

---

---

# CONTRACTING AROUND *CITIZENS UNITED*: A SYSTEMIC SOLUTION

Scott P. Bloomberg<sup>†</sup>

## CONTENTS

INTRODUCTION .....	301
I. CONTRACTING AROUND <i>CITIZENS UNITED</i> .....	302
II. THE PARTY-BASED FINANCIAL INCENTIVE FOR OFFERING OR ACCEPTING THE PLEDGE.....	307
A. <i>Outlining the Proposed Version of the Pledge</i> .....	308
B. <i>Advantages of the Party-Based Financial Incentive Compared to a State-Based Incentive</i> .....	311
III. THE INSTITUTIONAL INCENTIVE FOR THE PARTIES TO ADOPT THE PROPOSED PRACTICE .....	314
A. <i>Changes in Campaign Finance Law Have Allowed Outside Spending Groups to Gain Substantial Influence in Elections Relative to the Party Committees</i> .....	314
1. <i>The Institutional Advantage Gained by Creating a Party-Based Financial Incentive</i> .....	320
B. <i>Aligning Institutional Incentive with Operational Considerations</i> .....	321
IV. NORMATIVE JUSTIFICATIONS FOR INCREASED PARTY CONTROL OF ELECTION SPENDING .....	325
CONCLUSION.....	327
APPENDIX A: FULL TEXT OF THE WARREN-BROWN PEOPLE’S PLEDGE .....	328

## INTRODUCTION

Operating in a campaign finance environment flooded by advertisements from outside spending groups, Scott Brown and Elizabeth Warren managed to keep their 2012 Senate race almost entirely free from such ads. They did so by utilizing a private agreement, dubbed “the People’s Pledge.” The People’s Pledge deterred outside spending groups by imposing a financial penalty on a candidate’s campaign committee when outside groups aired advertisements to that candidate’s benefit. The Pledge proved to be

---

<sup>†</sup> I thank Ganesh Sitaraman, Ray La Raja, and Eli Tempken for their assistance with this Essay, and I thank my wife, Amber, for her love and support. I also want to thank the University of Michigan Law School, where I wrote this Essay, for giving me the training and resources necessary to do so.

---

---

remarkably effective: It was only violated twice, and the benefitting candidate complied with the penalty provision both times.

Given the barriers to statutory reform erected by the Court's reasoning in *Citizens United* and the implausibility of Article V amendment, the People's Pledge stands out as perhaps the most effective way to eliminate outside spending in elections. Yet, it has hardly been utilized since the Warren-Brown race. In a recent article in *Columbia Law Review*, *Contracting Around Citizens United*, Professor Ganesh Sitaraman discovers why: Candidates, acting in a financially rational matter, are unlikely to enter the Pledge in most situations.<sup>1</sup> This conclusion casts doubt on the People's Pledge's efficacy as a systemic reform solution.

This Essay argues that the People's Pledge can become a viable systemic reform solution by creating a financial incentive for candidates to offer the Pledge, or accept the Pledge if it is offered to them. Specifically, the Essay argues for the creation of a political party-based financial incentive. It analyzes the institutional incentives and operational considerations for the parties to adopt this proposed practice, and discusses the normative benefits that would result from adoption of the practice.

Section I reviews and analyzes Professor Sitaraman's article. Section II proposes a party-based financial incentive for offering or accepting the People's Pledge and details the proposed version of the Pledge. Section III demonstrates how the current state of campaign finance law gives the political parties an institutional incentive to adopt the proposed practice. It then analyzes other operational considerations that make adoption of the practice more viable. Section IV argues that adoption of the proposed practice, and the party-centralization of campaign financing that would result from it, would be normatively beneficial. The final Section concludes the Essay.

#### I. CONTRACTING AROUND *CITIZENS UNITED*

The Supreme Court's 2010 *Citizens United*<sup>2</sup> decision caused several changes in the financing of elections, including a drastic increase in the role of non-party committee outside spending groups.<sup>3</sup> The broad scope of the decision's reasoning acts as a roadblock to traditional avenues of campaign finance reform, including those which

---

1. See Ganesh Sitaraman, *Contracting Around Citizens United*, 114 COLUM. L. REV. 755, 760 (2014).

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

3. See, e.g., *infra* notes 13–14.

would lead to the elimination or curtailment of spending by these outside groups.<sup>4</sup> This has not dissuaded scholars, politicians, and commentators from proposing reforms.<sup>5</sup> But, statutory reforms face judicial review, so they focus not on curtailing spending but instead on disclosure.<sup>6</sup> Article V amendment proposals,<sup>7</sup> like all such proposals, teeter the line between impractical and virtually impossible.<sup>8</sup>

There is, however, one reform that has already proven effective in minimizing the role of outside spending groups in elections. In 2012, the Scott Brown and Elizabeth Warren campaigns signed an agreement which almost wholly eliminated third-party expenditures in their Senate race.<sup>9</sup> This agreement, titled the People's Pledge, worked in basic form as follows: If a third party runs any advertisement in favor of a candidate, that candidate's campaign agrees to donate fifty percent of the cost of the advertisement to a charity of their opponent's choice.<sup>10</sup> The agreement worked. It was only violated twice, and the benefitting campaign followed through with the charitable donation.<sup>11</sup>

---

4. *E.g.*, Sitaraman, *supra* note 1, at 763 (citing Heather Gerken, Keynote Address: Lobbying as the New Campaign Finance (Nov. 12, 2011)).

5. *See id.* at 763–65 (listing proposals to counteract the effects of *Citizens United*).

6. *E.g.*, DISCLOSE Act, H.R. 5175, 111th Cong. (2010).

7. S.J. Res. 19, 113th Cong. (2d Sess. 2010) (proposing a constitutional amendment “relating to contributions and expenditures intended to affect elections”); S.J. Res. 18, 113th Cong. (2013). Campaign finance reform organizations have also proposed constitutional amendments to that effect. *See* MOVE TO AMEND, [www.movetoamend.org](http://www.movetoamend.org) (last visited Nov. 28, 2015); PUBLIC CITIZEN, [www.democracysforpeople.org](http://www.democracysforpeople.org) (last visited Nov. 28, 2015).

8. A great deal of scholarship has been written about the inefficacy of Article V amendment. For a few interesting discussions of the issue and of constitutional amendment more broadly, see generally David Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457 (2001); *see also* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 44–57 (1991); Barry Friedman & Scott Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 44–45 (1998) (first citing Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1051–70 (1984); then citing Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, U. CHI. L. REV. 1043, 1044 (1988)).

9. *See* Sitaraman, *supra* note 1, at 767–69 (detailing how only two outside groups spent small amounts of money in the Warren-Brown election once they entered into the People's Pledge); Tovia Smith, *Warren-Brown Pledge Keeps Attack Ads at Bay*, NPR (May 6, 2012), <http://www.npr.org/2012/05/06/152030297/pledge-holds-attack-ads-at-bay-in-mass-senate-race>; Noah Bierman, *Warren, Brown's Pledge on Third-Party Ads Holds*, BOSTON GLOBE (Aug. 20, 2012), <http://www.boston.com/news/politics/2012/senate/2012/08/19/surprise-brown-and-warren-truce-outside-spending-surviving-imid-hard-fought-campaign/aRjA26KoNlwXsUEJde9HxO/story.html>.

10. *See infra* Appendix A for the Warren-Brown version of the People's Pledge reproduced in its full form.

