



Comments of the Campaign Finance Institute To the Federal Election Commission

Notice of Proposed Rulemaking on Aggregate Biennial Contribution Limits And Other Subjects

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These comments are in response to the Federal Election Commission's notice of proposed rulemaking published in the *Federal Register* October 17. I would also appreciate a chance to appear at the commission's public hearings on February 11.

For the record, the Campaign Finance Institute is a specialized, non-partisan research institute committed to the idea that the policy-making process works better when it is based on objective, fact-based research. CFI's board is made up of people from all over the political spectrum, with a heavy dose of scholars mixed in with former elected officials and other practitioners. For my part, in addition to being CFI's co-founder and executive director, I am a professor of political science at the University at Albany (SUNY) who has written professionally about campaign finance for decades.

The notice to which these comments respond focuses primarily on Aggregate Biennial Contribution Limits after the U.S. Supreme Court's decision in *McCutcheon v. FEC*. Many of those who have written about the Court's decision in this case have made assumptions about the political parties with which I disagree. I have expressed those disagreements in two written works attached to these comments. However, I do not intend to rehearse those issues in these comments because they do not have immediate rulemaking implications.

Instead, I want to express my gratitude to the commission for the final sentence in the Notice that appeared in the Federal Register. That sentence asked: "[W]hat regulatory changes or other steps should the Commission take to further improve its collection and presentation of campaign finance data?" The remainder of these comments responds to this question.

Transparency policy and implementation have been among the highest priorities for CFI from its beginning. CFI's first blue ribbon task force was on disclosure. It issued two major reports in the 2002 and 2003. CFI also produced numerous reports on the need for Senate electronic disclosure, submitted comments to the FEC in 2006 on disbursement reporting, and testified on the FEC's website initiative in 2009. Today's comments draw from these earlier works, all of which are available on CFI's website.

The FEC's website has become much better over the years, but it still has a long way to go. We have had the pleasure of speaking to the FEC's and GSA's staff about your latest initiative. What we have heard sounds good, but we know from experience that the best website redesigns build on a direct and detailed engagement from officials at the very top. The purpose of my comments is to persuade you as commissioners to buy into this proposition and act on it.

To grasp the FEC website's main problems, it is important to step back from the details to look at some larger questions about purposes. The FEC has two principal functions. One is to

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implement the statutes that regulate the spending and raising of money. The other is to serve as the government's prime vehicle for campaign finance disclosure. Before launching into a website redesign, I urge the FEC to consider the purpose of disclosure. One key goal, expressed in *Buckley v. Valeo*, is to bring information to the public so individuals may decide whether and how to act on that information, especially when they vote. To accomplish this, the public needs useful information presented in an intelligible format in a timely way.

From this objective flows the following proposition: *the primary beneficiary of disclosure is and ought to be the general public*. Unfortunately, almost nothing about the FEC's website seems to be designed with the general public in mind. Until the FEC put its map on the disclosure portal, it did almost nothing at all to educate the general public directly. The last redesign seemed mostly to serve the needs of what insiders like to speak of as stakeholders. Stakeholders are the squeaky wheels who already have the commission's attention – lawyers, public officials, political committees, the media, public interest groups, and research institutes like CFI. They are important, but who speaks for the public? To reach the public, the FEC seems to rely almost entirely on intermediaries. This need not be and it should not be. The web makes a more direct route possible. I urge you to grasp the opportunity. With the current economics of journalism, it is foolhardy to rely on local reporters to cover politics well. It is equally important not to rely on the nonprofit sector. We nonprofits put out some of what we do only because the FEC does not. If you do your job better, there will be more than enough left for us.

To explain my claim that the public seems not to be represented, I urge you to spend a few minutes on your home page. Almost everything on the home page is defined in terms of operating divisions at the FEC – enforcement, disclosure, the press, and so forth. A website that looked outward toward users rather than inward toward its own employees would be structured around content, not agency divisions. The need to break through this operating structure is why leadership has to come from the very top. Nothing now has a functional definition. For example, if you want to learn what the FEC has to tell us about the political parties you have to look separately at law, regulation, disclosure, and so forth and so on. If you want to see graphs or visual representations about political party finance, you have to find and then go to the section called “graphic data presentations” and then browse to see whether there is one on the parties. None of the material about parties is properly indexed and very little shows up through a subject matter search of the search engine. If you are not an expert you would not have a clue where to look for any of it. In fact, I *am* an expert and I often do not have a clue.

Another small example will make the point in microcosm: the FEC maintains a valuable set of historical reports summarizing the data for the receipts and disbursements of candidates, political parties and political action committees. These reports begin in 1976 and continue through the most current election. Where does a user now find that material? It is buried under the link for the press office, and then under the sub-link called “Statistics”. Why is it there? It is there because the press office happens to produce the report. Who outside the FEC is likely to know that fact? The correct answer is “nobody”. If you do not already know these reports exist, there is no way to find them.

There is one place the FEC has tried in recent years to make a gesture in the general public's direction. The disclosure portal presents a series of slides that flash by much too quickly. One of them is a map. Clicking on a state will get you to one way of finding summary data. But then what? If you want House races, you next see a map with district lines. That is alright if you live in Delaware or Wyoming, but I invite you to see what the map looks like for Illinois, New York or

California. It is literally impossible to see where the lines are. But suppose you could see them. Does the average citizen know his or her congressional district number? No. So, what comes next? The citizen has to go somewhere else to look up the number. That is not likely to happen. The structure is designed to discourage use instead of encouraging it. Why can't the FEC begin where the normal voter does? Why can't it simply ask you put in an address and then show you a list of the House and Senate candidate candidates running to represent that address? The technology is readily available and used by many state boards of elections.

When you do know the district number, the FEC's map transfers you to a useful page of summary information about candidates. But we all know that candidates are not the only spenders in modern races. If you want to find out about independent expenditures in the district you have to back up several steps to a different map, where some more clicks will drill down into far too many details. At no point, however, can you get to see all spending in the district together. If you want that, forget about using the using the FEC. You'll need to go to Open Secrets or CFI.

Stepping away from data, let's suppose a citizen wants to know about the law. The best lay language summaries are in the various guides written for candidates, parties and PACs. Once again, however, you almost have to be a candidate, party or PAC to look for them. They are buried many layers down and the documents' titles seem addressed specifically to the stakeholders. But much of the information is the same across the various booklets. This should be distilled and made available to the general public in a well indexed FAQ in HTML format, accessible from the home page.

