

## POLITICAL PARTIES, REPRESENTATION, AND FEDERAL SAFEGUARDS

Paul Frymer\* & Albert Yoon\*\*

Almost fifty years ago, Herbert Wechsler famously argued that congressional legislation requiring individual states to fulfill federal mandates should be given great deference by the Supreme Court because state interests were better protected by the legislative process.<sup>1</sup> All federal laws, Wechsler noted, had to gain the approval of the Senate, which by design represents states rather than individuals; the House, which is composed of districts drawn by state legislators; and the President, who is elected by the Electoral College, an institution also designed to protect in part the interests of states. Because the Constitution ensured that state interests were represented in the two elected branches of the federal government, Wechsler argued, it obviated the need for the Court to subject congressional legislation to judicial review on behalf of the states.

In 1980, Jesse Choper extended Wechsler's thesis, emphasizing the importance of congressional committees and party leadership in the Senate and House of Representatives, as well as the emergence of state lobbies that formed in the nation's capital to combat federal power during the Great Society.<sup>2</sup> Five years later, a majority of the Supreme Court adopted this line of argument, which has come to be called the "political safeguards thesis," in *Garcia v. San Antonio Metropolitan Transit Authority*:

[W]e are convinced that the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the "States as States" is one of process rather than result. Any substantive restraint on the exercise of the Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible

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\* Assistant Professor, Sociology and the Law and Society Program, University of California, San Diego. B.A., J.D., University of California, Berkeley; M.A., Ph.D. (political science), Yale University.

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\*\* Assistant Professor of Law, Northwestern University School of Law; Assistant Professor of Political Science (by courtesy), Northwestern University. B.A., Yale University; J.D., M.A., Ph.D. (political science), Stanford University.

<sup>1</sup> Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

<sup>2</sup> JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 176-81 (1980).

failings in the national political process rather than dictate a "sacred province of state autonomy."<sup>3</sup>

In recent years, however, the Court has largely abandoned the political safeguards thesis,<sup>4</sup> aggressively overturning federal legislation on the grounds that it infringes upon the constitutional interests of individual states.<sup>5</sup> The Court has argued that Congress and other national political institutions have not—and perhaps cannot—protect the interests of states, particularly state officials. There is, the Court has claimed, a fundamental conflict between national and state institutions: to avert blame for the difficult choices they face, congressional members attempt to accomplish national goals while deflecting the responsibility of policy enforcement, implementation, and financing onto the states through the passage of unfunded mandates.<sup>6</sup> Many law professors agree with the Court, arguing that Congress cannot be trusted with the representation of state actors and that there is little legal precedent for providing the national legislative branches with the opportunity to tread on state government terrain in the absence of

<sup>3</sup> 469 U.S. 528, 554 (1985) (quoting *EEOC v. Wyoming*, 460 U.S. 226, 236 (1983)). The Court cited Wechsler, Choper, and Bruce La Pierre, as leading authorities defending nonjusticiability. *Id.* at 551 n.11; see Bruce La Pierre, *The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation*, 60 WASH. U. L.Q. 779 (1982).

<sup>4</sup> This thesis, however, continues to have its advocates on the Court. See *United States v. Morrison*, 529 U.S. 598, 660-661 (2000) (Breyer, J., dissenting).

Congress, not the courts, must remain primarily responsible for striking the appropriate state/federal balance . . . . Congress is institutionally motivated to do so. Its Members represent state and local district interests. They consider the views of state and local officials when they legislate, and they have even developed formal procedures to ensure that such consideration takes place.

*Id.*; *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 95 n.4 (2000) (Stevens, J., dissenting) ("[T]he relevant constitutional provisions were crafted to ensure that the process itself adequately accounted for local interests."); *Printz v. United States*, 521 U.S. 898, 956 (1997) (Stevens, J., dissenting).

Given the fact that the Members of Congress are elected by the people of the several States, with each State receiving an equivalent number of Senators in order to ensure that even the smallest States have a powerful voice in the Legislature, it is quite unrealistic to assume that they will ignore the sovereignty concerns of their constituents. It is far more reasonable to presume that their decisions to impose modest burdens on state officials from time to time reflect a considered judgment that the people in each of the States will benefit therefrom.

*Id.*

<sup>5</sup> See *Board of Trustees v. Garrett*, 531 U.S. 356 (2001); *Morrison*, 529 U.S. 598; *Kimel*, 528 U.S. 62; *Printz*, 521 U.S. 898; *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996); *United States v. Lopez*, 514 U.S. 549 (1995); *New York v. United States*, 505 U.S. 144 (1992).

<sup>6</sup> See *Printz*, 521 U.S. at 930.

Members of Congress can take credit for "solving" problems without having to ask their constituents to pay for the solutions with higher federal taxes. And even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects.

*Id.*; *New York*, 505 U.S. at 182-83 ("If a federal official is faced with the alternatives of choosing a location or directing the States to do it, the official may well prefer the latter, as a means of shifting responsibility for the eventual decision.").

judicial review.<sup>7</sup> Even one of Wechsler's sympathizers, Mark Tushnet, has recently written, "It seems fair to say that no one today believes that Wechsler's arguments retain much force."<sup>8</sup> Through recent decisions, the Court has made emphatically clear that it believes it more effectively protects and advances state interests than does Congress or other national political institutions.<sup>9</sup>

In the face of these Court decisions and supporting legal scholarship, Larry Kramer has attempted to revive the Wechsler thesis, but with a twist.<sup>10</sup> States *are* protected by the legislative process, claims Kramer—although not by constitutionally created institutions like the Senate or the Electoral College. Instead, he argues, the party system has "protected the states by making national officials politically dependent upon state and local party organizations."<sup>11</sup> Kramer asserts that because American parties are highly decentralized and responsive to voter interests, they do an excellent job of channeling the concerns of state and local voters and officials into national party platforms and agendas. Moreover, local and state parties are the seedbeds of future national leaders; they provide a political education to these leaders and ultimately elect them to national office.<sup>12</sup> The rela-

<sup>7</sup> See, e.g., Elizabeth Garrett, *Enhancing the Political Safeguards of Federalism? The Unfunded Mandates Reform Act of 1995*, 45 U. KAN. L. REV. 1113 (1997); Marci A. Hamilton, *The Elusive Safeguards of Federalism*, 574 ANNALS 93 (2001); Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz or Principle?*, 111 HARV. L. REV. 2180 (1998); Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847 (1979); William P. Marshall, *Federalization: A Critical Overview*, 44 DEPAUL L. REV. 719, 728-32 (1995); Deborah Jones Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 VAND. L. REV. 1563, 1583 (1994); Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459 (2001); Richard B. Stewart, *Federalism and Rights*, 19 GA. L. REV. 917, 963 (1985).

<sup>8</sup> Mark Tushnet, *Two Versions of Judicial Supremacy*, 39 WM. & MARY L. REV. 945, 951 (1998).

<sup>9</sup> See *City of Boerne*, 521 U.S. at 519, 536.

Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation. . . .

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. . . When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed. RFRA was designed to control cases and controversies, such as the one before us; but as the provisions of the federal statute here invoked are beyond congressional authority, it is this Court's precedent, not RFRA, which must control.

*Id.* at 519, 536; *Lopez*, 514 U.S. at 557 n.2 ("[W]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court.") (quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 273 (1964) (Black, J., concurring) (alteration in original)).

<sup>10</sup> Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000) [hereinafter Kramer, *Political Safeguards*]; Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485 (1994) [hereinafter Kramer, *Federalism*].

<sup>11</sup> Kramer, *Political Safeguards*, *supra* note 10, at 278.

<sup>12</sup> See *id.* at 280.

tionship between state interests and national political parties, writes Kramer, "is one of elaborate, if diffuse reciprocity: of mutual dependency among party and elected officials at different levels; of one hand washing the other. It is this party-fostered system of mutual dependency that explains the success of American federalism . . ." <sup>13</sup>

Kramer's twist represents a major advance on the safeguards thesis and is rooted in the reality of American political history. Since their formation in the early nineteenth century, mass decentralized parties have played a critical role in maintaining state representation in the national legislative process. The national party system was initially "formed out of extant state and local parties, factions, and cliques," <sup>14</sup> and for much of the nineteenth and twentieth centuries national politicians in the executive and legislative branches owed their allegiance to these state and local power brokers.

But by relying on an extra-constitutional structure, Kramer is making an argument that there is something durable and more or less essential about parties and their function in the political system that enables them to maintain this role. Yet throughout history, and particularly in the last three decades, parties have changed considerably. <sup>15</sup> Of most consequence for the safeguards position, parties have become increasingly centralized organizations, with national elites playing a critical role in driving both fundraising and the formulation of party agendas. Gone are the days when states and cities developed political leaders and controlled them through the electoral process. Today, national party leaders bear far less of a relationship to local or state party organizations, and instead shape the nomination process and raise the money to mount national campaigns that are in many ways divorced from local concerns and political pressures. They, more than state or local leaders, influence the party's ideological and policy agenda, which is then reinforced in Congress through the party's leading representatives. And there is so far little indication that state parties have, as Kramer claims, "begun, apparently with some success, to reassert their place in the campaign process." <sup>16</sup> Instead, states are increasingly conduits of national control, providing a top-down arrangement that allows federal legislation to be dominated by national party concerns. <sup>17</sup> By focusing on three critical areas

<sup>13</sup> *Id.* at 279.

<sup>14</sup> JOHN H. ALDRICH, *WHY PARTIES? THE ORIGINS AND TRANSFORMATIONS OF PARTY POLITICS IN AMERICA* 109 (1995).

<sup>15</sup> *See id.* at 19.

Political actors have chosen to alter their parties dramatically at several times in our history, reformed them often, and tinkered with them constantly. Of all major political bodies in the United States, the political party is the most variable in its rules, regulations, and procedures—that is to say, in its formal organization—and its informal methods and traditions.

*Id.*

<sup>16</sup> Kramer, *Federalism*, *supra* note 10, at 1538.

<sup>17</sup> *See* John F. Bibby & Thomas M. Holbrook, *Parties and Elections*, in *POLITICS IN THE AMERICAN STATES: A COMPARATIVE ANALYSIS* (Virginia Gray, Russell L. Hanson & Herbert Jacob eds., 2000).

of party activity—nominations, fundraising, and legislative decision-making—we show how parties are no longer the decentralized organizations that Kramer contends they are, and therefore cannot be counted upon to represent state interests.

The absence of an essential organizational link between national elected officials and state and local parties leads us to alter our theoretical understanding of parties. Parties, like most political institutions, are highly malleable organizations filled with goal-oriented actors who respond to historically specific political contexts. The only thing relatively constant for a political party is that it must elect candidates to office in order to enact policy goals. As such, the overriding agenda of the major parties is to place candidates in office. That agenda prompts leaders to create rules and structures that will enable them to accomplish this goal. If an existing set of rules and organizational structures become perceived as failing to accomplish electoral goals, party leaders face the choice of reform or acceptance of political marginality.<sup>18</sup> The longevity of the two major parties in the United States is due in significant part to the ability of their leaders to rather constantly revise their organization's rules and procedures. Sometimes these reforms work to advance one set of concerns (for example, those of state officials), and at other times to advance another set of concerns (for example, those of independent voters), but at all times to advance the party's interest in getting candidates elected.<sup>19</sup> What this means in practice is that over time, the party's organizational characteristics necessarily change. While Kramer recognizes that parties do not have a single policy agenda, and are "non-programmatic,"<sup>20</sup> he ignores the implications these changes have for each party's ability to remain decentralized and accountable to state and local interests. To understand the current inability of parties to adequately represent states in national politics, then, we need to recognize that parties are pliable organizations that leaders and elites use over time to advance their own interests and as such, lack any fundamental, enduring, and essential nature.<sup>21</sup>

Kramer is by no means alone in assigning positive features to our na-

<sup>18</sup> See ALDRICH, *supra* note 14, at 18-27.

<sup>19</sup> See *id.* at 4 ("The major political party is the creature of the politicians, the ambitious office seeker and officeholder. They have created and maintained, used or abused, reformed or ignored the political party when doing so has furthered their goals and ambitions.")

<sup>20</sup> Kramer, *Federalism*, *supra* note 10, at 1524.

<sup>21</sup> This is not to deny, as Samuel Issacharoff well argues, that at specific historical moments, activists and party organizational rules (particularly party nominating procedures) can radically alter the ability of party leaders to construct their own agenda. See Samuel Issacharoff, *Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition*, 101 COLUM. L. REV. 274 (2001). However, we argue that over time, electoral incentives dominate all calculations, and activists and organizational rules that limit electoral opportunities are marginalized in the face of the constant necessity to maintain electoral viability. See PAUL FRYMER, *UNEASY ALLIANCES: RACE AND PARTY COMPETITION IN AMERICA* 42-44 (1999).

tion's two-party system. Political scholars have long promoted the two-party system as essential to the furthering of democratic values.<sup>22</sup> Justices on the Supreme Court have made this argument as well—in a line of cases unrelated to issues of federalism—arguing that various essential features of parties lead them inherently to perform democratic functions.<sup>23</sup> Recently, several law professors have endorsed the argument that parties play a special role in democratic society.<sup>24</sup> Because parties perform important functions, including the representation of groups—particularly racial minorities—the linkage of states and federal government, and a competitive electoral environment, they should be granted “near-absolute” First Amendment rights.<sup>25</sup> One of the authors of this Article has criticized this view before, arguing that historical and theoretical scrutiny reflects that national party organizations have no inherent interest in promoting democracy, and that party competition will often serve to demobilize and even disenfranchise groups—particularly racial minorities—when it benefits party electoral strategy.<sup>26</sup>

We argue in this Article that in order to better understand the behavior of party officials, we must come to terms with the institutional incentives that they follow to keep their jobs. As such, parties must be understood as instruments of political combat and assertion. They follow no inherent incentives that will lead them to act democratically or necessarily respond to state interests, but only to those state interests that enable them to get elected to political office. While electoral incentives will on occasion lead these officials to perform positive democratic functions, they are neither essential nor permanent. Electoral incentives and two-party competition have also led officials to disenfranchise voters and take away democratic freedoms. Parties should not be understood, as one scholar has argued, as

<sup>22</sup> For a discussion of the support parties have historically received from political scientists, see FRYMER, *supra* note 21, at 12-15.

<sup>23</sup> See *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 367 (1997) (finding that states may “favor the traditional two-party system” and may “temper the destabilizing effects of party-splintering and excessive factionalism”); *Rutan v. Republican Party*, 497 U.S. 62, 107 (1990) (Scalia, J., dissenting) (stating that “[t]he stabilizing effects of such a [two-party] system are obvious”); *Davis v. Bandemer*, 478 U.S. 109, 144 (1986) (O’Connor, J., concurring) (writing that “[t]here can be little doubt that the emergence of a strong and stable two-party system in this country has contributed enormously to sound and effective government”); *Branti v. Finkel*, 445 U.S. 507, 532 (1980) (Powell, J., dissenting) (stating that “[b]road-based political parties supply an essential coherence and flexibility to the American political scene”).

<sup>24</sup> See Bruce Cain, *Party Autonomy and Two-Party Electoral Competition*, 149 U. PA. L. REV. 793 (2001); Issacharoff, *supra* note 21; Nathaniel Persily, *Toward a Functional Defense of Political Party Autonomy*, 76 N.Y.U. L. REV. 750 (2001). But see Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and Republicans from Political Competition*, 1997 SUP. CT. REV. 331 (1997); Terry Smith, *Parties and Transformative Politics*, 100 COLUM. L. REV. 845 (2000).

<sup>25</sup> Persily, *supra* note 24, at 793.

<sup>26</sup> See FRYMER, *supra* note 21.

“grown-ups who, generally speaking, can be expected to take care of themselves.”<sup>27</sup> Instead, the Court should review their decisions as they do those of other agencies and individuals, to ensure that parties are promoting, rather than denying, the democratic process.

The Court itself, however, has been inconsistent in forcing parties to be more representative, particularly of the interests of state actors. Instead, in two important judicial realms of party-state relationships—the fight over control of the nomination process and the fight over who is allowed to fund party candidates—the Court has quite often allowed parties to isolate themselves from state interests by enabling the control of party organizations to shift away from democratically elected state actors to individual entrepreneurs who are funded almost entirely by corporate and wealthy special interest money that is devoid of any state or local political representation. The Court has consistently allowed national parties to exert control over nominating rules and the selection of delegates,<sup>28</sup> most recently in *California Democratic Party v. Jones*,<sup>29</sup> where it struck down a state proposition that allowed voters to participate in any party primary regardless of affiliation. Despite accusations that it would create state parties that are little more than “legal shells,” it has allowed state parties to cede their control over spending authority by legitimating “agency agreements” that enable the national parties to spend state party money.<sup>30</sup> Moreover, until very recently, the Court has consistently restricted efforts by national, state, and local political groups to regulate campaign finance in a manner that limits control of wealthy interests, corporate power, and rich financiers.<sup>31</sup> Thus, in one realm of jurisprudence (federalism and commerce decisions) the Court has argued it must protect state and local governments. In another realm (nomination reforms and campaign finance regulation), it has enabled a once-significant defender of these interests to be gutted by national and corporate interests.