11. *See* Bierman, *supra* note 9 (“The agreement was tested early, when two groups spent relatively small sums on Brown's behalf. Brown's quick agreement in March to donate \$1,000 and \$34,545 checks to the Autism Consortium helped erase doubts that the

The People's Pledge is the focus of Professor Sitaraman's recent *Columbia Law Review* article, *Contracting Around Citizens United*. Sitaraman provides in-depth analysis on the efficacy of the Pledge as a solution to deter third-party spending in elections. The article evaluates several variations on the Pledge, including that:

- The Pledge can cover different scopes of conduct. It may be limited to only television and radio advertising for example, or it may cover all forms of advertising and direct mailers.<sup>12</sup>
- The Pledge can cover different scopes of outside groups.<sup>13</sup> It may cover all outside group expenditures, or it may exempt party committees or certain categories of outside groups (perhaps, for example, an agreement would exempt regular (non-super) Political Action Committees (PACs) or leadership PACs).<sup>14</sup>
- The Pledge can contain different penalty provisions.<sup>15</sup> While the fifty percent penalty worked in the Warren-Brown race, a rational third-party actor may in some cases make expenditures despite the Pledge's penalty provision.<sup>16</sup> This may counsel for a higher penalty in some circumstances.<sup>17</sup>
- The Pledge can contain provisions to prevent loopholes. For example, the Warren-Brown agreement contained a clause stipulating that the campaigns would work together to address "sham ads"—ads that purport to benefit one candidate but in fact harm them.<sup>18</sup>

Importantly, Sitaraman also evaluates the several situations in which candidates would or would not be likely to offer or accept the Pledge. He categorizes five situations based on the candidates' expectations regarding the balance or imbalance of direct campaign contributions and the balance or imbalance of outside spending in the race:

- When campaign contributions and outside spending are expected to be symmetrical, campaigns will make decisions

---

candidates would comply.").

12. Sitaraman, *supra* note 1, at 771–72.

13. *Id.* at 770–71.

14. *See infra* text accompanying notes 43–48 (discussing the practical benefit of exempting certain leadership PACs from the Pledge).

15. Sitaraman, *supra* note 1, at 770, 792–93.

16. *Id.* at 792–93.

17. *See infra* text accompanying notes 41 & 42 (discussing briefly the idea of increasing the penalty as Election Day approaches).

18. Sitaraman, *supra* note 1, at 775.

based on other political factors.<sup>19</sup>

- When campaign contributions are expected to be symmetrical, and outside spending is expected to be asymmetrical, the side with the disadvantage in expected outside spending will be likely to offer the Pledge and the side with the advantage will be likely to reject it.<sup>20</sup>
- When campaign contributions are expected to be asymmetrical and outside spending is expected to be symmetrical, the outcome is uncertain.<sup>21</sup>
- When campaign contributions are expected to be asymmetrical and outside spending is expected to be asymmetrical in favor of the candidate with the expected advantage in campaign contributions, the outcome is uncertain.<sup>22</sup>
- When campaign contributions are expected to be asymmetrical and outside spending is expected to be asymmetrical in favor of the candidate with the expected disadvantage in campaign contributions, the candidate with the advantage in campaign contributions is likely to offer the Pledge and the other candidate is likely to reject it.<sup>23</sup>

Sitaraman discusses other factors that supplement this rational financial analysis performed above. The degree of certainty regarding the candidates' expectations about funding will matter. For example, if both sides expect that the other will have an outside spending advantage, then they may enter the agreement to mitigate that uncertainty.<sup>24</sup> The candidates' branding matters too. A candidate who runs on a clean government platform, for example, will be more likely to propose or accept the agreement, while a candidate who runs on a free speech platform may be more likely to reject it.<sup>25</sup> Outside factors, such as pressure from the press or the electorate, will also factor into a candidate's decision.<sup>26</sup>

Sitaraman's analysis proves troubling for the viability of the Pledge. As his analysis reveals, rational actors will only reach

---

19. *Id.* at 779.

20. *Id.*

21. *Id.* at 779–80.

22. *Id.* at 780.

23. Sitaraman, *supra* note 1, at 780.

24. *Id.* at 779 (positing that this may have been a factor in Warren's and Brown's decisions to enter the Pledge).

25. *Id.* at 781.

26. *Id.* at 782.

agreement in a limited number of situations.<sup>27</sup> Without more, this makes wide-scale adoption of the Pledge exceedingly unlikely, minimizing its efficacy as a means to eliminating or deterring third-party spending on a systemic level.

Perhaps recognizing this, Sitaraman suggests two ways to make the practice of entering into the Pledge a norm. If the practice becomes normalized, he correctly argues, the consequences to a candidate for rejecting an agreement are heightened, thus increasing the likelihood that candidates will reach agreement on entering the Pledge.<sup>28</sup> First, Sitaraman suggests that the practice can become a norm if the public and media increase pressure on candidates to enter into the Pledge.<sup>29</sup> This suggestion suffers from at least two flaws. For starters, it is in at least some sense circular: the likelihood that the public and the media will pressure candidates to enter the Pledge is slim unless it is *already* a norm. Additionally, the public and the media are both fractured and fleeting. That is, consensus sufficient to pressure candidates into adopting a particular practice is rare, and when there is unification on a front, it is rarely enduring.<sup>30</sup> Sitaraman wisely qualifies his opinion on the effectiveness of this solution by stating that it could create a norm “over time . . . in some jurisdictions.”<sup>31</sup> In other words, he recognizes that outside pressure could overcome the situational limitations he identifies as often preventing adoption of the Pledge on a localized, but not systemic, level.

Second, Sitaraman suggests that the practice can become a norm by tying the offering or accepting of the Pledge to receiving state public funding.<sup>32</sup> This strategy suffers from a myriad of drawbacks (which he details), but does have some strengths. I will begin with the drawbacks: the strategy “would not apply to federal congressional elections (which do not have a public funding option);<sup>33</sup> it is subject to the political process—it involves public funding—and so it would surely face constitutional review;<sup>34</sup> public funding is only offered by a fraction of states;<sup>35</sup> and public funding systems have proven to be both

---

27. *Id.* at 779–80, 782, 792, 799.

28. *See* Sitaraman, *supra* note 1, at 776–77, 779–80, 782.

29. *Id.* at 803.

30. *See id.* at 782, 803.

31. *Id.* at 803.

32. *Id.*

33. *See* Sitaraman, *supra* note 1, at 804.

34. *Id.*

35. *See id.* at 803 n.156 (stating that “sixteen states . . . provide some kind of public funding of elections”); *infra* note 36 (discussing sixteen-state figure and subsequent

constitutionally problematic and relatively unpopular.<sup>36</sup> On the other hand, the strength of the strategy is that it involves a third-party institution that can offer a financial incentive to candidates for offering or accepting the Pledge. In the public funding scenario, even this strength has limitations: its efficacy is dependent upon the coordinated action of several politically diverse states, and even assuming that states would and constitutionally could adopt this system, we are still only talking about a handful of states.

Thus, Sitaraman's article is immensely helpful towards understanding the mechanics of the Pledge, but does not present a means to "contract around" *Citizens United* on a systemic level. He is correct, however, in identifying the need to make the Pledge a norm in order to counteract how a rational financial actor would otherwise approach the decision of whether to enter into it. He is also correct in proposing that a third party creates a financial incentive for offering or accepting the Pledge in order to create that norm. He just identifies the wrong third party.

## II. THE PARTY-BASED FINANCIAL INCENTIVE FOR OFFERING OR ACCEPTING THE PLEDGE

The political party committee is the ideal third party to create a financial incentive for candidates to offer or accept the Pledge. Section A below begins developing this party-based financial incentive structure by outlining what features the version of the Pledge used by the party should include. It concludes that the Pledge must cover the dominant advertising mediums, include an adequate penalty provision, exempt party committee and certain leadership PAC spending, and provide a financial incentive that does not hand-tie the party from supporting

---

treatment).

36. Sitaraman, *supra* note 1, at 803 n.156 (citing *Public Financing in the States*, COMMON CAUSE, <http://www.commoncause.org/site/pp.asp?c=dkLNK1MQIwG&b=4773825> (last updated June 2007) [<http://web.archive.org/web/20081127121012/http://www.commoncause.org/site/pp.asp?c=dkLNK1MQIwG&b=4773825>]). Sitaraman claims that sixteen states have public funding options, but this number appears to be outdated. He cites a source from 2007, which would not account for subsequent developments of law. In 2011, the Supreme Court struck an essential provision of Arizona's public funding system on First Amendment grounds, casting serious doubt on the constitutionality of other state public funding systems. *Ariz. Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2829 (2011). Other states have rejected public funding systems by popular referendum. Californians, for example, voted down public funding by a fifty-seven percent to forty-two percent margin. *See* CAL. SEC'Y OF STATE DEBRA BOWEN, STATEMENT OF VOTE, STATE BALLOT MEASURES 127 (2010), <https://web.archive.org/web/20141027200617/http://www.sos.ca.gov/elections/sov/2010-primary/pdf/125-props.pdf>.