Then we get to the more technical legal material – the laws, regulations, court cases, advisory opinions, and MURs – both the ones in the past and those still pending. For each of these categories, you have to look in a separate section of the website. This is a format that can only be loved by a person who gets to bill deep-pockets clients by the hour for doing research. For anyone else it is an exercise in frustration. This need not be. Almost every one of these legal documents refers to one or another section of the U.S. Code. There is no reason why a database could not be constructed to cross reference all of the documents by code section. The same coding could also be put on the plain-language FAQ or guides that I described earlier. The code numbers could then be described by their own plain-language words. These words could be put into a hierarchy or table of contents, the user could click on the word, and then in one step, the user could have access to all of the many layers of documents that pertain to the same section of law. The only thing preventing this kind of heightened access is staff time. And because this will take some staff time, it will happen only if the commission imbues the job with the sense of mission and priority that the public deserves.

I could go on with more details and would be happy to do so with staff. But to do that in these comments would bury the main point. The key point is that a website redesign is not just about aesthetics. It is not just about bells and whistles or moving pictures or graphics. Redesigning your website is about rethinking the core of your communications. What exactly are you trying to communicate, to whom, and why? It is about thinking through the core of your mission. We all know there is disagreement within the commission about regulatory policy. But this is one place there ought to be a consensus. The key purpose of disclosure is to inform citizens. All of the rest of us stakeholders come second. The stakeholders already know how to find what they need. Only you can put citizens at the top, where they should be.

[ATTACHMENTS APPENDED]

McCUTCHEON COULD LEAD TO NO LIMITS FOR POLITICAL PARTIES—WITH WHAT IMPLICATIONS FOR PARTIES AND INTEREST GROUPS?

MICHAEL J. MALBIN*

INTRODUCTION

This Article explores some of the likely interplay between political parties and nonparty organizations after the Supreme Court's decision in *McCutcheon v. Federal Election Commission*.¹ It argues, first, that even though the holding in *McCutcheon* may have been about aggregate contribution limits, the reasoning directly challenges the rationale for base contribution limits. Assuming there is no change in the reasoning as the precedent is applied, politics in the future is likely to see the parties with few (if any) restrictions on the size of the contributions they may accept. This would bring the law more or less back to the days of unlimited soft money before the Bipartisan Campaign Reform Act (BCRA, otherwise known as McCain-Feingold).

Those who see McCain-Feingold as a major source of party decline, and who also see parties and nonparty organizations as engaged in a zero-sum power game, will see this turn of events as likely to strengthen the parties' hands. This Article questions the assumptions on which this stylized expectation is based. First, with respect to McCain-Feingold allegedly making the parties weaker, this Article argues that even though the national parties face challenges, McCain-Feingold is not at the heart of their current problems. With respect to seeing parties and nonparty organizations in a zero-sum game, this Article argues that both the nature of parties and interest groups have been changing in ways that have made them in some ways more interdependent and in others more conflictual. The concept of party networks is promising in pointing to the interdependence side of the equation, but it is still too limited and undifferentiated to encapsulate all that has been happening. In this

* Copyright © 2014 by Michael J. Malbin, Co-Founder and Executive Director of the Campaign Finance Institute; Professor of Political Science, University at Albany (SUNY).

¹ 134 S. Ct. 1434 (2014).

new, more nationalized, and more polarized environment, political parties are not simply “weaker” or “stronger.” They are different. The article concludes by speculating on what this might mean for party and interest-group politics in the future.

I

THE *MCCUTCHEON* DECISION

We begin with Shaun McCutcheon’s challenge to the Federal Election Campaign Act (FECA). As amended by McCain-Feingold, FECA allowed Mr. McCutcheon, in the 2012 election cycle, to give an inflation-adjusted amount of \$2500 per election to a candidate, \$30,800 per year to a national political party committee, \$10,000 per year to a state party committee, and \$5000 to a multi-candidate political action committee (or PAC).² In addition to these “base limits,” McCutcheon had to hold his total giving to federal committees within aggregates that were also adjusted for inflation. In 2011–2012, he could give no more than \$46,200 to candidates and another \$70,800 to party and nonparty political committees, for a total of \$117,000. All of the \$70,800 could go to national party committees or it could be divided between national parties, state parties, and PACs.³

McCutcheon challenged all of the aggregate limits and sub-limits. (He did not challenge the base limits.)⁴ On April 2, 2014, the Supreme Court agreed that the aggregate limits were unconstitutional.⁵ As is often the case, the Court’s reasoning was potentially more significant than the holding itself.

The court’s reasoning began from the landmark case of *Buckley v. Valeo*.⁶ The *Buckley* Court had held contribution limits subject to a “rigorous standard of review.”⁷ Under this standard, “[e]ven a significant interference with protected rights of political association may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary

² CONTRIBUTION LIMITS FOR 2011-2012, FED. ELECTION COMM’N, <http://www.fec.gov/info/contriblimits1112.pdf> (last visited Sept. 26, 2014).

³ *Id.*; see also Price Index Adjustments for Contribution and Expenditure Limits and Lobbyist Bundling Disclosure Threshold, 76 Fed. Reg. 8368–70 (Feb. 14, 2011) (publishing inflation-adjusted limits for the 2011–2012 election cycle).

⁴ *McCutcheon*, 134 S. Ct. at 1442 (“This case does not involve any challenge to the base limits, which we have previously upheld as serving the permissible objective of combatting corruption.”).

⁵ *Id.*

⁶ 424 U.S. 1 (1976).

⁷ *Buckley*, 424 U.S. at 29.

abridgment of associational freedoms.”⁸ The *Buckley* Court found such a “sufficiently important interest” in “the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates’ positions and on their actions if elected to office.”⁹ In its clearest form, the government’s interest is to prevent large contributions from being used “to secure a political *quid pro quo* from current and potential office holders”¹⁰ But “[o]f almost equal concern,” the Court said, is “the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.”¹¹

In the decades since *Buckley*, there has been sharp debate over how to interpret the “appearance of corruption” that is “inherent in a regime” of large contributions. The *Buckley* Court specifically distinguished this concern from an interest in promoting greater equality among donors.¹² Nevertheless, *Buckley* seemed also to say that the concern was not simply about selling decisions but also about the actuality *or appearance* of “real or imagined coercive *influence*” on a public official’s actions.¹³ Over the years, this writer¹⁴ (among others)¹⁵ has argued that undue “influence” can be broader than a quid-pro-quo exchange, and that a public official’s relevant actions run the full gamut from influencing agenda setting to implementation.

