

Spring 2017

Three Policy Paths after Citizens United: A Critical Review Essay

Michael J. Malbin

Follow this and additional works at: <http://digitalcommons.law.utulsa.edu/tlr>

 Part of the [Law Commons](#)

Recommended Citation

Michael J. Malbin, *Three Policy Paths after Citizens United: A Critical Review Essay*, 52 Tulsa L. Rev. 537 (2017).

Available at: <http://digitalcommons.law.utulsa.edu/tlr/vol52/iss3/19>

This Book Review is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Tulsa Law Review by an authorized editor of TU Law Digital Commons. For more information, please contact daniel-bell@utulsa.edu.

THREE POLICY PATHS AFTER *CITIZENS UNITED*: A CRITICAL REVIEW ESSAY

Michael J. Malbin*

ROBERT E. MUTCH, *BUYING THE VOTE: A HISTORY OF CAMPAIGN FINANCE REFORM* (OXFORD UNIVERSITY PRESS 2014). Pp. 363. HARDCOVER \$36.95. PAPERBACK \$21.95.

RAYMOND J. LA RAJA & BRIAN F. SCHAFFNER, *CAMPAIGN FINANCE AND POLITICAL POLARIZATION: WHEN PURISTS PREVAIL* (UNIVERSITY OF MICHIGAN PRESS 2015), Pp. 192. HARDCOVER \$75.00. PAPERBACK \$39.95.

RICHARD L. HASEN, *PLUTOCRATS UNITED: CAMPAIGN MONEY, THE SUPREME COURT, AND THE DISTORTION OF AMERICAN ELECTIONS* (YALE UNIVERSITY PRESS 2016). Pp. 241. HARDCOVER \$32.50. PAPERBACK \$22.00.

Citizens United v. Federal Election Commission has been an engine for growth in more ways than one.¹ It is better known for the massive jolt this case and its progeny have given to billionaire-funded independent campaign spending. Consider these facts. The 2016 federal elections have been the fourth since the *Citizens United* decision in January 2010. The pre-election year of 2007 thus was the last “Invisible Primary” or presidential-candidate-sifting year before the decision. In 2007, every one of the \$460 million dollars the presidential candidates raised had to come from donors who could give no more than \$2,300 each. According to the Campaign Finance Institute (CFI), about 87,000 donors gave the \$2,300 maximum in 2007, for a total of \$201 million coming from maxed-out donors.² By 2015, these numbers were looking quaint. Individuals, corporations, and unions were now free, because of this decision and its aftermath, to make unlimited contributions to independent spending political committees (Super PACs) and other organizations, including ones whose

* Michael J. Malbin is Professor of Political Science at the University at Albany (SUNY). He is also co-founder and executive director of the Campaign Finance Institute, a nonpartisan research institute in Washington DC.

1. 558 U.S. 310 (2010).

2. *Presidential Candidates' Small and Large Donors, Table 5: Individual Donors to 2008 Presidential Candidates*, Cumulative through December 31, 2007, CAMPAIGN FINANCE INSTITUTE, http://www.cfinst.org/pdf/federal/president/2016/YE/Presidential%20YE_Table5.pdf.

sole purpose was to support a single candidate. As a result, \$2,300 donors no longer looked big. In 2015 alone, seventy-eight of these donors gave one million dollars or more to Super PACs supporting a presidential candidate, giving a combined total of \$184 million.³ In other words, a mere seventy-eight donors in 2015 gave almost as much as the 87,000 “maxed-out” donors had given eight years before.⁴ They accounted for nearly one-fourth of all of the money raised in 2015 by the presidential candidates and their Super PACs combined.⁵

Less well known is the explosion of scholarship after *Citizens United*. In just one recent sixteen-month period, an online bibliography of money in politics added 225 new scholarly publications, papers, or books.⁶ As one of my professors used to say, I cannot read as fast as they write. This essay will focus on three of the many new books in the field. Robert E. Mutch’s *Buying the Vote* is a marvelously rich history with bleak policy conclusions.⁷ It argues that the breakdown of an older consensus on campaign finance reform leaves little opportunity for corrective action today. Raymond La Raja and Brian Schaffner see the major problem as stemming from the premises that undergirded the earlier consensus.⁸ Rather than combatting corruption or pursuing individualistic equality, they would see healthier politics arising from stronger political parties with laws that let the parties raise and make unlimited contributions. Finally, Richard Hasen would combat political inequality by moving in the opposition direction—with aggregate limits on the amount that any individual could give to political campaigns, combined with small donor public financing in the form of government-funded vouchers given to every adult U.S. citizen.⁹ Collectively, these books thus can stand as thoughtful exemplars for the strengths and some problems with three of the major policy directions moving forward.

I. MUTCH’S UNBRIDGEABLE GAP

Robert Mutch’s narrative in *Buying the Vote* begins in 1884 with an opulent fundraising dinner for the Republican presidential nominee, James G. Blaine.¹⁰ Among those attending were Jacob Astor, Levi Morton, Jay Gould, and others whose names have become synonymous with the Gilded Age. That the book begins with 1884 is

3. *Sources of Candidates’ and Campaign and Super PAC Dollars in 2015*, CAMPAIGN FINANCE INSTITUTE, http://www.cfinst.org/Press/PReleases/16-02-18/Sources_of_Presidential_Candidates'_Campaign_Super_PAC_Dollars_in_2015.aspx.

4. *Id.*

5. *Id.*

6. *Campaign Finance Institute Announces Update to Online Bibliography of Money in Politics Research*, CAMPAIGN FINANCE INSTITUTE, http://www.cfinst.org/Press/PReleases/16-02-26/CFI_Announces_Update_to_Online_Bibliography_of_Money_in_Politics_Research.aspx.