---

---

unwilling candidates but is adequate to increase the number of candidates who offer or accept the Pledge. After Section A establishes this basic structure of the Pledge, Section B briefly discusses the advantages of a party-based financial incentive over a state-based financial incentive, focusing primarily on questions of constitutionality.

*A. Outlining the Proposed Version of the Pledge*

The Pledge deters outside spending groups from airing advertisements in support of (or in opposition to) a candidate by attaching a financial penalty to the benefitting candidate's campaign.<sup>37</sup> As Professor Sitaraman explains, this arrangement can take different forms.<sup>38</sup> Its details can vary with respect to what conduct it deters, from who it deters the conduct, and the level of deterrence.<sup>39</sup> This Essay need not determine with exact specificity the details of the Pledge which the party committees should utilize. Ultimately, the minute details are best left to party leaders to determine. However, I will identify certain features which the Pledge must contain to be effective.

First, it must at least provide a financial penalty for common forms of advertising: television, radio, and internet. Whether it additionally provides a penalty for other forms of election spending, such as direct mailers to the public, direct mailers to members of the third party's organization, or get out the vote efforts, is a matter that party decision-makers should carefully consider. Including a broader category of conduct will more greatly reduce the influence of outside spending groups relative to the party committees, but the inclusion of certain conduct may be normatively undesirable.<sup>40</sup>

Second, the penalty for violating the Pledge has to be substantial enough to effectively deter outside spending. The success of the Warren-Brown version of the Pledge suggests that a 50% penalty—requiring the campaigns to donate 50% of the cost of any outside spending—is sufficient.<sup>41</sup> However, the parties may want to increase the penalty for advertising by outside groups aired close to Election Day. As Election Day approaches, campaigns with a surplus of funds may signal to outside groups that they are willing to pay the penalty in exchange for the increased advertising exposure. To counter this effect,

---

37. Sitaraman, *supra* note 1, at 770.

38. *Id.* at 770–72.

39. *Id.*

40. For example, most people may agree that third parties play a normatively beneficial role in encouraging people to get to the polls.

41. Sitaraman, *supra* note 1, at 792.

the penalty could be increased to 75% for third-party advertisements aired within *X* number of days before the election, and 100% for those run within *Y* number of days before the election.<sup>42</sup> Another possible deterring mechanism would be to require the benefitting candidate to publicly repudiate the ad. This would increase the reputational cost for the third parties that violate the Pledge and the candidate they intend to help.

Third, the Pledge will of course have to exempt party committee spending. It should also exempt certain leadership PACs. A leadership PAC is “a political committee that is directly or indirectly established, financed, maintained or controlled by the candidate or the individual but which is not an authorized committee of the candidate or individual and which is not affiliated with an authorized committee of the candidate or individual.”<sup>43</sup> They can be established “by current and former members of Congress as well as other prominent political figures.”<sup>44</sup> Leadership PACs are useful to candidates and elected officials both because they allow donors to circumvent the Federal Election Commission’s (FEC) limitation on contributions to campaign committees and because they allow candidates to help fund other candidates’ campaigns.<sup>45</sup> They are also used to fund the candidate’s own travel, office expenses, polling, and other non-campaign expenses.<sup>46</sup> Nearly every congressman and senator has a leadership PAC, so exempting all of them from the Pledge may swallow the rule.<sup>47</sup> However, banning them entirely may undermine the institutional support necessary for tying party funding to offering or accepting the Pledge. That is, the plausibility of a party adopting the proposed practice hinges in large part on support from elected party leaders. These leaders are less likely to support the proposal if it undermines their own electoral influence via their leadership PACs. The solution to this mini-conundrum lies somewhere between total inclusion and total exclusion: the prohibited conduct in

---

42. I, of course, mean the value of *Y* to be less than the value of *X*. For example, the penalty may increase to 75% within thirty days of Election Day and 100% within seven days.

43. 52 U.S.C.A. § 30104(i)(8)(B) (West 2015) (previously codified at 2 U.S.C. § 434 (2012)).

44. Alex Lazar, *Leadership PACs: Background*, CTR. FOR RESPONSIVE POLS., <http://www.opensecrets.org/industries/background.php?cycle=2014&ind=Q03> (last updated July 2015).

45. *Id.*

46. *See id.*

47. *See generally* 2014 Leadership PACs and Sponsors, FED. ELECTION COMMISSION (2014), [http://www.fec.gov/data/Leadership.do?format=html&election\\_yr=2014](http://www.fec.gov/data/Leadership.do?format=html&election_yr=2014) (listing 557 leadership PACs for the 2014 election cycle).

---

---

the Pledge should include outside spending by leadership PACs generally, but exempt the leadership PACs controlled by the current House and Senate leaders.<sup>48</sup> Not only does this solution circumvent a potential roadblock from adversely effected party leaders, it increases the likelihood of adoption by allocating additional electoral influence to key decision-makers.

Fourth, the financial incentive must be sufficient to induce some number of candidates to offer or accept the Pledge who otherwise would not, but cannot substantially burden the party's ability to support candidates in close races who were unwilling to offer or accept the Pledge. That is, the incentive must accomplish two ends. It must induce a number of otherwise unwilling candidates to offer or accept the Pledge in order to ensure that the practice becomes normalized over time. This number of candidates need not be great: the incentive must tip the balance of the scale, but it need not place a gold brick on one side. At the same time, the party must still be able to support unwilling candidates in close elections. Unsurprisingly, the parties concentrate their resources in close elections. For example, in 2014, the Democratic Congressional Campaign Committee spent a total of slightly less than \$4.6 million in independent and coordinated expenditures in California's closely contested Seventh Congressional District.<sup>49</sup> A financial incentive that strips the party's ability to support candidates in such races—such as the withholding of all party committee support—would put the party's candidates at a disadvantage in close elections. A party-based financial incentive bearing that characteristic is therefore unlikely to be adopted.

Party leaders may identify multiple ways to accomplish these somewhat conflicting ends. The solution that I suggest is the creation of a specific fund within the party committee to provide supplemental funding to candidates who offer or accept the Pledge. Logistically, donors could earmark contributions for the fund, and money could be distributed to, or spent on behalf of, cooperating candidates on a regular basis throughout the general election cycle.<sup>50</sup>

---

48. Even if the Pledge becomes widely adopted, it would not completely undermine the utility of leadership PACs. They would still be useful to fund the candidates' own non-campaign expenses, and to make expenditures in support of other candidates that are not covered by the Pledge (for example, spending on targeted get-out-the-vote efforts in other candidates' districts).

49. *Independent Expenditures and Coordinated Expenses, 2013-2014*, CTR. FOR RESPONSIVE POLS., <https://www.opensecrets.org/parties/index.php?cycle=2014&cmte=DCCC> (last visited Nov. 28, 2015).

50. Funding the incentive through earmarked contributions provides two benefits. First, it allows the party to gauge the popularity of the party-based financial incentive

Under this structure, the party's support for candidates in close elections who fail to offer or accept the Pledge would not be significantly impaired (if at all). At the same time, the availability of guaranteed supplemental funding would likely induce the requisite number of candidates to offer or accept the Pledge: The incentive would appeal to some candidates in races not expected to be close, because they otherwise would receive only minimal party committee support. It would also appeal to candidates in races expected to be close because they would gain additional party funding.

To summarize, the version of the People's Pledge used by the parties should contain the following features:

1. Prohibition of the most common forms of advertising: television, radio, and internet.
2. A penalty provision sufficient to effectively deter third-party spending.
3. An exemption for party committee spending and for Congressional leaders' leadership PACs' spending.
4. A financial incentive sufficient to incrementally increase the number of candidates who offer or accept the Pledge that does not hand-tie the parties from funding at-risk candidates who failed to offer or accept the Pledge. One suitable structure may be creating a supplemental funding account comprised of donations earmarked by donors for the proposed purpose.

*B. Advantages of the Party-Based Financial Incentive Compared to a State-Based Incentive*

Having outlined the features of the Pledge, this Essay briefly addresses why the Pledge should be tied to a party-based, rather than a state-based, financial incentive.

