

THE POSSIBILITIES FOR RESPONSIVE PARTY
GOVERNMENT*Tabatha Abu El-Haj**

INTRODUCTION

Professor Kang raises two fundamental worries about the associational path to party reform in *The Problem of Irresponsible Party Government*,¹ his response to my essay, *Networking the Party: First Amendment Rights and the Pursuit of Responsive Party Government*.² First, he doubts the feasibility of reestablishing thick relational parties given social, technological, and cultural changes since the 1970s.³ Second, he questions the choice to focus on refashioning First Amendment doctrine, cautioning that the judiciary, as an institution, is fundamentally incompetent to spearhead successful party reform. Thus, despite finding my diagnosis of the ills of contemporary American parties and my indictment of responsible party government and its hold over First Amendment doctrine “almost undeniable,” Professor Kang expresses significant uncertainty about both the realism of the target and the proposed means for achieving it.⁴

Indeed, the future of American democracy is uncertain. Its revitalization will require a broad reform agenda, an appreciation for incremental progress, and perseverance in the face of partial failures. The claim in *Networking the Party* was never that associational-party reform would be either easy or a panacea. Instead, the essay’s primary claim is that such a reform agenda will need to address the state of our political parties and that an associational-party path to reform is significantly more promising than the current menu of policy prescriptions, which remain grounded in responsible party government. As I

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1. Michael S. Kang, *The Problem of Irresponsible Party Government*, 119 Colum. L. Rev. Online 1 (2019), <https://columbialawreview.org/content/the-problem-of-irresponsible-party-government> [<https://perma.cc/NRX8-5UHA>] [hereinafter Kang, *The Problem of Irresponsible Party Government*].

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

3. Kang, *The Problem of Irresponsible Party Government*, supra note 1, at 10–14.

4. *Id.* at 10.

wrote: “By comparison [to responsible party government], the associational-party path is theoretically optimal as a guide to structuring First Amendment doctrine and as a measure for regulatory reforms—even as it does not guarantee a cure to all our democratic ills.”⁵

In his response, Professor Kang has essentially challenged me to explain why the associational path is not only theoretically optimal but also practically possible, and I take up that challenge in the friendly spirit in which it has been offered.

Parts I–III of this Reply make a prima facie case for the possibility of twenty-first-century associational parties. Indeed, the 2018 midterm elections suggest that associational-party building is not only feasible but already underway. In part, this is because recent advances in technology afford party leaders and grassroots activists significant new opportunities to rebuild political parties in an associational vein. Part IV of the Reply explicates the decision to focus on First Amendment law and the judiciary, rather than legislation and Congress, as starting points for reform. Part V clarifies how the doctrinal proposal offered in *Networking the Party* meaningfully differs from proposals that the Supreme Court has rejected in the past.

I. THE POSSIBILITIES FOR ASSOCIATIONAL-PARTY BUILDING

Professor Kang is right: There is no turning back.⁶ There will be no return to the era of old-style machine politics undertaken by party bosses over poker, as in the era of Franklin Delano Roosevelt. No return to mass-membership party organizations run by party bosses that mobilized their voters through the face-to-face appeals of party workers and, for the Democratic Party, union volunteers. Changes in the structure of American society since the 1950s are here to stay. The route to political power no longer runs through veterans’ groups, the Masonic Lodges, or the Klan. Party patronage has been put to rest by both civil service reform and developments in First Amendment law. There also will be no wholesale rejection of direct party primaries or return to the selection of U.S. Senators by state legislatures.

Dramatic economic, social, cultural, and technological changes preclude the possibility of returning to the days of such “bread-and-butter” transactional politics. Among other things, as Professor Kang succinctly explains, the emergence of mass media in the decades after World War II gave rise to the structure of modern campaigns, as “television advertising” displaced “party networks and retail politics as

5. Abu El-Haj, *Networking the Party*, supra note 2, at 1282.

6. Kang, *The Problem of Irresponsible Party Government*, supra note 1, at 12 (“What’s less clear is how and whether one can return to the days of yore that she implicitly extols.”).

the principal means by which candidates could reach voters.”⁷ The price tag of television politics, however, drove candidates toward private donors. Combined with the demise of patronage and decline in union membership, it produced hollowed-out political parties and a world in which the measure of a candidate’s political viability is the cash value of her Rolodex.⁸

But the target of associational-party reform is not a return to the smoke-filled backrooms of sex-segregated and racially exclusionary clubs in which white male party bosses made deals—often at the expense of minorities—as they dispensed patronage. The associational party that *Networking the Party* envisioned aspires to a political organization that marries the best of both the past and the present: the inclusiveness and internal democracy of contemporary parties with the interpersonally rich but also socioeconomically integrated social networks that brought everyday Americans more responsiveness in years past. It seeks, in other words, to strengthen and reshape the associational life of political networks given “the world in which we live.”⁹

Its possibility lies in the fact that we no longer live in the television era. Today, many people, especially young people, rely on social media to get news.¹⁰ While television has not died—just as unionism and patronage are not *exactly* dead—its importance, including in politics, is diminishing.¹¹ Older Americans, who vote at the highest rates, continue

7. *Id.* at 11.

8. See, e.g., Adam Bonica, *Why Are There So Many Lawyers in Congress?* 2 (Aug. 28, 2017) (unpublished manuscript), <https://ssrn.com/abstract=2898140> (on file with the *Columbia Law Review*) (explaining that candidates for congressional office who are lawyers have a fundraising advantage over nonlawyer candidates in part due to money raised from other lawyers); Lee Drutman, *There Are Too Many Lawyers in Politics. Here’s What to Do About It.*, *Vox* (June 30, 2016), <https://www.vox.com/polyarchy/2016/6/30/12068490/too-many-lawyers-politics> [<https://perma.cc/AR72-YHT8>] (noting that a political candidate who has attended an “elite law school” has access to “an impressive fundraising network, since graduates of elite law schools tend to be very rich”).

9. Abu El-Haj, *Networking the Party*, *supra* note 2, at 1302.

10. See, e.g., Katerina Eva Matsa, *Fewer Americans Rely on TV News; What Type They Watch Varies by Who They Are*, *Pew Research Ctr.* (Jan. 5, 2018), <https://www.pewresearch.org/fact-tank/2018/01/05/fewer-americans-rely-on-tv-news-what-type-they-watch-varies-by-who-they-are/> [<https://perma.cc/KPG8-ABM6>] (reporting that “Americans are relying less on television for their news” but that usage varies by income, education, and age—with “just 8% of those ages 18 to 29 . . . get[ting] news from network TV, compared with 49% of those 65 and older”).

11. Lindsey Erdody, *Political Campaigns Boost Investment in Social Media Ads*, *Indianapolis Bus. J.* (Sept. 21, 2018), <https://www.ijb.com/articles/70545-political-campaigns-boost-investment-in-social-media-ads> [<https://perma.cc/UU2E-77EH>] (reporting that even though “television ads still dominate the budget for [well-funded] candidates,” political consultants increasingly view digital advertising as necessary given the number of Americans who no longer get their entertainment and news from television); see also IAB Internet Advertising Revenue Report, *Interactive Advert. Bureau* (May 10, 2018), <https://www.iab.com/wp-content/uploads/2018/05/FY-2017-IAB-Internet-Advertising->

to get their news from television, but many Americans, particularly those under thirty years of age, are increasingly getting both their entertainment and news online.¹² Indeed, an array of democratic dysfunctions—from polarization to the underreporting of policy details in the haste to make a profit—have been attributed to the end of the era of the 7:00 PM nightly news and to the demise of local newspapers.¹³

The rise of the internet, to be sure, has been Janus-faced with respect to our democracy.¹⁴ Nevertheless, two critical differences between the era of television, which Professor Kang describes, and the advanced digital era in which we live have significant potential implications for the shape of the political parties of our future. First, unlike the former, the latter is driven by social networks. The bulk of profits for the internet giants of our era results from the vast and detailed information they collect about users, including users' social networks.¹⁵ Indeed, users experience their social media as free because users provide their information, including information about their friends and acquaintances, in exchange for access to Google's search engine and Facebook's

Revenue-IAB-Webinar-Presentation-05-10-2018.pdf [<https://perma.cc/LMK6-GEJF>] (showing that, in 2017, the share of total ad revenue earned from television ads has decreased by three percent, relative to the year before); Megan Jenetsky, *Low Transparency, Low Regulation Online Political Ads Skyrocket*, OpenSecrets.org (Mar. 7, 2018), <https://www.opensecrets.org/news/2018/03/low-transparency-low-regulation-online-political-ads-skyrocket/> [<https://perma.cc/CLD4-P4U6>] (providing estimates of the shift in spending from traditional to digital advertising and criticizing existing federal regulations for leaving digital advertising, despite its boom, entirely unregulated).

12. Pew Research Center's most recent study finds that sixty-one percent of American adults under thirty years of age report streaming services as their primary source of entertainment. In contrast, eighty-four percent of Americans over sixty-five years of age and seventy percent of Americans between ages fifty and sixty-four still get their entertainment primarily through digital antenna. That said, "two-thirds of adults—including 78% of those under 50—get at least some news from social media sites." About 6 in 10 Young Adults in U.S. Primarily Use Online Streaming to Watch TV, Pew Research Ctr. (Sept. 13, 2017), <http://www.pewresearch.org/fact-tank/2017/09/13/about-6-in-10-young-adults-in-u-s-primarily-use-online-streaming-to-watch-tv/> [<https://perma.cc/EW2P-QZT7>].

13. See Jacob Hacker & Paul Pierson, *Winner-Take-All Politics: How Washington Made the Rich Richer—and Turned Its Back on the Middle Class* 156 (2010) (outlining the ways in which the internet has created "a hardy band of news junkies and a much larger pool of entertainment addicts," with the result that "the best-informed citizens are better informed than ever, [even as] more and more citizens are consuming less and less news").

14. See, e.g., Danielle Keats Citron, *Hate Crimes in Cyberspace* 56–62 (2014) (explaining that internet users' anonymity and physical separation from one another appear to encourage antisocial and destructive behavior, even as they also facilitate free expression and mobilization); Cass Sunstein, *#Republic: Divided Democracy in the Age of Social Media* 63–68 (2017) (explaining the ease with which users can limit internet searches for news to likeminded websites and commentary).

15. See Dylan Curran, *Are You Ready? Here Is All the Data Facebook and Google Have on You*, *Guardian* (Mar. 30, 2018), <https://www.theguardian.com/commentisfree/2018/mar/28/all-the-data-facebook-google-has-on-you-privacy> [<https://perma.cc/4NFL-MF2R>] (noting the numerous types and the sheer amount of personal user data that Google and Facebook collect and store).

and Twitter's communication functions. This exchange has proven profitable for social media companies because, despite significant changes in the nature and distribution of social capital, individual users remain socially connected to one another¹⁶ and information about these connections has value, including for politicians. Second, unlike television and print media, which created significant financial barriers to accessing the public square, the internet has significantly reduced the transaction costs associated with organizing.¹⁷ Funding a project, petitioning one's representative, and organizing political campaigns of various kinds have become much easier to orchestrate. By contrast, the communicative

16. The primary changes have been in the form and distribution of social capital. With respect to form, there has been a replacement of weak bridging ties with stronger, more insular ties. To paraphrase Robert Putnam, Americans still bowl. They are just more likely to bowl alone. See Robert D. Putnam, *Bowling Alone: The Collapse and Revival of American Community* 111–13 (2000). See generally *id.* at 15–180 (reviewing trends in civic engagement and social capital to describe how traditional American social structures have disintegrated over time). This in turn has led to changes in distribution that manifest in at least two important ways. First, the atrophy of social capital has not proportionately affected all members of society. Socioeconomic elites, by and large, have suffered the least loss. Studies have shown that disparities in social capital tend to widen as economic inequality increases. See, e.g., Matthew Wright, *Economic Inequality and the Social Capital Gap in the United States Across Time and Space*, 63 *Pol. Stud.* 642, 642, 659 (2014) (finding that, as income inequality in a population increases, the disparity in social capital of high-income youths and low-income youths increases). The only significant social institution to possibly counteract this trend is the church—membership in which offers opportunities for both low-income and high-income persons to accrue social capital. See Sidney Verba, Kay Lehman Schlozman & Henry E. Brady, *Voice and Equality: Civic Voluntarism in American Politics* 281–83, 333 (1995) (“The relative equality with which opportunities for skill development are distributed in churches is a finding of potential significance for the understanding of American politics. . . . [T]he American churches . . . may partially compensate for the weakness of institutions that ordinarily function to mobilize the disadvantaged.”). Second, there has been a sharp retrenchment in socioeconomically integrated social capital. See Joe Soss & Lawrence R. Jacobs, *The Place of Inequality: Non-participation in the American Polity*, 124 *Pol. Sci. Q.* 95, 111–15 (2009) (explaining how the rise of economic segregation in local communities, along with economic segregation in education, occupation, and marriage, compounds patterns of inequality in civic and political participation); Robert J. Sampson, *Opinion*, *Division Street, U.S.A.*, *N.Y. Times: Opinionator* (Oct. 26, 2013), <https://opinionator.blogs.nytimes.com/2013/10/26/division-street-u-s-a/> [<https://perma.cc/HSP2-3B4Z>] (“The stigmatization and widespread social exclusion of poor neighborhoods is corrosive. . . . [C]oncentrated poverty lowered perceived trust and social cohesion among fellow residents, reinforcing a negative feedback loop.”). The continued centrality of face-to-face relationships in politics is most evident with respect to super-donor networks. See generally Lee Drutman, *The Political One Percent of the One Percent*, *Sunlight Found.* (Dec. 13, 2011), <https://sunlightfoundation.com/2011/12/13/the-political-one-percent-of-the-one-percent/> [<https://perma.cc/622X-956R>] (explaining that wealthy donors in a few geographical enclaves of the country have “unique access” to elected officials and candidates and act as “political gatekeepers”).