7. ROBERT E. MUTCH, *BUYING THE VOTE: A HISTORY OF CAMPAIGN FINANCE REFORM* (2014).

8. RAYMOND J. LA RAJA & BRIAN F. SCHAFFNER, *CAMPAIGN FINANCE AND POLITICAL POLARIZATION: WHEN PURISTS PREVAIL* (2015).

9. RICHARD L. HASEN, *PLUTOCRATS UNITED: CAMPAIGN MONEY, THE SUPREME COURT, AND THE DISTORTION OF AMERICAN ELECTIONS* (2016).

10. MUTCH, *supra* note 7, at 12.

no accident.¹¹ Since Andrew Jackson's 1828 election had regularized the spoils system, political parties had been financed in large part through kickbacks from those who held patronage jobs. Once the Pendleton Civil Service Reform Act became law in 1883, this source of party money began to dry up. At the same time, however, another was becoming increasingly available. Modern business corporations had become a growing force in the U.S. economy since the Civil War. Blaine's 1884 fundraising dinner was a symbol of the parties reaching out to leaders of the country's largest corporations and trusts.¹² By 1896, money from individual robber barons gave way to systematic assessments of corporations by William McKinley's campaign manager, Mark Hanna.¹³

Two elections later, McKinley's erstwhile Vice-President, Theodore Roosevelt, was running for reelection as President.¹⁴ Although known as a Progressive trust-buster, the contributions his 1904 campaign received from corporations produced what Mutch described as the country's first national-level cycle of scandal and campaign finance reform¹⁵. One legislative outcome was the Tillman Act of 1907, which prohibited corporate campaign contributions to federal elections.¹⁶ "The rise of the big corporation posed an entirely new question for the idea of democracy, and the Tillman Act answered it by saying that corporations are not citizens and do not have the political rights of citizens."¹⁷ Mutch's conclusion, after reviewing the primary source material, is that even though there were disagreements on other matters, conservatives joined Progressives in defining citizenship in a manner that did not include corporations.¹⁸

The middle third of Mutch's book covers the years from the 1907 Tillman Act to 1972.¹⁹ As in the earlier chapters, Mutch skillfully interweaves political economy with contributions and campaign finance reform. One important part of that story was how party realignment affected the Tillman Act's evolution. Mutch reports that the Tillman Act and its successor, the Corrupt Practices Act of 1925, were not well enforced. Big business donors, active throughout the period, were giving to both major parties in 1928, but became increasingly Republican during the Depression.²⁰ Labor was becoming more active and more aligned with the Democrats. Meanwhile, Southern Democrats in Congress in 1937 began aligning with some frequency in a "conservative coalition" with Republicans.²¹ The conservative coalition passed the temporary War Labor Disputes (or Smith-Connally) Act in 1943 over President Roo-

11. *Id.*

12. *Id.*

13. *Id.* at 21.

14. *Id.* at 26-27.

15. MUTCH, *supra* note 7, at 4-5.

16. *Id.* at 50.

17. *Id.*

18. *Id.* at 51.

19. *Id.* at 62-138.

20. MUTCH, *supra* note 7, at 100.

21. *Id.* at 8.

sevelt's veto, which included a ban on labor union as well as corporate contributions.²² During the Republican post-war Congress of 1947-48, the Taft-Harley Act (also passed over a presidential veto) replicated the 1943 ban on corporate and labor *contributions* to candidates and parties and expanded it to reach direct *expenditures* on communications to voters.²³ This expenditure provision, included again in the Federal Election Campaign Act (FECA) of 1971, was found unconstitutional in *Citizens United*.²⁴

Illegal corporate contributions were once again part of the scandal-reform cycle that began with President Richard M. Nixon's 1972 reelection campaign.²⁵ Of course there was also much more, including a break-in and cover-up that led to a presidential resignation before a House impeachment vote.²⁶ The 1974 campaign finance law followed, which was then tested in the landmark case of *Buckley v. Valeo*.²⁷ Among other things, *Buckley* held mandatory limitations on candidates' spending and independent expenditures to be unconstitutional.²⁸ It upheld contribution limits, but only in the name of restraining corruption or the appearance of corruption and not in the name of promoting equality.²⁹

From this time forward, Mutch says, ideological division replaced what he saw as a long time consensus in campaign finance law about corporate citizenship and corruption.³⁰ *Buckley*'s elevation of corruption as the only accepted basis for limits produced decades of argument about what might be counted as corruption. The most expansive judicial interpretation appeared in Justice Marshall's Opinion for a 6-3 Court in *Austin v. Michigan Chamber of Commerce*.³¹ Marshall's opinion upheld the State of Michigan's prohibition of corporate *expenditures* as aiming "at a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form" ³² As Richard Hasen has noted, this is a form of "corruption" that seems tinged with a fair degree of concern about equality.³³

For Mutch, the various opinions in *Austin* revealed an "unbridgeable ideological gulf," that was not only about the goal of equality.³⁴ The division was also, in part, between those who agreed with a "century-old premise that there was a . . . difference in kind between corporations and people . . ." and those who saw only a difference in degree.³⁵ *Citizens United* reversed *Austin*'s majority and minority votes, but along

22. *Id.* at 107.

23. *Id.* at 146.

24. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 385 (2010).

25. MUTCH, *supra* note 7, at 139.

26. *Id.*

27. 423 U.S. 387 (1976).

28. *Id.* at 45, 143.

29. *Id.* at 81, 143.

30. MUTCH, *supra* note 7, at 157.

31. 494 U.S. 652 (1990).

32. *Id.* at 659-60.