Most importantly, a party-based financial incentive is much more likely to be constitutional than a state public-funding-based financial incentive.<sup>51</sup> While the Court has treated the major political parties as state actors when they have acted to deny access to the voting or nominating process,<sup>52</sup> it has also treated them as private actors with

---

among its base. Relatedly, if the practice is popular among the party's base, the size of the incentive will be greater.

51. See Sitaraman, *supra* note 1, at 767 (stating that "because the private contract does not rely on or require *any form of public law* to enforce it or to restrict third parties, it does not run afoul of constitutional limitations on the government restricting speech") (emphasis added).

52. See *Smith v. Allwright*, 321 U.S. 649, 663–65 (1944); *Terry v. Adams*, 345 U.S.

strong associational rights protected by the First Amendment.<sup>53</sup> The Court has signaled that these associational rights include internal party governance and conducting campaigns.<sup>54</sup>

It is unclear whether the Court would treat a party committee as a state actor in the proposed scenario. Based on the Court's apparent willingness to treat the parties as such when they violate the constitutional rights of persons,<sup>55</sup> the determinative factor may be whether the Court believes that the party-based funding incentive constitutes an action burdening the First Amendment rights of outside spending groups.<sup>56</sup> The Court would be hard pressed to reach such a conclusion. The party action in question is the provision of a small financial incentive to candidates who choose to offer or accept the Pledge. While the constitutionality of entering the Pledge has itself not been judicially reviewed, no one has argued that it is unconstitutional, and indeed it is hard to imagine how it could be. The Pledge is a legally non-binding contract between private parties (namely, the candidates' campaign committees).<sup>57</sup> Moreover, the private agreement does not prohibit outside spending groups from "speaking"; it only disincentivizes that conduct by raising the cost of the third-party speech

---

461, 469–70 (1953) (both treating the Texas Democratic Party (or a subdivision thereof) as a state actor when it sought to exclude black people from voting in the state Democratic primary); *see also* *Morse v. Republican Party of Va.*, 517 U.S. 186, 195 (1996) (finding state action under section 5 of the Voting Rights Act when the Party charged a fee to be a delegate at their state nominating convention).

53. *See* *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 224 (1986); *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 224–25, 229–30 (1989); *Cal. Democratic Party v. Jones*, 530 U.S. 567, 581–82, 584 (2000) (all striking state regulations that burden parties' associational rights); *see also* *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 456–57 (2008) (citing *Clingman v. Beaver*, 544 U.S. 581, 593 (2005) (upholding a state blanket primary system that does not severely burden the parties' associational rights)).

54. *Jones*, 530 U.S. at 581 ("We are similarly unconvinced by respondents' claim that the burden is not severe because Proposition 198 does not limit the parties from engaging fully in *other* traditional party behavior, such as ensuring orderly internal party governance . . . and conducting campaigns. . . . In the end, however, the effect of Proposition 198 on these other activities is beside the point. We have consistently refused to overlook an unconstitutional restriction upon some First Amendment activity simply because it leaves other First Amendment activity unimpaired.") (citing *Spence v. Washington*, 418 U.S. 405, 411 n.4 (1974) (per curiam); *Kusper v. Pontikes*, 414 U.S. 51, 58 (1973)).

55. *See* *Smith*, 321 U.S. at 663–65; *Terry*, 354 U.S. at 469–70, 473; *Morse*, 517 U.S. at 195.

56. *See, e.g.,* *Ariz. Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2829 (2011).

57. *Sitaraman, supra* note 1, at 757.

for the benefitting candidate.<sup>58</sup> In sum, the party-based funding incentive gives a benefit to candidates who choose to partake in a perfectly constitutional practice. This is a far cry from the constitutional burden imposed by the Texas Democratic Party in the White Primary cases.<sup>59</sup>

Even if the Court were to treat the party-based financial incentive as state action, it would presumably balance the burden it creates on the constitutional rights of outside spending groups with the party's First Amendment associational rights related to internal party rules and conducting campaigns.<sup>60</sup> Here, the Court would likely apply an analysis similar to the one articulated in the paragraph above. The effect of the party-based funding incentive is only to persuade more candidates to enter into a perfectly constitutional practice.<sup>61</sup> On the other hand, striking the party-based funding incentive would intrude on the parties' associational interests.

Strengthening the proposition that the practice, if judicially reviewed, would be upheld as constitutional is the fact that the conservative wing of the Court has been more protective of these associational rights.<sup>62</sup> This makes agreement between the liberals, who are adverse to *Citizens United*, and the conservatives, who are protective of political parties' associational rights, more probable.

A party-based financial incentive has other advantages over a state-based incentive as well. The party committees are far more centralized than is a collection of states, so systemic implementation is dependent on fewer key policymakers. Further, whereas national implementation of a state public-funding incentive system is impossible, the party committees can create a funding incentive for any party candidate nationwide. Finally, the party committees have more flexibility in the size, type, and timing of distribution of the financial incentive.

That the party committees *could* undertake this practice, however,

---

58. *Id.* at 766-67, 770.

59. *See Smith*, 321 U.S. at 650-51, 663-65; *Terry*, 354 U.S. at 469-70.

60. *See Morse*, 517 U.S. at 228-29 (citing *Smith*, 321 U.S. at 657, and *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 232 (1989), as examples where persons' constitutional rights outweighed the associational rights of a political party).

61. *See generally*, Sitaraman, *supra* note 1.

62. *See Morse*, 517 U.S. at 241-47 (Scalia, J., dissenting, joined by Thomas, J.); *id.* at 250 ("Sensitive consideration of the rights of speech and association counsels much restraint before finding that a political party is a state actor for purposes of all preclearance requirements. In particular, we have called for circumspection in drawing the state-action line where political parties and their roles in selecting representative leaders are concerned.") (Kennedy, J., dissenting, joined by Rehnquist, C.J.); *Cal. Democratic Party v. Jones*, 530 U.S. 567, 567-86 (2000).

is insufficient to demonstrate that they *would*—proof of which is essential to showing the viability of the party-based financial incentive. Accordingly, the majority of the remainder of this Essay focuses on whether it is in both (a) the institutional interest and (b) the operational interest of the party committees to undertake the practice of creating a financial incentive for candidates to offer or accept the Pledge.

### III. THE INSTITUTIONAL INCENTIVE FOR THE PARTIES TO ADOPT THE PROPOSED PRACTICE

Section II above establishes how the party-based financial incentive could work *if* one of the major parties were to adopt the practice. Section III seeks to establish that one of the major parties *would* adopt the practice. To do so, this Section focuses first on the institutional incentive that both major parties have to adopt the practice and then shifts to whether the major parties have an operational incentive to adopt the practice. Section A concludes that developments in campaign finance law have created a strong institutional incentive for the parties to create a party-based financial incentive for candidates to offer or accept the Pledge. Section B concludes that, in addition to the institutional incentive, the parties have operational incentives for adopting the practice.

#### A. *Changes in Campaign Finance Law Have Allowed Outside Spending Groups to Gain Substantial Influence in Elections Relative to the Party Committees*

The power and influence of party committees has been dramatically altered since Congress's passage of the Federal Election Campaign Act (FECA) of 1971 and its 1974 amendments.<sup>63</sup> FECA "imposed a variety of disclosure requirements, contribution limits and spending ceilings on all candidates, parties, and groups."<sup>64</sup> The Supreme Court struck some of these restrictions as unconstitutional in *Buckley v. Valeo*.<sup>65</sup> In doing so, it exempted from all regulation advertisements which did not "in express terms advocate the election or defeat of a clearly identified candidate for federal office."<sup>66</sup> These advertisements

---

63. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3, 12-17 (1971); Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat., 1263, 1263, 1266, 1276-78, 1280, 1283, 1303 (1974).

64. Craig Holman & Joan Claybrook, *Outside Groups in the New Campaign Finance Environment: The Meaning of BCRA and the McConnell Decision*, 22 YALE L. & POL'Y REV. 235, 239 (2004) (citing HERBERT ALEXANDER, FINANCING THE 1976 ELECTION (1976)).

65. 424 U.S. 1, 45, 51, 143 (1976).