17. See Seong Jae Min, *As Democracy Goes, So Does Journalism: Evolution of Journalism in Liberal, Deliberative, and Participatory Democracy* 47 (2018) (“The Internet and social media dramatically lowered the cost of political participation by making it easy to access information, identify potential supporters, and allow networking.”).

capabilities of television, which was in fact free for viewers because advertisers paid for the opportunity to reach viewers, were inaccessible for all but the wealthy.

The ascendancy of social media is thus a game changer when it comes to the realism of an associational-party path to reform. The maturation of the era of social media has brought us fake news and foreign propaganda along with a heightened awareness of the risks social media poses to our democracy. But social media has also spawned a rekindling of face-to-face politics. Activists have learned that the political potential of social media is greatest when social media capitalizes on rich, existing relationships and then subsequently scales up by bridging more closely tied groups. Thus, although social media by no means guarantees associational-party rebuilding, its distinctive attributes present opportunities for a future-oriented associational-party network in ways that heretofore have appeared impossible.

Indeed, the 2018 midterm elections indicate that a path toward more responsive political parties—one that runs through social, rather than economic, capital—is already being paved. Whereas citizens and social capital did not replace donors and money in the recent midterm elections,¹⁸ the former were an undeniable force behind the “blue wave.”¹⁹ Across the country, Democratic Party leaders and activists made a concerted (if uncoordinated) effort to expand and activate a broader electorate through the fortuitous emergence of a new cadre of party faithful and their real and virtual ties to neighbors, coworkers, classmates, and friends.²⁰ Super PACs and party leaders blitzed their supporters with cheap digital advertising,²¹ but grassroots political activists took advan-

18. Alexander Burns, Rachel Shorey & Jugal K. Patel, *Small Donors Fuel a Big Democratic Lead in 2018 Fund-Raising*, N.Y. Times (Oct. 16, 2018), <https://www.nytimes.com/interactive/2018/10/16/us/politics/campaign-finance-small-donors.html> [<https://perma.cc/WE2V-X8E3>].

19. Sabrina Siddiqui, *The Democratic Blue Wave Was Real*, Guardian (Nov. 17, 2018), <https://www.theguardian.com/us-news/2018/nov/16/the-democratic-blue-wave-was-real> [<https://perma.cc/Z8R6-GBP3>] (outlining the Democratic Party’s many victories in the 2018 midterm elections).

20. Abu El-Haj, *Networking the Party*, *supra* note 2, at 1268 (defining “party faithful” . . . to include volunteers for campaigns, staff of state and local parties, and activists involved with groups such as Indivisible, the Tea Party, the National Right to Life, or the Sierra Club”).

21. See Erdody, *supra* note 11 (predicting that nearly \$1.8 billion would be spent on digital advertising in the 2018 midterm elections as “candidates running at all levels of government have turned to cheaper and potentially more effective social media ads to reach voters”). These efforts are often not intended to gather constituents’ input, let alone forge associational ties. Instead, campaigns and their party and PAC supporters often view them simply as a more efficient way to disseminate information. See Girish J. Gulati & Christine B. Williams, *Congressional Campaigns’ Motivations for Social Media Adoption*, *in* *Controlling the Message: New Media in American Political Campaigns* 32, 46–47 (Victoria A. Farrar-Myers & Justin S. Vaughn eds., 2015) (noting that, despite the potential for “social media to create different kinds of participatory opportunities” and to facilitate

tage of the cheapness of social media to bring individuals together in person—to canvas or meet for political house parties²² and to protest.²³

Taken together, the founding of civic groups and the rebuilding of state and local parties, along with the individual narratives of an array of candidates (both those who won and those who lost their respective elections), reveal the contours of a new form of retail politics capable of producing responsiveness. They demonstrate that an associational route to party reform is available, even in the absence of party patronage and strong unions.

II. PARTY LEADERS RECOMMIT TO ASSOCIATIONAL-PARTY BUILDING

Associational-party rebuilding is already happening in the Democratic Party, which has committed new resources to innovative party building. Hillary Clinton's 2016 loss was a wake-up call to the costs of insulation from the experiences of middle-class voters.²⁴ For a segment of the party establishment, coming to terms with the electoral costs of the hollowing out of our political parties has occasioned renewed investment in state parties and a commitment to recruiting candidates who are more representative of their constituencies.

Although the strength of these new commitments remains to be seen, the candidacy of Congresswoman Jahana Hayes illustrates both elements of the top-down strategy: recruiting candidates that better reflect the life experiences of the Democratic base and investing in state parties.²⁵ Hayes is extraordinary in many ways—she is the first African American woman to represent Connecticut in Congress and was the recipient of President Obama's Teacher of the Year Award in 2016.²⁶ Still, what is most striking about her election is her ordinariness. As a unionized public-school teacher, she campaigned on the notion that her experiences, including “living in the margins” earlier in life, made her

interactive relationships between campaigns and voters, most political campaigns use social media only for informational purposes and not for two-way engagement with voters).

22. See, e.g., Host Guide, MoveOn, <https://front.moveon.org/host-guides> [<https://perma.cc/8Z78-PURS>] (last visited Feb. 6, 2019).

23. See, e.g., Paul Farhi, How Mainstream Media Missed the March That Social Media Turned into a Phenomenon, *Wash. Post* (Jan. 22, 2017), https://www.washingtonpost.com/lifestyle/style/how-mass-media-missed-the-march-that-social-media-turned-into-a-phenomenon/2017/01/21/2db4742c-e005-11e6-918c-99ede3c8cafa_story.html [<https://perma.cc/M2AK-K5AA>].

24. See Abu El-Haj, *Networking the Party*, *supra* note 2, at 1273–74 (characterizing the Democratic Party as being in a “crisis” due to its “responsiveness to the ideological priorities of its high-socioeconomic-status party faithful, to the neglect of a less engaged, broader constituency”).

25. See Ebong Udoma, Viral Video Vaults Jahana Hayes onto National Stage, *WSHU* (July 18, 2018), <http://www.wshu.org/post/viral-video-vaults-jahana-hayes-national-stage> [<https://perma.cc/R73U-4757>].

26. *Id.*

uniquely well-positioned to represent Connecticut.²⁷ Congresswoman Hayes most certainly will bring a Main Street perspective to a Congress dominated by lawyers, businessmen, and professional politicians. She grew up in a public housing project in Waterbury, became pregnant at seventeen years of age, started higher education in community college, and worked in the Waterbury public schools.²⁸ Further, in terms of socioeconomic status, Hayes will stand out among the members of Congress, about forty percent of whom have a net worth of at least \$1 million.²⁹

Hayes's candidacy, however, did not spontaneously emerge from those grassroots. She was recruited by Senator Chris Murphy, who has publicly committed to help elect candidates that are more representative of the party's base, and she enjoyed the financial support of labor unions long before the viral video that brought her national attention.³⁰ Still, her candidacy inspired a cadre of volunteers and indicates a newfound interest among Democratic officeholders and operators to reconnect with Democratic voters and to rebuild the party faithful. Senator Murphy, for example, has invested in Connecticut's Democratic Party for the past two years, spending specifically on training and recruiting volunteers who have been motivated to get involved in politics for the first time in opposition to President Donald Trump.³¹

Indeed, under the leadership of Chairman Tom Perez, the Democratic National Committee (DNC) is increasingly doubling down on its investment in state parties. In 2017, the DNC raised its monthly grants to state parties by approximately thirty-three percent while facilitating state parties' access to ground-level voter data generated by

27. Daniela Altimari, *From Public Housing to Running for Congress: African-American Women Find Their Voices in Jahana Hayes*, *Hartford Courant* (July 13, 2018), <https://www.courant.com/politics/elections/hc-pol-fresh-voices-jahana-hayes-20180710-story.html> [<https://perma.cc/6GMH-HQTR>].

28. Matthew Ormseth, *Who Is Jahana Hayes, the Former National Teacher of the Year Who Represents Connecticut's 5th Congressional District?*, *Hartford Courant* (Jan. 3, 2019), <https://www.courant.com/news/connecticut/hc-news-connecticut-jahana-hayes-bio-20180815-story.html> [<https://perma.cc/A353-ENJJ>].

29. See, e.g., Jennifer E. Manning, Cong. Research Serv., R44762, *Membership of the 115th Congress: A Profile 2-4* (2018), <https://fas.org/sgp/crs/misc/R44762.pdf> [<https://perma.cc/3KCN-SLBW>]; Paul V. Fontelo & David Hawkings, *Wealth of Congress: Ranking the Net Worth of the 115th, Roll Call*, <https://www.rollcall.com/wealth-of-congress> (on file with the *Columbia Law Review*) (last visited Jan. 31, 2019) (estimating that 207 of the 530 members of Congress have a net worth of at least \$1 million).

30. See Neil Vigdor, *Chris Murphy Exerts Power over the Democratic Ticket*, *Hartford Courant* (May 18, 2018), <https://www.courant.com/politics/hc-pol-chris-murphy-influence-20180517-story.html> [<https://perma.cc/PJ5X-7AAN>].

31. Susan Haigh, *Murphy Shares Campaign Riches with Connecticut Democrats*, *U.S. News* (Oct. 24, 2018), <https://www.usnews.com/news/best-states/connecticut/articles/2018-10-24/murphy-shares-campaign-riches-with-connecticut-democrats> (on file with the *Columbia Law Review*); Vigdor, *supra* note 30.

face-to-face canvassing attempts.³² In addition, it allocated \$10 million to a State Party Innovation Fund, a competitive grant opportunity, to “incentivize[] early organizing through state parties and support[] efforts to engage African-American, Latino, Asian American/Pacific Islander, millennial and rural communities.”³³ Minnesota received a \$100,000 grant to “be used to increase face-to-face outreach in rural communities and small towns” and “to build stronger relationships with activists and key community leaders” in those places.³⁴

Perez’s explicit call to follow former Senator Harry Reid’s lead in Nevada reveals that the goal is not merely to increase monetary investment in state parties; it is to create a state party that is “talking to people” year-round.³⁵ The Nevada Democratic Party’s recent successes derive from its rich associational network: an old-style party boss with a particular eye for good candidates in former Senator Reid³⁶ and a powerful, aggressive, and participatory union, UNITE HERE’s Culinary Workers Union Local 226, which prides itself on cultivating an active, confrontational form of union membership.³⁷

32. Ben Kamisar, DNC Ups Resources to State Parties as Part of Rebuilding Process, Hill (July 10, 2017), <https://thehill.com/homenews/campaign/341329-dnc-ups-resources-to-state-parties-as-part-of-rebuilding-process> [<https://perma.cc/4SDQ-EWAC>].

33. Press Release, Democratic Nat’l Comm., DNC Announces State Party Innovation Fund Recipients (Jan. 24, 2018), <https://democrats.org/press/dnc-announces-state-party-innovation-fund-recipients> [<https://perma.cc/3JNT-YSSW>] (announcing grants to Arizona, Idaho, Maine, Michigan, Minnesota, Nevada, North Carolina, Pennsylvania, Tennessee, Washington, and West Virginia). Subsequently, the DNC announced a \$50,000 grant to Connecticut. Mark Pazniokas, DNC Gives CT Dems Cash to Organize and Unify for 2018, Conn. Mirror (Mar. 7, 2018), <https://ctmirror.org/2018/03/07/dnc-gives-ct-dems-cash-organize-unify-2018/> [<https://perma.cc/GC5L-RA5U>] (implying that the reason for the grant was the increasing concern that Republicans would gain majorities in the state legislature).

34. DNC Announces Minnesota DFL as Grant Recipient, Insight News (May 14, 2018), https://www.insightnews.com/news/dnc-announces-minnesota-dfl-as-grant-recipient/article_332e16cc-578e-11e8-a803-4f552a18c5ba.html [<https://perma.cc/FPF4-YMEQ>]; see also Press Release, Kan. Democratic Party, DNC Announces Kansas as Grant Recipient (May 15, 2018), <https://kansasdems.org/dnc-announces-kansas-as-grant-recipient> [<https://perma.cc/7CJT-L75A>] (noting focus on both digital organizing and leadership training for young Kansans as well as “new volunteer and voter outreach tactics in rural communities”).

35. Leila Fadel, Democrats See Nevada as ‘The Model’ for a Blue Wave, NPR (Oct. 24, 2018), <https://www.npr.org/2018/10/24/660012908/some-democrats-see-nevada-as-the-model> [<https://perma.cc/2496-94LZ>] (internal quotation marks omitted) (quoting DNC Chairman Perez).

36. See Ramona Giwargis, Despite Retirement, Harry Reid Orchestrated Democratic Wins in 2018 Election, L.V. Rev.-J. (Nov. 17, 2018), <https://www.reviewjournal.com/news/politics-and-government/nevada/despite-retirement-harry-reid-orchestrated-democratic-wins-in-2018-election-1529605/> [<https://perma.cc/2EEJ-MXFK>] (describing Senator Reid’s recruitment of successful Senate, congressional, and gubernatorial candidates in Nevada).