33. HASEN, *supra* note 9, at 27.

34. MUTCH, *supra* note 7, at 160, 185.

35. *Id.* at 160.

exactly the same fault line. It also turned Justice Kennedy's *Austin* dissent (narrowly defining corruption) into the *Citizens United* 5-4 Opinion of the Court.³⁶

If the division between these viewpoints is truly unbridgeable, as Mutch believes, then what might one do about it? Some suggest a constitutional amendment; others put forward legislative remedies.³⁷ Mutch demurs, stepping back from the "customary" conclusion that would "follow diagnosis with prescription".³⁸

[T]he diagnosis itself precludes such prescriptions by showing them to be legal solutions to a political problem, actions that would work only if backed by the kind of political consensus that crumbled decades ago . . . A reformed campaign finance system would make for better politics, but we need better politics to get reform . . . We can solve problems by passing laws as long as our political differences occur within a sense of national community, of shared purpose. When our differences grow so wide as to erode that sense of community, our political problems become fundamental to the system itself and are beyond legislative solution.³⁹

This gloomy prognosis parallels much of what recent surveys tell us about campaign finance reform: a bipartisan majority does not like what exists but sees little prospect for meaningful change.⁴⁰ But does Mutch's prognosis follow directly from his own history? He is surely correct that enduring political reform has to be built on some kind of consensus – at least about recognizing a problem. Nevertheless, one must wonder how deep that consensus was in the past. It is true that no one in 1907 would have portrayed corporations as having the same First Amendment rights as natural citizens. As a result, the issue did not come up in that way. Yet it was also true during these same years that disputes over the relationship between corporations and the state were central to the country's political divisions. Even within the nearly unanimous Congress that passed the Tillman Act in 1907, the consensus on the vote did not extend to the reasons.⁴¹ Moreover, the bill passed with a not unfamiliar dose of heavy skepticism. "Everyone knew the ban against corporate contributions would be very difficult to enforce, so hard-headed political realists could see voting for it as a largely symbolic measure that would let them resume the old ways in peace."⁴² The veto override battles during the 1940s over the Smith Connally and Taft Hartley Acts were also expressions of political division, not consensus.⁴³ And again, the new laws co-existed with practices that subverted their purpose. So even though it is correct to

36. *Austin v. Michigan Chamber of Comm.*, 494 U.S. 652 (1990); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

37. MUTCH, *supra* note 7, at 198.

38. *Id.*

39. *Id.*

40. Nicholas Confessore & Megan Thee-Brenan, *Polls Show Americans Favor an Overhaul of Campaign Financing*, N.Y. TIMES, June 2, 2015, <http://www.nytimes.com/2015/06/03/us/politics/poll-shows-americans-favor-overhaul-of-campaign-financing.html>.

41. Tillman Act of 1907, Pub. L. No. 59-36, 34 Stat. 864.

42. MUTCH, *supra* note 7, at 59.

43. Labor-Management Relations Act, ch. 120, 61 Stat. 136 (codified as amended at 29 U.S.C. § 401-531(1947)); Smith Connally Act, Pub. L. No. 78-89, 57 Stat. 163 (1943).

say that no significant part of pre-1970s campaign finance discourse treated corporations as natural persons, this silence was coupled with a lack of enforcement against corporate contributions made secretly. The apparent dissolution of a public legal consensus coincided with having a law (FECA) whose restrictions against secret behavior had teeth and were enforced.⁴⁴

Given these historical facts, therefore, perhaps one need not feel quite so resigned as Mutch does. Of course, he is right to say it is hard to pass major laws in a separation of powers system without some consensus that action is needed. But the consensus need not be about the same action pursued by all actors for the same reason. Because of that, worthwhile change may not be quite as difficult as Mutch suggests. We turn now to two different paths that such changes might take.

II. POLITICAL PARTIES

For Raymond La Raja and Brian Schaffner, the major issue is not a loss of consensus.⁴⁵ There may be enough agreement for some kind of change, but the question is to what end? As these authors see it, the problem is not the lack of common opinions about corruption and equality, but with the ways in which reformers have tried to pursue these goals by regulating money in politics. They argue that “the intense focus of campaign finance policy on preventing corruption” has been a serious blunder based on an “overly romanticized view that democracy is . . . about having a direct and equal voice in public affairs.”⁴⁶ In taking this approach, they fit squarely among such important non-libertarian campaign finance reform skeptics as Bruce Cain, Nathaniel Persily, Richard Pildes, and Jonathan Rauch.⁴⁷

All of these writers emphasize that democracies in a large republic do not work through individualistic citizen engagement. Intermediary organizations are necessary to give individuals an effective voice. But intermediary organizations, or interest groups, are typically concerned with only slices of the policy agenda. To win elections or govern, one needs majority coalitions among factions with different interests. Departing from La Raja and Schaffner for a moment, this is the basic argument for a large republic in James Madison’s *Federalist No. 10*: tyrannies can best be avoided by

44. Federal Election Campaign Act, Pub. L. No. 92-225, 86 Stat. 3 (1972).

45. LA RAJA & SCHAFFNER, *supra* note 8.

46. *Id.* at 3.

47. Bruce Cain, DEMOCRACY MORE OR LESS: AMERICA’S POLITICAL REFORM QUANDARY (2015); Nathaniel Persily, *Stronger Parties as a Solution to Polarization*, in SOLUTIONS TO POLITICAL POLARIZATION IN AMERICA, 123-35 (Nathaniel Persily ed., 2015); Jonathan Rauch, POLITICAL REALISM: HOW HACKS, MACHINES, BIG MONEY, AND BACK-ROOM DEALS CAN STRENGTHEN AMERICAN DEMOCRACY (2015); Richard Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 YALE L.J. 804-852 (2014); For critiques of this self-described “realist” school of thought, see Thomas E. Mann & E.J. Dionne, Jr., *The Futility of Nostalgia and the Romanticism of the New Political Realists: Why praising the 19th-Century Political Machine won’t Solve the 21st Century’s Problems*, BROOKINGS (June 17, 2015), <https://www.brookings.edu/research/the-futility-of-nostalgia-and-the-romanticism-of-the-new-political-realists/>; Lee Drutman, *How to Properly Diagnose the Chaos of American Politics*, VOX: POLYARCHY (June 24, 2016), <http://www.vox.com/polyarchy/2016/6/24/12020198/rauch-politics-chaos>; Lee Drutman, *Giving the Two Parties Even More Money Will Not Solve Polarization*, VOX (Nov. 20, 2015), <http://www.vox.com/polyarchy/2015/11/20/9763292/parties-polarization-small-donors>; Thomas E. Mann & Anthony J. Corrado, *Party Polarization and Campaign Finance*, BROOKINGS (July 15, 2014), <https://www.brookings.edu/research/party-polarization-and-campaign-finance/>.