66. *Id.* at 44.

came to be known as “issue ads” or “issue advocacy” advertisements.<sup>67</sup> *Buckley*, in other words, allowed outside groups to run ads that mentioned a candidate but did not use certain “magic words” indicating advocacy for the election or defeat of the candidate free from regulation.<sup>68</sup>

Importantly, this meant that these advertisements could be funded by the general treasuries of unions and corporations. This placed the political parties at a substantial disadvantage. While they were still subject to the strict contribution limits imposed by FECA, many outside spending groups were not. The latter could raise funds in unlimited amounts to finance advertisements portraying candidates in either a negative or positive light, so long as they did not expressly call for the election or defeat of that candidate. These funds, which did not need to be disclosed to the FEC, came to be known as “dark money.”<sup>69</sup>

Recognizing the disadvantage this created for the parties, Congress amended FECA to allow the party committees to make expenditures related to general party building.<sup>70</sup> This included things like get out the vote campaigns and the production of general party paraphernalia.<sup>71</sup> A series of FEC regulations lifted the restrictions on contributions to party committees for funds to be employed for these purposes. These donations, which could be given by corporations and unions, and were not subject to amount limitations, came to be known as “soft money” donations.<sup>72</sup>

Soft money grew during the 1980s, rising from \$19 million in 1980 to \$45 million in 1988. It was used to build the infrastructure of the national parties, to hire staff, acquire office space, develop direct mail capability, run polling and issues research operations, acquire data processing equipment, and create and improve facilities for mass media communications . . . .<sup>73</sup>

Soft money exploded further in the 1990s and early 2000s. At the same time, a favorable Supreme Court decision struck down FECA’s

---

67. See Holman & Claybrook, *supra* note 64, at 239–40.

68. *Buckley*, 424 U.S. at 44 n.52; Holman & Claybrook, *supra* note 64, at 238–43 (discussing the “Magic Words” test).

69. See generally Trevor Potter & Bryson B. Morgan, *The History of Undisclosed Spending in U.S. Elections & How 2012 Became the “Dark Money” Election*, 27 NOTRE DAME J.L. ETHICS & PUB. POL’Y 383, 385 (2013).

70. Anthony Corrado, *Party Finance in the 2000 Elections: The Federal Role of Soft Money Financing*, 34 ARIZ. ST. L.J. 1025, 1030 (2002).

71. *Id.* at 1030–33.

72. *Id.*

73. Richard Briffault, *The Political Parties and Campaign Finance Reform*, 100 COLUM. L. REV. 620, 629 (2000).

restrictions on political party expenditures in connection with a general election as applied to independent expenditures—spending uncoordinated with a candidate’s campaign that expressly advocates for the election or defeat of a candidate.<sup>74</sup> As soft money poured into the party committees, it was used without restriction on these independent expenditures and issue advocacy advertisements. This combination of soft money and loose spending restrictions put the party committees on par with outside spending groups. In the 1996 election cycle the national parties raised \$262 million in soft money, \$120 million of which was spent on issue advocacy advertisements.<sup>75</sup> Meanwhile, outside spending groups were also exploiting *Buckley*’s issue advocacy advertising exception:

Between \$135 and \$150 million was spent by corporations and unions on such ads in the 1996 federal elections. In the 1998 congressional elections, “77 organizations aired 423 ads at a total cost between \$270 million and \$340 million,” and in the 2000 presidential election the figures nearly doubled: “130 groups spent over an estimated \$500 million on more than 1,100 different ads.” During the 2000 cycle, only one-third of such spending (approximately \$162 million) was attributable [to] the Republican and Democratic parties. The remainder was attributable to outside groups—often with obscure names such as Citizens for Reform, Citizens for Better Medicare, or the Coalition to Protect America’s Health Care—that received donations from corporations and unions.<sup>76</sup>

The result of all this was a campaign finance system ripe with loopholes that allowed both party committees and other outside groups to easily circumvent the contribution limitations once required by FECA. The party committees had swiftly counteracted their initial post-*Buckley* disadvantages. By 2000, they were able to exert their influence through the traditional avenues—donations to candidates and coordinated expenditures—as well as virtually unlimited amounts of independent expenditures and issue advocacy advertisements.

The glut of unregulated spending in the 2000 election did not sit well with the public, and pressure was on Congress to act.<sup>77</sup> The result was the Bi-Partisan Campaign Reform Act (BCRA).<sup>78</sup> BCRA struck a

---

74. *Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm’n*, 518 U.S. 604 (1996).

75. Potter & Morgan, *supra* note 69, at 430.

76. *Id.*

77. See Holman & Claybrook, *supra* note 64, at 243.

78. See generally Bipartisan Campaign Reform Act (BCRA) of 2002 § 101, 52 U.S.C.A. § 30125 (West 2015) (previously codified at 2 U.S.C. § 44li).

central blow to the power of party committees by banning soft money,<sup>79</sup> damming the flood of corporate and union cash to the parties. It also curtailed the influence of outside spending groups by banning issue advocacy advertisements funded by the general treasuries of corporations or unions aired within thirty days of a primary election or sixty days of a general election.<sup>80</sup> Still, outside spending groups were mostly exempt from FEC regulation, save the aforementioned “electioneering communications” within the thirty- or sixty-day window.<sup>81</sup> Thus, as BCRA built a dam between soft money and the party committees, another outlet opened up, and the soft money flowed into the pockets of outside spending groups. Corporations, unions, and wealthy individuals took advantage of these largely unregulated entities and shifted their resources from the party committees to 527s and 501(c) organizations. “Money, like water, will always find an outlet.”<sup>82</sup>

While the dam between soft money and the party committees built by BCRA exists to this day, the Supreme Court has decimated BCRA’s regulation of outside spending groups under the heading of their First Amendment jurisprudence. In *McConnell v. FEC* a coalition of Justices Stevens, Ginsburg, Breyer, Souter, and O’Connor upheld the constitutionality of BCRA’s soft money prohibition and electioneering communication regulation.<sup>83</sup> But, by 2007, Justice Alito had replaced Justice O’Connor on the nation’s highest court. In *Wisconsin Right to Life*, Justice Alito joined Justices Scalia, Thomas, Kennedy, and Chief Justice Roberts to signal that *McConnell* was on shaky ground.<sup>84</sup> Right to Life had aired a series of advertisements instructing voters to contact Wisconsin’s Senators Feingold and Kohl and to ask them to stop filibustering the appointment of federal judges.<sup>85</sup> The advertisements were funded by Right to Life’s general treasury, not a PAC.<sup>86</sup> This placed the ads squarely within BCRA section 203’s regulation prohibiting such ads within thirty days of a primary. The conservative coalition struck section 203, as applied to issue advocacy ads, on First Amendment grounds.<sup>87</sup> The Court held that the government lacked a

---

79. *Id.*

80. BCRA § 201, 52 U.S.C.S. § 30104 (previously codified at 2 U.S.C. § 441i).

81. *Id.*

82. *McConnell v. Fed. Election Comm’n*, 540 U.S. 94, 224 (2003).

83. *Id.* at 110.

84. *Fed. Election Comm’n v. Wis. Right To Life, Inc.*, 551 U.S. 449 (2007).

85. *Id.* at 458–60.

86. *Id.* at 460.

87. *Id.* at 457.

compelling interest sufficient to burden Right to Life's speech.<sup>88</sup> The opinion opened the door for corporations and unions to fund issue advocacy advertisements aired close to election day from their general treasuries. But it declined to find section 203 facially unconstitutional, so its regulation of electioneering communications that expressly advocated for the election or defeat of a candidate remained. Still, the recently appointed Justice Alito signaled that section 203's days were numbered.

[I]t is unnecessary to . . . decide whether § 203 is unconstitutional on its face. If it turns out that the implementation of the as-applied standard set out in the principal opinion impermissibly chills political speech . . . we will presumably be asked in a future case to reconsider the holding in *McConnell* . . . that § 203 is facially constitutional.<sup>89</sup>

That future case came two years later with *Citizens United v. Federal Election Commission*.<sup>90</sup> Citizens United, a non-profit organization, sought to air a film critical of then-candidate for president Hillary Clinton within thirty days of a Democratic primary.<sup>91</sup> The film would not have fallen under the issue advocacy exception created by *Wisconsin Right to Life*. Instead, it would have been an electioneering communication calling for the defeat of a candidate, putting it in direct violation of BCRA sections 203 and 441(b).<sup>92</sup>

The Court sided with Citizens United and struck BCRA's corporate electioneering communications restriction as unconstitutional under First Amendment free speech principles.<sup>93</sup> As a result, outside spending organizations—including corporations and unions spending from their general treasuries—could air communications calling for the direct election or defeat of a candidate without being subject to the FEC's timing and funding regulations.

