

ESSAY

NETWORKING THE PARTY: FIRST AMENDMENT RIGHTS AND THE PURSUIT OF RESPONSIVE PARTY GOVERNMENT

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This Essay argues that the Supreme Court's political party jurisprudence is predicated on a set of theoretical assumptions that do not hold true in the real world of contemporary American politics. The Court's jurisprudence is grounded in a theory of democratic accountability—known as “responsible party government”—which views political parties primarily as speakers and presumes that electoral accountability emerges from the choice between ideologically distinct political parties during competitive elections.

It is time, however, to admit that responsible party government has run its course as a means for achieving democratic accountability. Without claiming that there are easy solutions to the democratic dysfunctions the United States is experiencing, and drawing on a substantial body of empirical literature, this Essay maintains that an alternative path to democratic responsiveness emerges when one focuses on the associational qualities of partisan networks. From this perspective, the primary impediment to responsive governance is a lack of effective social networks and feedback loops through which the interests of ordinary Americans can be filtered up to party elites. The current doctrinal preoccupation with shoring up party elites and their ability to define and control their distinct political brand should be replaced with an attentiveness to a party's capacity to mobilize broad and representative political participation and to facilitate a two-way street of information transmission through party activists.

This Essay concludes by identifying opportunities within existing First Amendment doctrine for fostering partisan networks more capable of producing democratic responsiveness and accountability. Specifically,

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it suggests extending the Anderson–Burdick framework to cases involving the associational rights of the major political parties.

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INTRODUCTION

Hardly a day goes by without a headline decrying the hyperpolarization and dysfunction of Congress. While the 2016 election has heightened these concerns, the fact is that for over a decade those who follow politics closely have been sounding alarm bells about the myriad ways the party system in the United States is failing to live up to its intended democratic function. Some have been preoccupied with ideological polarization and legislative gridlock,¹ others with the apparent

1. See, e.g., Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 *Yale L.J.* 804, 809 (2014) [hereinafter

disconnect between the policies pursued and the preferences of the constituencies represented,² and others still with an important secondary effect—the aggrandizement of executive power.³

Whatever the emphasis, there is little question that there is a growing consensus that the American party system is in need of fundamental reform if responsible and responsive governance is to emerge.⁴ In recent years, reformers across the political spectrum have increasingly called for the loosening of federal restrictions on party fundraising.⁵ Advocates of deregulation argue that the rise of Super PACs and similar entities capable of accepting unlimited contributions for independent expenditures, as a result of haphazard, court-driven deregulation, has empowered the more ideologically extreme elements of the partisan network—fomenting political polarization, legislative gridlock, and popular discontent.⁶

Pildes, *Romanticizing Democracy*]; Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 *Calif. L. Rev.* 273, 276–81 (2011) [hereinafter Pildes, *The Center Does Not Hold*].

2. See, e.g., Tabatha Abu El-Haj, *Beyond Campaign Finance Reform*, 57 *B.C. L. Rev.* 1127, 1128–31 (2016) [hereinafter Abu El-Haj, *Beyond Campaign Finance Reform*]; Kate Andrias, *Separations of Wealth: Inequality and the Erosion of Checks and Balances*, 18 *U. Pa. J. Const. L.* 419, 486–87 (2015).

3. See, e.g., Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 *Harv. L. Rev.* 2311, 2349–56 (2006); William P. Marshall, *Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters*, 88 *B.U. L. Rev.* 505, 509 (2008).

4. See, e.g., Thomas E. Mann & Anthony Corrado, *Brookings Inst., Ctr. for Effective Pub. Mgmt., Party Polarization and Campaign Finance 17–18* (2014), http://www.brookings.edu/wp-content/uploads/2016/06/Mann-and-Corrad_Party-Polarization-and-Campaign-Finance.pdf [<http://perma.cc/7UQT-2GPV>]; Samuel Issacharoff, *Outsourcing Politics: The Hostile Takeover of Our Hollowed-Out Political Parties*, 54 *Hous. L. Rev.* 845, 879–80 (2017) [hereinafter Issacharoff, *Outsourcing Politics*]; Pildes, *Romanticizing Democracy*, *supra* note 1, at 836–49. See generally Mark Schmitt, *Democratic Romanticism and Its Critics*, 36 *Democracy*, Spring 2015, <http://democracyjournal.org/magazine/36/democratic-romanticism-and-its-critics/> [<http://perma.cc/29QB-MNJS>] (reviewing recent arguments in favor of strengthening party leaders in the interest of reducing polarization and increasing responsible governance, including by deregulating party financing).

5. See Raymond J. La Raja & Jonathan Rauch, *Brookings Inst., Ctr. for Effective Pub. Mgmt., The State of State Parties—and How Strengthening Them Can Improve Our Politics 15–18* (2016), <http://www.brookings.edu/wp-content/uploads/2016/07/states.pdf> [<http://perma.cc/SRJ4-XZVN>]; Ian Vandewalker & Daniel I. Weiner, *Brennan Ctr. for Justice, Stronger Parties, Stronger Democracy: Rethinking Reform 14–15* (2015), http://www.brennancenter.org/sites/default/files/publications/Stronger_Parties_Stronger_Democracy_0.pdf [<http://perma.cc/PNF5-P2CL>]; Raymond J. La Raja, *Richer Parties, Better Politics? Party-Centered Campaign Finance Laws and American Democracy*, 11 *Forum* 313, 315–18 (2013); Pildes, *Romanticizing Democracy*, *supra* note 1, at 833–45.

6. See, e.g., Pildes, *Romanticizing Democracy*, *supra* note 1, at 830–31 (arguing that the ideological extremes of the informal party network have led to the cooptation of the party brand, particularly on the right; the election of extremists unable to compromise; and the demise of responsible party governance). For a reform aimed at accommodating the rise of Super PACs, see Robert F. Bauer, *Commentary, The Parties’ Struggles in the Political “Market”: Can Regulation Solve This Problem—Should It, and if So, How?*, 54 *Hous. L. Rev.* 881, 902–08 (2017) [hereinafter Bauer, *The Parties’ Struggles*].

Restoring responsible party government, the consensus goes, requires redirecting the flow of money toward the formal party apparatus as the only way to restore moderation and functionality to Congress.⁷ The election of Donald Trump—a candidate who never achieved more than a plurality of the primary vote and had the lowest approval rating of any incoming President—illustrates the costs of the current regulatory regime.⁸ The ease with which each of the numerous Republican hopefuls was able to amass support through Super PACs (frequently financed by individual wealthy donors) undercut the party leadership’s ability to narrow the primary field early enough to prevent Trump’s insurgent candidacy.⁹

Until recently, not only did it look like party reform in this vein was poised to succeed, but it appeared likely that reformers would manage to constitutionalize their vision.¹⁰ An obscure constitutional challenge by the Republican Party of Louisiana, carefully positioned procedurally to assure a decision on the merits, looked to be a swift and decisive path to party reform.¹¹ The Court that decided *Citizens United v. FEC*¹² and

7. See, e.g., Issacharoff, *Outsourcing Politics*, supra note 4, at 862–79 (criticizing three regulatory changes—restrictions on party financing, the demise of patronage, and the adoption of the primary—for enabling the hostile takeovers by political extremists); Pildes, *Romanticizing Democracy*, supra note 1, at 830–31, 845–49. But see Lee Drutman, *Giving the Two Parties Even More Money Will Not Solve Polarization*, *Vox* (Nov. 20, 2015), <http://www.vox.com/polyarchy/2015/11/20/9763292/parties-polarization-small-donors> [<http://perma.cc/BJ3K-MDVN>] (reviewing and criticizing this view).

8. See Jonathan Rauch, *How American Politics Went Insane*, *Atlantic* (July/Aug. 2016), <http://www.theatlantic.com/magazine/archive/2016/07/how-american-politics-went-insane/485570/> [<http://perma.cc/MN8D-M6KV>] (“Trump, however, didn’t cause the chaos. The chaos caused Trump.”).

9. See Julie Bykowitz, *Cash-Rich Super PACs Keep Flagging Presidential Campaigns Alive*, *PBS: News Hour* (Jan. 5, 2016), <http://www.pbs.org/newshour/nation/cash-rich-super-pacs-keep-flagging-presidential-campaigns-alive> [<http://perma.cc/ZCN4-74WJ>]; Kenneth P. Vogel & Tarini Parti, *Revenge of Citizens United*, *Politico* (July 15, 2015), <http://www.politico.com/story/2015/07/revenge-of-citizens-united-120115> [<http://perma.cc/5TMJ-4A3H>].

10. Cf. Pildes, *Romanticizing Democracy*, supra note 1, at 844 (noting that proposed campaign finance reforms would be moot “[i]f the political parties [are] constitutionally entitled to receive unlimited contributions dedicated for use only for independent party spending on behalf of candidates” because this would direct the flow away from Super PACs and to the parties themselves).

11. See *Republican Party of La. v. FEC*, 219 F. Supp. 3d 86, 90–91 (D.D.C. 2016), summarily aff’d, 137 S. Ct. 2178 (2017); see also Richard L. Hasen, *The Supreme Court’s Next Big Fight over Money in Politics*, *Atlantic* (May 7, 2016), <http://www.theatlantic.com/politics/archive/2016/05/supreme-court-soft-money/480978> [<http://perma.cc/RDH5-SUNE>] [hereinafter Hasen, *Money in Politics*] (“The [McCain–Feingold] appeals provision makes it very likely the Court will take the case, because unlike a usual decision not to hear a case, rejection of an appeal would indicate the Supreme Court’s belief that the lower court reached the right result.”).

12. 558 U.S. 310 (2010).

McCutcheon v. FEC,¹³ it was assumed, could easily be persuaded to strike down existing federal restrictions on how political party committees raise money for elections.¹⁴ A ruling in favor of the Louisiana plaintiffs would have leveled the playing field for political parties in their pursuit of campaign donations, thereby bringing into fruition party reformers' deregulatory agenda.

But the Court refused to take the bait.¹⁵ In so doing, and also in denying certiorari in a second case seeking clarity on the constitutionality of state-mandated open primaries,¹⁶ the Justices granted a much-needed opening to reconsider the Court's political party jurisprudence.

The Court has long determined that, with respect to political parties, First Amendment rights ought to be allocated in ways that promote democratic values and good governance.¹⁷ Unfortunately, in doing so, it has adopted a set of theoretical assumptions that do not hold true in the real world of contemporary politics. Known in the literature as "responsible party government," the theory, which, as it happens, also accounts for the specifics of the recent calls for party reform, presumes that electoral accountability emerges from the choice between ideologically distinct political parties during competitive elections.¹⁸

Responsible party government theory underpins the Court's jurisprudence on the First Amendment rights of political parties. It is responsible party government that explains not only why current constitutional doctrine entrenches the two-party system but also why it invariably sides with the leaders of the two major parties when internal disputes arise.¹⁹ Accordingly, whatever the precise ruling might have been in *Republican Party of Louisiana v. FEC*, one thing was virtually certain: The Court's reasoning would have taken place within the

13. 134 S. Ct. 1434 (2014).

14. See, e.g. Hasen, Money in Politics, *supra* note 11; see also Kenneth P. Doyle, New Challenge Filed to Party 'Soft-Money' Limits, Bloomberg News (Aug. 4, 2015), <http://www.bna.com/new-challenge-filed-n17179934349/> [<http://perma.cc/DMQ9-MDYM>] (noting that a newly filed lawsuit challenging McCain-Feingold "has a real chance to succeed if the Supreme Court decides to weigh in").

15. *Republican Party of La.*, 137 S. Ct. at 2178 (refusing to hear a challenge to McCain-Feingold's soft-money limits).

16. See *Democratic Party of Haw. v. Nago*, 833 F.3d 1119, 1124 (9th Cir. 2016), cert. denied, 137 S. Ct. 2114 (2017); see also Bob Bauer, The Political Parties and Their Problems, More Soft Money Hard Law (May 17, 2017), <http://www.moresoftmoneyhardlaw.com/2017/05/political-parties-problems/> [<http://perma.cc/H29E-D3SV>] (discussing the Ninth Circuit's decision in *Nago*).

17. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 26–29 (1976) (upholding limits on individual campaign contributions due to the state's compelling interest in preventing the appearance of quid pro quo corruption).

18. For an explanation of responsible party government and a comparison to prominent theories of political parties, see John H. Aldrich, Why Parties? A Second Look 8–16 (2011).

19. See *infra* notes 65–79 and accompanying text.

confines of this particular account of how to harness the imperfect incentives of political parties to produce democratic accountability. Thus, its recent decisions not to take up important cases involving the First Amendment rights of political parties provide an opportunity to revisit the commitment to responsible party government and, potentially, to head off any efforts to constitutionalize a party-reform agenda that appears doomed to fail.

The commitment to responsible party government in the Court's jurisprudence, and also among party reformers, is a colossal mistake. Responsible party government has not panned out. The political parties are stronger and more ideologically distinct than in any prior era.²⁰ Yet, responsible party government has not emerged. Indeed, as one prominent political scientist has concluded, "[t]he scope for independent action by elected leaders" is especially great today, with the "paucity of elite responsiveness to public opinion extend[ing] even to issues on which public opinion seems to be unusually firm and stable."²¹ To the extent there is accountability today, it is almost entirely to party donors and ideological groups.²²

Whereas the debate in legal-academic and policy circles has been driven by fidelity to responsible party government despite its well-documented failures, this Essay argues that it is time to admit that responsible party government has run its course as a means for achieving democratic accountability and, therefore, the Supreme Court's political party jurisprudence is in desperate need of a theoretical overhaul. Responsible party government is premised on the existence of competitive elections that provide each party with an incentive to mobilize the electorate and, accordingly, address the interests of the median voter.²³ We, however, live in a world of increasingly uncompetitive elections, and

20. See Pew Research Ctr., *Political Polarization in the American Public* 6 (2014), <http://www.people-press.org/2014/06/12/political-polarization-in-the-american-public/> [<http://perma.cc/ML83-37QW>] ("Republicans and Democrats are more divided along ideological lines—and partisan antipathy is deeper and more extensive—than at any point in the last two decades."). See generally Michael Barber & Nolan McCarty, *Causes and Consequences of Polarization*, in *Political Negotiation: A Handbook* 37, 39–43 (Jane Mansbridge & Cathie Jo Martin eds., 2016) (measuring increasing partisan polarization and decreasing dimensionality of political conflict).

21. Larry M. Bartels, *Unequal Democracy: The Political Economy of the New Gilded Age* 287 (1st ed. 2008); see also Stephen Ansolabehere et al., *Candidate Positioning in U.S. House Elections*, 45 *Am. J. Pol. Sci.* 136, 152–54 (2001) (arguing that it is the utility to incumbents of ideological coherence within the party that accounts for this pattern).

22. Cf. Mann & Corrado, *supra* note 4, at 1 (highlighting the effects of increased involvement of "[i]deologically-based outside groups financed by wealthy donors").

23. See Pildes, *The Center Does Not Hold*, *supra* note 1, at 308 ("If general elections were competitive, winning candidates would, in theory, have to be responsive to the median voter in the general election.").

there is no reason to expect that to change anytime soon.²⁴ For one, although the Supreme Court has shown fidelity to the need for strong parties, it has been singularly unreceptive to adopting a procompetition theory of the First Amendment that would ensure the requisite conditions for competitive elections.²⁵ Thus, absent mechanisms for direct democratic reform, increasing party competition would depend on legislatures acting against their self-interest. Further, there is good reason to believe that the lack of party competition in most places is substantially, and increasingly, a result of ideological geographic self-sorting rather than partisan gerrymandering.²⁶ Finally, at least for the moment, reforms aimed to shore up the party leadership's ability to control its political brand appear politically unpalatable, given the pervasive public mistrust of party insiders.²⁷ The bottom line is that we have no choice but to fundamentally reconceive how we might elicit responsive and responsible governance from our political parties.

Without claiming that there are easy solutions to our democratic dysfunctions, this Essay develops the contours of an alternate path to democratic responsiveness and accountability and identifies ways to incorporate it into existing First Amendment doctrine.²⁸ The proposed alternative path seeks to address our current crisis of responsiveness by reforming political parties *as associations*.²⁹

Viewed as associations, the capacity of political parties to foster a functioning democracy depends less on party leaders defining and enforcing a coherent platform and more on the depth and breadth of the party's political networks. The primary impediment to responsive

24. Drutman, *supra* note 7 (noting that in recent cycles only about one out of twenty House elections were competitive—defined as a margin of victory of less than 5%—and that the numbers are only marginally better for the Senate); see also Pildes, *The Center Does Not Hold*, *supra* note 1, at 309–10 (discussing the decline of competitive elections).

25. The architects of this approach are Samuel Issacharoff and Richard H. Pildes. See generally Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 *Stan. L. Rev.* 643 (1998). Although many continue to pin their hopes on a change of heart, to date, the Court has yet to take the bait. See *Benisek v. Lamone*, 266 F. Supp. 3d 799 (D. Md. 2017), cert. granted, 138 S. Ct. 543 (2017); *Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016), argued, Transcript of Oral Argument, No. 16-1161 (U.S. Oct. 3, 2017).

26. See, e.g., Drutman, *supra* note 7 (noting the geographic divide in partisan identities); Reiham Salam & Rob Richie, *Opinion, How to Make Congress Bipartisan*, *N.Y. Times* (July 7, 2017), <http://www.nytimes.com/2017/07/07/opinion/how-to-make-congress-bipartisan.html> (on file with the *Columbia Law Review*) (“Today’s voters . . . are self-sorting such that the median county in the 2016 presidential race was won by more than 40 percentage points.”).

27. Rauch, *supra* note 8 (noting that “the politics of [party reform aimed at shoring up the leadership] are hard” because, among other things, “[t]he public is wedded to an anti-establishment narrative”).

28. See *infra* Part III.

29. See *infra* Part II.

governance is not weak, mealy-mouthed political parties. It is candidates and political parties that lack effective social networks and feedback loops through which the interests of ordinary Americans can be filtered up to party elites. Those who have called for reforms “targeted . . . to *build up the institutional parties as . . . engines of broad participation in politics*” are exactly right.³⁰

Reinforcing the chains of democratic accountability lies in strengthening elected officials’ social ties to activists and activists’ ties to a broad and representative electorate, through the use of peer-to-peer strategies.³¹ A vast body of sociological and political scientific research demonstrates that relationships, far more than ideological commitments, drive political mobilization, organization, and information transmission.³² Once we appreciate that the decision to take political action is only partly a matter of belief, enthusiasm, or ideological commitment, it is possible to see why strengthening and broadening social ties within partisan networks presents an alternative and as yet underappreciated path to responsive and responsible governance.³³ It is also possible to see why uncontrolled deregulation of party financing is not necessarily the answer.³⁴

Party theorists have largely been blind to the democratic potential arising out of the fact that parties are political networks comprised of individuals and groups with social ties to one another and the broader electorate. Conceiving of parties almost exclusively *as ideological speakers*, they have failed to systematically explore the part associations can play in mobilizing and informing citizens and in facilitating a two-way street of communication between party leaders and ordinary voters, let alone the ways such efforts could contribute to good governance.³⁵

30. Vandewalker & Weiner, *supra* note 5, at 3; see also Robert F. Bauer, *The Right to “Do Politics” and Not Just to Speak: Thinking About the Constitutional Protections for Political Action*, 9 *Duke J. Const. L. & Pub. Pol’y* (Special Issue) 67, 69, 75, 78–79 (2013) [hereinafter Bauer, *The Right to “Do Politics”*] (noting that parties provide an avenue not only for speech and expressive association but also for the independent activities of political action such as coalition building); Joseph Fishkin & Heather K. Gerken, *The Party’s Over: McCutcheon, Shadow Parties, and the Future of the Party System*, 2014 *Sup. Ct. Rev.* 175, 210–11 (discussing the pluralist nature of political parties and their role in encouraging political participation).

31. See *infra* notes 206–220 and accompanying text.

32. For an earlier iteration of this argument, which reviews the seminal studies of Sidney Verba, Robert Putnam, and Doug McAdam, as well as their critics, see Tabatha Abu El-Haj, *Friends, Associates, and Associations: Theoretically and Empirically Grounding the Freedom of Association*, 56 *Ariz. L. Rev.* 53, 59, 87 n.164 (2014) [hereinafter Abu El-Haj, *Friends, Associates, and Associations*] (noting that critiques of the importance of personal ties emphasize organization, not speech or ideology, in their accounts of civic and political engagement).

33. See *infra* section II.A.

34. See *infra* notes 273–281 and accompanying text.

35. See *infra* section II.C.2.

It is important to acknowledge up front that, unlike traditional responsible party government theory, an associational-party perspective starts from the premise that “American political parties are not solely elite institutions selling their brand to a passive public”³⁶ and seeks a thicker form of democracy in which the political participation of ordinary citizens is not confined to “the general election, with the table already set and the menu already chosen.”³⁷ But it does so without ignoring the fact that “*somebody* is going to organize politics,” and that somebody is likely to be somebody with money, who may well “demand a price.”³⁸ In this regard, the associational-party perspective offers a marriage between the pragmatic tradition, which accepts political parties for what they are—associations dominated by self-interested political elites—and the romantic tradition, which seeks enhanced democratic accountability through the political participation of ordinary citizens as agents rather than consumers.³⁹

It is equally important to acknowledge upfront that the associational-party path is predicated on the assumption that entrenched problems demand multifaceted interventions aimed at incremental change. The current party system is unsustainable in the long term, and reforms grounded in responsible party government are not promising. It is, therefore, critically important not only to entertain alternative theoretical foundations but also to identify corresponding opportunities to address the dysfunctions of our party system in an incremental fashion.

This Essay concentrates on the Court’s First Amendment jurisprudence, identifying opportunities within existing doctrine to avoid constitutionally requiring wholesale deregulation of party finances. In so doing, it illustrates how that same doctrinal vehicle would permit courts to strategically underwrite the strength of those segments of the partisan network that enhance opportunities for social contact between party elites and the broader electorate (including with the aid of money) and thus further the goals of an associational path to responsive governance.

More specifically, this Essay argues for extending the *Anderson–Burdick* framework, which the Supreme Court developed in cases

36. Fishkin & Gerken, *supra* note 30, at 203–04.

37. *Id.* at 204. In this regard, the associational-party perspective unapologetically rejects the notion that “the people are a sovereign that ‘can speak only when spoken to,’ and ‘whose vocabulary is limited to two words, “Yes” and “No.”” Michael S. Kang, *The Hydraulics and Politics of Party Regulation*, 91 *Iowa L. Rev.* 131, 167 (2005) (quoting E.E. Schattschneider, *Party Government* 52 (Greenwood Press 1977) (1942)) [hereinafter Kang, *Hydraulics*].

38. Seth E. Maskett, *No Middle Ground: How Informal Party Organizations Control Nominations and Polarize Legislatures* 203 (2009).

39. Pildes, *Romanticizing Democracy*, *supra* note 1, at 815–16 (defining the two traditions while denigrating the latter).

involving burdens on the right to participate in elections,⁴⁰ to cases implicating the associational rights of the major political parties. The *Anderson–Burdick* framework has the distinct virtue of requiring courts to weigh the severity of constitutional burdens *before* imposing strict scrutiny.⁴¹ Developed to wrestle with the reality that the legitimacy of our democracy frequently depends on establishing election procedures, the test explicitly foregrounds analysis of the burdens, reserving strict scrutiny for cases in which regulatory burdens are severe.⁴² Because it is already sensitive to determining which burdens are of constitutional dimension, it provides a suitable vehicle for integrating the associational-party path into existing doctrine. As such, the *Anderson–Burdick* framework is also well positioned to attend to the longstanding goal of the Court’s political party cases—ensuring responsible governance.

The associational-party perspective, however, requires two modifications to current doctrine. First, the *Anderson–Burdick* framework would be extended to all contexts implicating the right to associate, including those involving the two major political parties. Second, and more importantly, the associational-party perspective demands a new scale with which to weigh and differentiate the burdens on a party’s First Amendment rights. In the typical *Anderson–Burdick* case, courts balance the character and magnitude of the alleged burden on voting against state interests.⁴³ In the party context, in weighing the severity of constitutional burdens, the focus would shift to assessing the regulatory impact on a party’s capacity to mobilize broad and representative political participation and facilitate a two-way street of information transmission through party activists. It would, thereby, ensure that First Amendment rights are allocated in ways that are more, rather than less, likely to encourage political parties and their candidates to heed the concerns of their constituents.

40. See *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 782 (1983).

41. *Burdick*, 504 U.S. at 434 (“Under this standard, the rigorousness of our inquiry . . . depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights.”). Thus, under the standard, when First and Fourteenth Amendment rights are subjected to “severe” restrictions, the regulation must be “narrowly drawn to advance a state interest of compelling importance.” *Norman v. Reed*, 502 U.S. 279, 289 (1992). “But when a state election law provision imposes only ‘reasonable, nondiscriminatory restrictions’ upon . . . [the] rights of voters, ‘the State’s important regulatory interests are generally sufficient to justify’ the restrictions.” *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 788).

42. *Burdick*, 504 U.S. at 433–34 (recounting that only those regulations severely restricting voting “must be ‘narrowly drawn to advance a state interest of compelling importance’” because to operate otherwise “would tie the hands of States seeking to assure that elections are operated equitably and efficiently” insofar as “[e]lection laws will invariably impose some burden[s]” (quoting *Norman*, 502 U.S. at 289)).

43. See, e.g., *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 190, 202–03 (2008) (applying the *Anderson–Burdick* framework and determining that requiring voters to provide a photo identification did not, in principle, impose a severe burden on the right to vote).

The principal mistake of the Court's doctrine has been its singular preoccupation with protecting political parties, as speakers, from burdens placed on their brand.⁴⁴ The latter modification provides a way to redirect the doctrinal focus from shoring up party elites and their ability to define and control a distinct political brand. Instead, courts would allocate First Amendment rights in ways that prevent regulation from undermining the socioeconomic and intergenerational breadth or the interpersonal depth of partisan networks.

Most importantly, this doctrinal proposal is not entirely a professorial pipe dream. The Supreme Court's political party jurisprudence is ripe for reform. First, it is already structured around the idea that First Amendment rights must be allocated to facilitate democratic accountability.⁴⁵ As such, it provides a relatively easy point of entry. Further, the extension of the *Anderson–Burdick* framework would merely rationalize the doctrine. Second, a growing consensus has emerged that our political party system needs fundamental reform if responsible and responsive governance is to emerge.⁴⁶ Thus, there is a good deal of political will, possibly even among the Justices in light of the Court's recent decisions, for change.

Part I of this Essay begins by recounting the origins of responsible party government and explaining the ways it underpins the Court's entire party jurisprudence. Part I's central contribution, however, is the evidence it provides of the growing consensus that responsible party government has given way to irresponsible party governance. In doing so, it sets up the central argument of this Essay: that we have no choice but to consider alternative paths to responsive and accountable governance. Part II proceeds to make the case that an alternate path to democratic responsiveness and accountability emerges when one focuses on political parties *as associations*. It reviews the empirical evidence supporting the importance of social ties to political mobilization, organization, and information transmission as well as the implications of recent changes to the associational qualities of partisan networks. Finally, Part III identifies opportunities within existing First Amendment doctrine to sustain and build partisan networks more capable of producing democratic responsiveness and accountability. Integrating an associational-party perspective into existing First Amendment doctrine is obviously only a first step. The fact, however, that there are no simple fixes to the ills of our party system should not diminish the value of incremental change.