Whether or not corruption-related concepts should be understood this broadly in ordinary speech, a majority of the Justices in *McCutcheon* did not agree that broader definitions should be used to justify limits. Building on the majority opinion in *Citizens United v. FEC*,¹⁶ the Chief Justice’s opinion in *McCutcheon* articulated a clear and narrow understanding of the form of corruption that it saw as

⁸ *Id.* at 25 (internal quotations omitted).

⁹ *Id.* at 25–26.

¹⁰ *Id.* at 26.

¹¹ *Id.* at 27.

¹² See *Buckley*, 424 U.S. at 25–26 (describing the interest in “equaliz[ing] the relative ability of all citizens to affect the outcome of elections” as “ancillary” to the interest in “the actuality of corruption and the appearance of corruption”).

¹³ *Id.* at 25 (emphasis added).

¹⁴ Michael J. Malbin, *Rethinking the Campaign Finance Agenda*, 6 FORUM, no. 1, 2008, available at <http://www.nonprofitvote.org/documents/2011/02/rethinking-the-campaign-finance-agenda-2008-malbin.pdf>.

¹⁵ See, e.g., LYNDY W. POWELL, *THE INFLUENCE OF CAMPAIGN CONTRIBUTIONS IN STATE LEGISLATURES: THE EFFECTS OF INSTITUTIONS AND POLITICS* (2012) (arguing that factors such as legislator compensation, chamber size, and term limits affect the degree of influence donors have over legislative outcomes).

¹⁶ 558 U.S. 310 (2010).

sufficiently compelling to justify contribution limits:

[W]hile preventing corruption or its appearance is a legitimate objective, Congress may target only a specific type of corruption—“*quid pro quo*” corruption. . . . Spending large sums of money in connection with elections, but not in connection with an effort to control the exercise of an officeholder’s official duties, does not give rise to such *quid pro quo* corruption. Nor does the possibility that an individual who spends large sums may garner “influence over or access to” elected officials or political parties.¹⁷

An important implication for political parties followed one page later:

[T]here is not the same risk of *quid pro quo* corruption or its appearance when money flows through independent actors to a candidate, as when a donor contributes to a candidate directly. When an individual contributes to a candidate, a party committee, or a PAC, the individual must by law cede control over the funds. The Government admits that if the funds are subsequently re-routed to a particular candidate, such action occurs at the initial recipient’s discretion—not the donor’s. As a consequence, the chain of attribution grows longer, and any credit must be shared among the various actors along the way. For those reasons, the risk of *quid pro quo* corruption is generally applicable only to “the narrow category of money gifts that are directed, in some manner, to a candidate or officeholder.”¹⁸

It is important to notice what falls *outside* this understanding of corruption. The case for McCain-Feingold’s limits on all contributions to political parties rested in part on statements from current or former Members of Congress attesting to situations of the following kind: (1) party leaders (or their agents) raising money for the six national party committees by indicating to donors that their access to the leaders would be affected by contributions; and (2) party leaders telling other members that decisions to put items on the legislative agenda were based in part on donors’ preferences.¹⁹ Put together,

¹⁷ *McCutcheon v. FEC*, 134 S. Ct. 1434, 1450–51 (2014) (quoting *Citizens United*, 558 U.S. at 359).

¹⁸ *Id.* at 1452 (quoting *McConnell v. FEC*, 540 U.S. 93, 310 (2003) (internal citations omitted)).

¹⁹ See 147 CONG. REC. S3840–47 (daily ed. Mar. 19, 2001) (statement of Sen. Specter) (discussing the actual and perceived influence of donations on Members of Congress and the legislative agenda); 145 CONG. REC. S13229–S13234 (daily ed. Oct. 27, 1999) (statement of Sen. Feingold) (same); see also Declaration of Sen. David Boren at 2–4, *McConnell v. FEC*, 251 F. Supp. 2d 176 (2003) (No. 02-0582) (describing how donors sought and received legislative favors after making contributions), available at http://campaignlegalcenter.org/attachments/BCRA_MCCAIN_FEINGOLD/McConnell_v_FEC_District_Court/694.pdf; Declaration of John Glenn at 2, *McConnell*, 251 F. Supp. 2d

these actions look close to a quid pro quo, with the party leaders being the link connecting the donors' money and their access to the actions of legislators. However, the leaders and their agents in these examples were raising money not for themselves but for a party committee over which they shared control. They were using the money not for their own campaigns but to help the party win a majority. Thus, the chain of actions fails to meet the Chief Justice's definition of quid-pro-quo corruption in the quotation for two reasons, either one of which would be sufficient to doom the case: (1) The money does not go directly to the legislator whose behavior is at issue, and (2) the donor's reason for giving is to influence the agenda rather than to purchase a specific decision.

But if these reasons are sufficient to overturn aggregate contribution limits for the parties, then it is hard to imagine that the constitutional challenges will stop there. A case has already been filed by the Republican National Committee to permit unlimited contributions into independent-expenditure Super PACs run by the national party committees.²⁰ If successful, this, too, would be a midpoint. A challenge to the base limits would surely be next. The Court could always modify its reasoning in a future case, or the makeup of the Court at some point may change. But if the Chief Justice's explanation is taken literally, it is hard to see how any contribution to a political party committee could meet the test for quid-pro-quo corruption unless it were raised by and earmarked for a specific candidate. In fact, all one would have to do to avoid a quid pro quo would be to collect money in a common pool before dispersing it. If that were the test, then the reasoning could even reach to nonparty intermediaries. It is worth noting that the quotation from the Chief Justice's opinion referred to "independent actors" and not specifically to parties.²¹

176 (2003) (No. 02-0582) (same), available at http://campaignlegalcenter.org/attachments/BCRA_MCCAIN_FEINGOLD/McConnell_v_FEC_District_Court/707.pdf; Declaration of Sen. John McCain at 3-7, *McConnell*, 251 F. Supp. 2d 176 (2003) (No. 02-0582) (same), available at http://campaignlegalcenter.org/attachments/BCRA_MCCAIN_FEINGOLD/McConnell_v_FEC_District_Court/719.pdf; Declaration of Sen. Warren Rudman at 3-5, *McConnell*, 251 F. Supp. 2d 176 (2003) (No. 02-0582) (same), available at http://campaignlegalcenter.org/attachments/BCRA_MCCAIN_FEINGOLD/McConnell_v_FEC_District_Court/723.pdf; Declaration of Paul Simon at 3-5, *McConnell*, 251 F. Supp. 2d 176 (2003) (No. 02-0582) (same), available at http://campaignlegalcenter.org/attachments/BCRA_MCCAIN_FEINGOLD/McConnell_v_FEC_District_Court/726.pdf.