37. See Tim Murphy, What the Democratic Party Can Learn from Nevada Casino Workers, Cooks, and Housekeepers, Mother Jones (Nov.–Dec. 2018), <https://www.motherjones.com/politics/2018/10/what-the-democratic-party-can-learn-from-nevada-casino-workers-cooks-and-housekeepers/> [<https://perma.cc/9MJT-2K9Q>] (describing how the Culinary Union

Nevada's Democratic Party network did not appear overnight: It emerged out of an effort to rebuild the state party, starting in the early 2000s. When Reid began building the state party, it "had no permanent staff in nonelection years; now it has double digits."³⁸ Today, local volunteers, party workers, and a year-round campaign of door-to-door canvassing appear to be the key elements to the success in Nevada. One reporter has paraphrased former U.S. Representative Ruben Kihuen's description of Harry Reid's political machine in Nevada as follows:

[The] Reid Machine's secret sauce is simple, but it's not easy: register, educate and mobilize. Reid has built an army of organizers from the Democratic Party, advocacy groups and the powerful Culinary Union to register voters, educate them about the candidates and mobilize them to get to the polls. The army works year-round on this strategy.³⁹

Perhaps most promisingly, for our purposes, Nevada shows how the associational formula for electoral success can come with an important price: Reid was occasionally forced to respond to the interests of his constituents, even in the wake of resistance from the national party.⁴⁰

Many states lack a powerful union network equivalent to that of UNITE HERE in Nevada. As such, it is likely that former U.S. Representative Beto O'Rourke's recent bid to replace Senator Cruz in Texas will provide the more typical model for the associational party of the future. Following the social capital models of Jon Ossoff's (unsuccessful) and U.S. Representative Conor Lamb's and Senator Doug Jones's (successful) special-election bids, Representative O'Rourke focused on building a network of volunteers in coordination with both emerging and established grassroots groups in order to mobilize dormant support.⁴¹

Local 226 "preps thousands of members and their families to become citizens, registers thousands of them as new voters, and trains hundreds to become organizers"); Ned Resnikoff, *Life After "Right-to-Work": How One Union Flourishes in Right-to-Work Nevada*, MSNBC (Dec. 27, 2012), <http://www.msnbc.com/the-ed-show/life-after-right-work-how-one-union-flo> [<https://perma.cc/QVG9-F4GR>]. See generally *Our Union History*, Culinary Workers Union Local 226, <https://www.culinaryunion226.org/union/history> [<https://perma.cc/Q79K-ED75>] (last visited Feb. 6, 2019) (summarizing the history of Culinary Workers Union Local 226).

38. Michelle L. Price & Nicholas Riccardi, *Harry Reid's Political Machine Keeps Humming in Nevada*, Associated Press (Nov. 19, 2018), <https://www.apnews.com/77d6ebe3913149cda87cc67bc1534a4e> [<https://perma.cc/339L-HNNU>].

39. Giwargis, *supra* note 36.

40. See Ella Nilsen, *Harry Reid Is Still a Democratic Kingmaker*, Vox (Oct. 11, 2018), <https://www.vox.com/policy-and-politics/2018/10/11/17864706/harry-reid-jacky-rosen-dean-heller-nevada> [<https://perma.cc/CX8U-6D45>] (noting Senator Reid's "risky political bet" in bringing the DREAM Act up for a Senate vote, against the advice of his campaign advisors and pollsters, and his efforts to secure support for Deferred Action for Childhood Arrivals (DACA) from reluctant members of the Obama Administration).

41. See Justin Miller, *How Beto Built His Texas-Sized Grassroots Machine*, Tex. Observer (Dec. 3, 2018), <https://www.texasobserver.org/how-beto-built-his-texas-sized->

That effort required money. O'Rourke raised more than \$80 million, contributing \$4.6 million to the Texas Democratic Party.⁴² But, as with Harry Reid, the money was harnessed to build a partisan infrastructure capable of competing with the partisan structure of the Republican Party that has dominated state politics.⁴³ The returns were palpable. Approximately 8.3 million voters showed up to the polls—more than twice as many as compared to the 2014 midterm election.⁴⁴ O'Rourke lost, but the turnout produced a significant number of Democratic upsets at all levels of government, including flipping twelve seats in the Texas legislature.⁴⁵

Taken together, these examples from 2018—and there are more—suggest that party leaders, at least in the Democratic Party, are already engaged in associational-party building. To be sure, directing more money to state parties does not necessarily facilitate the development of “social capital by building connections, trust, and cooperation across diverse individuals and groups.”⁴⁶ It all depends on how money is spent.⁴⁷ But as shown above,

grassroots-machine/ [https://perma.cc/G7WD-S8TG] (describing how O'Rourke's campaign techniques included “empower[ing] volunteers to do peer-to-peer texting, auto-dial phone banking and door-knocking all on their own time and with just a few clicks on a smartphone” and encouraging the creation of “hyper-local” pop-up offices to train additional volunteers).

42. Ctr. for Responsive Politics, Rep. Beto O'Rourke - Texas District 16 Expenditures 2017 - 2018, OpenSecrets.org, <https://www.opensecrets.org/members-of-congress/expenditures?cid=N00033540&cycle=2018> [https://perma.cc/Z6EJ-WASG] (last visited Jan. 31, 2019); Patrick Svitek, Beto O'Rourke Raised \$80 Million Total for Ted Cruz Challenge, Left Little in Bank, *Tex. Trib.* (Dec. 7, 2018), <https://www.texastribune.org/2018/12/07/Beto-ORourke-80-million-raised/> [https://perma.cc/8D3K-C52X].

43. See Brett Barrouquere, Turning Red: How Texas Became a GOP Stronghold, *Hous. Chron.* (Sept. 6, 2016), <https://www.chron.com/news/politics/article/Turning-Red-How-Texas-became-a-GOP-stronghold-9205271.php> (on file with the *Columbia Law Review*) (explaining that Texas has not supported a Democratic nominee for president since 1968, has had a Republican governor since 1994, and has a state legislature with a large Republican majority).

44. Tim Murphy, Beto O'Rourke Was Just the Beginning, *Mother Jones* (Jan.–Feb. 2019), <https://www.motherjones.com/politics/2018/11/beto-orourke-was-just-the-beginning-in-texas/> [https://perma.cc/5G9U-DNET].

45. Michelle Goldberg, Opinion, The Resistance Strikes Back, *N.Y. Times* (Nov. 10, 2018), <https://www.nytimes.com/2018/11/10/opinion/sunday/democrats-resistance-women-georgia-trump.html> [https://perma.cc/23SZ-4GV3].

46. Raymond J. La Raja & Jonathan Rauch, Brookings Inst., Ctr. for Effective Pub. Mgmt., *The State of State Parties—and How Strengthening Them Can Improve Our Politics* 5, 7, 20–21 (2016), <https://www.brookings.edu/wp-content/uploads/2016/07/states.pdf> [https://perma.cc/SRJ4-XZVN].

47. See Kenneth T. Andrews et al., *How to Revitalize America's Local Political Parties*, Scholars Strategy Network (Jan. 30, 2019), <https://scholars.org/contribution/how-revitalize-americas-local-political-parties> [https://perma.cc/5KPF-4R8K] (identifying a range of efforts on the part of state parties that would support face-to-face mobilization and local party development, including hiring regional organizers, providing training for local party activists and interns, and helping to create an online presence for publicizing local party activities and volunteer opportunities).

there is good reason to believe recent investments have been spent to build an infrastructure to support the emerging new party faithful.⁴⁸

The recent selection of Senator Catherine Cortez Masto, a Harry Reid protégé, to lead the Democratic Senatorial Campaign Committee suggests a party establishment keen on building a rich and diverse party network of volunteers and civic groups—not just donors—at the state and local levels.⁴⁹ Still, change is slow, and old habits are hard to break.⁵⁰ Despite Chairman Perez’s stated policy of supporting candidates that are more representative of the party’s base, the DNC continues to prioritize the dollar value of a candidate’s personal ties as a measure of viability, even as it is “no longer the *only* criteria,” and “demands . . . that at least 75 percent of the campaign budget be spent on paid advertising.”⁵¹

48. By way of contrast, money spent on mailers may be more efficient insofar as state parties qualify for the nonprofit rate at the U.S. Postal Service, whereas Super PACs do not. See La Raja & Rauch, *supra* note 46, at 15. But mass mailers do not build social capital.

49. Editorial, Cortez Masto’s New Role Shows How Nevadans Are Moving the Needle, L.V. Sun (Dec. 6, 2018), <https://lasvegassun.com/news/2018/dec/06/cortez-mastos-new-role-shows-how-nevadans-are-movi/> [<https://perma.cc/TD8V-NGA5>] (noting Nevada’s success in registering and mobilizing Democratic voters, including young voters and voters of color). In 2017, the Senate Majority PAC, another lead party fundraiser, broke with tradition by spending on voter mobilization during Senator Jones’s special election in recognition of the weakness of Alabama’s Democratic Party. Alexander Burns, To Take the Senate, Democratic Group Will Spend Big in Red States, N.Y. Times (July 26, 2018), <https://www.nytimes.com/2018/07/26/us/politics/democrats-senate-midterms.html> [<https://perma.cc/US8G-ZCZW>]. Still, the \$20 million it spent on mobilization pales in comparison to the \$80 million it spent on television advertising. See *id.* Super PACs, whose legal right to unrestricted donations depends on the independence of their expenditures, generally focus on advertising, leaving turnout to the campaign and the formal party on the view that coordinated voter mobilization is more efficient. See Alicia Parlapiano & Rachel Shorey, Who Financed the Georgia Sixth, the Most Expensive House Election Ever, N.Y. Times (June 20, 2017), <https://www.nytimes.com/interactive/2017/06/20/us/politics/georgia-6th-most-expensive-house-election.html> [<https://perma.cc/KN87-GHJS>] (explaining that the Super PACs generally spend on advertisements against their preferred candidate’s opponent). On the congressional side, the Democratic Congressional Campaign Committee (DCCC) has picked Representative Cheri Bustos of Illinois, who won her district by twenty-four percentage points notwithstanding that the district supported President Trump in 2016. Representative Bustos gained “instant credibility” with her mostly rural constituents, partly due to her marriage to a police officer and the relatability of her sons’ avocations and occupations. George F. Will, Opinion, Republicans Should Be Alarmed by this Sign of Intelligent Life in the Democratic Party, Wash. Post (Jan. 1, 2019), https://www.washingtonpost.com/opinions/republicans-should-be-alarmed-by-this-sign-of-intelligent-life-in-the-democratic-party/2019/01/02/990fa7b6-0d29-11e9-84fc-d58c33d6c8c7_story.html [<https://perma.cc/FBZ3-STSA>] (quoting Representative Bustos).

50. Michael S. Kang, The Brave New World of Party Campaign Finance Law, 101 Cornell L. Rev. 531, 553–54 (2016) [hereinafter Kang, *Brave New World*]; Kang, The Problem of Irresponsible Party Government, *supra* note 1, at 5 (noting that in “the television age” the focus of the party turned to providing the financial and technical support needed to engage in “television politics”).

51. Ryan Grim & Lee Fang, Candidates Who Signed Up to Battle Donald Trump Must Get Past the Democratic Party First, Intercept (Jan. 23, 2018), <https://theintercept.com/>

The importance of this investment in terms of associational-party reform arguably has less to do with future electoral wins than with reshaping the party to produce more responsiveness—for example, by influencing the kinds of candidates who run and the types of campaigns they run.⁵² Democratic Representative Lucy McBath won the 2018 election in Georgia’s Sixth Congressional District—which a Republican has represented since the election of Newt Gingrich in 1979.⁵³ Representative McBath, an African American, former Delta flight attendant, and national spokeswoman for Everytown for Gun Safety—who lost her own teenage son to gun violence—won in large part because of the partisan infrastructure built during Ossoff’s special election campaign.⁵⁴

III. ASSOCIATIONAL-PARTY BUILDING FROM THE GROUND UP

A more ambitious form of associational-party building is happening from the ground up. Ordinary voters, through their activism, are forging a path to party reform that resides in the agency of the new party faithful.

The election of Donald Trump triggered an unexpected and unprecedented level of political engagement.⁵⁵ On the day after his inauguration, a staggering 3.2 million Americans—at least half a million in Washington, D.C., itself—joined in the Women’s March to resist President Trump’s messages of xenophobia, sexism, racism, and science denial, as well as his Administration’s countenancing of corruption.⁵⁶ For many, this level of political activity was a first, but it turned out to be just the beginning.

2018/01/23/dccc-democratic-primaries-congress-progressives/ [https://perma.cc/LHW4-R4HF] (reporting that “across the country, the DCCC, its allied groups, or leaders within the Democratic Party are working hard against some of these new candidates for Congress, publicly backing their more established opponents”). It is worth observing that the Democratic Party’s candidates who had prior political experience, most often in state or local politics, by and large fared better than the upstart candidates. Whether the reason for that phenomenon was the quality of the candidates, the districts in which they ran, or the party’s support itself is unclear.

52. Goldberg, *supra* note 45.

53. *Id.*

54. See *id.*; Tia Mitchell, Being ‘Jordan’s Mom’ Defines Lucy McBath’s Run for Congress, *Atlanta J.-Const.*, <https://www.ajc.com/news/state-regional-govt-politics/being-jordan-mom-defines-lucy-mcbath-run-for-congress/BON5RLMaD0DHMvJ2otvJqK/> [https://perma.cc/5MV9-L8WR] (last updated Nov. 8, 2018).

55. See Mark Blumenthal, Poll Finds Surge of Political Activism on the Left, *Huffington Post* (Mar. 28, 2017), https://www.huffingtonpost.com/entry/poll-finds-surge-of-political-activism-on-the-left_us_58daad61e4b0ae61844c0706 [https://perma.cc/SKY5-GFW8] (reporting on a poll seeking to quantify the flurry of political activities in the early months of the Trump Administration).