44. Cf. *McConnell v. FEC*, 540 U.S. 93, 352 (2003) (Rehnquist, C.J., dissenting) (explaining that “the national political parties are exemplars of political speech,” “promot[ing] coordinated political messages” and existing often “primarily for the purpose of expressing ideas and generating debate”), overruled in part by *Citizens United v. FEC*, 558 U.S. 310 (2010).

45. See *infra* section I.A.

46. See *supra* notes 4, 7–9 and accompanying text.

I. FROM RESPONSIBLE PARTY GOVERNMENT TO IRRESPONSIBLE PARTY GOVERNANCE

Responsible party government theory underpins both the Court's jurisprudence on the First Amendment rights of political parties and the particulars of recent calls to reform our party system. This Part first recounts the origins and specifics of the theory of responsible party government, and how this theory is reflected in the case law. It then sets out the evidence demonstrating that the theory of responsible party government has not panned out as expected.

A. *Responsible Party Government and the First Amendment Rights of Political Parties*

Notwithstanding the Founding Fathers' opposition to political parties as quintessential factions, the Supreme Court has consistently afforded political parties robust First Amendment rights given their critical part in "the transformation of the voters' will into a government that reflects that will."⁴⁷ In fact, the Court has consciously allocated First Amendment rights in ways believed to encourage broader democratic goals, including participation and accountability.⁴⁸ Unfortunately, it is attached to a theory of how to harness parties' self-interest to democratic ends that—whatever its original merits—has not panned out as anticipated.

Parties are a puzzle for democracies. On the one hand, representative government in the modern nation state is unimaginable without a party system to organize voters, candidates, and legislators.⁴⁹ As Jonathan Rauch colorfully puts this point: "If the Constitution [is] the system's DNA, the parties . . . [are] its RNA, translating the Founders' bare-bones framework" into a working government.⁵⁰ On the other hand, "parties are no great friends of popular sovereignty."⁵¹ In the business of reelection, their *preferred* mode of operation is to persuade voters to accept their

47. *Vieth v. Jubelirer*, 541 U.S. 267, 357 (2004) (Breyer, J., dissenting).

48. See Kang, *Hydraulics*, *supra* note 37, at 138 (identifying and criticizing courts and commentators for their unrelenting efforts to devise regulatory proposals and judicial doctrines that encourage political parties "to promote democratic values like political participation, an informed electorate, and . . . democratic responsiveness").

49. *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574 (2000) ("Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views."); see also Aldrich, *supra* note 18, at 3–64 (explaining that without party identifications, voters would not be able to hold individual elected officials accountable for acts of government and elected officials would not be able to muster a record on which to be judged).

50. Rauch, *supra* note 8.

51. Kathleen Bawn et al., *A Theory of Political Parties: Groups, Policy Demands and Nominations in American Politics*, 10 *Persp. on Pol.* 571, 572 (2012).

preexisting agendas; only infrequently and reluctantly, and often in the face of defeat, do political parties modify their platforms to reflect the preferences of their members.⁵² Their traditional manifestation is the “machine[]” and its somewhat unseemly “powerbrokers.”⁵³

This tension between the *realpolitik* of political parties and the constitutional aspiration of self-governance gives rise to a central preoccupation among scholars of American democracy: Given their primary interest in aggrandizing power, how can political parties and the candidates they field be induced to govern responsively?

Enter responsible party government theory. In the 1950s, a group of prominent political scientists, under the auspices of the American Political Science Association (APSA), theorized a resolution to the paradoxical role parties play in modern democracies—a resolution that has dominated the field of political science since its inception. Known in the literature as responsible party government, it posited that the key to achieving democratic accountability is to provide the electorate a clear choice between candidates representing distinct political parties on election day.⁵⁴

Underlying the theory was a market metaphor: Political parties should be conceptualized as the producers of a product (candidates and platforms) that voters consume.⁵⁵ Just as consumers’ interests are served by competition among producers to make appealing products, the electorate’s interests are served by competition between parties to produce an appealing political brand—one that voters “purchase” on election day. The basic theory is nicely summarized by Justice Breyer in his dissent in *Vieth v. Jubelirer*:

[P]olitical parties play a necessary role in [transforming the will of the majority into effective government]. At a minimum, they

52. *Id.* (noting that political parties seek to “cede as little policy to voters as possible”); see also Martin Gilens, *Affluence and Influence: Economic Inequality and Political Power in America* 163 (2012) (concluding that data reveals “parties behave more like policy maximizers than vote maximizers, responding to the preferences of the public (and disproportionately to the most affluent segment of the public) when necessary but pursuing their own policy agendas when they can”).

53. Rauch, *supra* note 8 (noting further that “[p]arties, machines, and hacks may not have been pretty, but at their best they did their job so well the country forgot why it needed them”).

54. Am. Political Sci. Ass’n, *Toward a More Responsible Two-Party System: A Report of the Committee on Political Parties of the American Political Science Association*, 44 *Am. Pol. Sci. Rev.* 1, 15 (1950) [hereinafter APSA Report].

55. Nancy L. Rosenblum, *Primus Inter Pares: Political Parties and Civil Society*, 75 *Chi.-Kent L. Rev.* 493, 496 (2000) [hereinafter Rosenblum, *Primus Inter Pares*] (explaining that mainstream political science views “electoral parties as cadres of candidates, professional organizers, and hired consultants, and of citizens as consumers of their products”); see also Fishkin & Gerken, *supra* note 30, at 201 & n.94 (noting the marketplace metaphor was brought into the legal literature by the work of Samuel Issacharoff and Richard H. Pildes).

help voters assign responsibility for current circumstances, thereby enabling those voters, through their votes for individual candidates, to express satisfaction or dissatisfaction with the political status quo. Those voters can either vote to support that status quo or vote to “throw the rascals out.” A party-based political system that satisfies this minimal condition encourages democratic responsibility. It facilitates the transformation of the voters’ will into a government that reflects that will.⁵⁶

The theory’s principal payoff was that it appeared to offer a cheap solution to the persistent problem ignorant voters pose for democratic accountability. Faced with the limited capacity of individual citizens to monitor elected officials, responsible party government theory side-stepped the difficult task of producing an informed electorate. Instead, it sought to create a mechanism by which accountability to the electorate would be achieved indirectly through a strong two-party system in which ideologically distinct political parties competed for votes on election day. Critical to the success of the system was to empower party leaders to produce brands that would offer ignorant political consumers significant information about candidates at low cost, thereby “reducing the transaction costs’ of democracy.”⁵⁷ Professor Michael McConnell summarizes the basic hypothesis well:

To be sure, ideological labels are crude and one-dimensional, but they provide more accurate signals for the rationally ignorant voter than the old party labels, under which a “Democrat” might be far more conservative than his “Republican” opponent. . . . Ideologically coherent party identification can be seen as a form of “truth in labeling”: the voter knows what he or she is getting. Voters then have a clearer choice between directions for the country, which enables them to force a shift in policy.⁵⁸

Responsible party government, in other words, took political parties as they were, while promising to harness the self-interest of these elite organizations toward “small-d” democratic ends.

To be sure, legal reforms were necessary. The APSA Report recommended a series of reforms aimed to balance party discipline and

56. 541 U.S. 267, 356–57 (2004) (Breyer, J., dissenting) (citations omitted); see also *Branti v. Finkel*, 445 U.S. 507, 531 (1980) (Powell, J., dissenting) (“Voters with little information about individuals seeking office traditionally have relied upon party affiliation as a guide to choosing among candidates.”).

57. Rosenblum, *Primus Inter Pares*, *supra* note 55, at 497.

58. Michael W. McConnell, *Moderation and Coherence in American Democracy*, 99 *Calif. L. Rev.* 373, 379 (2011); see also John H. Aldrich & John D. Griffin, *Parties, Elections, and Democratic Politics*, in *Oxford Handbook of American Elections and Political Behavior* 595, 598–606 (Jan E. Leighley ed., 2010).

voice.⁵⁹ Reforms to the nomination process, in particular, took a central place. The closed primary was the key to the entire initiative. It would provide party members a voice, thereby reducing intraparty conflicts.⁶⁰ The APSA Report hypothesized that increasing the say of party members with respect to both candidates and platforms by adopting a direct primary would improve buy-in to a national platform from the party faithful.⁶¹ At the same time, limiting participation in the primary to party members would provide an opportunity to produce more ideologically distinct candidates and platforms. Candidates and elected officials selected by a more coherent party base would be more capable of holding a party line, especially if party leaders maintained informal control over the selection of primary contenders.⁶² The APSA Report's analysis of the various alternative nominating processes makes clear its thinking:

The direct primary probably can be adapted to the needs of parties unified in terms of national policy. *The closed primary deserves preference* because it is more readily compatible with the development of a responsible party system. *The open primary tends to destroy the concept of membership* as the basis of party organization. *Cross filing is bound to obscure program differences between the parties*, and to eliminate any sense of real membership on the part of the rank and file. The Washington *blanket primary corrupts the meaning of party even further by permitting voters at the same primary to roam at will among the parties.*⁶³

59. See APSA Report, *supra* note 54, at 67 (emphasizing two-way communication between the national party council and its members); see also *id.* at 22, 65–67 (addressing efforts to increase voice and membership).

60. *Id.* at 10.

61. *Id.* at 66–67 (arguing that “general and wholehearted support of the party program” would follow from the reorganization of the party “on democratic lines” and that “cohesion [would] spring[] naturally from willingness to support aims which the member himself has helped to shape and has come to accept”).

62. *Id.* at 10, 66, 72 (observing “[u]nity among leaders . . . is difficult if they speak for members with entirely different objectives and fundamentally different ideas on public policy” and noting “[t]he formal or informal proposal of candidates by preprimary meetings of responsible party committees or party councils is a healthy development”).

63. *Id.* at 10 (emphasis added). A blanket primary is one in which voters are presented with a single ballot, listing all the contenders, and are able to switch party primaries from office to office. See generally Alexander R. Podkul & Elaine Kamarck, *The Primaries Project: Blanket Primaries Have Yet to Deliver*, Brookings Inst. (Oct. 10, 2014), <http://www.brookings.edu/blog/fixgov/2014/10/10/the-primaries-project-blanket-primaries-have-yet-to-deliver/> [<http://perma.cc/EDK2-NSWU>]. By contrast, in an open primary, voters are permitted, regardless of partisan registration, to pick whichever party primary they wish to vote in but are limited to voting in that party's primary for all offices. State Primary Election Types, Nat'l Conference of State Legislatures (July 21, 2016), <http://www.ncsl.org/research/elections-and-campaigns/primary-types.aspx> [<http://perma.cc/ZTV7-8KWT>]. Cross-filing provisions permit a candidate to appear on more than one

Other reforms aimed to ensure party leaders could achieve a legislative record to match their brands.⁶⁴ Distinct party brands would be meaningless if the underlying product—the legislative record—did not hold up.

Strikingly, the Supreme Court's resolutions in cases involving the First Amendment rights of political parties virtually map onto the 1950 call for responsible party government through a two-party system. The Court's commitment to responsible party government's account of the path to democratic accountability explains both why the Court has consistently sided with the leaders of the two major parties when internal party conflicts arise and why it has taken positions in favor of entrenching the two-party system.

For one, the Court consistently rules in favor of the party leadership's control of the brand in conflicts between leaders and members. In decision after decision, the Court has permitted the party leadership to utilize the First Amendment as a shield by which it may secure exclusive control of the candidates it will field.⁶⁵ In cases involving intraparty feuds over a party's message, the Court has sided with the national party leadership over state party leadership.⁶⁶ In conflicts between state party

party's primary ballot. See Carl Hessler Jr., *Cross-Filing Can Be a Confusing Part of Municipal Elections*, *Mercury* (May 15, 2001), <http://www.pottsmmerc.com/article/MP/20010515/news01/305159996> [<http://perma.cc/PE26-SEL4>]. It was frequently used by incumbents, whose name recognition gave them an advantage even in the primary of the opposing party. Masket, *supra* note 38, at 58.

64. APSA Report, *supra* note 54, at 61–64 (proposing changes to the committee structure meant to ensure discipline in the legislature).

65. See *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 210 (2008) (Kennedy, J., concurring) (upholding New York's nomination process for judicial candidates in response to an argument that the system unconstitutionally burdened First Amendment rights by making "it . . . difficult for those who lack party connections or . . . backing to be chosen as a delegate or to become a nominee for office"); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 224–25 (1986) (upholding the Republican Party's right to open its primary to independent voters); see also *Kucinich v. Tex. Democratic Party*, 563 F.3d 161, 167–68 (5th Cir. 2009) (upholding state party leadership's ability to impose a loyalty oath on presidential candidates); *LaRouche v. Fowler*, 152 F.3d 974, 997–98 (D.C. Cir. 1998) (rejecting a challenge to the Democratic National Committee's 1996 Delegate Selection Rules, which limited qualified candidates to those deemed bona fide Democrats capable of accepting the nomination by the party leadership); *Duke v. Massey*, 87 F.3d 1226, 1234–35 (11th Cir. 1996) (upholding a statute that permitted state party leadership, in its discretion, to refuse to place candidates felt not to represent the views of the party on the primary ballot).

66. See *Democratic Party of the U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 123–26 (1981) (holding Wisconsin may not force the national political party to seat delegates from Wisconsin to the degree that those delegates have been bound by Wisconsin law to vote in favor of the candidate preferred by an open primary electorate).

leadership and party members, the Court has sided with the state party leadership.⁶⁷

The Court has, relatedly, created a clear constitutional preference for closed primaries. Most notably, in 2000, the Supreme Court struck down California's blanket primary, which was open to nonparty voters.⁶⁸ In doing so, it criticized the State's effort to "chang[e] the parties' message" and explained it was the decision to deprive the party of control over its preferred candidate that rendered the scheme constitutionally infirm.⁶⁹ Notably, the Court, in defining the constitutional harm, latched on to precisely what the APSA report had identified as the problem: "*The . . . blanket primary corrupts the meaning of party . . . by permitting voters at the same primary to roam at will among the parties.*"⁷⁰ As both the Court and the APSA report explained, this enables "a voter to consider himself both a Democrat and a Republican at one and the same moment" and undermines "the development of a program-conscious attitude among party members."⁷¹ The Court has yet to strike down a state-mandated open primary, but the writing is on the wall.⁷²

Finally, the Supreme Court's commitment to robust First Amendment rights frequently fades when the political party asserting those rights is a minor party.⁷³ Electoral accountability, according to the

67. See, e.g., *Lopez Torres*, 552 U.S. at 210 (Kennedy, J., concurring) (noting the challenge was brought by judicial candidates, whom the state-mandated primary system effectively marginalized).

68. *Cal. Democratic Party v. Jones*, 530 U.S. 567, 586 (2000).

69. *Id.* at 581–82; see also *Democratic Party of Wash. State v. Reed*, 343 F.3d 1198, 1203–07 (9th Cir. 2003) (holding state interests in increasing voter choice, protecting voter privacy, and promoting cross-party interests were not "compelling" enough to justify a blanket primary).

70. APSA Report, *supra* note 54, at 72.

71. *Id.*; see also *Jones*, 530 U.S. at 574–77.

72. The Supreme Court recently denied certiorari in a case that would have addressed confusion in the circuit courts regarding how to analyze as-applied challenges to the constitutionality of a state-mandated open primary. See, e.g., *Democratic Party of Haw. v. Nago*, 833 F.3d 1119, 1124 (9th Cir. 2016), cert. denied, 137 S. Ct. 2114 (2017); see also *Ravalli Cty. Republican Cent. Comm. v. McCulloch*, 655 F. App'x 592, 593 (9th Cir. 2016) (dismissing as moot the appeal of a denial of injunctive relief regarding an election that had already occurred).

73. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 367 (1997) (noting "[t]he Constitution permits the Minnesota legislature to decide that political stability is best served through a healthy two-party system" and thus permits the enactment of "reasonable election regulations that may, in practice, favor the traditional two-party system"); see also *Munro v. Socialist Workers Party*, 479 U.S. 189, 199 (1986) (upholding a state statute that conditioned a candidate's appearance on the ballot in a general election on the candidate having received at least 1% of the votes in a primary election). But see *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 593, 595 (6th Cir. 2006) (invalidating Ohio's ballot-access scheme—which effectively mandated minor parties to hold a primary a full year before the election to secure ballot access—as a severe and unconstitutional burden on a minor party's freedom of association).

APSA Committee Report, depends on voters having a clear choice between two, and only two, ideologically coherent parties on election day.⁷⁴ Third parties muddy campaigns by providing voters with a less distinct third option and undermine accountability by allowing candidates to win elections in the absence of majority support.

Clingman v. Beaver's rejection of the Libertarian Party of Oklahoma's challenge to the state's semiclosed primary, which permitted political parties to invite independent voters but not voters registered as partisans of other parties into their primary, is thus not an anomaly, as some have suggested.⁷⁵ Invoking the line of cases that protect party leaders' control of the brand, the Libertarian Party argued it had a constitutionally protected right to diffuse its brand by allowing in voters who were Democrats and Republicans in the interest of selecting a more viable candidate for the general election.⁷⁶ This argument fell on deaf ears. Instead, the Court found that the burden placed by the semiclosed primary on the party, which it characterized as minimal, was easily justified by the state's interest in protecting strong parties. Echoing the basic thrust of responsible party government theory, Justice Thomas accepted Oklahoma's interest in "preserv[ing] [political] parties as viable and identifiable interest groups"⁷⁷ and "avoid[ing] primary election outcomes which would tend to confuse or mislead the general voting population to the extent [it] relies on party labels as representative of certain ideologies."⁷⁸ As Justice Stevens astutely observed, the majority's commitment to the two-party system—a result of responsible party government theory—explains the Court's decision:

The flimsy character of the state interests in this case confirms my view that today's decision rests primarily on a desire to protect the two-party system. In [*California Democratic Party v. Jones*], the Court concluded that the associational interests of the parties trumped state interests that were much more compelling than those asserted in this case. Here, by contrast, where the associational interests are being asserted by a minor party rather than by one of the dominant parties, the Court has reversed course and rejected those associational

74. APSA Report, *supra* note 54, at 1–2 (“The fundamental requirement of accountability is a two-party system in which the opposition party acts as the critic of the party in power, developing, defining and presenting the policy alternatives”); see also *id.* at 18–19.

75. 544 U.S. 581, 584, 598 (2005) (plurality opinion).

76. *Id.* at 594 (“It does not matter that the LPO is willing to risk the surrender of its identity in exchange for electoral success.”).

77. *Id.* (second alteration in original) (internal quotation marks omitted) (quoting *Nader v. Schaffer*, 417 F. Supp. 837, 845 (D. Conn. 1976)).

78. *Id.* (second alteration in original) (internal quotation marks omitted) (quoting Brief of Petitioners on the Merits at 12, *Clingman*, 544 U.S. 581 (No. 04-37), 2004 WL 2681536, at *12).

interests as insubstantial compared to the interests asserted by the State.⁷⁹

In sum, the Supreme Court has long accepted that the First Amendment rights of political parties should be allocated in ways that channel their self-interest to produce democratic accountability. The problem, as will be shown in the next section, is that the theoretical assumptions upon which the Supreme Court has predicated its party jurisprudence do not hold true in the real world of contemporary politics.

B. *Irresponsible Party Governance and the Need to Revisit the Theoretical Foundation of the Court's Party Jurisprudence*

Whatever the merits of responsible party government as a solution to the problems faced by mid-twentieth-century American parties, it has not panned out as anticipated. More ideologically distinct than in any prior era, the Democratic and Republican parties today are closer than ever before to the ideal called for by the APSA Committee on Political Parties.⁸⁰ Yet, responsible party government has not emerged. As Professors Jacob S. Hacker and Paul Pierson note wryly, “What the committee coveted . . . was responsible party government. What they got—along with the rest of us—was *irresponsible* party government.”⁸¹

Elections are failing to tether government officials to the preferences of their constituents. The verdict, on this point, is unequivocal. Professor Larry Bartels has summed up the data as follows: “Whatever elections may be doing, they are *not* forcing elected officials to cater to the policy preferences of the ‘median voter.’”⁸² In fact, while “[t]he scope for independent action by elected leaders” is “especially great in cases where public sentiment is divided, unstable, confused, or simply nonexistent[,] . . . the paucity of elite responsiveness to public opinion

79. *Id.* at 619 n.11 (Stevens, J., dissenting).

80. See Pildes, *The Center Does Not Hold*, *supra* note 1, at 276–77 (summarizing consensus on the polarization of the parties). One succinct measure of this trend is the changing perceptions of the political parties among independent voters. In 1956, around the time of the APSA Report, “64% of independents in 1956 failed to see a difference between the two parties on at least one of the five more salient issues, compared to 21% of strong partisans;” by contrast, in 2012, only 14% of independents failed to recognize some issue differences between the parties. Corwin D. Smidt, *Polarization and the Decline of the American Floating Voter*, 61 *Am. J. Pol. Sci.* 365, 365, 368–69, 369 fig.2, 371, 373 (2017) (demonstrating “the clarity of differences between the two polarized parties makes it easy for . . . Americans who ignore politics to recognize that there are meaningful differences between them” and thus “to recognize the meaning and consequences of candidate differences,” which in turn leads to fewer independent voters).

81. Jacob S. Hacker & Paul Pierson, *Off Center: The Republican Revolution and the Erosion of American Democracy* 187 (2005).

82. Bartels, *supra* note 21, at 287.

extends even to issues on which public opinion seems to be unusually firm and stable.”⁸³ He is not alone in his assessment.⁸⁴

Equally as important, the political parties that have emerged are remarkably ineffective at governing.⁸⁵ Responsible party governance was predicated on the notions that the elected party would be capable of adopting the programs to which it had committed and, thus, could be judged on its legislative record come election day.⁸⁶ The recent norm, however, has been gridlock in Congress and aggrandized presidential power to compensate for Congress’s inability to act.⁸⁷ Nor has the return of unified government produced decisive governance.⁸⁸

Even scholars who continue to adhere to responsible party government acknowledge that strong political parties have not led to responsible party government. Professor Alan I. Abramowitz, for example, concedes that “although the conditions for responsible party government have largely been met on the electoral side, with ideologically defined parties offering voters a clear choice between

83. *Id.* Bartels further notes that “[i]n most cases, even massive differences in the preferences of middle- and upper-income constituents” have little “effect on senators’ policy choices” especially as compared to “their own partisan ideologies.” *Id.*

84. See, e.g., Gilens, *supra* note 52, at 83, 163, 166 (“Whatever empirical validity median voter models may hold with regard to the professed positions of parties and candidates, the findings presented above [with respect to the years 1981 through 2002] clearly show that actual government policy does not respond to the preferences of the median voter.”); Anthony Fowler & Andrew B. Hall, Long-Term Consequences of Election Results, 47 *Brit. J. Pol. Sci.* 351, 354, 358, 366 (2015) (concluding a study of policy responsiveness in competitive moderate districts with the assessment that “[a]cross American legislatures, elected representatives do not converge to the median voter in their constituency”); Joe Soss & Lawrence R. Jacobs, The Place of Inequality: Non-Participation in the American Polity, 124 *Pol. Sci. Q.* 95, 116 (2009) (“In recent decades, government officials have exhibited weak and declining levels of responsiveness to median public preferences.”).

85. See, e.g., Sarah A. Binder, Stalemate: Causes and Consequences of Legislative Gridlock 25–26, 67–69 (2003) (demonstrating ways that party homogeneity undermines policy responsiveness by breeding polarization and gridlock); Pildes, *Romanticizing Democracy*, *supra* note 1, at 808 (noting the government’s inability to act even with respect to issues that are pressing and with respect to which there is broad consensus).

86. APSA Report, *supra* note 54, at 1.

87. One’s normative assessment of gridlock, obviously, varies depending on whether one is generally opposed to federal legislative action as unnecessary or an infringement on states’ rights. Those who adhere to responsible party government, however, generally do not have a principled objection to governance at the federal level. Cf. Pildes, *Romanticizing Democracy*, *supra* note 1, at 808 (assuming that in “arenas where there is broad consensual agreement that government *must* act, in some fashion,” it is a problem that it “seems incapable of doing so”).

88. See, e.g., Sheryl Gay Stolberg & Nicholas Fandos, As Gridlock Deepens in Congress, Only Gloom Is Bipartisan, *N.Y. Times* (Jan. 27, 2018), <http://www.nytimes.com/2018/01/27/us/politics/congress-dysfunction-conspiracies-trump.html> (on file with the *Columbia Law Review*) (noting bipartisan concern in Washington “that Mr. Trump’s presidency has pushed an already dysfunctional Congress into a near-permanent state of gridlock that threatens to diminish American democracy itself”).

alternative sets of policies,” responsible and effective party governance has not followed.⁸⁹ Professor Seth Masket, meanwhile, grants that while the two major political parties are more ideologically distinct, including at the state level, than ever before, the accountability that has emerged has largely been to primary voters, donors, and other policy demanders capable of mounting credible primary challenges.⁹⁰ In Masket’s view, the primary obstacle to accountability has been the unforeseen consequences of the move to closed primary elections, which lead “legislators [to] look to their party first and to their district second.”⁹¹

Yet, political scientists and legal academics continue to adhere to responsible party government almost as an article of faith.⁹² Meanwhile, there is little evidence that the general public’s experience of the United States’ newly polarized democracy is positive.⁹³ Instead, the public

89. Alan I. Abramowitz, *The Disappearing Center: Engaged Citizens, Polarization, and American Democracy* 160 (2010) [hereinafter Abramowitz, *The Disappearing Center*]. Abramowitz further argues that it is the structural features of divided government that are the “major obstacle to effective party governance,” rather than the prescriptions of the strong party thesis or the absence of party competition. *Id.*

90. Masket, *supra* note 38, at 24–25 (noting a “virtual consensus” that “[c]andidates no longer converge on the median voter” but rather “represent[] the ideologically extreme elements within their parties, despite the electoral risk that this strategy carries”).

91. *Id.* at 93. Masket argues that “the view of officeholders as single-minded seekers of reelection,” who tack back to the median voter, “has little relevance [today], not because officeholders don’t care about the electoral connection” but because strong nominating parties today “interpose themselves between officeholders and voters and often thoroughly dominate the relationship.” *Id.* at 19; see also Gilens, *supra* note 52, at 9–10 (“My findings seem to support the notion that parties in the United States have evolved from broad-based, vote-maximizing organizations attentive to the preferences of large and diverse publics to coalitions of intense, narrow ‘policy demanders.’”); Soss & Jacobs, *supra* note 84, at 117–18 (summarizing evidence that “[t]he rising power of party activists has created strong incentives for politicians to discount the preferences of broad public opinion” including, for instance, popular opinion on immigration reform). But see Ansolabehere et al., *supra* note 21, at 154 (arguing that it is the usefulness of a coherent legislative party to self-interested incumbents, rather than the presence of an ideologically extreme base, that accounts for candidates’ failure to closely hew to constituents’ preferences).