²⁰ Complaint, Republican Nat'l Comm. v. FEC, No. 1:14-cv-0083 (D.D.C. May 23, 2014), available at http://fec.gov/law/litigation/rnc_rnc_complaint.pdf.

²¹ *McCutcheon*, 134 S. Ct. at 1452.

II

THE INTERPLAY BETWEEN PARTIES AND INTEREST GROUPS

If these predictions about future court decisions come to pass, it would mean that parties in the future may be able to accept unlimited contributions as they could in the days of soft money before McCain-Feingold. Predicting the likely consequences of *McCutcheon* therefore turns in part on one's assessment of McCain-Feingold. Many of the predictions so far have been based on one or both of the following assumptions: (1) McCain-Feingold has been responsible for a significant weakening of the political parties,²² and (2) campaign finance is a zero-sum game involving a tradeoff in political power between interest groups and political parties: When interest-group power goes up, party power goes down—and vice-versa.²³ I question the first of these assumptions and will argue that the second is far too simple to explain the contemporary relationships among interest groups and party organizations.

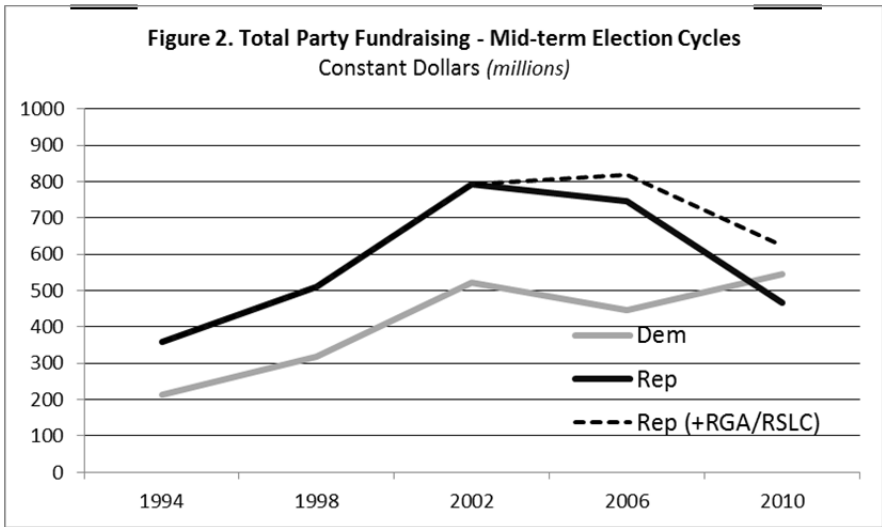
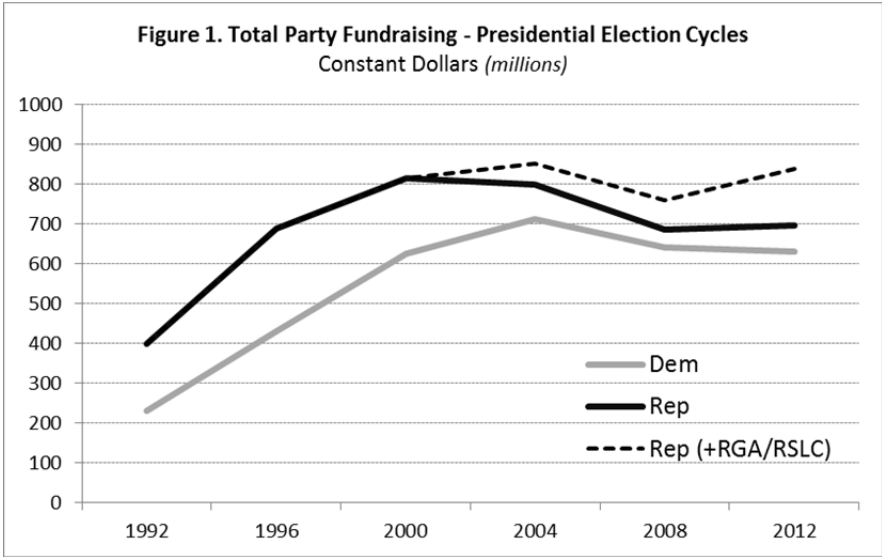
A. Political Parties Between McCain-Feingold and McCutcheon

The notion that the parties suffered a “collapse due to McCain-Feingold”²⁴ is not supported by the facts. Figures 1 and 2 show the receipts of the six national party committees for the election cycles of 1992–2012. All amounts in the tables are calculated in constant dollars, and midterm elections are separated from presidential cycles to allow for more meaningful comparisons. The three Democratic committees (gray) are separate from the Republicans (black). The Republicans' solid black line represents receipts for the three major national party committees. However, the Republicans are also shown with a dotted line above the solid one for the years after 2002. This is because the Republican Governors Association and Republican State Leadership Committee were formally part of the Republican

²² See, e.g., Robert K. Kelner, *The Practical Consequences of McCutcheon*, 127 HARV. L. REV. F. 380 (June 20, 2014), <http://harvardlawreview.org/2014/06/the-practical-consequences-of-mccutcheon> (discussing the “political parties’ collapse due to McCain-Feingold”); Jonathan S. Berkon & Mark E. Elias, *After McCutcheon*, 127 HARV. L. REV. F. 383, 374 (2014), <http://harvardlawreview.org/2014/06/after-mccutcheon> (substantially sharing this perspective).

²³ This is expressed by both supporters and opponents of McCain-Feingold's soft-money restrictions. For example, political scientist Lee Drutman of the Sunlight Foundation, a supporter of aggregate limits, wrote that the *McCutcheon* decision “will almost certainly make parties and party leaders more important and super PACs less important.” Lee Drutman, *What the McCutcheon Decision Means*, WASH. POST MONKEY CAGE (Apr. 2, 2014), <http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/04/02/what-the-mccutcheon-decision-means/>.