As such, while we are skeptical that there is any such thing as a distin-

<sup>27</sup> Daniel Hays Lowenstein, *Associational Rights of Major Political Parties: A Skeptical Inquiry*, 71 TEX. L. REV. 1741, 1790 (1993).

<sup>28</sup> See *infra* text accompanying notes 92-105.

<sup>29</sup> 530 U.S. 567 (2000).

<sup>30</sup> Fed. Election Comm’n v. Democratic Senate Campaign Comm., 454 U.S. 27, 41 (1981). The Court overturned a decision by the D.C. appeals court which had been concerned that such an agency agreement would lead candidates to “have little incentive to communicate with the State committee, preferring to deal with a committee of his colleagues that directs the flow of funds.” Democratic Senatorial Campaign Comm. v. Federal Election Comm’n, 660 F.2d. 773, 781 (D.C. Cir. 1980).

<sup>31</sup> See Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm’n, 518 U.S. 604, 614-15 (1996) (overturning government restrictions on party committee efforts to make “independent expenditures”); Fed. Election Comm’n v. Nat’l Conservative Political Action Comm’n, 470 U.S. 480, 497 (1985) (overturning government restrictions on political committees to make “independent expenditures”); Fed. Election Comm’n v. Mass. Citizens for Life, Inc., 479 U.S. 238, 263 (1986) (same); Buckley v. Valeo, 424 U.S. 1, 39-58 (1976) (overturning government restrictions on individuals to make “independent expenditures” and candidates to spend their own money).

guishable “state interest,”<sup>32</sup> we contend that both sides of the federalism debate have tended to overlook what is quite arguably today the greatest threat to the autonomy of state political actors—the vast assemblage of corporate wealth and financial power that is primarily found within political action committees (“PACs”) and soft-money donors. As we show in this Article, national and state political leaders rely on corporate and other special interest money at unprecedented levels. If the Court and its allies genuinely wish to protect the power of state officials, they should concentrate their attention on the growing influence of money on the political process itself—not just at the state level but at the national level as well. In the past few years, the Court has begun to take steps in this direction, by allowing both state regulation of donations to state candidates and national regulation of national party spending opportunities.<sup>33</sup> In contrast with previous decisions in which it allowed a great deal of leeway for special interest contributions to have significant influence in campaign battles,<sup>34</sup> the Court for the first time approved of regulations that limit party efforts to spend on campaigns. In doing so, the majority of the Court rightly recognized that parties are

necessarily the instruments of some contributors whose object is not to support the party’s message or to elect party candidates across the board, but rather to support a specific candidate for the sake of a position on one, narrow issue, or even to support any candidate who will be obliged to the contributors.<sup>35</sup>

The Court argued that when parties are spending the money of wealthy interests, they have the potential to “act as agents for spending on behalf of those who seek to produce obligated officeholders.”<sup>36</sup> To promote greater party representation on behalf of states, local governments, and a greater cross-section of American society, the Court should continue to scrutinize efforts by political actors to deny competition and public participation in the decision-making process.<sup>37</sup>

<sup>32</sup> See Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 944 (1994) (“Most of our states, the alleged political communities that federalism would preserve, are mere administrative units, rectangular swatches of the prairie with nothing but their legal definitions to distinguish them from one another.”); JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 65-70 (1996); Mark Tushnet, *Why the Supreme Court Overruled National League of Cities*, 47 VAND. L. REV. 1623, 1654 (1994) (“The globalization of the economy is surely more important in determining what happens in the lives of residents of the United States than the intricacies of federalism doctrine.”).

<sup>33</sup> *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377 (1999) (upholding a Missouri law limiting size of campaign contributions to candidates); *Fed. Election Comm’n. v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001) (*Colo. Republican II*) (upholding federal regulation of “coordinated expenditures” by political parties).

<sup>34</sup> See *supra* note 31.

<sup>35</sup> *Colo. Republican II*, 533 U.S. at 479.

<sup>36</sup> *Id.* at 480.

<sup>37</sup> See Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998); Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491 (1997).



Finally, in making this argument, we are not siding with those who promote greater federalism as part of a larger ideological project to severely diminish the organs of the national welfare state. We want the national government to play an active role in society. But we want it to be representative of more than corporate and elite economic interests. Indeed, our argument in this regard is in direct contrast with the common Court majority that has rejected the political safeguards approach to federalism decisions.<sup>38</sup> Instead of checking national power by infringing on its governing capacity, we promote the Court's efforts to check the self-interest of political and corporate actors with the activity of local and national communities that are democratically representative.

The Article proceeds in three parts. In Part I, we critically examine Kramer's argument that federalism principles endure through political parties, as we place his argument within the context of party theory and late twentieth-century political history. In Part II, we show the changes that have occurred to parties in the last three decades in the areas of presidential nominations, campaign finance, and legislative decision-making, emphasizing the ways in which these changes have affected the ability of national legislators to represent particularized state interests. In this Part we empirically examine how, at both the state and national levels, state interests may be subjugated to national interests. We conclude in Part III by considering the implications that the changing role of parties may have for our national party system, federalism, and the relationship between national and state political institutions.

#### I. NATIONAL PARTIES AND THE PROTECTION OF STATE INTERESTS IN THE MODERN CONTEXT

We begin with an historical and theoretical discussion of whether the two-party system serves as a safeguard for state interests in the national legislative process. As we stated in the introduction, Kramer's reliance on the two-party system as a device to protect state interests in the national legislative process is problematic for two reasons: First, he insufficiently confronts the consequence of significant changes that parties have undergone in the past three decades; and second, he fails to account for the manner in which parties have responded to the new political universe.<sup>39</sup> Parties have been faced with the real threat of irrelevance in a political system domi-

<sup>38</sup> See, e.g., *Colo. Republican II*, 533 U.S. at 493 (Thomas, J., dissenting). Justice Thomas was joined by Chief Justice Rehnquist and Justices Scalia and Kennedy.

<sup>39</sup> Kramer argues that the changes in parties have failed to impact the political dependency between state and federal officials on each other.

[W]hile parties and campaigns are vastly different enterprises than they were fifty or a hundred years ago, the changes have not been so important from the perspective of federalism . . . . The political dependency of state and federal officials on each other remains among the most notable facts of American government.

Kramer, *Political Safeguards*, *supra* note 10, at 282.

nated by interest group money, the media, and individual candidates not beholden to either party. They have tried to recreate themselves by figuring out important ways that they could help individual politicians get elected, and in turn, maintain some degree of control over these political actors. Parties are by no means what they were when self-proclaimed "bosses" had significant weapons to influence voters and legislators.<sup>40</sup> The new party organization exerts its influence more at the margins. It functions to advance or help service the needs of those individuals who choose to seek election under the party label.<sup>41</sup> But the *manner* in which they exert this influence has profound implications for state representation. We will show that these changes are of significance by focusing on three areas in which parties have tried to regain relevance: the presidential nomination process, campaign finance, and the passage of congressional legislation. As we will demonstrate, all three of these areas have been changed in a way that increases national party power and further weakens state and local parties.

Recognizing these historical changes in turn highlights the important implications of understanding parties as organizations dominated by goal maximizers who need to win electoral office to maintain relevance. It is the "winner-take-all" form of elections that encourages U.S. parties to be as nonprogrammatic as they are. Such elections provide incentives for the candidates to position their political stances to accommodate the politics of the majority of the district's voters. In the United States, where the majority of voters tends to lie in the middle of the ideological spectrum it leads the "parties in a two-party system [to] deliberately change their platforms so that they resemble one another."<sup>42</sup> By no means does every candidate make such an appeal; some candidates are sincere about their politics regardless of political calculation, others miscalculate what the majority of the voters support, and still others are beholden to political coalitions or specific interest groups and thus unable to moderate their image.<sup>43</sup> But, over time, parties need to win elections to remain politically relevant. Losses lead to disgruntled politicians and voters who demand changes. This necessity to win, then, leads party actors not only to strive to be nonprogrammatic, but to work constantly to make sure that their party's organizational structure enables them to do so. As such, there is constant dynamism on the part of party actors. Organizational strategies that serve well in one era are summarily displaced in the context of another.

By contrast, in maintaining that it is the nature of political parties to be

<sup>40</sup> See ALDRICH, *supra* note 14, at 282-83; John J. Coleman, *The Resurgence of Party Organization? A Dissent from the New Orthodoxy*, in *THE STATE OF THE PARTIES: THE CHANGING ROLE OF CONTEMPORARY AMERICAN PARTIES* 311 (Daniel M. Shea & John C. Green eds., 1994).

<sup>41</sup> ALDRICH, *supra* note 14, at 289.

<sup>42</sup> ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 115 (1957).

<sup>43</sup> See ANGELO PANEBIANCO, *POLITICAL PARTIES: ORGANIZATION AND POWER* (1988).

both nonprogrammatic (that is, nonideological) and decentralized,<sup>44</sup> Kramer ignores an essential tension between these two features. It is because parties must adapt and change to remain politically relevant that they are required to be nonprogrammatic. This need to be nonprogrammatic permits parties to enjoy real dynamism, both in their messages and in their organizational form. Party leaders are constantly reevaluating their organizational rules, their leaders, and their goals in an effort to respond to their perceptions of changing tides and electoral opportunities. As an illustration, one need only to look at the Democratic and Republican parties' position on civil rights issues over time. The Democrats have transformed from a party organization built around an alliance between northern and southern states that was designed to ignore national racial divisions, to an organization built solidly around the legitimacy of southern segregation and the demobilization of large swaths of voters in both the South and the North,<sup>45</sup> to an organization that dramatically promoted civil rights in the mid-1960s, to an organization in the 1990s designed to respond to a coalition of southern and suburban white moderates who were fearful of violent crime and resentful towards a perception that the government was handing out benefits unfairly.<sup>46</sup> The Republicans, of course, were making parallel changes—from a northern business coalition to a modern-day alliance between a “silent majority” of working class whites, southern whites, and business.<sup>47</sup> As a result, organizational features such as the decentralized nature of parties (a feature that Kramer claims is relatively unchanging and fundamental to a party's existence) are merely historical moments.

Certainly, the decentralized nature of parties enjoyed a substantially long era; from the foundations of the two-party system in the 1820s through the 1960s, politicians felt they could win elections by getting help from local party organizations. There was great variation during these 140 years, and many scholars would date the decline of state political power back to at least the New Deal, if not the Progressive era or Reconstruction. Nonetheless, academic works from the 1950s and 1960s on congressional committee behavior, the national presidential nomination process, and presidential power—three vital areas that generate national policy—show the central place of city and state political leaders in not just influencing, but indeed dominating, key aspects of the process.<sup>48</sup> David Mayhew found powerful

<sup>44</sup> See Kramer, *Federalism*, *supra* note 10, at 1524.

<sup>45</sup> See ALDRICH, *supra* note 14.

<sup>46</sup> See THOMAS BYRNE EDSALL & MARY D. EDSALL, *CHAIN REACTION: THE IMPACT OF RACE, RIGHTS AND TAXES ON AMERICAN POLITICS* (1991).

<sup>47</sup> See *id.*; Paul Frymer & John David Skrentny, *Coalition-Building and the Politics of Electoral Capture During the Nixon Administration: African Americans, Labor, Latinos*, 12 *STUD. AM. POL. DEV.* 131 (1998).

<sup>48</sup> Even in the 1930s through the 1950s, however, national pressures seemed to be eroding state representation. See JAMES MACGREGOR BURNS, *ROOSEVELT: THE LION AND THE FOX 198-202* (1956); PAUL T. DAVID, MALCOLM MOOS & RALPH M. GOLDMAN, *PRESIDENTIAL NOMINATING POLITICS IN*

local party organizations that controlled patronage and nominations well into the 1960s in many parts of the Northeast and Midwest.<sup>49</sup> Congressional committee members often had few policy interests of their own beyond providing direct goods and services to their community, while presidents and vice presidents were constantly wary of responding to regional interests that both placed them in power and had the ability to take that power away from them.<sup>50</sup> Moreover, national party organizations were so entirely dependent on state parties for money that one study referred to them as "politics without power."<sup>51</sup> As the late prominent political scientist William Riker argued in 1964, decentralized parties remained the lynchpin of state representation in national government. This meant

that the nation cannot control state decisions . . . . [T]he decentralization of the two-party system is sufficient to prevent national leaders (e.g., Presidents) from controlling their partisans by either organizational or ideological devices. As such, this decentralized party system is the main protector of the integrity of states in our federalism.<sup>52</sup>

But in the face of changing historical context, and with the rise of new competitors to parties in the service of helping candidates get elected, politicians have searched for alternative opportunities. In the process, they have worked to make organizational changes to better help them achieve their goals. Of course, these changes are not driven solely by electoral incentives nor are they a merely functional response to a newly recognized problem. Often electoral laws are passed with the support of voters or rivals that intentionally or unintentionally spur such changes within the par-

1952: THE NATIONAL STORY 191-93 (1954).

<sup>49</sup> DAVID R. MAYHEW, *PLACING PARTIES IN AMERICAN POLITICS: ORGANIZATION, ELECTORAL SETTINGS, AND GOVERNMENT ACTIVITY IN THE TWENTIETH CENTURY* 205 (1986).

<sup>50</sup> See SIDNEY M. MILKIS, *THE PRESIDENT AND THE PARTIES: THE TRANSFORMATION OF THE AMERICAN PARTY SYSTEM SINCE THE NEW DEAL* 138-39 (1993) (referring to the influence of state and local public employees over elections in comparison to federal public officials); DAVID, MOOS & GOLDMAN, *supra* note 48 (emphasizing the importance of state actors in determining presidential nominations); John F. Manley, *The House Committee on Ways and Means: Conflict Management in a Congressional Committee*, 59 AM. POL. SCI. REV. 927, 936-37 (1965) (on the importance of constituencies dominating congressional behavior); William G. Mayer, *A Brief History of Vice Presidential Selection*, in *IN PURSUIT OF THE WHITE HOUSE 2000: HOW WE CHOOSE OUR PRESIDENTIAL NOMINEES* 329-30 (William G. Mayer ed., 2001) (recounting the necessity of Democratic Party presidential nominee James M. Cox in 1920 picking a running mate contingent on the acceptance of party bosses). Moreover, between 1832 and 1936 the Democratic Party maintained a "two-thirds rule" in nominating presidential candidates. To be selected as the party's nominee, a candidate had to receive two-thirds of the party's delegates—not the simple majority that governs nominations today. As a result, southern states that were a minority of the party's coalition maintained veto power over the party's selection, thereby preventing candidates who were too liberal on civil rights matters. See ALDRICH, *supra* note 14, at 129-133.

<sup>51</sup> CORNELIUS P. COTTER & BERNARD C. HENNESSY, *POLITICS WITHOUT POWER: THE NATIONAL PARTY COMMITTEES* (1964).

<sup>52</sup> WILLIAM H. RIKER, *FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE* 91, 101 (1964).

ties.<sup>53</sup> At other times, pressure from activists will push a party in a direction that its leadership may not necessarily want to go. Reforms promoted from the party leadership can often have unintended consequences that negatively affect their power. But as we demonstrate in this Part, those most concerned with parties winning elections will be in the process of adapting to new information and promoting reforms to adapt to the new political universe, reforms that in the last thirty years have meant the unprecedented nationalization of the two major parties and severe implications for state parties.

## II. THE DECLINE OF DECENTRALIZED PARTIES AND THE EMERGENCE OF NATIONAL PARTIES

The modern-day party system has changed dramatically over the past four decades. Perhaps most dramatic is the destruction of urban machines that at one time not only ran cities but also helped determine congressional and presidential elections. These machines have been weakened by a multitude of events. The development of national bureaucracies during the New Deal and Great Society provided job and welfare programs to needy citizens, weakening the machines' ability to remain relevant to the everyday lives of their citizens.<sup>54</sup> The inability of city governments to represent and incorporate racial minorities into their political coalitions led to the machines' electoral downfall in many cities, particularly as African Americans and immigrants moved to these cities and demanded greater representation.<sup>55</sup> In many cities, the increase in immigrant and black population led to middle- and upper-middle-class white flight, helping spur financial difficulties for cities that lost huge amounts of tax dollars.<sup>56</sup> Meanwhile, the Supreme Court's decisions that made patronage on the basis of partisan support illegal severely weakened the ability of parties to control candidates and nominations.<sup>57</sup>

Changes in electoral and nomination laws, both during the Progressive era<sup>58</sup> and the 1960s and 1970s, further took power out of the hands of both

<sup>53</sup> See MARTIN SHEFTER, *POLITICAL PARTIES AND THE STATE: THE AMERICAN HISTORICAL EXPERIENCE* 75-81 (1994).

<sup>54</sup> See *id.* at 84; MILKIS, *supra* note 50.

<sup>55</sup> See AMY BRIDGES, *MORNING GLORIES: MUNICIPAL REFORM IN THE SOUTHWEST* 218-22 (1997); STEVEN P. ERIE, *RAINBOW'S END: IRISH-AMERICANS AND THE DILEMMAS OF URBAN MACHINE POLITICS, 1840-1985*, at 183-90 (1988); PAUL KLEPPNER, *CHICAGO DIVIDED: THE MAKING OF A BLACK MAYOR* 10-11 (1985); MANNING MARABLE, *BLACK AMERICAN POLITICS: FROM THE WASHINGTON MARCHES TO JESSE JACKSON* 191-246 (1985).

