

## THE PROBLEM OF IRRESPONSIBLE PARTY GOVERNMENT

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## INTRODUCTION

American party politics may be as nationally competitive as they have ever been, but at the same time they are perhaps as unresponsive to average citizens as they have been in a long time. It is this paradox that Professor Tabatha Abu El-Haj creatively interrogates in her essay, *Networking the Party: First Amendment Rights and the Pursuit of Responsive Party Government*.<sup>1</sup>

Of course, the major political parties are the subject of constant academic criticism these days, but Professor Abu El-Haj's critique of today's parties is distinctive. Contemporary criticism of the parties largely targets what most see as the excessive partisanship running rampant in American politics. This "hyperpartisanship" spills off many ugly byproducts, including legislative gridlock, democratic unresponsiveness, and toxic antipathy among partisans.<sup>2</sup> Professor Abu El-Haj recognizes all these symptoms of hyperpartisanship,<sup>3</sup> but unlike most critics she identifies and focuses on the parties' withdrawal from traditional associational politics as the most noteworthy cause.<sup>4</sup> The parties, as Professor Abu El-Haj describes, have increasingly become elite-directed, campaign finance-focused vehicles driven overwhelmingly by ideological missions.<sup>5</sup> What have gradually faded from party politics are thick social networks that once undergirded the major parties, in which "volunteers, rather than donors, take the lead."<sup>6</sup> The consequence, in Professor Abu El-Haj's view, has been that the parties spun off toward the ideological extremes,

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1. Tabatha Abu El-Haj, *Networking the Party: First Amendment Rights and the Pursuit of Responsive Party Government*, 118 *Colum. L. Rev.* 1225 (2018).

2. See Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116 *Mich. L. Rev.* 351, 411–18 (describing hyperpartisanship's negative consequences).

3. See Abu El-Haj, *supra* note 1, at 1226–27 (listing the ways the "United States is failing to live up to its intended democratic function").

4. See *id.* at 1231 (arguing that "reforming political parties *as associations*" is the way to solve the current political crisis).

5. See *id.* at 1230 ("To the extent there is accountability today, it is almost entirely to party donors and ideological groups.").

6. *Id.* at 1269.

unmoored from the practical concerns and centrism of regular people who used to constitute the heart of both parties.<sup>7</sup>

This Response considers Professor Abu El-Haj's diagnosis of today's party politics and her proposals for using First Amendment law to promote what she calls the "associational-party perspective."<sup>8</sup> In Part I, I describe Professor Abu El-Haj's indictment of the traditional "responsible party government" model and her proposed new doctrinal approach to "sustain and build partisan networks more capable of producing democratic responsiveness and accountability."<sup>9</sup> Part II evaluates the efficacy of her proposed solutions.

## I. RESPONSIBLE PARTY GOVERNMENT AND THE ASSOCIATIONAL PARTY

### A. *The Failure of Responsible Party Government*

Professor Abu El-Haj's principal worry is irresponsible party government: the chronic nonresponsiveness of the major parties to majority opinion in today's American politics. She—along with Professors Ganesh Sitaraman, Bertrall Ross, Nick Stephanopoulos, and Kate Andrias, among others—introduces to legal scholarship the persuasive wealth of political science research demonstrating that the American political system no longer represents the preferences of average Americans.<sup>10</sup> This work confirms popular suspicions that the parties have been captured by a wealthy donor class from both ends of the ideological spectrum.<sup>11</sup>

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7. See *id.* at 1230 (describing how the major political parties are currently polarized and largely unaccountable to the electorate).

8. *Id.* at 1233.

9. *Id.* at 1235.

10. See Kate Andrias, *Separations of Wealth: Inequality and the Erosion of Checks and Balances*, 18 U. Pa. J. Const. L. 419, 421 (2015) ("If we want to understand our current predicament . . . we need to focus not only on partisanship but also on the problems of concentrated wealth and its organization to achieve political ends."); Bertrall L. Ross II & Su Li, *Measuring Political Power: Suspect Class Determinations and the Poor*, 104 Calif. L. Rev. 323, 329 (2016) (using empirical research to demonstrate that the Supreme Court's suspect class jurisprudence has relied on flawed assumptions about political power in the United States); Ganesh Sitaraman, *The Puzzling Absence of Economic Power in Constitutional Theory*, 101 Cornell L. Rev. 1445, 1448 (2016) ("In a battery of studies over the last decade, political scientists have confirmed populist suspicions and demonstrated that economic elites dominate the American political system."); Nicholas O. Stephanopoulos, *Political Powerlessness*, 90 N.Y.U. L. Rev. 1527, 1534–35 (2015) (describing empirical analyses used to better measure political powerlessness in order to improve suspect class jurisprudence); Bertrall L. Ross II & Terry Smith, *Minimum Responsiveness and the Political Exclusion of the Poor*, *Law & Contemp. Probs.*, Fall 2009, at 197, 199 ("[I]n the American two-party competition model, both parties have incentives to appeal to median-swing voters at the expense of marginalized group interests.").

