RETHINKING POLITICAL PARTY CONTRIBUTION LIMITS: A ROADMAP TO REFORM

I. INTRODUCTION

An insidious irony pervades the American federal election system: in an institution legitimized by accountability and transparency, the American public has no idea of the source of $184 million spent in the 2016 presidential election cycle.[1] The proliferation of this so-called "dark money" is one of the many unfortunate results of a string of recent changes in campaign finance law since 2002. In that year, Congress eliminated "soft money" contributions to political parties—donations that circumvent the contribution limits and disclosure requirements federal election laws place on "hard money" contributions. These limits embodied a longstanding anti-corruption value in campaign finance regulation by restraining the ability of candidates to make quid pro quo political favors in exchange for significant campaign contributions from wealthy donors. In the wake of these measures, a line of Supreme Court rulings ensued allowing certain political groups to solicit *unlimited* contributions if spent on "independent expenditures"—political expenditures that are not made in cooperation with any candidate for office. Because these expenditures are "independent" from candidates, they foreclose any possibility of quid pro quo corruption.

Curiously, these limits remain in place for contributions to political committees of national parties. This handicap has played out just as one would expect in an era where money often decides elections. For the first time in modern history, outside special interest groups are outspending political parties, and it has not gone unnoticed. While political parties typically endorse more moderate candidates, studies have shown that special interest groups overwhelmingly support polarizing candidates.[2] The result of the inundation of special interest money is a modern

1. *See 2016 Total Outside Spending, by Group*, OPENSECRET.ORG, https://www.opensecrets.org/outsidespending/summ.php?cycle=2016&chrt=V&disp=O&type=U (last visited July 9, 2017).

2. *See infra* Section III.B.

electorate sharply polarized along partisan lines and a gridlocked Congress.[3]

Campaign finance reform has been at the forefront of political discourse in recent years, particularly since the Supreme Court's 2010 ruling in *Citizens United v. FEC*.[4] Reform efforts have run the legislative gamut: extensive public financing schemes,[5] constitutional amendments outlawing corporate political speech,[6] and the controversial "Voting with Dollars" program, in which every American citizen is given a $50 credit to spend on their favorite candidate.[7] Short of an entire legislative overhaul of the current campaign finance system, the incredible proliferation of money into politics is here to stay. While long-term systemic campaign finance reform may be necessary, this Comment proposes a short-term and pragmatic solution to fix a discrete problem. To improve a campaign system heavily restrained by arbitrary regulations, the current statutory limitations on campaign contributions should be revised: first through litigation and second through legislative reform.

This Comment proposes a roadmap for revisiting political party contribution limits since the most recent failed attempts at litigation in 2014.[8] After a thorough overview of the relevant law in Part II, Part III explains through political theory and empirical evidence the problems facing American democratic governance under the current contribution limits. Part IV then offers two solutions to removing the ceiling on contributions made to political parties—one litigious, the other legislative. Both

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3. *See infra* Part III.

4. *See generally* Citizens United v. FEC, 558 U.S. 310 (2010).

5. Federal efforts expanding public funding of campaigns most recently went to committee in 2015 under the Fair Elections Now Act. S.1538, 114th Cong. (2015). This same bill was sponsored in 2009 by Senator Dick Durbin but never left committee. S.752, 111th Cong. (2009).

6. Senator Tom Udall sponsored the most recently proposed constitutional amendment in 2013, which fell victim to a 2014 Republican filibuster. S.J. Res. 19, 113th Cong. (2013); *see also* Stephen Dinan, *GOP Blocks Democrats' Push to Rewrite First Amendment Campaign Spending*, WASH. TIMES, Sep. 11, 2014, http://www.washingtontimes.com/news/2014/sep/11/gop-blocks-democrats-push-rewrite-first-amendment-/.

7. *See generally* Bruce Ackerman, *Voting with Dollars*, BULLETIN OF THE AM. ACADEMY (2004), http://amacad.org/publications/bulletin/summer2004/ackerman.pdf.

8. *See generally*, Albert W. Alschuler, *Limiting Political Contributions After* McCutcheon*,* Citizens United*, and* SpeechNow, 67 FLA. L. REV. 389 (2015); James Bopp et al., *Contribution Limits After* McCutcheon v. FEC, 49 VAL. U. L. REV. 361 (2015); Richard Briffault, *Of Constitutions and Contributors*, 2015 U. CHI. LEGAL F. 29 (2015).

avenues for reform offer the most practical, immediate solution to the current dilemma: federal regulation should allow political parties to solicit unlimited contributions to be placed into a segregated account solely for independent expenditures. This measure will enable political parties to compete with increasingly polarized special interest groups.

II. THE HISTORY AND CURRENT STATE OF CONTRIBUTION LIMITS

Campaign finance law is a convoluted web of statutes, administrative regulations, and jurisprudence. The late Justice Scalia thought as much, remarking, "Campaign finance law is so intricate that I can't figure it out."[9] An adequate understanding of the current discrepancy in contribution limits between political parties and outside groups would be remiss without a thorough overview of the relevant history of campaign contribution limits. This history reveals a series of reforms to campaign finance regulations bereft of consistent judicial application, emphasizing the need for this Comment's proposed solutions.

A. CAMPAIGN FINANCE REFORM PRIOR TO 1971

Though extensive campaign finance regulation is a modern innovation, the motivations and values underlying recent reforms can be traced back to the Civil War. Because candidates in the early nineteenth century largely self-funded their own political endeavors, Congress did not consider funding an issue until 1867.[10] As third-party campaign contributions increased, policy-makers, economists, political scientists, and ordinary citizens still confront one question today: What limits, if any, should the government—in representing a society that values free speech yet ensures popular representation—place on private financing of public campaigns?

Amid the growth of corporatism during the Gilded Age of the late nineteenth century, populist statesmen spoke out against new corporate money that leveraged the platforms of both political parties.[11] Among these critics, populist democratic

9. Transcript of Oral Argument at *17, McCutcheon v. FEC, 134 S. Ct. 1434 (2014) (No. 12-536), 2013 WL 5845702.

10. Anthony Corrado, *Money and Politics: A History of Federal Campaign Finance Law, in* THE NEW CAMPAIGN FIN. SOURCEBOOK 8–9 (Anthony Corrado et al. eds., 2005) (discussing an 1867 statute barring mandatory political contributions from naval yard workers).

11. *See* Frank Pasquale, *Reclaiming Egalitarianism in the Political Theory of*

senator William Jennings Bryan argued that corporate interests "demand special legislation [and] favors," and could "strike down opposition with their all-pervading influence."[12] Populists feared that elected representatives were not the *real* policy-makers but were beholden to the interests of corporate money funding their campaigns.[13]

Anti-corporate reformers at the state level soon enacted laws prohibiting corporate contributions to campaigns.[14] These state contribution limits were modeled at the federal level under the Tillman Act of 1907, which barred nationally chartered banks and corporations from contributing to any federal campaign.[15] The Federal Corrupt Practices Act of 1925 (FCPA) soon expanded these restrictions, prohibiting national banks and corporations from making contributions or expenditures "in connection with" federal elections or any primary, convention, or caucus to select candidates for any office.[16]

With the exception of a 1943 amendment extending FCPA provisions to labor unions,[17] Congress did not revisit campaign finance regulation until the passage of the monumental Federal Election Campaign Act of 1971 (FECA).[18] The most important result of these early campaign finance reforms are three collective principles that still exist today: limits on the sources of funds, mandatory disclosures of certain information related to those funds, and limits on contributions to candidates and political organizations.[19]

B. THE FEDERAL ELECTION CAMPAIGN ACT OF 1971

Although the FECA subsumed many of the provisions of the Tillman Act and the FCPA, it principally placed new limits on campaign expenditures for advertising and added stronger

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Campaign Finance Reform, 2008 U. OF ILL. L. REV. 599, 604 (2008).

12. Pasquale, *supra* note 11, at 604.

13. *Id.* at 605.

14. *Id.* at 604–05.

15. Tillman Act, ch. 420, 34 Stat. 864 (1907) (current version at 2 U.S.C. § 441(b) (1994)).

16. The Fed. Corrupt Practices Act, ch. 368, 43 Stat. 1070, § 313 (1925) (subsequently codified at 2 U.S.C. § 441(b) yet repealed in 1972).

17. War Labor Disputes Act, ch. 144, § 9, 57 Stat. 167 (1943) (repealed 1948).

18. Fed. Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (codified as amended at 52 U.S.C. § 30101 *et seq.* (2015)).