<sup>56</sup> ERIE, *supra* note 55, at 181-190; SHEFTER, *supra* note 53, at 233.

<sup>57</sup> See *Rutan v. Republican Party*, 497 U.S. 62 (1990) (party affiliation not an "appropriate requirement" for hiring, transferring, recalling, or promoting public employees); *Elrod v. Burns*, 427 U.S. 347 (1976) (deciding that Chicago Democratic party organization was not allowed to fire public employees on the basis of party affiliation).

<sup>58</sup> See WALTER DEAN BURNHAM, *THE CURRENT CRISIS IN AMERICAN POLITICS* (1982).

city mayors and other state politicians and placed it directly into the hands of voters and individual candidates.<sup>59</sup> The Democratic Party's passage of the McGovern-Fraser reforms after the 1968 election<sup>60</sup> pushed the party to open itself up to African Americans, women, young people, and progressives.<sup>61</sup> Equally important, party leaders attempted to make the organization more inclusive of these constituencies by giving political power to the voters in the state party primaries and caucuses. Instead of the nominating delegates being chosen by the party leadership, the delegates were to be chosen by the voters. Opening the party to primaries changed who ran for office, how they ran for office, and who mattered in getting them elected. And as voters expressed increasing discontent towards their party's leadership, it suddenly became an asset for "outsider" politicians to run for office in direct opposition to the party leadership.

These reforms gave primary voters a more direct role in choosing candidates as well as giving private organizations such as the media and interest groups an unintended but important role in determining electoral outcomes.<sup>62</sup> Since the relationship of the primary voter to the party was often tenuous, and at times in direct conflict with the interests of the party leadership, in the wake of the McGovern-Fraser reforms many scholars argued that party involvement in the nomination process was effectively dead.<sup>63</sup> By the mid-1970s, Democrats were having trouble living up to any definition of the word "party." Instead, the Democratic Party had become an organization fragmented between distinct interest groups that voted for their specific candidates in primaries, and individual politicians who lacked a common goal, history, or ideology with the rest of the party. One political scientist claimed that the reforms were increasing the occurrence in government leadership of crazes, manias, and fads.<sup>64</sup> Another argued that "at bottom, the result of all these reforms was *the diminution, the constriction, at times the elimination, of the regular party in politics of presidential selection.*"<sup>65</sup>

Meanwhile, three simultaneous changes were occurring in the political landscape. As mentioned above, both the media and private interest groups became more influential in candidate election. The media placed a great

<sup>59</sup> See ALAN WARE, *THE BREAKDOWN OF DEMOCRATIC PARTY ORGANIZATION, 1940-1980* (1985).

<sup>60</sup> See PHILIP A. KLINKER, *THE LOSING PARTIES: OUT-PARTY NATIONAL COMMITTEES, 1956-1993* 88-104 (1994). To clarify, much of the subsequent discussion on party reforms necessarily focuses on the Democrats and not the Republicans because it has been the Democrats who have been most active in initiating the reforms. In large part, the Republicans have followed along, though often with important variants.

<sup>61</sup> See *id.* at 97.

<sup>62</sup> NELSON W. POLSBY, *CONSEQUENCES OF PARTY REFORM* 131-156 (1983).

<sup>63</sup> See, e.g., BYRON E. SHAFER, *QUIET REVOLUTION: THE STRUGGLE FOR THE DEMOCRATIC PARTY AND THE SHAPING OF POST-REFORM POLITICS* (1983).

<sup>64</sup> See POLSBY, *supra* note 62, at 147.

<sup>65</sup> SHAFER, *supra* note 63, at 252.

priority on individual candidates, particularly those who could portray themselves as “outsiders” and underdogs.<sup>66</sup> Second, special interests benefited greatly from campaign finance laws that enabled political action committees (PACs) to give as much, or close to as much, money as political parties. Since there are thousands of PACs but only a few parties (each major party can contribute money from its national, congressional, and state organization), the parties were immediately overwhelmed in the spending war.<sup>67</sup> With the increased importance of television, and with the Supreme Court’s decision in *Buckley v. Valeo*<sup>68</sup> that enabled wealthy candidates to spend unlimited amounts of money on themselves, the last three decades have witnessed an explosion of interest group participation in campaigns and wealthy candidates running independent campaigns for office.<sup>69</sup> Third, although by no means independent of these other changes in society, many more voters started to identify themselves as independent of the major parties.<sup>70</sup> Divided government became more prominent as a result of split-ticket voting. Some argue that split-ticket voting is the result of independent voters who trust neither party with too much power,<sup>71</sup> while others argue that voters want moderate politics in between the two parties.<sup>72</sup> Whatever the reason, the 1970s and 1980s reflected a period of voters and parties both in flux, but clearly out of alignment.<sup>73</sup> Candidates further exacerbated this problem by attempting to respond to it: recognizing that voters were uncomfortable with parties, candidates ran as “outsiders” with independent organizations and platforms that attacked “politics” (and parties) “as usual.” Perhaps equally important and more concerning, voters were less likely to participate in elections at all, a further reflection of “dealignment” and the weakening ability of the political party to mobilize voters for old-fashioned coalition campaigns that emphasized turnout over strategic spinning.<sup>74</sup>

Parties have since responded to this changing environment of independent interests, politicians, and voters. However, they have responded

<sup>66</sup> See THOMAS E. PATTERSON, *OUT OF ORDER* 216 (1993).

<sup>67</sup> See GARY C. JACOBSON, *THE POLITICS OF CONGRESSIONAL ELECTIONS* 63 (1987); FRANK J. SORAUF, *INSIDE CAMPAIGN FINANCE: MYTHS AND REALITIES* 30 (1992) (finding in 1990 that party contributions to candidates represented only 1% of total campaign contributions).

<sup>68</sup> 424 U.S. 1 (1976).

<sup>69</sup> JEFFREY M. BERRY, *THE INTEREST GROUP SOCIETY* 120-22 (1989).

<sup>70</sup> See MARTIN P. WATTENBERG, *THE DECLINE OF AMERICAN POLITICAL PARTIES, 1952-1994* (1996).

<sup>71</sup> Gary C. Jacobson, *Divided Government and the 1994 Elections*, in *DIVIDED GOVERNMENT: CHANGE, UNCERTAINTY, AND THE CONSTITUTIONAL ORDER* 61, 62-63 (Peter F. Galderisi et al. eds., 1996).

<sup>72</sup> See Morris P. Fiorina, *The Causes and Consequences of Divided Government: Lessons of 1992-1994*, in *DIVIDED GOVERNMENT*, *supra* note 71, at 35, 55-56.

<sup>73</sup> See Paul Frymer, Thomas P. Kim & Terri L. Bimes, *Party Elites, Ideological Voters, and Divided Party Government*, 22 *LEGIS. STUD. Q.* 195 (1997).

<sup>74</sup> See BURNHAM, *supra* note 58, at 121-65.

not by regaining control of the political process in the same way as prior to the decline, nor by using the same organizational entities to do it. First of all, PACs, individual politicians, and the media still play the preeminent role they have achieved in the past thirty years, with no hint of respite. The prominent political role played by institutions other than parties itself raises serious questions for a political safeguard model that places the state's protection in the hands of increasingly irrelevant parties. But there are also significant consequences for the ways in which parties have reemerged and become important once again to candidates who desire to win office. The problem for state governments is that they have been largely left out of this process of party reemergence. Instead, power has gone to strengthened national committees and national leaders who lack state and local constituencies or backgrounds.<sup>75</sup> It is with this in mind that we explore the different ways in which parties have regained some of their lost power in recent decades.

#### A. *Presidential Primaries*

In the modern era of national party nominations, money matters a great deal—particularly “early money” that enables candidates to rise to prominence in the early stages of the nomination campaign.<sup>76</sup> Primaries typically begin long before most Americans or political interest groups can even identify the candidates, let alone determine whom they support. Having money early on enables candidates to pay for hotel rooms, to charter planes, to hire staff, and to run campaign advertisements on television. In addition, early money attracts attention from the media and interest groups who are looking for signals that a candidate has the potential for success and thus deserves publicity and support. Interest groups in particular desire access to candidates once they achieve office, and therefore pay attention to and donate money to candidates who appear to have a chance to win. All of this helps those candidates who have early momentum to accumulate even more money.<sup>77</sup> Successful candidates, then, need to either fundraise from wealthy interests or, as in the case of a Ross Perot or Steve Forbes, rely on personal wealth to thrust them into national prominence.<sup>78</sup> Both national and state party leaders can have some influence in this process, but they are by no means necessary for a candidate to achieve success. Endorsements

<sup>75</sup> See PAUL S. HERRNSON, *PARTY CAMPAIGNING IN THE 1980s* (1988); ROBIN KOLODNY, *PURSUING MAJORITIES: CONGRESSIONAL CAMPAIGN COMMITTEES IN AMERICAN POLITICS* (1998).

<sup>76</sup> David Dodenhoff & Ken Goldstein, *Resources, Racehorses, and Rules: Nominations in the 1990s*, in *THE PARTIES RESPOND: CHANGES IN AMERICAN PARTIES AND CAMPAIGNS* 170, 183 (L. Sandy Maisel ed., 3d ed. 1998).

<sup>77</sup> *Id.* at 183-186.

<sup>78</sup> George W. Bush, for example, had raised \$57 million from wealthy donors and interest groups by mid-1999, leading other candidates to immediately drop out of the race before a single vote had been cast in the presidential primaries. Steve Forbes, meanwhile, spent \$37 million of his own money in 1996. Kevin Merida, *Texas Two-Step: Run and Cut*, WASH. POST, Oct. 28, 1999, at C1.



from leading governors or the heads of the Democratic National Committee (“DNC”) or the Republican National Committee (“RNC”) are helpful, but not required, for candidate success. As a result, the most prominent role of the political parties in nomination politics centers around helping the front-running candidate have as smooth a ride as possible through the convention and into the general election. In turn, presidential candidates are more correctly characterized as individual campaigners than as representatives of party coalitions.<sup>79</sup>

In a candidate-centered campaign world, parties have tinkered with the state primary schedules to increase their influence in determining which candidate emerges as the leader from the nomination process.<sup>80</sup> In response to electoral concerns, national party leaders have attempted to devise ways of implementing new rules to promote the nomination of “electable” candidates. For instance, after a series of poor electoral showings, the DNC, working with a combination of congressional and state leaders, initiated reforms during the 1980s and 90s.<sup>81</sup> Among other things, they restructured the nomination schedule by “front-loading” primaries early on in the campaign season.<sup>82</sup> In 1996, for instance, seventy-three percent of the Republican Party’s delegates had been chosen by the end of March; by comparison, only twenty-one percent of the Democratic Party’s delegates had been chosen at the end of March in 1972.<sup>83</sup> The hope in front-loading was to diminish the power of upstart outsiders who spend all their money and energy to have a good showing in one of the earliest state contests—typically the New Hampshire Primary or the Iowa Caucus. Front-loading limits a candidate’s outsider strategy because it privileges candidates who have large campaigns that are organized in many different states at once. Typically, the party leadership’s choice has benefited from this, in no small part due to the efforts of state leaders around the country. Most recently, for example, Pat Buchanan’s momentum from winning the New Hampshire primary in 1996 was eliminated by decisive losses in New York and the South because he lacked a campaign apparatus in these states. In contrast, candidates who have the backings of state officials automatically have a campaign organization in place.

<sup>79</sup> William Crotty, *Political Parties in the 1996 Election: The Party as Team or the Candidates as Superstars?*, in *THE PARTIES RESPOND*, *supra* note 76, at 202, 204 (“The role of the political parties on the national level is best understood as an extension, for better or worse, of the presidential candidate’s campaign.”).

<sup>80</sup> See Anthony Corrado, *The Politics of Cohesion: The Role of the National Party Committees in the 1992 Election*, in *THE STATE OF THE PARTIES: THE CHANGING ROLE OF CONTEMPORARY AMERICAN PARTIES* 61 (Daniel M. Shea & John C. Green eds., 1994).

<sup>81</sup> See KLINKNER, *supra* note 60, at 155-91; Corrado, *supra* note 80; Jon F. Hale, *The Democratic Leadership Council: Institutionalizing a Party Faction*, in *THE STATE OF THE PARTIES: THE CHANGING ROLE OF CONTEMPORARY AMERICAN PARTIES*, *supra* note 80, at 249.

<sup>82</sup> Dodenhoff & Goldstein, *supra* note 76, at 196.

<sup>83</sup> *Id.* at 174.

On the face of it, then, front-loading enhances the power of candidates with national organizations, and state leaders might be expected to play an important role, both collectively and individually. To build a national party organization requires either an immense amount of money or the support from many state leaders who can assist by offering the aid of their existing party organizations. Again, in the Buchanan example, his loss in the New York presidential primary in 1996 was due in large part to his failure to appear on the state's primary ballot. New York's party leadership—Governor George Pataki, Senator Alphonse D'Amato, and New York City Mayor Rudolph Giuliani—all supported Kansas Senator Bob Dole. The New York Republican Party's nomination regulations require that, to be on the ballot, a candidate must obtain 30,000 signatures from state voters, including 1,250 from each of twenty-five of the state's thirty-one congressional districts.<sup>84</sup> The state's party leaders' support made it easy for Dole to secure the necessary signatures. Without Pataki's support, however, and without any extra resources beyond what he was spending in New Hampshire, Buchanan ended up losing badly, receiving none of the state's ninety-three delegates. Dole received all but one delegate, who was garnered by Steve Forbes, a multimillionaire candidate who paid organizers to gather the required signatures.<sup>85</sup>

Super Tuesday is another example of how state parties appear to have increased their influence over the nomination process. Since 1984, the Democrats have held many southern state primary elections on the same day. By grouping these southern primaries together early on, party leaders hope to attract candidates who will appeal to southern white voters, resulting in the nomination of a more moderate national candidate. If a conservative southern white candidate runs on Super Tuesday, he or she will most likely end up with a commanding lead over other Democratic Party contenders. Even if no southern candidate runs for president, Super Tuesday is important because it forces all candidates to adopt policy positions consistent with the interests of southern voters.<sup>86</sup> Super Tuesday received a great deal of support from southern states and the Southern Legislative Conference, and southern states enacted legislation to enable the primaries to take place.<sup>87</sup>

But the factors that determine which states matter in the nomination process and which states do not has little to do with maintaining state interests. The goal of the national party leadership is to devise a strategy that enables the national party leaders to elect their candidate to office. When this strategy dovetails with the interests of certain states, they bolster the power of these states; when interests diverge, states suffer. Because indi-

<sup>84</sup> Steven Greenhouse, *Buchanan Criticizes G.O.P. Primary Rules*, N.Y. TIMES, Nov. 21, 1995, at B6.

<sup>85</sup> *See id.*

<sup>86</sup> *See* KLINKNER, *supra* note 60, at 185-86.

<sup>87</sup> KENNETH S. BAER, *REINVENTING DEMOCRATS: THE POLITICS OF LIBERALISM FROM REAGAN TO CLINTON 100-01* (2000).

vidual candidates and national committees dominate the nomination process, there is little incentive for the parties to protect state interests. Rather, the parties devise strategies to help national candidates best compete in the presidential election. In the case of Super Tuesday, the big nominating day provided an opportunity for the Democratic Party to moderate its image and distance itself from groups that were perceived by party leaders as making mainstream America uncomfortable. Writes Kenneth Baer,

[T]he [Democratic Leadership Council's] central goal during the 1988 nominating campaign became to move the emphasis in the primaries from the early New Hampshire and Iowa contests, where the candidates were forced to address unrepresentative electorates and pander to narrow special interests, to the South and to the Super Tuesday primaries, where the political environment would force candidates to craft platforms that would better reflect the general electorate.<sup>88</sup>

The first priority for party strategists has been to implement a process that will help nominate a national candidate who can win the November presidential election. To the degree that states have influence in this process, it is secondary to considerations of national political strategy. The influence by states over candidate selection is increasingly fleeting and is subject to a variety of changes by national actors constantly looking for a new way to win elections.

Again, parties are influential when individual candidates who want to get elected need help. As such, both national and state parties remain marginal in relation to the candidates who raise money independently. Moreover, both states and parties are still beholden to the voters who show up to vote on primary day. Super Tuesday, for instance, has been an experiment with fluctuating rates of success. In 1988, the winner of Super Tuesday was Jesse Jackson, not the candidate of the leadership's choosing—Al Gore. Jackson won because he mobilized African American voters throughout the South, a group that has become a significant minority within the Democratic Party's southern states. In an election with two other major candidates (Gore and Michael Dukakis), Jackson was able to win states without necessarily winning a majority of the votes. He won a majority of the southern states and Al Gore subsequently dropped out of the race.<sup>89</sup>

To the extent that parties matter in the nomination process, it is through national party organizations much more than through state party organizations. National leadership influences which states are relevant and which are not; all the while considering national and not state interests in making such determinations. As Jonathan Bernstein finds in his analysis of career

<sup>88</sup> *Id.* at 103; see also KLINKNER, *supra* note 60, at 186 (noting that the DNC supported Super Tuesday because "it provided the party with another way to help shed its 'special interest' label and also allowed the constituency served by the [Democratic Leadership Council], southern, white moderates, to believe that the party was responsive to their demands").

