only one highly constrained choice to make. From this perspective, the answer to the question of who ought to steer the party is straightforward. It’s the ordinary voters who support the party: the party-in-the-electorate, to use V. O. Key’s famous formulation.⁹⁰ If parties are democratic arenas, then their voters are the real principals, and the party officials and the party-in-government are merely their agents.

If the parties are democratic arenas, then we ought to structure them to encourage greater participation by voters in party governance. For instance, candidates should be chosen in high-turnout primaries rather than low-turnout caucuses. As for resolving intraparty disagreements, this conception of the party yields a straightforward answer: ideally, the party’s voters ought to have an equal say over the party’s direction. “One person, one vote” is often cast as equalizing voter influence over elections.⁹¹ What we might call the *equality model* of party control extends this principle into the intraparty domain.

The equality model is very distant from our present political system. Any time a donor, a campaign volunteer, or even an officeholder has more say over the direction of the party writ large than a randomly chosen, disengaged voter, we have moved a step away from the equality model. To come anywhere close to this model, we would have to ban campaign contributions and fund campaigns publicly. Even leaving donations aside, it would seem mildly corrupting every time an enthusiastic volunteer donates a lot of time to a campaign and thereby acquires more influence than someone else.⁹² Moreover, the equality model is hard to square with the

⁸⁸ Nancy L. Rosenblum, *On the Side of the Angels* 1–6 (Princeton 2008).

⁸⁹ This issue was of great interest to academics in the past, but their concern was largely about liberating the national party from the control of the state and local party bosses rather than democratizing the party full stop. See, for example, Schattschneider, *Party Government* at 170–86 (cited in note 42); American Political Science Association, *Toward a More Responsible Two-Party System: A Report of the Committee on Political Parties*, 44 Am Pol Sci Rev (Supp Sept 1950).

⁹⁰ V.O. Key, *Politics, Parties, And Pressure Groups* 181 (T.Y. Crowell 4th ed 1958).

⁹¹ See *Reynolds v Sims*, 377 US 533, 555 (The one person, one vote rule is designed to prevent a “debasement or dilution of the weight of a citizen’s vote.”). But see Joseph Fishkin, *Weightless Votes*, 121 Yale LJ 1888 (2012) (arguing that one-person-one-vote does not protect the influence of individual voters, but rather protects the equal influence of equally-sized numerical groups). Either way, the extension of the equality model to the internal governance of parties would mean that in any intraparty dispute, the majority of party members should rule.

⁹² David Strauss makes this point in his seminal article on the equality roots of campaign finance. David Strauss, *Equality, Corruption, and Campaign Finance Reform*, 94 U Chi L Rev 1369 (1994).

reality that candidates and elected officials will inevitably play a substantial role in steering the party.

Even if the equality model cannot be fully realized, it might still function as a useful lodestar. We could structure the parties to minimize inequality of influence among party members. On this view, we should aim for parties that are as representative as possible of the views of all their members, broadly defined.

This model has some genuine appeal, but it misses something important. Parties are not simply democratic arenas. They are also critical *players in the larger democratic arena*. There are sellers as well as buyers in politics. When the general election rolls around, ordinary voters need the parties to articulate clear alternatives so they can understand their choices.⁹³ From this perspective, parties are the means by which people with strong views band together and sell their views to the mass public.⁹⁴ For parties to perform this role, those with intense preferences and/or expertise ought to wield more influence over the party's direction than a randomly selected individual voter. Each party must function like a smart and nimble firm in a complex marketplace. It must be deliberative, yet decisive. It must know its own brand and customer base, and yet it must also respond to change and seek out new market niches even if it risks alienating another part of the base.