56. Erica Chenoweth & Jeremy Pressman, This Is What We Learned by Counting the Women’s Marches, *Wash. Post* (Feb. 7, 2017), <https://www.washingtonpost.com/news/monkey-cage/wp/2017/02/07/this-is-what-we-learned-by-counting-the-womens-marches/> [https://perma.cc/3ANL-4GEN] (noting that the marches took place in 653 locations in the United States).

There were airport protests,⁵⁷ immigration vigils,⁵⁸ environmental and gun control marches, campaigns to defend the Affordable Care Act,⁵⁹ and protests to protect special counsel Robert Mueller's investigation.⁶⁰ Indeed, a 2018 *Washington Post* Kaiser Family Foundation poll found that one in five Americans report having participated in a street protest or political rally since 2017.⁶¹

These grassroots activists, moreover, have channeled their political enthusiasm in ways that are rebuilding the associational life of the Democratic Party—despite (or possibly because of) their frustrations with Washington and the political party system.⁶²

While a surge in the formation of citizens groups for political action is unsurprising in light of the rise in enthusiasm, the sheer magnitude of their proliferation has been remarkable. For example, the number of local chapters of Indivisible, a citizens group founded in response to the 2016 presidential election, exceeded five thousand by 2017.⁶³

Even more unanticipated have been these groups' participatory structures. They are organized through social media, often per a

57. See, e.g., Lauren Gambino, Sabrina Siddiqui, Paul Owen & Edward Helmore, Thousands Protest Against Trump Travel Ban in Cities and Airports Nationwide, *Guardian* (Jan. 29, 2017), <https://www.theguardian.com/us-news/2017/jan/29/protest-trump-travel-ban-muslims-airports> [<https://perma.cc/74S4-2NNK>].

58. See, e.g., Maya Roja, Anti-Trump Protesters Hold Candlelight Vigil by White House, *Hill* (July 19, 2018), <https://thehill.com/homenews/news/397796-anti-trump-protesters-hold-candlelight-vigil-by-white-house> [<https://perma.cc/RA3K-F8Y3>]; Bruce A. Scruton, Immigration Vigil on Newton Green Opposes Separation of Children from Parents, *N.J. Herald* (June 30, 2018), <https://www.njherald.com/20180630/immigration-vigil-on-newton-green-opposes-separation-of-children-from-parents> [<https://perma.cc/E5YZ-BVXX>].

59. See, e.g., Noam N. Levey & Michael A. Memoli, Democrats and Their Allies Won't Let Obamacare Go Down Without a Fight, *L.A. Times* (Jan. 10, 2017), <https://www.latimes.com/politics/la-na-pol-obamacare-defense-campaign-20170110-story.html> (on file with the *Columbia Law Review*).

60. See, e.g., Jen Kirby, "Protect Mueller" Protests Pop Up Across the Country, *Vox* (Nov. 9, 2018), <https://www.vox.com/policy-and-politics/2018/11/9/18078890/protect-mueller-protests-whitaker-attorney-general-trump> [<https://perma.cc/9K3D-C5F2>].

61. Mary Jordan & Scott Clement, Rallying Nation: In Reaction to Trump, Millions of Americans Are Joining Protests and Getting Political, *Wash. Post* (Apr. 6, 2018), <https://www.washingtonpost.com/news/national/wp/2018/04/06/feature/in-reaction-to-trump-millions-of-americans-are-joining-protests-and-getting-political/> [<https://perma.cc/VSA7-LPW9>]. Although the poll was the most extensive study of public protest in more than a decade, it offers only a snapshot from when it was conducted—January and February 2018—and does not account for the nationwide days of protest that have subsequently occurred. See, e.g., Ryan Sit, More than 2 Million in 90 Percent of Voting Districts Joined March for Our Lives Protests, *Newsweek* (Mar. 26, 2018), <https://www.newsweek.com/march-our-lives-how-many-2-million-90-voting-district-860841> [<https://perma.cc/2SPV-R22Q>].

62. Goldberg, *supra* note 45.

63. Kara Voght, The Congressional Progressive Caucus Has an Ambitious Plan to Govern from the Left, *Mother Jones* (Nov. 16, 2018), <https://www.motherjones.com/politics/2018/11/the-congressional-progressive-caucus-has-an-ambitious-plan-to-govern-from-the-left/> [<https://perma.cc/HSK8-GSWR>].

template that former Capitol Hill staffers have written.⁶⁴ However, unlike many online partisan organizations, the new groups are not primarily vehicles for the collection of small donations online, and ordinary citizens are no longer simply targets of requests for money or signatures on largely symbolic online petitions. Instead, these new groups offer their members opportunities to meet one another, negotiate priorities, and allocate responsibilities.⁶⁵

The opposition to the election and presidency of Donald Trump has to a surprising degree brought Americans together in their neighborhoods to take both local and national action. Face-to-face, associational activities—such as “Tuesdays with Toomey,”⁶⁶ coordinated resistance to individual deportations,⁶⁷ and coffee-shop meetings to contemplate future political actions⁶⁸—accompanied the petitions and the calls to congressional offices. Most importantly, these new groups identify the building of political infrastructure as an explicit organizational goal.⁶⁹

The creation of membership-based (if not dues-paying) groups at the local level represents the evolution of Moveon.org’s national model of mobilizing voters through emails, friends, and house parties, and the democratic returns from this thicker, relational form of politics have

64. A few young Democrats, who had served as congressional aides during the early years of the Obama Administration, founded Indivisible by creating an online guide to effective political resistance at the grassroots level based on an analysis of what had driven the success of the Tea Party. See generally Osita Nwanevu, *Indivisible, an Early Anti-Trump Group, Plans for a Democratic Future*, *New Yorker* (Nov. 9, 2018), <https://www.newyorker.com/news/news-desk/indivisible-an-early-anti-trump-group-plans-for-a-democratic-future> [<https://perma.cc/U7BW-HHUD>].

65. See, e.g., *About, Indivisible*, <https://indivisible.org/about> [<https://perma.cc/C9NU-3G9X>] (last visited Feb. 23, 2019) (describing the various forms of participation the Indivisible movement prioritizes, such as “mak[ing] calls,” “show[ing] up,” “speak[ing] with . . . neighbors,” and supporting “civic education and leadership development”).

66. See Thomas Fox Parry, “It’s His Job to Listen,” *Phila. Citizen* (Jan. 3, 2017), <https://thephiladelphiacitizen.org/tuesdays-with-toomey/> [<https://perma.cc/2NZ4-HG97>] (describing the “group of mostly middle-aged women” who, under the name “Tuesdays with Toomey,” “show up each week at Senator [Pat] Toomey’s office to give him a piece of their post-election mind”).

67. See, e.g., *Community Responses to Stop the Deportation Dragnet, Immigrant Def. Project*, <https://www.immigrantdefenseproject.org/community-stop-deportation/> [<https://perma.cc/TL9R-A5HR>] (last visited Feb. 23, 2019) (providing, among other resources for grassroots deportation prevention, materials for building a “case campaign to stop an individual’s deportation”).

68. See, e.g., Brenda Schory, *Residents Organize with ‘Indivisible Guide’ to Counter Trump Policies*, *Kane County Chron.* (Feb. 6, 2017), <https://www.kcchronicle.com/2017/02/05/residents-organize-with-indivisible-guide-to-counter-trump-policies/ajlyn8a/> [<https://perma.cc/LVR8-AT7J>] (describing one such coffee-shop meeting of a local chapter of Indivisible in Illinois).

69. Nwanevu, *supra* note 64 (quoting Ezra Levin, one of the masterminds of Indivisible, as saying “whether you win or not, you’re building up the [party] infrastructure”).

been considerable.⁷⁰ The new party faithful, although not necessarily representative of the electorate as a whole, consists of neighbors, friends, and coworkers, and its constituents have capitalized on those social connections. Such preexisting social ties effectively promote civic and political engagement—for example, the decision to march on the day after the President’s inauguration—and breed still more involvement, in some cases inspiring a run for public office.⁷¹ Katie Muth, an athletic trainer, helped to found a local Indivisible group in the wake of Trump’s election.⁷² In November 2018, an upset victory won her a seat in the Pennsylvania state legislature. Why did she run? The Executive Director of Emerge Pennsylvania encouraged Muth to run when she happened to meet Muth at an organizing meeting, remarking to Muth that the state legislature needed fewer lawyers.⁷³

What might be most promising for the future of associational-party rebuilding is that these groups are rooting themselves in the partisan network.⁷⁴ One measure of their aspiration for political longevity is the decision to register as a 501(c)(4) organization—a choice that permits them to operate in partisan ways, including lobbying, during and between elections.⁷⁵ Interestingly, more established policy demanders

70. This trend is especially noteworthy because researchers in the past have worried that the internet “reinforces the disconnection from local community,” effectively replacing local connections with connections to “like-minded” but geographically distant individuals. Dana R. Fisher & Marije Boekkooi, *Mobilizing Friends and Strangers*, 13 *Info. Comm. & Soc’y* 193, 196 (2010). It would seem that we are seeing an emerging trend of using social media not only to create virtual association at the national level but also to build face-to-face connections at the local level.

71. See Tabatha Abu El-Haj, *Friends, Associates, and Associations: Theoretically and Empirically Grounding the Freedom of Association*, 56 *Ariz. L. Rev.* 53, 83–85 (2014) [hereinafter Abu El-Haj, *Friends, Associates, and Associations*] (explaining that social science studies have found that the most effective way to recruit participants in a social movement is through preexisting social ties).

72. Liz Essley Whyte, *Her Message Resonates in East Coast Cities. Will It Play in Rural Pennsylvania?*, *Slate* (Nov. 2, 2018), <https://slate.com/news-and-politics/2018/11/katie-muth-progressive-pennsylvania-senate-race-democrats.html> [https://perma.cc/3WB2-LDNJ].

73. *Id.*

74. This is not particularly surprising given the political incentives of Democratic Party leaders to cultivate grassroots outrage. As explained above, a group of former Democratic congressional staffers devised the template for Indivisible. See *supra* note 64.

75. See, e.g., David Pozen, *The Tax-Code Shift That’s Changing Liberal Activism*, *Atlantic* (Nov. 27, 2018), <https://www.theatlantic.com/ideas/archive/2018/11/501c3-501c4-activists-and-tax-code/576364/> [https://perma.cc/Q9BQ-2CUD] (“[U]nlike public charities, [501(c)(4)s] may lobby as much as they wish, and they may engage in partisan political work—from asking candidates to sign pledges to registering like-minded voters to endorsing specific pieces of legislation—as long as that work is not their ‘primary’ purpose or activity . . .”). To maintain their tax status, electioneering activity cannot be the 501(c)(4) organization’s “primary” purpose, but it is permitted to engage in unlimited lobbying, grassroots organizing, and nonpartisan voter registration and mobilization. *Id.* A 501(c)(4) organization may keep the names of its donors secret. See generally Jeremy Koulish, *Urban Inst., From Camps to Campaign Funds 1* (2016), <https://www.urban.org/>

within the broader Democratic partisan network have also beefed up their social-welfare arms in ways that shore up the political capacity of these outposts of the partisan network.⁷⁶ Indeed, the NAACP has transformed itself entirely into a 501(c)(4) organization.⁷⁷ These choices are critical to building a party organization capable of demanding policy responsiveness during governance. They offer the ability to sustain individual political energy and engagement beyond particular charismatic candidates as well as alliances between elections. Many, for example, have correctly criticized President Obama for failing to do just that with the momentum from his 2008 campaign.⁷⁸

The new party faithful, moreover, has not limited its party building to the outposts of the partisan network. Recognizing that tangible political results require rebuilding the Democratic Party itself, the new party faithful has not ignored the formal organizations of the state and local Democratic Party.⁷⁹ Consequently, despite the “hollow[ing] out” of parties as political associations, which Professor Kang accurately describes,⁸⁰ “across the country, party meetings that had once been sleepy affairs, dominated by Robert’s Rules of Order and a handful of graying activists, ha[d] become standing room only” as early as February 2017.⁸¹ In Oklahoma, a young registered Independent with little prior involvement

sites/default/files/publication/77226/2000594-From-Camps-to-Campaign-Funds-The-History-Anatomy-and-Activities-of-501(c)(4)-Organizations.pdf [https://perma.cc/7567-MVPJ] (“Much of the recent rise in tax-exempt election spending has been concentrated in a handful of sizable 501(c)(4) organizations that use that status to protect the identity of their donors . . .”).

76. See, e.g., Pozen, *supra* note 75 (“In fiscal year 2017, for example, total assets of the American Civil Liberties Union’s (c)(3) grew 17 percent. Total assets of its (c)(4), on the other hand, grew 89 percent. [In June 2018], the Southern Poverty Law Center spun off a (c)(4), the SPLC Action Fund.”).

77. *Id.*

78. See, e.g., Lara Putnam & Theda Skocpol, *Women Are Rebuilding the Democratic Party from the Ground Up*, *New Republic* (Aug. 21, 2018), <https://newrepublic.com/article/150462/women-rebuilding-democratic-party-ground> [https://perma.cc/KJV9-JWS5] (noting that whereas “a campaign-orchestrated mass movement” fueled Obama’s 2008 victory, “[its] infrastructure was left to rot” and the participation it generated never infiltrated the Democratic Party). For a summary of Obama’s grassroots-organizing approach to campaigning, see Abu El-Haj, *Networking the Party*, *supra* note 2, at 1261–62.