11. See Larry M. Bartels, *Unequal Democracy: The Political Economy of the New Gilded Age 2* (2008) ("[T]he political process has evolved in ways that seem likely to reinforce the advantages of wealth."); Martin Gilens, *Affluence and Influence: Economic Inequality and Political Power in America 1–2* (2012) ("Th[e] ideal of political equality is

However, Professor Abu El-Haj presents the overarching problem with a different emphasis and normative direction, as she focuses on the dysfunction of the major parties.<sup>12</sup>

Election law scholars and other legal commentators have criticized today's hyperpartisanship for years now, but Professor Abu El-Haj is less concerned about hyperpartisanship than with the concomitant "hollowing out" of the parties. The major parties have disassociated from their rank-and-file membership and are increasingly dominated by social and economic elites motivated largely by intense ideological preferences.<sup>13</sup> As she explains, "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."<sup>14</sup> The parties, in her view, have polarized because they no longer respond to regular Americans and instead have been pulled to the ideological extremes by wealthy campaign contributors and activist elites. "Donors and ideological partisans," as she puts it, "have become the target audience for party brands, and concern for the preferences of the general electorate is largely coincidental."<sup>15</sup>

An irony, Professor Abu El-Haj points out, is that our modern parties are exactly what constitutional law and political science have prescribed for effective democracy.<sup>16</sup> A 1950 American Political Science Association (APSA) report on the political parties, issued by the era's leading political scientists, proposed a theory of responsible party government that was eventually embraced by courts and constitutional law.<sup>17</sup> The APSA report reasoned that the parties should be ideologically well differentiated and firmly controlled by party leaders who would then offer voters a distinct choice between party nominees on election day.<sup>18</sup> The parties would therefore cultivate clear ideological brands that would enable voters to match their own preferences and assign retrospective accountability for policy outcomes. Voters, who consistently display only a modest

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perhaps impossible to fully achieve in the face of economic inequality . . . [U]nder most circumstances, the preferences of the vast majority of Americans appear to have essentially no impact on which policies the government does or doesn't adopt."); Jacob S. Hacker & Paul Pierson, *Winner-Take-All Politics: How Washington Made the Rich Richer—and Turned Its Back on the Middle Class* 8 (2010) (describing how both major political parties cater to "America's superrich").

12. See Abu El-Haj, *supra* note 1, at 1243–45 (describing how the political system has failed to "tether government officials to the preferences of their constituents" and produced parties that are "remarkably ineffective at governing").

13. See *supra* note 11 and accompanying text.

14. Abu El-Haj, *supra* note 1, at 1267.

15. *Id.* at 1252.

16. See *id.* at 1229–30 ("[T]he debate in legal-academic and policy circles has been driven by fidelity to responsible party government despite its well-documented failures . . .").

17. See *id.* at 1237.

18. See *id.*

interest and sophistication about politics, could better effectuate their preferences through elections if only the parties were ideologically distinct and their political brands clearly defined.<sup>19</sup>

The emphasis on ideologically distinctive parties made sense at the time. The major parties during the postwar period were notoriously ambiguous, with enormous ideological overlap that made it difficult to characterize one party as more liberal or conservative than the other.<sup>20</sup> Neither party presented a coherent ideology or even a reasonably well-defined package of policy positions.<sup>21</sup> Jim Crow Dixiecrats dominated the one-party Democratic South but were more conservative than their Democratic and Republican counterparts to the North.<sup>22</sup> Northeastern Republicans represented more liberal Yankee constituencies that were far more progressive than Southern Democrats on race and foreign policy.<sup>23</sup> Both parties were thus a muddle, riven internally by ideological and regional disagreements, a patchwork of local parties that sorted out their differences mainly during national elections.

Over time, though, the major parties changed considerably. The Civil Rights movement of the 1960s produced the Voting Rights Act and began the ideological realignment of both parties.<sup>24</sup> The Democrats slowly became the party of ideological liberals and Republicans the party of ideological conservatives.<sup>25</sup> Southern Democrats defected to the Republican Party.<sup>26</sup> Northeastern liberals gradually shifted from the Republican to the Democratic Party.<sup>27</sup> By the 1990s, the parties became ideologically cohesive without the internal tensions of the midcentury.<sup>28</sup>

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19. See *id.* at 1238 (describing the responsible party government theory developed in the 1950 APSA report).

20. See Hahrie Han & David W. Brady, *A Delayed Return to Historical Norms: Congressional Party Polarization After the Second World War*, 37 *Brit. J. Pol. Sci.* 505, 509–12 (2007) (describing “an unprecedented level of overlapping voting [among Republicans and Democrats] in both the House and the Senate in the years immediately after the Second World War”).

21. See *id.* at 512–16 (“During the 1950s, the distinctions between [the] parties on key national issues like race and the role of government were not so clear.”).

22. See *id.* at 517 (explaining how Southern Democrats were pulled in a conservative direction by their districts even as the national party was becoming more liberal).

23. See *id.* at 515 (“[V]oters with liberal views on [race] issues continued to vote for Republicans (and vice versa) even beyond the 1960s.”).

24. See Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 *Yale L.J.* 804, 819–20 (2014) (describing how the Civil Rights era, and in particular the Voting Rights Act, “launched into motion” forces that would sort and polarize the Democratic and Republican parties).

25. See *id.*

26. See *id.*

27. See *id.*

28. See *id.* See generally Matthew Levendusky, *The Partisan Sort: How Liberals Became Democrats and Conservatives Became Republicans* 1–11 (2009) (describing the mechanisms through which voters have sorted between the two major parties along ideological lines).