This analogy between the party and a firm is at the heart of a radically different model of the party from the equality model, an account we might call the *elite-driven model*.⁹⁵ In this model, parties are like firms, donors are like shareholders, and ordinary voters are like consumers choosing between the two parties' offerings. There is no equality of influence here. The normative roots of this ideal are not egalitarian. Instead they are bound up with the ideal of free association: people should be free to band together, build a party, and hawk their wares to the general public. On this model, parties must respond to ordinary voters, just as firms must respond to their customers. But large donors and party elites are the party's real constituents. This market-based model obviously owes a great deal to a Schumpeterian conception of democracy, which casts democracy as a contest among elites for the assent of the people.⁹⁶

⁹³ The idea that the parties need to present clear choices, and then act on them, so that voters can hold them accountable for the results, is the heart of the theory of "responsible party government." In 1950, an influential report by the American Political Science Association made the case for this view. *A Report of the Committee on Political Parties: Toward a More Responsible Two-Party System*, 44 Am Pol Sci Rev 1 (1950) ("An effective party system requires, first, that the parties are able to bring forth programs to which they commit themselves and, second, that the parties possess sufficient internal cohesion to carry out these programs."). See also Austin Ranney, *The Doctrine of Responsible Party Government: Its Origins and Present State* (Illinois 1954). Some of the concerns about responsible party government from this era seem quaint today: we no longer worry that the national parties are too weak in comparison to their state and local branches.

⁹⁴ See *California Democratic Party v Jones*, 530 US 567, 574 (2000) (Scalia) (viewing the parties as vehicles that promote "the ability of citizens to band together in promoting among the electorate candidates who espouse their political views"). Justice Scalia is perhaps the Court's strongest advocate of this view of parties. He who wrote for the Court in this case, striking down a law requiring a "blanket" primary in which all voters—not merely those affiliated with the party—would in effect select the parties' nominees.

⁹⁵ The arguments of Rick Pildes and Sam Issacharoff are a good deal more subtle and complex than the extreme view we sketch here. But they should at least get a hat tip for pioneering efforts in our field to think of "politics as markets." Samuel Issacharoff and Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 Stan L Rev 643 (1998).

⁹⁶ Joseph A. Schumpeter, *Capitalism, Socialism, and Democracy* (Harper 1942).

Like the equality model, the elite-driven model captures something about the parties that is true . . . but partial. The elite-driven model might ring truer in a party system like Israel's, with its robust political market featuring low barriers to entry, many players, and regular shifts in public allegiances among the parties. In an extremely stable, highly polarized two-party system like our own, the shortcomings of the market analogy are more immediately apparent. In our system, neither liberals nor conservatives really have anywhere else to go to pursue their political aims. (They could in theory withhold their support or stay home, but that option borders on the self-defeating.) *Without realistic exit options, they need voice.*⁹⁷ They need and want a role in shaping the parties to which they are deeply and practically bound. And our system does, in fact, give them a variety of opportunities to exercise voice. The elite-driven model overlooks the fact that voters are not just customers of a political party; they constitute it.

The majority in *McCutcheon* firmly rejects the equality model without articulating any clear alternative. But the elite-driven model is closest to what the majority has in mind, as is made clear in the very first sentence of the opinion: "There is no right more basic in our democracy than the right to *participate* in electing our political leaders."⁹⁸ As retired Justice Stevens has pointed out, this sentence is an odd way to begin a case about aggregate contribution limits; it makes sense only if *contributions* are a form of *participation*.⁹⁹ Later on, the *McCutcheon* majority repeatedly refers to donors as "constituents," and says that responsiveness to these donor-constituents is "a central feature of our democracy . . . key to the very concept of self-governance through elected officials."¹⁰⁰

This is a striking concept of "constituents," to put it mildly. On this view, many of the most important "constituents" of a state party or representative, for instance, are donors who live outside the state. That makes sense from the perspective of the elite-driven model. On that view, donors are like shareholders and thus properly the ones in charge. The individual voters—the people we ordinarily refer to as "constituents"—are the customers, not the firm.