79. See, e.g., Ryan Grim & Amanda Terkel, *The Movement Resisting Donald Trump Has a Name: The (Local) Democratic Party*, *Huffington Post* (Feb. 21, 2017), https://www.huffingtonpost.com/entry/democratic-party-trump_us_58ac7f3ce4b0c4d5105717e0 [https://perma.cc/M4F7-GKY8] (last updated Feb. 22, 2017) (“Interviews with activists in 24 states . . . reveal a strikingly similar pattern: . . . [P]eople of all ages, some of them Democrats, some independents, some Greens, found the time and location of a local party meeting and showed up.”); Putnam & Skocpol, *supra* note 78 (arguing that “[t]he Democratic Party, long in retreat, is being rebuilt from below across a geographic spectrum that would have seemed impossible two years ago” because people of all ages and various party affiliations are showing up to local party meetings).

80. Kang, *The Problem of Irresponsible Party Government*, *supra* note 1, at 5–6.

81. Grim & Terkel, *supra* note 79.

in politics found himself putting “more than thirty thousand miles on his old Honda . . . visiting thirty or so Oklahoma counties,” working to rebuild the Democratic Party of Oklahoma.⁸² A teachers’ strike over the appalling underfunding of public education in the state reinforced his party-building efforts.⁸³ Renewed political energy on the left led nearly a hundred teachers to run for office in Oklahoma.⁸⁴ Although the blue wave did not reach Oklahoma,⁸⁵ these efforts were not without success: Supporters of public education, exceeding expectations, fell short by less than one percentage point of winning a ballot initiative to increase school funding,⁸⁶ and Democrats flipped the state’s Fifth Congressional District.⁸⁷

Oklahoma was not the only state to experience formal party building in an associational vein.⁸⁸ Across the country, citizens and the civic groups they have formed rediscovered their local parties, appreciating the benefits that these existing structures offer to their efforts to rebuild and reshape the Democratic Party.⁸⁹ For these individuals, party membership no longer means a small donation online. It now involves attending meetings, putting miles on one’s car, and running for seats on county and state Democratic tickets.

82. Rivka Galchen, *The Teachers’ Strike and the Democratic Revival in Oklahoma*, *New Yorker* (June 4, 2018), <https://www.newyorker.com/magazine/2018/06/04/the-teachers-strike-and-the-democratic-revival-in-oklahoma> [<https://perma.cc/J9UM-DVGY>].

83. *Id.*

84. McKenna Eubank, *Oklahoma Teachers Rally as November Nears*, *Fox 25 News* (Sept. 22, 2018), <https://okcfox.com/news/local/oklahoma-teachers-rally-as-november-nears> [<https://perma.cc/78BD-SRY8>] (“After last spring’s teacher walkout, ninety-nine teachers ran for office. [A]nd fifty-six are still in the running.”).

85. *Republicans, Democrats Trade Seats in Oklahoma Legislature*, *Associated Press* (Nov. 7, 2018), <https://www.apnews.com/beb35344bec84679b270f987d041a1d7> [<http://perma.cc/3QFP-5Y9H>].

86. *Oklahoma State Question 801, Allow Certain Voter-Approved Property Taxes to Fund School District Operations Amendment (2018)*, *Ballotpedia*, [https://ballotpedia.org/Oklahoma_State_Question_801,_Allow_Certain_Voter-Approved_Property_Taxes_to_Fund_School_District_Operations_Amendment_\(2018\)](https://ballotpedia.org/Oklahoma_State_Question_801,_Allow_Certain_Voter-Approved_Property_Taxes_to_Fund_School_District_Operations_Amendment_(2018)) [<https://perma.cc/D4AA-7VNY>] (last visited Feb. 7, 2019).

87. Sean Murphy, *Democrat Horn Wins Oklahoma US House Seat in Upset*, *Associated Press* (Nov. 6, 2018), <https://www.apnews.com/85a68b1cdaff448c8a7aa73289760a14> [<https://perma.cc/X925-L55V>].

88. See Peter Slevin, *Anti-Trump Protests Gave Way to Local Fervor that Helped Turn Wisconsin Back to Blue*, *Wash. Post* (Nov. 23, 2018), https://www.washingtonpost.com/politics/anti-trump-protests-gave-way-to-local-fervor-that-helped-turn-wisconsin-back-to-blue/2018/11/23/cca2b672-edb7-11e8-baac-2a674e91502b_story.html? [<https://perma.cc/9XQG-SKB3>]. In Wisconsin, grassroots campaigning brought Democratic gains in 2018. *Id.* Republican Governor Scott Walker was defeated, and the Democratic Party made significant gains in certain localities. *Id.*

89. Putnam & Skocpol, *supra* note 78 (summarizing qualitative research based on “in-depth observations and surveys of grassroots organizations in eight pro-Trump counties in North Carolina, Ohio, Wisconsin, and Pennsylvania” while emphasizing that the citizen participants are often moderates, such as gun-owning, church-going Democrats).

Both the investment in state and local parties and the decision to organize as 501(c)(4) social welfare organizations, rather than 501(c)(3) public charities, are particularly promising evidence that an associational path to party reform is already underway.⁹⁰ Moreover, the grassroots efforts at associational-party reform have merged with and reinforced similar party-building efforts on the part of party elites, particularly during election season. For example, local volunteer canvassers for a candidate for state office might use voter apps that the national party created to collect data.⁹¹ As such, the emerging associational parties promote a form of party membership that is not only limited to Election Day but also seeks engagement in between election cycles to shape governance.

For the new party faithful, the quest for policy responsiveness includes, among other things, diversifying the candidate pool. The new, more participatory partisan network has produced a wider range of candidates, as I hypothesized in *Networking the Party*.⁹² The wave of teachers' strikes and protests in Arizona, Colorado, Kentucky, North Carolina, Oklahoma, and West Virginia in 2018 inspired hundreds of teachers to run for state office.⁹³ The American Federation of Teachers reported a three-fold increase in the number of members running for elected office, with over 100 wins.⁹⁴

Demanding elected officials that have backgrounds and life experiences in common with a larger share of their constituencies, Justice Democrats (a PAC funded entirely by small donations) and Indivisible spearheaded the candidacies of Stacey Abrams, Andrew Gillum, Beto O'Rourke, and Alexandria Ocasio-Cortez, among many others.⁹⁵ Despite some significant setbacks for these grassroots candidates

90. The Tax Cuts and Jobs Act of 2017 made it much less advantageous for upper-middle-class filers to itemize their deductions and thereby take advantage of writing off contributions to 501(c)(3) organizations. Pozen, *supra* note 75. As a result, the Tax Cuts and Jobs Act significantly lowered the opportunity cost associated with foregoing the ability for donors to deduct their contributions to the organizations when filing taxes. *Id.*

91. Kamisar, *supra* note 32 (explaining that the Democratic National Committee provided, along with a monthly monetary grant to state parties, a mobile app).

92. Abu El-Haj, *Networking the Party*, *supra* note 2, at 1269–70.

93. Galchen, *supra* note 82.

94. Karen Tumulty, Opinion, This 31-Year-Old Had Had Enough. So She Ran. And Won., *Wash. Post* (Nov. 14, 2018), https://www.washingtonpost.com/opinions/this-31-year-old-had-had-enough-so-she-ran-and-won/2018/11/14/cd6a7046-e6c2-11e8-bbdb-72fdbf9d4fed_story.html [<https://perma.cc/CX9B-9LLA>].

95. Tessa Stuart, Can Justice Democrats Pull Off a Progressive Coup in Congress?, *Rolling Stone* (Nov. 21, 2018), <https://www.rollingstone.com/politics/politics-features/who-are-justice-democrats-758447/> (on file with the *Columbia Law Review*); see also Candidates, Indivisible, <https://indivisible.org/candidates> [<https://perma.cc/Y2AE-ZZP3>] (last visited Feb. 7, 2019).

for statewide and national offices,⁹⁶ the elections of Alexandria Ocasio-Cortez, Ayanna Pressley, and Rashida Tlaib reflect a growing popular demand for “a slate of candidates who look like America” and an electorate that wants “candidates who come from every facet from our society, including working-class people who know what it’s like to struggle.”⁹⁷

Ocasio-Cortez’s primary electoral appeal was the authenticity of her middle-class credentials.⁹⁸ A waitress living in a one-bedroom apartment in the Bronx, where she was born, she did not fit the mold of a typical DCCC candidate when her brother first submitted her application to Justice Democrats.⁹⁹ A graduate of Boston University, she grew up in Westchester, where her family had moved to provide her with better educational opportunities.¹⁰⁰ Her family owned their home but struggled with debt and mortgage payments after her father, who was an architect, passed away while she was in college.¹⁰¹

Similarly, the appeal of Congresswoman Pressley’s candidacy turned on her “regularness” as well as the depth of her experience in local government. Although most reports have emphasized that she is the first black representative to the House of Representatives from Massachusetts, the most striking thing about her candidacy is that, like nearly seventy

96. Only a handful of candidates for Congress endorsed by Indivisible and incumbent Senator Kirsten Gillibrand succeeded in their bids for office. The five gubernatorial candidates they supported did not win. See Ella Nilsen, *Progressive Democrats Running in Competitive House Districts Had a Bad Night on Tuesday*, Vox (Nov. 7, 2018), <https://www.vox.com/2018/11/7/18071700/progressive-democrats-house-midterm-elections-2018> [<https://perma.cc/VR5B-2A6C>]. Their losses are particularly noticeable when compared to the general-election success of candidates endorsed by the DCCC and Emily’s List during the primaries. See Emma Newburger, *Women Donors and PACs Fueled Political Funding for Democratic Women Candidates in 2018—But They Left GOP Women Behind*, CNBC (Dec. 6, 2018), <https://www.cnbc.com/2018/12/06/women-donors-delivered-for-democratic-women-candidates-in-2018.html> [<https://perma.cc/4SB2-VACZ>] (highlighting the electoral success of Democratic candidates whom Emily’s List endorsed in the 2018 midterm elections).

97. See Altimari, *supra* note 27 (internal quotation marks omitted) (quoting Justice Democrats’ Executive Director, Alexandra Rojas).

98. See David Remnick, *Alexandria Ocasio-Cortez’s Historic Win and the Future of the Democratic Party*, New Yorker (July 23, 2018), <https://www.newyorker.com/magazine/2018/07/23/alexandria-ocasio-cortezs-historic-win-and-the-future-of-the-democratic-party> [<https://perma.cc/J53J-44S4>].

99. See *id.* Although less experienced than many others endorsed by Justice Democrats, Ocasio-Cortez did not come to the candidacy with no political experience. She had worked part-time for Senator Ted Kennedy during college and had campaigned for President Obama. *Id.* Presumably, her relative lack of political experience was less of a barrier in a safe Democratic district.

100. *Id.*

101. *Id.*

percent of Americans, she does not hold a bachelor's degree.¹⁰² Only a tiny minority of the 116th Congress shares this trait with their constituents.¹⁰³

By focusing on candidates with backgrounds and life experiences similar to those of a larger portion of their constituents, grassroots activists are seeking to improve the feedback loops through which the interests of ordinary Americans can be filtered up to legislatures. On Capitol Hill, where most representatives are lawyers, businessmen, and white men, Congresswomen Ocasio-Cortez, Pressley, and Hayes will likely provide a much needed middle-class perspective. Moreover, insofar as these candidates owe their electoral success to local civic groups and the cadre of volunteers with whom they knocked on doors, it is not unreasonable for their voters to expect that they will continue to meet with and listen to actual constituents once in office.¹⁰⁴ Ocasio-Cortez's primary campaign, by her own report, was a success because its staffers and volunteers collectively knocked on 120,000 doors and focused on new voters, both young and old.¹⁰⁵

102. See 7 Things About Ayanna Pressley, *Bos. Globe* (Jan. 31, 2018), <https://www.bostonglobe.com/metro/2018/01/31/things-about-ayanna-pressley/hJo1s12ZPJFJezn6GO7K3J/story.html> (on file with the *Columbia Law Review*); Reid Wilson, Census: More Americans Have College Degrees than Ever Before, *Hill* (Apr. 3, 2017), <https://thehill.com/homenews/state-watch/326995-census-more-americans-have-college-degrees-than-ever-before> [<https://perma.cc/J9ZQ-8Z72>].

103. See Philip Bump, Nearly Everyone in Congress Has a College Degree. Most Americans Don't, *Wash. Post* (Feb. 2, 2017), <https://www.washingtonpost.com/news/politics/wp/2017/02/02/nearly-everyone-in-congress-has-a-college-degree-most-americans-dont/> [<https://perma.cc/K8VL-RJLG>] (reporting that while ninety-five percent of elected officials in Congress are college-educated, the figure hovers around thirty percent for all Americans); Michael T. Nietzel, The College Profile of the 116th Congress's First-Year Class, *Forbes* (Dec. 10, 2018), <https://www.forbes.com/sites/michaelt Nietzel/2018/12/10/the-college-profile-of-the-116th-congresss-first-year-class/> [<https://perma.cc/RX28-76DL>].