92. See, e.g., Masket, *supra* note 38, at 24–25, 95–96, 195 (asserting that accountability to the party base, notwithstanding its failures, is preferable to diffuse accountability to the electorate insofar as the base and party operatives are better positioned to monitor the actions of legislators and thus thwart lobbyists from buying elected officials); see also Issacharoff, *Outsourcing Politics*, *supra* note 4, at 855, 861 (noting that members of the party in government “foremost look[] to winning elections . . . by hewing close enough to the center of the political distribution of voters” and concluding that “stronger parties . . . might be the most effective vehicle for enabling the compromises and deals necessary to enable more effective governance” (quoting Pildes, *Romanticizing Democracy*, *supra* note 1, at 809–10)).

93. See John Wagner & Scott Clement, ‘It’s Just Messed Up’: Most Think Political Divisions as Bad as Vietnam Era, New Poll Shows, *Wash. Post* (Oct. 28, 2017), http://www.washingtonpost.com/graphics/2017/national/democracy-poll/?utm_term=.014c8abb0f73 (on file with the *Columbia Law Review*) (reporting on polls revealing a “starkly pessimistic view of U.S. politics, widespread distrust of the nation’s political leaders and their ability to

appears generally dissatisfied with both political parties and a political process in which elected officials repeatedly fail to address the general electorate's preferences on the rare occasions when Congress is able to get anything done.⁹⁴ Party disillusionment is particularly stark among young voters.⁹⁵

Despite the well-documented failure of responsible party government, no one in the legal academy has been quite willing to tell the Supreme Court that the APSA Committee Report got it wrong in the 1950s. Instead, the tendency in legal circles has been to focus on the most obvious fix, a theoretical patch, so to speak: increase party competition.⁹⁶ On this account, the strategic choice to cater to the ideologically extreme party base depends on knowing one is a shoo-in during the general election because the district is safe for one's party.⁹⁷ Increasing party competition should therefore resolve the problem.

compromise, and an erosion of pride in the way democracy works in America"); see also Pew Research Ctr., *Declining Confidence in Trump, Lower Job Ratings for Congressional Leaders 2* (2017), <http://assets.pewresearch.org/wp-content/uploads/sites/5/2017/11/02124917/11-02-17-Political-release.pdf> [<http://perma.cc/WW2F-9AMC>] (reporting, among other things, that "[s]ince earlier this year, approval ratings for the congressional leaders of both parties have fallen—largely because fewer Republicans and Democrats are expressing positive views of their *own* parties' leaders").

94. See Wagner & Clement, *supra* note 93 (noting 87% of respondents believe members of Congress "do whatever is needed to win reelection").

95. A recent national poll of young voters (defined as 18- to 29-year-olds) found only a minority of young Americans believe that the major parties and the President "care[] about people like [them]." Harvard Kennedy School Inst. of Politics, *Executive Summary: Survey of Young Americans' Attitudes Toward Politics and Public Service 7* (2017), http://iop.harvard.edu/sites/default/files/content/docs/171205_Harvard%20IOP%20Poll_Fall%20_Exec%20Summary.pdf [<http://perma.cc/9WGR-PW2V>] (reporting specific numbers as 21% for the Republican Party and 34% for the Democratic Party).

96. See, e.g., Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 *Harv. L. Rev.* 593, 629–30 (2002) ("[A] focus on the competitive implications of rules governing the political process allows for confined yet effective court oversight to guard against conduct that frustrates democratic accountability."); Issacharoff & Pildes, *supra* note 25, at 707 (arguing that there is a "historical basis" for believing that political competition could counter vote dilution); see also Michael S. Kang, *Race and Democratic Contestation*, 117 *Yale L.J.* 734, 801–02 (2008) (noting that a theory of democratic contestation can provide a "substantive vision for healthy democratic politics"); David Schleicher, "Politics as Markets" Reconsidered: Natural Monopolies, Competitive Democratic Philosophy and Primary Ballot Access in American Elections, 14 *Sup. Ct. Econ. Rev.* 163, 176–87 (2006) (analyzing models of political contestation).

97. Jonathan Rauch summarizes the view succinctly: "Walled safely inside their gerrymandered districts, incumbents are insulated from general-election challenges that might pull them toward the political center, but they are perpetually vulnerable to primary challenges from extremists who pull them toward the fringes." Rauch, *supra* note 8; see also Abu El-Haj, *Beyond Campaign Finance Reform*, *supra* note 2, at 1151 ("[T]he lack of partisan competition has unmoored political parties and candidates from the interests of their constituents. With the rise of safe districts, the party primary has increasingly become the most important election.").

Whether this would in fact work is somewhat disputed. On the one hand, data do show increased responsiveness where there is party competition and decreased responsiveness while one party dominates.⁹⁸ On the other hand, there are data questioning how much competition affects responsiveness given that voters rarely cast their votes based on overall legislative performance as theorized in the traditional model of responsible party government.⁹⁹

But here is the catch: Even if increasing party competition would substantially improve policy responsiveness, as far as the Supreme Court is concerned, that patch is off the table. The Court has been singularly unreceptive to structuring First Amendment doctrine in ways that increase party competition.¹⁰⁰ At times, it has even been openly hostile to the suggestion that there might be a constitutional interest in fostering electoral competition. In *New York State Board of Elections v. Lopez Torres*, a case in which judicial candidates challenged New York's cumbersome ballot access rules, the Court declared:

98. Martin Gilens's seminal investigation of policy responsiveness finds, for instance, that party competition, both in the electoral sphere and in legislatures, somewhat increases convergence toward the preferences of the public. See Gilens, *supra* note 52, at 192, 194 (concluding that "high levels of political competition in the form of an evenly divided Congress" increases policy responsiveness while "elections appear to be only modestly successful at aligning policy outcomes with the preferences of the public"). See generally *id.* at 162–233 (comprehensively analyzing the degree to which elections prompt responsiveness as well as the effect of divided versus unified government on policy responsiveness). More specifically, Gilens found that "policy responsiveness is . . . highest during the first congressional session after a shift in partisan control of the presidency" but that dominance of one party generally reduces responsiveness to the electorate over time and enables the party to pursue its own agenda. *Id.* at 83, 163, 166. Despite these modest findings Gilens recommends "reforms that enhance political competition" insofar as they "can intensify . . . the responsiveness of policy makers." *Id.* at 10.

99. For example, a recent study by Anthony Fowler and Andrew B. Hall of competitive moderate districts found Democratic and Republican legislators represent identical districts differently, demonstrating that officials elected in competitive elections do not necessarily cater to the median voter in their roll-call votes. Fowler & Hall, *supra* note 84, at 351–52. Moreover, the discrepancy between legislators' roll-call votes and the preferences of their districts does not lessen over time, and despite what one might expect, those elected officials are not kicked out of office for their policy divergence. *Id.* at 354–59. In sum, the authors conclude that "[a]cross American legislatures, elected representatives do not converge to the median voter in their constituency." *Id.* at 352, 354–59, 364–68; accord Binder, *supra* note 85, at 108–11 (demonstrating that incumbents "do not pay an electoral price" for legislative performance); Ansolabehere et al., *supra* note 21, at 154 (arguing partisanship rather than the presence of an ideologically extreme base accounts for candidates' failure to closely hew to constituents' preferences); see also Drutman, *supra* note 7 (summarizing recent literature).

100. Nicholas O. Stephanopoulos, Elections and Alignment, 114 *Colum. L. Rev.* 283, 288, 291–98 (2014) (defending alignment theory, in part, on grounds that the existing literature's focus on structural concerns—participation and competition—has had no traction with the Court).

The reason one-party rule is entrenched may be (and usually is) that voters approve of the positions and candidates that the party regularly puts forward. . . . The States can, within [constitutional] limits . . . discourage party monopoly But the Constitution provides no authority for federal courts to prescribe such a course. *The First Amendment creates an open marketplace where ideas*, most especially political ideas, may compete without government interference. *It does not call on the federal courts to manage the market by preventing too many buyers from settling upon a single product.*¹⁰¹

Legislators, meanwhile, have zero incentive to approve measures aimed to increase partisan competition.

It is, therefore, time to reckon with the need for a theoretical overhaul. Whatever its merits at the time, a variety of developments in American politics since the 1950s, including those in election law, have undercut responsible party government's usefulness as a framework through which to achieve democratic responsiveness and accountability.

The Court's recent refusal to consider two cases involving First Amendment challenges on behalf of political parties squarely framed in terms of responsible party government theory provides a window of opportunity, possibly indicating that some members of the Court are growing wary of the path it has forged.¹⁰² In fact, cracks in the responsible party government consensus may already be evident.

Washington State Grange v. Washington State Republican Party involved a challenge to the primary system Washington voters adopted when its blanket primary was struck down in the wake of *California Democratic Party v. Jones*.¹⁰³ Under Washington's new system, voters, regardless of party affiliation, are permitted to vote for any of the candidates seeking nomination for a given seat. The top two vote-getters for each office advance to the general election, creating the possibility that two candidates from the same party may run against one another in the general election.¹⁰⁴ Unlike in the traditional blanket primary, candidates select their party affiliation.¹⁰⁵

The challengers argued that the new blanket primary procedure was constitutionally infirm because nominees associated with the political

101. N.Y. State Bd. of Elections v. Lopez Torres, 552 U.S. 196, 208 (2008) (emphasis added) (citation omitted).

102. Democratic Party of Haw. v. Nago, 833 F.3d 1119, 1124 (9th Cir. 2016), cert. denied, 137 S. Ct. 2114 (2017); Republican Party of La. v. FEC, 219 F. Supp. 3d 86, 90–91 (D.D.C. 2016), summarily aff'd, 137 S. Ct. 2178 (2017).

103. 552 U.S. 442, 444 (2008); see also Democratic Party of Wash. State v. Reed, 343 F.3d 1198, 1201–02 (9th Cir. 2003) (describing the history of Washington's blanket primary system).

104. See *Wash. State Grange*, 552 U.S. at 444.

105. *Id.*

party were not exclusively chosen by members of the party.¹⁰⁶ In this regard, the fundamental constitutional burden placed on a political party was exactly the same as in *Jones*: The party had been stripped of control over its brand, as candidates selected by the system were not authentic representatives of the party.¹⁰⁷

The Court, however, dismissed these arguments out of hand, noting, “The nonpartisan blanket primary ‘has all the characteristics of the partisan blanket primary, save the constitutionally crucial one: Primary voters are not choosing a party’s nominee.’”¹⁰⁸ Washington’s new primary system was constitutional under *Jones* because it did not purport to select party representatives; it selected the two most popular candidates for office to be placed on the general election ballot regardless of party affiliation.¹⁰⁹

The reasoning in *Washington State Grange* cannot easily be squared with a commitment to responsible party government theory. As Justice Scalia argued in dissent, the very purpose of a blanket primary—partisan or nonpartisan—is to moderate the candidates that appear on the general election ballot.¹¹⁰ Driving the point home, he wrote:

Among the First Amendment rights that political parties possess is the right to associate with the persons whom they choose and to refrain from associating with persons whom they reject. Also included is the freedom to choose and promote “the standard bearer who best represents the party’s ideologies and preferences.”

When an expressive organization is compelled to associate with a person whose views the group does not accept, the organization’s *message* is undermined; the organization is understood to embrace, or at the very least tolerate, the views of the persons linked with them.¹¹¹

The constitutional foul of the nonpartisan primary remains the same, according to Justice Scalia, for individuals are allowed to “appropriate the parties’ trademarks” at the critical juncture in an election, thus

106. *Id.* at 452–53.

107. *Cal. Democratic Party v. Jones*, 530 U.S. 567, 581–82 (2000).

108. *Wash. State Grange*, 552 U.S. at 452 (quoting *Jones*, 530 U.S. at 585–86).

109. *Id.* at 453 (“The flaw . . . in [the challengers’] argument is that, unlike the California primary, the I-872 primary . . . ‘does not serve to determine the nominees of a political party but serves to winnow the number of candidates to a final list of two for the general election.’” (quoting Wash. Admin. Code § 434-262-012 (2005))).

110. *Id.* at 470 (Scalia, J., dissenting) (“There is no state interest behind this law except the Washington Legislature’s dislike for bright-colors partisanship, and its desire to blunt the ability of political parties with noncentrist views to endorse and advocate their own candidates.”).

111. *Id.* at 463 (emphasis added) (citations omitted) (quoting *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989)).

muddying the parties' messaging.¹¹² Further, the general election ballot may require a party to associate with a candidate that it perceives as being nonrepresentative of its views.¹¹³

In sum, responsible party government has run its course as a basis either for allocating First Amendment rights to political parties or for devising party regulations in the interest of good governance. A variety of developments in American politics and law since the 1950s have undercut responsible party government's usefulness as a framework through which to achieve democratic responsiveness and accountability. In this regard, the Court's recent decisions are an invitation to consider a fresh path to responsive and accountable democratic governance.

II. FORGING A NEW PATH TO RESPONSIVE AND ACCOUNTABLE GOVERNANCE

It is time, therefore, to turn to the central contribution of this Essay: the development of an alternative theoretical foundation for achieving policy responsiveness through political parties. Drawing upon the empirical research on the drivers of political participation in both political science and sociology, this Part explains why measures targeted toward cultivating, strengthening, and broadening social ties within partisan networks present an alternative, and underappreciated, path to responsive and accountable governance. The argument is developed in four stages. Section II.A lays out key premises, including the operative definition of a political party, while introducing an overview of an associational-party path to responsive governance. Section II.B describes the empirical basis for believing that social ties not only breed political participation but also offset the limits to voters' interest and knowledge in politics by facilitating information transmission. The heavy lifting comes in section II.C, which draws out the implications of the empirical research for an alternative path to responsive governance. Finally, section II.D squarely addresses various bases for skepticism, arguing that, whatever its limits, a party-reform agenda tailored to strengthening the associational life of political parties—including by redirecting the flow of money—is significantly more promising than one that is singularly focused on strengthening the political power of party leaders.

112. *Id.* at 471.

113. *Id.* at 462. Justice Scalia went on to remark:

Recognizing that parties draw support for their candidates by giving them the party *imprimatur*, Washington seeks to reduce the effectiveness of that endorsement by allowing *any* candidate to use the ballot for drawing upon the goodwill that a party has developed, while preventing the party from using the ballot to reject the claimed association or to identify the genuine candidate of its choice.

Id. at 464–65.

A. *An Associational Path to Responsive Party Government*

The puzzle of how to curb the tendency of elected officials to act out of self-interest or at the behest of special interests has plagued the republic since the Founding. Even as the Founders aspired to a republican form of government in which legislators would govern in the public interest, rather than simply vindicate their constituents' particularized advantages, they fretted over the potential for elected representatives to act out of self-interest or at the behest of special interests.¹¹⁴ Throughout the ratification debates, for instance, Anti-Federalists raised concerns that the new Constitution would give rise to "a system in which the people would be effectively excluded from the world of public affairs and in which national leaders, only weakly accountable, would have enormous discretion to make law and policy."¹¹⁵

The Constitution's primary answer to the threat of unaccountable politicians is periodic elections.¹¹⁶ Regular elections, it was thought, would guarantee that representatives remained bound to their constituents. The structural features of separation of powers and federalism would provide "auxiliary precautions."¹¹⁷

The shortcomings of elections as instruments for ensuring responsiveness are well known.¹¹⁸ Among their myriad limitations as vehicles for producing accountability, one has proven particularly intractable: the quality of political participation. Even in a world of competitive districts in which turnout is high and representative, democratic accountability turns on voters having sufficient information to assess the adequacy of representation.¹¹⁹ Unfortunately, individuals face significant barriers when it

114. Robert C. Post, *Citizens Divided: Campaign Finance Reform and the Constitution* 15 (2014) (explaining the Founding generation's understanding that "a representative government can fulfill the promise of self-government only if there is a close connection between representatives and their constituents").

115. Geoffrey R. Stone, Louis Michael Seidman, Cass R. Sunstein, Mark V. Tushnet & Pamela S. Karlan, *Constitutional Law* 10 (7th ed. 2013).

116. See Post, *supra* note 114, at 13 (noting the Federalists' position that frequent elections would serve to keep elected officials responsive); see also *The Federalist* No. 53, at 330 (James Madison) (Clinton Rossiter ed., 1961) (noting that "where annual elections end, tyranny begins" while wrestling with the question of the optimal interval for elections).

117. *The Federalist* No. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961) (describing the structural devices of federalism and separation of powers as "auxiliary precautions").

118. While some argue that it is incoherent to speak of responsive governance because the electorate is incapable of having a preference, this Essay takes a pragmatic stance. In some theoretical sense this is no doubt true, but it is too far from our political culture or the law to be a valuable critique. For a summary of this extreme skepticism, see Schleicher, *supra* note 96, at 181–86 (explaining the critique but arguing that it is sufficient that voters have some political views and some capacity to judge their interests and preferences).

119. See Abu El-Haj, *Beyond Campaign Finance Reform*, *supra* note 2, at 1152 (noting "[v]oters cannot hold elected officials accountable if they do not know [what those offi-

comes to monitoring elected officials, and policy ignorance among voters is much more common than is policy knowledge.¹²⁰

Responsible party government pursued an indirect solution to the pervasiveness of voter ignorance. Presenting voters on election day with a choice between clear ideological brands, it hypothesized, would substitute for actual knowledge.¹²¹ Meanwhile, an interest in winning office would incentivize the production of brands responsive to voter preferences.¹²² As in the economic market, political parties would compete to provide the most desirable good, and accountability would follow.

The shortcut proved to be fool's gold. Merely consuming the political brands manufactured by party elites has not been enough to produce accountability.¹²³ Despite the increasingly clear choice voters face, the weight of the evidence confirms the Anti-Federalists' worst fears.¹²⁴ At the national level, our leaders are millionaires, "only weakly accountable" to the people, who leverage their enormous policy discretion largely to the advantage of others like themselves.¹²⁵ Donors and ideological partisans have become the target audience for party brands, and concern for the preferences of the general electorate is largely coincidental.¹²⁶

cials have done]" and observing that "elected officials who engage in off-center politics depend on the voting public not noticing"); cf. *Buckley v. Valeo*, 424 U.S. 1, 14–15 (1976) (recognizing that "[i]n a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential" (emphasis added)).

120. See, e.g., Bawn et al., *supra* note 51, at 577–78 (identifying a large "blind spot" with respect to information about official behavior, which renders ordinary voters incapable of holding politicians accountable through monitoring).

121. See *supra* notes 52–55 and accompanying text.

122. See Daniel Hays Lowenstein, *Associational Rights of Major Political Parties: A Skeptical Inquiry*, 71 *Tex. L. Rev.* 1741, 1760–63 (1993) (discussing the theory of responsible party government).

123. Drutman, *supra* note 7 (summarizing recent literature).

124. See *supra* notes 115–117 and accompanying text.

125. Stone et al., *supra* note 115, at 10; see also Abu El-Haj, *Beyond Campaign Finance Reform*, *supra* note 2, at 1136–40 (reviewing literature demonstrating that Congress is significantly more responsive to the wealthy than to the broader electorate).

126. See, e.g., Abu El-Haj, *Beyond Campaign Finance Reform*, *supra* note 2, at 1163–70 (explaining how party primaries today drive a wedge between elected officials and their constituents); Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 *Persp. on Pol.* 564, 573 (2014) (concluding a study of policy responsiveness from 1981 through 2002 by observing that the United States has become a "democracy by coincidence"). It is worth emphasizing that none of the main critics of Professors Martin Gilens and Benjamin Page's study substantially undermine their conclusion that the United States is a "democracy by coincidence." See, e.g., Peter K. Enns, *Relative Policy Support and Coincidental Representation*, 13 *Persp. on Pol.* 1053, 1058–61 (2015) (conceding "[c]oincidental representation appears to be the norm," but rejecting the conclusion that this comes "at the expense of those in the middle").

What then would happen if one sought to create a system of political accountability the hard way—by seeking to increase informed political participation? The relationship between electoral participation and democratic accountability is certainly complex. Still, the necessity of a threshold level of representative political participation—including on election day—is indisputable. No one, not even the authors of the APSA Report, denies that participation of citizens is necessary for accountability.¹²⁷ In fact, the APSA Report identified the “*failure to bring about adequate popular participation in politics*” as one of the two “conspicuous failings” of the two political parties.¹²⁸ The primary dispute, therefore, turns on whether it is possible to create an informed electorate.¹²⁹

Individual voters may not be capable of monitoring elected officials to hold them accountable,¹³⁰ but the same is not necessarily true for organized voters.¹³¹ It is no accident that federal policy is highly solicitous of the needs of older Americans; they succeed in asserting their interests because they are more politically active and better organized than most Americans.¹³²

127. See APSA Report, *supra* note 54, at 76 (“It is only at the polls that a party can be held finally accountable for its promises and its deeds. And it is through the act of election to a greater extent than through anything else that more widespread popular participation may be achieved in the political process.”).

128. *Id.* at 25 (emphasis added); see also *id.* at 30, 76 (arguing low voter turnout “is the result of disappointment as well as inertia” and that “[m]ore significant operation of the party system would create greater interest in voting” but also in party membership).

129. See generally Michael X. Delli Carpini, *The Psychology of Civic Learning*, in *The Political Psychology of Democratic Citizenship* 23, 23–51 (Eugene Borgida et al. eds., 2009) (arguing for the integration of five different research models to advance our understanding of political knowledge and for future research to focus on how institutions as well as social and psychological processes affect knowledge acquisition); Michael Henderson, *Issue Publics, Campaigns, and Political Knowledge*, 36 *Pol. Behav.* 631, 633 (2014) (explaining the “issue publics hypothesis” that democratic accountability demands only “a pluralist division of labor” whereby a panoply of “issue publics” with “the necessary information to monitor claims and actions of political leaders” compensates for the lack of “a broad base of information of politics” in any individual voter); Jennifer Jerit et al., *Citizens, Knowledge, and the Information Environment*, 50 *Am. J. Pol. Sci.* 266, 266–67 (2006) (revisiting the question whether there is “a permanent information underclass” in U.S. politics).

130. See, e.g., Kang, *Hydraulics*, *supra* note 37, at 167 (“The party-in-the-electorate faces intractable collective action problems that prevent it from acting on its own initiative.”)

131. See, e.g., Robert D. Putnam, *Bowling Alone: The Collapse and Revival of American Community* 344–47 (2000) (reviewing evidence that communities with strong civic associations both demand and get better government); Robert D. Putnam, *Bowling Alone: America’s Declining Social Capital*, 6 *J. Democracy* 65, 66 (1995) (“The norms and networks of civic engagement also powerfully affect the performance of representative government.”).

132. See, e.g., Hacker & Pierson, *supra* note 81, at 77–79 (2005); see also Jacob S. Hacker et al., *Inequality and Public Policy*, in *Inequality and American Democracy: What We Know and What We Need to Learn* 156, 189 (Lawrence R. Jacobs & Theda Skocpol

New possibilities arise when one resists the urge to overstate the implications of the data supporting voter ignorance.¹³³ While voter ignorance is certainly pervasive, it need not preclude a path to political accountability in which informed political participation plays a critical role. That route, however, becomes visible only when one puts social ties and membership organizations back into the picture.¹³⁴ A substantial body of empirical work supports the hypothesis that intermediary associations, including political parties, can spur political participation and facilitate a two-way street of communication between elites and ordinary citizens.¹³⁵

An associational path to responsive and accountable party governance emerges from this empirical evidence demonstrating the critically important role that association and associations play in mobilizing and informing citizens. It capitalizes on the fact that, as Professor Daniel Lowenstein has astutely remarked, “the term ‘party’ can be and is used with greatly disparate referents.”¹³⁶ While responsible party government adopted a relatively formalist conception of the party as its officers, the

eds., 2005); Suzanne Mettler, *The Transformed Welfare State and the Redistribution of Political Voice*, in *The Transformation of American Politics: Activist Government and the Rise of Conservatism 191*, 211 (Paul Pierson & Theda Skocpol eds., 2007). Similarly, gun-rights supporters who are members of the National Rifle Association (NRA) are notably more politically active than gun owners who do not belong to the NRA. Some 46% of gun owners in the NRA say they have contacted a public official to express their opinion on gun policy, including 24% who have done so in the past 12 months. Far fewer gun owners who do not belong to the NRA have reached out to a public official regarding gun policy: only 15% have ever done this, and just 5% have done this in the past 12 months. Kim Parker, *Among Gun Owners, NRA Members Have a Unique Set of Views and Experiences*, Pew Research Ctr. (July 5, 2017), <http://www.pewresearch.org/fact-tank/2017/07/05/among-gun-owners-nra-members-have-a-unique-set-of-views-and-experiences/> [<http://perma.cc/M2FQ-C6PS>].

133. See Martin Gilens et al., *The Mass Media and the Public’s Assessment of Presidential Candidates, 1952–2000*, 69 *J. Pol.* 1160, 1173 (2007) (“[F]ocus[ing] on trends in Americans’ knowledge and evaluations of presidential candidates for the public taken as a whole . . . may obscure important variation across subgroups of the public.”). In this regard, it is important to acknowledge the ways in which theory shapes research agendas. Most studies of differential voter knowledge are predicated on the assumption that knowledge is the springboard to participation, not the inverse. It is, thus, not an accident that polls on differential knowledge among voters rarely ask about the partisan associations to which such individuals belong, let alone whether those individuals have been contacted by partisan networks. See, e.g., Michael Dimock et al., *Beyond Red vs. Blue: The Political Typology 93–98* (2014), <http://assets.pewresearch.org/wp-content/uploads/sites/5/2014/06/6-26-14-Political-Typology-release1.pdf> [<http://perma.cc/E34E-58UZ>].

134. Compare Bruce E. Cain, *Democracy More or Less: America’s Political Quandary* 11, 16 (2015) (emphasizing voter ignorance as an explanation for why “popular sovereignty” is an “illusion” and why we must return to a pluralistic approach to politics in which democratic accountability is achieved through democratic competition between interest groups and political parties), with *infra* section II.B (arguing that social ties, relationships, and associations play a vital role in political mobilization and engagement).

135. See *infra* section II.B.

136. Lowenstein, *supra* note 122, at 1760.

associational-party path exploits the sociological fact that the contemporary party organization is a network of individuals and groups connected formally and informally in their efforts to influence elections and government policy.¹³⁷

From an associational-party perspective, the relevant definition of a political party is a sociological one in which “[t]he term ‘party’ is a colloquial shorthand to describe . . . a loose collection of political relationships, some legal and some non-legal, among a diverse set of actors and institutions, all of whom perform important work in furtherance of a common [electoral, policy, and ideological] agenda.”¹³⁸ The party network certainly includes the well-known trinity of elected officials (also known as “the party in office or seeking office”); “party activists,” including paid party operatives and volunteers; and voters (“the party in the electorate”).¹³⁹ But it is significantly broader, including not only legislative caucuses¹⁴⁰ but also nonparty entities and policy demanders such as the AFL-CIO, Club for Growth, and NRA.¹⁴¹ As Professor Michael Kang summarizes:

Beyond a party’s nominees or titular officials (such as the party chairman, spokespeople, and employees), the party comprises . . . a teeming, polyarchic aggregation of politically interested constituents. The kaleidoscopic mass of political activists, volunteers, financial contributors, interest groups, PACs, lawyers, consultants, journalists, and intellectuals who perform important work aligned with the party’s collective

137. See, e.g., Masket, *supra* note 38, at 19, 45 (noting “the shape of the modern party is more of a network than a machine hierarchy” while emphasizing its focus on shared electoral goals); Kang, *Hydraulics*, *supra* note 37, at 143 (noting the “diversity of motivations and interests” of partisan actors but emphasizing their broader “overlapping political goals”).