Note how this contrasting view exposes a potential shortcoming of the equality model. In addition to failing to take into account the parties' roles as actors within a larger democratic

⁹⁷ We draw here on the fundamental contribution of A.O. Hirschman, *Exit, Voice, and Loyalty* 70 (1970) (noting that an ideologically committed voter in stable two-party duopoly "cannot exit . . . but just because of that he, unlike the consumer or voter who can exit, will be maximally motivated bring all sorts of potential influence into play so as to keep the firm or party from doing things are highly obnoxious to him"). Hirschman goes on to note that this mechanism—the voice of those who have nowhere to go—has force in partisan politics in part because the parties know their success depends "on the enthusiasm which each of the parties can inspire among activist party workers and volunteers"—that is, the party faithful. *Id.* at 72.

⁹⁸ *McCutcheon*, 572 US at 1440–41.

⁹⁹ Adam Liptak, *Justice Stevens Suggests Solution for "Giant Step in the Wrong Direction"*, NY Times A14 (Apr 22, 2014); John Paul Stevens, *Oops!* (Harold Leventhal Lecture, remarks before the Administrative Law Section of the DC Bar Sept 12, 2014), online at [http://www.supremecourt.gov/publicinfo/speeches/JPS%20Speech\(DC\)_09-12-2014.pdf](http://www.supremecourt.gov/publicinfo/speeches/JPS%20Speech(DC)_09-12-2014.pdf) (visited Dec 9, 2014) (underscoring the point and noting that *McCutcheon*—and any similar donor exceeding the aggregate limits for candidate contributions—is certainly donating to candidates of whom she is *not* a constituent in the more usual sense of the word). See also Yasmin Dawood, *Democracy Divided: Campaign Finance Regulation and the Right to Vote*, 89 NYU L Rev Online 17 (2014) (outlining normative concerns raised by *McCutcheon*'s equation of voting and contributing).

¹⁰⁰ *McCutcheon*, 572 US at 1441.

arena, it does not account for intensity of preferences. The elite-driven model of the party undergirding *McCutcheon* might seem better on this score. But it takes into account only intense preferences of a certain sort. There are many people whose commitments are sufficiently intense for them to put their time and energy into a campaign. But most of these people don't have hundreds of thousands of dollars lying around and thus aren't the sort of "constituents" that *McCutcheon* protects.

At this point in the argument, it should come as no surprise that we think that neither the equality model nor the elite-driven model fully captures the complex role the parties actually play or should play in our political system. Each of these models embodies only a half-truth, both empirically and normatively. Parties do act like firms when they sell their product in the democratic arena, just as the elite-driven model suggests. But they are also democratic arenas unto themselves, sites where individuals and groups engage in intraparty contestation that is itself an important form of political participation. That is why the equality model has real pull. With apologies to Schumpeter, American political parties are not solely elite institutions selling their brand to a passive public. They are also sites of democratic mobilization and engagement.

This engagement is an important, even essential, feature of our democratic order. It would be a thin sort of democracy indeed if the only moment when ordinary people engaged with politics were the general election, with the table already set and the menu already chosen. It is largely through activism *within* parties, be it primaries or campaigns or GOTV or small donations, that ordinary people exercise their most significant role in the political process.¹⁰¹

What the equality model misses is that this intraparty engagement and contestation takes place not just at the base of the party pyramid but *at every level*. Many people engage with the party only by voting in elections. While they may not be deeply connected to the party, each person gets a tiny say about its direction. The equality model captures this part of the story . . . and then stops. Meanwhile, the elite-driven model captures a different but just as partial story, one confined to the top of the pyramid. The party's elites do play an outsized role in steering the party. The elite-driven model explains and justifies their influence, but little else.

Neither of these models captures the full story of intraparty contestation. And both models have something of a blind spot for the role of the party faithful, who serve as a crucial bridge between the electorate and the elite. Both descriptively and normatively, these activists, volunteers, organizers, and small donors are "constituents" of the party in a deep sense: they constitute its active, committed membership and thus have a real stake in the party and its future. However, unlike the "constituents" protected by the *McCutcheon* decision, their form of influence does not involve large quantities of cash.