²⁴ Kelner, *supra*, note 22.



National Committee through 2002, after which McCain-Feingold made it advantageous to separate the state committees. The two state committees' receipts are included within the RNC's in the solid line through 2002. The dotted lines add these two committees to the national ones for comparative purposes. There is no similar line shown for the Democrats because the Democratic Governors Association was separate before McCain-Feingold.²⁵

²⁵ The receipts for the six national party committees are available online. HARD AND

The figures show first that it is misleading to begin with 2000–2002. Because both parties' receipts in those years were far above any historical precedent, it is wrong to present them as if they reflect the normal role of the parties in recent history. It is equally misleading to paper over the differences between the parties. Even starting from 2000–2002, the Democratic high point was two years *after* McCain-Feingold. The party has held its own since. Republicans tailed off slightly in presidential years after 2002, but the gap is made up if RGA and RSLC money is added back. The big drop for Republican committees was in midterm elections. Even here (and correcting for the RGA and RSLC) the drop was between 2006 and 2010 (after McCain-Feingold), not between 2002 and 2006. Moreover, a substantial part of the Republican decline was from a drop in receipts from small donors (\$200 or less).²⁶ Based on this evidence, it is simply not possible to say that McCain-Feingold caused a decline in the national parties' income.

Critics of McCain-Feingold may have a stronger case with respect to the state parties. The Campaign Finance Institute analyzed the National Institute on Money in State Politics's data for state parties' receipts for 1999–2002 (the four years before McCain-Feingold) and 2009–2012 (the most recent four years for which data are available). State party receipts declined by more than one-third in constant dollars over the decade.²⁷ This is not the place for a detailed analysis, but McCain-Feingold may be one reason for the decline.²⁸

SOFT MONEY RAISED BY NATIONAL PARTY COMMITTEES, 1992-2012, CAMPAIGN FIN. INST., http://www.cfinst.org/pdf/vital/VitalStats_t13.pdf (last visited Sept. 20, 2014). Figures for the RGA are also available online. CENTER FOR RESPONSIVE POLITICS, REPUBLICAN GOVERNORS ASS'N, <http://www.opensecrets.org/527s/527cmtedetail.php?ein=113655877> (last visited Sept. 20, 2014). Figures for the RSLC are available online as well. CENTER FOR RESPONSIVE POLITICS, REPUBLICAN STATE LEADERSHIP COMM., <http://www.opensecrets.org/527s/527cmtedetail.php?ein=050532524> (last visited Sept. 20, 2014).

²⁶ NATIONAL PARTY COMMITTEES' RECEIPTS, 1999-2012, CAMPAIGN FIN. INST., http://www.cfinst.org/pdf/historical/Donors_Party_National_2000-2012.pdf (last visited Sept. 20, 2014); HOUSE PARTY COMMITTEES' RECEIPTS, 1999-2012, CAMPAIGN FIN. INST., http://www.cfinst.org/pdf/historical/Donors_Party_House_2000-2012.pdf (last visited Sept. 20, 2014); SENATE PARTY COMMITTEES' RECEIPTS, 1999-2012, CAMPAIGN FIN. INST., http://www.cfinst.org/pdf/historical/Donors_Party_Senate_2000-2012.pdf (last visited Sept. 20, 2014).

²⁷ Calculations are based on political party receipts reported for each state in each year, 1999–2012. NATIONAL OVERVIEW, NAT'L INST. ON MONEY IN STATE POL., <http://www.followthemoney.org/database/nationalview.phtml?l=0&f=P&y=2000&abbr=0> (last visited Sept. 19, 2014); STATE POLITICAL PARTY RECEIPTS 1999-2002 v. 2009-2012, CAMPAIGN FIN. INST., <http://cfinst.org/State/TablesCharts/StatePartyReceipts.aspx> (last visited Sept. 19, 2014).

²⁸ For evidence to the contrary, see Thomas E. Mann & Anthony Corrado, *Party*

Specifically, McCain-Feingold required state parties to adhere to federal contribution limits for any money raised for registration and get-out-the-vote activities for a substantial period during election years.²⁹ A person interested in changing the law to help the parties while keeping the base contribution limits might consider freeing the state parties to be governed by state laws for these activities.

One way to help the national parties within the current framework is also worth mentioning. Several co-authors and I have recommended that parties be able to make unlimited coordinated expenditures in support of their candidates from money that comes from donors who give smaller amounts.³⁰ However, both this and the state-party recommendation assume base limits. As noted earlier, such base limits themselves are likely to come under increasing pressure in future years.

B. *The Relationships Among Parties and Groups*

The main complaint about political party power is less about cash balances than that the parties have lost ground *relative to* nonparty organizations. The complaint has some merit. Since the *Citizens United*³¹ and *SpeechNow*³² cases in 2010, nonparty organizations have been able to raise unlimited contributions for committees that make independent expenditures. The increase in nonparty expenditures has been well documented.³³ But this does not tell us all we need to know about the interplay between party and nonparty organizations.

After *McCutcheon*, some were predicting that removing the aggregate limits meant money would flow away from Super PACs

Polarization and Campaign Finance, BROOKINGS INST. (July 15, 2014), <http://www.brookings.edu/research/papers/2014/07/15-party-polarization-campaign-finance>.

²⁹ 2 U.S.C. § 431(20)(A) (2012) (defining “federal election activity” subject to federal hard-money limits).

³⁰ ANTHONY J. CORRADO, MICHAEL J. MALBIN, THOMAS E. MANN & NORMAN J. ORNSTEIN, REFORM IN AN AGE OF NETWORKED CAMPAIGNS: HOW TO FOSTER CITIZEN PARTICIPATION THROUGH SMALL DONORS AND VOLUNTEERS 48–53 (2010), available at http://www.cfinst.org/books_reports/Reform-in-an-Age-of-Networked-Campaigns.pdf.

³¹ *Citizens United v. FEC*, 558 U.S. 310 (2010).

³² *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (holding that base contribution limits are unconstitutional as applied to pure independent-expenditure organizations).