<sup>89</sup> See FRYMER, *supra* note 21, at 116-17.

patterns of current party activists:

the new national parties have . . . developed outside of the formal party organizations. The Stars are not only party elites; they are *national* party elites, part of a network of governing and electioneering Democrats or Republicans who concern themselves with national matters—gaining partisan control of Congress and the White House, and then governing or influencing national policy makers. Indeed, unlike the state and local party notables who gathered to bargain over nominations at the pre-reform conventions, [these] people . . . are truly a *presidential elite*.<sup>90</sup>

National leaders have also imposed party rules on state organizations. For instance, the Democratic Party imposed new rules on the state of Wisconsin (which were upheld by the Supreme Court<sup>91</sup>) mandating delegate selection through a party caucus process. With national leaders having more control over the nomination process, the influence of state party actors is secondary to strategic concerns of winning national elections. Again, this does not mean that states do not at times have representation, but rather that the barriers that once prevented national parties from ignoring state interests (control over delegate selection, control over state nomination procedures, and veto power within the final nominating stages) are no longer institutionally meaningful.

As we stated earlier, the Supreme Court has played a pivotal role in allowing the national parties to impose their rules and will on state parties. In the Democratic Party's battle with its Illinois branch over delegate selection criteria, the state court had justified an injunction against the national party on the grounds that the "interest of the state in protecting the effective right to participate in primaries is superior to whatever other interests the party itself might wish to protect."<sup>92</sup> The Supreme Court reversed the state court and thereby denied the state party any institutional protection over delegate selection: "The States themselves have no constitutionally mandated role in the great task of the selection of Presidential and Vice-Presidential candidates."<sup>93</sup> Allowing each state to exert control over the national party conventions "could seriously undercut or indeed destroy the effectiveness of the National Party Convention as a concerted enterprise engaged in the vital process of choosing Presidential and Vice-Presidential candidates—a process which usually involves coalitions cutting across state lines."<sup>94</sup> Similarly, in the Wisconsin case mentioned above, the Court struck down a Wisconsin law that permitted registered voters to vote in the Democratic Party primary even if they were not affiliated with the party. The conflict

<sup>90</sup> Jonathan Bernstein, *The New New Presidential Elite*, in IN PURSUIT OF THE WHITE HOUSE 2000: HOW WE CHOOSE OUR PRESIDENTIAL NOMINEES, *supra* note 50, at 171-72.

<sup>91</sup> Democratic Party of United States v. Wisconsin *ex rel* LaFollette, 450 U.S. 107 (1981).

<sup>92</sup> Wigoda v. Cousins, 302 N.E.2d 614, 629 (1973).

<sup>93</sup> Cousins v. Wigoda, 419 U.S. 477, 489-90 (1975).

<sup>94</sup> *Id.* at 490.

arose because, under the state law, the delegates selected by the party to attend the national convention were bound to vote in accordance with the results of the open primary,<sup>95</sup> a result that conflicted with the rules of the Democratic National Party. The Court again sided with the parties, asserting that the ability of parties to carry out their “essential functions” was of primary importance.<sup>96</sup>

In contrast to Wisconsin, Connecticut in 1955 passed a law requiring that voters in primary elections be registered members of that party’s primary. The Republican Party initially supported this law,<sup>97</sup> but subsequently changed its mind, inviting independent voters to vote in its primary and challenging the constitutionality of the state law. The trial and appellate federal courts struck down the state law as unconstitutional. The Supreme Court, in *Tashjian v. Republican Party*,<sup>98</sup> affirmed, holding that the Republican Party enjoyed the freedom of association, which included the discretion to determine the class of citizens eligible to vote for its candidate.<sup>99</sup> In *Eu v. San Francisco County Democratic Central Committee*,<sup>100</sup> the Democratic and Republican parties challenged a California law that banned political parties from endorsing political candidates during a direct primary election.<sup>101</sup> The Court held that the burden the law placed on the parties’ right to state “whether a candidate adheres to the tenets of the party or whether party officials believe that the candidate is qualified for the position sought”<sup>102</sup> was an impermissible burden on both speech and association.<sup>103</sup> Most recently, in *California Democratic Party v. Jones*,<sup>104</sup> the Court struck down a state proposition that allowed voters, regardless of political affiliation, to vote for any candidate, regardless of the candidate’s political affiliation. The Court, citing *Eu*, *LaFollette*, *Tashjian*, and *Timmons*, stated that primaries were not wholly public affairs and therefore political parties reserved the right of associational freedom, which included the right to exclude nonmembers from participating in the primary. The state’s justifications for the proposition—including better representation, expanded candidate debate, and increased voter choice and turnout—did not pass heightened scrutiny.<sup>105</sup>

States, to achieve autonomy and relevance in the political process,

<sup>95</sup> *LaFollette*, 450 U.S. at 112.

<sup>96</sup> *Id.* at 122.

<sup>97</sup> *See Nader v. Schaffer*, 417 F. Supp. 837 (D. Conn.), *summarily aff’d*, 429 U.S. 989 (1976) (upholding district court decision preventing an independent voter from voting in the Republican primary).

<sup>98</sup> 479 U.S. 208 (1986).

<sup>99</sup> *See id.* at 217-25.

<sup>100</sup> 489 U.S. 214 (1989).

<sup>101</sup> *Id.* at 217.

<sup>102</sup> *Id.* at 223.

<sup>103</sup> *See id.* at 224.

<sup>104</sup> 530 U.S. 567 (2000).

<sup>105</sup> *See id.* at 582-84.

need control over candidates and leaders. Yet the Court has been consistent in denying states the ability to influence the decision-making process of the national parties. As we have shown here in the realm of the presidential nomination process, and as we will continue to see in the next two subparts, there is less and less that state elected officials—and their citizens—can do to influence the election of national officers.

*B. Campaign Finance—The Impact of Corporate and Interest Group Wealth on Parties*

In the campaign finance arena, just as in the nomination process, parties have had some lean years, particularly during the 1970s and 1980s, before they were able to respond to a series of important reforms. The Federal Election Campaign Act (“FECA”) was most significant, as it inadvertently led to the rise of PACs and their replacement for the national political parties as the most important helper in electing a candidate to office. FECA attempted to limit party organizations and interest groups equally, but failed to account for the sheer number of interest groups that would form as PACs, severely marginalizing the ability of the single political party to contribute to and spend on campaigns. Since the amount of money a House or Senate candidate can receive from hundreds of PACs far exceeds what the Democratic or Republican Party can contribute, candidates began to depend almost entirely on these financiers and individual contributions for campaign funding.<sup>106</sup> These campaign laws remain generally unaltered today, and as a result, to the degree that parties have reemerged, it has largely been at the margins—in close elections where parties feel they can make a difference.<sup>107</sup>

Currently, FECA regulations separate campaign financing into two categories, hard and soft money. Hard money is most directly regulated by federal law and is strictly limited based on who is giving the donation. By statute, corporations and labor unions cannot contribute directly to federal elections; only by creating and registering political action committees can these organizations donate to candidates, and such donations are limited to \$5000 per House candidate and \$7500 per Senate candidate in any single election. Individuals can contribute no more than \$1000 per candidate for federal election, and no more than \$20,000 to a political party. Soft money is not covered under FECA, however, and provides an opportunity for people to spend large sums of money as long as it is used for specific purposes, most notably for “party-building” or “democracy” purposes.<sup>108</sup> This could

<sup>106</sup> Frank J. Sorauf, *Political Parties and the New World of Campaign Finance*, in THE PARTIES RESPOND: CHANGES IN AMERICAN PARTIES AND CAMPAIGNS, *supra* note 76, at 222, 231.

<sup>107</sup> *Id.* at 238; Stephen Ansolabehere & James M. Snyder, Jr., *Soft Money, Hard Money, Strong Parties*, 100 COLUM. L. REV. 598 (2000).

<sup>108</sup> There is also a new form of soft money: in the 2000 elections some Senate candidates—notably Hillary Clinton and John Ashcroft—established joint fundraising committees that collected both soft and

refer to a broad array of activities—get-out-the-vote (“GOTV”) drives, bumper stickers, or generic advertisements that encourage voters to vote (in most cases) Democratic or Republican.<sup>109</sup> A nontrivial amount of soft money is used to pay for administrative and overhead costs, which frees up other contributions to the party to be used directly to support candidates.<sup>110</sup> Because soft money is unregulated, any individual, corporation, or union can contribute in this fashion, and without any limit on the size of the contribution. Increasingly, soft money does not even involve a political party, since individuals, corporations, and unions are all free to spend unlimited amounts of their own money to voice their own message in a federal election—so long as the message does not directly advocate on behalf of a candidate. Thus, in contrast to hard money—because of the federal reporting requirements—soft money is much harder to document and trace.

In this backdrop of soft and hard money contributions, the potential importance of parties in close elections remains significant. Both parties have given much more power to their national and congressional committees to spend money, recruit candidates, and coordinate election activities, and, perhaps most importantly, to funnel interest group money into soft money for campaign activities. As we will see from these activities, however, this enhanced role for the national party has not translated into greater state representation. Instead, the parties serve as providers to individual candidates, and they have accepted an equally subservient role to the various necessities of financing increasingly expensive congressional campaigns.

1. *Hard Money.*—To examine the effect political parties have on congressional races, we analyzed the hard money contributions of the two political parties from the 1998 U.S. House and Senate elections.<sup>111</sup> In that year, the 435 House races included 764 candidates (incumbents, challengers, and those running for open seats); in the Senate, 70 candidates ran in 33

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hard money contributions.

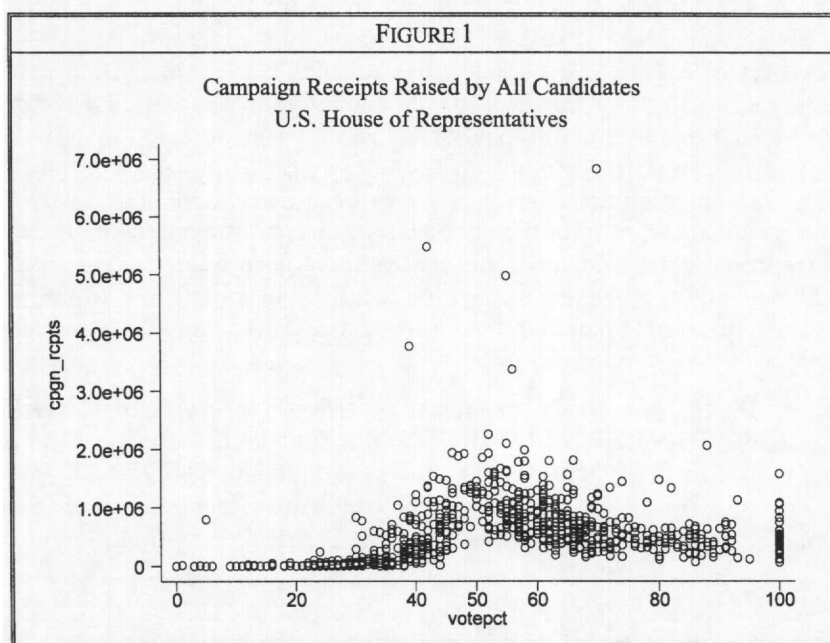
<sup>109</sup> The distinction between soft and hard money contributions can perhaps be best illustrated by an example: A political advertisement that states, “Vote for Candidate X because . . .,” must come from hard money contributions, because its message directly advocates on behalf of a candidate. A political advertisement that states, however, “Candidate Y has supported the following [ostensibly ‘detrimental’ policies]; be sure to vote,” is technically an *educational* advertisement and not a political advocacy advertisement and therefore can be funded via soft money. The substantive difference between the two types of advertisements, of course, is often semantic.

<sup>110</sup> See Ray La Raja & Elizabeth Jarvis-Shean, *Assessing the Impact of a Ban on Soft Money: Party Soft Money Spending in the 2000 Elections*, Policy Brief for the Institute of Governmental Studies and Citizens’ Research Foundation 3 (2001) (on file with authors) (noting that in the 2000 elections, national parties spent over 40% of their soft money on “administrative and overhead,” and state parties spent nearly 30% for this purpose).

<sup>111</sup> Press Release, Federal Election Commission, *FEC Reports on Political Activity for 1997–98*, at <http://www.fec.gov/press/ptyye98.htm> (Apr. 9, 1999) (listing party contributions, coordinated expenditures, and independent expenditures for each 1998 general election candidate). The statistics and graphs that follow in this text are drawn from this dataset.

rices. The data provide the amount each of the candidates raised on their own in direct contributions; how much, if any, they received from political parties; and their vote percentage in the election.

In the House, the candidates collectively raised \$418,043,992 in direct contributions, with the average candidate raising \$547,178. The political parties spent \$13,409,728 on behalf of candidates, either in the form of direct contributions to the candidates, or independent expenditures on behalf of the candidates, giving on average \$17,552. However, neither the amount raised nor the amount contributed was uniformly distributed across all candidates. Figure 1 shows a scatterplot of how much each candidate raised, broken down by the percentage of votes he or she received in the general election.



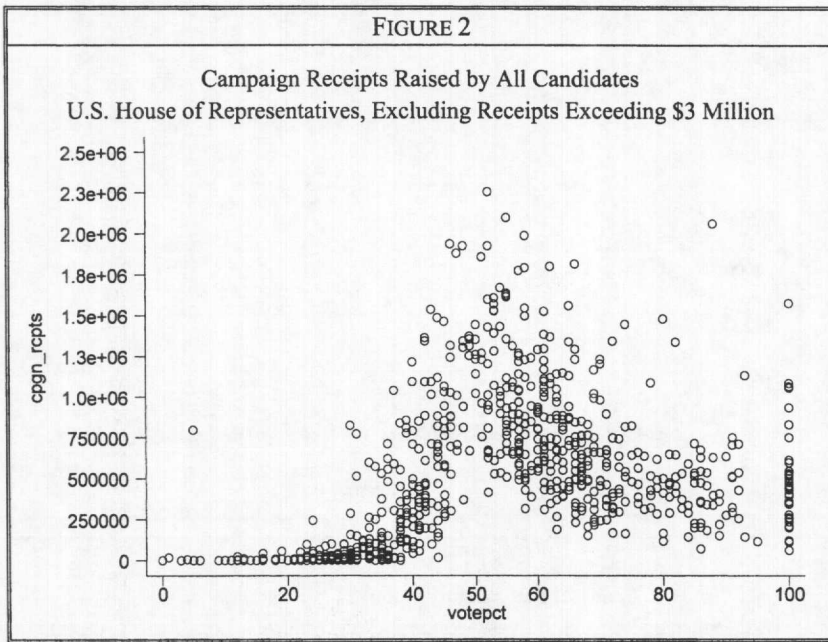
A higher number of plots located along a particular vote percentage reflect a greater number of representatives receiving that percentage of vote. Similarly, a higher number of plots located along a particular amount of campaign receipts reflect a higher number of representatives receiving that level of campaign receipts. Figure 1 reveals a normal, or bell, distribution, reflecting that those candidates in the middle received, by and large, the greatest amount of contributions.

Figure 2 excludes the five candidates who raised more than \$3,000,000 in contributions,<sup>112</sup> making it easier to view the distribution for the remain-

<sup>112</sup> The five candidates were Loretta Sanchez (Democrat of California), Robert Dornan (Republican of California), Richard Gephardt (Democrat of Missouri), Phillip Maloof (Democrat of New Mexico),



ing candidates. As one might expect, the distribution is not uniform. Marginal candidates have trouble raising money, competitive candidates raise a lot of money, and a few of the candidates (almost always incumbents) raise a tremendous amount, thereby warding off challengers in the first place. While the issue of causality between what candidates raise in contributions and the vote percentages they receive is debatable, the correlation is clear: candidates who raised more money fared better in the election.



Campaign contributions by political parties show a similar trend. Figure 3 shows how much money political parties contributed to these same candidates, based on the percentage of the vote they received in the general election.