19. R. SAM GARRETT, CONG. RESEARCH SERV., R41542, THE STATE OF CAMPAIGN FIN. POLICY: RECENT DEVELOPMENTS AND ISSUES FOR CONGRESS 1 (2015).

disclosure requirements.[20] In 1974, in response to campaign finance abuses amid the Watergate scandal,[21] Congress substantially expanded FECA restrictions.[22] Congress capped individual contributions for candidates at $1,000, political committee contributions for candidates at $5,000, and enacted a $25,000 annual aggregate limit on all contributions.[23] The 1974 Amendments also limited expenditures made by campaigns.[24] To enforce these new regulations, the 1974 Amendments created the Federal Election Commission (FEC), a six-member commission charged with preparing written rules, reports, and advisory opinions, as well as conducting investigations to enforce FECA provisions.[25]

The 1974 Amendments also triggered the first landmark decision by the U.S. Supreme Court regarding campaign finance regulations: *Buckley v. Valeo*.[26] The Court in *Buckley* reviewed key FECA provisions and the 1974 Amendments, particularly the limitations placed on contributions and expenditures.[27] In a per curiam opinion, the Court struck down the FECA's "independent expenditure" limits but allowed the contribution limits to remain intact.[28] The Court distinguished independent expenditures from political contributions by determining how limitations placed on either would affect political speech protected under the First Amendment.[29] A restriction on independent expenditures, the Court explained, "necessarily reduces the quantity of expression

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20. *See* Fed. Election Campaign Act of 1971 §§ 203, 301 *et seq*.

21. Investigations revealed that the Watergate break-in was financed in part by President Nixon's reelection campaign. For a comprehensive account of these campaign abuses, *see, e.g.*, FINAL REPORT OF THE SENATE SELECT COMM. ON PRESIDENTIAL CAMPAIGN ACTIVITIES OF THE U.S. SENATE, S. REP. NO. 93-981 (1974).

22. *See generally* Fed. Election Campaign Act Amendments of 1971, Pub. L. N. 03-433, 88 Stat. 1263 (codified as amended in scattered sections of 52 U.S.C. (2015)).

23. *Id.* at § 101(a)–(b)(3).

24. *Id.* at § 101(c)(1). Principally, this included a $10,000,000 limit on candidate expenditures for the nomination for the election to the office of the President, a $20,000,000 limit on expenditures for election to the office of the President, and a $100,000 limit on expenditures for election to the Senate or House of Representatives.

25. *Id.* at §§ 208–09.

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

27. *Id.* at 7. The Court also reviewed provisions of the FECA's disclosure requirements, the creation of the FEC, and provisions establishing a system for public funding of Presidential campaign activities under the Internal Revenue Code. *Id.*

28. *Id.* at 51, 58.

29. *Id.* at 19–20.

by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."[30]

In contrast, restrictions on the amount of money that may be contributed to candidates place "only a marginal restriction upon [a] contributor's ability to engage in free communication."[31] As the Court reasoned, "[a] contribution serves as a general expression of support for the candidate and his views, but does not communicate the *underlying basis* for the support."[32] Thus, contribution limits serve to restrain only "symbolic expression" of political support and do not infringe on the "contributor's freedom to discuss candidates and issues."[33]

Applying strict scrutiny to the FECA's independent expenditure limits, the Court held that these restrictions burdened political speech and therefore could not justify the government's interest in preventing "corruption and the appearance of corruption."[34] Because the Court believed campaign contributions were a less protected form of political speech, it applied a standard less than strict scrutiny, requiring the government to demonstrate a "sufficiently important interest" and identify means "*closely drawn* to avoid unnecessary abridgment of associational freedoms."[35] There, the government's interest in limiting the "actuality and appearance of corruption" justified the contribution limits imposed by the FECA.[36]

Congress amended the FECA again with the 1976 Amendments to accommodate the *Buckley* framework.[37] Among these amendments were provisions limiting the annual individual donations to a political action committee (PAC) to $5,000 and individual contributions to a national party committee to $20,000.[38]

30. Buckley v. Valeo, 424 U.S. 1, 19 (1976).

31. *Id.* at 20.

32. *Id.* at 21 (emphasis added).

33. *Id.*

34. *Id.* at 45.

35. *Buckley*, 424 U.S. at 25 (emphasis added) (internal citations omitted).

36. *Id.* at 26.

37. Fed. Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (1976) (subsequently codified in scattered sections of 52 U.S.C. (2015)).

38. *Id.* at § 112 (subsequently codified in scattered sections of 52 U.S.C. (2015)).

C. THE BIPARTISAN CAMPAIGN REFORM ACT OF 2002

Despite minor amendments,[39] the FECA remained unchanged until the 1990s when the public began to scrutinize perceived FECA loopholes that caused a rise in unregulated "soft money."[40] Soft money refers to contributions made by individuals to political parties outside the scope of the FECA disclosure requirements and contribution limits. The loophole for such contributions arose from a provision of the 1979 FECA Amendments that amended the definition of "contribution" to exclude donations that parties spent on certain state and local political "party building" activities that were thought not to influence federal elections.[41] Systematic exploitation of the soft money loophole first occurred during the 1996 elections when parties raised $262 million—more than three times the $86 million raised by parties during the 1992 election cycle.[42] Some members of Congress feared an outpouring of soft money betrayed an "appearance of corruption," and "real or perceived quid pro quo" arrangements—vocabulary nearly identical to that used by the Court in *Buckley*.[43] In response, Congress enacted the Bipartisan Campaign Reform Act (BCRA).[44]

The BCRA raised most contribution limits and banned the collection of soft money in federal elections for national parties, federal candidates, and officeholders.[45] Contribution limits under the BCRA increased individual contributions for federal candidates to $2,000, individual contributions for national

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39. *See generally* Fed. Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (subsequently codified in scattered sections of 52 U.S.C. (2015)).

40. *See* 148 CONG. REC. S2104 (March 20, 2002) (statement of Sen. Feingold) ("Most amazing, as I look back on these many years, is the growth since then of the soft money outrage, which has become the central focus of our campaign finance reform effort over the past several years.").

41. Amendments of 1979, § 101. For a comprehensive summary of the development of the "soft money" loophole, see, e.g., Prohibited and Excessive Contributions; "Soft Money", 63 Fed. Reg. 37722 (proposed July 13, 1998) (to be codified at 11 C.F.R. pts. 102, 103, and 106).

42. 148 CONG. REC. S2104 (March 20, 2002) (statement of Sen. Feingold). Soft money contributions nearly doubled again to $495 million in the 2000 election cycle. *Id.*

43. *See id.* at S2136 (statement of Sen. Snowe), S2143 (statement of Sen. Feingold).

44. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002) (codified at 52 U.S.C. § 3010 *et seq.* (2015)). BCRA is also known as "McCain-Feingold."

45. 52 U.S.C. §§ 30116, 30125 (2015).

political party committees to $25,000, and individual contributions for any PAC to $5,000.[46] The BCRA also set a $37,500 aggregate limit on individual contributions for candidates in a single year.[47]

Since the BCRA's enactment, most changes to campaign finance regulation have come through the courts and the FEC. The BCRA underwent its first judicial review in 2003 in *McConnell v. FEC*, where most of its provisions survived a facial challenge.[48] In *McConnell*, a 5–4 majority upheld the ban on soft money contributions, finding that the ban was justified by the government's interest, not only in preventing actual quid pro quo arrangements between donors and candidates, but also in preventing the *appearance* of corruption.[49] Most significantly, the *McConnell* majority rejected the argument in *Buckley* recognizing a legitimate government interest only where there is actual evidence of a "cash-for-vote agreement," and instead found a legitimate interest where there is a mere *appearance* of undue influence.[50] The surge of soft money into party coffers made it "not only plausible," said the Court, "but likely, that candidates would feel grateful for such donations and that donors would seek to exploit that gratitude."[51] It was enough that donors received *access* for their donations. "Implicit . . . in the sale of access," explained the Court, "is the suggestion that money buys influence."[52]

Much debate has focused on delineating the government's permissible interests in enacting contribution limits.[53] More specifically, courts have grappled with whether the government's

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46. 52 U.S.C § 30116(a)(1) (2015).

47. § 30116(a)(3)(A) (found unconstitutional in McCutcheon v. FEC, U.S 134 S. Ct. 1434 (2014)).

48. McConnell v. FEC, 540 U.S. 93 (2003) (overruled in part by Citizens United v. FEC, 558 U.S. 310 (2010)). The plaintiffs in *McConnell* challenged the BCRA provisions extending the FECA's contribution limits; however, the Court did not review the limits because it found that the plaintiffs lacked standing. *Id.* at 114.

49. *See id.* at 154.

50. *See id.* at 145–154.

51. *Id.* at 145.

52. *McConnell*, 540 U.S. at 154.