The result is that the major parties now represent the ideological differentiation and partisan polarization that the APSA report urged in 1950.<sup>29</sup> According to Professor Abu El-Haj, this is a shame. She argues that the APSA recommendations on responsible party government have been largely achieved but have not yielded the promised benefits for democratic government.<sup>30</sup> As Professors Jacob Hacker and Paul Pierson quip, the APSA committee coveted responsible party government but “[w]hat they got—along with the rest of us—was *irresponsible* party government.”<sup>31</sup>

Making matters worse is the replacement of the party organization with television politics and thus the new importance of campaign finance to pay for advertising.<sup>32</sup> Of course, money has always been important in politics, but television ads were particularly expensive, as were the associated media consulting and production costs.<sup>33</sup> The political parties of the 1960s, near the start of the television age, were equipped for a different style of retail politics, not the fundraising- and media-focused campaigning then coming into importance.<sup>34</sup> Candidates therefore needed to raise money elsewhere for their advertising campaigns and reached out directly to private donors to fund them.<sup>35</sup> Party politics thus shifted dramatically in focus and operation from the 1960s to the 1990s.<sup>36</sup> Donors became the candidates’ primary audience, in Professor Abu El-Haj’s opinion, far ahead of regular citizens.<sup>37</sup> And again, the empirical literature thoroughly substantiates the suspicion that politicians hew

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29. See Morris P. Fiorina, Parties, Participation, and Representation in America: Old Theories Face New Realities, *in* Political Science: The State of the Discipline 511, 521–23 (Ira Katznelson & Helen V. Milner eds., 2002) (“[T]hose who read [the APSA report] typically report a response of the following sort: ‘Gee, a lot of what those guys wanted actually has happened.’”).

30. See Abu El-Haj, *supra* note 1, at 1243 (“[T]he Democratic and Republican parties today are closer than ever before to the ideal called for by the APSA Committee on Political Parties. Yet, responsible party government has not emerged.” (footnote omitted)).

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

32. See John H. Aldrich, Why Parties? The Origin and Transformation of Political Parties in America 270 (1995); see also Anthony J. Gaughan, The Forty-Year War on Money in Politics: Watergate, FECA, and the Future of Campaign Finance Reform, 77 *Ohio St. L.J.* 791, 811–13 (2016).

33. See Gaughan, *supra* note 32, at 811–13.

34. See Aldrich, *supra* note 32, at 269–73.

35. See Gaughan, *supra* note 32, at 812 (explaining that “[c]andidates have been on a fundraising treadmill” since the emergence of modern, advertising-based political campaigns).

36. See Abu El-Haj, *supra* note 1, at 1257 (“The national committees of the two major political parties, for example, largely function as vessels through which to collect and distribute donations.”).

37. See *id.* at 1264–65.

more closely to the preferences of campaign donors and party activists than regular voters.<sup>38</sup>

The parties have therefore been hollowed out as political associations. Professor Abu El-Haj laments the decline of participatory politics that has followed from this shift. She explains that the “urban machine politics that depended on the confluence of relatively strong personal ties and a formal organization bound by patronage is long gone.”<sup>39</sup> This hollowing out of the major parties, for Professor Abu El-Haj, is critical to understanding their modern dysfunctions. The disconnection of the major parties from ordinary folks, the so-called party faithful, has meant that the parties lost touch with everyday America.<sup>40</sup> The parties are responsive mainly to the politician and donor classes who largely come from the socioeconomic elite rather than “individuals with more typical experience 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.”<sup>41</sup>

Professor Abu El-Haj’s special contribution here is linking our hollowed-out parties to the overarching problem of democratic nonresponsiveness. Although others have cited the same literature on the parties’ detachment from the concerns of regular citizens, Professor Abu El-Haj connects this depressing trend to the diminishment of mass participation in the major parties.<sup>42</sup> As she reasons it, “[T]he heyday of membership-based routes to political power was also the New Deal period during which federal policy was significantly more attentive to the needs of middle-class Americans.”<sup>43</sup> Bolstering democratic accountability therefore “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.”<sup>44</sup> Professor Abu El-Haj cites the extensive empirical literature on social networks and political participation to argue that “[r]elationships and social networks, far more than ideology and belief, drive political recruitment and sustain political activism.”<sup>45</sup> Along these lines, she champions the rebuilding of the major parties as political associations that would once again embody these values and social ties. At the center of this party-associational path, Professor Abu El-Haj advocates “cultivating, strengthening, and broadening social ties

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38. See, e.g., Stephanopoulos, *supra* note 10, at 1577–79, 1595 (finding, in accord with prior studies, “that the poor are relatively powerless at both the federal and state levels,” meaning that policymakers are responsive only to the wealthy).

39. Abu El-Haj, *supra* note 1, at 1256.

40. See *id.* at 1267–68.

41. *Id.* at 1266.

42. See *id.* at 1265–67.

43. *Id.* at 1270–71.

44. *Id.* at 1232.

45. *Id.* at 1259 & n.162.

within partisan networks [as] an alternative, and underappreciated, path to responsive and accountable governance.”<sup>46</sup>

What’s distinctive about Professor Abu El-Haj’s perspective is that she, unlike other election law scholars, does not look to the party leadership or greater electoral competition as an answer. Viewing the same partisan dysfunction, Professor Richard Pildes calls for further deregulation of campaign finance to empower party leaders and other elites with greater leverage over the party coalition to steer it back to center.<sup>47</sup> Pildes, in this vein, believes that partisan competition would induce party leaders toward ideological moderation if only they had more control over party activists and outside groups such as Super PACs.<sup>48</sup> But Professor Abu El-Haj argues that the larger problem is that wealthy donors with extreme ideological preferences already have outsized influence over party politics and might simply dominate party leaders even further if campaign finance deregulation made those leaders yet more reliant on their money.<sup>49</sup> Instead, as she puts it, “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.”<sup>50</sup>

Unlike Pildes, Professor Abu El-Haj does not assume party leaders have natural incentives toward moderation and partisan competitiveness. Reforming the parties, then, requires more than simply empowering party leaders. As a consequence, courts and scholars have wrongly placed all their eggs in the basket of responsible party government, which is a “colossal mistake” that “has not panned out.”<sup>51</sup> Even as the parties became more competitive with each other in many respects over the last fifty years, Professor Abu El-Haj argues that they actually became less responsive to regular Americans and even their party faithful because the changing internal dynamics of the parties shifted too much influence into the hands of the politicians and donor class.<sup>52</sup>

For this reason, Professor Abu El-Haj advocates an “associational-party perspective” that accepts parties “for what they are—associations dominated by self-interested political elites”—but also seeks to open parties to “the political participation of ordinary citizens as agents rather than consumers.”<sup>53</sup> Rather than conceiving of parties mainly as ideological speakers with a passive audience of voters, Professor Abu El-Haj

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46. *Id.* at 1250.