³³ E.g., CAMPAIGN FIN. INST., NON-PARTY INDEPENDENT EXPENDITURES IN HOUSE AND SENATE ELECTIONS, 1978-2012, http://www.cfinst.org/pdf/vital/VitalStats_t14.pdf (last visited Oct. 1, 2014); CTR. FOR RESPONSIVE POL., OUTSIDE SPENDING, <http://www.opensecrets.org/outsidespending/> (last visited Oct. 1, 2014).

toward the parties.³⁴ Others went further to suggest that more money for the parties would help make members of Congress feel less threatened by polarizing factional groups and thus would help the government to function more smoothly.³⁵

Having more money would help the parties but the assumptions about tradeoffs are being painted too broadly. In a recent article on independent spending in the 2006–2010 state elections several colleagues and I divided organizations into the following sectors: business, labor, issue/ideological, party allies, party affiliates, and formal party committees.³⁶ The 2012 and 2014 federal election cycles tell us that we need to add single-candidate Super PACs to any future analysis, and that we need to subdivide the issue and ideological groups to give clearer focus to ideological factional organizations.³⁷ Within this division, the groups we called “party allies” (such as American Crossroads) would be the ones most likely to lose money if the parties could accept unlimited contributions.

But the picture for umbrella business organizations, labor unions, and issue-based organizations is more complicated. Many of these had partisan leanings in the past but also supported candidates from each major party. As issues and voters have become “sorted” and the parties more polarized,³⁸ the groups also became more partisan and more linked to each other within party networks.³⁹ Increased activity by these groups in a polarized environment did not come at the *expense* of the parties. The organizations often acted together with party surrogates through independent-spending coalitions in a manner that has been more helpful to the parties than the groups’

³⁴ See, e.g., Drutman, *supra* note 23 (making this prediction).

³⁵ Ray La Raja, *The Supreme Court Might Strike Down Overall Contribution Limits. And That's Okay.*, WASH. POST MONKEY CAGE (Oct. 9, 2013), <http://www.washingtonpost.com/blogs/monkey-cage/wp/2013/10/09/the-supreme-court-might-strike-down-overall-contribution-limits-and-thats-okay/>.

³⁶ Keith E. Hamm, Michael J. Malbin, Jaelyn J. Kettler & Brendan Glavin, *Independent Spending in State Election: Vertically Networked Political Parties Have Been the Real Story*, FORUM (forthcoming 2014), available at http://www.cfinst.org/pdf/state/Hamm-Kettler-Malbin-Glavin_State-Indep-Spdg_2006-2010_WebVersion.pdf.

³⁷ For a treatment of these factional groups in terms of functional differentiation, see ROBERT G. BOATRIGHT, *GETTING PRIMARIED: THE CHANGING POLITICS OF CONGRESSIONAL PRIMARY CHALLENGES* (2013).

³⁸ For a review of the literature on sorting and polarization, see Michael Barber & Nolan McCarty, *Causes and Consequences of Polarization*, in AMERICAN POLITICAL SCIENCE ASSOCIATION, *NEGOTIATING AGREEMENT IN POLITICS* 19–46 (Jane Mansbridge & Cathie J. Martin eds., 2013).

³⁹ For the literature on party networks, see Joseph Fishkin & Heather K. Gerken, *Two Trends that Matter for Party Politics*, 89 N.Y.U. L. REV. ONLINE 32, 36–38 (2014).

direct contributions to candidates had ever been.⁴⁰ These efforts will continue even if the parties' contribution limits disappear; the groups need to maintain their own independent followings for group survival. Maintaining close operational ties makes sense for the groups as long as the conditions for polarized party politics remain as they are.

Ideological PACs are more complicated still. Some act like polarized issue groups in coalition with the parties. But others, such as MoveOn.org and the Club for Growth, operate as factional groups working to pull the parties toward the groups' preferred policy directions. These groups' donors cannot be expected to transfer their money to the parties if the law changes. Moreover, when one speculates about the future balance of power, there is little evidence so far that the formal party committees will become engaged against the groups in more than a handful of contested primaries. That they have not done so is not because the parties lack money. It is because it is rarely in the party leaders' self-interest to take the risk.

CONCLUSION

U.S. political parties are often portrayed in stylized campaign finance debates as if they have become weak at the expense of interest groups. The portrayal makes little sense when considered in historical context.⁴¹ The parties within Congress have been stronger since 1995 than at any time in American history, except for the decades from about 1880 through 1910. It is true that state and local party organizations until fifty years ago played a more significant role in congressional elections, but the bonds between congressional districts and state parties have not been the same since the Supreme Court mandated "one person, one vote" in redistricting during the early 1960s⁴² and Congress declared that addressing racial discrimination during the redistricting process trumped traditional

⁴⁰ Coalition groups that act as party allies and make independent expenditures are prominent in Hamm, Malbin, Kettler & Glavin, *supra* note 36. This Article also documents the increase in independent spending in the states. For the increase in independent spending in federal elections, see CTR. FOR RESPONSIVE POL., *supra* note 33.

⁴¹ See Mann & Corrado, *supra* note 28, at 6–10 (reviewing the impact of political and campaign-finance reform efforts since the early twentieth century).

⁴² Gray v. Sanders, 372 U.S. 368, 381 (1963) (establishing the principle of "one person, one vote" under the Equal Protection Clause); see also Reynolds v. Sims, 377 U.S. 533 (1964) (applying the equal-population rule to state legislative districts); Wesberry v. Sanders, 376 U.S. 1 (1964) (holding that the Equal Protection Clause requires equality of population across congressional districts in the redistricting process); Baker v. Carr, 369 U.S. 186 (1962) (holding that constitutional claims triggered by redistricting are justiciable).

geographic boundary lines in the Voting Rights Act of 1965.⁴³ Interest group and congressional party politics have both become more nationalized for a variety of additional reasons in the half century since then. As politics became more polarized, the party and issue-group systems also became more intertwined. In this new environment, the formal parties were holding their own. In the congressional elections after McCain-Feingold but before *Citizens United*, the national party committees were spending more money in competitive states and districts during the campaigns' closing weeks than anyone else—often including the candidates.⁴⁴

Citizens United and *SpeechNow* took the contribution limits off of independent spending by nonparty organizations. This changed the equation. Taking the limits off of the formal parties would likely move some current nonparty money in the parties' direction. It would also be likely to increase what the *McCutcheon* Court's plurality opinion seems to present as a constitutionally protected interplay: Party leaders (or their agents) may pressure donors to extract higher contributions, the donors will gain agenda-setting access and influence, and the leaders will turn around to pressure the members on policy. Contribution limits were not intended to insulate politics from all such pressure and influence. But the limits were meant to put some restraining boundaries around what is considered acceptable. The *McCutcheon* opinion questions whether these considerations may still be considered an appropriate basis for limits. If the Court's membership and reasoning stay unchanged and the contribution limits are stricken, the result will likely increase both the amount of money in the parties' treasuries and the not-quite quid-pro-quo connections between money and policy.⁴⁵

But even should this occur, there is one thing removing the limits will not do. It is not likely to produce a fundamental change in the relationships among the parties and the actors in the interest-group system. The groups that work in concert with the parties will continue

⁴³ Pub. L. No. 89-110, 79 Stat. 437 (1965).