The party faithful play a distinctive role in our party system. They help parties function both as players in the democratic arena and as internally democratic arenas in their own right. The party faithful are the backbone of the party; they generate much of its energy and carry out

¹⁰¹ For an overview and typology, see Sidney Verba and Norman Nie, *Participation in America: Political Democracy and Social Equality* (Chicago 1972).

much of its ground game.¹⁰² They are everyday voters who have chosen to invest their energies in the parties. As a result, they have one foot in each world. They differ from ordinary voters in ways that help ensure the parties function coherently as players in the democratic arena. Their enthusiasm and strong ideological attachment pushes the party to offer a clear choice, not an echo.¹⁰³ They discipline the party and block elites from abandoning the core commitments of the people whose attachment to the party is strongest.¹⁰⁴ In this way, they make the party more accountable to its constituents. At the same time, however, in crucial ways the party faithful are more like ordinary voters than party elites. Their sheer numbers ensure that the party is more participatory and at least somewhat more broadly representative than the elite-driven model. With one foot in each world, they are uniquely positioned to convey some the concerns of ordinary voters to party leaders and campaign operatives. And they are more likely to be heard because they speak from inside the campaign, not outside of it.¹⁰⁵ Ultimately, the party faithful keep alive forms of democratic participation that have intrinsic value in a democratic society: They attend rallies, hold signs at conventions, show up at caucuses, hold fundraisers, and knock on doors, all of which makes for a more robust, active, and contested democratic sphere within and among the parties. Such forms of participation also have instrumental value, to the extent that they nudge the parties in the directions that the parties' active members desire.

Any account of who steers a political party must, as a descriptive matter, include some role for the party faithful. As a normative matter, any account of who *ought* to steer the party should give the party faithful a substantial role. As Kate Andrias and others have shown,¹⁰⁶ the status of the party faithful within the party has eroded considerably in recent decades, a trend that we believe ought to concern small-d democrats (and not only those who see intrinsic value in this form of political participation).

If parties were composed solely of the top and bottom of the pyramid—the elites and the electorate, with no role for the party faithful in between—much would be lost. If not for the higher level of engagement and deliberation among the party faithful, ordinary voters would be in even greater danger of manipulation by party elites, just as consumers are sometimes subject to manipulation by firms and their advertising. Strong ideological polarization gives elites too free a hand because ordinary voters are unlikely to exercise their exit option and switch to the other party, no matter what the elites do.¹⁰⁷ As a result, it is up to the party faithful to check the

¹⁰² Compare with Cohen, Karol, Noel, and Zaller, *The Party Decides* at 29 (cited in note 46) (noting that the parties “are, and may long have been powered by large numbers of policy-oriented individuals”).

¹⁰³ We allude here to the title of Phyllis Schlafly's 1964 right-wing jeremiad against the moderate Republican establishment then in control of the national party. Phyllis Schlafly, *A Choice, Not an Echo* (Pere Marquette 1964). Subsequent election outcomes suggest that Schlafly spoke for a substantial faction of the Republican party faithful.

¹⁰⁴ See Paul Allen Beck and Frank J. Sorauf, *Party Politics in America* 106 (Harper 1992) (noting high-intensity volunteers' “interactions and relationships, the contributions they make to the organization, and the price they exact for their contributions”).

¹⁰⁵ See id. (noting that the “staff of national and state offices share many of the attributes of volunteers”).

¹⁰⁶ Andrias, *Hollowed-Out Democracy* (cited in note 87).