138. Kang, *Hydraulics*, *supra* note 37, at 133 (emphasis added).

139. Larry J. Sabato, *The Party’s Just Begun: Shaping Political Parties for America’s Future* 26–27 (1988).

140. For an interesting account of congressional membership organizations and their success in pooling resources and disciplining members in the quest for donations and power, see generally Andrew J. Clarke, *Party Sub-Brands and American Party Factions* (2017) (unpublished working paper), http://www.andrewjclarke.net/uploads/2/8/0/2/28027431/party_sub-brands_and_american_party_factions__clarke_.pdf (on file with the *Columbia Law Review*).

141. Some political scientists exclude these partisan civic associations from their definition. See, e.g., Richard Skinner et al., 527 Committees, Formal Parties, and Party Adaptation, 11 *Forum* 137, 144 (2013) (distinguishing between 527s that are “deeply embedded within the formal party structure[]” and subservient to their partisan goals, and certain policy-demanding groups, such as Club for Growth or Planned Parenthood, which while “generally aligned with a party” are not “automatically subservient to th[e] party’s desires”). Donors, which most political scientists include within the definition, however, are also not “automatically subservient” to the party, so it is not entirely satisfactory to treat the two groups differently as some definitions do. *Id.*

agenda are not necessarily bound formally to or paid by the official party.¹⁴²

The sociological perspective further recognizes that elected officials and party leaders operate within the confines of the official party organization only when it suits their interests.¹⁴³ The legal entities of campaign finance are largely window dressing, even as the formal rights of such entities can and do reshape the texture of partisan networks.¹⁴⁴

Once we see the full scope of the party, it is evident that legal efforts to sustain and build out political parties *as associations* provide an alternate, and far more promising, path to democratic responsiveness and accountability, especially when married with similar efforts to enhance the associational life of contemporary civic associations.

Contemporary party organizations, while not the membership organizations of bygone eras, have yet to shed their essential associational attributes.¹⁴⁵ The era of nineteenth-century urban machine politics that depended on the confluence of relatively strong personal ties and a formal organization bound by patronage is long gone.¹⁴⁶ Yet, even in the twenty-first century, political parties remain networks of individuals and

142. Kang, *Hydraulics*, *supra* note 37, at 143.

143. *Id.* at 147, 158 (noting an early instance in which Wisconsin political parties—in response to Progressive-era reforms—transformed themselves into civic associations and explaining how this shift into an informal network pushed “strategic behavior . . . deeper into the quiet background of politics”); see also Skinner et al., *supra* note 141, at 141 (arguing that 527s emerged as an adaptation within the party network to accommodate the legislative ban on soft money and providing as evidence that the “best-connected 527s tend[ed] to have a high[er] percentage of employees who ha[d] also worked for formal party organizations and top presidential campaigns”).

144. The Obama campaign’s concerted effort to obscure the existence of different legal entities by naming them such that they could all be referred to by the same acronym—“OFA”—nicely illustrates this point. Elizabeth McKenna & Hahrie Han, *Groundbreakers: How Obama’s 2.2 Million Volunteers Transformed Campaigning in America* 4 n.2 (2014) (describing how the acronym blurred the distinction between Obama for America (the official campaign) and Organizing for America (a 501(c)(4)), inducing campaign workers to think of themselves as working for state parties even though the money to cover their salaries came from transfers from Obama for America); see also Kang, *Hydraulics*, *supra* note 37, at 142–43 (noting “the core constellation of leading actors in a political party extends far beyond the party’s legal apparatus” and further that “the law captures only a small portion of the activity and people referenced when we refer colloquially to a ‘political party’”).

145. See James L. Gibson et al., *Assessing Party Organizational Strength*, 27 *Am. J. Pol. Sci.* 193, 199–201 (1983) (describing the division of labor in and professionalization of state party organizations between 1960 and 1980).

146. See McKenna & Han, *supra* note 144, at 26–30 (describing the demise of local parties centered around ward and precinct workers who maintained personal connections with voters precisely in order to create a sense of indebtedness that would be paid on election day). For a vivid history of nineteenth-century political parties, see generally Jean H. Baker, *Affairs of Party* (1983) (exploring the “party experience” of mid-nineteenth-century Democrats); Gerald Leonard, *The Invention of Party Politics* (2002) (examining political parties in the early nineteenth century).

groups—activists, donors, officeholders, and dealmakers—tied together and to the electorate by social connections of various strengths.¹⁴⁷

Beyond their capacity to act as vehicles for aggregating and amplifying preferences and perspectives, the formal parties have an associational life, although there is great variation in the depth and breadth of that life. The national committees of the two major political parties, for example, largely function as vessels through which to collect and distribute donations. Like other tertiary associations based in Washington, D.C., they are professionally managed and donor funded.¹⁴⁸ Their professional staffs are selected for their strong ties to elected officials and donors.¹⁴⁹ The primary interaction these committees have with the broader public is through membership donations, with at least some emphasis on small donors—both because it is to their electoral advantage to do so and because federal law constrains their ability to solicit big donations.¹⁵⁰ Small donations do not necessarily lead to social interaction with party elites. Even so, such entities are able to collect money only because they are situated within a partisan social network capable of mobilizing voters on election day. Other nodes within the formal party operate more like the parties of the nineteenth century. Organizations like the Democratic National Committee (DNC) and Republican National Committee (RNC) remain participatory and federated, and they regularly bridge ties between party elites and activists.¹⁵¹ Super donors, meanwhile, operate in

147. Masket, *supra* note 38, at 19, 108–58 (depicting, vividly, the various associational qualities of these networks in California).

148. Compare Daniel J. Galvin, *The Transformation of Political Institutions: Investments in Institutional Resources and Gradual Change in the National Party Committees*, 26 *Stud. Am. Pol. Dev.* 50, 50–53 (2012) (describing the transition to “parties in service”), with Mark E. Warren, *Democracy and Association* 39 (2001) (describing tertiary associations as professionally run membership-based interest groups funded by foundations or other donors, rather than by membership dues).

149. Cf. Gregory Koger et al., *Partisan Webs: Information Exchange and Party Networks*, 39 *Brit. J. Pol. Sci.* 633, 652 (2009) (finding “formal party organizations tend to be information receivers” that collect potential-donor and -voter lists from interest groups and partisan-affiliated media sources); Emily Cahn, *DSCC Announces 2016 Staff, Roll Call* (Nov. 21, 2014), <http://www.rollcall.com/news/home/dsc-announces-2016-staff-roster> [<http://perma.cc/KMD5-CXUU>] (introducing the 2016 members of the Democratic Senatorial Campaign Committee, many of whom had strong ties to the incoming DSCC chairman).

150. Cf. Kenneth P. Vogel et al., *Hillary’s Cash Flow Issue: Red Flags in Finance Reports for Clinton, Jeb Bush and Marco Rubio*, *Politico* (Oct. 16, 2015), <http://www.politico.com/story/2015/10/hillary-clinton-fec-filing-cash-flow-problem-214870> [<http://perma.cc/R2PF-ENK7>] (recognizing that Hillary Clinton’s big donors were quickly maxing out and recommending that she “significantly expand her fundraising base to include more small donors, who can—and usually do—continue giving throughout the race”).

151. See *Democratic National Committee—2016, Democracy in Action*, <http://www.p2016.org/parties/dnc16.html> [<http://perma.cc/FCH4-VKCE>] (last visited Jan. 17, 2018) (listing the members of the DNC and their diverse backgrounds and affiliations).

insular social and professional networks; their strong ties to one another enhance both their ability to fundraise and their access to party leaders.¹⁵²

The picture is equally complicated at the local level. While some local party organizations are well integrated with membership-based associations, such as labor unions, churches, and firefighter and law enforcement organizations, others are dominated by business interests and socially insulated from district constituencies.¹⁵³ The power of the latter derives from the money that they provide to bankroll candidates rather than from the social networks they are capable of tapping on election day.¹⁵⁴

Wed to responsible party government and conceiving of parties narrowly and almost exclusively *as ideological speakers*, party reformers have been blind to the democratic potential arising out of the associational diversity within the partisan network. This blindness has prevented systematic consideration of both the part association can play in mobilizing and informing citizens and the ways that building out the associational life of contemporary political parties—by shoring up those nodes of the partisan network capable of fostering social ties between elected officials and activists and between activists and constituents—could contribute to good governance.

B. *The Democratic Returns of a Party's Associational Life*

With a clearer sense of what is being proposed, it is time to review the empirical evidence demonstrating the critically important role that association and associations play in mobilizing and informing citizens. The existence of an associational path to responsive party governance derives from marrying the insight that contemporary political parties retain significant associational qualities with two relatively uncontroversial empirical findings pointing to the significant political returns of those associational qualities. First, social ties, far more than ideological

152. Cf. Nicholas Confessore et al., *The Families Funding the 2016 Presidential Election*, N.Y. Times (Oct. 10, 2015), <http://www.nytimes.com/interactive/2015/10/11/us/politics/2016-presidential-election-super-pac-donors.html> (on file with the *Columbia Law Review*) (noting that “across party lines, [super donors] are patrons of the same symphonies, art museums or at-risk youth programs,” that they are “business partners, in-laws and, on occasion, even poker buddies,” and that they frequently have pre-existing “personal, regional and professional ties to the candidates”).

153. See, e.g., Masket, *supra* note 38, at 14, 119–20, 180–84 (depicting local party networks and their variations).

154. *Id.* at 182–83 (noting local party leaders, as business leaders, “aren’t well known by rank-and-file primary voters;” instead, their political power derives from “the funding advantage they provide” to candidates).

commitment, drive civic and political participation.¹⁵⁵ Second, information travels best through social networks.¹⁵⁶

The drivers of political participation are unquestionably multifaceted, with time, money, education, civic skills, and political interest all playing significant roles.¹⁵⁷ Still, one finding emerges time and again: Individuals who are asked to engage civically and politically are far more likely to do so than those who are not.¹⁵⁸ A recent inquiry into the drivers of participation in state politics, for example, found that “contact from the political parties and other organizations” was “especially important in motivating participation in state politics.”¹⁵⁹ In doing so, it noted further that the organizational strength of state and local parties shaped the time and effort of those activated (a point to which this Essay will return later).¹⁶⁰ In this regard, it should not be surprising that a key attribute of nonvoters is that they have not been asked to vote.¹⁶¹

Relationships and social networks, far more than ideology and belief, drive political recruitment and sustain political activism.¹⁶² Existing social

155. See *infra* notes 158–166 and accompanying text.

156. See *infra* notes 182–183 and accompanying text.

157. See generally Henry H. Brady et al., *Beyond SES: A Resource Model of Political Participation*, 89 *Am. Pol. Sci. Rev.* 271, 271 (1995) [hereinafter Brady et al., *Beyond SES*] (identifying time, money, civic skills, political interest, and recruitment through social networks as the dominant explanations of individual political participation, based on a review of the literature).

158. See Abu El-Haj, *Friends, Associates, and Associations*, *supra* note 32, at 80–85 (reviewing the empirical literature on this point). See generally Sidney Verba et al., *Voice and Equality: Civic Voluntarism in American Politics* 3–4 (1995) (finding “[t]hose who have both the motivation and the capacity to become active are more likely to do so if they are asked,” and further that motivation and capacity arise out of the social experiences, institutions, and associations to which individuals are exposed).

159. Andrea McAtee & Jennifer Wolak, *Why People Decide to Participate in State Politics*, 64 *Pol. Res. Q.* 45, 52 (2011) (using survey data from the 1990 American Citizen Participation Study to assess the drivers of political participation).

160. *Id.* at 51–52.

161. See Benjamin Highton & Raymond E. Wolfinger, *The Political Implications of Higher Turnout*, 31 *Brit. J. Pol. Sci.* 179, 188 (2001) (finding nonvoters had not been “politically mobilized,” defined as having been “canvassed either by telephone or in person”).

162. See Brady et al., *Beyond SES*, *supra* note 157, at 285 (concluding that “motivations such as interest in politics are not enough to explain political participation”); Valerie A. Lewis et al., *Religion, Networks, and Neighborliness: The Impact of Religious Social Networks on Civic Engagement*, 42 *Soc. Sci. Res.* 331, 340 (2013) (finding “those who attend religious services more often are more likely to engage in civic activities and informal helping not because of beliefs, politics, or general sociability, but because they have strong religious social networks”); Doug McAdam, *Recruitment to High-Risk Activism: The Case of Freedom Summer*, 92 *Am. J. Soc.* 64, 70, 81–82 (1986) (finding, notwithstanding similar levels of motivation and available time, those who stuck it out in the 1964 Freedom Summer had deeper personal connections to the Civil Rights movement); Doug McAdam & Ronnelle Paulsen, *Specifying the Relationship Between Social Ties and Activism*, 99 *Am. J. Soc.* 640, 654, 659 (1993) (revising his earlier study to address prior limitations and

ties frequently explain who is likely to be asked in the first place.¹⁶³ In fact, the seminal study found individuals are most likely to be recruited by individuals whom they know from civic associations.¹⁶⁴ Equally important, those who are asked are much more likely to accept the invitations to take political action if they are asked by someone they know.¹⁶⁵ Weak social ties are particularly valuable in this regard because they provide the opportunity to expand a political network.¹⁶⁶

Beyond the value of the initial contact, research also shows that once formed, relationships both breed and sustain political action. This effect is influenced by the strength of the personal ties involved. Strong personal connections, in particular, frequently explain the choice to engage in time-consuming, sustained, risky, or expensive endeavors.¹⁶⁷

concluding that continued contact with activist friends from the Civil Rights movement sustained activism and political engagement over the long term).

163. See, e.g., Florence Passy, *Social Networks Matter. But How?*, in *Social Movements and Networks: Relational Approaches to Collective Action* 21, 24, 34 (Mario Diani & Doug McAdam eds., 2003) (reviewing literature showing that a primary path by which individuals disposed to take political action are connected to opportunities to do so is through social ties).

164. Verba et al., *supra* note 158, at 144 (finding Americans were more likely to be recruited into politics by associates from civic and political groups).

165. *Id.* at 142–45 (analyzing when requests are likely to be accepted and finding the existence of a personal relationship to make it significantly more likely that the invitation is accepted); Henry E. Brady, Kay L. Schlozman & Sidney Verba, *Prospecting for Participants: Rational Expectations and the Recruitment of Political Activists*, 93 *Am. Pol. Sci. Rev.* 153, 159–61 (1999) [hereinafter Brady et al., *Prospecting for Participants*] (finding recruiters who have personal leverage and, therefore, more information about potential recruits are most likely to be successful); see also Robert M. Bond et al., *A 61-Million-Person Experiment in Social Influence and Political Mobilization*, 489 *Nature* 295, 296–97 (2012) (finding close friendships influenced not only expressive political behavior but also real-world behavior and, in fact, accounted “for all of the significant contagion . . . in spite of the fact that they make up only 7% of all friendships on Facebook”); David A. Snow et al., *Social Networks and Social Movements: A Microstructural Approach to Differential Recruitment*, 45 *Am. Soc. Rev.* 787, 787 (1980) (concluding social-movement recruitment cannot be explained by individual disposition and finding that preexisting relationships with movement members was one of three main factors).

166. Mark S. Granovetter, *The Strength of Weak Ties*, 78 *Am. J. Soc.* 1360, 1376 (1973) (“Weak ties are more likely to link members of *different* small groups than are strong ones, which tend to be concentrated within particular groups.”); see also Bob Edwards & John D. McCarthy, *Strategy Matters: The Contingent Value of Social Capital in the Survival of Local Social Movement Organizations*, 83 *Soc. Forces* 621, 638 (2004) (concluding Mothers Against Drunk Driving “offers clear support for the long-standing body of work on the strength of weak ties and their ability to counter social closure” by “extend[ing] the group’s reach into a broader” community and “increas[ing] a group’s . . . access to resources of all kinds”); McAdam & Paulsen, *supra* note 162, at 655 (“Numerous studies have shown that movements often spread by means of diffuse networks of weak bridging ties or die for lack of such ties.” (citations omitted)).

167. See, e.g., McAdam, *supra* note 162, at 70, 81–82 (finding individuals more likely to engage in high-risk activism when they have stronger social ties to the those involved).

Thus, even party activists turn out to stay engaged because of the friendships and social contacts associated with the work.¹⁶⁸

Politicians know well the electoral value of personal ties and social networks. For much of the twentieth century, the Republican National Committee cultivated personal networks of activists to broaden its electoral base.¹⁶⁹ In the 1950s, for example, it trained women on how to converse with their neighbors in order to facilitate fundraising.¹⁷⁰

President Barack Obama's ground game depended on 2.2 million volunteers to canvass among friends and neighbors, equipped with both their own local knowledge and a list of persuadable voters generated by the state-of-the-art analytics developed at headquarters.¹⁷¹ Tellingly, the primary task assigned to paid staffers was to train local volunteers to use personal narratives to persuade neighbors and friends to vote for Obama on election day.¹⁷² In 2012, when faced with polls showing that a substantial percentage of his 2008 supporters were wavering, Obama extended this strategy to the virtual world, using social media, not just neighborhood geography, to identify social ties that could be harnessed.¹⁷³ More specifically, the campaign turned to the Facebook pages of individuals already committed to the reelection campaign to "identify[] persuadable friends," focusing specifically on friends with strong ties.¹⁷⁴

Relationships built during the Obama campaign also sustained it.¹⁷⁵ The authors of a recent study of Obama's ground game note that

168. Rosenblum, *Primus Inter Pares*, supra note 55, at 503 (noting "[s]tudies indicate that activists who became engaged for issue-related reasons come to find . . . social gratification" a primary motivation for staying involved with the party because they are "rewarded with 'social contacts and friendship,' the 'fun and excitement of politics,' and the 'feeling of recognition in the community'").

169. Galvin, supra note 148, at 61, 64 (describing the success of the RNC's efforts to create "a 'sustaining membership' small-donor program that mobilized local volunteers to 'fish' for new donors among their neighbors").

170. *Id.* at 64 (describing the RNC's efforts to "train[] Republican women in the art of grassroots mobilization").

171. See McKenna & Han, supra note 144, at viii-x, 12-13, 92 (noting the degree to which those who campaigned for Obama stayed involved because of the relationships they forged during the campaign). By way of comparison, John Kerry's 2004 field operation, which was generally considered "well executed," consisted of approximately 700,000 (paid and volunteer) individuals. *Id.* at 39.

172. See, e.g., *id.* at 73-75, 80, 105 (noting the metric of success for paid organizers was relationship building rather than the number of voter contacts and illustrating this campaign approach in various places, including in the 2008 Pennsylvania primary).

173. Jim Rutenberg, *Data You Can Believe In*, *N.Y. Times* (June 20, 2013), <http://www.nytimes.com/2013/06/23/magazine/the-obama-campaigns-digital-masterminds-cash-in.html> (on file with the *Columbia Law Review*); see also Bond et al., supra note 165, at 298 ("Online mobilization works because it primarily spreads through strong-tie networks that probably exist offline but have an online representation.").

174. Rutenberg, supra note 173.

175. McKenna & Han, supra note 144, at 91-92.

volunteers accepted “the hard ask”—defined as a significant and accountable commitment to work for the campaign—largely as a consequence of “the strength of the relationship the organizer had built with the supporter.”¹⁷⁶ Paid organizers, moreover, spent significant time developing these relationships, which began with a one-on-one, face-to-face meeting in which the goal was to help organizers assess the particular strengths and abilities of potential volunteers so they could tailor their “hard ask” appropriately.¹⁷⁷ The authors further observe:

OFA’s ability to motivate volunteers and persuade and turn out voters depended in large part on the strength of interpersonal connections People may have joined the campaign because of Obama’s opposition to the war in Iraq or his stance on gender equality, but, as many of our interviewees told us, they put long, thankless hours into the field because of their relationships with others.¹⁷⁸

The Obama campaign was neither the first, nor the last, presidential campaign to harness personal ties to achieve electoral ends. In 2004, one-third of eligible New Hampshire primary voters reported having been invited to a local house meeting to support Howard Dean, often by volunteer supporters.¹⁷⁹ That same year, President George W. Bush launched a successful final drive to bring voters to the polls through a face-to-face operation, inspired by Amway, in which volunteers were encouraged to target voters with shared associational affiliations—such as chapters of the NRA or Boy Scouts—during the last seventy-two hours of the campaign.¹⁸⁰ In 2016, Ted Cruz’s campaign manager employed a similar strategy, explaining that his goal was “to personalize each contact . . . to have neighbors call neighbors, pro-lifer to pro-lifer, gun owner to gun owner.”¹⁸¹

176. *Id.* at 115–17.

177. *Id.*

178. *Id.* at 91–92. The authors further note that 75% of their interviewees emphasized the importance of the campaign’s human presence, *id.* at 92, and that these interpersonal connections existed at three levels: “among the field staff themselves, between the field organizer and the volunteer, and between the volunteer who performed voter contact and his or her neighbor,” *id.* at 91.

179. *Id.* at 35–38 (noting Obama’s team frequently attributed Dean’s failure in Iowa to the campaign’s overreliance on paid staff and out-of-state volunteers).

180. *Id.* at 39–40 (reporting GOP campaigns attracted 1.4 million volunteers on election day in 2004).

181. Philip Rucker & Robert Costa, How GOP Campaigns Are Strategizing for Super Tuesday’s Delegate Bonanza, *Wash. Post.* (Nov. 23, 2015), http://www.washingtonpost.com/politics/how-gop-campaigns-are-strategizing-for-super-tuesday-delegate-bonanza/2015/11/22/17bbfca4-8fa1-11e5-ae1f-af46b7df8483_story.html (on file with the *Columbia Law Review*); see also Sasha Issenberg, Data-Mining Firm Searches for Voters by Combining High School Yearbooks, *Bloomberg News* (Nov. 24, 2015), <http://www.bloomberg.com/news/articles/2015-11-24/a-new-data-mining-technique-to-uncover-new-hampshire-influencers> (on file with the *Columbia Law Review*) (“[Volunteers] are given call sheets prioritized by who the voters

Beyond the tendency of social ties to facilitate political participation, it is well established that information, including about politics, travels best through social networks.¹⁸² Tea Party activists at the grassroots level have consciously exploited this fact, having made a concerted effort to ensure that the political information they wish to disseminate to the broader electorate arrives through trusted sources.¹⁸³ Both Facebook’s “like” function and Twitter are predicated on this dynamic.

In sum, there is strong evidence that association itself—that is, personal ties, weak and strong—can play at least two critical roles in the democratic process: First, social ties are capable of drawing citizens into politics, including those that are not terribly interested in politics, merely on the strength of the friendship. Second, they are efficient vectors when it comes to information transmission. These dynamics, moreover, are likely to be quite familiar to many of us: the discovery of the risks that the shortage of large-animal vets poses to our food supply learned from a college-age babysitter, the novel read based on a friend’s recommendation, or the campaign house party attended because the host is a family friend.

C. *Party Strength—Envisioning the Shape of a Responsive Party System*

The heavy theoretical lifting that remains is an exploration of the implications of this empirical research for strengthening the political parties in the interest of responsive and accountable governance. First, what can we infer from this empirical research about the shape partisan networks would need take to yield democratic returns? Equally important, is it possible to nudge parties in that direction under current sociopolitical conditions? Ultimately, the remaining two sections of this Part aim to explain how a party-reform agenda tailored to broadening and strengthening the associational life of political parties could improve

know. . . . ‘It doesn’t take too many people who are connected to a persuadable target to say nice things to them about John Kasich,’ to start to close the deal, says Matt Kalmans, a 22-year-old co-founder of Applectart.”).

182. See, e.g., Sidney Tarrow, *Dynamics of Diffusion: Mechanisms, Institutions, and Scale Shift*, in *The Diffusion of Social Movements: Actors, Mechanisms, and Political Effect* 204, 209 (Rebecca Kolins Givan et al. eds., 2010) (noting “innovations [in social-movement tactics] travel most easily along established lines of [social] interaction” even if occasionally they spread between individuals without social relationships); Damon Centola & Michael Macy, *Complex Contagions and the Weakness of Long Ties*, 113 *Am. J. Soc.* 702, 730 (2007) (noting public health officials understand that information, unless socially reinforced, will generally not change entrenched, risky behaviors).

183. Theda Skocpol & Vanessa Williamson, *The Tea Party and the Remaking of Republican Conservatism* 128–29 (2012) (describing how the Tea Party took advantage of the well-known sociological fact “that citizens find news more credible if trusted people vouch for its veracity and relevance”).

policy responsiveness notwithstanding what we know about the myriad sources of electoral dysfunction today.¹⁸⁴

1. *The Shape of Partisan Networks*. — Without denying that the causes of our crisis in representation are numerous, an associational path to responsible party governance takes as its starting point a significantly underappreciated transformation of the political landscape: the increasing social isolation of political elites and its impact on both participation and the flow of political information between ordinary Americans and their leaders.

The contrast between the social networks of political elites today and those in prior eras of American history is both stark and revealing. While democratic politics is frequently a contest among elites,¹⁸⁵ prior to the advent of mass media, candidates needed “to build extensive interpersonal networks not confined to particular occupational or social circles” to garner reputation and votes.¹⁸⁶ As such, the path to political power ran through membership in socioeconomically integrated civic associations—the Shriners, the Rotary Club, the American Legion.¹⁸⁷ These groups required regular attendance at meetings and frequently involved election to higher offices and attendance at federated meetings.¹⁸⁸ Political elites were thereby prevented from becoming socially insulated from the rest of American society.¹⁸⁹

By contrast, electoral incentives today pull candidates and parties into a narrow social network of extremely unrepresentative and socially isolated donors and activists.¹⁹⁰ Given the sheer cost of running a federal

184. For an overview of some of the salient dynamics that increasingly render elections incapable of tethering elected officials to the preferences of their constituents, see generally Abu El-Haj, *Beyond Campaign Finance Reform*, supra note 2, at 1151–57, 1161–74.

185. The notion that democratic politics has long consisted of a contest among elites is the primary insight of the pluralist tradition of American politics, even as key figures within the tradition differ over how impenetrable elite power is. See generally Robert A. Dahl, *Who Governs? Democracy and Power in an American City* (1st ed. 1961); C. Wright Mills, *The Power Elite* (1st ed. 1956); E.E. Schattschneider, *The Semisovereign People: A Realist's View of Democracy in America* 35 (2d ed. 1975).

186. Theda Skocpol, *Diminished Democracy: From Membership to Management in American Civic Life* 113 (2004).

187. *Id.* at 108–13 (noting “involvement in cross-class membership federations . . . contributed to U.S. electoral campaigns and helped democratic politicians to legitimate their aspirations for governmental leadership”).

188. *Id.* at 78–79, 85–93.