⁴⁴ Michael J. Malbin, Aaron Dusso, Gregory Fortelny & Brendan Glavin, *The Need for an Integrated Vision of Parties and Candidates: National Political Party Finances, 1999-2008*, in THE STATE OF THE PARTIES: THE CHANGING ROLE OF CONTEMPORARY AMERICAN PARTIES 185-95 (2011).

⁴⁵ In fact, using campaign finance law to give party leaders additional leverage seems increasingly to be favored by some scholars (although they are not necessarily arguing for an end to the base limits). See Richard Pildes, *How to Fix Our Polarized Politics? Strengthen Political Parties.*, WASH. POST MONKEY CAGE (Feb. 6, 2014), <http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/02/06/how-to-fix-our-polarized-politics-strengthen-political-parties/>. For a contrary perspective, see generally Mann & Corrado, *supra* note 28.

to do so, while those whose goals are more factional will continue to frustrate the parties. Finally, the parties' power and willingness to respond to the factional groups will depend on a lot more than the depth of their pocketbooks. The relationships among all of these organizations are being structured by nationalizing and polarizing forces larger than the campaign-finance laws.



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CFI's Malbin Calls for "A Third Approach" to Party Coordination

Calls for Freer (but not completely unfettered) Coordination between Parties and Candidates, Coupled with Tighter Rules for Non-Party Organizations

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Michael J. Malbin today presented a new vision for the campaign finance regulations that govern the relationships between candidates, their political parties and non-party independent spenders. Malbin, who is CFI's Executive Director and a Professor of Political Science at the University at Albany, SUNY, was speaking on a panel on Super PACs at the Annual Meeting of the Council on Governmental Ethics Laws (COGEL), held this year in Pittsburgh, Pennsylvania.

Malbin called for a "third approach" between two that have dominated public discourse since the Supreme Court's 2010 decision in *Citizens United*. Those two have each called for levelling the playing field between independent spenders, parties and candidates – one by removing all contribution limits so the candidates and parties would be as unfettered as the independent spending groups, and the other – moving in the opposite direction – by amending the Constitution to restrain independent spending.

This third path would acknowledge the inevitability of independent expenditures. In response, it would loosen up the rules for the parties somewhat, while also tightening up on the rules meant to insure that non-party groups are truly independent of the candidates they support.

To be more specific, this path would let the parties make unlimited coordinated expenditures to help their candidates – but only from donors who give \$1,000 or less. The recommendation is based on one developed in a joint project by CFI, The Brookings Institution and American Enterprise Institute, [Reform in an Age of Networked Campaigns](#) (2010). Based on current party receipts, a pool of money like this would produce enough to let the parties convert all party independent spending into coordinated spending.

At the same time, Malbin said, the new freedom for the parties should be coupled with tightening the coordination rules for non-party organizations – especially the single-candidate Super PACs.

The following is the full text of Malbin's remarks, as prepared for delivery.

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A Third Approach to Party Coordination in an Era of Super PACs

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Remarks Prepared for the 2014 Annual Meeting
Council on Governmental Ethics Laws (COGEL)

Panel Title

Super PACs: Legal, Political and Policy Implications of
Deregulating Independent Spending

December 8, 2014

Generally there have been two major policy approaches put forward since *Citizens United* to deal with Super PACs. Let's call them the no-limits approach versus the strict-limits approach.

On the no-limits side, the argument goes something like this: Unlimited independent expenditures are facts of life of contemporary politics, protected by a First Amendment that we cherish. However, these independent expenditures have distorted politics by drowning out the voices of the political parties and candidates. The best response therefore is to free up the candidates and parties so they also can raise unlimited contributions on a level playing field with the non-party groups.

The opposite response agrees with the importance of level playing fields but disagrees with the idea that unlimited independent spending is or should be protected speech. Those who advocate this position typically disagree not only with *Citizens United*, but with the whole line of case law back to *Buckley v Valeo*. Far from accepting unlimited spending, this argument seeks to overturn *Buckley* either by reversing the Supreme Court's jurisprudence or by amending the Constitution.

These two approaches have dominated much of the debate since *Citizens United*. I plan to put forward a third approach. This approach would acknowledge the inevitability of independent expenditures but nevertheless would defend the value of contribution limits on candidates and parties. It would seek to level the playing field by strengthening the hand of the political parties – but within limits. Unlike Senate Republican Leader Mitch McConnell's attempt last week to do away with any limits on coordinated spending, this approach would expect something commensurate in return. Specifically, it would let the parties coordinate more freely with their candidates but in return for two conditions: first, the parties should be able to do unlimited coordinated spending with candidates, but only from money raised in amounts of \$1,000 or less, so the parties would not undercut the contribution limit for candidates.* As I explain later, even

* This approach builds upon one in *Reform in an Age of Networked Campaigns* by Anthony J. Corrado, Michael J. Malbin, Thomas E. Mann and Norman J. Ornstein (A Joint Project of the Campaign Finance Institute, Brookings Institution and American Enterprise Institute, 2010).

this limit this would produce a lot of real money. Second, the freedom for parties should be coupled with tightening the coordination rules for non-party organizations – especially the single-candidate Super PACs.

This, in brief, is the third approach to parties that I would like to put on the table. I plan to return to this approach shortly, but first want to present some of the relevant data.