53. As one scholar has noted, the reason for the difference in opinions exists because the two sides of the debate "share neither empirical assumptions nor theoretical premises." Lillian R. BeVier, *First Amendment Basics Redux:* Buckley v. Valeo *to* FEC v. Wisconsin Right to Life, 2006–2007 CATO SUP. CT. REV. 77, 106–107 (2007). While one side argues that freedom to spend money on political issues is the *answer*, the other side purports that such activity is the *problem*. *Id.*

interest must prevent identified instances of corruption, the appearance of corruption, or something broader.[54] In the most recent decisions following *McConnell*, the majority opinions have clearly restrained the anti-corruption rationale underlying contribution limits.[55] Under this more narrowly tailored understanding of *Buckley*, the only permissible anti-corruption interest the government may have is in preventing actual quid pro quo corruption or its appearance—*not* in preventing "access" from donors whose large contributions *may* influence the political process.[56]

D. CURRENT CONTRIBUTION LIMITS: HOW MUCH CAN AN INDIVIDUAL CONTRIBUTE TO A POLITICAL PARTY?

Since the enactment of the BCRA, limits on contributions to political parties have remained unchanged, with two recent exceptions: inflationary increases set by the FEC for 2015–2016 and the new statutory limits for "party segregated accounts" under the 2015 Appropriations Act (Appropriations Act). While the Appropriations Act raised political party contributions from $25,000 to $33,400 to offset inflation,[57] it more importantly

54. *Compare* McConnell v. FEC, 540 U.S. 93, 154 (2003) (finding that the government has a legitimate interest in preventing the appearance of undue influence through access) *with id.* at 292 (Kennedy, J., dissenting) (arguing that *Buckley* made clear in its express language that "campaign finance regulation that restricts speech without requiring proof of particular corrupt action withstands constitutional challenge only if it regulates conduct posing a demonstrable *quid pro quo* danger"). This issue has been the decisive wedge in nearly every campaign finance decision since the per curium decision in *Buckley*. *See* Bradley A. Smith, McCutcheon v. Federal Election Commission: *An Unlikely Blockbuster*, 9 N.Y.U. J. L. & LIBERTY 48, 53 (2015). In the time between its decisions in *Buckley* and *McCutcheon*, the Court decided twenty campaign finance cases with only two unanimous decisions—far from the average of 40–60% unanimous rulings per term. *Id.*; *see also id.* at 53 n.10 (listing the twenty Supreme Court decisions since *Buckley*).

55. *See, e.g.*, McCutcheon v. FEC, 134 S. Ct. 1434, 1450 (2014) ("Spending 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."); Citizens United v. FEC, 558 U.S. 310, 359 (2010) ("When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption." (citing *McConnell*, 540 U.S. at 296–98 (opinion of Kennedy, J.)); SpeechNow.org v. FEC, 599 F.3d 686, 694–95 (2010) (recognizing the *Citizen United* Court's understanding of *Buckley*'s more narrowly conceived anti-corruption rationale).

56. *See*, *e.g.*, *Citizens United*, 558 U.S. at 314 ("That speakers may have influence over or access to elected officials does not mean that those officials are corrupt.").

57. Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 80 Fed. Reg. 5,750, 5,752 (Feb. 3, 2015) (noting that the inflation-adjusted contribution limit is in effect from January 1, 2015

modified the FECA contribution limits by implementing new limits for various national party committee accounts.[58]

The Appropriations Act amended the FECA by establishing separate limits on contributions made to three types of segregated accounts: (1) "convention accounts," for expenses incurred with respect to a presidential nominating convention; (2) "headquarters accounts," for expenses incurred towards the operations of party headquarters buildings; and (3) "recount/legal accounts," for expenses incurred toward a recount and other legal proceedings.[59] The limits on each of these accounts are set by the Appropriations Act at 300% of the limits on contributions to national political party committees ($33,400) or $100,200 total.[60] These new limits affect three types of committees within the national Democratic and Republican parties: the national committees (the Democratic National Committee and Republican National Committee), the Senate campaign committees (the Democratic Senatorial Campaign Committee and National Republican Senatorial Committee), and the House campaign committees (the Democratic Congressional Campaign Committee and National Republican Congressional Committee).[61]

In practice, if an individual desired to contribute the maximum allowance to the segregated accounts of a party's three national committees, in addition to the $33,400 baseline individual limit, the total contribution would be $801,600.[62] The magnitude of these modifications to the FECA limits is clear when you compare this maximum contribution to the largest permissible contribution *before* the Appropriations Act—

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to December 31, 2016).

58. Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2130, 2772, div. N, sec. 101 (2014) (amending 52 U.S.C. 30116(a)).

59. *Id.*

60. *Id.*; *see also Contribution Limits for 2015–2016*, FEC, https://www.fec.gov/updates/contribution-limits-for-2015-2016/ (last visited Aug. 25, 2017).

61. *See 2018 Party Financial Activity*, FEC, http://www.fec.gov/disclosure/partySummary.do (last accessed Aug. 25, 2017) (listing the six registered committees).

62. This total is calculated based on a $33,400 individual baseline contribution to all three party committees, a $100,200 contribution to the convention, building, and recount/legal accounts of a national party committee, a $100,200 contribution to the building and recount/legal accounts of the House campaign committee, and a $100,200 contribution to the building and recount/legal accounts of the Senate campaign committee. *See* R. SAM GARRETT, CONG. RESEARCH SERV., R43825, INCREASED CAMPAIGN CONTRIBUTION LIMITS IN THE FY2015 OMNIBUS APPROPRIATIONS LAW: FREQUENTLY ASKED QUESTIONS, 3 (2015).

$129,600.[63]

Despite this tremendous increase in possible contributions to political parties, it is unlikely that the excess funds will affect the activity of political parties anywhere outside of the statutorily limited purposes of these party accounts. Though the FEC has yet to issue a rule on implementing the FECA-amending provisions of the Appropriations Act, a recent FEC draft notice of proposed rulemaking indicated that the agency will require these funds be used *solely* for the purposes of each account—not for independent expenditures or general campaigning.[64] This prospective regulation promises to limit the actual effect of political parties becoming more engaged in political speech as a direct result of any increased contributions under the new limits.[65]

E. THE RISE OF SUPER PACS, NONCONNECTED PACS, 501(C)(4)S, AND THE DECLINE OF THE POLITICAL PARTY

Concurrent with the elimination of soft money contributions to political parties has been the empowerment of new organizations: super PACs, nonconnected PACs, and 501(c)(4)s. With far greater latitude to raise money than political parties, these entities have recently dominated electoral fundraising and advertising.

1. SUPER PACS

Super PACs—born out of the holding of *Citizens United v. FEC*[66]—are political committees that make only independent

63. *See* R. SAM GARRETT, CONG. RESEARCH SERV., R43825, INCREASED CAMPAIGN CONTRIBUTION LIMITS IN THE FY2015 OMNIBUS APPROPRIATIONS LAW: FREQUENTLY ASKED QUESTIONS, 3 at 2 & n.15 (2015).

64. FEC, No. 15-54-B, REG 2014-01, OUTLINE OF DRAFT NPRM IMPLEMENTING PARTY SEGREGATED ACCOUNTS 4, 7, 9 (2015) (noting that for each account, the proposed regulation would prohibit the use of funds "to make independent expenditures or contributions or for general campaign expenses").

65. It is worth noting that the purpose of these increased contributions limits was *not* to directly give political parties more political speech, but rather to enable the Republican and Democratic parties to pay for their presidential nominating conventions in the wake of the abolishment of public financing for such conventions. Nicholas Confessore, *G.O.P. Angst Over 2016 Led to Provision on Funding*, N.Y. TIMES (Dec. 13, 2014), http://www.nytimes.com/2014/12/14/us/politics/gop-angst-over-2016-convention-led-to-funding-provision.html?_r=2. Another compelling interest of lawmakers sponsoring the bill was to allow the Democratic Senatorial Campaign Committee to more easily pay its millions of dollars of debt. *Id.*

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

expenditures rather than contributions to candidates for public office.[67] By a 5–4 vote, the Court in *Citizens United* invalidated the FECA's ban on the funding of independent expenditures and electioneering communications by corporations (profit or non-profit) and unions.[68] The Court reasoned that while the government has a legitimate interest in prohibiting *direct contributions* to candidates by corporations and unions because of potential quid pro quo arrangements, no such concern arises where corporations and unions make *independent expenditures* separate from a political campaign.[69]

Expounding on the Court's *Citizens United* decision and its return to *Buckley*, recognizing that the government only has a legitimate interest in preventing corruption through direct contributions, the D.C. Circuit Court of Appeals extended the First Amendment protection of *Citizens United* to PACs in *SpeechNow.org v. FEC*.[70] In *SpeechNow.org*, the D.C. Circuit held that for PACs making *only* independent expenditures, there is no legitimate anti-corruption interest in preventing quid pro quo arrangements simply because "there is no corrupting 'quid' for which a candidate might in exchange offer a corrupt 'quo.'"[71] In response to *SpeechNow.org*, the FEC issued an Advisory Opinion allowing independent-expenditure-only committees to solicit and accept *unlimited* contributions from the general public.[72]

2. "NONCONNECTED" PACS

One year after the effects of *Citizens United* and *SpeechNow.org* began to unravel, the FEC pronounced a statement giving unlimited fundraising capabilities to yet another political organization: nonconnected PACs.[73] Nonconnected PACs are unaffiliated with corporations, unions, parties, and candidates, but unlike super PACs, these organizations may make both independent expenditures *and*

67. Stop This Insanity, Inc. Employee Leadership Fund v. FEC, 902 F. Supp. 2d 23, 37 (D.D.C. 2012).

68. *See* Citizens United v. FEC, 558 U.S. 310, 365 (2010).