¹⁰⁷ The party faithful can, of course, stay home—a limited form of exit that remains open even when one's choice of party is extremely settled. In extreme cases, activists can refuse even to cast a ballot out of disappointment with their side's candidate, or can vote for a protest candidate. But like so much else, these limited forms of exit become less viable with the parties highly polarized. If even the disappointing candidate from your party is far better, from your perspective, than the candidate of the other party, then it begins to seem self-destructive to exercise these forms of exit.

elites on behalf of a somewhat broader and more democratic constituency. In this way, the party faithful help solve a conundrum in politics.¹⁰⁸ Ordinary voters cannot directly monitor their representatives. So how does the principal control the agent? We often cast the political parties in this role because they enforce party discipline and punish defectors.¹⁰⁹ But *quis custodiet ipsos custodes*? Who will guard the guardians? Who will ensure that the parties do right by the voters?¹¹⁰ One answer is the party faithful.

All this means we need a different model of the party, a hybrid approach that takes into account the party's multilayered role in our politics. The party speaks in part for its ordinary voters, in part for its elites, and in part for the party faithful who stand in between. We call this model the *pluralist model*. We use the term not to refer to multiparty democracy, but rather to evoke the competition and cajoling, the disagreeing and the deliberating, the buttonholing and bickering that takes place—and should continue to take place—within the party itself.

If you view the parties through a pluralist lens, it quickly becomes clear that one of the signal strengths of the modern political party is that it has many points of entry. The structure of modern American political parties is highly complex, in part because of the decentralized structure of American elections. Because of this decentralization, the official party leadership must answer to a variety of constituencies. Moreover, the official party leadership has reasons to listen not only to large donors and party elites, but also to the party faithful. Large donors bring with them large quantities of money, whose value is never underestimated in party circles. But the party faithful bring energy and time and attention—the people standing behind the candidates at rallies, the people who drive voters to the polls, the voters in low-turnout primaries and caucuses. Just as cold, hard cash matters to campaigns, so do warm bodies. When the party faithful enter into the campaign process, they become part of the diffuse network that helps steer the party. It is important to avoid romanticizing just how much influence the party faithful have today. In today's world of candidate-driven, television-based campaigning, party elites have primacy. But even so, the official party has multiple points of entry for the party faithful. This makes the party writ large more open than it would otherwise be.

The pluralist model suggests that every rung in the pyramid—the ordinary voters, the elites, and the party faithful in between—should have roles in steering the party. To make this argument more concrete, consider how the state of Texas chooses presidential nominees. In 2008, Texans endured much ridicule for their “Rube Goldberg-esque” system, which employs *both* a primary and a caucus to select delegates.¹¹¹ From the point of view of the pluralist model, however, the Texas approach makes some sense. The primary creates an opportunity for participation by the mass public. It is the most participatory and representative way to select a candidate. A caucus, by contrast, gives voice to the party's core constituents—the party faithful, the ones who know enough and care enough to show up. These core constituents are likely to be

¹⁰⁸ This discussion is adapted from Gerken, *Boden Lecture* at 922 (cited in note 7). Thanks to Ana Muñoz for a comment in class that prompted at least one of us to think harder about the role of the party faithful.

¹⁰⁹ See, for example, John Aldrich, *Why Parties: The Origins and Transformation of American Politics* 1–26 (Chicago 1995).

¹¹⁰ For an overview of the literature and an astute take on the question, see Samuel Issacharoff and Daniel Ortiz, *Governing Through Intermediaries*, 85 Va L Rev 1627 (1999).

¹¹¹ Martin Frost, *Bigger—And More Confusing—in Texas*, Politico (Feb 18, 2008), online at <http://www.politico.com/news/stories/0208/8576.html> (visited Dec 9, 2014).

more deliberative and less easily manipulated than the party-in-the-electorate. A well-functioning party should listen to both.

The party writ large is a complex, diffuse creature. This is why Bob Bauer rightly described the politician's job as "political tradecraft." Politicians, Bauer writes, are always "balancing political self-interest against representational responsibility, looking for a 'path' through the demands of conflicting constituencies, weighing short-term costs against longer-term gains and vice versa."¹¹² The official parties, with their layered structure and multiple nodes of influence, are inevitably messy and unruly. They force politicians to balance many constituencies and concerns at once.