189. See *id.* at 110 (noting further that biographies of prominent businessmen, politicians, and professionals and their wives often involved long accounts of their membership in the same civic associations that record numbers of ordinary Americans joined as well).

190. Cf. Confessore et al., supra note 152; Brian Schaffner, Jesse H. Rhodes & Sean McElwee, *How Big Is the Gap Between the Donor Class and Ordinary Americans? Bigger than You Think*, Wash. Post (Dec. 15, 2016), <http://www.washingtonpost.com/news/>

campaign in the current era, individuals running for office are required to tap their social networks for significant early capital to gain the confidence of party operatives.¹⁹¹ It is, thus, not surprising that a vast majority of members of Congress are millionaires.¹⁹²

Even beyond the donor circle, the tendency of contemporary political parties has been to eschew broad mobilization.¹⁹³ For the average voter, computer-generated requests for donations have replaced the ward boss as the personal face of the party.¹⁹⁴ This is particularly concerning since those most likely to be targeted by such impersonal requests also happen to have relatively high incomes and levels of educational attainment. Political commentator Michael Lind only slightly overstates the case when he writes:

Politicians chosen by membership-based mass parties have been replaced by politicians selected by donors and sold . . . to voters. At the same time, the decline of neighborhood party machines turning out the vote has resulted in declining participation by lower income and less educated voters. The Americans who do vote are disproportionately affluent.¹⁹⁵

When millionaires constitute a supermajority of Congress and lawyers are overrepresented in Congress, the interests of lawyers,

monkey-cage/wp/2016/12/15/how-big-is-the-gap-between-the-donor-class-and-ordinary-americans-bigger-than-you-think (on file with the *Columbia Law Review*).

191. See, e.g., Adam Bonica, Professional Networks, Early Fundraising, and Electoral Success, 16 *Election L.J.* 153, 153 (2017) (“Demonstrating the ability to fundraise early on is often regarded as a prerequisite for a campaign to be seen as viable.”). In 2014, the average cost of a successful House bid was just over \$1.4 million while an average Senate bid cost nearly \$ 9.7 million. See Brookings Inst., Vital Statistics for Congress, Table 3-1: The Cost of Winning an Election (1986–2014), http://www.brookings.edu/wp-content/uploads/2017/01/vitalstats_ch3_tbl1.pdf [<http://perma.cc/K5BC-XRY3>] (last visited Dec. 13, 2017); see also Soo Rin Kim, The Price of Winning Just Got Higher, Especially in the Senate, *OpenSecrets.org* (Nov. 9, 2016), <http://www.opensecrets.org/news/2016/11/the-price-of-winning-just-got-higher-especially-in-the-senate> [<http://perma.cc/23GF-UU4W>] (noting a substantial rise in the cost of a successful Senate, but not House, bid while cautioning that such figures significantly underestimate the cost given outside spending).

192. Philip Bump, So, Just How Rich Is Congress? Richer than You, *Wash. Post* (Oct. 22, 2014), <http://www.washingtonpost.com/news/the-fix/wp/2014/10/22/so-just-how-rich-is-congress-richer-than-you> (on file with the *Columbia Law Review*).

193. Andrea Louise Campbell, Parties, Electoral Participation, and Shifting Voting Blocs, *in* *The Transformation of American Politics: Activist Government and the Rise of Conservatism*, supra note 132, at 68, 68 (arguing contemporary “patterns of party mobilization reinforce rather than combat underlying patterns of political inequality”).

194. *Id.* at 73.

195. Michael Lind, Opinion, Is There Too Much Democracy in America or Too Little?, *N.Y. Times* (May 14, 2016), <http://www.nytimes.com/2016/05/15/opinion/campaign-stops/is-there-too-much-democracy-in-america-or-too-little.html> (on file with the *Columbia Law Review*) (arguing further that the result is that candidates that do run are those whose views comport with those of their donors and only by coincidence those of their constituents).

millionaires, and college-educated white men have more resonance than other interests and experiences.¹⁹⁶ The absence of individuals with more typical experiences of American life—individuals who have never had a white-collar professional job, women who have left their young, school-age children at home with siblings because they cannot afford daycare, or those who regularly navigate the criminal justice or welfare systems—in Congress (and presumably in the social networks of the partisans upon whom members of Congress rely for policy advice) makes it significantly less likely that Congress will prioritize policies addressing the experience of such citizens.¹⁹⁷

To make matters worse, entrenched socioeconomic segregation means politicians—even ones who gain from church attendance or NRA membership—are much more socially isolated from individuals from different walks of life than they were in the past.¹⁹⁸ Put plainly, if members of Congress and their associates were financially dependent on public education for their children, they might not have been quite as taken aback by the broad bipartisan outrage at Betsy DeVos's nomination.¹⁹⁹ Equally important, the less government addresses those

196. See, e.g., Nicholas Carnes, *Casting a Wider Net: The Untapped Potential of Programs to Increase the Economic Diversity of the Candidate Pool* 1–3 (2016), <http://people.duke.edu/~nwc8/widernet.pdf> [<http://perma.cc/NJ66-SQ2A>]; see also Philip Bump, *Nearly Everyone in Congress Has a College Degree. Most Americans Don't.*, *Wash. Post* (Feb. 2, 2017), <http://www.washingtonpost.com/news/politics/wp/2017/02/02/nearly-everyone-in-congress-has-a-college-degree-most-americans-dont> (on file with the *Columbia Law Review*) (reporting that while 95% of elected officials in Congress are college-educated, the figure hovers around 30% for all Americans).

197. Cf. Nicholas Carnes, *White-Collar Government: The Hidden Role of Class in Economic Policy Making* 2–3, 48–49, 84 (2013) [hereinafter Carnes, *White-Collar Government*] (demonstrating “how the shortage of people from the working class and the sharp overrepresentation of white-collar professionals affect the economic policies our government enacts” because “[I]ike ordinary Americans, lawmakers from different classes tend to think, vote, and advocate differently”).

198. Cf. Soss & Jacobs, *supra* note 84, at 110 (noting that policymaking that focuses on only the most visible and collectivized groups might hinder intergroup recognition of shared interests); Robert J. Sampson, *Division Street, U.S.A.*, *N.Y. Times: Opinionator* (Oct. 26, 2013), <http://opinionator.blogs.nytimes.com/2013/10/26/division-street-u-s-a/> (on file with the *Columbia Law Review*) (documenting the racial and economic disparities across American neighborhoods).

199. Emma Brown, *The Popular Uprising that Threatens the Betsy DeVos Nomination*, *Wash. Post* (Feb. 4, 2017), http://www.washingtonpost.com/local/education/the-popular-uprising-that-threatens-the-betsy-devos-nomination/2017/02/03/bd7c19aa-e967-11e6-80c2-30e57e57e05d_story.html (on file with the *Columbia Law Review*); see also Carnes, *White-Collar Government*, *supra* note 197, at 21, 36 (noting legislators from “white-collar professions tend not to be as supportive of social safety net programs, progressive taxes, and other liberal economic causes” even after controlling for partisanship); cf. *id.* at 2, 12–16, 21 (noting the dearth of working-class legislators means an absence of personal experiences of unemployment and public-works or minimum-wage jobs, and, further, that this is significant because lawmakers often prioritize “problems that have some personal significance to them”).

needs, the more likely those constituents will disengage from electoral politics, and the vicious cycle begins.²⁰⁰ While few would wish to return to the eras in which political power ran through sex-segregated and racially exclusionary clubs—veterans' groups, Masonic Lodges, or the Klan—the socioeconomic exclusivity of contemporary partisan networks has had democratic costs.

Social insularity of party elites along with the unrepresentativeness of both voters and party activists affects the types of policies and actions that are considered, even in the absence of corruption or undue influence.²⁰¹ Individuals' experiences of the world shape how they process information, what issues they prioritize, and what issues fall off their radars. A behavioral economist might describe this in terms of the availability heuristic; an anthropologist might describe it in terms of culture and social practice. The bottom line, however, is the same: Social context shapes what one prioritizes (e.g., tax cuts or social security), finds reasonable (e.g., accepting extravagant gifts from donors or engaging in an illicit market to make ends meet), and perceives as being problematic (e.g., what constitutes sexual harassment or racism).²⁰² No amount of data or polling can compensate for the fact that polls are written by the very elites whose world experiences are increasingly insular.²⁰³

The associational life of partisan elites inevitably affects responsiveness and accountability. The absence of consideration of this phenomenon by responsible party government theorists can probably be attributed to the fact that through the 1950s, elected officials and party leaders had robust ties to their constituents through membership associations based on socioeconomic status (if not race or gender).²⁰⁴ Churches, veterans' groups, and even the Ku Klux Klan in the South were extremely well integrated into the party network.²⁰⁵

200. See generally Suzanne Mettler & Joe Soss, *The Consequences of Public Policy for Democratic Citizenship: Bridging Policy Studies and Mass Politics*, 2 *Persp. on Pol.* 55 (2004) (describing the ways public policy, including its absence, can enhance or undermine political participation).

201. See Carnes, *White-Collar Government*, *supra* note 197, at 14, 84, 113–27 (noting an array of mechanisms that influence the distinct choices of lawmakers from different occupational groups, including that “social classes tend to develop political and ideological habits over time” and that “people tend to associate with other people from their class, which reinforces those habits”); Verba et al., *supra* note 158, at 3, 12 (noting that inequalities in political participation matter for policy outcomes).

202. See Carnes, *White-Collar Government*, *supra* note 197, at 89–91.

203. *Id.*

204. See, e.g., Noah Feldman, *Scorpions: The Battles and Triumphs of FDR's Great Supreme Court Justices 51–59* (2010) (discussing the relationship of the Klan to Southern politics).

205. See, e.g., *id.* (noting various social networks' influence on Southern politics in the early- and mid-twentieth century); Skocpol, *supra* note 186, at 110–13 (describing associational memberships of political elites).

The optimal partisan network, it follows, is one with both socioeconomic and intergenerational breadth *and* interpersonal depth.²⁰⁶ Such a political organization would be more capable of mobilizing voters of all ages through a broad cadre of party activists with ties to a representative electorate. It would be better able to disseminate political information during and between elections.

The vital link in developing strong parties is the “party faithful”—defined to include volunteers for campaigns, staff of state and local parties, and activists involved with groups such as Indivisible, the Tea Party, the National Right to Life, or the Sierra Club.²⁰⁷ Such activists are much more likely to be the neighbors of ordinary people.²⁰⁸ As a result, they are exceptionally well positioned to mobilize and inform others.²⁰⁹ Even beyond the basic influence of personal ties on recruitment and information transmission, evidence indicates that ordinary citizens have devised their own ways to get “[political] information on the cheap”:

206. This Essay does not affirmatively argue for racially integrated partisan networks. This is for two reasons. First, incorporating younger voters and increasing socioeconomic diversity will inevitably increase racial and ethnic diversity in those regions that are diverse. Younger Americans appear to operate in much more diverse social contexts—at least at work—than older Americans. Skocpol & Williamson, *supra* note 183, at 72–73. Second, the goal of racial integration is politically and normatively charged, arguably itself polarizing. In fact, on one view, the “Make America Great Again” slogan of the Donald Trump campaign reflected, at least partially, a nostalgia for a period when there was less racial integration. See Dan Balz, *How the Republican Party Created Donald Trump*, Wash. Post (Mar. 5, 2016), http://www.washingtonpost.com/politics/behind-the-rise-of-trump-long-standing-grievances-among-left-out-voters/2016/03/05/7996bca2-e253-11e5-9c36-e1902ff6b6571_story.html (on file with the *Columbia Law Review*) (“Beyond economic issues, Trump has tapped fears about a changing America, a country that is increasingly diverse and culturally tolerant.”).

207. Fishkin & Gerken, *supra* note 30, at 195.

208. *Id.* at 179, 205 (arguing that “in crucial ways the party faithful are more like ordinary voters than party elites” which makes them “uniquely positioned to convey some of the concerns of ordinary voters to party leaders and campaign operatives”).

209. Regrettably, McKenna and Han do not explore either the effects of the Obama campaign’s community organizing on the knowledge base of contacted Obama voters or whether the activist network it built subsequently influenced the policies of the administration. See McKenna & Han, *supra* note 144. This gap is typical of the literature, which assumes knowledge precedes participation. For example, the vast literature on the ways that union membership significantly increases political participation, especially for those with the fewest pre-existing resources, such as educational attainment, rarely addresses the political knowledge among such union members separately. See generally Jasmine Kerrissey & Evan Schofer, *Union Membership and Political Participation in the United States*, 91 Soc. Forces 895 (2013) (examining the effect of union membership on civic and political participation in the late twentieth century in the United States). Similarly, the literature on the effects of face-to-face contact from campaigns for purposes of voter mobilization almost exclusively measures behavior (not knowledge) as the outcome measure. See, e.g., David Broockman & Joshua Kalla, *Durably Reducing Transphobia: A Field Experiment on Door-to-Door Canvassing*, 352 Science 220, 223–24 (2016) (finding significant and durable persuasive effects from face-to-face canvassing by strangers on attitudes toward transgender individuals).

They turn to “politically knowledgeable individuals” within their social networks—preferably, but *not exclusively*, those “who hold compatible political biases.”²¹⁰ The strategy works because people, it turns out, are relatively good judges of actual expertise, and political junkies have a knack for clearly communicating their political knowledge.²¹¹ Unsurprisingly, individuals are more likely to be drawn into politics if their social networks include persons with political expertise.²¹²

Such a partisan network—one in which volunteers, rather than donors, take the lead—is significantly more likely to facilitate the two-way street of communication and to tie elected officials to the concerns and experiences of their electoral base.²¹³ In the first instance, the cadre of party activists, with extensive face-to-face interactions with local constituents, can provide feedback to headquarters about what they are hearing from constituents both in relation to the immediate election and for purposes of future governance.²¹⁴ Such intelligence can compensate for top-down efforts to collect information when it proves inaccurate.²¹⁵ Equally important, a candidate whose electoral strategy depends on a face-to-face ground game has to cultivate relationships with civic associations capable of undertaking such efforts.²¹⁶ Ties forged with the

210. Robert Huckfeldt, *The Social Communication of Political Expertise*, 45 *Am. J. Pol. Sci.* 425, 426, 437 (2001). Huckfeldt specifically notes that “the perception of political disagreement produces a relatively minor and inconsequential effect on the perception of expertise” among friends and associates with whom one has in-person conversations. *Id.* This study was based on a network analysis of a large sample of residents of Indiana and Missouri, and it objectively verified the expertise of alleged experts. *Id.* at 427–28.

211. *Id.* at 436.

212. Ronald La Due Lake & Robert Huckfeldt, *Social Capital, Social Networks, and Political Participation*, 19 *Pol. Psychol.* 567, 579 (1998) (reporting that “as political expertise within the [social] network increases, so does individual involvement in politics” and that this effect is discernable apart from both individual-level capacity and individual-level participation in civic organizations).

213. Cf. Edward-Isaac Dove, *How Clinton Lost Michigan—and Blew the Election*, *Politico* (Dec. 14, 2016), <http://www.politico.com/story/2016/12/michigan-hillary-clinton-trump-232547> [<http://perma.cc/4KFA-REB6>] (arguing because “no one [in the Clinton campaign] was knocking on doors trying to drum up support for the Democratic nominee, . . . no one was hearing directly from voters [or] . . . tracking how feelings about the race and the candidates were evolving”).

214. Cf. *id.* (describing failed efforts to communicate to headquarters information learned about voters by union activists).

215. Cf. Sam Stein, *The Clinton Campaign Was Undone by Its Own Neglect and a Touch of Arrogance*, *Staffers Say*, *Huffington Post* (Nov. 16, 2016), http://www.huffingtonpost.com/entry/clinton-campaign-neglect_us_582cacb0e4b058ce7aa8b861 [<http://perma.cc/T3YW-WF53>] (noting how the Clinton campaign’s internal polling proved inaccurate while arguing the campaign invested in too few paid canvassers given how few volunteers it had galvanized).

216. Cf. Dove, *supra* note 213 (reporting complaints that “Clinton never even stopped by a United Auto Workers union hall in Michigan” and ignored requests to send a surrogate to speak with the Michigan Democratic Women’s Caucus, as well as allegations that state unions failed to come through on voter mobilization).

leaders of such groups during the campaign are likely to mean that their calls, not just the calls of big donors, will be put through should the candidate come to hold office.²¹⁷ Such candidates, especially for lower offices, are also more likely to spend time knocking on doors themselves, accompanied by volunteers, and thus to learn directly from their constituents.²¹⁸ Finally, and arguably most importantly, some number of the party faithful—those individuals who are more likely to be some ordinary person's neighbor than any major party donor—will find themselves drawn further into politics, possibly even running for office.²¹⁹ Thus, a broader and more representative party may itself breed a different range of candidates.²²⁰

In sum, a party with social breadth and interpersonal depth would go a long way to grounding elected officials in the experiences of their constituents through intermediaries, rather than depending on elections to produce responsiveness.²²¹ And the best evidence of this is the fact that the heyday of membership-based routes to political power was also the

217. Cf. Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 *Stan. L. Rev.* 191, 219–24 (2012) (explaining that, for lobbyists, influence is a product of access and trust, both of which are significantly facilitated by lobbyists' ability to bundle campaign contributions as well as their prior social and professional relationships to candidates).

218. Cf. David Weigel, *Iowa Went Big for Trump, but There Are Signs Its Voters Are Souring on the President*, *Wash. Post* (Jan. 1, 2018), http://www.washingtonpost.com/powerpost/iowa-went-big-for-trump-but-there-are-signs-its-voters-are-souring-on-the-president/2018/01/01/e84cc764-e73c-11e7-833f-155031558ff4_story.html (on file with the *Columbia Law Review*) (quoting Obama as attributing his win in Iowa to the fact that “[he] spent 87 days going to every small town and fair and fish fry and VFW hall, and there were some counties where I might have lost, but maybe I lost by 20 points instead of 50 points”).

219. Cf. McKenna & Han, *supra* note 144, at 35 (explaining how engagement among volunteers in the 2004 Democratic campaign carried over into Obama's 2008 campaign).

220. It is a little early to tell, but there is some reason to believe that the Indivisible movement is having that effect, especially with respect to recruiting women. See Michael Tackett, *From Annapolis to Congress? These Three Women Know Tough Missions*, *N.Y. Times* (Jan. 29, 2018), <http://www.nytimes.com/2018/01/29/us/politics/women-annapolis-democrats-congress-trump.html> (on file with the *Columbia Law Review*) (describing the rise of women with military backgrounds as political candidates in the last two years); Michael Tackett, *Women Line Up to Run for Office, Harnessing Their Outrage at Trump*, *N.Y. Times* (Dec. 4, 2017), <http://www.nytimes.com/2017/12/04/us/politics/women-candidates-office.html> (on file with the *Columbia Law Review*) (noting the rise of female candidates since President Trump's inauguration); see also E.J. Graff, *Trump's Victory Inspired Thousands of Women to Get Involved in Politics*, *Mother Jones* (July 2017), <http://www.motherjones.com/politics/2017/06/indivisible-women-resistance-trump> [<http://perma.cc/7K6Z-WA2T>] (describing successes of Indivisible in organizing middle-aged women, many “political neophytes,” through Facebook into a politically effective resistance movement).

221. Comparative data also suggest that broader and representative social networks are likely to keep party elites informed about the interests of their constituents. See Nancy L. Rosenblum, *On the Side of Angels: An Appreciation of Parties and Partisanship* 47 (2008) (observing that one advantage of single-party and anti-pluralist regimes over dynastic or military dictatorships is the party's ability to function as a channel of communication with party activists, helping party leaders to keep track of the demands of the masses).

New Deal period during which federal policy was significantly more attentive to the needs of middle-class Americans.²²²

2. *Opportunities and Constraints in the Reshaping of Partisan Networks.* — Success, unquestionably, depends on diversifying the party faithful. Compared to super donors, volunteers and activists are more likely to have social ties to ordinary voters,²²³ but they are by no means socioeconomically representative of the electorate. Delegates to the Democratic National Convention, for instance, are not only more progressive than Democratic voters, but they are also significantly more likely to be members of the upper middle class, and increasingly so.²²⁴ “In 2008, 70 percent of the delegates [to the Democratic National Convention] reported earning \$75,000 or more per year, compared to 27 percent of Democratic voters at that time.”²²⁵ Likewise, a survey of participants in mass demonstrations since January 2017 finds that the protestors have been somewhat whiter and significantly more educated than the average American.²²⁶ Even the small donors—who are often touted as a critical antidote to big money—are older, whiter, wealthier, more educated, and more male compared to the electorate.²²⁷ When activist networks remain themselves socioeconomically isolated,

222. Cf. Bartels, *supra* note 21, at 12–15 & fig.1.4 (arguing that current levels of income inequality rival those of the Roaring Twenties and are the consequence of political choices, and implicitly contrasting the current economic state to the relative income equality during the New Deal period); Skocpol, *supra* note 186, at 108–13 (describing social integration of political figures in the mid-twentieth century).

223. See Confessore et al., *supra* note 152 (noting that “across party lines, [super donors] are patrons of the same symphonies, art museums or at-risk youth programs” as well as “business partners, in-laws and, on occasion, even poker buddies”).

224. Thomas B. Edsall, Opinion, Has the Democratic Party Gotten Too Rich for Its Own Good?, *N.Y. Times* (June 1, 2017), <http://www.nytimes.com/2017/06/01/opinion/democratic-party-rich-thomas-edsall.html> (on file with the *Columbia Law Review*).

225. *Id.*

226. Sarah Kaplan, A Scientist Who Studies Protest Says ‘The Resistance’ Isn’t Slowing Down, *Wash. Post* (May 3, 2017), <http://www.washingtonpost.com/news/science/wp/2017/05/03/a-scientist-who-studies-protest-says-the-resistance-isnt-slowing-down/> (on file with the *Columbia Law Review*) (“More than three-quarters of participants at each march had at least a bachelor’s degree (for the overall U.S. population, it’s just one out of three . . .). Interestingly, the Women’s March . . . was the most highly educated—a stunning 53 percent of survey respondents had a graduate or professional degree . . .”).

227. See Sean McElwee et al., *Dēmos*, Whose Voice, Whose Choice? The Distorting Influence of the Political Donor Class in Our Big-Money Elections 4–5 (2016), http://www.demos.org/sites/default/files/publications/Whose%20Voice%20Whose%20Choice_2.pdf [<http://perma.cc/W5GD-SMPL>] (“Though history will consider 2016 one of America’s most extraordinary elections, one thing remained unchanged: presidential donors were white, male and wealthy.”); Adam Hughes, 5 Facts About U.S. Political Donations, *Pew Research Ctr.* (May 17, 2017), <http://www.pewresearch.org/fact-tank/2017/05/17/5-facts-about-us-political-donations/> [<http://perma.cc/Q4EG-ELDU>] (“Higher-income, more educated and older Americans are more likely to donate.”).

expanding the party faithful would simply reinforce the stratification of political participation.²²⁸

Given that Americans increasingly live in socioeconomically segregated neighborhoods and social circles, diversification will not be without its challenges.²²⁹ Affirmative strategies to compensate for our social landscape would need to be devised.²³⁰ Similarly, reformers would have to consider how to sustain activism beyond individual campaigns by bolstering both formal local party organizations and informal ones, like Indivisible or the Tea Party.²³¹ On the positive side, however, there is good evidence that initial forays into politics breed further political engagement.²³²

Even if one could expand the party faithful, some might remain skeptical that personalizing and diversifying the partisan network would facilitate the communication of the electorate's worldview back to elected officials and the leadership of legislative caucuses. In this regard, the recent influence of the Koch network and the Tea Party activists with whom it connected is relevant.²³³ Scholars of the Koch network are unequivocal that, beyond money, "the most pervasive and subtle form of leverage by the Koch network on the Republican Party" derived from "the flow of people back and forth between" Koch-funded organizations

228. See Brady et al., *Prospecting for Participants*, supra note 165, at 161–62 (finding that recruiters who have personal leverage are most likely to be successful but cautioning that this dynamic, especially in combination with other known indicators of political participation, tends "to exacerbate participatory stratification").

229. See Soss & Jacobs, supra note 84, at 121–24 ("[A]s the most affluent become more segregated from other parts of American society, the social ecologies that provide the most basic backdrop for political life grow farther apart and more unequal as conditions for political engagement."); Sampson, supra note 198 (noting that social policies often exacerbate trends of increasing inequality); see also Thomas B. Edsall, *Opinion, How the Other Fifth Lives*, N.Y. Times (Apr. 27, 2016), <http://www.nytimes.com/2016/04/27/opinion/campaign-stops/how-the-other-fifth-lives.html> (on file with the *Columbia Law Review*) (summarizing recent studies demonstrating increased geographic and social isolation of economic elites and providing a clear graph of the significant change since the 1970s).

230. Cf. Richard Cohen, *Opinion, Americans Are Stuck in Bubbles. Here's a Way to Pop Them*, Wash. Post (Sept. 11, 2017), http://www.washingtonpost.com/opinions/americans-are-stuck-in-bubbles-heres-a-way-to-pop-them/2017/09/11/2c682904-972c-11e7-87fc-c3f7ee4035c9_story.html (on file with the *Columbia Law Review*).

231. Cf. McKenna & Han, supra note 144, at 42 (noting the Obama campaign's decision to eschew both the party infrastructure and the labor movement may have contributed to the difficulties Democrats experienced in channeling the enthusiasm for Obama to other elections).

232. Abu El-Haj, *Friends, Associates, and Associations*, supra note 32, at 85–86.

233. See generally Jane Mayer, *Covert Operations: The Billionaire Brothers Who Are Waging a War Against Obama*, New Yorker (Aug. 30, 2010), <http://www.newyorker.com/magazine/2010/08/30/covert-operations> (on file with the *Columbia Law Review*).

and the formal party.²³⁴ Face-to-face social and political networking—from the institution of an annual seminar that brings together millionaires and billionaires, to the cultivation of a network of party professionals and activists sympathetic to their cause—has been the lynchpin for developing party support for their libertarian philosophy.²³⁵ It is the absence of a similar social network that has rendered comparable expenditures on the Democratic side less effective.²³⁶

To be sure, the Koch strategy testifies to the ways that partisan networks can influence national party platforms, but it does not itself demonstrate the communication of the worldview of ordinary Americans to party leaders.²³⁷ The Kochs' is a top-down political strategy in which grassroots activists are given few opportunities to shape its messaging.²³⁸ That said, although there are few studies tracking the policy effects of activism within the Democratic Party since Howard Dean's primary challenge, it is hard not to see effects of this activism reshaping both the party's platform and the kinds of candidates it runs. McKenna and Han's study of the Obama ground game inadvertently documents the trajectory of activists in Howard Dean's failed primary campaign into both the Obama campaign and the national Democratic Party machine.²³⁹ It is perhaps not an accident that federal policymaking under President Obama—whose campaign energized a stunning 2.2 million volunteers, many of whom reported experiencing “a resurgence . . . of deep political engagement”—was significantly more responsive to the needs of middle- and lower-class Americans than during preceding administrations, arguably even Bill Clinton's.²⁴⁰ Beyond the passage of the Affordable

234. Theda Skocpol & Alexander Hertel-Fernandez, *The Koch Network and Republican Party Extremism*, 14 *Persp. on Pol.* 681, 692 (2016).