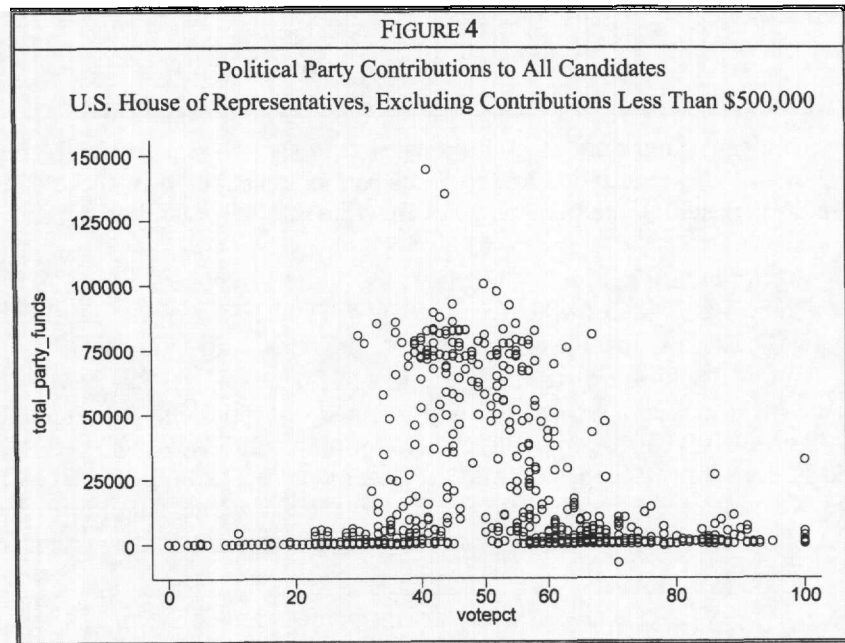
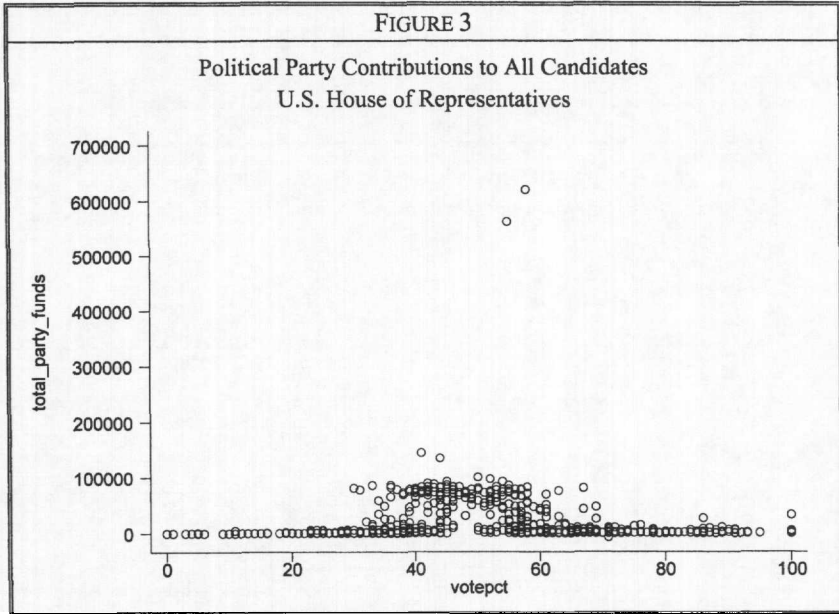
As with Figure 2, Figure 4 excludes the outliers in contributions, in this case the two candidates who received over \$500,000 in contributions,<sup>113</sup> making it easier to view the distribution for the remaining candidates.

Figures 3 and 4 are strikingly similar to Figures 1 and 2: they show that political parties allocated the bulk of their contributions to candidates who were involved in competitive races. Some candidates who received contributions from the parties still lost the general election, but most of them were at least competitive. Looking at these statistics slightly differently, candidates who received between forty percent and sixty percent of

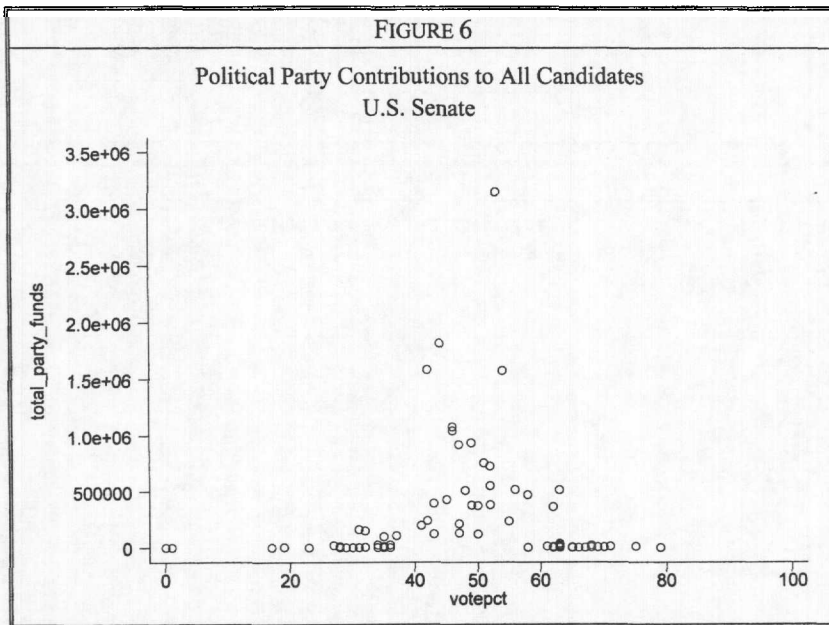
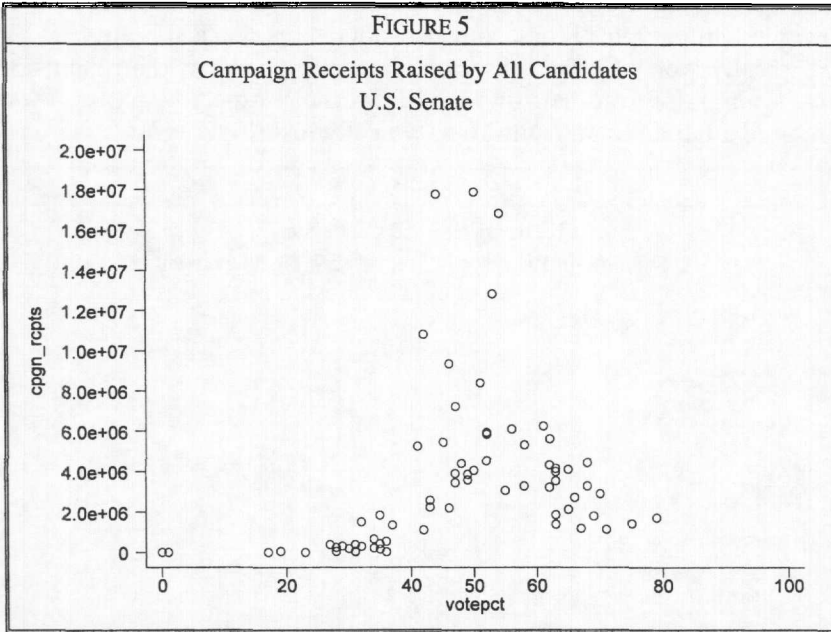
and Newt Gingrich (Republican of Georgia).

<sup>113</sup> The two candidates were Richard Gephardt (Democrat of Missouri) and Floyd Spence (Republican of South Carolina).

the votes in the general election, on average, raised \$899,648 on their own, and political parties kicked in \$46,271 to each of these candidates. Either way, the parties gave their money to those candidates who were in the most competitive races.

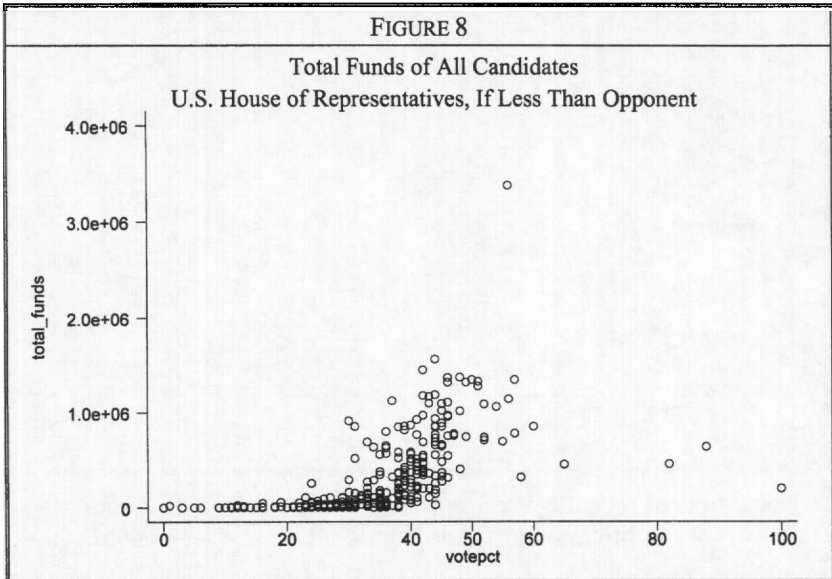
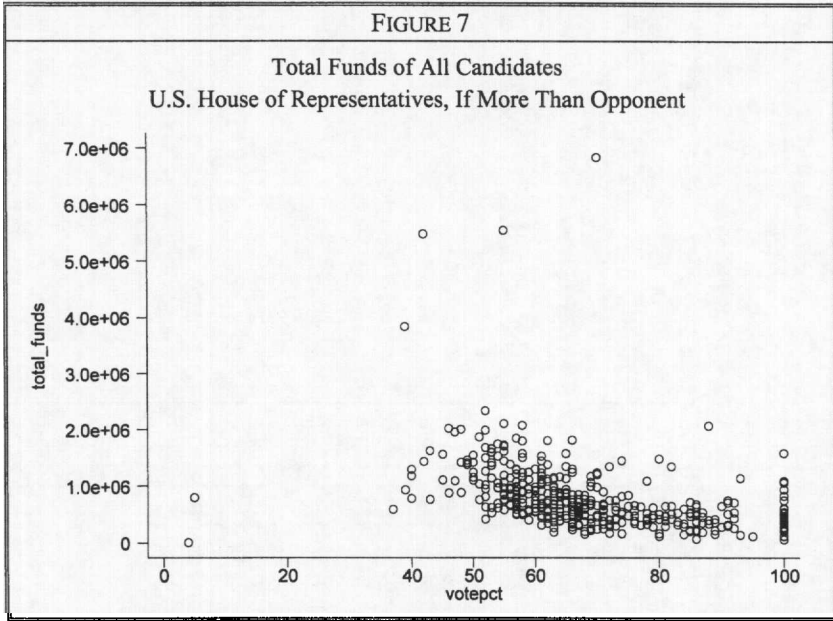


As denoted by Figures 5 and 6, the U.S. Senate elections reflect a similar pattern to the House, albeit with fewer observations.

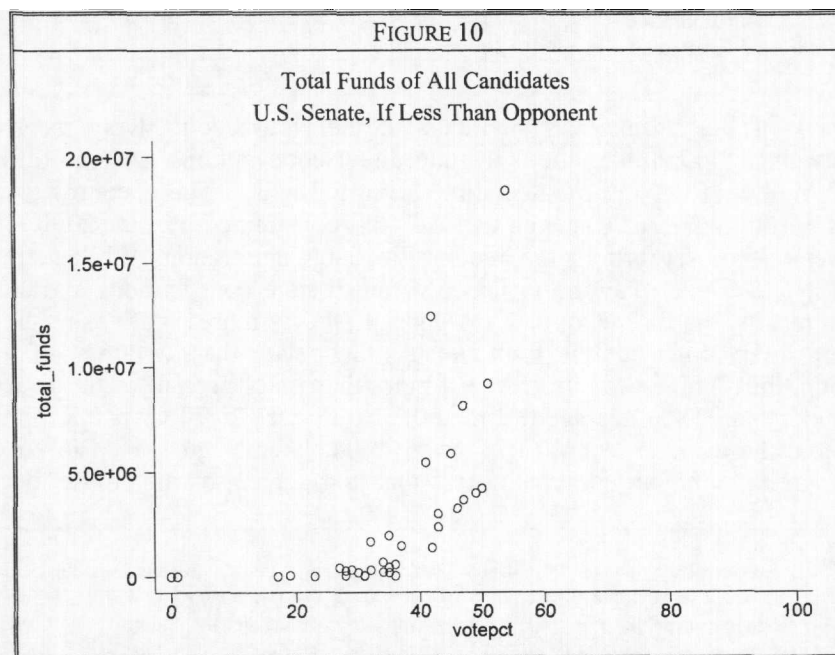
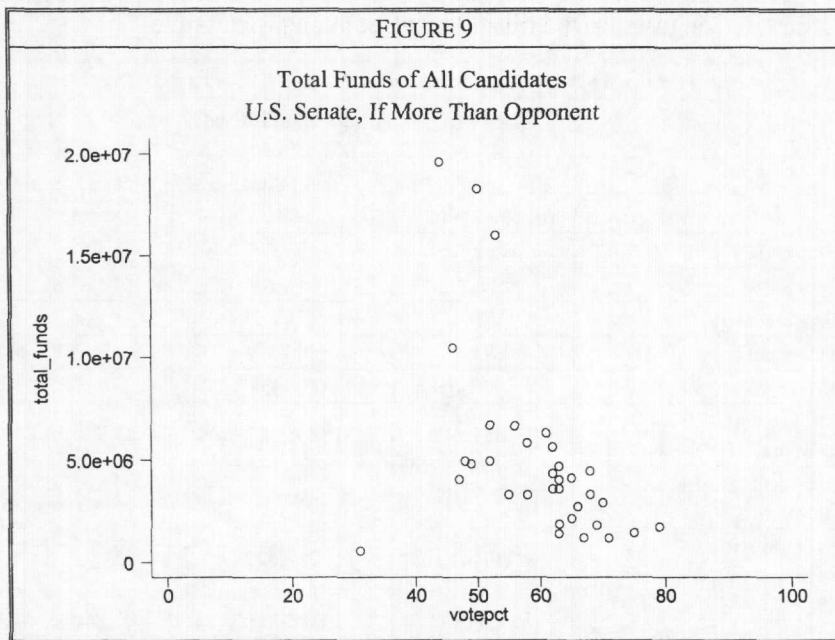


These figures reveal several important points, some of them obvious, a few less so. As political pundits and public advocacy groups have long de-

cried, money plays a crucial role in congressional elections. Candidates for the House of Representatives in the 1998 elections who had relatively low amounts of money (raised on their own and spent on their behalf by their respective party) typically still outspent their opponents (Figure 7). They also typically won. Conversely, candidates who had less than their opponents (again, raised on their own and from their respective party), even if they raised a fair amount themselves, typically lost (Figure 8).



The same trend holds for the 1998 U.S. Senate races (Figures 9 and 10, respectively).



The second point is that political parties gave their money to those

candidates in the most competitive races. This strategy is wholly rational on their part, given their limited resources. However, it is clear that the parties' driving motivation in these races is to maximize their own candidates' presence in Congress, in the most cost-effective way possible.

TABLE 1: U.S. HOUSE OF REPRESENTATIVES—1998 ELECTIONS<sup>114</sup>

	All Members	Reps Who Raised More In-State Than Out-of-State	Reps Who Raised More Out-of-State Than In-State
Members	435	395	40
Democrats	212	186	26
Republicans	223	209	14
Average Tenure (years)	9.83	8.73	20.70
Average Vote Received	68.27%	68.34%	70.99%
Total Amount Raised In-State	\$117,381,600	\$113,610,786	\$3,770,814
Total Amount Raised Out-of-State	\$32,556,641	\$25,280,118	\$7,276,523
Average Amount Raised In-State	\$270,464	\$287,622	\$94,270
Average Amount Raised Out-of-State	\$75,015	\$64,000	\$181,913
Number of Committee Chairs and Party Leadership Positions	40	27	13

As Table 1 illustrates, members of the House collectively received more than \$117 million from in-state direct contributions, and more than \$32 million from out-of-state direct contributions. These contributions came from individuals as well as PACs, all constrained by the \$2000 contribution limit set forth by the Federal Election Commission. While there is not a one-to-one relationship between out-of-state contributions and election results, the following patterns emerge. Forty representatives received more direct contributions from outside their state than within. Of this group, thirty-three of them received more than sixty percent of the vote in the election. Their average tenure at the House was 20.70 years, more than double the average tenure (8.73 years) of their colleagues.<sup>115</sup> Moreover, this group, although comprising less than ten percent of the House, occu-

<sup>114</sup> Table compiled by authors from data available from The Center for Responsive Politics, a non-partisan, non-profit research group based in Washington, D.C. that tracks money in politics, and its effect on elections and public policy. The data is available in annual reports and on their website at <http://www.opensecrets.org>. Data set created from these reports on file with the authors.

<sup>115</sup> This difference is statistically significant at the 0.01 level. This subgroup also had a higher margin of victory in their election race, although this difference was not statistically significant.

pied thirteen of the forty positions reserved for committee chairs or ranking members, or majority or minority leadership positions.<sup>116</sup>

In the Senate, the influence of out-of-state contributions is even more pronounced.