104. One example of an elected official maintaining a close connection with her constituents is Senator Lisa Murkowski. See, e.g., Susan Dominus, How Lisa Murkowski Mastered Trump's Washington, *N.Y. Times Mag.* (Apr. 5, 2018), <https://www.nytimes.com/2018/04/05/magazine/how-lisa-murkowski-mastered-trumps-washington.html> [<https://perma.cc/4jNQ-VM26>] (reporting a variety of informal interactions with her constituents, including those in an airplane's coach class); Aris Folley, Constituents Line Up to Give Murkowski Flowers After She Opposes Kavanaugh Vote, *Hill* (Oct. 6, 2018), <https://thehill.com/blogs/blog-briefing-room/news/410235-constituents-line-up-to-give-murkowski-flowers-after-she> [<https://perma.cc/RDV4-7BUL>] ("Constituents lined up to give Sen. Lisa Murkowski (R-Alaska) flowers on Friday after she became the only Republican to vote against advancing the Supreme Court nomination of Brett Kavanaugh after multiple allegations of sexual misconduct were brought against him.").

105. David Cantanese, A Queens Makeover: Inside the New York Congressional District That Shocked the Nation with the Upset of the Year, *U.S. News: Civic Rep.* (July 6, 2018), <https://www.usnews.com/news/the-report/articles/2018-07-06/how-alexandria-ocasio-cortez-remade-the-queens-political-machine> (on file with the *Columbia Law Review*); cf. Abu El-Haj, *Networking the Party*, *supra* note 2, at 1269–70 (hypothesizing that an elected official who cultivated relationships with the leaders of civic groups during the campaign would be more likely to answer their calls, not just calls from big donors, while in office).

Finally, the resurgence of protest in the last decade—from the rise of Occupy and Black Lives Matter to the recent stand-off over the North Dakota Access Pipeline—is also making party inroads, both broadening the electorate and shaping the candidate field. The county in which the Standing Rock Indian Reservation is located experienced a 105% increase in Native American turnout in 2018, relative to the preceding midterm election.¹⁰⁶ In the wake of Black Lives Matter, St. Louis, Philadelphia, Denver, Chicago, Boston, Dallas, and San Antonio have all elected district attorneys who are aware of the second-order costs of incarceration and are committed to implementing criminal justice reforms and addressing police bias. Those newly elected district attorneys include Mark Gonzales of Nuences County, Texas, a former public defender with his own criminal record, who views himself as having more in common with the defendants that come through the office than the prosecutors he supervises.¹⁰⁷ Although the well-known super-donor George Soros has supported a number of these candidates, their election speaks to a path between social movement activism and party responsiveness—a path that was critical to both the New Deal and the passage of civil rights legislation in the late 1960s.¹⁰⁸

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The 2018 midterms certainly did not throw aside the previous fifty years of American politics. The fingerprints of established networks of moneyed donors, including big donors, were all over the election.¹⁰⁹

106. Maggie Astor, Meet the Native American Woman Who Beat the Sponsor of North Dakota's ID Law, *N.Y. Times* (Nov. 13, 2018), <https://www.nytimes.com/2018/11/13/us/politics/north-dakota-ruth-buffalo.html> (on file with the *Columbia Law Review*) (noting also that the turnout in the 2018 midterm election exceeded, by seventeen percent, even the turnout in the 2016 presidential election). Other North Dakota counties with Native American reservations saw similarly staggering rises in Native American turnout. *Id.* Meanwhile, Ruth Buffalo became the first Native American elected to the North Dakota legislature, flipping a Republican seat around Fargo. *Id.* Although her candidacy grew out of involvement in the local Democratic Party over the years, she comes to office with significant personal experiences of the difficulties faced by rural communities with inadequate health facilities. *Id.*

107. Justin Jouvenal, From Defendant to Top Prosecutor, This Tattooed Texas DA Represents a New Wave in Criminal Justice Reform, *Wash. Post* (Nov. 19, 2018), https://www.washingtonpost.com/local/public-safety/from-defendant-to-top-prosecutor-this-tattooed-texas-da-represents-a-new-wave-in-criminal-justice-reform/2018/11/19/e1dca7cc-d300-11e8-83d6-291fcedad2ab1_story.html [<https://perma.cc/4P5C-HA44>].

108. See, e.g., Doug McAdam, Political Process and the Development of Black Insurgency 1930–1970, at 147 (1982) (explaining that the long-term success of insurgent groups within broader social movements depends on their ability “to parlay their initial successes into the increased resource support needed to place the movement on a more permanent footing”).

109. See, e.g., Ctr. for Responsive Politics, 2018 Top Donors to Outside Spending Groups, *OpenSecrets.org*, <https://www.opensecrets.org/outsidespending/summ.php?disp=D> [<https://perma.cc/Z8MT-PF7K>] (last visited Feb. 7, 2019) (listing the disclosed donors, both individuals and groups, that made the largest contributions in the 2018 midterms).

Most candidates were recruited the old-fashioned way after an assessment of the net worth of their social networks, and spending by Super PACs and dark-money organizations reached new highs.

Still, the midterms suggest that the shape and form of party infrastructure may be changing once again.¹¹⁰ This emergent change speaks to the possibilities for an associational path to party reform—one that emphasizes strengthening citizen ties, as opposed to unleashing donors, as the future of responsive political parties. Political developments in the Democratic Party, since 2016, hint at the form of a forward-looking associational party:

- A new party faithful consisting of a web of activists and local civic groups with significantly more-substantial ties to a broader electorate, operating as the equivalent of the associational party of the mid-twentieth century by educating, politicizing, and mobilizing voters, by monitoring politics and maintaining political mobilization between elections, and by cultivating a more representative pool of candidates grounded to their local constituents;
- Peer-to-peer voter registration and turnout efforts undertaken by local volunteers and civic groups, armed with data analytics from the state and national party;
- A more representative set of elected officials, who recognize that they owe their victories just as much to the sweat hours of the new party faithful as to the money that the officials amassed from donors; and
- Increased social and financial investment in state and local parties, as well as increased reliance on the 501(c)(4) form by civic groups and policy demanders to permit lobbying and ongoing partisan work between elections.

The new associational party would constitute a marriage between the pragmatic and the romantic—an association that is both “dominated by self-interested political elites” and full of ordinary citizens who participate “as agents,” not simply consumers.¹¹¹ The new associational party’s agenda, as well as the candidates that it would field, would emerge out of negotiations between those elements. Established elites would have the upper hand, but the new party faithful would exercise leverage as the point of access to the new electorate.

110. See Kang, *Brave New World*, *supra* note 50, at 553 (noting that “[t]he shape and form of the party infrastructure has changed many times as they adapted to modern circumstance” even as the essential coordinating function of the party infrastructure remains the same).

111. Kang, *The Problem of Irresponsible Party Government*, *supra* note 1, at 7 (internal quotation marks omitted) (quoting Abu El-Haj, *Networking the Party*, *supra* note 2, at 1233).

Many questions, of course, remain to be answered. For one, it is still uncertain how much the recent association building has actually promoted socioeconomic and intergenerational breadth. By emphasizing a peer-to-peer organizing model that marries the power of the internet to the power of the personal and face-to-face engagement, both the activists and the party leaders invested in the kind of social capital that enhances the party's capacity to mobilize broader and more representative political participation.¹¹² And, indeed, turnout in the 2018 midterm elections reached 50.3%—the highest for a midterm election since 1914.¹¹³ We cannot yet say whether the bumps in turnout in states like Connecticut, Georgia, Nevada, North Dakota, and Texas are attributable to recent party building (as opposed to, for example, competitiveness). Still, the numbers are striking: In 2018, voter turnout reached 46.3% in Texas, 58.6% in North Dakota, 54.4% in Connecticut, 55% in Georgia, and 47.5% in Nevada.¹¹⁴ By way of comparison, the average turnout achieved in each state over the four previous midterms was 31.6% in Texas, 46.7% in North Dakota, 45.3% in Connecticut, 37.4% in Georgia, and 36.2% in Nevada.¹¹⁵ In Minnesota, a state with a history of high voter turnout, turnout of 64.2% was not unprecedented, but it was nearly ten percentage points higher than the last two midterm elections.¹¹⁶ Still, it remains unclear whether the 2018 midterm gains in participation among young and minority voters will be sustainable in the long term.¹¹⁷ And we do not yet know how the 2018 midterm election changed long-established patterns of low voter turnout among lower-income and less

112. Abu El-Haj, *Networking the Party*, *supra* note 2, at 1257–59 (reviewing the empirical evidence supporting this dynamic).

113. 2018 November General Election Turnout Rates, U.S. Elections Project, <http://www.electproject.org/2018g> [<https://perma.cc/NC7X-BSGC>] (last updated Dec. 14, 2018); National General Election VEP Turnout Rates, 1789-Present, U.S. Elections Project, <http://www.electproject.org/national-1789-present> [<https://perma.cc/SF56-M2B2>] (last visited Feb. 1, 2019).

114. 2018 November General Election Turnout Rates, *supra* note 113. Early estimates of turnout among young voters was thirty-one percent, which was ten percentage points higher than in previous midterm elections. See John W. Schoen, *This Chart Shows How Every State Turned Out to Vote in the Record-Setting 2018 Midterm Election*, CNBC (Nov. 9, 2018), <https://www.cnn.com/2018/11/09/heres-how-your-state-turned-out-to-vote-in-the-midterm-election.html> [<https://perma.cc/L66M-Y775>].

115. Schoen, *supra* note 114.

116. The last time Minnesota had comparable turnout in a midterm was 2002, when 64.9% of the electorate turned out. In 2014, voter turnout was 50.5%. In 2010, it was 55.8%, and in 2006, it was 60.5%. See *Historical Voter Turnout Statistics*, Office of the Minn. Sec'y of State Steve Simon, <https://www.sos.state.mn.us/election-administration-campaigns/data-maps/historical-voter-turnout-statistics/> [<https://perma.cc/4ZFC-GD2F>] (last visited Feb. 7, 2019).

117. See, e.g., *Elections in America: Concerns over Security, Divisions over Expanding Access to Voting*, Pew Research Ctr. (Oct. 29, 2018), <http://www.people-press.org/2018/10/29/impressions-of-voting-in-elections/#most-say-voting-will-be-easy-for-them-personally> [<https://perma.cc/3J5Q-QFPB>] (detailing the reasons that young and minority voters cite for declining to vote, such as difficulty and inconvenience).

educated voters. What is encouraging is that the engagement of young voters leading up to the 2018 election was unusually high, as was youth turnout on election day.¹¹⁸

Partisan activism at the grassroots level appears, however, to have (1) reinforced social ties among constituents, (2) activated voters who do not normally turn out to vote, (3) in some cases, launched candidates with more conventional backgrounds, and (4) potentially indebted elected officials to the volunteers and organizations that propelled them into office.

Despite such achievements, it is too early to tell whether responsiveness will follow. The trajectory of criminal justice reform, however, suggests reasons for cautious optimism on that front as well. Although it is true that conservatives have, in recent years, come around to the (fiscal) costs of our harsh criminal justice policies, it seems unlikely that a Republican-led Senate would have voted across party lines on substantial criminal justice reform in 2018, had it not been for Black Lives Matter and its political evolution.

In sum, focusing on the rough-and-tumble of the recent elections enables us to see that the associational-party path is not only feasible but already underway. Recent developments in the Democratic Party speak to the possibilities of enhancing democratic responsiveness and accountability by rebuilding more representative partisan networks through peer-to-peer strategies. In the right political winds, the technological advancements of recent decades will provide sails to such associational-party building.

IV. INSTITUTIONAL INCOMPETENCE ALL AROUND

Professor Kang's second major concern pertains to the decision to focus on First Amendment doctrine as a vehicle for furthering an associational path to party reform. Courts, he says, are simply "the wrong institution to spearhead this type of reform."¹¹⁹ Their record demonstrates that they are not competent to undertake institutional change.¹²⁰ Party reform, Professor Kang argues, must start with the legislature.

118. CIRCLE Poll: Youth Engagement in the 2018 Election, Ctr. for Info. & Research on Civic Learning & Engagement (Oct. 9, 2018), <http://civicyouth.org/circle-poll-youth-engagement-in-the-2018-election/> [https://perma.cc/3CDB-6VCP]; see also Memorandum from John Della Volpe, Dir. of Polling, Harvard Kennedy Sch. Inst. of Politics, Historic Turnout and Performance by Young Voters (Nov. 7, 2018), <https://iop.harvard.edu/about/newsletter-press-release/memo-historic-turnout-and-performance-young-voters> [https://perma.cc/RZ39-WH82].

119. Kang, *The Problem of Irresponsible Party Government*, *supra* note 1, at 17.

120. Professor Kang initially frames the concern as whether it is reasonable to imagine that an institution can solve a problem it did not cause. See *id.* at 10 (suggesting insofar as "much of the changes to the parties over the past fifty years have a broad historical arc that transcends the Court's First Amendment case law," it is not clear how easy they will be "to change through a new judicial approach"). I think there is good reason, however, to believe that the law can incentivize restructuring of civil and political society even when it did not cause the state of that society. And even if the law did not cause the demise of

Networking the Party is not opposed to legislative reforms of the party system. Indeed, it claims that “the associational-party path is theoretically optimal as a guide to structuring First Amendment doctrine *and as a measure for regulatory reforms.*”¹²¹ Its aim was to establish a beachhead from which to start a different conversation about party reform in all forums where it might occur. Still, as Professor Kang suggests, the choice to start with First Amendment doctrine requires justification.

While Professor Kang does provide a valid assessment of the limits of the judiciary’s competence to adjudicate the First Amendment claims of political parties,¹²² we part company in our respective assessments of the institutional competence of legislatures and the likely *real* politics of party reform.