With the BCRA soft money ban still intact for the parties, *Citizens United* gave outside spending groups another leg up. The impact was felt immediately. Party committee spending as a percentage of total outside spending dropped substantially. The below charts, based on data as reported to the FEC, detail this drop<sup>94</sup>:

---

88. *Id.* at 477–81.

89. *Wis. Right To Life, Inc.*, 551 U.S. at 482–83 (Alito, J., concurring).

90. 558 U.S. 310 (2010).

91. *Id.* at 331.

92. *Id.* at 322–24.

93. *Id.* at 365–66.

94. Data used in the below charts comes from the Center for Responsive Politics. The raw input data is available by search at CTR. FOR RESPONSIVE POL., <https://www.opensecrets.org> (last visited Nov. 28, 2015). The data as compiled and

<b>Election Cycle</b>	<b>Committee Spending as a Percentage of Total Reported Outside Spending</b>	<b>Dollars +/- Spent by Committees Compared to Outside Spending Groups</b>
2004	57.90%	\$72,432,994
2006	75.72%	\$147,265,667
2008 (post <i>WRTL</i> )	41.09%	(\$102,331,288)
2010 (post <i>Citizens United</i> )	37.97%	(\$120,194,388)
2012	24.59%	(\$783,313,594)
2014	29.01%	(\$330,056,936)

This drop in relative influence was felt by both parties within their respective ideological realms as well:

<b>Election Cycle</b>	<b>Dem. Committee Spending as a Percentage of Total Liberal Outside Spending</b>	<b>Dollars +/- Spent By Dem. Committees Compared to Liberal Outside Spending Groups</b>
2004	60.64%	\$62,000,000
2006	72.48%	\$63,700,000
2008 (post <i>WRTL</i> )	36.48%	(\$83,200,000)
2010 (post <i>Citizens United</i> )	50.73%	\$3,100,000
2012	28.02%	(\$178,900,000)
2014	35.51%	(\$101,000,000)

calculated into percentages is available in spreadsheet format upon request from the author. Importantly, the data only includes spending reported to the FEC. So, it does not include spending on issue advocacy advertisements. Accordingly, the data almost definitely overstates the actual percentage of party committee spending in the most recent election cycles.

<b>Election Cycle</b>	<b>GOP Committee Spending as a Percentage of Total Conservative Outside Spending</b>	<b>Dollars +/- Spent By GOP Committees Compared to Liberal Outside Spending Groups</b>
2004	56.35%	\$20,000,000
2006	85.53%	\$94,800,000
2008 (post <i>WRTL</i> )	52.35%	\$11,100,000
2010 (post <i>Citizens United</i> )	30.30%	(\$107,000,000)
2012	16.41%	(\$579,000,000)
2014	25.53%	(\$200,400,000)

While this data does not capture the whole picture,<sup>95</sup> it illustrates the problem. When it comes to making election related communications and advertisements, the current state of campaign finance law places the party committees at a serious disadvantage compared to outside spending groups.

*1. The Institutional Advantage Gained by Creating a Party-Based Financial Incentive*

Creating a party-based financial incentive for candidates to offer or accept the Pledge allows party committees to reclaim the influence lost to non-party committee outside groups after BCRA, *Wisconsin Right to Life*, and *Citizens United*. As outside groups are excluded, or at least deterred, from entering individual races, donors to those groups will seek other ways to influence the outcome of the elections. The threat that candidates will enter the Pledge may alone deter donors from contributing to outside spending groups. If, for example, a donor wants to influence a particular election, and there is a likelihood that the candidates will enter into an agreement, that donor will rationally avoid donating to outside spending groups. As more candidates enter the Pledge, rational donors will increasingly be deterred from contributing to outside spending groups out of the fear that their donation will be ineffective.

Increasingly over time, as outside spending groups are deterred from greater numbers of races, donors' money would be allocated to the candidates, parties, and PACs that donate directly to candidates and

---

95. It does not account for party influence gained from party donations to candidates, coordinated expenditures with candidates, holding conventions, or branding. On the other side of the scale, the data doesn't include the tremendous amount of money spent on issue advocacy advertisements, discussed *supra* in text accompanying note 76.

parties. This would not necessarily eliminate outside spending altogether, but it would force the groups to undertake a different set of activities. Instead of airing advertisements, outside spending groups would have to focus more on conduct permitted by the Pledge. For example, the Pledge may not penalize get out the vote campaigns, direct mailers to organization members, and other election related activities.

The result would be an election advertising universe controlled mostly by the parties and their candidates. From an institutional perspective, this is of course advantageous to the party committees. But, the result must also be advantageous from an operational perspective for the parties to want to undertake the proposed practice. That is, the goal of the parties is to get as many of their candidates for office elected as possible. When outside spending groups air advertisements to elect a party's candidate or defeat the candidate's opponent, it presumably helps towards achieving that goal. From an operational perspective, then, a party with a predictable and significant advantage in outside spending would be less likely to act to eliminate the influence of outside spending groups. The other side of that coin, of course, is that a party with a predictable and significant *disadvantage* in outside spending is more likely to act to eliminate the influence of outside spending groups.

The next section of this Essay addresses this financial factor, along with other operational considerations that affect the likelihood of the adoption of the party-based financial incentive.

#### *B. Aligning Institutional Incentive with Operational Considerations*

Mitigating the influence of outside spending groups and enhancing their own influence creates a strong institutional incentive for the party committees to adopt the practice proposed by this Essay. However, this institutional incentive alone is insufficient to cause the party committees, acting rationally, to adopt the practice. Decision-makers in the party committees would also consider the operational interests of their respective party. This Section examines the operational factors the parties would be likely to consider, looking particularly to financial considerations and the general popularity of the People's Pledge.

First, the primary goal of party committees is to get as many of the party's candidates elected to office as possible. As it turns out, having a financial advantage over the other candidate is an incredibly effective way to accomplish that goal.<sup>96</sup> Because the goal of adopting the practice

---

96. Wesley Lowery, *91% of the Time the Better Financed Candidate Wins. Don't Act Surprised*, WASHINGTON POST: THE FIX (Apr. 4, 2014), <http://www.washingtonpost.com/blogs/the-fix/wp/2014/04/04/think-money-doesnt-matter-in-elections-this-chart-says-youre->

is to systemically eliminate third-party outside spending, a party with a predictable outside spending advantage is unlikely to forego that advantage because it will decrease the likelihood of getting the party's candidates elected to office.<sup>97</sup>

Data from the past few election cycles suggests that the Republican Party has enjoyed a substantial expected advantage in non-party committee outside spending. Based on spending data reported to the FEC, Republicans have nearly doubled Democrats in non-party committee outside spending combined over the three federal election cycles since *Citizens United*, outpacing them by almost \$600,000,000 total.<sup>98</sup> Moreover, because this figure only includes data reported to the FEC, the actual spending advantage held by conservative outside spending groups is almost definitely even greater.<sup>99</sup>

This advantage, however, may change with time, and has narrowed significantly in the most recent election cycle.<sup>100</sup> As the parties reach closer to equilibrium in outside spending, the operational environment

---

wrong; Russ Choma, *Money Won on Tuesday, But Rules of the Game Changed*, CTR. FOR RESPONSIVE POL. (Nov. 5, 2014), <http://www.opensecrets.org/news/2014/11/money-won-on-tuesday-but-rules-of-the-game-changed>.

97. This only holds true if the predicted financial advantage outweighs any stigmatic effect of rejecting or not proposing the pledge plus any stigmatic effect of the outside spending itself. The goal of the party-based financial incentive is to increase these stigmatic effects over time. But, the purpose of analyzing the operational interests of the parties is to determine whether either would adopt the practice *initially*. Accordingly, because the practice would initially not be an expected norm, a substantial outside spending disparity would likely outweigh the initial stigmatic effects.

98. This figure is established by totaling the non-party committee liberal spending from 2010, 2012, 2014 and subtracting it from the non-party committee conservative spending from the same cycles. Data available by search at CTR. FOR RESPONSIVE POL., *supra* note 94.