requiring a multiplicity of factions to bargain to form majorities.⁴⁸ Madison and most of the other Framers anticipated that those majorities would be formed through a process of deliberative compromise, one bill at a time. At the outset, the Framers were opposed to political parties forming coalitions across the policy spectrum. But within a short time, as John Aldrich points out, most politicians of the founding generation came to feel that they needed durable and broad coalitions to achieve their electoral and policy goals.⁴⁹ This was the origin of the first American party system in the 1790s. For Aldrich and many other political scientists, including La Raja and Schaffner, parties have since proven essential to representative self-government.

Because parties are essential, La Raja and Schaffner argue, the laws regulating money in politics should be (but have not been) sensitive to their effects on these key institutions.⁵⁰ It would be better, they say, if the parties could receive and give unlimited contributions.⁵¹ The candidates could then rely on their parties, while the party organizations – in their need to build majority coalitions – could filter and temper the demands of their donors. Because party professionals are more interested in winning than in making ideological statements, they will favor moderate candidates over purists, thus helping the political system as the parties pursue their own ends. The current laws, they say, channel money directly from donors to candidates, encouraging the candidates to depend on patrons who are more extreme than the average citizen and fostering polarization within Congress.⁵² This happens because donors, and the factional candidates they support, often are more wedded to specific issue positions than to winning an election. These problems date back to the FECA and McCain-Feingold, they say, but *Citizens United* has fueled the imbalance by letting donors give unlimited amounts to factional organizations while retaining the limits on parties.⁵³

Some of these claims (as well as opposing counter-claims) will be familiar to those who have been immersed in party debates these past two decades, but these authors try to back their claims with empirical research. Statements about the effects of campaign finance laws often suffer from a single-minded focus on federal elections. The problem is that with only one jurisdiction and one set of laws in effect at any one time, it can be impossible to decide whether a change in law has been wholly or partially responsible for (as opposed to being merely coincident with) a change in the larger political system. One way to get around the problem is to compare states to each other. With fifty jurisdictions to analyze instead of one, comparisons and causal analyses can begin to get serious.

La Raja and Schaffner prepared a dataset of laws governing contributions going *into* the state political party committees, as well as the ones governing contributions

48. THE FEDERALIST, NO. 10 (James Madison).

49. JOHN H. ALDRICH, WHY PARTIES? A SECOND LOOK (2011).

50. LA RAJA & SCHAFFNER, *supra* note 8, *passim*.

51. *Id.* at 137.

52. *Id.* at 135.

53. Federal Election Campaign Act, Pub. L. No. 92-225, 86 Stat. 3 (1972); McCain-Feingold Act, Pub. L. No. 107-155, 116 Stat. 81 (2002); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010); LA RAJA & SCHAFFNER, *supra* note 8, at 144-47.

out from the party committees to candidates.⁵⁴ Their data covered 1990-2010 – the twenty years before *Citizens United*. In the main comparative empirical chapter, the authors described a state as having a “party friendly” system if the law put no limits both on contributions going into and coming out of the parties, but they ran separate tests on states that had limits in either direction or both, and separate tests for states that had professionalized state legislatures as well as for all legislatures.⁵⁵ Their questions were whether states with no limits on party money would be associated with (1) more moderate state legislators and (2) less polarized legislatures.⁵⁶ The units of analysis for both questions in the main section of interest for this review were the ideology scores calculated by political scientists Boris Shor and Nolan McCarty for every state legislator who served during the time period covered.⁵⁷

With respect to the moderation of legislators, their results were mixed.⁵⁸ The authors found Democrats in states with no party limits to be more moderate than those in states with limits, but there was no difference for Republican legislators.⁵⁹ The authors then retested the twenty most professional legislatures and said that this time the difference between states with and without limits held up more strongly.⁶⁰ However, as I interpret the presentation of results, it looks from the graphs as if the Republicans from states with limits continued to be more moderate than the Republicans from unlimited states. What is going on is not that the two parties are each less extreme, but that the distance between the two parties is less in the unlimited states and the result is entirely due to the Democrats. Since the legal difference is associated with moderation for only one party even though the law applies equally to both, it is hard to see how the law can be the engine behind the results.

With respect to polarization, or distance between the parties (which is different from extremism), the results again seem to be inconclusive. The authors find that limits on contributions from individuals to candidates were associated with greater polarization, but political *party* contribution limits had no such effect.⁶¹ Both of these findings were contrary to expectations. However, when the analysis was restricted to the twenty most professional legislatures, the result was directly opposite: individual contribution limits had no effect but party contribution limits did.⁶² These results are paradoxical. Like the previous mixed findings on the moderation of legislators, the facts call for an explanation. Unfortunately, the reader does not get one. Instead the authors use the mixed and somewhat contradictory findings as a foundation for their key policy recommendation: that all party contribution limits should be repealed.⁶³

54. LARAJA & SCHAFFNER, *supra* note 8, at 93.

55. *Citizens United*, 558 U.S. 310 (2010); LARAJA & SCHAFFNER, *supra* note 46, at 79.