Legislatures suffer from their own incompetence in the field of party reform. The regulation of the political process is marred by institutional incompetence from all directions. The judiciary is ill-informed and reactive, but the legislature’s Achilles’ heel is its self-interest. Elected officials and the political parties with which they are affiliated have little incentive to devise regulatory regimes that will induce political accountability, let alone responsiveness.¹²³ Indeed, by and large, elected officials

associational parties, its choices will influence the future of the political parties. In my view, the recent explosion of Super PACs in the wake of the Supreme Court’s decision in *Citizens United v. FEC* strongly indicates that the Court can influence the shape of the party. However, I will put this debate aside.

121. Abu El-Haj, *Networking the Party*, supra note 2, at 1283 (emphasis added). For a defense of that position and engagement with a host of potential objections, including the fear that associational-party reform might breed even more polarization, see *id.* at 1275–86. One might object that the goal of responsiveness may be incompatible with a republican vision of democracy. Our constitutional order does anticipate some level of responsiveness and accountability, however, even as it does not expect that majorities will get exactly what they want. The current crisis is that the public’s views are routinely ignored, even when they are longstanding and reasonable, and that, even so, voters are only rarely able to expel incumbents from office. See Tabatha Abu El-Haj, *Beyond Campaign Finance Reform*, 57 B.C. L. Rev. 1127, 1128–29, 1136–40 (2016) (reviewing evidence that Congress is more responsive to wealthy elites than to the public as a whole).

122. In his previous scholarship, Professor Kang has argued that, in cases challenging state regulation of political parties, judicial doctrine should start from the presumption that these are the culmination of intraparty fights that are best resolved politically. Consequently, according to Professor Kang, courts should “presumptively strike down party regulation that attempts to dictate the internal affairs of political parties, their leadership structure and decisionmaking.” Michael S. Kang, *The Hydraulics and Politics of Party Regulation*, 91 Iowa L. Rev. 131, 175–76 (2005) [hereinafter Kang, *Hydraulics and Politics*].

123. See Tabatha Abu El-Haj, *Wholly Native to the First Amendment: The Positive Liberty of Self-Government*, 164 U. Pa. L. Rev. Online 241, 243–44 (2016), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1176&context=penn_law_review_online [https://perma.cc/G2RB-PMMW] (noting the “realities of the rough and tumble of politics and the powerful incentives to entrenchment,” including on the part of political parties); see also Tabatha Abu El-Haj, *Changing the People: Legal Regulation and American Democracy*, 86 N.Y.U. L. Rev. 1, 6 (2011) (noting that a central premise of the field of law of democracy is the recognition that “[l]egislators . . . are problematic regula-

eschew political responsiveness in favor of aggrandizing power and legislating in the electorate's blind spot.¹²⁴

To be sure, political moments, on occasion, create opportunities for reforms with positive democratic returns. The election of President Trump appears to be just such a moment for the Democratic Party, and party-governance reformers should take advantage of the political opportunity to create legal structures and incentives that support, extend, and sustain these networks. In doing so, they should seek opportunities to advance the associational-party building that *Networking the Party* describes. Such reforms could relate to campaign finance but just as well might involve revising party rules and constitutions.

Still, in the normal case, party reform that originates in the legislature is unlikely to have been devised to encourage democratic accountability and responsiveness. In 2014, Congress tried its hand at party reform. Tucked into an appropriations bill was an amendment significantly increasing the amount that individuals (but not corporations) may contribute to political parties.¹²⁵ In the absence of the federal limits on aggregate contributions, which the Supreme Court struck down that same year, the change permitted, for the 2016 election cycle, a single donor to give as much as \$1.2 million to the state and national committees of a party.¹²⁶ Still, the most striking thing about this reform, for our purposes, is a second proviso—the law now permits an individual donor to contribute \$100,200 per year for three earmarked expenditures: presidential nominating conventions, the construction and renovation of party headquarters, and litigation expenses associated with recounts and other election-related legal proceedings.¹²⁷ While there is a good-governance rationale to support increasing the flow of money to state and national party committees, it is entirely unclear how increasing

tors when it comes to the rules governing elections because they are self-interested and are regularly tempted to use legal rules to entrench themselves”).

124. Kathleen Bawn, Martin Cohen, David Karol & Seth Masket, *A Theory of Political Parties: Groups, Policy Demands and Nominations in American Politics*, 10 *Persp. on Pol.* 571, 572 (2012).

125. Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2130, 2772–73 (2014); R. Sam Garrett, Cong. Research Serv., R43825, *Increased Campaign Contribution Limits in the FY2015 Omnibus Appropriations Law: Frequently Asked Questions 2* (2015), <https://fas.org/sgp/crs/misc/R43825.pdf> [<https://perma.cc/ZL8F-8YH4>] (explaining that the Consolidated and Further Continuing Appropriations Act of 2015 permitted an individual to contribute beyond \$34,000 per year and up to \$129,600 to a national political party).

126. Ian Vandewalker & Daniel I. Weiner, Brennan Ctr. for Justice, *Stronger Parties, Stronger Democracy: Rethinking Reform 8* (2015), https://www.brennancenter.org/sites/default/files/publications/Stronger_Parties_Stronger_Democracy.pdf [<https://perma.cc/VP3G-CAPV>] (“Before *McCutcheon*, an individual donor could give no more than \$74,600 to all party committees in a given election cycle. Afterward, the same donor could give a combined \$1.2 million to all the national and state committees of either party . . .”).

127. 52 U.S.C. § 30116(a)(9) (2012).

the flow of money to conventions, building projects, or litigation has any bearing on increasing accountability under any theory of responsible governance. As such, it is hard to see these separate funds as anything other than a promise of access in exchange for a slush fund for party elites.¹²⁸ And therein lies the judiciary's justification for engaging in judicial review and the importance of First Amendment doctrine.

Professor Kang, like all scholars of democracy, fully recognizes the compromised incentives of legislators when it comes to regulating the political process. His view, however, has been that the judicial role should be limited to other "areas of election law that influence the political process . . . including voting rights, all campaign finance reform nonspecific to parties, and general election administration."¹²⁹ Judicial incompetence with respect to party reform, he argues, dictates a doctrine that presumes all regulations that "directly dictat[e] the internal affairs of parties," including campaign finance regulations, are unconstitutional—thereby ensuring the political fluidity of intraparty fights.¹³⁰

Whatever the merits of his nuanced approach, the realpolitik of the moment virtually guarantees that party reform will be undertaken by the judiciary. It would be political suicide for any elected official to vote to unleash more money into politics given the widespread public hostility to money in politics.¹³¹ As such, the most likely path to party reform is through constitutional litigation. As with *Citizens United v. FEC*,¹³² we should expect skillfully orchestrated First Amendment challenges intended to produce party reform in the responsible party government vein—that is, suits seeking significant, if not total, deregulation of party

128. Vandewalker & Weiner, *supra* note 126, at 9 (noting that, "[i]f anything, lifting party contribution limits . . . [could] further sidelin[e] the party faithful" and is likely to "lessen[] the clout of small donors").

129. Kang, *Hydraulics and Politics*, *supra* note 122, at 176.

130. See *id.* A blanket presumption of unconstitutionality, I will admit, makes me nervous. With respect to the latter, Professor Kang also appears to have some hesitations: He has defended the constitutionality of the soft-money ban as narrowly tailored to the interest in preventing quid pro quo corruption. Kang, *Brave New World*, *supra* note 50, at 584–86 (concluding "that party soft money regulations can be constitutionally justified as a means of combating quid pro quo corruption," but noting that "preemptive legislative adjustment of restrictions on soft money might be a smart political concession nonetheless").

131. See Bradley Jones, *Most Americans Want to Limit Campaign Spending, Say Big Donors Have Greater Political Influence*, Pew Research Ctr. (May 8, 2018), <http://www.pewresearch.org/fact-tank/2018/05/08/most-americans-want-to-limit-campaign-spending-say-big-donors-have-greater-political-influence/> [https://perma.cc/YSH5-QSMB] (describing polling results showing that "77% of the public says 'there should be limits on the amount of money individuals and organizations' can spend on political campaigns"). To be sure, it is possible that a measure could be tacked onto an appropriations bill. But in the wake of the 2016 election and the subsequent increase in voter interest and enthusiasm, it seems unlikely that such a measure could remain in the electorate's blind spot.

132. 558 U.S. 310 (2010).

finances.¹³³ To be sure, the Court may demur, as it did when the Republican Party of Louisiana invited it to strike down the soft-money ban in 2017.¹³⁴ But party leaders, acting as if they speak for “the party itself,” will keep asserting their rights, and the cases will keep coming.¹³⁵ Eventually, judicial restraint will flounder, and the Supreme Court will decide.

When it does, the Court should not allocate party rights pursuant to a theory of democratic accountability that is untenable. In a world where courts will ultimately decide, First Amendment jurisprudence should ensure an allocation of rights that encourages democratic accountability and political responsiveness. Put differently, the aim in *Networking the Party* is not “to instruct courts . . . to look for opportunities to strike down even more legislative regulation of politics in the name of political participation.”¹³⁶ Instead, it is an effort to guide the courts’ discretion away from doctrine grounded in responsible party government insofar as the latter has been an unmitigated failure.

Let me restate this defense of the choice to start with First Amendment doctrine slightly differently. The Supreme Court has repeatedly refused to adopt doctrinal solutions aimed at ending one-party lockups or fostering two-party competition (an approach that might or might not redeem responsible party government).¹³⁷ Instead, it has

133. See, e.g., *Republican Party of La. v. FEC*, 219 F. Supp. 3d 86, 90–91 (D.D.C. 2016), summarily aff’d, 137 S. Ct. 2178 (2017) (mem.) (challenging the ban on political parties using soft money for federal election spending as a violation of the First Amendment).

134. *Republican Party of La.*, 137 S. Ct. at 2178. The Supreme Court has issued a series of certiorari denials in similar efforts to enhance the associational rights of party leaders. See, e.g., *Democratic Party of Haw. v. Nago*, 833 F.3d 1119, 1124 (9th Cir. 2016), cert. denied, 137 S. Ct. 2114 (2017) (mem.) (challenging the constitutionality of state-mandated open primaries).

135. See, e.g., *Utah Republican Party v. Cox*, 892 F.3d 1066, 1072 (10th Cir. 2018), cert. denied, No. 18-450, 2019 WL 1005847 (U.S. Mar. 4, 2019) (mem.) (challenging Utah’s requirement that political parties “allow candidates to qualify for the primary ballot through either the [party’s] nominating convention or by gathering signatures”); *Lair v. Motl*, 873 F.3d 1170 (9th Cir. 2017), cert. denied, 139 S. Ct. 916 (2019) (mem.) (challenging, inter alia, the constitutionality of the limits Montana placed on a political party’s ability to contribute to the campaigns of its candidates).

136. Kang, *The Problem of Irresponsible Party Government*, supra note 1, at 16.

137. See, e.g., *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 208 (2008) (“The First Amendment creates an open marketplace where ideas, most especially political ideas, may compete without government interference. It does not call on the federal courts to manage the market by preventing too many buyers from settling upon a single product.” (citation omitted)). For the seminal work in this regard, see Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 *Stan. L. Rev.* 643, 644 (1998). The classic case is *Burdick v. Takushi*, which involved a First Amendment challenge to Hawaii’s ban on write-in votes. 504 U.S. 428, 430 (1992). The Court’s majority could barely contain their ridicule of the petitioner’s claims. See *id.* at 434 (noting “it can hardly be said that the laws at issue . . . unconstitutionally limit access to the ballot by party or independent candidates or unreasonably interfere with the right of voters to associate and have candidates of their choice placed on the ballot”). But

structured its doctrine around a different aspect of responsible party government theory (one that is more compatible with the individual rights framework of the First Amendment): shoring up the party leader's ability to crystalize the party's brand.¹³⁸ As such, the Supreme Court routinely sides with the party leadership as the guardians of the party.¹³⁹ Because the Court takes this approach, the doctrine suffers from all of the limits that Professor Kang identifies regarding the judiciary's institutional competence, as well as from the misconception that empowering party leaders to control ideologically distinct brands will produce responsible party government. Only the former limitation would apply to a doctrine grounded in an associational path to party reform. While Professor Kang is right to alert us to the ways in which courts fall short as party reformers, we should not underestimate the importance of preventing them from "avoiding additional harms," given the pressures they face to undertake reform anyway.¹⁴⁰

V. FINAL DOCTRINAL CLARIFICATIONS

This, then, leads to Professor Kang's final set of objections: whether the doctrinal alternative offered in *Networking the Party* is significantly different from the rejected views of Justice Stevens.¹⁴¹ And what exactly does that doctrinal alternative entail for the constitutionality of the federal soft-money ban?

Professor Kang doubts whether what I have offered is materially different from the rejected views of Justice Stevens.¹⁴² Just as the Supreme Court has been singularly unreceptive to structuring First Amendment doctrine in ways that increase two-party competition, so it has shown hostility to the suggestion that there is a constitutional interest in fostering political participation, he argues.¹⁴³ As such, "courts are quite unlikely to adopt the associational-party perspective."¹⁴⁴

academics, along with Justice Kennedy, understood that the ban on write-in votes was important given the local political context—that is, one-party Democratic rule in Hawaii. See *id.* at 444 (Kennedy, J., dissenting).

138. See Abu El-Haj, *Networking the Party*, *supra* note 2, at 1237–38.

139. See *id.* at 1240–41 (summarizing the Supreme Court's consistent support for the party leadership's control of the brand against challenges from party membership).

140. See Kang, *The Problem of Irresponsible Party Government*, *supra* note 1, at 14–15; see also Kang, *Hydraulics and Politics*, *supra* note 122, at 159–73 (documenting the Supreme Court's inability to comprehend the intraparty fights and compromises at work in the cases that come before it).