235. *Id.* at 685–92.

236. *Id.*

237. Cf. James Hohmann, *The Daily 202: Trump's True Priorities Revealed in Holiday News Dumps*, *Wash. Post* (Jan. 2, 2018), <http://www.washingtonpost.com/news/powerpost/paloma/daily-202/2018/01/02/daily-202-trump-s-true-priorities-revealed-in-holiday-news-dumps/5a4af37830fb0469e883fe50/> (on file with the *Columbia Law Review*) (intimating that the Koch brothers' willingness to pay for the New Year's Eve fireworks at Mar-a-Lago was a thank you for recent policy changes, from the recently adopted tax cuts to the various efforts to lessen the burdens imposed by federal regulatory agencies).

238. Skocpol & Hertel-Fernandez, *supra* note 234, at 689–90, 692–96.

239. McKenna & Han, *supra* note 144, at 35 (observing how “[m]any of Dean's key digital staff joined the Obama campaign in 2008” and identifying, among others, Zephyr Teachout, who ran for a congressional seat in New York in 2016).

240. *Id.* at 39, 43 (comparing this figure to the 1.4 million volunteers who came out in the last seventy-two hours of George W. Bush's 2004 campaign and the approximately 700,000 who volunteered for John Kerry's). This is not to say that Bill Clinton's campaign completely ignored middle-class interests. The passage of the Children's Health Insurance Program, raising the minimum wage, and the introduction of certain tax credits were notable achievements that benefited the middle class. See Todd S. Purdum, *Clinton Defends Income Tax Credit Against G.O.P. Cut*, *N.Y. Times* (Sept. 19, 1995), <http://www.nytimes.com/1995/09/19/us/clinton-defends-income-tax-credit-against-gop->

Care Act, Obama oversaw the reform of student lending and implemented a significant expansion of educational benefits to veterans.²⁴¹ One could also argue that the Democratic Party's current crisis is the product of responsiveness to the ideological priorities of its high-socioeconomic-status party faithful, to the neglect of a less engaged, broader constituency.²⁴²

Incidentally, it also must be acknowledged that party activists may have very little interest in facilitating responsiveness to the electorate. Certainly, the unelected operatives, whose power is exercised within the formal party, are likely to be wary of broad mobilization. Their power derives from their control over the nomination process, which in turn depends on low voter turnout in low-information primaries.²⁴³ Ideological activists, meanwhile, will have their own reasons to resist undertakings that would increase responsiveness to constituents' interests and preferences.²⁴⁴

cut.html (on file with the *Columbia Law Review*); Richard W. Stevenson, Clinton Signs a Bill Raising Minimum Wage by 90 Cents, *N.Y. Times* (Aug. 21, 1996), <http://www.nytimes.com/1996/08/21/us/clinton-signs-a-bill-raising-minimum-wage-by-90-cents.html> (on file with the *Columbia Law Review*); Valerie Strauss, 9 Million Kids Get Health Insurance Under CHIP. Congress Just Let It Expire., *Wash. Post* (Oct. 1, 2017), <http://www.washingtonpost.com/news/answer-sheet/wp/2017/10/01/9-million-kids-get-health-insurance-under-chip-congress-just-let-it-expire/> (on file with the *Columbia Law Review*).

241. See generally Suzanne Mettler, *Reconstituting the Submerged State: The Challenges of Social Policy Reform in the Obama Era*, 8 *Persp. on Pol.* 803 (2010) (describing the host of social-welfare policies adopted during the early years of the Obama administration).

242. Cf. Jerome Karabel, *The Roots of the Democratic Debacle*, *Huffington Post* (Dec. 12, 2016), http://www.huffingtonpost.com/entry/the-roots-of-the-democratic-debacle_us_584ec983e4b04c8e2bb0a779 [<http://perma.cc/PXS2-D7F5>] (“Having since the 1980s joined rather than resisted the move toward neoliberalism and having adopted a pro-corporate stance, the Democratic Party now finds itself in a crisis that is simultaneously political, economic, and cultural.”).

243. Cf. Masket, *supra* note 38, at 46–47 (arguing the informal party organizations that control nominations today, like the party machines of bygone times, depend on low voter turnout during the primary election to consolidate their power because their ability to effectively determine the outcome of the primary depends on predictability).

244. Where the electorate is more moderate than the ideological policy demanders, such groups may fear broader mobilization will undercut their policy goals. Perhaps the most salient example is the NRA, whose leadership is known to have much more expansive views of gun rights than either Republicans generally or its own members. For example, the NRA has been known to advocate behind the scenes for legislation permitting the mentally ill to purchase guns even as “large majorities of [Republican gun-owning] NRA members and nonmembers alike favor barring gun purchases by . . . the mentally ill.” Parker, *supra* note 132 (noting “significant differences in policy views between Republican gun owners who say they belong to the NRA and those who don’t” and offering as an example that while only 52% of Republican NRA members support “background checks for private gun sales,” 75% of Republican nonmembers do so); see also Alan Judd, *NRA Push on Mental Health: Solution or Diversion?*, *Atlanta J.-Const.* (Nov. 29, 2014), <http://www.myajc.com/news/crime-law/nra-push-mental-health-solution-diversion/UZdrOIpXmBUWYO1aMvCF8I/> [<http://perma.cc/8WTF-XT5U>] (noting, notwithstanding its

On the other hand, it would be foolish to ignore the unique opening provided by the 2016 election in which party leaders, on both sides, were blindsided by the dissatisfaction of the electorate.²⁴⁵ Equally as important, some commentators have attributed the parties' surprise to the increased isolation of party elites. *New York Times* columnist David Brooks, most prominently, has argued that those tracking the 2016 election were incapable of perceiving Donald Trump's appeal in large part "because [they] were not socially intermingled with his supporters and did not listen carefully enough" to notice that for those who have "suffered lost jobs, lost wages, [and] lost dreams . . . [t]he American system is not working."²⁴⁶ Thus, we are at a moment when incumbents, despite generally having little interest in accountability, have heightened awareness of the costs to operating within a super-elite social network, insulated from the experiences of their core supporters.²⁴⁷

In sum, there are significant opportunities to reshape partisan networks at this transitional moment in American democracy, even though any effort to make contemporary party networks more representative while strengthening their associational attributes will not be without its challenges. Renewed political engagement combined with heightened levels of concern for the state of our democratic institutions provide a window of opportunity and, as such, an appropriate nudge from the Supreme Court could go a long way toward putting us on a path to a more responsive and accountable political order.

D. *Assessing the Likelihood of Success*

The most important question, of course, is whether an associational focus would work. Given the various dysfunctions of American politics today, what reasons are there to believe that regrounding political elites

public statements to the contrary, the NRA advocates for states "to ensure the right of gun ownership for . . . the mentally ill," including the "restor[ation] of firearms rights" to individuals "who lost those rights after being involuntarily committed").

245. See Nicholas Confessore, *How the G.O.P. Elite Lost Its Voters to Donald Trump*, *N.Y. Times* (Mar. 28, 2016), <http://www.nytimes.com/2016/03/28/us/politics/donald-trump-republican-voters.html> (on file with the *Columbia Law Review*) (reporting "dozens of . . . Republican lawmakers, donors, activists and others describ[ing]—some with resignation, some with anger—a party that paved the way for a Trump-like figure to steal its base, as it lost touch with less affluent voters and misunderstood their growing anguish"); Jim Norman, *Trump Victory Surprises Americans; Four in 10 Afraid*, *Gallup* (Nov. 11, 2016), <http://news.gallup.com/poll/197375/trump-victory-surprises-americans-four-afraid.aspx> [<http://perma.cc/Z788-FAWT>] (reporting that Trump's win surprised both Republicans and Democrats and about 75% of adult voters surveyed).

246. David Brooks, *Opinion, No, Not Trump, Not Ever*, *N.Y. Times* (Mar. 18, 2016), <http://www.nytimes.com/2016/03/18/opinion/no-not-trump-not-ever.html> (on file with the *Columbia Law Review*) (discussing the GOP reaction to Trump's candidacy).

247. Confessore, *supra* note 245 (quoting various Republican elites voicing their surprise at the Republican base's perspective); *Dovere*, *supra* note 213 (discussing the ways in which the Clinton campaign was out of touch with voters).

in the broader electorate while extending representative and informed political participation would, in fact, improve democratic policy responsiveness? Even a sympathetic reader might ask how strengthening the associational life of political parties would make a difference given the incentives that push elected officials to cater to primary voters and wealthy donors in a world of uncompetitive elections. Moreover, assuming an associational focus could work, shouldn't we be worried that peer-to-peer engagement will make polarization even worse? The party faithful are known to be ideologically extreme.²⁴⁸ Shouldn't we, therefore, worry that this approach will exacerbate polarization and further ease the spread of misinformation and damaging populist rhetoric?

These are all valid concerns. The relevant question, however, is: How do the potential obstacles to an associational-party path compare with the known ones under responsible party government? By that measure, the associational-party path is a clear winner. Given the failures of responsible party government, an associational approach presents the only viable way to induce responsible government. Before making that case, however, it is important to address these challenges on their own terms.

First, how might broadening electoral participation improve democratic responsiveness given that it does not appear to undercut the existing incentives, which uncompetitive elections create, to cater to the preferences of wealthy donors and an ideologically extreme base of the party? It is important, first and foremost, to acknowledge that the relationship between party competition and policy responsiveness is decidedly imperfect. Efforts to increase party competition—including efforts to end partisan gerrymandering—are certainly worthwhile.²⁴⁹ Nevertheless, the fact remains that the evidence is decidedly mixed as to whether, let alone how much, party competition improves policy

248. See, e.g., Pew Research Ctr., *Partisanship and Political Animosity in 2016*, at 14, 34, 44, 53 (2016) [hereinafter *Pew Research Ctr., Partisanship and Political Animosity*], <http://www.people-press.org/2016/06/22/partisanship-and-political-animosity-in-2016/> [<http://perma.cc/G9MX-8FYA>] (noting high levels of agreement with the positions of their own party and hostility toward members of the other party among respondents who are “highly engaged in politics,” defined as “those who nearly always vote and have either donated money or volunteered for a campaign in the last year”).

249. Currently, efforts to expand electoral competition are primarily directed at convincing the Supreme Court to hold that partisan gerrymanders are both unconstitutional and justiciable. See generally *Benisek v. Lamone*, 266 F. Supp. 3d 799, 801 (D. Md. 2017), (“[T]he Court now . . . [stays] this case pending the outcome of *Whitford*. . . [S]uch action is necessary because the justiciability of political gerrymandering claims remains in doubt, but the Supreme Court will likely resolve or clarify this threshold jurisdictional matter in its *Whitford* decision.”), cert. granted, 138 S. Ct. 543 (2017); *Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016), stay granted, 137 S. Ct. 2289 (June 19, 2017) (staying the judgment of the district court pending resolution of an appeal). Legislative efforts to adopt nonpartisan redistricting commissions are also underway. Such efforts are most likely to succeed in states with direct democratic mechanisms.

responsiveness.²⁵⁰ That relationship is even more attenuated when the electorate that actually turns out on election days is increasingly polarized.²⁵¹

It is equally important to come to terms with the fact that uncompetitive elections are, for the moment, an entrenched feature of the American electoral system. Partisan gerrymanders explain only some of the absence of party competition currently evident.²⁵² In the main, the lack of party competition is a result of ideological geographic self-sorting rather than partisan gerrymandering.²⁵³ Even if the Supreme Court puts an end to partisan gerrymandering, only a limited—albeit extremely important—set of swing districts would be affected.²⁵⁴

Accordingly, while we must fight fading party competition, it is time to devise strategies to address policy responsiveness in the absence of party competition. The associational-party path's emphasis on expanding the electorate seeks to do just that. By focusing on drawing in more voters and creating a more representative electorate, it points to opportunities to radically shift electoral expectations.²⁵⁵ In particular, it

250. See *supra* notes 98–99.

251. Smidt, *supra* note 80, at 366 (“Polarization limits the number of floating voters and the electoral payoff of appealing to their moderate or pragmatic concerns.”).

252. See Fred Dews, *A Primer on Gerrymandering and Political Polarization*, Brookings (July 6, 2017), <http://www.brookings.edu/blog/brookings-now/2017/07/06/a-primer-on-gerrymandering-and-political-polarization/> [<http://perma.cc/DLT2-8TVX>] (reviewing the debate about the degree to which partisan gerrymandering causes polarization and to which its end would improve electoral competition).

253. See, e.g., Drutman, *supra* note 7 (“Democrats and Republicans have more and more become regional parties. . . . As a result, a large number of single-member House districts are going to be dominated by one party or the other—no matter how the lines get drawn.”); Salam & Richie, *supra* note 26 (noting, “[r]egardless of how you slice the map, the majority of Americans will live in so-called landslide districts,” meaning voters who “defy stereotypes of left and right” are often “locked out of representation”).

254. See Laura Royden & Michael Li, Brennan Ctr. for Justice, *Extreme Maps 1–2* (2017), <http://www.brennancenter.org/sites/default/files/publications/Extreme%20Maps%205.16.0.pdf> [<http://perma.cc/6C5U-ZMSJ>] (identifying seven extremely gerrymandered states, including swing states such as Pennsylvania, Florida, North Carolina, Ohio, and Virginia); Dews, *supra* note 252 (endorsing the assessment that “the clustering of Americans into like-minded communities” limits the likelihood that ending partisan gerrymandering will significantly increase the number of competitive legislative districts).

255. Most recently, this phenomenon was seen in the Democrat Doug Jones’s special-election win in solidly Republican Alabama, which was attributed to unprecedented black turnout, driven, at least in part, by civic groups within the partisan network. As reported by journalist Al Giordano on Twitter, the success was in large part the result of old-fashioned grassroots mobilization efforts by the Democratic Party and its civil-society allies. For example, “[t]he state NAACP instructed its local branches to call every registered voter in the state who did not vote in 2016.” Al Giordano (@AlGiordano), Twitter (Dec. 12, 2017), <http://twitter.com/algjordano/status/940657230499733504> [<http://perma.cc/B427-KGXT>]. Local pastors affiliated with the Mobile NAACP undertook both “congregation-wide robo calls and voter registration tables at church events.” Al Giordano (@AlGiordano), Twitter (Dec. 12, 2017), <http://twitter.com/algjordano/status/940657750228590593> [<http://perma.cc/5FX5->

creates the opportunity to use strong associational parties to significantly increase turnout during party primaries, thereby undercutting the current hold that primary voters have on the system.²⁵⁶

Turning now to the second concern: Wouldn't a peer-to-peer engagement strategy that depends on the party faithful inadvertently exacerbate legislative gridlock by increasing polarization? In this regard, it is important to state clearly the ways in which this project is driven by different concerns than party reforms primarily targeted at addressing polarization. This project is driven by the evidence that American democracy is suffering from a crisis of representation. If the broader citizenry is genuinely polarized—a question that remains decidedly open—legislative polarization would be representative democracy at work.²⁵⁷ Should the result of activating eligible voters be the rise of even

EGNQ]. The party had “[a] dozen paid canvassers . . . going door to door in the Mobile area all week.” Al Giordano (@AlGiordano), Twitter (Dec. 12, 2017), <http://twitter.com/AlGiordano/status/940657340591853568> [<http://perma.cc/S2ZW-BFLV>]. Giordano concludes: “More money for field and GOTV. Less for TV ads. This is the @TomPerez era at work.” Al Giordano (@AlGiordano), Twitter (Dec. 12, 2017), <http://twitter.com/algordano/status/940658713135689729> [<http://perma.cc/L92M-SPM8>]. Arguably, Obama’s 2008 campaign operated similarly, redefining which states were swing states partly by changing the electorate. See William H. Frey, Population Studies Ctr., Report No. 09-688, *How Did Race Affect the 2008 Presidential Election?* 4 (2009), <http://www.psc.isr.umich.edu/pubs/pdf/rr09-688.pdf> [<http://perma.cc/2QM6-4QGG>] (showing “how the changing racial composition and voting of minorities and whites affected the 2008 results” in several states, including Virginia, North Carolina, Nevada, and New Mexico, which swung to the Democrats for the first time in several elections).

256. The gap between the actual electorate and the eligible electorate is quite significant. See, e.g., Abu El-Haj, *Beyond Campaign Finance Reform*, *supra* note 2, at 1162–70, 1175–83 (providing charts of turnout in both primary and general elections and describing strategies for making primary turnout more akin to turnout in the general election as a way to overcome the incentives created by party primaries in uncompetitive districts).

257. A continuing area of dispute is polarization’s reach among the general electorate. Partisan polarization is certainly increasing and the parties appear to be increasingly drawing support from starkly different demographic groups. See generally Pew Research Ctr., *The Parties on the Eve of the 2016 Election: Two Coalitions, Moving Further Apart 1* (2016), <http://assets.pewresearch.org/wp-content/uploads/sites/5/2016/09/09-13-2016-Party-ID-release-final.pdf> [<http://perma.cc/2DTD-3NG8>] (finding the two parties increasingly differ in terms of race, religion, ethnicity, and educational attainment); Pew Research Ctr., *The Partisan Divide on Political Values Grows Even Wider* (2017) [hereinafter *Pew Research Ctr., The Partisan Divide*], <http://assets.pewresearch.org/wp-content/uploads/sites/5/2017/10/05162647/10-05-2017-Political-landscape-release.pdf> [<http://perma.cc/EE6Q-BAQC>] (summarizing survey results showing increased polarization of the electorate). Yet, many continue to argue that most Americans remain relatively moderate in their policy preferences. These scholars emphasize that polarization remains most extreme among those who are most politically engaged. For recent data supporting this view, see Pew Research Ctr., *Partisanship and Political Animosity*, *supra* note 248, at 1 (reporting that “[a]mong those [who are] highly engaged in politics—those who say they vote regularly and either volunteer or donate to campaigns—fully 70% of Democrats and 62% of Republicans say they are afraid of the other party,” compared to 55% and 49% among all Democrats and Republicans, respectively); Pew Research Ctr., *Political Polarization in the American Public 6* (2014), <http://assets.pewresearch.org/wp-content/>

more polarized legislatures, we should take heart that our elected bodies are functioning as representative bodies (if not as governing bodies).

The problem today is that it is not at all clear that the stark ideological difference between the political parties is a product of an increasingly polarized electorate at large.²⁵⁸ Pew's most recent study, for example, finds that "many Americans continue to hold a mix of liberal and conservative views across different issue areas" even as partisan polarization is rising.²⁵⁹ It is also not clear that ideological polarization in the electorate corresponds with ideological polarization in the legislature: For instance, in 2016, Pew found "just 16% of Republicans and 20% of Democrats say they 'almost always' agree with their party's policy

uploads/sites/5/2014/06/6-12-2014-Political-Polarization-Release.pdf [http://perma.cc/T4VD-VUY4] (reporting increased political polarization, especially "among those who are the most engaged and active in the political process" such as primary voters, campaign contributors, and campaign volunteers); see also Abramowitz, *The Disappearing Center*, supra note 89, at 4–5 (arguing partisan, ideological polarization is driven not by elites but by the politically engaged public—those who are attentive, informed and active citizens—but noting that "[i]t is among the uninterested, uninformed, and inactive that ideological moderation and independence flourish"). For various takes on this debate, see generally Morris P. Fiorina & Matthew S. Levendusky, *Disconnected: The Political Class Versus the People, in Red and Blue Nation? Characteristics and Causes of America's Polarized Politics* 49, 60–62, 66, 95–103 (Pietro S. Nivola & David W. Brady eds., 2006) (including responses by Alan Abramowitz and Gary C. Jacobson); Nolan M. McCarty, *The Limits of Electoral and Legislative Reform in Addressing Polarization*, 99 *Calif. L. Rev.* 359, 361 n.5 (2011) (noting "[t]he debate about whether voters are as polarized as elites is ongoing"); Steven W. Webster & Alan I. Abramowitz, *The Ideological Foundations of Affective Polarization in the U.S. Electorate*, 45 *Am. Pol. Res.* 621, 622–23, 643 (2017) (reviewing the debate before arguing that ideological polarization is the source of rising antipathy to the opposing party, but acknowledging that ideological differences drive partisan polarization most strongly "among the most politically engaged members of the public"). For specific criticisms of Abramowitz's quantitative methods, see Fiorina & Levendusky, supra, at 95–103.

258. Some attribute the increasing polarization in Congress to the primary electorate. See, e.g., Masket, supra note 38, at 24–25 (noting a "virtual consensus" that candidates today "represent[] the ideologically extreme elements within their parties" rather than the preferences of their constituents); David W. Brady et al., *Primary Elections and Candidate Ideology: Out of Step with the Primary Electorate?*, 32 *Legis. Stud. Q.* 79, 80, 82–83, 98–99 (2007) [hereinafter Brady et al., *Primary Elections*] (finding that congressional candidates, like presidential candidates, face pressures to accommodate ideologically extreme primary electorates and that this influences legislative polarization). But see Shigeo Hirano et al., *Primary Elections and Partisan Polarization in the U.S. Congress*, 5 *Q.J. Pol. Sci.* 169, 173 (2010) (claiming to have undermined this conventional wisdom based on a seven-state study focused almost entirely on Senate rather than House elections). For a recent review of the literature, see Barber & McCarty, supra note 20, at 43–64.

259. Pew Research Ctr., *The Partisan Divide*, supra note 257, at 11. But see Shiva Maniam & Samantha Smith, *A Wider Partisan and Ideological Gap Between Younger, Older Generations*, Pew Research Ctr. (Mar. 20, 2017), <http://www.pewresearch.org/fact-tank/2017/03/20/a-wider-partisan-and-ideological-gap-between-younger-older-generations/> [http://perma.cc/K4AL-2RDJ] ("[T]he share [of respondents] saying they do not lean to either party is smaller today (11%) than in the early 2000s (17% in 2000).").

stances.”²⁶⁰ As another example, although Republican voters expressed overall strong support for the 2017 tax cuts, their priorities were quite different from those of party leaders.²⁶¹

That said, it certainly would be concerning if the associational-party path were likely to foment further polarization. On this front, the trepidation appears to be driven by a fear that peer-to-peer strategies dependent on the party faithful (known to be more ideologically extreme) would polarize those with whom they come into contact.

In fact, however, there is reason to have confidence that an associational-party path would mitigate rather than exacerbate polarization. Much of the polarization research focuses on the political effects of partisan media and its dissemination online.²⁶² But there is little reason to expect the dynamics of social media to permeate old-fashioned face-to-face retail politics. People act differently in person than online.²⁶³ For a variety of psychological reasons (especially anonymity), it appears to be much easier to engage in asocial behaviors online than in person—to be more confrontational, to express more extreme views, and to lie or misrepresent oneself.²⁶⁴ By contrast, there is a strong incentive when

260. Pew Research Ctr., *Partisanship and Political Animosity*, supra note 248, at 1.

261. See Hannah Fingerhut, *More Americans Favor Raising than Lowering Tax Rates on Corporations, High Household Incomes*, Pew Research Ctr. (Sept. 27, 2017), <http://www.pewresearch.org/fact-tank/2017/09/27/more-americans-favor-raising-than-lowering-tax-rates-on-corporations-high-household-incomes/> [<http://perma.cc/HDA6-M75U>] (reporting that “only about a third of Republicans (36%) say tax rates on household incomes above \$250,000 should be reduced; nearly as many (33%) say they should be kept as they are and 26% want them raised”); National Tracking Poll #180108 93–117, *Morning Consult* (2018), http://morningconsult.com/wp-content/uploads/2018/01/180108_crosstabs_POLITICO_v1_AP-1.pdf [<http://perma.cc/JQ4V-HX3W>] (showing that while 75% of Republican voters surveyed support the tax bill, overall support for the bill is much higher than support for many of its individual provisions, especially those that favor the extremely wealthy); see also Toby Eckert, *Poll: Voters Like Tax Reform Overall but Cool to Corporate Cut*, *Politico* (Nov. 1, 2017), <http://www.politico.com/story/2017/11/01/voters-like-tax-reform-overall-but-cool-to-corporate-cut-244399> [<http://perma.cc/6GXM-GUMZ>] (noting that “a key part of the plan, lowering the corporate tax rate to 20 percent from 35 percent, remains one of its least popular aspects” with “[a] plurality of respondents—41 percent—[saying] it shouldn’t be part of tax legislation, compared to 39 percent who said it should”).

262. See Matthew S. Levendusky, *Why Do Partisan Media Polarize Viewers?*, 57 *Am. J. Pol. Sci.* 611, 612–619 (2013) (finding, based on a review of the literature and a series of experiments, that partisan media does not polarize moderates and concluding they, instead, take “people who are already somewhat extreme and makes them *even more extreme*”).

263. See generally Danielle Keats Citron, *Hate Crimes in Cyberspace* 57, 62 (2014) (touting the Internet’s many civic virtues, including politically connecting individuals, while noting that “[s]ome of the Internet’s key features—anonymity, mobilization of groups, and group polarization—make it more likely that people will act destructively,” including fueling, in certain contexts, “astronomical growth” in extremist hate groups).

264. See John Suler, *The Online Disinhibition Effect*, 7 *CyberPsychol. & Behav.* 321, 322 (2004) (attributing this effect to, inter alia, anonymity and invisibility); see also Jacob

interacting in person to be prosocial—to cooperate and avoid conflict, sometimes to a fault—especially with individuals with whom one has a prior relationship.²⁶⁵ Certainly, the social-capital literature suggests that knitting together the polity and encouraging civic engagement is less likely to draw out the dark and dysfunctional elements of our politics.²⁶⁶ To the degree that an associational-party path envisions peer-to-peer mobilization online, it is primarily focused on situations where the connection between those individuals also has a face-to-face manifestation—such as the efforts of the Obama campaign. Particularly in that context, it seems just as plausible that the effect might run the other way: Contact with less ideologically extreme neighbors and associates might create a reality check for the most ideologically extreme because personal connection between peers might mitigate the inclination to simply reinforce one’s beliefs.²⁶⁷

Ultimately, however, this is an institutional-design project the primary goal of which is to ensure the openness of the channels of democratic politics, including parties, rather than a particular substantive outcome: If polarization is the outcome of broadening the electorate and enhancing its access to information, then so be it. The same is true if it

Groshek & Chelsea Cutino, Meaner on Mobile: Incivility and Impoliteness in Communicating Contentious Politics on Sociotechnical Networks, 2 Soc. Media & Soc’y, Oct.–Dec. 2016, at 1, 4, 7 (extending the online disinhibition hypothesis to a study of a random sample of tweets and finding that mobile communication is more uncivil and impolite than fixed webmessages, and that civil and polite discourse is distinctly less evident on Twitter); Arthur D. Santana, Virtuous or Vitriolic: The Effect of Anonymity on Civility in Online Newspaper Reader Comment Boards, 8 Journalism Prac. 18, 26–29 (2014) (finding anonymous commenters were noticeably more uncivil). For a short review of the debate, see Maria Konnikova, The Psychology of Online Comments, New Yorker (Oct. 23, 2013), <http://www.newyorker.com/tech/elements/the-psychology-of-online-comments> [<http://perma.cc/EF69-6X5T>] (opposing, however, the decision to ban online comments and discussing ways that they can be structured to invite the imposition of civility).