47. See Pildes, *supra* note 24, at 836–45 (describing recommendations for empowering political parties through campaign finance deregulation).

48. See *id.* at 828–33 (“Party-based contributions to campaigns are a force for moderation compared to individual contributions.”).

49. See Abu El-Haj, *supra* note 1, at 1282–83.

50. *Id.* at 1284.

51. *Id.* at 1230.

52. See *supra* note 5 and accompanying text.

53. Abu El-Haj, *supra* note 1, at 1233.

argues for exploring “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.”<sup>54</sup> It is necessary to change the inputs and influences on party leadership, which in turn changes the party leadership, to reform the parties. The theory of responsible party government, in her view, wrongheadedly trusted party leaders and party competition to produce responsiveness, while an associational-party perspective makes no such assumption. Professor Abu El-Haj would reform the party from within by democratizing its internal composition.<sup>55</sup>

B. *Constitutional Law and the Associational Party*

What does this have to do with constitutional law? Professor Abu El-Haj correctly points out that a theory of responsible party government “underpins the Court’s jurisprudence on the First Amendment rights of political parties.”<sup>56</sup> Most notably, in disputes between the party membership and leadership over party affairs, the Court has sided with the leadership as the guardian of a political party’s ideological and political brand.<sup>57</sup> This guardianship encompasses control over nomination processes and party organization against challenges from rank-and-file members, candidates, and government regulation. These decisions assume, sometimes explicitly, that the leadership will position the party to compete electorally and can therefore be trusted to strategically balance the party’s ideological interests against the electorate’s preferences.<sup>58</sup> But Professor Abu El-Haj argues that this judicial bet on the party leadership has proved to be “fool’s gold” that fails to produce accountability.<sup>59</sup>

Instead of doubling down on party competition and responsible party government, Professor Abu El-Haj proposes that courts alter First Amendment doctrine to “enhance opportunities for social contact between party elites and the broader electorate.”<sup>60</sup> In cases involving regulation of parties, she would deemphasize the party leadership’s

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54. *Id.* at 1232.

55. See *id.* at 1254–55 (“While responsible party government adopted a relatively formalist conception of the party as its officers, the 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.”).

56. *Id.* at 1229.

57. See, e.g., Michael S. Kang, *The Hydraulics and Politics of Party Regulation*, 91 *Iowa L. Rev.* 131, 139 (2005) (“[T]he Court has been excessively solicitous of the leaders of the major parties and thus suppressed political vitality in American politics by striking down regulations that would have helped to democratize the process.”); Nathaniel Persily, *Toward a Functional Defense of Political Party Autonomy*, 76 *NYU. L. Rev.* 750, 752 (2001) (“The Court has been quite aggressive in protecting parties’ rights to define their primary electorate . . .”).

58. See Abu El-Haj, *supra* note 1, at 1252.

59. *Id.*

60. *Id.* at 1286.



control of the party brand by having courts weigh any effect on the parties' "capacity to foster deep and wide social ties to a representative electorate."<sup>61</sup> She would have courts complicate the traditional First Amendment analysis of the party as speaker juxtaposed against the state as regulator by instead incorporating an assessment of how regulation affects the capacity of regular voters to engage the parties.

Specifically, Professor Abu El-Haj suggests an extension of *Anderson–Burdick* balancing—used by courts to weigh regulation mainly of election administration—to “all manner of political party regulations,” including campaign finance law.<sup>62</sup> To illustrate her proposal, she applies it to the Court’s decision in *McConnell v. FEC*<sup>63</sup> to uphold the provision of the Bipartisan Campaign Reform Act (BCRA) that banned party “soft money.”<sup>64</sup> The amount of soft money skyrocketed during the 1990s to the point that it approached half of national party fundraising before it was banned in 2002.<sup>65</sup> Unrestricted soft money to the national party committees, sometimes in million-dollar denominations, raised major concerns about campaign finance corruption and undue influence over party actors. The Court in *McConnell* upheld the federal soft-money ban on these grounds.<sup>66</sup> But soft money also funded, because of legal requirements about how it was spent, grassroots party activities at the state and

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61. *Id.* at 1288.

62. *Id.* at 1286. Under the *Anderson–Burdick* test, courts weigh the injury to voters’ First and Fourteenth Amendment rights against “the precise interests put forward by the State as justifications for the burden imposed by its rule,” taking into consideration “the extent to which those interests make it necessary to burden the plaintiff’s rights.” *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214 (1986)).

63. 540 U.S. 93 (2003), overruled in part by *Citizens United v. FEC*, 558 U.S. 310 (2010).