69. *See id.* at 356–357.

70. SpeechNow.org v. FEC, 599 F.3d 686, 695 (D.C. Cir. 2010).

71. *Id.* at 694–95.

72. FEC, ADVISORY OPINION 2010-09 (July 22, 2010).

73. *See* FEC, FEC STATEMENT ON CAREY V. FEC: REPORTING GUIDANCE FOR POLITICAL COMMITTEES THAT MAINTAIN A NON-CONTRIBUTION ACCOUNT (2011).

political contributions.[74]

Pursuant to a stipulated order and consent judgment in *Carey v. FEC*, which was filed in the wake of *SpeechNow.org*, the FEC agreed to allow unlimited contributions to nonconnected political committees for independent expenditures as long as the committee maintains separate bank accounts for these funds.[75] In the same vein as the *SpeechNow.org* rationale, a memorandum opinion issued by the D.C. District Court acknowledged that there is no governmental interest in preventing corruption where a nonconnected PAC "[makes] independent expenditures wholly separate from federal candidates or parties."[76]

3. 501(C)(4) ORGANIZATIONS

Three other types of organizations have become particularly prominent in campaign finance since 2010: 501(c)(4) social welfare groups, 501(c)(5) unions, and 501(c)(6) trade associations.[77] Collectively, these groups fall under the general moniker of "501(c)" organizations in reference to their tax-exempt non-profit organization status under Section 501(c) of the Internal Revenue Code.[78] Though 501(c)(4), (c)(5), and (c)(6) organizations may all legally engage in political activity so long as it is not the organization's primary activity,[79] the 501(c)(4) has garnered the most attention in the world of campaign finance.[80]

Like super PACs and nonconnected PACs, 501(c)(4)s may solicit unlimited contributions.[81] And like super PACs, 501(c)(4)s

74. Though the FECA does not expressly distinguish between "connected" and "nonconnected" PACs as discussed in this section, the distinction was made by the D.C. Circuit Court of Appeals in *Emily's List v. FEC*. 581 F.3d 1, 8 n.7 (D.C. Cir. 2009).

75. *See* Carey v. FEC, 864 F. Supp. 2d 57, 62 (D.D.C. 2012).

76. *Id.* at 59–60.

77. SAM GARRETT, CONG. RESEARCH SERV., R41542, THE STATE OF CAMPAIGN FIN. POLICY: RECENT DEVELOPMENTS AND ISSUES FOR CONGRESS 1, 21 (2015).

78. 26 U.S.C. § 501(c) (2015).

79. *See* I.R.S. Gen. Couns. Mem. 34233 (Dec. 3, 1969) ("Thus, an organization whose primery [sic] activity is directed to influencing legislating which is germene [sic] to the interest of the organization would not be disqualified if it incidentally engaged in political activity.").

80. *See, e.g.*, Lauren Kelley, *Author Jane Mayer on How the Koch Brothers Have Changed America*, ROLLING STONE (Feb. 14, 2016), http://www.rollingstone.com/politics/news/author-jane-mayer-on-how-the-koch-brothers-have-changed-america-20160214 (describing the ability of the Koch brothers to enact political change in secrecy through a 501(c)(4)).

81. *See* R. SAM GARRETT, *Candidates, Groups, and the Campaign Finance*

cannot make contributions to candidates and parties without establishing a separate PAC.[82] However, unlike other political committees subject to the FECA, 501(c)(4)s are entities established by the Internal Revenue Code and thus regulated by the Internal Revenue Service (IRS).[83] As a result, 501(c)(4)s may solicit unlimited contributions for independent political activity expenditures from individuals—as long as it is not its primary purpose—and will not be subject to *any* of the FECA's donor disclosure requirements.[84] Such requirements dictate that PACs (including super PACs and nonconnected PACs) publicly disclose the identity of any person who donates over $200 in a calendar year.[85] In sum, any person may individually donate unlimited funds to a 501(c)(4), which may make unlimited independent political expenditures without fear that the American public will ever know of the source of the donation.

4. THE DECAY OF THE POLITICAL PARTY AND THE NEW ERA OF DARK MONEY

Because of the decisions and regulations outlined above, party committees are limited in soliciting contributions for independent expenditures although these restrictions have been lifted for other political groups. Under this new scheme, political parties now find themselves unable to compete with the vast financial resources of other political groups.

This disparity becomes apparent in the amount of

Environment, CONG. RESEARCH SERV. INSIGHTS (May 19, 2015), https://www.fas.org/sgp/crs/misc/IN10280.pdf.

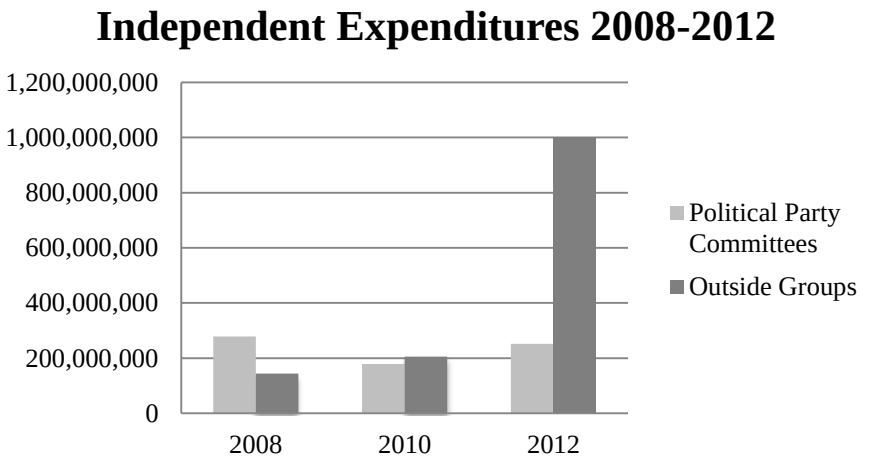
82. *See* FEC v. Beaumont, 539 U.S. 146, 163 (2003) (upholding the FECA's ban on direct contributions by nonprofit corporations, recognizing that the ability of such corporations to establish PACs "allows corporate political participation without the temptation to use corporate funds for political influence").

83. 501(c)(4)s are created under 26 U.S.C. § 501(c)(4) (2012). For an overview of the regulation of 501(c)(4)s by the FEC, see generally ERIKA K. LUNDER & L. PAIGE WHITAKER, CONG. RESEARCH SERV., R40183, 501(C)(4)S AND CAMPAIGN ACTIVITY: ANALYSIS UNDER TAX AND CAMPAIGN FIN. LAWS (2013).

84. The FEC permits "qualified nonprofit corporations" to make independent expenditures and electioneering communications. 11 C.F.R. § 114.10(d) (2014); *see also* FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 263 (1986) (striking down FECA's prohibition on independent expenditures by nonprofit corporations). A "qualified nonprofit" 501(c)(4) has the following five characteristics: (1) it was formed for the express purpose of promoting political ideas; (2) it does not engage in business activities; (3) it has no shareholders or other persons with ownership interests in its assets or earnings; (4) it was not formed by a business corporation or labor organization; and (5) it does not directly or indirectly accept donations from business corporations or labor organizations. 11 C.F.R. § 114.10(c)(1)–(5) (2011).

85. 52 U.S.C. § 30104(b)(3)(A) (2015).

expenditures made by super PACs, nonconnected PACs, and 501(c)(4)s (hereinafter collectively referred to as "outside groups") since the 2008 election cycle. Total independent expenditures by outside groups rose from $143 million in 2008 to over $1.4 *billion* in 2016—an 860% increase.[86] Amazingly, independent expenditures for the top six political party committees of both parties during the same period *decreased* 9%—from $278 million in 2008 to $253 million in 2016.[87] The evolution of these expenditures is summarized in the chart below.[88]



More disturbing is the increase in independent expenditures of 501(c)(4)s, so called "dark money" for the lack of public information revealing who donates to these groups. In 2004—the

86. *See Total Outside Spending by Election Cycle, Excluding Party Committees*, OPENSECRETS.ORG, https://www.opensecrets.org/outsidespending/cycle_tots.php (last visited July 9, 2017).