265. Cf. Brady et al., Prospecting for Participants, *supra* note 165, at 159–61 (confirming the hypothesis that “relationships [of various kinds] have the potential for giving a target added incentive to comply” with requests to participate because “we ordinarily seek not to offend those to whom we are close”); Broockman & Kalla, *supra* note 209, at 223 (finding face-to-face conversations with individuals had persistent effects on attitudes toward transgender individuals, whereas surveys did not).

266. The central claim of the social-capital literature is that face-to-face association in small and intimate groups—neighborhood associations, bowling leagues, and clubs—instills cooperative virtues, such as cooperation, reciprocity, and trust. See generally Nancy L. Rosenblum, Membership and Morals: The Personal Uses of Pluralism in America 29–41 (1998) (reviewing the social-capital literature in anticipation of criticizing it for failing to explain how the cultivation of social capital within face-to-face communities necessarily translates beyond that social context).

267. Cf. Levendusky, *supra* note 262, at 617–19 (concluding, based on a series of experiments, that partisan media does not polarize moderates and finding it, instead, takes “people who are already somewhat extreme and makes them *even more extreme*” because of a natural tendency to wish to reinforce one’s predispositions).

turns out that the nation truly is racist, misogynist, prone to believe falsehoods, and enamored of hypercapitalism.²⁶⁸ At the moment, however, institutional features of contemporary democracy are driving those political trends.²⁶⁹

The bottom line is that, notwithstanding the reasonableness of these various concerns, an associational-party approach is the only viable reform agenda. Responsible party government is not working.²⁷⁰ The political parties have not been sufficiently responsive to the electorate, and voters appear increasingly dissatisfied with the brands that are on offer.²⁷¹ Nor is the most salient current party-reform agenda, which seeks to strengthen the power of party leaders by loosening or abolishing contribution limits to political parties—either as a matter of statutory or (far worse) constitutional law—significantly more promising.²⁷²

Proponents of strengthening party leaders through deregulation argue that raising or removing contribution limits to the official political party will shore up party elites by leveling the playing field with so-called outside groups, such as Super PACs. This will, in turn, undercut the power of the more ideologically extreme elements of the partisan network, reduce polarization, and end legislative gridlock.²⁷³

Untamed deregulatory efforts, however, could push the formal political parties further to the ideological extremes just as easily as they could bring forth moderate parties inclined to legislative compromise.²⁷⁴ Why should we believe the newly empowered party elites will be the moderates of older days? Moderation depends on party competition. Conferring total control over the party brand to party leadership in the

268. It is also, of course, possible that polarization is a phenomenon that cannot be contained and will keep increasing regardless of either campaign finance or mobilization efforts. See, e.g., Heather K. Gerken, *Playing Cards in a Hurricane: Party Reform in an Age of Polarization*, 54 *Hous. L. Rev.* 911, 914–17 (2017) (“[T]he real question we should be asking is not *how* to reduce polarization but *whether* we can.”). As to the spread of fake news, it is not at all clear how reforms in the vein of responsible party government would better address the fake-news phenomenon, nor is it at all clear that our Constitution permits efforts to regulate, even define, what is fake news.

269. See Pildes, *The Center Does Not Hold*, *supra* note 1, at 329–33; see also Brady et al., *Primary Elections*, *supra* note 258, at 98–99 (finding that “candidates who do not appeal to an ideological base of organized voters are more likely to lose in the primaries” and arguing that is an important explanation of party polarization in Congress).

270. See *supra* section I.B.

271. See *supra* notes 80–84 and accompanying text.

272. See, e.g., La Raja & Rauch, *supra* note 5, at 10–12; Issacharoff, *Outsourcing Politics*, *supra* note 4, at 865–70; La Raja, *supra* note 5, at 313–15.

273. See, e.g., Pildes, *Romanticizing Democracy*, *supra* note 1, at 845.

274. See Michael J. Malbin & Charles R. Hunt, *Campaign Fin. Inst., Party Contribution Limits and Polarization* 7 (2017), http://www.cfinst.org/pdf/papers/PartyContributionLimits_Polarization.pdf [<http://perma.cc/572N-55ED>]; Gerken, *supra* note 268, at 915–19; Michael S. Kang, *The Brave New World of Party Campaign Finance Law*, 101 *Cornell L. Rev.* 531, 601–03 (2016).

belief that electoral competition will force officials to tack back to the median voter's preferences certainly will not work absent electoral competition. But it may not work even where competition exists. Party competition, as noted previously, is a decidedly imperfect mechanism for producing policy responsiveness.²⁷⁵

Even putting to one side problems associated with party competition and its absence, it is not at all clear that leveling the playing field will redirect the flow back to the formal party and its leaders: Donors make campaign contributions to different entities depending on their interests.²⁷⁶ Ideological donors may well continue to donate to ideological groups; moreover, even if they were to decide to fund the political parties, their demands for ideologically pure candidates are unlikely to disappear.²⁷⁷

To make matters worse, unbridled deregulation of party funding is likely to strengthen the hands of wealthy donors.²⁷⁸ In 2014, following *McCutcheon*, Congress substantially lifted contribution limits for three main areas of party expenditures: presidential nominating conventions, expenses associated with the construction and renovation of party headquarters, and litigation expenses associated with recounts and other election-related legal proceedings.²⁷⁹ It is difficult to see how creating these kinds of party slush funds breeds accountability to the electorate.²⁸⁰ As Lee Drutman argues, deregulating to “allow[] party insiders to control larger pots of money” may well improve party discipline, but it is not at all clear why it would make them more attentive to the interests of constituents rather than the (largely out-of-precinct) donors from whom the money arrives.²⁸¹

By comparison, the associational-party path is theoretically optimal as a guide to structuring First Amendment doctrine and as a measure for regulatory reforms—even as it does not guarantee a cure to all our democratic ills. A party-reform agenda tailored to strengthening the associational life of political parties, including by redirecting the flow of

275. See *supra* notes 98–99 and accompanying text.

276. Samuel Issacharoff & Jeremy Peterman, Special Interests After *Citizens United*: Access, Replacement, and Interest Group Response to Legal Change, 9 *Ann. Rev. L. & Soc. Sci.* 185, 187, 194–95 (2013).

277. See Bauer, *The Parties' Struggles*, *supra* note 6, at 889; Gerken, *supra* note 268, at 917–19.

278. Gerken, *supra* note 268, at 919.

279. See 52 U.S.C. § 30116(a)(9) (2012); see also Athena Jones, Lawmakers Chip Away at Campaign Finance Rules in Spending Bill, *CNN Politics* (Dec. 10, 2014), <http://www.cnn.com/2014/12/10/politics/spending-bill-campaign-donations/index.html> [<http://perma.cc/9XZY-JLWN>].

280. Drutman, *supra* note 7; see also Schmitt, *supra* note 4.

281. Drutman, *supra* note 7 (noting further that even when political party leaders have the funds, they do not spend them in primaries on moderate candidates).

money, is significantly less prone to these problems than one singularly focused on strengthening the political power of party leaders.

The central premise underlying an associational-party path is that curtailing the political influence of donors and other unrepresentative policy demanders requires creating a counterpoint to that influence by empowering and mobilizing millions of ordinary Americans through civic and political organizations.²⁸² Any deregulation of party financing must, therefore, be narrowly tailored to the goal of encouraging peer-to-peer party-building and voter-mobilization strategies that significantly rely on face-to-face interactions.

From an associational perspective, in other words, the pertinent question for any deregulatory proposal ought to be where within the party the money is likely to flow. This is because responsive governance is most likely to arise out of a party capable of engaging a representative electorate in a peer-to-peer fashion through personal appeals by party activists and individuals in community-based civic associations. The impact of deregulation will be vastly different if it flows to political parties engaged in orchestrating volunteers and peer-to-peer mobilization rather than buying TV advertisements that seek to influence likely voters or paying for lavish party headquarters.²⁸³ Even directing more money to state and local parties will not necessarily facilitate the development of “social capital by building connections, trust, and cooperation across diverse individuals and groups.”²⁸⁴

282. Abu El-Haj, *Beyond Campaign Finance Reform*, supra note 2, at 1143–51 (arguing this approach is necessary because in a capitalist economy, in which wealth is not equally distributed, the wealthy benefit disproportionately from basic First Amendment guarantees, with respect to election-related spending, issue advocacy, lobbying, and funding citizens’ knowledge base); see also Tabatha Abu El-Haj, *Key Findings: The Inevitable Limits of Campaign Finance Reform*, Scholars Strategy Network (Sept. 2016), <http://www.scholarsstrategynetwork.org/brief/inevitable-limits-campaign-finance-reform> [<http://perma.cc/GE5X-YW4K>] (providing a concise summary of the argument in *Beyond Campaign Finance Reform*).

283. Similarly, from the perspective of an associational path to responsive party government, current efforts to increase small donors, such as matching programs, are too blunt. Efforts to enhance the amount of money small donors contribute online are useful to the degree that they free legislators’ time to legislate and to spend more time with their constituents. But this solution is no magic bullet: Simply increasing the number of online contributions to campaigns from small donors through matching programs will not in and of itself empower those donors. To achieve that end, small-donor programs would also have to create incentives for legislators to give small donors opportunities for access similar to those big donors receive today. That is, they would need to be specifically structured to encourage elected officials and partisan elites to provide face-to-face access for small donors or to strengthen the power of existing membership-based political and civic organizations.

284. La Raja & Rauch, supra note 5, at 5. None of the reforms that La Raja and Rauch propose explicitly address the sort of peer-to-peer strategies that are likely to increase social capital.

The associational-party path is preferable to other proposals for one final reason: Unlike responsible party government, it eschews the assumption that party reform alone can bear the entire weight of solving our democratic dysfunctions. Entrenched problems demand multifaceted interventions aimed at incremental change. Party reform can only ever be a partial solution. To the degree responsible party government suggested otherwise, it was obviously mistaken.

Reforms to address the associational qualities of the traditional party are most likely to succeed as part of a package of reforms aimed to empower ordinary Americans in politics by responding to broader transformations in civil society.²⁸⁵ While the traditional party is arguably the least well situated to translate peer-to-peer strategies into a two-way street of communication given the cyclical nature of elections, the payoff of pursuing democratic accountability by promoting both electoral associations *and* civic associations derives from a central and recurring finding from the empirical research: Political experiences tend to produce additional and deeper civic and political engagement.²⁸⁶ Simply put, efforts to broaden electoral participation through peer-to-peer engagement, particularly when face-to-face, are likely to lead individuals into additional forms of political participation and organizational membership, thereby reinforcing efforts to stimulate a more representative and membership-based array of civic associations—the kind most capable of breeding informed political participation.²⁸⁷

Put differently, as the sociological definition of the party highlights, the formal party—that is, the traditional focus of party reform—is merely one type of node within the partisan network.²⁸⁸ In addition to candidates and formal party entities (governance and election-related entities), there are PACs of various sorts (primarily election-related entities) as well as—and this is what the traditional account fails to notice—certain civic associations (policy demanders that engage in electoral politics when it serves their interests). Efforts to increase

285. See Abu El-Haj, *Beyond Campaign Finance Reform*, *supra* note 2, at 1154–62, 1184–85 (documenting how “[t]he chain of political accountability has . . . been weakened by the transformation of civic associations” and arguing that campaign finance reformers need to turn their attention to legal strategies for empowering ordinary Americans in politics).

286. Abu El-Haj, *Friends, Associates, and Associations*, *supra* note 32, at 81–82 (noting “empirical research indicates that civic participation breeds more participation” and that “[i]nitial forays into public life quickly turn into a habit, as individuals become part of social networks likely to encourage it”).

287. Abu El-Haj, *Beyond Campaign Finance Reform*, *supra* note 2, at 1157–58 (noting “the critical feature missing in the vast majority of civic associations today is active membership and class-integrated, personal ties” and concluding strong civic associations with active memberships have the unique “ability . . . to generate political activity, including voting, and to effectively disseminate relevant political information to ordinary Americans”).

288. See *supra* notes 136–144 and accompanying text.

responsive and accountable governance must seek improvements in all three arenas.

To conclude, given the failures of responsible party government, the associational-party path, on balance, offers the most viable route to inducing political parties and their elected officials to govern responsibly and responsively. Having outlined the assumptions and contours of an associational-party path, this Essay will next consider the implications for First Amendment doctrine.

III. RECONCEIVING FIRST AMENDMENT BURDENS

While it is obviously possible to reshape the associational texture of partisan networks by shifting the regulatory framework to empower different legal entities within the partisan network, this Essay focuses on constitutional doctrine.²⁸⁹ Many regulatory debates are best left to the democratic process, but the regulation of the democratic process is not one of them.²⁹⁰ The incentives of elected officials are too compromised to devise regulatory regimes that will induce political accountability.²⁹¹ It is, therefore, incumbent on First Amendment doctrine to allocate rights in ways that encourage democratic accountability and political responsiveness.

Toward this end, this Part identifies opportunities within existing First Amendment doctrine to strategically underwrite the strength of those segments of the partisan network that enhance opportunities for social contact between party elites and the broader electorate. The doctrinal proposal, set forth below, essentially entails two steps. The first would extend the *Anderson–Burdick* framework to all manner of political party regulations, including those that burden the First Amendment rights of the two major political parties. The second step would recalibrate the burdens analysis to focus on impediments to the party’s ability to mobilize broad and representative political participation—as

289. The author plans to consider the regulatory implications of an associational-party path in future work.

290. See Tabatha Abu El-Haj, *Wholly Native to the First Amendment: The Positive Liberty of Self-Government*, 164 U. Pa. L. Rev. Online 241, 243–44 (2016), <http://www.pennlawreview.com/online/164-U-Pa-L-Rev-Online-241.pdf> (on file with the *Columbia Law Review*) (“A default rule of deference to legislatures with respect to the basic rules of democracy . . . requires a willful blindness to the realities of the rough and tumble of politics and the powerful incentives to entrenchment.”).

291. See *supra* notes 48–54 and accompanying text (noting that a “central preoccupation among scholars of American democracy” is the fact that political parties are inevitably primarily interested in aggrandizing power); see also Tabatha Abu El-Haj, *Changing the People: Legal Regulation and American Democracy*, 86 N.Y.U. L. Rev. 1, 6 (2011) (noting a central premise of the field of law of democracy is the recognition that “[l]egislators . . . are problematic regulators when it comes to the rules governing elections because they are self-interested and are regularly tempted to use legal rules to entrench themselves”).

opposed to those placed on access to the polls or the ballot, as in the typical case.

A. *Assessing Regulatory Burdens Within the Anderson–Burdick Framework*

There is no question that the First Amendment rights of formal political parties can shape the associational attributes of partisan networks. When a political party is forced to hold an open primary, for example, its partisan network is diversified. When it is prevented from holding open primaries, the power of party activists is heightened. An associational path to responsive party government suggests that First Amendment rights should be allocated in ways that prevent regulation from undermining either the socioeconomic and intergenerational breadth or the interpersonal depth of partisan networks.²⁹²

The principal mistake of current doctrine is its preoccupation with protecting political parties, *as speakers*, from burdens placed on their brand.²⁹³ Compounding this error is the fact that the members of the *Citizens United* majority appear to assume that any regulatory burden placed on a political party as a speaker demands strict scrutiny.²⁹⁴

From an associational-party perspective, not every restriction on a political party's freedom of speech and association "is of constitutional dimension"—a point the Court has itself acknowledged at times.²⁹⁵ The primary concern is burdens placed on the party's ability to foster deep and wide social ties to a representative electorate. Burdens on the clarity of a party's message, by comparison, are much less important.

Extending the *Anderson–Burdick* framework to the two major political parties would provide a relatively simple way to incorporate an associational-party perspective into existing First Amendment doctrine.²⁹⁶ Developed in the context of restrictions on access to the ballot, the *Anderson–Burdick* framework is particularly well suited to the task because

292. For First Amendment purposes, the political party refers to the formal party; other nodes of the partisan network may have their own First Amendment rights.

293. See, e.g., *McConnell v. FEC*, 540 U.S. 93, 352 (2003) (Rehnquist, C.J., dissenting) (explaining "the national political parties are exemplars of political speech," "promote coordinated political messages," and exist often "primarily for the purpose of expressing ideas and generating debate"), overruled in part by *Citizens United v. FEC*, 558 U.S. 310 (2010).

294. See *Republican Party of La. v. FEC*, 219 F. Supp. 3d 86, 94–95 (D.D.C. 2016) (recounting uncertainty with respect to the level of scrutiny in light of cases such as *McCutcheon v. FEC*), summarily aff'd, 137 S. Ct. 2178 (2017).

295. *McConnell*, 540 U.S. at 99; see also *FEC v. Colo. Republican Fed. Campaign Comm.* (*Colorado Republican II*), 533 U.S. 431, 450 n.11 (2001) (making a similar argument when the party asserted only speech interests).

296. See generally *Burdick v. Takushi*, 504 U.S. 428, 433–43 (1992) (laying out the *Anderson–Burdick* framework).

it explicitly foregrounds analysis of the burdens, reserving strict scrutiny for cases in which the burdens are severe.²⁹⁷

An associational-party perspective provides a new scale with which to weigh the burdens on a party's First Amendment rights in which the focus would turn to burdens placed on parties as associations and their capacity to foster deep and wide social ties to a representative electorate. A few lower courts have already taken this step, attending, in the context of challenges brought by minor parties, to the nature of the burdens placed on the party's ability to cultivate and maintain ties to the electorate.²⁹⁸ In one case, plaintiffs challenged a state law that required election officials to scrub voter rolls of affiliations with third parties that no longer met the state's legal definition of a political party.²⁹⁹ In applying the *Anderson-Burdick* test, the court explained that the burden was severe, insofar as it undermined the party's ability to identify and mobilize potential voters or engage in "party building activities."³⁰⁰

Currently, while the Supreme Court consistently applies the *Anderson-Burdick* framework when adjudicating both challenges brought by minor parties and intraparty feuds involving the right to participate,³⁰¹ its practice has been inconsistent in cases involving the direct regulation of the two major political parties. When First Amendment challenges have been brought by the leaders of a major political party, the tendency has been to simply apply strict scrutiny.³⁰² The only outlier was the recent

297. *Id.* at 433–43 (permitting some burdens to be placed on the right to vote in light of a recognition that elections must be regulated to ensure fairness and accuracy of the count).

298. See, e.g., *Green Party of N.Y. State v. N.Y. State Bd. of Elections*, 389 F.3d 411, 416, 420–21 (2d Cir. 2004) (striking down a New York statute that required state officials to "erase the enrollment information" of any member of a political party that has lost its recognition and "change the status of that individual to non-affiliated on the registration poll record"); see also *Baer v. Meyer*, 728 F.2d 471, 473–74 (10th Cir. 1984) (striking down a Colorado law that "unreasonably burdened the ability of [voters] to note their support of the Citizens and Libertarian parties on their voter registration forms"); *Council of Alt. Political Parties v. State Div. of Elections*, 781 A.2d 1041, 1047, 1051–52 (N.J. Super. Ct. App. Div. 2001) (noting the "voter affiliation declaration scheme" at issue "imposes a considerable, albeit not severe, burden on plaintiffs' First Amendment rights to express political ideas and to associate to exchange these ideas to further their political goals").

299. See, e.g., *Green Party*, 389 F.3d at 416.

300. *Id.* at 420–21.

301. See *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 201–02 (2008) (involving an intraparty fight over judicial nominations); *Clingman v. Beaver*, 544 U.S. 581, 584, 599 (2005) (involving a challenge by the Libertarian Party of Oklahoma to the state's semiclosed primary); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 353–54 (1997) (involving a minor party's challenge to the constitutionality of Minnesota's antifusion law).

302. See *Cal. Democratic Party v. Jones*, 530 U.S. 567, 572, 582 (2000) (citing *Burdick v. Takushi* but failing to recite or explicitly apply its test before concluding strict scrutiny was warranted).

case of *Washington State Grange v. Washington State Republican Party*.³⁰³ The *Anderson–Burdick* framework has never been mentioned in cases challenging restrictions on the financing of political parties, even by Justices reluctant to submit to *Buckley v. Valeo*'s distinction between contributions and expenditures.³⁰⁴ Moreover, even in those minor-party cases where it has applied the *Anderson–Burdick* test, the Court has sidelined separate analyses of the impact of various ballot-access rules on those parties' associational life.³⁰⁵

The extension of the *Anderson–Burdick* framework to assess the First Amendment implications of all facets of political party regulation—by establishing a jurisprudence that is sensitive to regulatory burdens that further undermine the existing associational life of political parties—would enable the Court to adjudicate the First Amendment burdens placed on political parties in ways that will encourage broader democratic goals. It would also have the added benefit of affording political parties robust First Amendment protection without constitutionalizing an unbounded right to accept unlimited contributions.³⁰⁶

B. *Illustrating the New Approach in the Context of the Soft-Money Ban*

To illustrate the implications of this doctrinal and analytic shift, consider the controversy over the constitutionality of the 2002 amendments to the Federal Election Campaign Act (FECA), which closed the so-called soft-money loophole. In the 1990s, the national party committees regularly exploited the fact that federal law, at the time, exempted the financing of state and local elections as well as generic party-building activities from its regulatory purview.³⁰⁷ Through this loophole, national party leaders solicited unlimited contributions (soft money), ostensibly earmarked for state or local elections, from big donors with promises of

303. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451–52 (2008) (“If a statute imposes only modest burdens, however, then ‘the State’s important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions’ on election procedures.” (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983))).

304. This is evident if one keycites *Burdick* in Westlaw. See also *Buckley v. Valeo*, 424 U.S. 1, 25, 44–45 (1976); see also *infra* notes 323–328 (explaining *Buckley*'s doctrinal framework as well as Justice Kennedy's refusal to apply it in certain cases).

305. *Clingman*, 544 U.S. at 591–93 (noting that “*Tashjian* applied strict scrutiny with little discussion of the magnitude of the burdens imposed by Connecticut's closed primary on parties' and voters' associational rights” and dismissing the burdens placed by the challenged law on the minor party's associational rights as minimal); *Timmons*, 520 U.S. at 359–64 (“[T]he burdens Minnesota imposes on the party's First and Fourteenth Amendment associational rights—though not trivial—are not severe.”).

306. As discussed above, the most aggressive version of the party-reform agenda, in the vein of responsible party government, seeks to achieve its end as a matter of constitutional dictate.

307. See *Shays v. FEC*, 528 F.3d 914, 917–18 (D.C. Cir. 2008) (describing, concisely, the implications of the loophole).

access to federal candidates and elected officials.³⁰⁸ Those funds were then funneled to activities that, while formally related to state and local elections, directly benefited the federal candidates who appeared on the same ballot—for example, sham issue advertisements (the bulk of the spending), voter-registration drives, and get-out-the-vote efforts.³⁰⁹

Not surprisingly, the use of the so-called soft-money loophole to circumvent FECA's contribution limits eventually raised concerns about the sort of solicitude donors were receiving from federal candidates and political parties. In response, Congress enacted the Bipartisan Campaign Reform Act of 2002 (BCRA), which embraced a multipronged strategy for closing the soft-money loophole.³¹⁰ First, BCRA establishes caps on contributions from individuals to a federal political party committee.³¹¹ Second, it prohibits *both* federal political party committees from soliciting funds above their base contribution limits *and* state, district, or local parties from using funds solicited outside BCRA's new contribution limits for any "*Federal election activity*."³¹² Finally, it adopts an extremely broad statutory definition of "Federal election activities."³¹³

Whatever its merits as an effort to contain the influence of big donors, BCRA, unquestionably, has made it much more difficult for political parties to engage in joint party building and a variety of face-to-face mobilization efforts.³¹⁴ Taken together, its provisions set up a regulatory regime in which *all* activities that fall within the statutory definition of "Federal election activity" must be funded with hard money (that is, those funds raised within federal base limits). After BCRA, not

308. *McConnell v. FEC*, 540 U.S. 93, 122, 146–47 (2003) (defining soft money as money raised outside federal contribution limits by national party committees, often at the behest of candidates, ostensibly to cover expenses related to state and local elections, although intentionally spent in ways that benefited federal candidates), overruled in part by *Citizens United v. FEC*, 558 U.S. 310 (2010).

309. *Shays*, 528 F.3d at 916 (“[I]ssue ads’ purportedly aimed at influencing people’s policy views but actually [were] directed at swaying their views of [federal] candidates.”).

310. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of 2 and 52 U.S.C.).

311. 52 U.S.C. § 30116(a)(1)(B) (Supp. III 2016) (setting contribution limits to “political committees established and maintained by a national political party”); see also *id.* § 30118 (banning contributions to political parties and candidates from general funds of corporations and unions).

312. *Id.* § 30125(a)–(c) (emphasis added); see also 11 C.F.R. § 300.32(a)(1)–(3) (2018) (defining the hard-money requirement for state and local parties).

313. 52 U.S.C. § 30101(20).

314. See, e.g., *id.* § 30116(d) (raising the limits on coordinated expenditures between political parties and federal candidates above what would otherwise be applicable); see also *Colorado Republican II*, 533 U.S. 431, 445–64 (2001) (upholding the constitutionality of these limits on coordinated expenditures by parties with candidates out of concern that without such restrictions the source and amount contribution limits on candidates could easily be circumvented, enabling corruption).

only issue ads (including sham ones)³¹⁵ but also all voter identification, get-out-the-vote, and generic campaign activity conducted in connection with an election in which a candidate for federal office appears on the ballot, as well as voter-registration drives undertaken within 120 days of a federal election, must be paid for with hard money insofar as these practices constitute “Federal election activity.”³¹⁶ Party officials who spend “more than 25 percent of [their] compensated time” on “activities in connection with a Federal election,” similarly, must be paid with hard money.³¹⁷

Congress, to be fair, tried to offset these burdens by establishing a limited opportunity for intraparty coordination through Levin funds.³¹⁸ Levin funds permit national party committees and state and local party committees to spend jointly on voter-registration activity, voter identification, and get-out-the-vote drives, so long as, *inter alia*, no mention is made of a federal candidate.³¹⁹ Unfortunately, Levin funds are subject to complex and convoluted rules that make them virtually unusable.³²⁰ As a consequence, they have not provided much relief.³²¹

Despite these burdens, BCRA’s soft-money ban was upheld in *McConnell v. FEC*.³²² The *McConnell* Court chose to analyze the framework as a contribution limit, thereby triggering an ill-defined level of

315. 52 U.S.C. § 30101(20)(A)(iii) (defining “Federal election activity” as including “public communication[s] that refer[] to a clearly identified candidate for Federal office” and “promote[,] . . . support[,] . . . attack[,] or oppose[]” her).

316. *Id.* § 30101(20)(A)(i)–(ii); see also 11 C.F.R. § 100.24 (defining “Federal election activity” as including get-out-the-vote and voter-identification activities).

317. 52 U.S.C. § 30101(20)(A)(iv). Congress also explicitly excluded certain types of activities from the definition of “Federal election activity.” See *id.* § 30101(20)(B).