64. See Abu El-Haj, *supra* note 1, at 1293–96; see also *McConnell*, 540 U.S. at 122–26, 146–47 (upholding BCRA’s restrictions on soft money). “Soft money is collected outside the usual strictures of the federal campaign regulation[s] . . . [governing] express advocacy. The FEC originally authorized the collection of soft money for use mainly on ‘party building’ activity, including voter registration, get-out-the-vote activities, and general administration, rather than for federal electioneering.” Michael S. Kang, *The Brave New World of Party Campaign Finance Law*, 101 *Cornell L. Rev.* 531, 586 (2016) [hereinafter Kang, *Brave New World*] (footnote omitted). However, the major party committees soon exploited this interpretation and used soft money to fund “sham issue advertising” that closely resembled “hard money” electioneering. See Kang, *Brave New World*, *supra*, at 586–87.

65. See Michael J. Malbin, *Political Parties Under the Post-McConnell Bipartisan Campaign Reform Act*, 3 *Election L.J.* 177, 177 (2004) (“The six major party national committees raised almost \$500 million in soft money in 2001–2002. This was more than 40% of their total receipts.”); see also *Bipartisan Campaign Reform Act of 2002*, Pub. L. No. 107-155, § 101, 116 Stat. 81, 82–86 (codified as amended at 52 U.S.C. § 30125 (Supp. IV 2017)) (enacting a ban on political parties raising soft money).

66. See *McConnell*, 540 U.S. at 143.

local levels. When BCRA banned soft money, funding for these activities dried up.<sup>67</sup>

Sensitive to this type of effect on parties as associations, Professor Abu El-Haj believes that *Anderson–Burdick* balancing would focus on two new critical questions: (1) “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 (2) “whether it otherwise undermines the party’s organizational stability and coalition-building capacity.”<sup>68</sup> She illustrates how First Amendment law omits consideration of these questions, instead focusing on the usual corruption and expressive-interest analysis.<sup>69</sup> Although Professor Abu El-Haj cagily stops short of arguing *McConnell* should have struck down the soft-money ban, she demonstrates that *Anderson–Burdick* balancing, as she conceives it, leads to a constitutional analysis that “is significantly different from the current state of the party jurisprudence.”<sup>70</sup>

## II. WHAT CAN AND SHOULD COURTS DO?

Professor Abu El-Haj’s rich diagnosis of the problems with today’s parties—that is, capture by wealthy donors and ideological extremists, disconnection from regular voters, and organizational hollowing out—is almost undeniable, but I am less sure about her proposals to fix them. To be fair, today’s major parties present deep-rooted problems that are difficult to fix. But that’s partially the point—many of the changes to the parties over the past fifty years have a broad historical arc that transcends the Court’s First Amendment case law and therefore are not easy to alter through a new judicial approach.

First, the diagnosis. Professor Abu El-Haj is clearly correct that today’s major parties are very different from the political associations they were fifty years ago. Parties have always served as vehicles for politicians to coordinate with like-minded voters and activists. For most of American history, parties were mass-membership organizations of one sort or another that sprang into action during elections to mobilize

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67. See Kate Andrias, *Hollowed-Out Democracy*, 89 N.Y.U. L. Rev. Online 48, 48–50 (2014), [http://www.nyulawreview.org/sites/default/files/pdf/nyulawreviewonline-89-48-andrias\\_0.pdf](http://www.nyulawreview.org/sites/default/files/pdf/nyulawreviewonline-89-48-andrias_0.pdf) [<https://perma.cc/ATX9-GWCS>] (criticizing the “hollowed-out” parties and noting the larger absence of participatory institutions); Joseph Fishkin & Heather K. Gerken, *The Party’s Over: McCutcheon, Shadow Parties, and the Future of the Party System*, 2014 Sup. Ct. Rev. 175, 204 (lamenting the deterioration of the parties’ role in democratic mobilization and engagement); Samuel Issacharoff, *Market Intermediaries in the Post-Buckley World*, 89 N.Y.U. L. Rev. Online 105, 109–10 (2014), <http://www.nyulawreview.org/sites/default/files/pdf/nyulawreviewonline-89-105-issacharoff.pdf> [<https://perma.cc/LE29-9YGJ>] (arguing that state-level party infrastructure no longer exists and must be “created on the fly” for national campaigns).

68. Abu El-Haj, *supra* note 1, at 1293.

69. See *id.* at 1291–93, 1298–99.

70. *Id.* at 1298–99.

volunteers and voters.<sup>71</sup> Along with newspapers and other print media, party organizations communicated information to voters and bonded regular citizens to the party ticket through the face-to-face relationships that Professor Abu El-Haj celebrates. She is dead-on about the disappearance of these thick networks of party relationships between regular folks and party officials and politicians. As she puts it aptly, “For the average voter, computer-generated requests for donations have replaced the ward boss as the personal face of the party.”<sup>72</sup>

But why has this happened? I do not think that the Court’s jurisprudence on election administration or campaign finance is the main reason. As I hinted above, the partisan realignment of the past fifty years occurred coextensively with the rise of television politics. Television, and more specifically television advertising, intruded into American households and replaced party networks and retail politics as the principal means by which candidates could reach voters.<sup>73</sup> Candidates once needed to climb the local party hierarchy and eventually win the party bosses’ nod before relying on the party machine to mobilize loyal party voters on election day. The party machine doled out favors and jobs to the reliant faithful, who ensured that the party ranks turned out en masse at the polls to elect whomever the party bosses had placed on the ticket as their nominees.<sup>74</sup>

However, the parties eventually adopted primary elections to decide their nominations in place of party bosses. Television then enabled candidates to reach voters directly and establish a personal brand independent of the party label.<sup>75</sup> Television and other forms of mass media allowed party candidates and party voters to coordinate on election day without the mediating authority of party bosses and machine politics.<sup>76</sup> What’s more, prohibitions on party patronage shrank the influence of party bosses even further, stripping them of their control over the party organization and volunteers that candidates once relied on.<sup>77</sup> When combined with the contemporaneous realignment of the parties into uniform ideological coalitions, American politics today is less about face-to-face, bread-and-butter relationships and more about ideological commitments that can be afforded, in terms of time and money, largely by a richer, more privileged class.