56. LARAJA & SCHAFFNER, *supra* note 8, at 87.

57. *Id.* at 99; Boris Shor & Nolan McCarty, *The Ideological Mapping of American Legislatures*, 105 AM. POL. SCI. REV. 530-51 (2011).

58. LARAJA & SCHAFFNER, *supra* note 8, at 103-05.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. LARAJA & SCHAFFNER, *supra* note 8, at 107.

To some extent the problems with the results may turn on methodology and data, although these are not my main concerns.⁶⁴ My main concern is better explained through a thought experiment. Let us assume all of La Raja's and Schaffner's findings are correct. Assume there is some apparent relationship—albeit paradoxical and inconsistent—between political party contribution limits and either extremism or polarization.⁶⁵ The recommendation they draw from these findings is to remove all party contribution limits.⁶⁶ But if the limits do any good at all, would not one want to know something more before throwing them away? Specifically, given the nature of the findings, would not one want to know how to connect the dots between the harmful alleged effects (immoderation and polarization) and imputed cause (contribution limits)? For unlimited contributions to affect who gets elected, parties with unlimited contributions should be using the money to influence who runs under their labels. Of course, we know that strong party leaders can do a great deal to influence who runs for and wins their nominations, but the specific effects of unlimited contributions can only work through the parties' direct raising and spending of money.

As it happens, there is a natural quasi-experiment at the federal level to test the imputed connection. La Raja's and Schaffner's state data run only through 2010.⁶⁷ Since then, the *Citizens United* and *SpeechNow* decisions have let Super PACs raise unlimited contributions.⁶⁸ It turns out that some of the largest Super PACs are all but arms of the congressional party leaders, run by their former staff and political advisors. These quasi-party organizations, like their formal party counterparts, were among the biggest spenders in closely contested general election races, but they have spent practically nothing in contested primaries.⁶⁹ By their behavior, modern party leaders repeatedly have shown that contribution limits are not all that important in deciding whether or how they will get involved in a competitive primary. But if they do not spend their unlimited money in primaries—if they are saving their money for November—then there is no persuasive way to connect the presence or absence of contribution limits to the political coloration of those who wear the parties' labels in

64. Lee Drutman has written thoughtful and detailed critiques on the book's data and methodology, the authors have replied, and the debate has gone on. I recommend both sides to all interested readers. See Lee Drutman, *Giving the Two Parties Even More Money Will Not Solve Polarization*, VOX (Nov. 20, 2015), <http://www.vox.com/polyarchy/2015/11/20/9763292/parties-polarization-small-donors>; Lee Drutman, *The Debate Over State Polarization and Campaign Finance Laws Continues*, BROOKINGS (July 16, 2015), <https://www.brookings.edu/blog/fixgov/2015/07/16/the-debate-over-state-polarization-and-campaign-finance-laws-continues/>; Ray La Raja & Brian Schaffner, *Unlimited Party Fundraising and Spending Gives You Less Polarized Legislatures? Discuss*, WASH. POST: MONKEY CAGE BLOG (July 8, 2015), <https://www.washingtonpost.com/blogs/monkey-cage/wp/2015/07/08/unlimited-party-fundraising-and-spending-gives-you-less-polarized-legislatures-discuss/>; Lee Drutman, *Can Unlimited Contributions to Political Parties Really Reduce Polarization?*, WASH. POST: MONKEY CAGE BLOG (June 23, 2015), <https://www.washingtonpost.com/blogs/monkey-cage/wp/2015/06/23/can-unlimited-contributions-to-political-parties-really-reduce-polarization/>.

65. LA RAJA & SHAFFNER, *supra* note 8, at 4-6.

66. *Id.* at 59.

67. *Id.* at 56.

68. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 312, 314 (2010); *SpeechNow.org v. Fed. Election Comm'n*, 599 F.3d 686, 689 (D.C. Cir. 2010), *cert denied sub nom.* Keating v. Fed. Election Comm'n, 526 U.S. 1003 (2010).

69. See Robert Boatright et. al., *Independent Expenditures in Congressional Primaries after Citizen United: Implications for Interest Groups, Incumbents, and Political Parties*, 5 INT. GROUPS AND ADVOC. 119, 126, 134 (2016).

the general election campaign. The benefits La Raja and Schaffner expect from removing contribution limits have not been established.

On the other side are the potential risks. And yes, these are about corruption or the appearance of corruption. I live in a state in which the Democratic Speaker of the Assembly and the Republican Senate Majority Leader have been convicted recently for abusing the power of their offices. Perhaps more relevant are the depositions filed in the case of *McConnell v. Federal Election Commission*, in which members of Congress testified about party leaders shaping the legislative agenda to avoid offending unlimited soft money campaign contributors.⁷⁰ So there are plenty of examples in the historical and contemporary record to support that there is a risk, combined with insufficient evidence to support the supposed benefit.⁷¹

I want to be clear about this critique. It is not an anti-party screed. I agree with La Raja and Schaffner about the importance of parties.⁷² I also agree with most of the recommendations in a recent Brennan Center report about strengthening the parties.⁷³ Among other things, these include recommendations to bolster the parties through small donor matching funds or tax credits, and to relieve state and local parties of burdensome regulations in federal law.⁷⁴ My complaint is not with parties as such, but with the removal of contribution limits. It may be correct to say that parties help overcome *one* of the defects that come from relying solely on pluralism by making it easier to form durable coalitions that can enforce bargains across multiple bills and over time. Because of that, it is important to make sure that parties can have the resources to operate well in a political world with Super PACs that do not have the same interest in broad coalition-building. Even so, this does not mean one should scrap contribution limits. There are good contemporary as well as historical reasons to avoid taking this path again.