	All Members	Senators Who Raised More In-State Than Out-of-State	Senators Who Raised More Out-of-State Than In-State
Members	100	65	35
Democrats	50	27	23
Republicans	49	38	11
Independents	1	0	1
Average Tenure (years)	12.12	9.55	16.89
Average Vote Received	59.33%	57.94%	61.90%
Total Amount Raised In-State	\$161,420,756	\$126,728,445	\$34,692,311
Total Amount Raised Out-of-State	\$128,786,683	\$56,456,843	\$72,329,845
Average Amount Raised In-State	\$1,614,208	\$1,949,668	\$991,209
Average Amount Raised Out-of-State	\$1,287,867	\$868,567	\$2,066,567
Number of Committee Chairs and Party Leadership Positions	34	11	23

As Table 2 illustrates, while senators received more in-state contributions—\$161 million—than out-of-state contributions—\$129 million—the former represented only fifty-five percent of their total direct contributions. Thirty-five senators received more direct contributions from outside their state than from within. Of this group, twenty-three received at least sixty percent of the vote in their last election. Their average tenure in the Senate was 16.89 years, more than seven years longer than their colleagues' average tenure of 9.55 years.<sup>117</sup> These thirty-five senators occupied twenty-three of the thirty-four leadership positions in the Senate.<sup>118</sup> Thus, in both

<sup>116</sup> This difference is statistically significant at the 0.01 level. This included Richard Gephardt (Minority Leader), David Bonior (Minority Whip), C.W. Young (chairman of the Appropriations Committee), and David Obey (ranking member of the Appropriations Committee).

<sup>117</sup> This difference is statistically significant at the 0.01 level. This subgroup also had a higher margin of victory in their election race, but as with the House, this difference was not statistically significant.

<sup>118</sup> This difference is statistically significant at the 0.01 level. This includes, among others, Tom Daschle (Senate Majority Leader), Christopher Dodd (chairman of the Rules Committee), Ted Kennedy

the House and the Senate, candidates who received most of their funding from outside their respective state held a disproportionate number of the important positions in their chamber.

Our limited examination into state legislatures revealed, as one might expect, a far smaller role for out-of-state contributions. While an examination of the contribution patterns of each of the fifty states is both potentially overwhelming and currently impossible given a lack of data sources, we examined the Virginia Legislature to provide some sense of comparison.

Members	100
Democrats	47
Republicans	52
Independents	1
Average Tenure	10.85
Average Vote Received	79.07%
Total Amount Raised	\$9,384,177
Average Amount Raised	\$107,864
Average Amount Raised from Top 10 Zip Codes	\$69,824
Average Amount Raised In-State from Top 10 Zip Codes	\$68,170
Percentage Raised In-State from Top 10 Zip Codes	97.6%

Table 3 reflects that while we were unable to know what percentage of each candidate's overall contribution came from in or outside the state, we could measure the difference based on contributions from the top ten zip codes.<sup>120</sup> In the Virginia Assembly, each of the one hundred representatives raised the majority of their funds within the state; the average amount of funds raised from within the state was ninety-six percent. The average legislator, with a tenure of 10.85 years, raised \$107,864 in direct contributions, \$69,824 of which came from ten zip codes, with \$68,170 of that amount coming from within the state.

The Virginia Senate, shown in Table 4, reveals similar results. The average senator had a tenure of 8.79 years, and raised \$191,814 dollars; \$101,495 came from ten zip codes, and \$99,421 of that amount came from zip codes within the state. While it is impossible to determine from the existing data on the Virginia Assembly or Senate how much candidates raised

(chairman of the Health and Education Committee), and Orrin Hatch (ranking member of the Judiciary Committee).

<sup>119</sup> Table compiled by authors from the Virginia Public Access Project on the website, <http://www.vpap.org>. Data set created from these reports on file with the authors. For a few of the members, some of their data were missing. This explains why an average figure may not simply be 1/100 of the total figure.

<sup>120</sup> We could also measure how much of the contributions from the top ten zip codes compared with the total amount the candidate raised. On average, the amount raised in the top ten zip codes represented 57.2% of the total amount the representatives raised in direct contributions.



from outside the state, it is clear, from the zip codes contributing the most funds, that little, if any, came from outside the state.

Members	40
Democrats	18
Republicans	22
Average Tenure	8.79
Average Vote Received	81.10%
Total Amount Raised	\$6,905,308
Average Amount Raised	\$191,814
Average Amount Raised from Top 10 Zip Codes	\$101,495
Average Amount Raised In-State from Top 10 Zip Codes	\$99,421
Percentage Raised In-State from Top 10 Zip Codes	98.0%

2. *Soft Money*.—Since 1992, soft money has become the primary loophole by which parties can influence campaign finance. Both parties have spent more than fifty million dollars in soft money per election since 1992, and this has increased considerably with each election.<sup>122</sup> The national parties have transferred considerable amounts of the money they have raised to the state parties.<sup>123</sup> Both parties, in fact, have been giving considerable sums of money, and in particular soft money, to the states in recent years for “party building” and “issue advocacy” activities. In 1995–1996, for instance, the RNC gave \$66.3 million, while the DNC gave \$74.3 million.<sup>124</sup> In the 2000 federal elections, the two parties raised roughly \$500 million in soft money and transferred \$280 million to their respective state parties.<sup>125</sup> Parties channel their funds in this manner because federal and state regulations are more permissive of state spending of soft money than of federal spending.<sup>126</sup> But it is questionable whether these transfers have been used to bolster state party organizations. As John Bibby and Thomas Holbrook argue, this money transfer demonstrates “that the national party organizations are using the state parties as vehicles to implement national campaign strategies.”<sup>127</sup> To the degree that state parties help candidates,

<sup>121</sup> Table compiled by authors from the Virginia Public Access Project on the website, <http://www.vpap.org>. Data set created from these reports on file with the authors. For a few of the members, some of their data were missing. This explains why an average figure may not simply be 1/100 of the total figure.

<sup>122</sup> Marianne Holt, *The Surge in Party Money in Competitive 1998 Congressional Elections*, in *OUTSIDE MONEY: SOFT MONEY AND ISSUE ADVOCACY IN THE 1998 CONGRESSIONAL ELECTIONS* 17, 19 (David B. Magleby ed., 2000).

<sup>123</sup> Ansolabehere & Snyder, *supra* note 107, at 613-15.

<sup>124</sup> Bibby & Holbrook, *supra* note 17, at 74.

<sup>125</sup> See La Raja & Jarvis-Shean, *supra* note 110, at 4.

<sup>126</sup> See *id.* at 2.

<sup>127</sup> Bibby & Holbrook, *supra* note 17, at 74.

it must be kept in mind that their role is to supplement the activities of the candidates' own personal campaign organizations. . . . This restricted campaign role is an adaptation by the parties to the candidate-centered nature of state electoral politics in which candidates rely primarily on their own organizations, set up personal headquarters, and have nonparty groups providing campaign assistance.<sup>128</sup>

In fact, one recent study found that national parties will transfer soft money to state and local parties with the understanding that the state and local parties will make hard money contributions to national candidates:

One of the most obvious money swaps occurred during the 1991-1992 election cycle, when the NRCC (National Republican Congressional Committee) transferred \$116,000 in soft money to the Oregon Republican Party . . . . The Oregon Republican Party in turn made \$6,000 in hard money contributions to House candidates in Oregon and \$110,000 in hard money contributions to House candidates in other states, primarily challengers and open-seat candidates in some of the nation's most competitive races.<sup>129</sup>

Table 5 further explicates the role that soft money is playing in enhancing the power of state parties. This table lists all transfers of funds from the national Democratic and Republican Committees to federal, state, and local party committees from 1997-1998. The Republican Party gave significantly more money to states—\$27.7 million—than the Democratic Party—\$15.6 million. This money, however, was not uniformly distributed across all states, or even distributed according to population. The RNC spent the most in New York, California, and Florida, three of the largest states. However, they spent the next highest amount in Nevada—over \$1.5 million—while spending *only* \$500,000 in Texas. Conversely, the DNC spent the most in Ohio, Wisconsin, and California, while their expenditures in New York and Florida were not among the top ten. Soft money, then, allows political parties to target funds to candidates who need it most, and not to candidates who will easily win or surely lose. As such, its use is to help candidates win, not to buttress severely weakened state party budgets. For example, in Nevada, Senator Harry Reid won reelection in 1998 over Republican challenger John Ensign by the narrowest of margins: 48.8% to 48.7%. Conversely, in Texas, neither of the senators was in an election year in 1998 and, with the exception of Democratic Representative Charles Stenholm, all of the incumbent representatives won with at least 55% of the popular vote.<sup>130</sup>

Meanwhile, the national parties are increasingly spending money on

<sup>128</sup> *Id.* at 75.

<sup>129</sup> Victoria A. Farrar-Myers & Diana Dwyre, *Parties and Campaign Finance*, in *AMERICAN POLITICAL PARTIES: DECLINE OR RESURGENCE?* 149 (Jeffrey E. Cohen, Richard Fleisher & Paul Kantor eds., 2001).

<sup>130</sup> The election results are available from the Open Secrets website, <http://www.opensecrets.org/politicians/candliststate.asp>.

local races, most notably when the Republicans gave one million dollars to the 1997 Virginia governor's race and \$750,000 to the New Jersey governor's race.<sup>131</sup> Party spending on state races varies, as does the amount of money spent more broadly by state candidates.<sup>132</sup> Democrats gave a total of \$3,659,284 to candidates in California races during 1992; they gave \$5,052 to candidates in Wyoming.<sup>133</sup>

We can draw a number of conclusions from these tables, all of which are problematic for Kramer and other defenders of the political safeguards thesis. First, PAC money dominates most congressional races. In close races, soft money from the parties has become increasingly important. While the soft money comes from parties, it is made up of interest group donations representing corporate and wealthy influences from around the nation. In the 1999–2000 election cycle, for instance, thirty-six of the forty-seven interest groups to give one million dollars or more to one or both of the parties were corporate.<sup>134</sup> Of course, the soft money donations to the national parties are quite arguably state specific, but large sums of money are not coming from state budgets, they are coming from interest groups—many of which transcend state boundaries in their economic and political interests, as well as in their property ownership. These groups are rarely representing state interests as much as they are representing their own interests, which are predominantly corporate and free market.<sup>135</sup> At times, this works to the benefit of specific states, particularly when jobs are linked to a specific interest group (for example, the importance of Microsoft to the state of Washington). But the Framers were clearly not thinking about Microsoft when they were passing the Tenth Amendment.

For state parties, meanwhile, national campaign financing has had a dramatic impact. As mentioned earlier, the national parties, searching for increased funds, have created “agency agreements” that enable state parties to cede their spending authority to the national party committees. These agreements, endorsed by the Supreme Court, led the national parties to spend about seventy percent of state party funds on national campaign agendas.<sup>136</sup> The ability to take state party money as well as to fundraise

<sup>131</sup> Bibby & Holbrook, *supra* note 17, at 85.

<sup>132</sup> See Gary F. Moncrief, *Candidate Spending in State Legislative Races*, in *CAMPAIGN FINANCE IN STATE LEGISLATIVE ELECTIONS* 43 (Joel A. Thompson & Gary F. Moncrief eds., 1998) (reporting that the mean total expenditures by candidates in state house races in 1994 varied from \$322,688 in California to \$3,947 in Maine).

<sup>133</sup> See Anthony Gierzynski & David A. Breaux, *The Financing Role of Parties*, in *id.* at 187.

<sup>134</sup> Press Release, Federal Election Commission, FEC Reports on Political Activity for 1997–98, at <http://www.fec.gov/press/ptyye98.htm> (Apr. 9, 1999).

<sup>135</sup> In 1996, corporate PACS spent \$18 million in Senate elections, and \$51 million in House elections. Health care PACS added another \$12 million and \$44 million respectively. See 1995–96 Financial Activity of All Senate and House Campaigns, at <http://www.fec.gov/finance/allsum.htm> (last visited Feb. 28, 2002).

<sup>136</sup> Sorauf, *supra* note 106, at 227.

TABLE 5: NATIONAL PARTY TRANSFERS TO STATE/LOCAL PARTY COMMITTEES  
 JANUARY 1, 1997 TO DECEMBER 31, 1998

State	Federal RNC	Federal DNC	Nonfederal RNC	Nonfederal DNC	Total RNC	Total DNC	Total RNC & DNC
1 Alabama	\$33,000	\$36,159	\$852,200	\$5,000	\$885,200	\$41,159	\$926,359
2 Alaska	\$121,750	\$15,849	\$3,750	\$15,000	\$125,500	\$30,849	\$156,349
3 Arizona	\$37,900	\$68,193	\$308,700	\$82,052	\$346,600	\$150,245	\$496,845
4 Arkansas	\$91,500	\$65,315	\$1,106,051	\$47,057	\$1,197,551	\$112,372	\$1,309,923
5 California	\$1,983,330	\$437,202	\$749,000	\$731,307	\$2,732,330	\$1,168,509	\$3,900,839
6 Colorado	\$59,300	\$44,149	\$11,700	\$0	\$71,000	\$44,149	\$115,149
7 Connecticut	\$92,500	\$90,538	\$406,500	\$562,529	\$499,000	\$653,067	\$1,152,067
8 Delaware	\$3,395	\$8,680	\$138,100	\$10,000	\$141,495	\$18,680	\$160,175
9 Florida	\$177,677	\$133,935	\$1,973,448	\$528,142	\$2,151,125	\$662,077	\$2,813,202
10 Georgia	\$28,837	\$33,220	\$524,300	\$0	\$553,137	\$33,220	\$586,357
11 Hawaii	\$8,120	\$12,282	\$66,030	\$50,000	\$74,150	\$62,282	\$136,432
12 Idaho	\$130,408	\$97,792	\$619,361	\$247,038	\$749,769	\$344,830	\$1,094,599
13 Illinois	\$7,187	\$54,734	\$366,716	\$200,526	\$373,903	\$255,260	\$629,163
14 Indiana	\$22,500	\$132,026	\$194,532	\$373,750	\$217,032	\$505,776	\$722,808
15 Iowa	\$45,528	\$86,868	\$396,372	\$650,200	\$441,900	\$737,068	\$1,178,968
16 Kansas	\$2,000	\$36,450	\$25,000	\$45,000	\$27,000	\$81,450	\$108,450
17 Kentucky	\$8,220	\$113,603	\$346,500	\$526,939	\$354,720	\$640,542	\$995,262
18 Louisiana	\$21,245	\$13,007	\$15,250	\$138,016	\$36,495	\$151,023	\$187,518
19 Maine	\$2,000	\$19,284	\$66,000	\$15,226	\$68,000	\$34,510	\$102,510
20 Maryland	\$142,200	\$72,151	\$155,300	\$103,585	\$297,500	\$175,736	\$473,236
21 Massachusetts	\$43,987	\$31,084	\$78,000	\$856,565	\$621,987	\$887,649	\$1,509,636
22 Michigan	\$23,550	\$110,765	\$241,200	\$371,512	\$264,750	\$482,277	\$747,027
23 Minnesota	\$0	\$49,836	\$1,207,500	\$715,415	\$1,207,500	\$765,251	\$1,972,751
24 Mississippi	\$6,650	\$5,789	\$438,100	\$0	\$444,750	\$5,789	\$450,539

	State	Federal RNC	Federal DNC	Nonfederal RNC	Nonfederal DNC	Total RNC	Total DNC	Total RNC & DNC
25	Missouri	\$403,385	\$46,406	\$12,450	\$52,227	\$415,835	\$98,633	\$514,468
26	Montana	\$11,350	\$21,065	\$46,700	\$133,900	\$58,050	\$154,965	\$213,015
27	Nebraska	\$9,607	\$20,690	\$99,380	\$59,500	\$108,987	\$80,190	\$189,177
28	Nevada	\$255,502	\$13,610	\$1,288,211	\$51,000	\$1,543,713	\$64,610	\$1,608,323
29	New Hampshire	\$13,200	\$34,816	\$178,300	\$216,000	\$191,500	\$250,816	\$442,316
30	New Jersey	\$0	\$110,309	\$486,645	\$89,913	\$486,645	\$200,222	\$686,867
31	New Mexico	\$164,413	\$42,820	\$708,583	\$3,271	\$872,996	\$96,091	\$969,087
32	New York	\$1,531,171	\$94,612	\$825,648	\$498,134	\$2,356,819	\$592,746	\$2,949,565
33	North Carolina	\$22,275	\$176,232	\$287,530	\$524,980	\$309,805	\$701,212	\$1,011,017
34	North Dakota	\$19,250	\$20,524	\$78,750	\$28,700	\$98,000	\$49,224	\$147,224
35	Ohio	\$2,200	\$65,521	\$1,309,800	\$1,368,701	\$1,312,000	\$1,434,222	\$2,746,222
36	Oklahoma	\$19,700	\$47,437	\$275,800	\$0	\$295,500	\$47,437	\$342,937
37	Oregon	\$15,000	\$79,068	\$75,000	\$37,000	\$90,000	\$116,068	\$206,068
38	Pennsylvania	\$36,250	\$74,003	\$225,750	\$310,351	\$262,000	\$384,354	\$646,354
39	Rhode Island	\$216,869	\$8,098	\$14,400	\$0	\$231,269	\$8,098	\$239,367
40	South Carolina	\$258,357	\$37,906	\$946,134	\$17,500	\$1,204,491	\$55,406	\$1,259,897
41	South Dakota	\$12,000	\$14,046	\$36,000	\$82,000	\$48,000	\$96,046	\$144,046
42	Tennessee	\$850	\$62,089	\$93,500	\$232,675	\$94,350	\$294,764	\$389,114
43	Texas	\$26,400	\$137,788	\$469,600	\$623,221	\$496,000	\$761,009	\$1,257,009
44	Utah	\$107,030	\$26,953	\$267,253	\$10,000	\$374,283	\$36,953	\$411,236
45	Vermont	\$11,895	\$19,510	\$89,300	\$38,480	\$101,195	\$57,990	\$159,185
46	Virginia	\$609	\$66,983	\$549,091	\$288,592	\$549,700	\$355,575	\$905,275
47	Washington	\$649,042	\$100,632	\$887,571	\$290,816	\$1,536,613	\$391,448	\$1,928,061
48	West Virginia	\$15,000	\$12,645	\$1,000	\$0	\$16,000	\$12,645	\$28,645
49	Wisconsin	\$104,500	\$185,139	\$617,000	\$993,634	\$721,500	\$1,178,773	\$1,900,273
50	Wyoming	\$4,800	\$15,514	\$42,200	\$5,000	\$47,000	\$20,514	\$67,514
	<b>Total</b>	\$7,003,439	\$3,303,327	\$20,701,206	\$12,280,454	\$27,704,645	\$15,583,781	\$43,288,426

and coordinate enormous sums of money from interest groups has led the national parties to be in a position to dominate electoral strategy and policy decisions. Writes John F. Bibby:

[State parties] suffer a loss of autonomy and become dependent upon national party largess. In some instances, state parties' headquarters may be literally taken over by national party and presidential candidates operatives as the state party becomes little more than a check-writing mechanism for the national party. When such takeovers occur, national party priorities and strategies tend to prevail over those of state parties.<sup>137</sup>

Frank Sorauf agrees:

National party campaign committees assume the spending authority of state committees via agency agreements, and the party committees in Congress replace the local parties as the "party" that incumbents and candidates deal with. And national party committees, and their growing field staffs, take over what had been the local party's main role in nominations: the recruitment of candidates.<sup>138</sup>

This does not mean that state parties are unimportant. Indeed, national party money has in some ways given state organizations a larger, although different, role in participating in electing candidates. But what is crucial here is that the direction of control has changed—where once it was the state parties telling the national committees what they wanted, today it is the national parties calling the shots. "National party organizations allocate funds to state parties in a manner that is intended to implement a national campaign strategy geared toward winning key states in the presidential race and maximizing the parties' seats in the House and Senate."<sup>139</sup>

The importance of campaign money on winning elections is fairly clear.<sup>140</sup> But what effect does money from out-of-state sources, combined with party soft money produced by largely international corporate interests, have on a congressional representative's ability to represent state interests? In the 1998 U.S. Senate elections—the chamber most idealized by the likes of Wechsler and by the Framers<sup>141</sup> as the embodiment of state interests—candidates received a substantial majority of their money from out of state. In addition, candidates from small states (those most protected by the Senate institution) received even larger sums of out-of-state money and soft money because of the absence of available cash in those states.<sup>142</sup> Thus the

<sup>137</sup> John F. Bibby, *Party Networks: National-State Integration, Allied Groups, and Issue Activists*, in *THE STATE OF THE PARTIES: THE CHANGING ROLE OF CONTEMPORARY AMERICAN PARTIES* 69, 75 (John C. Green & Daniel M. Shea eds., 1999).

<sup>138</sup> Sorauf, *supra* note 106, at 239.

<sup>139</sup> Bibby & Holbrook, *supra* note 17, at 85.

<sup>140</sup> See, e.g., Donald P. Green & Jonathan S. Krasno, *Salvation for the Spendthrift Incumbent: Re-estimating the Effects of Campaign Spending on House Elections*, 32 *AM. J. POL. SCI.* 884 (1988).

<sup>141</sup> Rakove, *supra* note 32, at 63-68.

<sup>142</sup> See also Helen Dewar & Guy Gugliotta, *In Campaign Finance, One Party's 'Level Playing*

small states that the Senate was particularly designed to protect are those most impacted by out-of-state funding.

To date, scholars have discussed the effect of money on parties and candidates with mixed predictions of its consequences.<sup>143</sup> As some scholars have shown, large sums of money from interest groups and individuals have influence in a number of subtle ways beyond "vote buying"; they help shape the context of legislation, the candidates who run for office, and the agendas on which parties campaign.<sup>144</sup> Moreover, a number of studies have shown the ways in which individual members of Congress are affected by campaign contributions, finding changes in voting behavior as well as degrees of access for the interested investors.<sup>145</sup> One study, for instance, on the influence of contributions from the tobacco lobby to state legislators, found a significant relationship between donations and legislator support of tobacco interests.<sup>146</sup> Another study showed that money donated by the National Association of Automobile Dealers was directly correlated with congressional members' votes on Federal Trade Commission regulation. In the House, 186 of the 216 representatives who overturned the regulation had received contributions from the auto dealers in the previous three years.<sup>147</sup>

The Court has also recognized the potential power of money. More than forty years ago, Justice Frankfurter wrote,

We all know . . . that one of the great political evils of the time is the apparent hold on political parties which business interests and certain organizations seek and sometimes obtain by reason of liberal campaign contributions. Many believe that when an individual or association of individuals makes large contributions for the purpose of aiding candidates of political parties in winning the elections, they expect, and sometimes demand, and occasionally, at least, receive, consideration by the beneficiaries of their contributions which not in-

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*Field' Is Another's Shaky Ground*, WASH. POST, Apr. 7, 1997, at A6.

<sup>143</sup> THOMAS FERGUSON & JOEL ROGERS, *RIGHT TURN: THE DECLINE OF THE DEMOCRATS AND THE FUTURE OF AMERICAN POLITICS* (1981); Marie Hojnacki & David C. Kimball, *PAC Contributions and Lobbying Contacts in Congressional Committees*, 54 POL. RES. Q. 161 (2001); Woodrow Jones, Jr. & K. Robert Keiser, *Issue Visibility and the Effects of PAC Money*, 68 SOC. SCI. Q. 170 (1987); Richard A. Smith, *Interest Group Influence in the U.S. Congress*, 20 LEGIS. STUD. Q. 89 (1995).

<sup>144</sup> DAN CLAWSON, ALAN NEUSTADTL & DENISE SCOTT, *MONEY TALKS: CORPORATE PACS AND POLITICAL INFLUENCE* (1992); Laura I. Langbein, *Money and Access: Some Empirical Evidence*, 48 J. POL. 1052, 1057-61 (1993).

<sup>145</sup> See Diana Evans, *Before the Roll Call: Interest Group Lobbying and Public Outcomes in House Committees*, 49 POL. RES. Q. 287 (1996) (finding a relationship between contributions and committee member behavior); S.B. Gordon, *All Votes are Not Created Equal: Campaign Contributions and Critical Votes*, 63 J. POL. 249 (2001) (finding a relationship between campaign contributions and legislator votes in close roll calls); Richard L. Hall & Frank W. Wayman, *Buying Time: Moneyed Interests and the Mobilization of Bias in Congressional Committees*, 84 AMER. POL. SCI. REV. 797, 809-15 (1990) (finding that the greater the contributions to members of Congress, the more consistent the members' voting and behind the scenes activity was with the interest group).

<sup>146</sup> Fred Monardi & Stanton A. Glantz, *Are Tobacco Industry Campaign Contributions Influencing State Legislative Behavior?*, 88 AMER. J. PUB. HEALTH 918 (1998).

<sup>147</sup> BERRY, *supra* note 69, at 132.

frequently is harmful to the general public interest.<sup>148</sup>

The recent decisions by the Court that enhance the power of both states and the federal government to regulate campaign funding, then, represent a step in the right direction to return democratic representation to communities of voters.<sup>149</sup> If further research continues to substantiate the link between funding and representation, the Court must remain aggressive in scrutinizing both party and interest group activity if any notion of state or local autonomy is to be maintained.

### C. *Congressional Politics and the Importance of the House Rules Committee*

Finally, the national parties have become considerably more influential in congressional politics over the last three decades, particularly in the House of Representatives. Part of this is traditional and institutional; with 435 members, the House has always needed more hierarchy than the Senate. But recent reforms have transferred this hierarchy from senior committee chairs to party leaders.<sup>150</sup> Senior committee chairs no longer control policy with an iron fist and without fear of reprisals. Seniority of time in office—the historic method by which congressional members attained control of committee chairs—still matters, but both political parties have made moves to overthrow senior chairs who are seen as getting in the way of the demands of the party majority.<sup>151</sup> As with the other areas we have examined, the reforms are the combined product of a desire to implement policy goals and a concern about not jeopardizing reelection opportunities. To help them get reelected in their districts while simultaneously promoting policy goals in the House, the members of the party have found it in their interests to enhance the Speaker's power to control committee assignments, the Rules Committee, and the legislative agenda, as well as to rid important pieces of legislation from particularistic interests.<sup>152</sup> Members desire a stronger party leader because the Speaker can create procedures that allow them to accomplish both of their goals—reelection and policy accomplishments—even when the goals are in conflict. As we will see in our discussion of the passage of the Brady Bill, the Democratic Party in the 1990s was faced with a number of prominent pieces of legislation that its House membership wanted to pass, but that raised individual members' fears of electoral fallout from their constituents. The Speaker, particularly through the

<sup>148</sup> *United States v. Int'l Union United Auto., Aircraft & Agric. Implement Workers*, 352 U.S. 567, 576 (1957) (quoting 65 CONG. REC. 9507-9508 (1924)).

<sup>149</sup> See *supra* note 33.

<sup>150</sup> See Sarah A. Binder, *The Partisan Basis of Procedural Choice: Allocating Parliamentary Rights in the House, 1789-1990*, 90 AMER. POL. SCI. REV. 8 (1996); Eric Schickler & Andrew Rich, *Controlling the Floor: Parties as Procedural Coalitions in the House*, 41 AMER. J. POL. SCI. 1340, 1372 (1997).

<sup>151</sup> See DAVID W. ROHDE, *PARTIES AND LEADERS IN THE POSTREFORM HOUSE* 20-23 (1991).

<sup>152</sup> *Id.* at 17-34.



Rules Committee, exerted a great deal of power in devising schemes that protected and distanced members from their constituents while allowing them to support the national party's legislative goals.

The Rules Committee has become one of the most important weapons of party rule. Once dominated by southern Democrats via seniority,<sup>153</sup> the Speaker of the House now picks the committee's members.<sup>154</sup> The committee has critical importance to the success of a bill because it determines the procedure by which a piece of legislation is debated on the House floor. After a bill is written and voted upon by the relevant committees, it is submitted to the Rules Committee for determination of the method that the bill will be discussed by the House at large. If the Rules Committee wants the bill to lose, an "open rule" enables endless discussion and opportunities to offer germane amendments while the bill is being debated on the House floor. If the Rules Committee wants a bill to pass, it can propose a "closed rule" that restricts discussion and prevents potential "killer amendments" from entering into the debate. This forces members to vote on a bill that provides a narrowly defined choice of yes or no to a legislative topic that many members support in theory, but not in the bill's specifics.

Perhaps most cleverly, the Rules Committee has devised procedures that allow members to support the party leadership while at the same time appealing to their districts through various complex and restrictive rules.<sup>155</sup> As David Mayhew has famously argued, House members are good at "position taking," taking stands often little more than symbolic that reflect the constituencies of her or his district.<sup>156</sup> Quite often, this position taking is unrelated to the behavior of the member as a policy maker. Writes Mayhew, "the congressman as a position taker is a speaker rather than a doer. The electoral requirement is not that he make pleasing things happen but that he make pleasing judgmental statements."<sup>157</sup> This is because members can well claim to their constituents that they are merely one of 535 members, and have little influence in determining outcomes of legislation.<sup>158</sup> It is perhaps for this reason that even while Congress is so unpopu-

<sup>153</sup> Because the South prior to 1965 lacked significant party competition, Democrats from the region generally won reelection until they decided to retire, and as a result, dominated committee leadership positions.

<sup>154</sup> See ROHDE, *supra* note 151, at 98. The Speaker is chosen via a House vote that is inevitably a strict party-line.

<sup>155</sup> For an overview, see *id.* at 98-105; STANLEY BACH & STEVEN S. SMITH, *MANAGING UNCERTAINTY IN THE HOUSE OF REPRESENTATIVES: ADAPTATION AND INNOVATION IN SPECIAL RULES* (1988); WALTER J. OLESZEK, *CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS* (4th ed. 1996); BARBARA SINCLAIR, *LEGISLATORS, LEADERS, AND LAWMAKING: THE U.S. HOUSE OF REPRESENTATIVES IN THE POSTREFORM ERA 136-62* (1995); Douglas Dion & John D. Huber, *Procedural Choice and the House Committee on Rules*, 58 J. POL. 25 (1996).

<sup>156</sup> DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* 62 (1974).

<sup>157</sup> *Id.*

<sup>158</sup> See *id.* at 53.

lar with the national public as an institution, members continue to not only get reelected at amazingly high percentage rates, but also have very high approval ratings from their constituents.<sup>159</sup> Rules can be created that allow members to position take in support of their constituents throughout the floor discussion and amendment process until the final roll call vote with the party (and in opposition to her or his constituents' preferences). For example, a "king of the mountain" rule allows for a series of amendments to be voted on usually with a substance and order that is predetermined by the Rules Committee. The Committee members strategically place amendments that are popular with constituents who oppose the party's choice of ultimate legislation. As such, members wishing to take a position to please their constituents can vote exuberantly in favor of as many amendments as they like. They do so with the knowledge that only the last successful amendment passed becomes part of the legislation. Generally, the last amendment is a "compromise" (that is, the version of the bill that the party leadership has preferred from the beginning of the floor vote). After a series of extreme stances, it becomes easier for members to defend themselves to their constituents—they are only one of 435 people; they voted in correspondence with constituency interests as much as possible; but in the end they accepted the "compromise" to avoid a potentially worse outcome. "Self-executing" rules have a similar ability to insulate members from controversial decisions. This type of rule, when passed by a floor vote, leads to the automatic passage of a series of amendments without members having to vote for them specifically. The key is that the party leadership wants to find a way to structure the choices offered to its members on the House floor so that members can vote with the party without deeply offending their constituents, and, if constituents are offended, to cover up their own involvement in the legislation's passage.

As mentioned above, the party leadership has not always dominated the Rules Committee. The power of the committee is historically a response to the party rank and file. There have been times when the rank and file has opposed having a strong leadership, desiring instead individual autonomy so that they can more directly represent their districts. This is what Jesse Choper found when he argued that state interests were protected by committee leaders who represented a variety of local interests.<sup>160</sup> What Choper misidentified as a permanent feature of Congress, however, was merely a transient procedural dynamic. By the 1960s, majorities of the Democratic Party's House membership had tired of southern members controlling committees and blocking efforts to pass civil rights legislation. To make the House more accountable to their interests, these Democratic reformists successfully pushed for procedural changes that gave the Speaker

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<sup>159</sup> See GARY C. JACOBSON, *THE POLITICS OF CONGRESSIONAL ELECTIONS* 25-58 (1987).

<sup>160</sup> See CHOPER, *supra* note 2, at 176-81.

the power to rid committees of recalcitrant chairs.<sup>161</sup> The Speaker remains beholden to his members, and thus there is a great deal of fluctuation in his power. But since these reforms, the power has been significant and raises further complications for safeguard theorists. As evident in the discussion of the Brady Bill below, there are ample opportunities for members to “fool” their constituents by voting against their interests in key procedural votes while voting “correctly” on often formal but ultimately symbolic roll calls. This type of party power is further concerning when it becomes clear, as the previous subpart discussed, that the party leadership has strong financial reasons to be beholden to interests that are not specific to local constituencies.

A key illustration of this phenomenon occurred in the U.S. House of Representatives during the passage of the Brady Bill in 1993. We chose this illustration because the Brady Bill would be later overturned by the Court in *Printz v. United States*<sup>162</sup> on the Tenth Amendment grounds that Congress had exceeded its Article I powers by forcing, or “commandeering,” the state legislative process and executive officials to be responsible for both the implementation of the law, and subsequently for any problems it might have.<sup>163</sup> It was in this case, in fact, that the Court made perhaps its most extended attack on the political safeguards thesis.<sup>164</sup>

The Brady Bill, both in its 1993 version as well as earlier versions, required a waiting, or cooling-off, period before prospective gun buyers could purchase a gun. During that period, local police would have time—and the legal responsibility (something the Court objected to in *Printz*<sup>165</sup>)—to run checks to see if the purchaser had a criminal background. Proponents in Congress had struggled mightily over the years to pass the bill. It was first brought up in the 101st Congress as part of a larger antidrug package, but died on the House floor.<sup>166</sup> Democrats in the Senate also introduced the Brady Bill, but it never got out of the Senate judiciary subcommittee.<sup>167</sup> In 1990, the House Judiciary Committee approved a version of the Brady Bill requiring a seven-day waiting period,<sup>168</sup> but the House floor never consid-

<sup>161</sup> See RHODE, *supra* note 151, at 20-28.

<sup>162</sup> 521 U.S. 898 (1997).

<sup>163</sup> *Printz*, 521 U.S. at 930.

Under the present law, for example, it will be the CLEO and not some federal official who stands between the gun purchaser and immediate possession of his gun. And it will likely be the CLEO, not some federal official, who will be blamed for any error (even one in the designated federal database) that causes a purchaser to be mistakenly rejected.