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71. See Aldrich, *supra* note 32, at 97–98.

72. Abu El-Haj, *supra* note 1, at 1265.

73. See Aldrich, *supra* note 32, at 270.

74. See *id.* at 269 (“The party held an effective monopoly on the resources . . . that were necessary to run an effective campaign for local, state, or national office. Ambitious politicians therefore could realize their long-term career [and short-term electoral] ambitions . . . only through the agency of the party.”).

75. See *id.* at 269–74 (describing the influence of television on political parties and their structure).

76. See *id.* at 270.

77. See *id.*

Professor Abu El-Haj is probably right that the decline of the party organization has meant disconnection from the regular rank-and-file who once constituted the major parties. Professor Abu El-Haj reports dutifully that today's political activists tend to be whiter, wealthier, and more educated than the rest of the electorate.<sup>78</sup> What's less clear is how and whether one can return to the days of yore that she implicitly extols. The dynamics I have described are overarching trends in American society and politics that are unlikely to be reversed very easily. Professor Abu El-Haj admits that "[a]ffirmative strategies to compensate for our social landscape would need to be devised" to overcome the ways that modern politics have evolved away from the participatory politics of a half century ago.<sup>79</sup> This requirement is challenging because, as Professor Abu El-Haj again agrees, "party activists may have very little interest in facilitating responsiveness to the electorate" and "are likely to be wary of broad mobilization."<sup>80</sup> Despite these changes, Professor Abu El-Haj insists that parties "have yet to shed their essential associational attributes" and "remain networks of individuals and groups—activists, donors, officeholders, and dealmakers—tied together and to the electorate by social connections of various strengths."<sup>81</sup> She argues that we live in a special moment following the 2016 election when elites should be aware of the costs of ignoring the dissatisfaction and disaffection of regular people, from whom they've insulated themselves.<sup>82</sup>

That said, these are still deep structural changes to American society and politics that have contributed to the participatory decline and that are unlikely to be undone.<sup>83</sup> Patronage, for one, was a foundation of the rich political associations we used to call the party machine.<sup>84</sup> Patronage offered solidary benefits to regular neighborhood folks in the form of jobs, favors, and material rewards as a payoff for party loyalty and votes.<sup>85</sup> The party machine and its loyal following cared little about highfaluting ideological principles compared with neighborhood camaraderie and spreading the spoils of government riches across the community.<sup>86</sup>

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78. See Abu El-Haj, *supra* note 1, at 1271.

79. *Id.* at 1272.

80. *Id.* at 1274.

81. *Id.* at 1256–57.

82. See *id.* at 1275.

83. Of course, an overarching decline of American civic participation has occurred over the past half century that includes but transcends the major parties. See generally Robert D. Putnam, *Bowling Alone: The Collapse and Revival of American Community* (2000); Theda Skocpol, *Diminished Democracy: From Membership to Management in American Civic Life* (2003).

84. See generally Robert Yablon, *Campaigns, Inc.*, 103 *Minn. L. Rev.* 151 (2018) (offering a nice overview).

85. See Fiorina, *supra* note 29, at 530–31 (arguing that traditional parties fifty years ago offered material rewards through patronage and other means in place of today's currency of ideological payoffs).

86. See *id.* at 532–35.

Professor Abu El-Haj implicitly celebrates the participatory culture fed by the machine, but it is hard to imagine its restoration in the modern era. The rejection of machine politics and party patronage has constitutional pedigree; the Court has held that government employment conditioned on partisan affiliation or allegiance was unconstitutional under the First Amendment, subject only to narrow exceptions.<sup>87</sup> Just as importantly, American political culture has shifted so decisively against patronage that civil service bans on patronage are standard practice at almost every level of government.<sup>88</sup>

The decline of union membership and political power has also transformed political participation, at least within the Democratic Party. Once a pillar of the Democratic Party's workforce, union members provided a committed volunteer base and constituency that saw its economic fate tied up with the Party.<sup>89</sup> Not only did union members participate in party affairs at higher rates than other citizens;<sup>90</sup> unions themselves also mobilized nonunion members on behalf of the Democrats and boosted overall political participation.<sup>91</sup> However, union membership has declined dramatically over the past fifty years.<sup>92</sup> This decline in union membership, and therefore union resources and political efficacy, has contributed to a decline in political participation over the same period.<sup>93</sup> What is more, the Court has eroded union activism by limiting unions' ability to collect

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87. See, e.g., *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 65 (1990) (holding that promotion, transfer, recall, and hiring decisions involving low-level public employees may not be based on party affiliation and support); *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (“We hold . . . that the practice of patronage dismissals is unconstitutional under the First and Fourteenth Amendments . . .”).

88. See, e.g., Megan Glasheen, *Patronage Employment Practices and the First Amendment*, 34 *How. L.J.* 663, 667–68 (1991) (“All of the states have enacted some form of civil service legislation [banning patronage].”).

89. See Jake Rosenfeld, *What Unions No Longer Do* 159–61 (2014).

90. See, e.g., Jasmine Kerrissey & Evan Schofer, *Union Membership and Political Participation in the United States*, 91 *Soc. Forces* 895, 930 (2013) (“[W]e observe large and significant effects of [union] membership on volunteering and political donations.”).