87. *See 2008 Party Financial Activity*, FEC, http://www.fec.gov/disclosure/partySummary.do (follow "2008" hyperlink and then follow "Party Financial Activity Data" hyperlink) (last visited July 9, 2017); *see also 2016 Party Financial Activity*, FEC, http://www.fec.gov/disclosure/partySummary.do (follow "2016" hyperlink and then follow "Party Financial Activity Data" hyperlink) (last visited July 9, 2017).

88. *See supra* notes 86–87; *see also 2010 Party Financial Activity*, FEC, http://www.fec.gov/disclosure/partySummary.do (follow "2010" hyperlink and then follow "Party Financial Activity Data" hyperlink) (last visited July 9, 2017); *see 2012 Party Financial Activity*, FEC, http://www.fec.gov/disclosure/partySummary.do (follow "2012" hyperlink and then follow "Party Financial Activity Data" hyperlink) (last visited July 9, 2017); *2014 Party Financial Activity*, FEC, http://www.fec.gov/disclosure/partySummary.do (follow "2014" hyperlink and then follow "Party Financial Activity Data" hyperlink) (last visited July 9, 2017).

first presidential election cycle after the BCRA's enactment—501(c)(4)s collectively spent $5.8 million.[89] In 2016, these groups collectively increased their independent expenditures by an astonishing 3,072% to $184 million.[90] In the 2016 election cycle, not one of these 122 groups disclosed the identity of a single donor.[91]

Thus far, this Comment has explained the discrepancy in contribution limits that has developed as a consequence of recent changes in campaign finance law. Under today's regulations, political parties have a fraction of the fundraising capabilities possessed by outside groups such as super PACs and 501(c)(4)s. As Part III reveals below, models of political theory and empirical evidence suggest that this discrepancy poses a significant threat to America's political landscape.

III. THE THEORETICAL AND EMPIRICAL EFFECTS OF DISCREPANT CONTRIBUTION LIMITS ON DEMOCRATIC GOVERNANCE

This Part analyzes the current discrepant contribution limits through two lenses: political theory and empiricism. Section A reveals that this discrepancy is problematic for democratic governance under two competing visions of democracy that encompass *both* sides of the campaign finance debate through pluralism and deliberative democracy. Section B then provides empirical evidence to show that these concerns are not merely theoretical, but are in reality problematic for effective American governance.

A. THEORETICAL UNDERPINNINGS OF THE CONTRIBUTION LIMIT DEBATE

Underlying the legal issues of campaign finance reform is a far more theoretical debate that questions the role of money, voters, and interest groups in democratic governance. This section explains the sources of contention on both sides of this debate and suggests that *both* visions of democracy serve to lose under the current state of campaign contribution limits.

89. *See 2004 Total Outside Spending, by Group*, OPENSECRETS.ORG, https://www.opensecrets.org/outsidespending/summ.php?cycle=2004&disp=O&type=U&chrt=V (last visited Feb. 17, 2016).

90. *Id.*; *see 2016 Total Outside Spending*, *supra* note 1.

91. *See 2016 Total Outside Spending*, *supra* note 1.

1. COMPETING VISIONS OF DEMOCRACY: PLURALISM VERSUS DELIBERATIVE DEMOCRACY

The theoretical dialogue of campaign finance reform can be seen in jurisprudence as early as *Buckley v. Valeo*.[92] Before the D.C. Circuit Court of Appeals, the *Buckley* plaintiffs, in seeking to overturn the FECA amendments, argued that money is essential to effective campaigns:

> It is . . . too crabbed a notion of the political process to restrain people from demonstrating the intensity of their convictions on particular issues. Indeed, it is hard to see how a democratic nation can have a stable government if it does not permit intensity of feeling as well as numbers of adherents to be reflected in the political process . . . . Campaign contributions represent a means by which intensity can be shown . . . .[93]

Soon following the D.C. Circuit's decision in *Buckley*, Judge J. Skelly Wright wrote of this argument's pluralistic undertones favoring unrestricted political contributions.[94]

The theory of pluralism posits that the political process consists of competing interest groups clashing to produce a policy outcome representative of the dominant interest. Under this view, it is these groups, rather than individual citizens, that constitute the political decision-making units of a democracy. Judge Wright suggested that the *Buckley* plaintiffs embraced this theory: that political donations and expenditures are conduits through which interest groups can relay the intensities of their political ideas.[95] In turn, any governmental restriction on these expenditures impedes the democratic process.

A countervailing view of pluralism is the theory of deliberative democracy, which proposes that the democratic process can be improved by fostering a political marketplace where individual voters meet face to face to communicate and reflect about political matters.[96] This theory suggests that the intrusion of financial contributions into the political forum dilutes

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92. Buckley v. Valeo, 519 F.2d 821 (D.C. Cir. 1975).

93. Brief of the Plaintiffs at 105, *Buckley*, 519 F.2d 821 (quoted in Judge J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001, 1013–14 (1976)).

94. *See* J. Wright, *supra* note 93, at 1013.

95. *Id.* at 1016.

96. *See* Pasquale, *supra* note 11, at 623.

an honest and informed debate on issues that matter most to individual citizens.[97] Rather, this money pushes only discrete issues advanced by special interest groups and their candidates to the forefront of the political marketplace.[98]

The debate between pluralism and deliberative democracy, and the larger debate between the regulation of contributions versus a free market of ideas, is at heart a controversy over the theoretical premise of the role of money in a democracy. While one side views money as the inherent *problem*, the other views money as the *solution*.[99]

2. THE ROLE OF PUBLIC CHOICE THEORY IN PLURALISM AND DELIBERATIVE DEMOCRACY

Despite the competing values in pluralism and deliberative democracy, underlying both beliefs is the theory of public choice. The public choice theory suggests that individual members of society seek to maximize their own economic interests through political decision-making.[100]

Through the lens of pluralism, interest groups compete in demanding self-interested goods and services through the implementation of their own ideological agenda on the political process. This competition is expressed through political capital expenditures to candidates and campaigns in support of one's own economic interests. In theory, the greater each group's expenditure of political capital, the more it can secure its own interests from the state and thus orient political debate.

As far as the effect of public choice on deliberative democracy, some political theorists contend that public choice informs an individual's idea of what deliberation must accomplish to render collective democratic decision-making meaningful.[101] For example, suppose Voter A is a small business owner. During

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97. *See* Pasquale, *supra* note 11, at 602.

98. *Id.*

99. *See* BeVier, *supra* note 53.

100. *See generally* JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY 21–26 (1962).

101. *See* John S. Dryzek & Christian List, *Social Choice Theory and Deliberative Democracy: A Reconciliation*, 33 BRIT. J. POL. SCI. 1, 28 (2003). This view runs counter to the understanding among many political economists that deliberative democracy theory is not susceptible to public choice because thoughtful deliberation makes *any* individual amenable to changing beliefs through rational persuasion. *Id.* at 1.

a congressional election, Candidate B promises to raise taxes on small businesses, while Candidate C promises to cut taxes for small businesses. Though Voter A's support for either candidate is amenable to change through a rational, thoughtful deliberation with other voters, from the outset Voter A's deliberation will be informed by her economic interests in supporting Candidate C. Even if Voter A decides to support Candidate B, the theory presumes Voter A will recognize an economic rationale within her vote that gives her decision meaning within the democratic process.

3. THE THEORETICAL IMPLICATIONS OF DISPARATE CONTRIBUTION LIMITS ON PLURALISM AND DELIBERATIVE DEMOCRACY

The current discrepancy in fundraising capabilities between political parties and outside groups proves problematic for both theories of pluralism and deliberative democracy. A functioning normative model of pluralism presumes a level playing field upon which various interest groups compete. Under the pluralist model, each group's interests can be mapped in divergent vectors; when these groups clash, the resultant vector represents the general public interest.[102] The direction in which public interest sways is determined by which groups are able to garner the most intense public support, thereby attracting the most political capital. In an egalitarian forum where political capital is equally available to all groups, the outcome of the inter-group competition should reflect where the most intense public support lies on the issue. However, when the structure of the forum systemically restricts access to political capital from only *certain* groups, the resultant vector does not accurately represent the most intense public support and does not appropriately reflect "public opinion."

This outcome is only exacerbated when public choice enters the pluralist model. Following public choice, the vectors expressed by each interest group presumably do not represent what is best for the general social welfare but rather the economic interests of each individual group. On an equal playing field, it could be said that the resultant vector from the clash of groups represents what is the most intense economic interest of the general public. However, when one group does not have the same access to political capital as other groups, the political landscape is artificially skewed towards the economic interests of the group

102. J. Wright, *supra* note 93, at 1016.

with unrestricted access to political capital.

This artificially skewed vector of public opinion represents the political market under the current state of campaign contribution regulations. While outside groups have an unlimited supply of political capital to make independent expenditures and voice their economic interests, political parties are far more restricted. The policy outcomes under this discrepant regulatory landscape cannot reflect a truly pluralistic model of governance.