*Id.*

<sup>164</sup> For Court discussion of the limits of political safeguards, see *supra* note 6.

<sup>165</sup> 521 U.S. at 928-30.

<sup>166</sup> See *President Signs “Brady” Gun Control Law*, 1993 CQ ALMANAC 300.

<sup>167</sup> See Thomas: Legislative Information on the Internet, at <http://thomas.loc.gov>, a service of the Library of Congress, which provides the information for all Congressional legislation beginning with the 101st Congress. In particular, see S. 1236, 101st Cong. (1989).

<sup>168</sup> H.R. 467, 101st Cong. (1990).

ered it. During the 102nd Congress, both the House and Senate passed versions of an omnibus crime bill that included a Brady provision requiring a five-day waiting period before purchasing a gun.<sup>169</sup> But the multitude of provisions created factions of proponents and opponents in Congress towards the overall crime bill. Democrats opposed the restrictions of federal prisoners' habeas corpus petitions, while Republicans objected to the waiting period provisions.<sup>170</sup> On two separate occasions, the Senate failed on a cloture vote to end debate, with voting falling along strong party lines.<sup>171</sup> The omnibus crime bill eventually died. The Senate subsequently considered the Brady Bill as a separate provision, but it never reached the floor.<sup>172</sup>

Following the election of President Bill Clinton, the 103rd Congress, with majorities of Democrats in both houses, again attempted to pass the Brady Bill as part of an omnibus anticrime legislative package.<sup>173</sup> Clinton had made the passage of the Brady Bill a key piece of his 1992 campaign and an essential aspect of his effort to move the Democratic Party to the center on crime and violence issues. But in attempting to pass this legislation, Clinton and Democratic leaders in Congress faced a number of problems. Most notably, southern Democrats, many who represented pro-gun constituencies and received substantial funds from the National Rifle Association ("NRA"), were understandably wary. These members were also among the most vulnerable to electoral defeat as they represented constituents who for at least two decades had been voting Republican in presidential elections. They represented conservative voters and their only hope of maintaining office was to continue to convince their constituents that were similarly conservative, despite their Democratic identification.<sup>174</sup> On the other hand, Clinton represented perhaps a last chance for southern Democrats to have influence over the national party. For decades, Democrats were seen in the South as too liberal, particularly on race and crime. Clinton was trying to change this while balancing liberal constituencies he needed to win northern support. Southern Democrats recognized this and that Clinton needed a victory to jump-start his presidency. When the omnibus bill stalled, Jack Brooks (Democrat of Texas), chairman of the House Judiciary Committee and a long-time supporter of the NRA, agreed to reintroduce the Brady Bill as freestanding legislation, which greatly improved the bill's

<sup>169</sup> The Senate approved The Violent Crime Control Act of 1991, S. 1241, 102d Cong., while the House approved The Omnibus Crime Control Act of 1991, H.R. 3371, 102d Cong.

<sup>170</sup> See *No Compromise Forged on Crime Bill*, 1992 CQ ALMANAC 311.

<sup>171</sup> In the Senate, 60 votes are needed to pass cloture, and effectively end a filibuster. The vote on the first filibuster was 54-43, with Republicans voting 4-38, and Democrats voting 50-5. On the second filibuster, the vote was 55-43, with Republicans voting 3-39, and Democrats voting 52-4. See *Senate Votes*, 1991 CQ ALMANAC 36-S, 38-S.

<sup>172</sup> See The Brady Handgun Violence Prevention Act, S. 3282, 102d Cong. (1992).

<sup>173</sup> See The Violent Crime Control and Law Enforcement Act of 1993, H.R. 3131, 103d Cong.

<sup>174</sup> See Paul Frymer, *Ideological Consensus Within Divided Party Government*, 109 POL. SCI. Q. 187 (1994).

chances. The bill again required a five-day waiting period, while calling for an eventual national instant-check system.<sup>175</sup> The Brady Bill garnered the support of the House Judiciary Committee in early November 1993. Before full consideration before the House floor, the bill went before the Rules Committee. On November 10, 1993, the House Rules Committee passed House Resolution 302, which stated in full:

*Resolved*, That at any time after the adoption of this resolution the Speaker may, pursuant to clause 1(b) of rule XXIII, declare the House resolved into the Committee of the Whole House on the State of the Union for consideration of the bill (H.R. 1025) to provide for a waiting period before the purchase of a handgun, and for the establishment of a national instant criminal background check system to be contacted by firearms dealers before the transfer of any firearm. The first reading of the bill shall be dispensed with. ***All points of order against consideration of the bill are waived.*** General debate shall be confined to the bill and the amendments made in order by this resolution and shall not exceed one hour equally divided and controlled by the chairman and ranking minority member of the Committee on the Judiciary. After general debate the bill shall be considered for amendment under the five-minute rule. It shall be in order to consider as an original bill for the purpose of amendment under the five-minute rule the amendment in the nature of a substitute recommended by the Committee on the Judiciary now printed in the bill, modified by the amendment printed in part 1 of the report of the Committee on Rules accompanying this resolution. The committee amendment in the nature of a substitute, as modified, shall be considered as read. ***All points of order against the committee amendment in the nature of a substitute, as modified, are waived.*** No amendment to the committee amendment in the nature of a substitute, as modified, shall be in order except those printed in part 2 of the report of the Committee on Rules. ***Each amendment may be offered only in the order printed in the report, may be offered only by a Member designated in the report, shall be considered as read, shall be debatable for the time specified in the report equally divided and controlled by the proponent and an opponent, shall not be subject to amendment, and shall not be subject to a demand for division of the question in the House or in the Committee of the Whole.*** All points of order against the amendment numbered 3 in part 2 of the report are waived. At the conclusion of consideration of the bill for amendment the Committee shall rise and report the bill to the House with such amendments as may have been adopted. Any Member may demand a separate vote in the House on any amendment adopted in the Committee of the Whole to the bill or to the amendment in the nature of a substitute made in order as original text. The previous question shall be considered as ordered on the bill and amendments thereto to final passage without intervening motion except one motion to recommit with or without instructions.<sup>176</sup>

The rules set forth in this resolution, while not closed, were extremely restrictive. It limited the general debate both in time and scope. The rules

<sup>175</sup> See President Signs "Brady" Gun Control Law, *supra* note 166, at 301.

<sup>176</sup> See 139 CONG. REC. 28,527 (1993) (emphasis added).

expedited consideration of the Brady Bill by dispensing with the first reading, limiting debate to one hour, and implementing the five-minute rule for consideration of amendments. Moreover, it prohibited—with a few specific exceptions outlined and authorized by the Rules Committee members themselves—amendments to the bill.

In constructing House Resolution 302, the Rules Committee rejected a series of proposed amendments submitted by non-committee members. While these failed amendments do not appear in the rule, they are worth mentioning here. The failed amendments encompassed both procedural and substantive grounds.<sup>177</sup> Procedurally, the committee openly rejected a proposal to a) consider the Brady Rule under open rule; b) add the text of an omnibus crime bill to the end of the bill; c) require that states purchase only American goods when buying hardware and software to update their criminal files; and d) limit government contracts with foreign countries to those with an open trade policy. The substantive amendments, however, were more numerous. They proposed, among other things, to a) eliminate the five-day waiting period; b) require the federal government, not the state, to conduct the background checks; c) allow states to opt out of participating in the background checks; and d) require the federal government to pay for all costs incurred by state and local governments. These provisions, as the discussion of the Brady Bill describes below, were at the heart of the Brady Bill. Yet they were being proffered to the Rules Committee rather than the floor.

Virtually every rejected amendment was defeated by a seven to four margin, with the same four Republican members—Solomon, Quillen, Dreier, and Goss—voting in favor of the amendments and the seven Democrats—Derrick, Beilenson, Frost, Bonior, Hall, Wheat, and Slaughter—opposing the amendments.<sup>178</sup> The rule drew strong criticism from both dissenting members of the Rules Committee and from the floor. Representative Solomon, acknowledging his opposition to the Brady Bill, criticized the committee's restrictive rule for preventing members "from considering and voting on ideas that should be before this House."<sup>179</sup> He also submitted material showing the Rules Committee's growing use of semiclosed, or restrictive rules when considering legislation.<sup>180</sup> Perhaps Representative Sensenbrenner (Republican of Wisconsin) captured the sentiment of most members when he stated, "I rise in support of this rule, not because it is a good rule, because it is not. . . . I am supporting this rule because this is our only shot to bring the Brady bill up as separate legislation during this Con-

<sup>177</sup> These failed amendments are discussed in 139 CONG. REC. 28,527 (1993).

<sup>178</sup> Representatives Moakley and Gordon, both Democrats, did not vote in any of the amendment votes.

<sup>179</sup> See 139 CONG. REC. 28,528-29 (1993).

<sup>180</sup> Solomon submitted a chart showing that the use of restrictive rules grew from 15% of legislation in 1977-78 to 43% in 1985-1986 to 74% in 1993-94. See 139 CONG. REC. 28,529 (1993).

gress."<sup>181</sup> The floor voted in favor of the rule, by a margin of 238-189.<sup>182</sup>

Restricted in the scope of debate by the Rules Committee, the House floor adopted an amendment to eliminate the waiting period after five years (also referred to as a sunset provision), but rejected an amendment to preempt state waiting periods once the instant-check system was implemented.<sup>183</sup> The House floor subsequently voted in favor of the bill on November 10, 1993.<sup>184</sup> While the same number of House members—238—voted for House Resolution 302 as voted for the final passage of the chamber bill, the groups that comprised the majority in each vote varied considerably from one bill to the next. Of the 435 members, 187 members (11 Republicans and 176 Democrats) voted for both the rule and the bill, and 135 members (113 Republicans and 22 Democrats) voted against both the rule and the bill.

The remaining 112 members split their votes, and the flip-flopping occurred almost equally between the Democrats and Republicans.<sup>185</sup> One Republican and forty-nine Democrats voted *for* the rule but *against* the bill. Conversely, forty-one Republicans and four Democrats voted *against* the rule but *for* the bill. Given that the Rules Committee virtually ensured the passage of the bill out of the House through House Resolution 302, the flip-flopping most likely reveals strategic voting on behalf of the House members. Constituents are generally unaware of their representative's record on specific votes, and certainly unaware of votes on seemingly procedural matters such as voting on rules; accordingly, the House members who switched votes knew that they would have to explain only their floor votes to their constituents. The forty-nine Democrats who voted for the rule and against the bill quite likely were participating strategically to support their party

<sup>181</sup> See 139 CONG. REC. 28,532 (1993).

<sup>182</sup> Of the four members of the Rules Committees who voted against the rule, all voted against it on the floor.

<sup>183</sup> See *House Votes*, 1993 CQ ALMANAC 136-H. These amendments will be discussed in greater detail, *infra*.

<sup>184</sup> The House floor vote was 238-189, with Republicans voting 54-199, and Democrats voting 184-69. See *id.* at 138-H.

<sup>185</sup> *Id.* at 136-H to 139-H. These tables were compiled by the authors, and are available on file. We compared the voting on Roll Call 564 (the passage vote for the Brady Bill) with Roll Call 557 (vote on H. Res. 302). Specifically, two Democrats (Foley and Moakley) did not vote on either the resolution or the final floor bill. One independent (Sanders) voted for the resolution but against the final floor bill; one Republican (Ewing) voted for the resolution but against the final floor bill. Conversely, two Republicans (McCandless and Shuster) voted against the resolution but did not vote on the final floor bill. As discussed in the text, 49 Democrats voted for the resolution but against the final floor bill, while 41 Republicans voted against the resolution but voted for the final floor bill. Four Democrats (Condit, Cooper, Hutto, and Minge) voted against the resolution but voted for the final floor bill, while four Republicans (Bartlett, Bentley, Hunter, and Michel) did not vote on the resolution but voted against the final floor bill. One Republican (Morella) did not vote on the resolution but voted for the final floor bill; one Democrat (de la Garza) did not vote on the resolution and voted against the final floor bill; and five Democrats (Dellums, McCloskey, Rangel, Slattery, and Torricelli) did not vote on the resolution but voted for the final floor bill.

while protecting themselves from angry constituents. In comparison to the Democrats that voted for both the rule and the bill, they represented congressional districts that were far less supportive of President Clinton in 1992.<sup>186</sup> More than half of these members were from southern states that have tended Republican in recent decades; nine alone came from Texas. Among the more notable examples, Representative Ralph Hall (Democrat of Texas) voted for the resolution, both as a member of the Rules Committee and in the chamber floor vote, yet voted against the passage of the bill following conference committee. Conversely, the forty-five members who voted in the opposite manner (against the rule but for the bill) by and large wanted the Brady Bill to fail, but came from districts that supported it.

This pair of votes, while hardly unique in congressional politics, illustrates two phenomena. First, representatives act strategically in how they cast their votes. Second and perhaps more significant, members of Congress engage in behavior that is consistent with maintaining their office but not necessarily representing state (or local) interests. The institutional intricacies of Congress allow its members to engage in behavior that appears to serve the constituent's interests, but also serves their party's and their own. Representative Hall's behavior was emblematic. A relatively conservative Democrat from a gun-supporting district, he nonetheless followed his party responsibilities by voting for the rule, enabling the legislation to pass. At the same time, he voted against the bill, providing cover for himself from voters anxious to know his position. As such, we need to recognize that the behavior of congressional members and leaders cannot simply be understood as the direct representation of their constituencies. Members operate strategically within the context of institutional rules and procedures, enabling them to both create and maneuver within often multiple political agendas and in a manner that leads to the representation of interests independent of those who elected them.

### III. CONCLUSION

Larry Kramer's effort to revive the political safeguards thesis deserves the attention it has received from both academics and the Court. In the face of a Supreme Court that is aggressively trying to prevent Congress from responding to national problems, some alternative argument must be promoted and championed. Kramer greatly expands our understanding of the political safeguards that can exist beyond the constitutional structures em-

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<sup>186</sup> The 49 Democrats who voted for the rule but against the bill came from congressional districts that on average supported Bill Clinton at a rate of 43.5% in the 1992 presidential election, just under Clinton's vote percentage nationwide. In contrast, the 22 Democrats who voted against both the rule and the bill came from districts that on average supported Clinton at a rate of 41.4%, while the 176 Democrats who voted both for the rule and the bill came from districts that on average supported Clinton at a rate of 54.5%. These averages were compiled from district electoral data in Michael Barone & Grant Ujifusa, *ALMANAC OF AMERICAN POLITICS* 1994 (1993).



phasized by Herbert Wechsler. Moreover, we need to be reminded that there are serious costs associated with judicial intervention of the legislative process. It is exceptionally difficult for Congress and the President to pass legislation. There is also the real possibility that the consequence of the Court's holdings is less to protect state interests than to simply overturn good laws, even laws that many if not most state officials want. The *Printz* case, for example, represented state and local interest groups on both sides of the debate—many state and local groups desired the national legislation for the same reason states have promoted national legislation for much of the twentieth century—it is a way of responding to a problem they were having difficulty addressing on their own.

At the same time, we must recognize that party organizations are limited in their ability to ensure the types of representation that most concerns the Court in its federalism jurisprudence. Unfortunately, political parties are currently not the correct alternative, descriptively or normatively. Our empirical investigation of the role that national parties currently play in the federal and state legislative process raises serious questions for any argument that places parties at the center of the political safeguards thesis. Both of the nation's major political parties are currently dominated by national interests, represented through nationally centered committees and largely beholden to corporate and other wealthy interest groups that are not state-specific. Moreover, the incentives to which these parties respond are not conducive to a long-term representation of state interests. Parties are trying to elect candidates to office and are instrumental in their approach. As a result, any benefits that state actors receive from the major parties are incidental to the party's broader goals.

Political actors are dynamic; they are constantly pushing on political boundaries and transforming the relationships between themselves and other political actors. Given this dynamism, we need to be careful when ascribing to political institutions any essential nature or function. This is particularly problematic with regard to the national two-party system—an institution that has consistently been lauded for a variety of ways that it promotes democracy. As we have shown here, parties may serve these interests, but not as a result of their essential features. To promote organizations that have such dynamic and disinterested features as a permanent safeguard of state interests in the national political process, then, seems to create more problems than solutions.

But to argue that parties fail to protect the interests of states does not end the inquiry. States today (and arguably always) are fragmented and diverse entities. Significant parts of the state communities, namely urban communities, want federal programs and have pushed for more control from the federal government on a number of important issues. For scholars to argue that states should remain autonomous, because autonomous states can “serve as political breeding grounds, where parties and factions excluded from national power rebuild their strength and new political forces

gain footholds,"<sup>187</sup> they need to provide a credible explanation for how states can and do provide this role. They need to equally recognize the dynamism involved in state actors and their ability to transcend local and state powers into something that looks only vaguely like a state entity. In the meantime, many of the Court's most ardent supporters of states' rights fail to pay attention to many of the substantial ways in which any remaining notion of states' rights is under attack. In an increasingly global era where corporate power is given unrestrained capacity by all three branches of government, legislative activism by the national government seems to be a relatively insignificant problem in the threat against state autonomy.

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<sup>187</sup> Merritt, *supra* note 7, at 1574.