318. 52 U.S.C. § 30125(b)(2); see also 11 C.F.R. § 300.32(a)(4), (b)–(d) (delineating the conditions for the use of Levin funds).

319. 52 U.S.C. § 30125(b)(2)(A)–(B). Levin funds cannot be used to fund broadcast communications unless they refer “solely to a clearly identified candidate for State or local office.” *Id.* § 30125(b)(2)(B)(ii).

320. See *McConnell v. FEC*, 540 U.S. 93, 163–64 (2003) (summarizing limits placed on the involvement of the national party in their solicitation, on how such funds can be raised, and on the sorts of transfers between party outposts that are permissible), overruled in part by *Citizens United v. FEC*, 558 U.S. 310 (2010).

321. See, e.g., Plaintiffs’ Motion for Summary Judgment at 3, *Republican Party of La. v. FEC*, 219 F. Supp. 3d 86 (D.D.C. 2016) (No. 15-cv-01241), 2016 WL 1242607 (complaining that the Levin-fund exception is too convoluted to undertake); Letter from Neil Reiff, Counsel to Minn. Democratic Farmer Labor Party, to Matthew Peterson, Chairman, FEC 2, 5 (June 14, 2016), <http://sers.fec.gov/fosers/showpdf.htm?docid=351550> [<http://perma.cc/N94V-MJ6K>] (explaining the precise ways that current regulatory burdens undermine state and local parties).

322. 540 U.S. at 133–85 (rejecting a facial challenge to the constitutionality of these provisions); accord *Republican Nat’l Comm. v. FEC*, 698 F. Supp. 2d 150, 153, 162–63 (D.D.C. 2010) (rejecting as-applied challenges to these statutory limitations), *aff’d*, 561 U.S. 1040 (2010).

intermediate scrutiny under *Buckley v. Valeo*.³²³ The dissenters, however, were not persuaded.³²⁴ Justice Kennedy, in particular, advocated for the application of strict scrutiny on the grounds that the soft-money ban was neither a contribution nor an expenditure limit, but both at once and, as such, “fundamentally alter[ed], and thereby burden[ed], protected speech and association throughout our society.”³²⁵ Given the absence of a compelling state interest, he maintained the provisions were unconstitutional.³²⁶

While the contribution–expenditure distinction is a conceptual quagmire, Justice Kennedy’s alternative—strict scrutiny for any party regulation arguably involving speech—is no better. The former framework assumes that contribution limits are virtually never constitutionally problematic in the name of a pragmatic compromise. The latter amounts to the rote application of strict scrutiny, thereby granting political parties an effectively unlimited First Amendment right to accept campaign contributions.³²⁷ Neither approach attempts to consider the underlying First Amendment interests before assessing whether the campaign finance burden is of constitutional dimension.³²⁸ Both completely neglect the ends to which First Amendment rights ought to be granted.

The *Anderson–Burdick* framework, by contrast, is already sensitive to determining which burdens placed on political parties are of constitutional dimension.³²⁹ The test explicitly foregrounds analysis of these burdens, reserving strict scrutiny for cases in which they are severe, in recognition of the fact that the legitimacy of elections frequently depends on their regulation. Extending the framework—from the current doctrine, in which it applies to cases involving burdens on the right to participate and those involving minor parties, to cases involving the two major political parties—provides a unique opportunity to develop a theoretically sound doctrine capable of allocating First

323. See *McConnell*, 540 U.S. at 134–38 & n.40 (quoting *FEC v. Beaumont*, 539 U.S. 146, 162 (2003)); see also *Buckley v. Valeo*, 424 U.S. 1, 25, 44–45 (1976).

324. See *McConnell*, 540 U.S. at 286–87, 308–14 (Kennedy, J., dissenting in part).

325. *Id.* at 314.

326. See *id.* Justice Kennedy further argued that soft-money expenditures undertaken independently of candidates, by definition, “lack[] a possibility for *quid pro quo* corruption of federal officeholders.” *Id.* at 301.

327. Presumably, the theory is as follows: Since money is speech and a political party is a speaker, any restriction on the money that a political party has at its disposal during an electoral campaign amounts to an unconstitutional burden on its freedom of speech in the absence of a compelling state interest in preventing *quid pro quo* corruption. See, e.g., *id.* at 319, 321.

328. *Burdick v. Takushi*, 504 U.S. 428, 433–34 (1992) (describing the differing standards the Court applies to “severe” versus “reasonable” restrictions on First and Fourteenth Amendment voting rights).

329. See *id.*

Amendment rights to political parties in ways that facilitate the goals of democratic accountability and responsiveness.

To further the associational path to party responsiveness, however, it is necessary to establish a new measure for how to weigh those burdens.³³⁰ The critical questions would become: first, whether the regulation decreases a party's ability to mobilize political participation and facilitate information transmission through peer-to-peer appeals by party activists; and second, whether it otherwise undermines the party's organizational stability and coalition-building capacity. The former burdens are worrisome not only because personalized solicitations are particularly effective means for facilitating electoral participation but also because genuine points of contact with the electorate are more likely to ground elected officials in the experiences of their constituents.³³¹ The latter burdens are worrisome to the degree that the need to rebuild organizational capacity each cycle detracts from the ability to sustain political engagement over the long term. The extension would have the added payoff of bringing coherence to the doctrine.

In the context of BCRA's soft-money ban, shifting to the *Anderson–Burdick* test demands a separate analysis for each of the three types of party expenditures implicated: (1) voter-identification, -registration, and get-out-the-vote initiatives; (2) state and local party staff; and (3) issue advocacy. Ultimately, the recalibrated *Anderson–Burdick* test points to a middle-ground position, in which some, but not all, aspects of the soft-money ban would be held unconstitutional. When the question of whether a burden should be deemed severe turns on how it impacts the party's ability to foster broad social networks with interpersonal depth, it is the first two limitations on expenditures that pose the most severe burdens. This section addresses each provision in turn.

The congressional choice to define “Federal election activity” to include voter-registration, -identification, and -mobilization drives undertaken within 120 days of a federal election, thereby requiring that such activities be undertaken with hard money, burdens core First Amendment interests. Face-to-face appeals are incredibly effective for fostering short- and long-term political participation, as we have seen, but are also extremely costly.³³² When party resources are limited, it is

330. One could, of course, extend the *Anderson–Burdick* framework to cases involving the major political parties but remain faithful to responsible party government by focusing on burdens placed on the party leaders' ability to speak clearly. While this would be better than rote application of strict scrutiny to any regulation placed on the major political parties, the associational-party path rejects this approach insofar as it would not strengthen the associational life of political parties.

331. See *supra* sections II.B–.C.

332. Donald P. Green & Alan S. Gerber, *Get Out the Vote: How to Increase Voter Turnout* 10, 13, 34–40, 77–79, 94–95 (2004) (comparing the effectiveness and cost of different get-out-the-vote strategies and arguing that door-to-door, in-person canvassing,

reasonable to expect parties to choose cheaper forms of mobilization, such as impersonal mass communication. In fact, campaigns frequently devote far fewer resources to such efforts, despite their broader democratic returns.³³³ In 2008, for example, nearly 60% of the presidential campaign budgets on both sides were spent on advertising.³³⁴

To the degree that it implicates the peer-to-peer efforts at political engagement that are most likely to be undertaken face-to-face, while undermining incentives for candidates to coordinate with state and local parties in that effort, BCRA's requirement that mobilization be done with hard money warrants strict scrutiny under the revised *Anderson-Burdick* test. The central problem is that this aspect of BCRA limits the money available for the most promising path to deepening and broadening political participation and responsive party government. The very requirement that such activities may only be undertaken with hard money and Levin funds, where applicable, in the ordinary case will limit the amount of mobilization undertaken.

Certainly, campaigns that have specific strategic reasons to devote resources to their ground game will find ways to fund it using a combination of hard and soft money. The Obama campaigns, for instance, orchestrated a significant ground game in both 2008 and 2012 while operating under BCRA.³³⁵ The effects of BCRA's constraints on the

even by paid workers, is the "gold-standard mobilization tactic"); Bauer, *The Right to "Do Politics,"* *supra* note 30, at 77–78 (discussing the costs of association building).

333. See, e.g., Steve Phillips, *Opinion, How Democrats Should Spend Their Millions*, *N.Y. Times* (Apr. 17, 2017), <http://www.nytimes.com/2017/04/17/opinion/how-democrats-should-spend-their-millions.html> (on file with the *Columbia Law Review*) (criticizing Jon Ossoff's campaign for spending around 80% of its \$6 million on advertising rather than a face-to-face turnout operation); Steve Phillips, *Opinion, How to Build a Democratic Majority that Lasts*, *N.Y. Times* (Oct. 5, 2016), <http://www.nytimes.com/2016/10/05/opinion/campaign-stops/how-to-build-a-democratic-majority-that-lasts.html> (on file with the *Columbia Law Review*) (praising Representative Keith Ellison for "consistently increas[ing] voter turnout in his congressional district . . . by focusing on personal contact" rather than devoting millions to "[p]aid ads [that] do little to change voter behavior").

334. McKenna & Han, *supra* note 144, at 32.

335. That said, BCRA may still have impacted Obama's strategy (at least in 2012 when he was no longer an outsider) to the degree the campaign often sidestepped state and local parties. Professor Issacharoff has recounted the following regarding his experience as a senior legal advisor to Obama for America in 2012:

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

Issacharoff, *Outsourcing Politics*, *supra* note 4, at 847–48. Contribution caps to parties also limit the ability of political parties to coordinate with civic organizations in the party net-

choices in the average campaign, in which resources are more limited and the payoff of a ground game less clear, however, are likely to be significant.

The *McConnell* Court, it is true, flatly rejected the suggestion that contribution caps limited the resources available to parties, pointing out the ways in which they merely incentivize parties to reach out to more individuals to achieve their fundraising goals. As the Court put it, “[t]he ‘overall effect’ of dollar limits on contributions is ‘merely to require candidates and political committees to raise funds from a greater number of persons.’”³³⁶ On this view, contribution limits are not a burden on the associational life of parties; instead, they promote it by incentivizing parties to expand their donor base.

There are several problems with the *McConnell* Court’s analysis. First, contribution limits may incentivize reaching out to more donors, but they do not incentivize spending on face-to-face mobilization efforts, as opposed to impersonal, media advertising, for example. Second, monetary contributions are a very thin sort of association. This is especially true of donations generated online or through mass mailings insofar as they provide no opportunity to facilitate a two-way street of communication.

Third, and most damningly, it is unquestionably the case that Congress could have adopted far less restrictive alternatives that would have both contained the soft-money problem and maintained, perhaps even incentivized, the growth of the party faithful and richer forms of association. For one, BCRA could have exempted money raised to fund *individualized, face-to-face* forms of campaigning from its definition of federal election activity. Ironically, an early FEC rule turned on this distinction. Unfortunately, rather than exempting personalized voter-registration and get-out-the-vote activities from hard-money limits, the FEC excluded generic letters and prerecorded telephone calls from the statutory definition and thus the hard money restrictions.³³⁷ In other words, it redirected the flow of soft money to impersonal forms of voter engagement utterly incapable of facilitating a two-way street of communication.

Another less burdensome approach would have replaced the cumbersome Levin-fund amendment with an exemption allowing state and local political parties to freely coordinate with existing civic

work in such endeavors without running afoul of contribution limits. See Bauer, *The Right to “Do Politics,”* supra note 30, at 77–79.

336. *McConnell v. FEC*, 540 U.S. 93, 136 (2003) (quoting *Buckley v. Valeo*, 424 U.S. 1, 21–22 (1976)), overruled in part by *Citizens United v. FEC*, 558 U.S. 310 (2010).

337. Cf. *Shays v. FEC*, 528 F.3d 914, 931–32 (D.C. Cir. 2008) (striking down the FEC rule on grounds that, in the absence of a persuasive justification, the FEC’s narrow definition “[ran] directly counter to BCRA’s purpose”).

associations, including churches and unions, *in any face-to-face recruitment efforts*.³³⁸ It is well known that local parties with ties to labor unions or community-based associations tend to have substantial points of intersection with the electorate—knocking on doors, hosting events with elected officials, and boosting turnout.³³⁹

Either option would have been not only less burdensome but also more promising from an associational-party perspective. Both would have nudged the political parties to spend in ways more likely to mobilize a broader electorate (possibly even a more representative one) through the party faithful (including volunteers and state and local parties), thereby creating a variety of opportunities for opening up the two-way street of communication discussed above. Such targeted deregulation is far more promising than approaches that result in unbridled, unlimited contributions—or that raise contribution limits for funding party conventions, headquarters, and litigation. To the degree that any monetary contribution raises some risk of corruption or its appearance (and, greater still, a risk of preferential treatment), surely it would be better to have the contributed money go toward activities that are most likely to produce a counterweight to those interests, such as an engaged electorate?³⁴⁰

To be sure, those who have challenged the constitutionality of the soft-money ban have not focused on these associational burdens. In the most recent challenge, brought by the Republican Party of Louisiana, there was no mention of a desire for expanded funds with which to engage in peer-to-peer mobilization efforts in order to expand its electoral base.³⁴¹ Instead, the demand for unregulated contributions, it argued, would cover costs associated with its website, emails, and mass

338. See Bauer, *The Right to “Do Politics,”* *supra* note 30, at 73 (expressing concern that current rules inhibit coalition building, rather than democratic participation *per se*); cf. Bob Bauer, *Super PACs and Concerns About Political Equality, More Soft Money Hard Law* (Feb. 12, 2016), <http://www.moresoftmoneyhardlaw.com/2016/02/super-pacs-concerns-political-equality/> [<http://perma.cc/Y89V-BCAS>] (“Targeted regulatory relief should be available for other membership-based organizations, and even to candidates when conducting particular voter mobilization activities.”).

339. See Masket, *supra* note 38, at 184; cf. *id.* at 119–20, 180–82 (discussing Congresswoman Maxine Waters’ ties with the New Frontier Democratic Club, “local activists,” and “many church and civic leaders” in South Los Angeles, and her influence over other elections in her district).

340. Cf. *McConnell*, 540 U.S. at 168 (raising the concern that “[b]ecause voter registration, voter identification, GOTV, and generic campaign activity all confer substantial benefits on federal candidates, the funding of such activities creates a significant risk of actual and apparent corruption”).

341. See *Republican Party of La. v. FEC*, 219 F. Supp. 3d 86 (D.D.C. 2016) (containing no mention of funds for peer-to-peer mobilization efforts), *summarily aff’d*, 137 S. Ct. 2178 (2017).

mailings.³⁴² In this regard, its complaint is consistent with the views of state party officials surveyed on the effects of federal campaign finance law, which made little mention of burdens on the sorts of peer-to-peer strategies that increase social capital.³⁴³

An associational-party perspective similarly offers a new measure for assessing the First Amendment burdens placed on political parties by BCRA's requirement that the "services provided during any month by an employee of a State, district, or local committee of a political party who spends more than 25 percent of that individual's compensated time during that month on activities in connection with a Federal election" be undertaken with hard money.³⁴⁴

To the degree this requirement undermines the organizational capacity to build a partisan network with sustained ties to the electorate, it poses a severe constitutional burden. It is well established that a significant weakness of the contemporary American party system is the seasonal quality of local and state party associations—measured in terms of, *inter alia*, the number of full-time party staff between election seasons.³⁴⁵ The infirmity of state and local parties is critical because they serve as the national parties' primary link to the electorate. As Justice Scalia astutely noted in his dissent from the Court's decision to strike down party patronage, a traditional instrument of party building and discipline, the need for low-level party workers is not "obsolete":

[Mass media has] supplemented but not supplanted personal contacts. Certainly they have not made personal contacts unnecessary in campaigns for the lower level offices that are the

342. Plaintiffs' Motion for Summary Judgment at 9–28, *Republican Party of La.*, 219 F. Supp. 3d 86 (No. 15-cv-01241), 2016 WL 1242607; see also Verified Complaint for Declaratory and Injunctive Relief at 29–33, *Republican Party of La.*, 219 F. Supp. 3d 86 (No. 15-cv-01241) (on file with the *Columbia Law Review*). In only one paragraph does the party allege a desire to engage in voter-identification activity, again by mail. *Id.* at 33.

343. Professor Raymond La Raja and Jonathan Rauch, similarly, focus on the comparative advantage of state and local parties with respect to mass mailers. La Raja & Rauch, *supra* note 5, at 5, 15–18 (emphasizing that state parties qualify for the nonprofit rate at the U.S. Postal Service, unlike Super PACs). Their survey did not specifically ask how often state parties engaged in peer-to-peer strategies for mobilization, in person or by email. This would appear to be a glaring oversight given that they argue that "state parties are . . . the tissue of civic and cultural organizations that creates social capital by building connections, trust, and cooperation across diverse individuals and groups." *Id.* at 5; see also *id.* at 7, 20–21 (presenting survey data). It is difficult to see how mass mailers produce social capital.

344. 52 U.S.C. §§ 30101(20)(A)(iv), 30125(b) (2012).

345. Douglas D. Roscoe & Shannon Jenkins, *Changes in Local Party Structure and Activity, 1980–2008*, in *The State of the Parties: The Changing Role of Contemporary American Parties* 228, 237 (John C. Green et al. eds., 2014) (arguing the intermittent character of local party organizations results from the fact that they "mainly are useful [to candidates] in the period immediately preceding elections and are less critical to candidates—or anyone else—during the interim intervals").

foundations of party strength, nor have they replaced the myriad of functions performed by party regulars not directly related to campaigning.³⁴⁶

Once again, some might object that the requirement that state and local party workers who spend more than 25% of their time campaigning for federal elections be paid out of hard money has positive associational effects by creating an incentive to recruit volunteers. Surely, a volunteer-based political party is likely to have broader connections to the electorate than a professional party. Moreover, a volunteer-based party will have broader democratic repercussions insofar as initial forays into politics, such as volunteering to canvass a neighborhood for a campaign, are known to lead to even more substantial political activity.

Regulations that incentivize the use of volunteers unquestionably have distinct associational benefits for all the previously stated reasons. Encouraging volunteerism is critical: Initial forays into electioneering are likely to breed or sustain activism beyond individual campaigns and thus feed the desired two-way street of communication, which depends on active and sustained membership within the party network.

That said, regulations that incentivize recruiting volunteers while undercutting the nodes within the formal party that are most capable of orchestrating that volunteerism impose significant First Amendment burdens. It is unquestionably difficult to organize volunteers without paid staff; moreover, it does not serve any larger democratic goal to insist that candidates reinvent a participatory network each cycle.

Finally, from an associational-party perspective, BCRA's requirement that issue ads be undertaken with hard money no longer seems constitutionally suspect. When the path to responsible governance does not lie in the clarity of the message but in the breadth and depth of the network, the inclusion of issue ads within BCRA's regulatory purview is a much less significant First Amendment burden. The party's freedom of speech is adequately preserved by its ability to use hard money to speak *independently*.³⁴⁷ By contrast, when the route to good governance is understood to run through the party brand, it is the burdens on the party's ability to speak that are most troubling. It is BCRA's provision that issue ads must be purchased with hard money that raises the most alarm insofar as it undermines the party's capacity to disseminate its brand.³⁴⁸

It should now be clear how the doctrinal proposal being offered in this Essay is significantly different from the current state of the party

346. *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 105 (1990) (Scalia, J., dissenting).

347. *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 615–18 (1996); accord *McConnell v. FEC*, 540 U.S. 93, 171 (2003) (suggesting that when a political party has an alternative avenue of expression available to it, the burdens are less severe), overruled in part by *Citizens United v. FEC*, 558 U.S. 310 (2010).

348. *McConnell*, 540 U.S. at 352 (Rehnquist, C.J., dissenting).

jurisprudence. Simply put, the proposal being made is that the *Anderson–Burdick* framework be extended to all cases involving challenges to regulatory burdens placed on the major political parties, and that courts should allocate First Amendment rights in ways that prevent regulation from undermining the socioeconomic and intergenerational breadth or the interpersonal depth of all partisan networks. The current doctrinal preoccupation with shoring up party elites and their ability to define and control their distinct political brand, in other words, would be replaced by a focus on how challenged regulations might impact a party's capacity to mobilize broad and representative political participation or to facilitate a two-way street of information transmission through party activists.

C. *From Here to There: Assessing Probabilities of Doctrinal Change*

One remaining question is whether any of this is possible. Convincing the Court to bring consistency to its doctrine is an easy sell; persuading it to abandon the theoretical underpinnings of its doctrine, less so. Still, there may be more opportunity than usual to do so. The associational-party path to responsive governance fits more comfortably within the First Amendment tradition than the theoretical alternatives the Supreme Court has rejected in the past.³⁴⁹ For one, it speaks in the traditional register of rights. For another, it is premised on a commitment shared by both wings of the current Supreme Court that citizen participation breeds democratic responsiveness and accountability.

The centrality of political participation to our republican form of government is a leitmotif in the Court's decisions relating to parties and elections. In *California Democratic Party v. Jones*, Justice Kennedy asserted that “[e]ncouraging citizens to vote is a legitimate, indeed essential, state objective; for the constitutional order must be preserved by a strong, participatory democratic process.”³⁵⁰ More recently, Chief Justice Roberts explained:

There is no right more basic in our democracy than the right to participate in electing our political leaders. Citizens can exercise that right in a variety of ways: They can run for office themselves, vote, urge others to vote for a particular candidate, volunteer to work on a campaign, and contribute to a candidate's campaign.³⁵¹

349. See Stephanopoulos, *supra* note 100, at 288, 291–98 (noting the Supreme Court's commitment to an individual-rights-based approach and its unwillingness to reorganize doctrine around competitiveness).

350. 540 U.S. 567, 587 (Kennedy, J., concurring) (striking down the state's blanket primary as a threat to the party leadership's control of its message).

351. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1440–41 (2014) (arguing “a central feature of democracy” is the notion that “candidates who are elected can be expected to be responsive to [the] concerns” of those who contributed to their campaigns) (citing *Citizens United v. FEC*, 558 U.S. 310, 360 (2010)). Professors Fishkin and Gerken make a

Nor is the motif a new one. In *FEC v. Massachusetts Citizens for Life, Inc.*, a case involving a challenge to rules related to corporate election spending, the Court's decision to strike down certain federal restrictions on corporate political spending was driven, in part, by a concern that complying with the challenged regulations might lead some civic groups to "decide[] that the contemplated political activity was simply not worth it."³⁵²

Equally relevant, the Court routinely assumes—perhaps a little too naively—that democratic participation leads to political responsiveness. Justice Kennedy, in particular, is prone to emphasize the need for First Amendment protections at the nexus between political participation and legislative responsiveness.³⁵³ In fact, this nexus appears to have motivated his decision to write separately in *Nevada Commission for Ethics v. Carrigan*, a case involving a challenge to a statute that mandated legislative recusals on matters in which a reasonable person would think the legislator had a material interest through a personal connection.³⁵⁴ Justice Kennedy's reservations about the premise underlying Nevada's statute are revealing:

As a general matter, citizens voice their support and lend their aid because they wish to confer the powers of public office on those whose positions correspond with their own. That dynamic, moreover, links the principles of participation and representation at the heart of our democratic government. Just as candidates announce positions in exchange for citizens' votes, so too citizens offer endorsements, advertise their views, and assist political campaigns based upon bonds of common purpose. These are the mechanisms that sustain representative democracy.³⁵⁵

For all these reasons, the associational-party path to responsive governance fits comfortably within the First Amendment tradition. The value of common ground should not be underestimated when it comes

fair point that *McCutcheon* offers an odd and elitist version of democratic participation and influence insofar as it frames donors as constituents to which responsiveness is in order, despite the fact that those donors typically live outside the district. Fishkin & Gerken, *supra* note 30, at 203.

352. 479 U.S. 238, 255, 263 (1986) (Brennan, J.) (holding unconstitutional a federal law that prohibited a voluntary political association from using its treasury funds to finance a pro-life voter guide simply because of the organization's corporate form and noting "[v]oluntary political associations do not suddenly present the specter of corruption merely by assuming the corporate form").

353. See, e.g., *McConnell*, 540 U.S. at 297 (Kennedy, J., dissenting in part) ("It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness.").

354. 564 U.S. 117, 129 (2011) (Kennedy, J., concurring).

355. *Id.* at 131–32.

to proposals for doctrinal change, especially when some members of the Court may already be wary of the path it has forged.³⁵⁶

To conclude, the proposed extension of the *Anderson–Burdick* framework to cases involving the First Amendment rights of the major political parties has several virtues. First, it provides an eminently plausible way of working within the contours of existing First Amendment doctrine to underwrite those segments of the partisan network that already enhance opportunities for social contact between party elites and the broader electorate and their associated virtues. Second, it offers to bring coherence to the doctrine, and it resonates with existing commitments of a doctrine that the Court itself has devised to serve broader democratic goals of responsiveness and accountability. In that regard, it provides a relatively easy point of entry for doctrinal reform. Finally, the extension demonstrates what a commitment to incremental change looks like as well as how the theory could inform campaign finance reform should that topic return to the political agenda.

CONCLUSION

The Supreme Court has long granted political parties constitutional protection from government intrusion in recognition of their central role in promoting democratic accountability. Unfortunately, it has done so on the basis of a set of theoretical assumptions about how to induce responsive and responsible governance that do not hold true in contemporary American politics. Worse still, this attachment to responsible party government has crowded out other plausible paths to self-governance.

This Essay has argued that the Court's recent denials of certiorari in important party cases have granted a much-needed reprieve—an opportunity to pause to consider an alternative path to responsive and responsible governance. In doing so, it has explained the basis for believing that an alternative path exists once we focus on political parties as civic associations rather than speakers. More specifically, it has argued that reinforcing the chains of democratic accountability lies in the promotion of integrated, cross-class partisan networks.

Achieving responsive and accountable governance by strengthening the breadth and depth of partisan networks will be difficult. The changes in the structure of American society since the 1950s are here to stay. The route to political power no longer runs through veterans' groups, the Masonic Lodges, or the Klan, and few want the key to political power to return to sex-segregated and racially exclusionary men's clubs. Socioeconomic segregation in American life is also fairly entrenched.

356. See *supra* notes 102–113 and accompanying text.

Nevertheless, given the known failures of responsible party government, an associational approach presents the only viable way to induce responsive and accountable governance today. It is theoretically optimal, both as a guide to structuring First Amendment doctrine and as a measure for future regulatory reforms—even as it does not guarantee a cure to all our democratic ills. And it is, therefore, essential to begin to identify those opportunities to reshape existing partisan networks given the world in which we live.

Embracing the associational-party framework is a necessary component of any multidimensional approach to addressing the democratic dysfunctions that pervade U.S. politics. Democracy is an aspiration that requires ongoing work. The goal at any given moment is to attain more, rather than fewer, of these democratic goods. Party reform will inevitably be only a partial solution. The parties' incentives to accurately inform ordinary citizens are limited, and their interests in being held accountable are even weaker. If political parties were the only piece in the self-governance puzzle, the project would likely be doomed to fail. Thankfully, there are other institutions—most importantly, civic associations and the press. Each has mixed incentives, but each can also compensate for the limits of the others, and therein lies a basis for hope. To the degree the sorts of party reforms advocated for here are married to efforts to revitalize civic associations for ordinary Americans, there is significant room for optimism.