There has been a great deal of coverage in the press about increased independent expenditures in the 2014 congressional elections. However, that coverage has missed some important parts of the story by focusing on a misleading top line. It is certainly true that independent spending has gone up a great deal since last midterm election in 2010, the year *Citizens United* was decided. But most of that jump occurred between 2010 and 2012. There was a significant levelling off between 2012 and 2014. Non-party independent expenditures in congressional elections went from \$470 million in 2012 to \$518 million in 2014. That was an increase of 10%. Over the same two years: Party independent spending went up by 8 percent – two percentage points less than non-party spending.

But even this is misleading. \$73 million of the allegedly non-party spending came from two committees that were handmaidens of the Democratic Party's leadership – the Senate and House Majority PACs. Another \$58 million came from single candidate PACs. Most of the single-candidate PAC spending was in Senate elections, and two-thirds of the Senate single-candidate PAC money was pro-incumbent. Like the two Democratic leadership PACs, these single-candidate PACs can hardly be said to have stolen the election away from the candidates and parties.

Now let us move from the overall spending numbers to look at the races in which spending concentrated. There were 42 House races with \$1 million or more in independent spending. In those 42 races, candidates raised \$188 million; parties made \$128 million in independent expenditures, and non-party organizations spent \$90.3 million. So the parties actually spent more than the non-party organizations in these 42 House races and the candidates spent more than either.

The situation was different in the Senate. In the 18 Senate races with \$1 million or more of independent expenditures, candidates raised \$333.1 million, the parties spent \$92.1 million and non-party organizations spent \$310.4 million. So it looks as if the non-party organizations swamped the parties and spent almost as much as the candidates. But there is a problem with that interpretation. \$95 million of the non-party groups' \$310 million came from single-candidate pro-incumbent PACs plus from the Sen Majority PAC. Another \$41 million came from the two American Crossroads groups, which are run by a former aide to Sen. McConnell. If you add up the formal party money, the three non-party organizations run by close allies of the leaders, and the pro-incumbent single-candidate PACs, then the total for the parties, close party allies, and allies of the candidates together came to \$228 million, compared to \$174 million for all of the remaining the non-party spending combined.

We are also seeing many of the same patterns in state elections, but at lower levels. In the states, three national party organizations – the Republican Governors Association, Republican State Leadership Committee and the Democratic Governors Association – have dominated outside spending. The states have not yet seen many single-candidate PACs, but these are bound to come.

So to get back to the main policy point: I do not see the candidates and the parties being drowned out. The formal party organizations remain quite strong, and the parties look even stronger when you add their closest allies among the independent spenders.

That does not mean there is no problem with independent spending from the parties' perspectives, but it does mean the problem is being misidentified. That is why the third approach to party coordination that I am presenting focuses on what I see as a double-sided problem of coordination.

The first side has to do with coordination between the parties and candidates. I would like to see political parties be able to get out of the business of independent spending. Parties should not have to pretend they are independent of their candidates. Instead, the parties should be able to make unlimited coordinated expenditures – but only from contributions they raise from donors who give them \$1,000 or less. Why do I say \$1,000? Why not unlimited spending from unlimited contributions, or perhaps from all party hard money up to \$32,000 per donor per calendar year? Because a contribution to a party that the donor knows can be coordinated with the candidate effectively is an increase in the contribution limit for candidates. I do believe that contribution limits uniquely help to reduce corruption. Independent expenditures may also produce gratitude from office holders, but unlimited direct contributions have been shown time and again to encourage a soft form of extortion from office holders. For that reason, I think a \$5,200 limit per election cycle is useful. I would not break out in a sweat if it effectively became \$6,200 with the coordination rules I have proposed. After all, without public financing, the candidates have to get money from somewhere. But completely untying party coordination would effectively add another \$60,000 to the candidate limit over the course of two years, and that is a different story. There is no problem with having a higher contribution limit for the parties than for the candidates. But it would defeat the purpose of a candidate limit to let donors give that much to a party for the purpose of helping a candidate.

So I would argue that unlimited coordinated spending should come out of this limited pool. Even with a \$1,000 ceiling, this is a lot of money. The RNC raised \$153 million from \$1,000-or-less donors during the 2012 cycle. That was 2-1/2 times as much as all of the RNC's combined independent and coordinated spending in 2012. The DNC, DCCC and DSCC also raised more than enough in these contributions to convert all of their independent spending into coordinated. Even the NRSC and NRCC had enough in these contributions to convert half of their independent spending into coordinated. I am confident they could raise the extra \$30 million they would need if they once again put their minds to looking for small donors. This used to be the strong suit for the Republicans and may be picking up once again. This proposal will provide an incentive to help them along. In fact, the three Republican committees could have converted all of their independent spending into coordinated spending if they could have pooled their \$1,000 money together, and they still would have had \$20 million left over in change.

The other side of coordination has to do with the relationship between candidates and non-party groups. When a candidate's relative or former staffer can set up an organization, when the candidate can raise money for the organization and bless its good works, and when a regulatory body can say that none of it counts as coordination unless the candidate and group work together on a specific message, then the concept of coordination has been stretched beyond any recognizable boundaries. The real concern has to do with coordination of strategies by two organizations, not with the wording of specific messages. Participants on this panel are likely to disagree over whether the FEC's definition is a plausible interpretation of

statute law, but wherever you come out on that I think it clear that the FEC's reading is not compelled by the Constitution. That means that one can constitutionally change the federal statute, and that the states can start fresh with their own statutes or rules.

I am not going to argue here for specific coordination rules, but a good place to start looking is in a bill introduced this September by Reps. David Price (NC) and Chris Von Hollen (MD). That bill would tighten up the definition of coordination generally, tighten up the ability of candidates to raise money for Super PACs, and particularly tighten up on the relationships between candidates and single-candidate Super PACs. It undoubtedly will need some work but is raising the right subjects.

This is a simple tradeoff: fuller coordination between the candidates and their parties, coupled with enforced independence between the candidates and the non-party groups. Taken together, this would address some of the bigger problems that have developed since *Citizens United*. The relationship between candidates and their parties would be strengthened, contribution limits would be restored, and the subterfuge of the single-candidate Super PAC would be eliminated. The Koch Brothers, Sheldon Adelson, Tom Steyer and Michael Bloomberg could still spend their money freely, but candidates could no longer suggest that their minions should go shopping for patrons. At the same time, the tradeoff would mean that the candidates and parties together would be better able to compete, while the parties would be given a stronger incentive to look for donors who give less than the top dollar. The system as a whole would be healthier for the rebalancing.

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