99. See *Ad Spending in 2014 Elections Poised to Break \$1 Billion*, WESLEYAN MEDIA PROJECT (Oct. 14, 2014), <http://mediaproject.wesleyan.edu/releases/ad-spending-in-2014-elections-poised-to-break-1-billion> (tracking broadcast and national television advertising (including advertising not reportable to the FEC) in the 2014 election cycle and stating that "Republicans continue to be more reliant on outside group advertising than Democrats."); *id.* at tbl.1 (showing a higher percentage of advertisements aired by Republican outside groups than Democratic outside groups in thirteen out of the fifteen most competitive Senate races during a two-week stretch leading up to Election Day); *id.* at tbl.A (showing a higher percentage of advertisements aired by Republican outside groups than Democratic outside groups in seven out of the eight most competitive Senate races during the 2014 Election Cycle); see generally Erika Fowler & Travis Ridout, *Political Advertising in 2014: The Year of the Outside Group*, 12 F.: J. APPLIED RES. CONTEMP. POL. 663 (2014), [http://mediaproject.wesleyan.edu/wp-content/uploads/2015/04/2014-Forum-FowlerRidout\\_FINAL2.pdf](http://mediaproject.wesleyan.edu/wp-content/uploads/2015/04/2014-Forum-FowlerRidout_FINAL2.pdf) (detailing the impact of outside spending groups in the 2014 election cycle).

100. See *Total Outside Spending by Election Cycle, Excluding Party Committees*, CTR. FOR RESPONSIVE POL., [https://www.opensecrets.org/outsidespending/cycle\\_tots.php](https://www.opensecrets.org/outsidespending/cycle_tots.php) (last visited Nov. 28, 2015) (compare 2012 election cycle to 2014 election cycle).

that the parties would find themselves in would be much akin to the more favorable environment identified by Sitaraman, where neither party would have an expected outside spending advantage.<sup>101</sup> Like two candidates faced with the same situation, curtailing this uncertainty in outside spending may give each party reason to adopt the Pledge.

Second, in addition to the financial factor, there are other operational considerations that increase the viability of the party-based financial incentive. One is the reputational backlash to not adopting the proposed practice if the opposing party does. As it turns out, the Pledge specifically, and getting money out of politics generally, enjoy widespread popular support.<sup>102</sup> A recent poll found that 68% of likely voters are favorable to the Pledge, including 70% of Democrats, 64% of Republicans, and 69% of Independents.<sup>103</sup> Moreover, 45% of likely voters are more likely to support a candidate who has taken the Pledge, compared to only 8% who are less likely.<sup>104</sup> This overwhelming support for the Pledge is in addition to the over 80% support for limiting campaign contributions generally<sup>105</sup> and the nearly 70% of Americans who think super PACs should be illegal.<sup>106</sup> When proposed in only a small number of races, the backlash from not signing the Pledge may not be so great. Failure to sign the Pledge may be just one of many fleeting, tangential issues. But, if the practice normalizes through adoption of the party-based financial incentive, the magnitude of the backlash would increase.<sup>107</sup>

---

101. Sitaraman, *supra* note 1, at 779.

102. See Robert Carpenter, *Republicans Should Join in Scuttling Citizens United*, THE HILL (Jan. 25, 2015, 4:00 PM), <http://thehill.com/blogs/congress-blog/politics/229524-republicans-should-join-in-scuttling-citizens-united> (noting that “[p]oll after poll shows that the majority of voters of all political stripes are alarmed at the record amounts of money pouring into elections”, that “by a 6-1 margin, voters say that reducing the influence of money in politics is an important issue”, and that “voters favor a constitutional amendment [to counteract *Citizens United*] by a 61-28 percent margin”).

103. Memorandum from Celinda Lake et al., Lake Research Partners, to Interested Parties, Recent Research Findings on the “People’s Pledge” (Aug. 5, 2014), <http://www.peoplespledge2014.org/for-candidates/recent-research-findings-on-the-peoples-pledge>.

104. *Id.*

105. Mark Sherman, *Poll: Strong Support for Campaign Spending Limits*, YAHOO! NEWS (Sept. 15, 2012, 12:06 PM), <http://news.yahoo.com/poll-strong-support-campaign-spending-limits-120557612—election.html>.

106. *Poll: Seven in 10 Would Send Super PACs Packing*, ABC NEWS/WASHINGTON POST (March 13, 2012), <http://www.langerresearch.com/wp-content/uploads/1135a3SuperPACs.pdf>.

107. This risk of backlash is how many informal rules are enforced. Take golf for example. It is a norm that while your opponent is lining up a putt you cannot walk in his “line”—the area in between the ball and the hole. This is not an official rule of golf, but

Another is the positive association created by instituting a pledge on a wide scale within a party. Americans see special interests as controlling both parties.<sup>108</sup> The Pledge can change that by strengthening the association between a popular reform policy and party. Take Grover Norquist's "No Tax Pledge" for example.<sup>109</sup> Regardless of the reader's feelings about the underlying merits of that pledge, it has certainly helped to make the Republican Party synonymous with lower taxes, a popular association even if it may sometimes result in undesirable public policy. The People's Pledge could create a similar association between a party that adopts it and getting outside money out of elections.

Finally, the Pledge would allow a party, or the parties, to achieve a policy goal before even taking office. This highlights an important distinction between the Pledge and all other pledges—like Norquist's—that candidates are asked to sign. Other pledges are legislative promises. Candidates promise that they will or will not do something once they are elected. The electoral value of those pledges is reduced by general skepticism of campaign promises. Voters may like the words, but they remain skeptical about the prospect of action. The People's Pledge is different. It is both the declaration of a policy position and the execution of that policy. It is both a promise and a result.

In sum, there are both institutional and operational reasons that one, if not both, of the two major political parties in the country would create a financial incentive for the People's Pledge in the near future. This is important to show that the party-based financial incentive could work in practice, and not only in theory.

---

golfers abide by it even though it might be advantageous for better putters to disrupt their opponents by walking in their lines. Golfers who fail to follow the rule face backlash in the form of reputational cost. As the Pledge becomes more widely offered and accepted, candidates who refuse to sign it will risk looking like the golfer who insists on walking in his opponent's line. When the game is a glorified popularity contest, that is not a good look.

108. *E.g.*, Greenberg Quinlan Rosner Research, *A Special Interest Congress*, CAMPAIGN MONEY (Dec. 17, 2013), [http://campaignmoney.org/sites/default/files/WhoMembersListenTo\\_0.pdf](http://campaignmoney.org/sites/default/files/WhoMembersListenTo_0.pdf) (finding Americans think that special interest groups and campaign contributors have the most influence on how members of Congress vote).

109. *See About the Taxpayer Protection Pledge*, AMERICANS FOR TAX REFORM, <http://www.atr.org/about-the-pledge> (last visited Nov. 28, 2015).

## IV. NORMATIVE JUSTIFICATIONS FOR INCREASED PARTY CONTROL OF ELECTION SPENDING

This Essay, and the practice that it proposes, has important consequences for campaign finance reformers. Short of a future Court overturning *Citizens United*, this proposal is perhaps the first viable path to mitigating the case's effects on outside spending on a systemic level: It does not require Article V amendment and does not involve state action. These features alone make the proposal worthy of serious consideration by reformers. Some reformers, however, will still be unsatisfied with the result of even a successful implementation of this proposal. The resulting campaign finance landscape would still include tremendous amounts of money flowing to the parties, candidates, and certain leadership PACs. But this landscape is normatively far more desirable than the status quo in several respects.

First, the resulting centralization of campaign financing around the parties may improve the functioning of our democracy. In a recent article in the *Yale Law Journal*, Professor Richard Pildes argues this very point.<sup>110</sup> He persuasively demonstrates how the fragmentation of our political institutions and campaign finance system has made compromise between political actors more difficult.<sup>111</sup> Giving party leadership more influence, specifically in the realm of campaign financing, would make compromise more likely by giving a small, core number of party-centrist actors greater negotiating power and authority.<sup>112</sup> Professor Ray La Raja reaches similar conclusions in his 2013 article *Richer Parties, Better Politics?*<sup>113</sup> He concludes that, while more empirical research is needed, “theory (and some empirical research) indicates that party control over resources might improve aspects of the political system . . . includ[ing] campaigns, mass representation and governing.”<sup>114</sup>

Second, because expenditures on advertising would come from candidates, party committees, or party leaders, candidates will be more closely tethered to advertising messaging than they are when third parties fund the advertisements. In the current campaign finance environment, “[t]he escalating activity of independent groups in

---

110. Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 *YALE L.J.* 804, 851–52 (2014).