Moreover, these regulations do not bode well for the other side of the political theory debate: deliberative democracy. The public choice-deliberative democracy model outlined above presumes that a voter's underlying economic interests are actually in the voter's best economic interest.[103] These interests form the basis of rational deliberative debate, the outcome of which accurately represents the general public interest.

A normative model of this theory in which political parties and interest groups have different fundraising and advertising capabilities disrupts the resultant public interest entirely. Because political parties are financially limited in the volume of policy messages they can promote, outside groups can drive the debate simply by outspending any conflicting party messages. Voters may soon find their "economic interests" amenable to change depending on the strength and effectiveness of these messages. Empirical research supports this theory: while public choice suggests individuals vote in their own economic interest, an effective advertising campaign may cause voters to support a platform that is not actually in their own interest.[104] As a result, when deliberations begin, voters find themselves initially basing their opinions on false presumptions of economic interest. The outcome of this debate is *not* representative of the actual public good but artificially skews towards the economic interests of the most financially empowered group.

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103. *See supra* Section III.A.2.

104. *See, e.g.*, Steve Mariotti, *An Economic Analysis of the Voting on Michigan's Tax Expenditure Limitation Amendment*, 33 PUB. CHOICE 15, 23–24, 25 n.19 (1978). Mariotti found that in a vote on a Michigan tax "a substantial portion of the Michigan Electorate voted for reasons other than purely pecuniary ones." He also stated that "there is substantial evidence that a misleading and deceptive advertising campaign, directed against Proposal C, and funded in large part by the Michigan Educational Association, played a decisive role in confusing the economic and political issues surrounding Proposal C, thereby encouraging voting behavior inconsistent with the purely economic self-interests of the Michigan electorate." *Id.*

Political theory illustrates the problems American democracy faces under the current discrepancies in campaign contribution limits. These flaws exist on both sides of the theoretical debate of the role of money in democracy: under models of pluralism and deliberative democracy. Public choice theory suggests that the current regulations artificially distort democratic perceptions of the public good.

B. THE EMPIRICAL CASE FOR CONCERN: WHY DISPARATE CONTRIBUTION LIMITS HARM AMERICA'S POLITICAL ENVIRONMENT

The discrepancy in fundraising capabilities between political parties and outside groups is not just theoretically problematic but has also proven harmful to American politics. The unlimited fundraising abilities of special interest groups have fueled the polarization of the American government in recent years, which has led to an unprecedented era of gridlock.

Political parties are not discrete, insular organizations; they are national networks of numerous local, state, and national committees.[105] Because these national networks must attract millions of diverse voters to a common platform, electoral success requires parties to appeal to the broadest range of possible interests.[106] This broad base of interests thus compels government party leaders to respond to a similarly broad range of policies and programs.[107] Though political parties could not exist without the financial backing of a small group of donors, their electoral success is ultimately beholden to the voters.[108] Today, the growth of campaigning by outside groups has disrupted this system.

Unlike political parties, smaller outside groups, such as super PACS and 501(c)(4)s, typically push social and political agendas targeting insular issues.[109] These outside groups

105. Richard M. Skinner et al., 527 Committees and the Political Party Network, 40 AM. POL. RES. 60, 62 (2012).

106. *See* Richard Pildes, *How to Fix Our Polarized Politics? Strengthen Political Parties*, WASH. POST, Feb. 6, 2014, https://www.washingtonpost.com/news/monkey-cage/wp/2014/02/06/how-to-fix-our-polarized-politics-strengthen-political-parties/.

107. *See id.*

108. Less than one-half of 1% of American adults contributed $200 or more to any federal election campaign in the 2012 election cycle. *Donor Demographics*, OPENSECRETS.ORG, https://www.opensecrets.org/bigpicture/donordemographics.php?cycle=2012 (last visited Feb. 17, 2016).

109. For example, the 501(c)(4) at issue in *Emily's List v. FEC* promoted abortion

typically receive their support from a small number of generous donors with specific economic or social interests that guide the group's expenditures.[110] Unlike the national party network, which supports establishment candidates capable of connecting a broad range of interests, the outside group system spends astronomical amounts lobbying candidates on behalf of distinct and narrow platforms.

For a government to function effectively, its leaders must pragmatically come to a consensus in certain broad areas, such as budgetary and debt-related matters.[111] Historically, such deal making was possible because party leaders could coalesce rank and persuade party members to vote a certain way.[112] However, with a new class of politicians beholden to the financial backing of special interest groups, rather than more diverse parties, America now faces an era scholars have termed "political fragmentation."[113] Fragmentation has eroded political power away from broader party coalitions to individual officeholders themselves.[114]

Fragmentation and unprecedented financial backing from outside groups have redefined the interests of the "party" and enabled more extreme candidates to enter office with an independent power base.[115] Pragmatic party leadership no longer has the same place in legislating, as many of the parties' voices are now polarizing ideologues. As a result, the moderate center of American politics has all but disappeared: moderates comprised 41% of the Senate in 1970 but only a mere 5% in 2009.[116]

Divided government is nothing new in America—such division is indeed necessary to ensure government responds to

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rights and supported pro-choice Democratic women candidates. 581 F.3d 1, 4 (D.C.C. 2009).

110. *See* Wesley Y. Joe et al., *Do Small Donors Improve Representation? Some Answers from Recent Gubernatorial and State Legislative Elections*, THE CAMPAIGN FIN. INST. 16 (2008) ("Large donors are more likely than small donors to give in the interest of advancing their own narrow economic concerns, as distinct from a more general concern about the economy.").

111. *See* Pildes, *supra* note 106.

112. *See id.*

113. *See id.*

114. *See id.*

115. *See id.*

116. Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 277 (2011).

the broad range of interests among the citizenry.[117] However, a divided, hyperpolarized government incapable of creating a center between ideological lines cannot govern efficiently. Hyperpolarization has proven that the minority party will remove itself from the legislative process altogether, voting strictly along partisan lines.[118] As a result, there are no partisan checks and balances toward ensuring that legislation is as well written as possible to serve the interest of the collective whole.[119] Moreover, recent history has shown that in periods of hyperpolarization inter-branch checks and balances erode if a single party controls multiple branches.[120]

Recent changes in campaign finance law have prevented national party committees from competing with the unlimited fundraising capabilities of outside groups. This discrepancy is not only legally inexplicable and theoretically problematic but also has contributed to the hyperpolarization of politics and gridlock in Congress. It is abundantly clear that reform is needed.

IV. LITIGIOUS AND LEGISLATIVE SOLUTIONS

Though there are many potential avenues to repair the demise of party fundraising capabilities, this Comment poses two practical, immediate solutions: one litigious and the other legislative. First, litigation should be pursued against the FEC

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117. *See* Pildes, *supra* note 116, at 325–26 (noting that "[d]ivided government was the norm for most of the last half of the twentieth century").

118. *See id.* at 327.

119. *See id.*

120. *See id.* at 327, n.214 ("For example, no congressional committee subpoenaed the White House for the first six years of the Bush II presidency, when Republicans controlled the House and the Senate for all but about eighteen months of that period, despite momentous issues engaged in the aftermath of 9/11."). A more recent example is illustrated by the efforts of the Republican-controlled 114th Congress to enact legislative reform during the Trump presidency. Senate Majority Leader Mitch McConnell has reportedly considered amending the Senate procedural rules to override the legislative filibuster, allowing passage of bills with a simple majority vote of Republicans in the face of Democratic opposition. David Herzig, *Funeral For the Filibuster: GOP Will Likely Lay Senate Tool to Rest*, THE HILL, June 26, 2017, http://thehill.com/blogs/pundits-blog/economy-budget/339451-funeral-for-the-filibuster-gop-may-lay-senate-tool-to-rest. President Trump has openly supported this "nuclear option," tweeting: "The U.S. Senate should switch to 51 votes, immediately, and get Healthcare and TAX CUTS approved, fast and easy. Dems would do it, no doubt!" Donald J. Trump (@realDonaldTrump), TWITTER (May 30, 2017, 6:59 AM), https://twitter.com/realDonaldTrump/status/869553853750013953?ref_src=twsrc%5Etfw&ref_url=http%3A%2F%2Fthehill.com%2Fhomenews%2Fadministration%2F335594-trump-calls-for-end-to-filibuster.

seeking a certification of the question as to the constitutionality of the 52 U.S.C. § 30116 limits on individual contributions to political parties when those contributions are used solely for independent expenditures. Second, Congress should revise the § 30116 limits due to their arbitrary nature and in light of recent precedent removing limits on contributions to outside groups.

A. A LITIGIOUS ROADMAP FOR REFORM

In light of Supreme Court precedent, this Comment poses the following question for courts today: whether there is any legitimate governmental interest in reducing actual or apparent quid pro quo corruption if political parties solicit unlimited contributions to be deposited into a segregated account *solely* for independent expenditures. Though this question was recently litigated before the D.C. District Court in *Rufer v. FEC*, the case was inexplicably withdrawn before the court ruled on the issue.[121] This section will argue that despite this failed attempt to reform, the courts are willing to revisit the question once again.