The shadow parties are different. There is a lot less to balance: the groups are structured so that they answer ultimately to their funders. That is why they provide such an efficient mechanism for funders to exercise influence. But that efficiency comes at a price—the loss of the multiple nodes of influence offered by the messier and more complex structure of the official party. Despite the changes of recent years, the official parties are still relatively open to, even welcoming of, the party faithful. The shadow parties are closed to them.

It's possible this could change. You might think that the role of everyday voters will be erased entirely as bytes on the Web become more important than boots on the ground. Even as Facebook and phone calls and electronic "touches" displace the door knocking of the past, however, regular people still have a role to play, as was made evident in the Obama campaign's impressive use of its army of young volunteers. Peer-to-peer GOTV methods turn out to be remarkably effective.

In light of this fact, you might think that things will shift in a quite different direction. As long as activists are needed for GOTV efforts, perhaps the shadow parties will discover they need the party faithful, just as the official parties do. On this view, a new equilibrium will emerge, with the party faithful influencing the shadow parties of the future just as they influence the official parties of today.¹¹³ For instance, some shadow party groups have begun to recruit activists for get-out-the-vote efforts,¹¹⁴—strong evidence that engaged party members will continue to play a role in campaigns and will not be displaced by television ads and other technologies.

As the shadow party system develops, these groups will certainly pay some attention to the views of these volunteers, lest they lose their allegiance to the cause. But there are limits on how far this can go. Even if the party faithful had meaningful exit options—and they don't¹¹⁵—the structural differences between the official parties and the shadow parties will have out. In the shadow parties, activists will be people to recruit, perhaps manipulate and, if necessary, jettison. That's because they are not the shadow parties' real constituents. The internal structure of the

¹¹² Bob Bauer, *Politicians: The Good, The Bad, and The Corrupt—and their Different "Constituencies"*, More Soft Money Hard Law Blog (Jul 31, 2014), online at <http://www.moresoftmoneyhardlaw.com/2014/07/politicians-good-bad-corrupt-different-constituencies/> (visited Dec 9, 2014).

¹¹³ Thanks to Guy Charles for pressing us on this point.

¹¹⁴ Rutenberg, *Billionaire Oligarchs Are Becoming Their Own Political Parties* (cited in note 45) (suggesting that Americans for Prosperity has a "volunteer base [that] now numbers in the tens of thousands").

¹¹⁵ For the reasons discussed in note 107.

shadow parties is not democratic; they do not serve as democratic arenas in the same way that the official parties do. Funders alone pay the piper and call the tune, and there are precious few points of entry for anyone who lacks a massive checking account. Thus, the complex interest balancing—the “political tradecraft”—that inevitably occurs in the official parties will always be attenuated in the shadow parties. Shadow party groups may recruit activist volunteers for instrumental reasons, but there is a low ceiling on the amount of influence such “shadow-party faithful” could ever exert in a tug of war with the donors.

Our worry is that as more and more money flows from the official parties to the shadow parties, the center of gravity within the parties writ large will also shift decisively toward the shadow parties. Party elites will always have to practice “political tradecraft,” but there will be fewer constituencies to balance when they do. Candidates will look mostly to the shadow parties, and the party faithful will be hived off into the increasingly irrelevant official party (or given limited roles in shadow party groups that do not really represent them). If the official party has a role to play, it will be as a shell organization that is temporarily occupied by a candidate whose real campaign is being run by the shadow parties. The party faithful will still exist, and they will still participate in politics, but they will be farther away from the decisionmakers who really matter. As a result, they will play less and less of a role in shaping the direction of the party with each election cycle. The system as a whole will continue to drift away from the pluralist model and toward the elite-driven model. The party faithful’s already reduced role will become even more anemic.