91. See Benjamin I. Sachs, *The Unbundled Union: Politics Without Collective Bargaining*, 123 *Yale L.J.* 148, 168–76 (2013); Roland Zullo, *Union Membership and Political Inclusion*, 62 *Indus. & Lab. Rel. Rev.* 22, 32 (2008).

92. See Rosenfeld, *supra* note 89, at 1–9 (documenting the decline of American unions over the past half century).

93. See Jan E. Leighley & Jonathan Nagler, *Unions, Voter Turnout, and Class Bias in the U.S. Electorate, 1964–2004*, 69 *J. Pol.* 430, 439 (2007) (“[T]urnout would have been approximately 3 percentage points higher in 2004 had unions remained as strong as they were in 1964.”).

fees to fund their activities,<sup>94</sup> most recently last Term in *Janus v. American Federation of State, County, & Municipal Employees, Council 31*.<sup>95</sup>

Another objection is that courts are quite unlikely to adopt the associational-party perspective that Professor Abu El-Haj urges. Of course, this appeal to feasibility is often fatuous because academics both test the limits of possibility and press their normative values.<sup>96</sup> But it is worth noting that Professor Abu El-Haj turns away from competition-oriented approaches to political parties partially because the Court “has been singularly unreceptive to adopting a procompetition theory of the First Amendment.”<sup>97</sup> Along the same lines, though, the Court has rejected Justice Stevens’s dissenting view, which mirrors much of Professor Abu El-Haj’s approach, in some of the party cases she discusses.<sup>98</sup> Most prominently, in *California Democratic Party v. Jones*, Justice Stevens argued in dissent that California’s blanket primary should have been upheld, notwithstanding the state-facilitated intrusion of nonmembers into the parties’ nomination processes.<sup>99</sup> Justice Stevens argued that “[w]hen a State acts not to limit democratic participation but to expand the ability of individuals to participate in the democratic process, it is acting not as a foe of the First Amendment but as a friend and ally.”<sup>100</sup> Justice Stevens would have upheld the blanket primary because he found compelling the state’s interest in “[i]ncreasing the representativeness of elected officials, giving voters greater choice, and increasing voter turnout and participation.”<sup>101</sup> This view, similar to Professor Abu El-Haj’s, was rejected

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94. See generally Benjamin I. Sachs, *Agency Fees and the First Amendment*, 131 Harv. L. Rev. 1046, 1052–55 (2018) (detailing the major Supreme Court cases concerning agency fees).

95. See 138 S. Ct. 2448, 2459–60 (2018) (holding that agency fees imposed by public-sector unions are unconstitutional).

96. See Kang, *Brave New World*, supra note 64, at 577–79 (arguing that academics and reformers should map reform strategies over the long term and not be deterred by short-term political infeasibility, which changes as immediately as judicial personnel changes).

97. Abu El-Haj, supra note 1, at 1231.

98. See, e.g., *Cal. Democratic Party v. Jones*, 530 U.S. 567, 584–85 (2000) (rejecting the promotion of fairness, increased voter choice, and increased voter participation as sufficient state interests to uphold California’s blanket primary); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 369–70 (1997) (rejecting Justice Stevens’s argument in dissent while upholding Minnesota’s antifusion laws prohibiting candidates from appearing on the ballot as a candidate of multiple political parties); *Burdick v. Takushi*, 504 U.S. 428, 430, 442–44 (1992) (upholding a state ban on write-in votes, over a dissenting opinion joined by Justice Stevens, which argued that voters “dissatisfied with the choices available to them” were impermissibly burdened).

99. *Jones*, 530 U.S. at 590–92 (Stevens, J., dissenting).

100. *Id.* at 595–96.

101. *Id.* at 600 (alteration in original) (internal quotation marks omitted) (quoting *Cal. Democratic Party v. Jones*, 169 F.3d 646, 662 (9th Cir. 1999), rev’d, 530 U.S. 567 (2000)).

by the majority and has no greater currency today with the Roberts Court.<sup>102</sup>

In any event, political participation and the democratization of the parties may be an area in which courts simply can do little affirmatively to help at this point. Legislatures author the primary regulatory choices that structure society and politics, while courts largely react to restrict them through judicial review when they see fit. But courts lack the broader affirmative authority it would take to revitalize American democratic life through a “party-reform agenda tailored to strengthening the associational life of political parties” that Professor Abu El-Haj proposes.<sup>103</sup> Courts strike down unconstitutional choices and trim legislative overextension, but they can do little more to encourage adoption of wise legislative choices other than stand aside when they are made. Courts may do best to help merely by avoiding additional harm. This secondary posture is in the nature of the judicial role when it comes to much political reform. Professor Abu El-Haj may be right about the value and effects of her proposals, but her arguments might be better directed toward legislatures than courts.

The same is true for her specific arguments in favor of soft money in campaign finance. I, too, have proposed loosening restrictions on soft-money fundraising for the same reasons that Professor Abu El-Haj cites, but I pitched my appeal to the legislative process, rather than courts.<sup>104</sup> It is much more difficult for courts to direct the affirmative project of constructive reform themselves. There’s not too much courts can do to encourage adoption of subsidies for grassroots party building other than uphold them when legislatures finally make wise choices to enact them. Courts have a weak institutional hand to play unless legislatures and other policymaking bodies act first.