Besides the corruption concern, we ought also to acknowledge a flip side to the issue—something that gets lost by relying solely on pluralism. We can agree with La Raja and Schaffner (and more fundamentally with James Madison) that encouraging multiplicity in a pluralist system helps temper the dangers of factionalism by forcing compromise.⁷⁵ However, this part of the Constitutional design was mostly about helping the system avoid a bad outcome. It does not by itself create the positive goods that the Founders sought from a democratic republic. There are shortfalls within pluralism that pluralism itself cannot remedy. One is that bargaining within a pluralist

70. See 145 CONG. REC. S13229-S13234 (daily ed. Oct. 27, 1999); 147 CONG. REC. S2433-S2455 (daily ed. Mar. 19, 2001); Michael J. Malbin, *McCutcheon Could Lead to No Limits for Political Parties—With What Implications For Parties and Interest Groups?*, 89 N.Y.U. LAW REV. 92, 95-96 (2014); see also Declaration of Senator David Boren at 3, *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003) (No. 02-0582); Declaration of John Glenn at 1-2, *Id.*; Declaration of Senator Jon McCain at 3-4, *Id.*; Declaration of Paul Simon at 3, *Id.*; Declaration of Senator Warren Rudman at 4, *Id.* These declarations are available by using the search engine at http://campaignlegalcenter.org/index.php?option=com_content&view=article&id=89%3Amcconnel-fedecwrd&catid=29&Itemid=2.

71. Malbin, *supra* note 70, at 97.

72. LA RAJA & SCHAFFNER, *supra* note 8, at 33.

73. Ian Vandewalker & Daniel I. Weiner, *Stronger Parties, Stronger Democracy: Rethinking Reform*, NEW IDEAS FOR A NEW DEMOCRACY (Brennan Ctr. For Justice) 2015.

74. *Id.* at 12-13, 16.

75. LA RAJA & SCHAFFNER, *supra* note 8, at 148.

system occurs only among those who have the political power to be heard. To the extent that participation, access to power, and influence over policy can be purchased through wealth, this means an electoral system without limits encourages a form of political inequality—what Schlozman and colleagues have described as the “unheavenly chorus” of unequal political voice.⁷⁶ Relying more heavily on mega-donors to finance the parties can only exacerbate this issue. The question is whether some countervailing power could and should be introduced to bolster the voices of those not being heard. This is the central concern of our next book.

III. PLUTOCRACY V. EQUALITY

Richard Hasen’s *Plutocrats United*, is both an indictment of the out-sized role of wealthy donors in contemporary politics and a proposal for change.⁷⁷ Hasen is concerned about having an electoral system whose dominant financial supporters remind one of the robber barons at the 1884 dinner in Mutch’s book.⁷⁸ It is clear that for Hasen, the problem large donors pose will not be resolved by overturning *Citizens United*.⁷⁹ All that would do is turn the money, now contributed to Super PACs by privately held corporations, into individual contributions from the same corporations’ owners.⁸⁰ Neither will the problem be resolved by transferring mega-donors’ money from Super PACs to the parties. The problem, for Hasen, is the role of the mega-donors *per se*.⁸¹

We know that having *more* money does not always assure a candidate will win an election. Nevertheless, candidates and office holders behave as if they have to raise *enough* money (however much that might be) to be competitive. This results in candidates spending endless hours dialing for dollars and building up debts of gratitude toward those who respond. And while Hasen acknowledges that contributions cannot be shown to sway final roll call votes in Congress, there are thousands of less visible ways in which donors and lobbyists can, and do shape legislative outcomes.⁸² He cites much political science research to support the claim that major donors have a substantial level of access to and influence over the policy decisions of office holders, including party leaders.⁸³

76. KAY SCHLOZMAN ET AL., THE UNHEAVENLY CHORUS: UNEQUAL POLITICAL VOICE AND THE BROKEN PROMISE OF AMERICAN DEMOCRACY 277-78 (2012); citing E.E. SCHATTSCHEIDER, THE SEMISOVEREIGN PEOPLE: A REALIST’S VIEW OF DEMOCRACY IN AMERICA 35 (1960).

77. HASEN, *supra* note 9.

78. *Id.* at 46; MUTCH, *supra* note 7, at 21.

79. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010); HASEN, *supra* note 9, at 11.

80. HASEN, *supra* note 9, at 175.

81. *Id.* at 47.

82. *Id.* at 50-56.

83. See MARTIN GILENS, AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA 41-46 (2012); LYNDY POWELL, THE INFLUENCE OF CAMPAIGN CONTRIBUTIONS IN STATE LEGISLATURES: THE EFFECTS OF INSTITUTIONS AND POLITICS 131-47 (2012); Joshua L. Kalla & David E. Broockman, *Campaign Contributions Facilitate Access to Congressional Offices: A Randomized Field Experiment*, 60 AM. J. OF POL. SCI. 545, 555 (2016); Benjamin I. Page et. al., *Democracy and the Policy Preference of Wealthy Americans*, 11 PERSP. ON POL. 51, 54 (2013); see also John C. Fortier & Michael J. Malbin, *An Agenda for Future Research on Money in Politics in the United States*, 11 FORUM 455, 466 (2013); Lynda Powell, *The Influence of Campaign Contributions on Legislative Policy*, 11 FORUM 339, 343 (2013).