That would be unfortunate, because we think the pluralist model has much to recommend it. It accounts for the multi-layered role of the party in our system and captures much of what is valuable about parties. After all, parties are not, as Edmund Burke once posited, simply associations of like-minded individuals united by their policy program (what today we would call an ideology).¹¹⁶ While this ancient account seems more salient as our politics becomes ever more polarized, it still misses the plethora of players in this game: the party leaders and elites, their major funders and backers, the officeholders who shape the policy program, and the activists who drive the ground game. At the same time, parties are also not mere coalitions of elected officials seeking to build and maintain power by appealing to the mass public. John Aldrich’s influential model of political parties has that starting point—he puts politicians and office-seekers in the driver’s seat, conceptualizing the party as fundamentally “the ambitious politicians’ creation.”¹¹⁷ That is part of what parties are, to be sure, but only part.

Newer models of the political party conceptualize it as a looser coalition, with activists, donors, and interest groups playing various roles, but with party elites in the driver’s seat.¹¹⁸ Over the decades, some accounts have put more emphasis on the role of local parties in constituting the national parties.¹¹⁹ Others have emphasized the role of patronage machines.¹²⁰

¹¹⁶ Edmund Burke, *Reflections on the Revolution in France* (J. Dodsley 1790).

¹¹⁷ John H. Aldrich, *Why Parties: A Second Look* 5 (Chicago 2011). Some of Aldrich’s precursors even imagine politicians without substantive policy preferences of their own, seeking marketing niches to sell the voters what they want to buy. See, for example, Anthony Downs, *An Economic Theory of Democracy* (Harper 1957).

¹¹⁸ See, for example, Cohen, Karol, Noel, and Zaller, *The Party Decides* (cited in note 46); Bawn, Cohen, Karol, Masket, Noel, and Zaller, *A Theory of Political Parties* (cited note 46).

¹¹⁹ David Mayhew, *Placing Parties in American Politics: Organization, Electoral Settings, and Government Activity in the Twentieth Century* (Princeton 1986).

Each of these models begins the story in a different place, and each captures an important dimension of what the party is. But the very multiplicity of these models—the fact that it is possible to conceptualize political parties from such divergent starting points—strongly suggests that political parties are plural in character.¹²¹ They are organizations, and they are networks. They are vehicles in pluralist competition, and they are sites of pluralist competition. They are arenas of political participation, and they are brands to which many ordinary people feel intense loyalty.

In the political order that is rapidly developing, the party brands are no longer the sole property of the official parties. Instead, they are up for grabs in each election cycle, as different entities attempt to capture the party writ large. As the center of gravity shifts from the official parties and campaigns to their shadow counterparts, the Democratic or Republican mantle is there to be claimed by anyone who can convince a partisan group of voters that she is the best product for the party brand. There is a sense in which this new order is very open and small-d democratic: you need not rise up through the party ranks or please a motley assortment of local bosses in order to become either party's standard-bearer. But in a different sense, the new order is hardly democratic at all. The increasing strength of the shadow parties makes it far easier to convert economic power to political power. This rapidly developing system is open and pluralistic—for those with lots of money to spend.

From the point of view of the party faithful, the system that is emerging is not pluralistic at all. The real problem with shadow parties and shadow campaigns is not that they will reliably tilt in one direction or another, be it extreme or moderate. The problem is that the emerging order will make our politics look more like the broadcast television business—a system of professional producers and passive consumers, rather than one that features widespread democratic engagement and pluralism. A system built on the shadow parties is one with starring roles for those at the top of the pyramid and those at the bottom: the top because someone needs to fund the shadow parties, and the bottom because politicians still need votes in the end. But the role of those who stand between—the party faithful—is much less clear. We may soon find ourselves living in a world in which the main “constituents” of any party are indeed the ones Chief Justice Roberts identified in *McCutcheon*: the donors at the top, competing to secure the assent of the voters at the bottom. That is an elite-driven, Schumpeterian world, not a pluralist one.

CONCLUSION

For the reasons we have discussed, *McCutcheon* is not much of a solution to what ails American politics. The decision will make parties and candidates marginally more responsive to extra-large donors like Shaun McCutcheon—an effect we expect to be modest because donors in that tier are not terribly numerous. *McCutcheon* does not introduce a sufficient shock to the

¹²⁰ See, for example, Martin Shefter, *Political Parties and the State: The American Historical Experience* (Princeton 1994).