The larger problem is that the Supreme Court has already done the harm it should have avoided by constitutionalizing so much of campaign finance law. As I just hinted, I share Professor Abu El-Haj’s belief that soft money helps build party capacity and deepen grassroots political involvement. There is little doubt that *McConnell* upholding the BCRA soft-money ban removed funding for state and local parties that benefited from federal soft money.<sup>105</sup> But I also think that *McConnell* was correct in upholding the soft-money ban in deference to Congress’s determination that unfettered soft-money fundraising posed a corruption risk. Courts should hesitate, absent convincing grounds, to strike down campaign finance regulation whether it expands funding for grassroots activities or

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102. See, e.g., *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 207 (2008) (“[Respondents] argue that the existence of entrenched ‘one-party rule’ demands that the First Amendment be used to impose additional competition in the nominee-selection process of the parties. . . . This is a novel and implausible reading of the First Amendment.”).

103. Abu El-Haj, *supra* note 1, at 1283.

104. See Kang, *Brave New World*, *supra* note 64, at 586–88.

105. See *supra* notes 66–67 and accompanying text.

not. Unfortunately, the Roberts Court instead has aggressively cleared the field of campaign finance regulation over the past decade by striking down contribution limits,<sup>106</sup> source restrictions,<sup>107</sup> and fundraising triggers<sup>108</sup> in the name of free speech. Judicial deregulation of campaign finance has thus tied the hands of most kinds of political reform through campaign finance regulation and sent reform proposals in the direction of even further deregulation as the only available option in the area.<sup>109</sup>

I would hesitate then to instruct courts, per Professor Abu El-Haj's proposal, to look for opportunities to strike down even more legislative regulation of politics in the name of political participation. Her proposed balancing would be difficult to apply—so difficult, in fact, that I'm unsure whether Professor Abu El-Haj believes *McConnell* should have struck down the soft-money ban. Did the costs for grassroots activity funded by soft money outweigh the compelling corruption risks found by Congress to result from soft-money fundraising? Balancing the diffuse interests, typically with little empirical foundation for prospectively judging the former, is sufficiently challenging that it might not be worth the candle. Courts may get their analysis wrong and end up doing more harm than good over the long run.

Indeed, my bet is that formal party leadership is more likely to oppose Professor Abu El-Haj's desired democratization of their internal affairs than it is to be a willing participant. As Professor Abu El-Haj acknowledges, the incumbent party leadership can be expected to favor today's institutional structures that ensure its continued authority over party affairs.<sup>110</sup> If that's true, the democratization of the parties is more likely to be achieved by government regulation over the party leadership's opposition. And judicial deference to such regulation is most likely to affirm reform measures that “enhance opportunities for social contact between party elites and the broader electorate.”<sup>111</sup> By contrast, the courts' traditional approach with regard to party regulation has been party autonomy, under which courts have struck down regulation that

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106. See *McCutcheon v. FEC*, 572 U.S. 185, 227 (2014).

107. See *Citizens United v. FEC*, 558 U.S. 310, 372 (2010).

108. See *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 728 (2011).

109. See, e.g., Raymond J. La Raja & Brian F. Schaffner, *Campaign Finance and Political Polarizations: When Purists Prevail* 134 (2015) (advocating for a “party-centered” campaign finance system that would allow “more money [to] flow through parties” and thereby “boost the influence of the pragmatist wing[s] of the part[ies] by making party organizations more salient in elections”); Pildes, *supra* note 24, at 807, 836–45 (advocating a party-based campaign finance system “aimed at giving the political parties . . . more influence in elections”).

110. See Abu El-Haj, *supra* note 1, at 1274.

111. *Id.* at 1233.



infringes on party leadership's discretion over party affairs.<sup>112</sup> It's precisely this judicial aggressiveness over such regulation to which Professor Abu El-Haj objects.<sup>113</sup> For this reason, we might expect Professor Abu El-Haj actually to want *less* judicial scrutiny over party regulation and *greater* deference to government attempts to democratize the parties over countervailing objections by the party leadership.

In other words, Professor Abu El-Haj may be absolutely right in her diagnosis of the parties' democratic deficit and even her prescriptions about how to cure them, but courts may be the wrong institution to spearhead this type of reform.

#### CONCLUSION

Professor Abu El-Haj is undeniably persuasive in her diagnosis of modern party politics and her central claim that responsible party government has not resulted from today's First Amendment approach to political parties. It is less clear if courts can really do much to reverse the pathologies she identifies so insightfully. Directing her suggestions toward legislative regulation and party reform could be more productive than focusing on courts.<sup>114</sup> Perhaps, though, the larger payoff is that trusting courts to affirmatively inject a greater interest in participatory politics is a second-best strategy that has its limitations but is still better than the courts' current approach. Given the dysfunctional state of today's party politics, maybe that's justification enough.

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112. See, e.g., *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196 (2008); *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208 (1986).

113. See Abu El-Haj, *supra* note 1, at 1287.

114. See, e.g., David Weigel, *Democrats Weaken 'Superdelegates' in Effort to Avoid Another Bitter Presidential Primary*, *Wash. Post* (Aug. 25, 2018), [https://www.washingtonpost.com/politics/democrats-weaken-superdelegates-in-effort-to-avoid-another-bitter-presidential-primary/2018/08/25/f45c6512-a7be-11e8-a656-943eefab5daf\\_story.html](https://www.washingtonpost.com/politics/democrats-weaken-superdelegates-in-effort-to-avoid-another-bitter-presidential-primary/2018/08/25/f45c6512-a7be-11e8-a656-943eefab5daf_story.html) [<https://perma.cc/8C7G-VBEJ>] (describing a successful effort to change internal Democratic Party rules that had previously empowered "superdelegates," party insiders and elected officials "whose presidential convention votes were not bound to the results of primaries or caucuses").