1. RECENT FAILURES IN LITIGATION: WHY THERE IS ROOM FOR IMPROVEMENT

Two reasons explain why the most realistic method of campaign finance reform should begin with litigation: (1) the current gridlock in Congress often prevents expeditious passage of large-scale legislation, and (2) history shows that the Supreme Court has been central in most campaign finance reform since the enactment of the BCRA.[122] Given this reality, this Comment first proposes that a Democratic or Republican Party national committee file suit against the FEC under 52 U.S.C. § 30110 seeking certification of the constitutionality of the § 30116(a)(1)(B) statutory limits on contributions to political parties when those contributions are deposited into a segregated account solely for independent expenditures and electioneering communications.

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121. Rufer v. FEC, 64 F. Supp. 3d 195 (D.D.C. 2014).

122. *See, e.g.*, McConnell v. FEC, 540 U.S. 93 (2003) (striking down BCRA's prohibition of contributions by minors); Wisonsin Right to Life v. FEC, 551 U.S. 449 (2007) (striking down BCRA's prohibition on the use of corporate funds to finance electioneering communications in certain pre-federal election periods); Davis v. FEC, 554 U.S. 724 (2008) (striking down BCRA's "Millionaire's Amendment"); Citizens United v. FEC, 558 U.S. 310 (2010) (striking down BCRA's prohibition on corporations and labor unions from using general treasury funds for independent expenditures and electioneering communications); McCutcheon v. FEC, 134 S. Ct. 1434 (2014) (striking down BCRA's aggregate contribution limits).

Despite the relative success of reform already granted by the courts, the precise issue at hand was recently litigated to no avail in *Rufer v. FEC*.[123] In *Rufer*, the Republican and Libertarian party committees and an individual Libertarian contributor sought to invalidate the FECA's § 30116(a)(1)(B) contribution limits as applied to their independent expenditures.[124] The parties argued that contributions deposited into a segregated account for independent expenditures pose no threat of actual or apparent quid pro quo corruption—"the only constitutionally permissible grounds on which Congress may seek to limit political contributions."[125]

The plaintiffs in *Rufer* faced an unfortunate procedural hurdle in their claim: They brought the claim under BCRA § 403(a)(d)(2) and sought to challenge the provision before a three-judge court—likely to receive a fast track to the Supreme Court.[126] This proved fatal, however, as the court denied review of the claim because the plaintiffs lacked standing under § 403, which requires that the suit be targeted at BCRA's *amendments*.[127] Because the party contribution limits were initially established under the FECA and were not "substantially changed" by the BCRA, the *Rufer* plaintiffs could not challenge the limits in the procedural manner they sought.[128] The *Rufer* plaintiffs did argue that in the alternative the court should certify the questions of the constitutionality of the contribution limits to the D.C. Circuit under 52 U.S.C. § 30110.[129] Though the *Rufer* court did certify the question, the *Rufer* plaintiffs dropped their suit four months later.[130]

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123. Rufer v. FEC, 64 F. Supp. 3d 195 (D.D.C. 2014).

124. *Id.* at 199.

125. *Id.* at 200 (internal quotations omitted).

126. *Id.* at 202. BCRA § 403 grants the U.S. Supreme Court direct and exclusive appellate jurisdiction over any final decision of a three-judge panel on an issue of BCRA's constitutionality. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 403(a), 116 Stat. 81, 114 (2002) (further imposing a duty on the U.S. Supreme Court "to advance on the docket and to expedite to the greatest possible extent the disposition of the action and appeal").

127. *Rufer*, 64 F. Supp. 3d at 202.

128. *Id.* at 204.

129. *Id.* at 198.

130. Joint Dismissal Agreement, Rufer v. FEC, No. 14-837 (D.C.C. filed Dec. 2, 2014). Rather than continue the *Rufer* case, some of the same plaintiffs filed suit again against the FEC seven months later in *Republican Party of Louisiana v. FEC*. 146 F. Supp. 3d 1 (D.D.C., 2015). This time, the plaintiffs challenged the prohibition on soft money contributions to state, local, and district committees—the centerpiece of the BCRA. *See id.* at 4. At the time of the writing of this Comment, the *Republican*

Given that dicta in *Rufer* overwhelmingly favored the merits of the plaintiffs' arguments, a national party committee should be well-served by filing a § 30110 suit seeking certification of the same questions certified to the D.C. Court of Appeals in *Rufer*. More specifically, the court in *Rufer* certified the following question: do the § 30116 contribution limits "violate the First Amendment by prohibiting political-party committees from establishing accounts that accept contributions in excess of the FECA contribution limits to fund 'independent expenditures'—i.e., expenditures that expressly advocate for the election or defeat of federal candidates but are not coordinated with candidates or their campaigns?"[131]

Despite the unbroken line of precedent upholding the BCRA and FECA contribution limits,[132] the *Rufer* court's determination that the plaintiffs' constitutional claims were "substantial" indicates the court's willingness to evaluate challenges to the FECA's contribution limits.[133] As the court noted, there is ample opportunity for courts to reform and strike down the FECA's political party contribution limits because the Supreme Court has yet to "expressly consider" the issue presented here: "whether the threat of *quid pro quo* corruption or its appearance inherent in donations to political parties may be sufficiently reduced by segregating contributions to independent expenditure accounts so as to defeat the government's ability to cap such contributions consistent with the First Amendment."[134] An analysis of the guiding precedent should make the answer to this question a

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Party of La. litigation is still unfolding, though many contend that it is nearly certain that the Supreme Court will review the case. *See, e.g.*, Richard L. Hasen, *McCain-Feingold Act May Doom Itself; A Provision in the Campaign-Reform Law Could Spur the Supreme Court to Hear a Challenge*, THE NAT'L L. J., Aug. 17, 2015.

131. Certification Order at 2, Rufer v. FEC, No. 14-837 (D.C.C. filed Oct. 2, 2014).

132. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 29 (1976) ("We find that . . . the weighty interests served by restricting the size of financial contributions to political candidates are sufficient to justify the limited effect upon First Amendment freedoms caused by the $1,000 contribution ceiling."); McConnell v. FEC, 540 U.S. 93, 96 (2003) ("The Government's strong interests in preventing corruption, and particularly its appearance, are thus sufficient to justify subjecting all donations to national parties to FECA's source, amount, and disclosure limitations."); McCutcheon v. FEC, 134 S. Ct. 1434, 1446 (2014) ("Limits on contributions to political committees consequently create an additional hurdle for a donor who seeks both to channel a large amount of money to a particular candidate and to ensure that he gets the credit for doing so.").

133. Rufer v. FEC, 64 F. Supp. 3d 195, 203 (D.D.C. 2014) ("Because the Supreme Court has not squarely confronted the issue, the constitutional questions raised by Plaintiffs meet the threshold level of substantiality . . . .").

134. *Id.* at 203.

resounding *yes*.

2. A WINNING ARGUMENT

The Supreme Court has substantially narrowed the scope of the government's anti-corruption interest under the BCRA since its broad decision in *McConnell v. FEC*. In *McConnell*, the majority found that the BCRA's anti-corruption interests were justified by the inherent conflict of interest in donors merely obtaining *access* to the political process.[135] *Citizens United* curtailed such a broad interpretation of anti-corruption interests, finding "[t]hat speakers may have influence over or access to elected officials does not mean that those officials are corrupt."[136] The recent *McCutcheon* plurality further articulated what is and is not a permissible interest: "while preventing corruption or its appearance is a legitimate objective, Congress may target only a specific type of corruption—'*quid pro quo*' corruption."[137] Further, *McCutcheon* found that "the risk of *quid pro quo* corruption is generally applicable only to the narrow category of money gifts that are directed . . . to a candidate or officeholder."[138] It is clear today that in regulating contribution limits, Congress may *only* seek to prevent actual or apparent quid pro quo corruption from contributions made directly to candidates.

It is precisely this analysis that led the *Citizens United* Court to hold—*as a matter of law*—that independent expenditures *do not* give rise to corruption or the appearance of corruption.[139] Thus, under current law there is no legitimate governmental interest in limiting contributions to corporations, unions, and PACs that engage in only independent expenditures.[140] Similarly, there would be no legitimate anti-corruption interest in limiting contributions to political parties if those contributions are to be deposited into a segregated account and used *only* for independent expenditures.

In sum, a political party should pursue litigation seeking certification of the same constitutional question certified in *Rufer*. Based on the *Rufer* court's finding of substantiality in the *Rufer*

135. McConnell v. FEC, 540 U.S. 93, 154 (2003) ("Implicit . . . in the sale of access is the suggestion that money buys influence.").

136. Citizens United v. FEC, 558 U.S. 310, 314 (2010).

137. McCutcheon v. FEC, 134 S. Ct. 1434, 1450 (2014).

138. *Id.* at 1452 (internal quotations and citations omitted).