141. Kang, *The Problem of Irresponsible Party Government*, *supra* note 1, at 14–15 (“[T]he Court has rejected Justice Stevens’s dissenting view, which mirrors much of Professor Abu El-Haj’s approach . . .”).

142. *Id.* at 14.

143. *Id.* at 14–15.

144. *Id.* at 14.

Predicting what will and will not pique the Court's doctrinal fancy is even more foolish than usual given the retirement of Justice Kennedy and the as-yet-unknown repercussions of the open partisanship at Justice Kavanaugh's confirmation hearings. But there is a subtle, yet important, difference between the dissenting view of Justice Stevens and the proposal set forth in *Networking the Party* that should be clarified.

Justice Stevens's position in *California Democratic Party v. Jones*, the case on which Professor Kang relies most heavily, was that any analysis of the constitutionality of a blanket or open primary should recognize, "as [a] 'substantial, indeed compelling[']" state interest,¹⁴⁵ the state's desire "to expand the ability of individuals to participate in the democratic process."¹⁴⁶ The weight of the state interest derived, in Justice Stevens's view, from the fact that it aligns with the interests of the First Amendment itself.¹⁴⁷

The Supreme Court has, indeed, rejected Justice Stevens's invitation to accept as compelling a state's interest in encouraging political participation,¹⁴⁸ but my proposed doctrinal approach does not ask the Court to revisit that position. The recalibration of the *Anderson–Burdick* analysis called for in *Networking the Party* does not seek to justify placing burdens on the speech and associational rights of political parties in the name of the compellingness of a state interest in "[i]ncreasing the representativeness of elected officials, giving voters greater choice, and increasing voter turnout and participation."¹⁴⁹

Instead, the recalibration of the *Anderson–Burdick* analysis focuses on the burdens analysis: What constitutes a substantial burden on a

145. 530 U.S. 567, 600 (2000) (Stevens, J., dissenting) (quoting *Cal. Democratic Party v. Jones*, 169 F.3d 646, 662 (9th Cir. 1999)).

146. *Id.* at 595–96. As to Justice Stevens's dissent in *Timmons v. Twin Cities Area New Party*, it bears emphasis that Justice Stevens's argument that the Court rejects is one soundly grounded in responsible party government theory. See 520 U.S. 351, 371 (1997) (Stevens, J., dissenting) (finding the ban on fusion candidacies burdensome insofar as it undermines the third party's ability to select the "standard bearer who best represents the party's ideologies and preferences" (internal quotation marks omitted) (quoting *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989))). Justice Stevens further explained that the challenged statute undermines the party's choice of a candidate, which is "the most effective way in which that party can communicate to the voters what the party represents." *Id.* at 372. Meanwhile, the dissent that he joined in *Burdick v. Takushi* discusses the associational burdens of the ban on write-in votes because it primarily seeks to vindicate an individual voter's ability to object to a one-party system. See 504 U.S. 428, 444 (1992) (Kennedy, J., dissenting).

147. See *Jones*, 530 U.S. at 595–96 (Stevens, J., dissenting) ("When a State acts not to limit democratic participation but to expand the ability of individuals to participate in the democratic process, it is acting not as a foe of the First Amendment but as a friend and ally.").

148. *Id.* at 584 (majority opinion) (finding that "[t]he interest in increasing voter participation is" hardly compelling and questioning whether it is even legitimate).

149. *Id.* at 600 (Stevens, J., dissenting) (quoting *Cal. Democratic Party v. Jones*, 984 F. Supp. 1288, 1303 (E.D. Cal. 1997)).

party's First Amendment rights?¹⁵⁰ Under current law, which is grounded in the responsible party government perspective, a party demonstrates a severe burden when the clarity or authenticity of the party's message or brand is undermined (unless it is a third party).¹⁵¹ Under my proposed analysis, a party shows a severe burden whenever the party's ability to "increas[e] the representativeness of elected officials, [and] . . . increas[e] voter turnout and participation" through face-to-face and peer-to-peer strategies is undermined.¹⁵²

In a doctrine grounded in an associational-party path to responsiveness, the burdens analysis, under *Anderson-Burdick*, would be "recalibrate[d] . . . to focus on impediments to the party's ability to mobilize broad and representative political participation."¹⁵³ As I wrote:

From an associational-party perspective, not every restriction on a political party's freedom of speech and association "is of constitutional dimension" The primary concern is burdens placed on the party's ability to foster deep and wide social ties to a representative electorate. Burdens on the clarity of a party's message, by comparison, are much less important.¹⁵⁴

Nothing in my proposed revision calls for courts to recognize a compelling state interest in enhancing political participation. State interference in the democratic process—per the well-established First Amendment principle of liberal neutrality—is questionable.¹⁵⁵

With this distinction in mind, I hope we can resolve the question of what the proposed revision of the *Anderson-Burdick* framework mean for the constitutionality of the soft-money ban. Professor Kang suggests that I "cagily stop short of arguing *McConnell* should have struck down the soft money ban."¹⁵⁶ I did not mean to be cagey. My view is clear: Whether the soft-money ban should be struck down depends on what aspect of it is challenged and on what grounds.¹⁵⁷

On my "new scale . . . [for] weigh[ing] the burdens on a party's First Amendment rights," a regulatory burden triggers strict scrutiny where it

150. Abu El-Haj, *Networking the Party*, supra note 2, at 1286 (arguing that the burdens analysis, under *Anderson-Burdick*, would be "recalibrate[d] . . . to focus on impediments to the party's ability to mobilize broad and representative political participation").

151. Interestingly, Justice Stevens's primary objection to this approach was to the qualification that undermining the message or brand of a third party does not constitute a severe burden. See *Timmons*, 520 U.S. at 371–72 (Stevens, J., dissenting).

152. See Abu El-Haj, *Networking the Party*, supra note 2, at 1286, 1295–96.

153. See *id.* at 1286.

154. *Id.* at 1287 (quoting *McConnell v. FEC*, 540 U.S. 93, 171 (2003)).

155. See Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 512 (1996).

156. Kang, *The Problem of Irresponsible Party Government*, supra note 1, at 10.

157. Abu El-Haj, *Networking the Party*, supra note 2, at 1293 (explaining that "the recalibrated *Anderson-Burdick* test points to a middle-ground position, in which some, but not all, aspects of the soft-money ban would be held unconstitutional").

impedes “parties as associations and their capacity to foster deep and wide social ties to a representative electorate.”¹⁵⁸ Thus far, litigants who have questioned the constitutionality of the soft-money ban have placed no emphasis on its potential burdens to their association-building opportunities. In the most recent challenge, brought by the Republican Party of Louisiana, no mention was made of a desire for expanded funds with which to engage in peer-to-peer mobilization efforts in order to expand its electoral base.¹⁵⁹ Instead, the party argued that it needed unregulated contributions to cover costs associated with its website, emails, and mass mailings.¹⁶⁰

In the absence of a cognizable burden, the soft-money ban is constitutional. By contrast, a legal challenge that demonstrates the ways in which the soft-money ban undermines the party’s ability to “build up grassroots infrastructure,”¹⁶¹ to engage in face-to-face voter-identification and registration, or to organize volunteers might be able to show a substantial burden under the associational-party version of *Anderson–Burdick*. For example, were the Minnesota Democratic-Farmer-Labor Party to raise the same kinds of concerns that it raised before the FEC and were those claims substantiated, it would have shown a significant First Amendment burden triggering strict scrutiny under the revised *Anderson–Burdick* analysis.¹⁶² This is because, before the FEC, the Minnesota Democratic-Farmer-Labor Party argued that the definition of “federal election activities” is so expansive that some local parties have begun to refrain from allowing their staff to engage in state or local candidate activities that qualify as federal election activities.¹⁶³

158. *Id.* at 1288.

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

160. Plaintiffs’ Motion for Summary Judgment at 9–28, *Republican Party of La.*, 219 F. Supp. 3d 86 (No. 15-cv-01241), 2016 WL 1242607; see also Verified Complaint for Declaratory & Injunctive Relief at 29–33, *Republican Party of La.*, 219 F. Supp. 3d 86 (No. 15-cv-01241) (on file with the *Columbia Law Review*). In only three paragraphs does the party allege a desire to engage in voter-identification activity—again by mail. *Id.* at 32–33.

161. Kang, *Brave New World*, *supra* note 50, at 587.

162. Cf. Comm. on Campaign Fin. Reform, Ass’n of State Democratic Chairs, *Legislative Recommendations for Campaign Finance Reform 1–2* (2013) [hereinafter *Legislative Recommendations*] (on file with the *Columbia Law Review*) (explaining that the expansive definition of federal election activity under the Bipartisan Campaign Reform Act has effectively required any voter communication that mentions a federal candidate be made using federal funds only, thereby discouraging local candidates from joint communication with federal candidates).

163. Letter from Neil Reiff & Rachel Provencher, Counsel to Ken Martin, Chair, Minn. Democratic-Farmer-Labor Party, to Matthew Peterson, Chairman, FEC 3–4 (June 14, 2016) (on file with the *Columbia Law Review*); see also *Legislative Recommendations*, *supra* note 162, at 2. But see Douglas D. Roscoe & Shannon Jenkins, *Changes in Local Party Structure and Activity, 1980–2008*, in *The State of the Parties: The Changing Role of Contemporary American Parties* 287, 295 (John C. Green, Daniel J. Coffey & David B. Cohen eds., 7th ed.

As I wrote, when applied to political parties, the critical inquiry on the burdens side of the *Anderson–Burdick* analysis would become: “first, whether the regulation decreases a party’s ability to mobilize political participation and facilitate information transmission through peer-to-peer appeals by party activists;”¹⁶⁴ and second, “whether it otherwise undermines the party’s organizational stability and coalition-building capacity.”¹⁶⁵

This points to a second clear distinction from current doctrine. The inclusion of issue ads within the Bipartisan Campaign Reform Act’s regulatory purview does not impose a significant First Amendment burden under the recalibrated *Anderson–Burdick* test because “the path to responsible governance does not lie in the clarity of the [party’s] message.”¹⁶⁶ Responsible party government reformers worry that the clarity of the party’s message is lost when independent expenditure groups, which are permitted to accept unlimited contributions, are given a regulatory advantage when it comes to advertising.¹⁶⁷ With respect to this aspect of the soft-money ban, the *McConnell* Court was exactly right: “The party’s freedom of speech is adequately preserved by its ability to use hard money to speak *independently*.”¹⁶⁸

To make the point at a broader theoretical level: Whereas the Court has rejected Justice Stevens’s invitation to consider a state’s interest in encouraging political participation as a compelling state interest, it has not rejected the overarching view that First Amendment rights ought to be allocated in ways that promote democratic values and good governance or that political participation is central to the production of responsiveness.¹⁶⁹ It just believes that distinct brands in the hands of party leaders, not citizen participation, is the route to responsible and accountable democratic institutions. Justice Stevens never offered the Court a reason to reject its hypothesis. I have.

2014) (finding that, since the Bipartisan Campaign Reform Act of 2002, local parties have significantly increased the amount of time that they spend organizing campaign events, conducting registration drives, and undertaking door-to-door canvassing).

164. Abu El-Haj, *Networking the Party*, *supra* note 2, at 1293 (explaining further that this form of “burden[] [is] worrisome not only because personalized solicitations are particularly effective means for facilitating electoral participation but also because genuine points of contact with the electorate are more likely to ground elected officials in the experiences of their constituents”).

165. *Id.* (explaining further that this form of burden is “worrisome to the degree that the need to rebuild organizational capacity each cycle detracts from the ability to sustain political engagement over the long term”).

166. *Id.* at 1298.

167. See *id.* at 1238 (explaining that, under the responsible party government theory, strengthening the party’s control over its message promotes clarity of its message).

168. *Id.* at 1298.

169. *Id.* at 1299–301 (showing that Justices across the political spectrum embrace the notion that political participation is central to our republican form of government because it brings forth political responsiveness).

Networking the Party is an effort to revisit responsible party government in order “to head off . . . [the] constitutionaliz[ation] [of] a party-reform agenda that appears doomed to fail.”¹⁷⁰ In doing so, it offers the Court several key reasons to reconsider its commitment to responsible party government. Most importantly, it explains how responsible party government has led to irresponsible party governance. Further, it provides empirical bases for believing that regulatory burdens on a party’s message or brand are not per se substantial burdens. This is because relationships and social networks, far more than ideology, drive political participation.¹⁷¹ Ultimately, it explains why judicial party reform should aim for deregulation targeting only burdens on the flow of money “directed toward party mobilization and engagement of ordinary voters.”¹⁷² Permitting unregulated money to flow to the political parties for purposes of grassroots mobilization is sensible in a world where money floods politics. At the very least, such an approach would direct new money toward activities that are likely to create a political counterweight to the political influence of moneyed elites.

CONCLUSION

The claim in *Networking the Party* was never that associational-party reform would be easy, let alone a panacea. The future of American democracy is uncertain. The central claim of *Networking the Party* is that when those opportunities for party reform arise, an associational-party path is significantly more promising than policy prescriptions grounded in responsible party government—especially to the degree it is part of a broader reform agenda aimed at a variety of sources of dysfunction. On this point, Professor Kang and I appear to agree.

170. *Id.* at 1230.

171. Abu El-Haj, *Friends, Associates, and Associations*, *supra* note 71, at 83–85.

172. Kang, *Brave New World*, *supra* note 50, at 588 (arguing that “[p]arty soft money presents a lesser risk of corruption if it can be regulated on sensible terms”).