However, the Supreme Court (in *Citizens United* and *McCutcheon v. Federal Election Commission*) refused to accept preferential access or undue influence as constitutionally acceptable reasons for limiting campaign contributions.⁸⁴ For the five-justice majority, only preventing *quid pro quo* corruption (or the appearance of *quid pro quo* corruption) could justify what they saw as a restraint on free speech.⁸⁵ Some scholars have reacted to the Court by arguing for a broader definition of corruption.⁸⁶ In contrast, Hasen urges scholars and future courts to break free of the corruption framework that has dominated campaign finance conversations since *Buckley* in 1976.⁸⁷ He argues, contrary to *Buckley*, that promoting a specific form of equality should also be accepted as a constitutionally permissible basis for campaign finance legislation, including limits on campaign spending and contributions.⁸⁸ Any such pursuit should be done with greater sensitivity to protecting freedom of speech than is often present in campaign finance reform advocacy, but sensitivity does not require inaction.

With that caveat, Hasen argues for laws that would promote an “equality of inputs.”⁸⁹ The phrase is used to distinguish it from an equality of results, or an equality of all forms of political influence. To promote an equality of inputs, Hasen recommends a two-pronged approach. To “level up” the playing field, he would provide government-funded vouchers of \$100 per voter.⁹⁰ Voters would then be free to distribute the vouchers to the candidates, political parties, or outside groups of their choice. By themselves, vouchers, public matching funds, or tax credits, should not provoke constitutional controversy, although many would oppose leveling up on political or policy grounds. But the second prong of Hasen’s approach would challenge *Buckley* directly.⁹¹ Hasen says he is not “wedded” to the details, but wants to focus the reader on the larger structure.⁹² To quote the proposal in its entirety:

An individual or entity may contribute, spend from one’s own personal or treasury funds, or both, no more than \$25,000 in each federal election on election-related express advocacy or electioneering communications supporting or opposing candidates for that election. Such limits shall not apply to the press, to political committees that solely spend contributions received from others, or to money contributed or spent in a voluntary, government-created public finance program. An individual also cannot contribute and/or spend more than \$500,000 total in all federal election activity in a two year cycle.⁹³

84. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 362, 451 (2010); *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434, 1450, 1464 (2014).

85. *Citizens United*, 558 U.S. at 361; *McCutcheon*, 134 S. Ct. at 1438.

86. See LAWRENCE LESSIG, *REPUBLIC, LOST 17* (2011) (on dependency corruption); ZEPHYR TEACHOUT, *CORRUPTION IN AMERICA 292-98* (2014) (on the historical understanding of corruption).

87. *Buckley v. Valeo*, 424 U.S. 1 (1976); HASEN, *supra* note 9, at 185-89 (2016).

88. *Buckley*, 424 U.S. at 54; HASEN, *supra* note 9, at 11.

89. HASEN, *supra* note 9, at 90.

90. *Id.* at 89.

91. *Id.* at 95.

92. *Id.* at 94.

93. *Id.*

Candidates, political parties, and political committees (PACs) could continue to spend unlimited amounts of contributed money. However contributions would be limited, as would independent expenditures by an individual or from an organization's treasury funds. This is a proposal that Hasen knows would have been rejected by the recent five-justice majority, which included the late Justice Antonin Scalia.⁹⁴ Even so, Hasen does not think that a constitutional amendment is necessary, or desirable.⁹⁵ For one thing, it would be difficult to imagine mustering the needed supermajority for an amendment. More fundamentally, he argues that a constitutional amendment cannot work.⁹⁶ Even after an amendment, the boundary lines between what would be considered political speech (regulated), and issue speech (not regulated), would either be so restrictive as to threaten free speech, or so porous as to be easily circumvented and useless.⁹⁷ There is no "sweet spot" that will let one avoid one problem or the other.

As a result, Hasen says, "[t]he fight for campaign reform will be political, not legal, in the battle for control over the Court: it likely will take a Democratic president nominating progressives who can be confirmed by the Senate."⁹⁸ This sentence about the primacy of politics, is reminiscent of Mutch's – but with far different implications. For Hasen, politics can provide a way out of what Mutch presents as an endless loop. He may well be right on this point. However, the 2016 Presidential election clearly has made this path more difficult for now. But whatever the immediate practicalities, the argument needs to be addressed. Hasen's call for a shift in jurisprudence does not settle anything about the politics that might produce the new laws that could come up to the Court for a test.⁹⁹ Most of the attempts to make new laws are likely to occur on the state and local level, and those laws may not look much like Hasen's proposal. There is more than one way to build from the bottom up to promote equality, and there is something to be said for Mutch's view that cross-partisan majorities are needed for change to be durable.¹⁰⁰ Despite the national election results, cross-partisan support may be closer in many states and localities than Mutch or Hasen seem to expect. The *New York Times* poll quoted earlier found that eighty percent of *Republicans* thought money had too much influence in elections, seventy-one percent supported contribution limits and seventy-three percent wanted to limit independent spending.¹⁰¹ Among campaign finance reform advocacy organizations, Take Back Our Republic (TBOR) is composed of Republicans and run by a Tea Party campaign professional. It supports contribution limits, stronger disclosure, and tax credits for small donors. Another organization, Issue One, has created a Reformers Caucus that as of this writing includes more than fifty Republican former Members of Congress

94. HASEN, *supra* note 9, at 95.

95. *Id.* at 168.

96. *Id.*

97. HASEN, *supra* note 9, at 94.

98. *Id.* at 178.

99. *Id.* at 95.

100. MUTCH, *supra* note 7, at 198-99.

101. Nicholas Confessore & Megan Thee-Brenan, *Poll Shows Americans Favor an Overhaul of Campaign Financing*, N. Y. TIMES, June 2, 2015, http://www.nytimes.com/2015/06/03/us/politics/poll-shows-americans-favor-overhaul-of-campaign-financing.html?_r=0.

and Governors. In short, this is an issue arena with more political cross currents outside the Washington D.C. Beltway than inside Congress.