139. *Citizens United*, 558 U.S. at 357.

140. *See* SpeechNow.org v. FEC, 599 F.3d 686, 695 (D.D.C. 2010).

plaintiffs' claim and the current line of precedent striking down limits on contributions for independent expenditures, there is little reason to believe a court would not rule in favor of reform.

B. A LEGISLATIVE ROADMAP TO REFORM

While the litigious avenue of campaign finance reform has proven the most successful route since the enactment of the BCRA, there is no reason why Congress should refuse to revisit contribution limits. Indeed, in 2014 Congress enacted minor amendments to the FECA's party contribution limits.[141] This section proposes an amendment revising the FECA's existing party contribution limits that satisfies constitutional scrutiny under the current precedent. Next, this section provides a response to arguments most likely to arise against such an amendment.

1. PROPOSED LEGISLATION

Courts have held any limitation on contributions to corporations, political committees, nonprofit corporations, and labor unions unconstitutional when those contributions are used for independent expenditures.[142] To afford national political committees of parties this same constitutional protection, Congress should amend the FECA to include an exception to the 52 U.S.C. § 30116(a)(1)(B) limits where: (1) the funds are donated for the express purpose of the committee to dispose of such funds as independent expenditures; and (2) such funds are deposited into a separate, segregated account of a national committee of a political party which is used solely to make independent expenditures.[143]

2. RESPONSES TO LIKELY ROADBLOCKS

At least three arguments could arise against unlimited contributions to political parties in any form:

(1) Party committees engage in campaign activities outside of independent expenditures—including contributing directly to candidates—that should not be fueled by any unlimited

141. *See supra* Section II.D (discussing the FECA amendments enacted under the Consolidated and Further Continuing Appropriations Act).

142. See *supra* Section IV.A.2.

143. The language herein is phrased to mirror as closely as possible the language in 52 U.S.C. § 30116(a)(9) creating separate, segregated accounts for convention accounts, headquarters accounts, and recount accounts.

sources of funds.

(2) These are *political parties* with far more political power than other groups.

(3) Giving parties unlimited fundraising capabilities would initiate a return to the soft-money-era Congress expressly sought to end.

Nonetheless, guiding precedent forecloses each of these arguments. First, courts, Congress, and the FEC have already demonstrated a willingness and ability to enact and regulate higher contributions than the FECA's base limits for expenditures that are not direct contributions to candidates. The D.C. Circuit has already enabled unlimited contributions for other "hybrid" political committees that also make direct contributions *and* independent expenditures if those funds are placed into a segregated account.[144] Also, Congress has already recently enacted contribution limits greater than those within the FECA for contributions made to parties if deposited into similar segregated accounts.[145] Based on a draft notice of proposed rulemaking enforcing these segregated accounts, the FEC has demonstrated the ability to strictly enforce the activities of those accounts to ensure that the funds are to be used only for the purpose for which they were deposited.[146] This should alleviate any concern that these accounts may be used to circumvent other individual contribution limits.

Second, party committees should not be restrained from soliciting unlimited contributions for independent expenditures solely on the basis that they are *political parties*. The Supreme Court has already held that regulatory distinctions in campaign finance on the basis of the speaker's identity are unconstitutional.[147] Moreover, there is no constitutional basis in

144. Emily's List v. FEC, 581 F.3d 1, 12 (D.C. Cir. 2009) ("A non-profit that makes expenditures to support federal candidates does not suddenly forfeit its First Amendment rights when it decides also to make direct contributions to parties or candidates. Rather, it simply must ensure, to avoid circumvention of individual contribution limits by its donors, that its contributions to parties or candidates come from a hard-money account.").

145. *See supra* Section II.D (discussing the FECA amendments enacted under the Consolidated and Further Continuing Appropriations Act).

146. FEC, No. 15-54-B, REG 2014-01, OUTLINE OF DRAFT NPRM IMPLEMENTING PARTY SEGREGATED ACCOUNTS, 4, 7, 9 (2015) (noting that for each account, the proposed regulation would prohibit the use of funds "to make independent expenditures or contributions or for general campaign expenses").

147. *See* Citizens United v. FEC, 558 U.S. 310, 365 (2010).

regulating party committees more strictly than other political committees simply to equalize the playing field of political fundraising; the Court long ago denied the legitimacy of such interests.[148]

Finally, it is not a well-founded criticism to suggest that allowing unlimited contributions to political parties for sole use in independent expenditures would usher a return of the soft money era. This criticism largely misunderstands the nature of soft money and the interests the Supreme Court has recognized as legitimate in seeking to curtail such unregulated contributions.

The Court in *McConnell* upheld the BCRA's prohibition on soft money, recognizing the government's anti-corruption interests as "sufficient to justify subjecting all donations to national parties to the FECA's source, amount, and disclosure limitations."[149] The "amount" limitations were justified by an interest in preventing the "appearance" of corruption that is inherent in mere *access* to the political system through large political contributions.[150] However, more recent opinions have found such a justification unduly broad and out of touch with the only rational permissible interest in limiting contributions: the prevention of corruption inherent in *direct contributions* to candidates that make the appearance of quid pro quo arrangements inevitable.[151] There is no such interest at stake when an organization makes independent expenditures that have absolutely no coordination with any candidates—there is no *quid* given for which a *quo* could be returned.

Most importantly, removing contribution limits on funds used for independent expenditures would *not* lead to any increase in soft money. Simply put, these contributions are not soft money. The "soft money" the BCRA sought to eliminate were donations contributed in a manner that avoided all disclosure requirements and source and contribution limits.[152] The concern

148. *See* Buckley v. Valeo, 424 U.S. 1, 48–49 (1976) ("But the concept that the government may restrict the speech of some elements of our society in order to enhance the relative voice of other is wholly foreign to the First Amendment . . . .").

149. McConnell v. FEC, 540 U.S. 93, 96 (2003).

150. *Id.* at 154 ("Implicit . . . in the sale of access is the suggestion that money buys influence.").

151. Citizens United v. FEC, 558 U.S. 310, 357 (2010).

152. *See McConnell*, 540 U.S. at 95 (noting BCRA's soft money prohibition, "which forbids national party committees and their agents to 'solicit, receive, . . . direct . . . or spend any funds, that are not subject to [FECA's] limitations, prohibitions, and reporting requirements'") (internal citations omitted); *see also* 148 CONG. REC. S2096

underlying such donations is that no one really knows *who* is donating funds that are used in campaigning. Removing contribution limits for the very limited purpose proposed above would by no means compromise the FECA's existing anti-corruption measures. Rather, party committees would still be subject to the FECA's remaining source and disclosure regulations over contributions.[153]

Consequently, legislative revision of the FECA allowing unlimited contributions for independent expenditures is necessary to afford national party committees the same constitutional protection already given to similar political groups. Such a revision is wholly consistent with guiding precedent, which dictates that such limits are wildly unconstitutional if the committee is restricted from engaging in independent expenditures. Most importantly, any concerns of a return to the era of unregulated "soft money" should be dissuaded by the reality that these contributions will still be subject to the FECA's longstanding disclosure and reporting requirements.

V. CONCLUSION

Campaign finance is deeply in need of reform. While reform in 2002 principally sought to eliminate unregulated "soft money" from the political landscape, a line of judicial precedent, unimaginable at that time, has since ushered in a new era of unprecedented campaign fundraising capabilities. Also unforeseen in 2002 was an outcome of court decisions enabling only certain select outside groups to solicit unlimited contributions. Money in politics has predictably flowed along the path of least resistance away from highly regulated political parties and toward an ocean of lesser regulated super PACs, nonconnected PACs, and 501(c)(4)s. This discrepancy is incoherent, against the public's interest, and constitutionally irreconcilable.

While the issue presented in this Comment is clear, the

(March 20, 2002) (statement of Sen. Hutchinson) ("One of the provisions that is in [BCRA] that I am very worried about allows unregulated special interest groups to raise and spend unlimited amounts of soft money without any real reporting requirements. I really do not know who the contributors are to a private group that decides to become politically active.").

153. Political party committees must still comply with the FECA's disclosure requirements that mandate reporting of any individual donating over $200 and any expenditure (including independent expenditures) by the committee over $200. 52 U.S.C. §§ 30104(b)(3)(A), (b)(4) (2015).

solutions are far more nuanced. Short of an entire legislative overhaul of the current campaign finance system, the incredible proliferation of money into politics is here to stay. One practical, immediate solution to fulfilling governmental anti-corruption interests in campaign regulation is to restore balance to the field of independent expenditures by political groups. The two proposals outlined in this Comment easily implement this solution by granting national party committees the same fundraising capabilities already enjoyed by similar groups. Through litigation or legislation, reform must be proactively sought sooner than later. The only question remaining is who will make the first move.

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