111. *Id.* at 828–31.

112. *Id.* at 831–32, 836–38.

113. Raymond La Raja, *Richer Parties, Better Politics? Party-Centered Campaign Finance Laws and American Democracy*, 11 *FORUM* 313, 314 (2013).

114. *Id.* at 332.

---

---

campaigns may create a muddled information environment for voters” making it more difficult for voters to evaluate candidates and “sort through the noise to make decisions that reflect their priorities or preferences.”<sup>115</sup>

The tethering of the candidate to the advertisement may be especially important when it comes to negative advertising. Portraying an opponent in a negative light can be beneficial to a candidate, but it also comes with risk. Negative advertising can backfire when the media or the public thinks that the advertisement is tasteless, unfair, or just plain mean. Under the current campaign finance system, candidates are able to reap the benefits of negative advertising while deflecting much of the cost (reputational risk) to the unassociated third parties that pay for the advertisements. Tethering the candidates, the parties, or identifiable party leaders to the messaging would likely reduce the amount of negative advertising by forcing the candidates to bear the true cost (reputational risk) of the advertisements.

Third, the centralization of contributions would increase the amount of disclosed donations and decrease the amount of so-called dark money in elections. Outside spending groups not regulated by the FEC, such as 501(c)(4) organizations, are not required to disclose the sources of their funding. As a result, voters are entirely unaware of who is funding much of the messaging they are inundated with during election seasons. Donations to candidates and parties, however, must be disclosed to the FEC. Perhaps more importantly than the implications for the average voter, who likely will not research funding sources regardless, increased disclosure has normatively beneficial implications for government corruption watchdogs.

One possible drawback to the party-centralization of campaign financing is an increased risk of corruption. In arguing that the government can constitutionally impose an aggregate limit on the amount of money an individual can donate to a political party and individual candidates, Professor Michael Kang asserts that there is a “risk of party-based, group-level corruption” associated with high-level donors.<sup>116</sup> This risk, he argues, gives the government an interest sufficient to impose the aggregate limit.<sup>117</sup>

This author recognizes that potential for corruption and shares

---

115. *Id.* at 324.

116. Michael S. Kang, *Party-Based Corruption and McCutcheon v. FEC*, 108 *Nw. U. L. Rev.* 240, 255 (2014).

117. The aggregate limit was nonetheless struck down in *McCutcheon v. Federal Election Commission*, 134 *S. Ct.* 1434, 1446 (2014).

Professor Kang's conclusion that party-based corruption is a government interest sufficient to permit the imposition of aggregate contribution limitations. But that has little bearing on the overall normative desirability of the party-centralization of campaign financing. The potential for party-based corruption must be weighed against the potential for corruption resulting from third-party expenditures. While further research is needed to determine the comparative potential for, and nature of, corruption arising from large aggregate donations to parties and candidates compared to large donations made to outside spending groups, common sense dictates that individuals and institutions feel at least somewhat indebted when they are the beneficiaries of expenditures, regardless of what conduit those expenditures pass through.<sup>118</sup> Even assuming that, on balance, the nature of, and potential for, corruption is greater for large aggregate contributions to the parties and their candidates, such contributions will be made regardless of whether campaign finance becomes more party-centric. So, the only possible risk of additional corruption resulting from centralization is the difference between (a) permitting large aggregate donations in the current campaign finance system, which includes outside spending, and (b) doing so in a system which eliminates the outside spending. This risk of additional potential for corruption, if at all existent, is likely negligible, and outweighed by the other normative benefits of centralization. Thus, the fact that large aggregate donations to parties and candidates may corrupt has little influence on the normative desirability of instituting the party-based funding incentive, and the party-centralization of campaign financing that would result from doing so.

#### CONCLUSION

The People's Pledge allows candidates to exclude outside spending from their races, creating a private contract to circumvent the effects of *Citizens United*. For the Pledge to be adopted on a systemic scale, however, it must become normalized, such that failing to enter the Pledge has increased reputational or stigmatic costs. To solve this problem, this Essay established that the political parties can create a party-based funding incentive that will increasingly persuade candidates to offer or accept the Pledge, making the practice a norm over time. This Essay next determined that both major political parties have an institutional incentive, based on their electoral influence relative to

---

118. Although, a majority of the Supreme Court disagrees. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

---

---

outside spending groups, to create this incentive. In addition, the parties have certain operational incentives to implement the party-based funding incentive, an important fact towards determining the practicality of the practice. Finally, this Essay discussed some of the normative benefits to the centralization of campaign finance around the parties that would occur if the proposed practice is adopted.

APPENDIX A: FULL TEXT OF THE WARREN-BROWN PEOPLE'S PLEDGE<sup>119</sup>

Because outside third party organizations—including but not limited to individuals, corporations, 527 organizations, 501(c) organizations, SuperPACs, and national and state party committees—are airing, and will continue to air, independent expenditure advertisements and issue advertisements either supporting or attacking Senator Scott Brown or Elizabeth Warren (individually the “Candidate” and collectively the “Candidates”); and

Because these groups function as independent expenditure organizations that are outside the direct control of either of the Candidates; and

Because the Candidates agree that they do not approve of such independent expenditure advertisements, and want those advertisements to immediately cease and desist for the duration of the 2012 election cycle; and

Because the Candidates recognize that in order to make Massachusetts a national example, and provide the citizens of Massachusetts with an election free of third party independent expenditure advertisements, they must be willing to include an enforcement mechanism that runs not to the third party organizations but to the Candidates' own campaigns:

The Candidates on behalf of their respective campaigns hereby agree to the following:

- In the event that a third party organization airs any independent expenditure broadcast (including radio), cable, satellite, or online advertising in support of a named, referenced (including by title) or otherwise identified Candidate, that Candidate's campaign shall, within three (3) days of discovery of the advertisement buy's total cost, duration, and source, pay 50% of the cost of that advertising buy to a charity of the opposing Candidate's choice.
- In the event that a third party organization airs any independent

---

119. Scott Brown & Elizabeth Warren, *The People's Pledge* (Jan. 23, 2012), reprinted in Ganesh Sitaraman, *Contracting Around Citizens United*, 114 COLUM. L. REV. 755, 805 (2014).

---

---

expenditure broadcast (including radio), cable, satellite, or online advertising in opposition to a named, referenced (including by title) or otherwise identified Candidate, that Candidate's campaign shall, within three (3) days of discovery of the advertisement buy's total cost, duration, and source, pay 50% of the cost of that advertising buy to a charity of the opposed Candidate's choice.

- In the event that a third party organization airs any broadcast (including radio), cable, or satellite advertising that promotes or supports a named, referenced (including by title) or otherwise identified Candidate, that Candidate's campaign shall, within three (3) days of discovery of the advertisement buy's total cost, duration, and source, pay 50% of the cost of that advertising buy to a charity of the opposing Candidates [sic] choice.
- In the event that a third party organization airs any broadcast (including radio), cable, or satellite advertising that attacks or opposes a named, referenced (including by title) or otherwise identified Candidate, the opposing Candidate's campaign shall, within three (3) days of discovery of the advertisement buy's total cost, duration, and source, pay 50% of the cost of that advertising buy to a charity of the opposed Candidate's choice.
- The Candidates and their campaigns agree that neither they nor anyone acting on their behalf shall coordinate with any third party on any paid advertising for the duration of the 2012 election cycle. In the event that either Candidate or their campaign or anyone acting on their behalf coordinates any paid advertisement with a third party organization that Candidate's campaign shall pay 50% of the cost of the ad buy to a charity of the opposing Candidate's choice.
- The Candidates and their campaigns agree to continue to work together to limit the influence of third party advertisements and to close any loopholes (including coverage of sham ads) that arise in this agreement during the course of the campaign.

Scott Brown January 23, 2012

Elizabeth Warren January 22, 2012