¹²¹ It is by now a trope in the field that the parties are complex and exceedingly difficult to pin down precisely. Samuel J. Eldersveld, *Political Parties in American Society* 407 (Basic Books 1982) (“[P]olitical parties are complex institutions and processes, and as such they are difficult to understand and evaluate.”), quoted in Aldrich, *Why Parties* at 16 (cited in note 117); Charles Perrow, *Complex Organizations: A Critical Essay* 14 (Scott, Foresman 1972) (“Party organizational analysis is . . . one of the oldest in parties’ research and one of the most frustrating.”).

system to change it, and its effects cannot override the fast-moving shift toward shadow parties and shadow campaigns.

That is unfortunate, because this larger shift ought to be a source of concern. What were once relatively porous, diffusely organized official parties are being displaced by hierarchical, closed shadow parties beholden almost entirely to donors. If you have faith in the party faithful, if you are a small-d democrat, if you worry about flattening the party structure and inhibiting pluralist politics, this is a depressing shift indeed. It means that the story of the shadow parties is much more complex than the simplistic tale everyone tells about wealthy elite gaining even more political power than they once had. This isn't only a story about the rich getting richer. It's also a story about the parties being hollowed out and thereby losing their ability to serve as robust democratic arenas. It's a story about the party faithful, already in decline, being left with a depressingly anemic role in American political life.

Let us close with a final cautionary note about future reform. Regulating the shadow parties is, of course, the most obvious strategy for strengthening the official party and thus shoring up the influence of the party faithful. However, unless and until the Supreme Court changes its views about the relationship between independence and corruption, that option is a constitutional nonstarter.

It is possible that we could instead continue down the deregulatory path *McCutcheon* marks out. We think shadow parties are here to stay because of the important benefits they offer big donors. But the more we deregulate direct contributions to parties and candidates, the stronger the hand of the official parties will be. Complete deregulation—unlimited donations to candidates and parties, coupled with transparency—was once unthinkable. But now some see it as a potential cure to what ails our democracy.¹²²

In this article, we identify an important cost associated with deregulation, one that has been utterly neglected by commentators and academics alike. This approach would save the parties *only by remaking them in the image of the shadow parties*. The official parties, as reconstituted under a deregulated regime, would look very different from the more pluralist model of the past. Like the shadow parties today, they would be beholden to few, not many. The regulations currently imposed on the official parties are a hodgepodge—a system that no one could possibly have intended given its many perverse effects. But you can say one thing for the existing system: it has ensured that the official party serves many masters. To be sure, in this system, money matters a lot. But other modes of influence remain.

Small-d democrats ought to worry about the ways in which this unusual solution to a partially deregulated regime—still more deregulation—risks further flattening what was once a complex and pluralistic system. In thinking about our alternatives, we should worry about cutting out the party faithful and creating a system that features big donors and a mass voting public but nobody in-between.

¹²² See, for example, Ron Faucheux, *The Only Way to Fix Campaign-Finance Regulation Is to Destroy It*, The Atlantic (Jul 30, 2012), online at <http://www.theatlantic.com/politics/archive/2012/07/the-only-way-to-fix-campaign-finance-regulation-is-to-destroy-it/260426/> (visited Dec 9, 2014).

That kind of politics may be well adapted to a political world that is still dominated by broadcast media. But we think such broadcast-based politics is a hollowed-out kind of politics, missing some of the energy and engagement that makes politics worthwhile. Instead of trying to strengthen “the parties”—which, for the reasons discussed in Part II, are actually quite strong—we ought to focus on a different problem. The question is not how to make the parties stronger, nor is it how to equalize influence between outsiders and insiders. The question is how to preserve the pluralist remains of the party system and ensure a robust role for the party faithful in our strange new political world.