Given this situation, one could easily imagine a variety of policies taking root. That would be welcome. With variety comes the possibility of serious policy analysis, and with analysis come the opportunity for a more evidence-based approach to making decisions. It is one thing to throw broad ideas into the air for discussion. But when the opportunity opens for new policy, it is best to be ready with one whose details have been well scrutinized. This is the weak spot in Hasen's book. Given the paucity of real world examples to test, the weakness is understandable. Nevertheless, it is a concern that demands more attention.

Consider Hasen's arguments in favor of statutory limits.¹⁰² He says that a constitutional amendment would inevitably be too broad or too narrow.¹⁰³ But if that is correct, as I believe it to be, then might not some statutory limits have the same problems, diverting contributions without limiting them? This objection, known as the "hydraulic theory," was named by Issacharoff and Karlan and endorsed by La Raja and Schaffner.¹⁰⁴ Hasen responds to the theory by referring to a Campaign Finance Institute study, which showed that public for-profit corporations did *not* push their money back into the system once political party soft money was banned.¹⁰⁵ In other words, squeezing in one place did not cause the same money to bubble up somewhere else. The point was correct when the study appeared in 2006, and even today there is little evidence that the large, publicly traded corporations that gave soft money to the parties before 2002, have shifted their money toward independent spending groups.¹⁰⁶ That is because many corporations contributing soft money to the parties before 2002 were not at all eager to be doing so. Edward A. Kangas, then the chairman of global directors for the large accounting firm of Deloitte Touche Tohmatsu, and co-chair of the Committee for Economic Development, wrote in a 1999 *New York Times* opinion piece that "[w]hat has been called legalized bribery looks like extortion to us."¹⁰⁷ It should not be a surprise that those who felt their contributions were extorted did not work hard to find loopholes to evade the new limits.

102. HASEN, *supra* note 9, at 84-103.

103. *Id.* at 94.

104. Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L.REV. 1705 (1998) <http://www.campaignfreedom.org/wp-content/uploads/2015/06/Issacharoff-Karlan-1999-Hydraulics-Of-CF-Reform.pdf>; Ray LaRaja & Brian Schaffner, *Unlimited Party Fundraising and Spending Gives You Less Polarized Legislatures? Discuss.*, OPINION, WASH. POST, July 8, 2015, <https://www.washingtonpost.com/blogs/monkey-cage/wp/2015/07/08/unlimited-party-fundraising-and-spending-gives-you-less-polarized-legislatures-discuss/>.

105. Stephen R. Weissman & Ruth Hassan, *BCRA and the 527 Groups*, in THE ELECTION AFTER REFORM: MONEY, POLITICS AND THE BIPARTISAN CAMPAIGN REFORM ACT, 79 (Michael J. Malbin ed., 2006).

106. Robert G. Boatright, Michael J. Malbin, Mark J. Rozell, & Clyde Wilcox, *BCRA's Impact on Interest Groups and Advocacy Organizations*, in LIFE AFTER REFORM: WHEN THE BIPARTISAN CAMPAIGN REFORM ACT MEETS POLITICS 43 (Michael J. Malbin ed., 2003); Timothy Werner, *The Sound the Fury and the Nonevent: Business Power and Market Reactions to the Citizens United Decision*, 39 AM. POL. RES. 118 (2011).

107. Edward A. Kangas, *Soft Money and Hard Bargains*, OPINION, N.Y. TIMES, Oct. 22, 1999, <http://www.ny-times.com/1999/10/22/opinion/soft-money-and-hard-bargains.html>.

In contrast, the mega-donors who have been participating in recent years are more likely to be partisans, or issue-driven or ideologically-driven donors. Rather than being like the corporate lobbyists who used part of their companies' corporate government affairs budgets for soft money contributions before McCain-Feingold, the current mega-donors typically contribute their personal funds or use money from privately held corporations they own and run. They "push" their money into the system rather than having it "pulled" out of them by office holders.¹⁰⁸ They are in the game because they want to be. We can neither assume they will transfer their money to party organizations, as La Raja and Schaffner seem to do, nor assume with Hasen that the new limits will slow them down. La Raja and Schaffner were right to say that new laws will affect intermediary organizations in a way that will be driven by organizational imperatives as much as by partisan electoral politics. Sorting this out will be complicated, but vitally important.

There remain dozens of other empirical questions to ask about Hasen's proposals. For example, I do not think he makes a strong case for vouchers over small donor matching funds. We know about small donor matching funds from watching them in action since 2001 in New York City but we will have no parallel information about vouchers or their side effects until the first-in-the-country Seattle system goes into partial effect in 2017.¹⁰⁹ Hasen is also mistaken to suggest that small donors are more polarized, or more ideological, than large donors. It is more likely true that small donors can be more or less polarized, depending upon the laws and fundraising mechanisms that stimulate them.¹¹⁰ Finally, allowing voters to give vouchers or any other form of public financing to interest groups, as he would, seems likely to favor some organizations over others with consequences that need to be considered carefully before adoption.¹¹¹

None of the limitations noted in this essay should deter readers from devouring all three of these books. They deserve a place in any serious conversation about money in politics. They have raised the key issues. Yet one walks away feeling much is left unresolved. In particular, any effort to change laws should be preceded by much more thorough and more nuanced policy analysis than this field has seen so far. It is not enough to rely on sweeping proposals guided by instinct. Sound proposals should be preceded by rigorous analysis on a level of specificity consistent with the questions raised here. The curse of unforeseen consequences should teach us the importance of doing one's homework. But just because something is unforeseen does

108. BOATRIGHT ET AL., *supra* note 106, at 44; Robert G. Boatright, Michael J. Malbin, & Brendan Galvin, *Independent Expenditures in Congressional Primaries After Citizens United: Implications for Interest Groups, Incumbents, and Political Parties*, 5 INT. GROUPS & ADVOC. (2016) http://cfinst.org/pdf/papers/Boatright-Malbin-Glavin_IEs-in-Primaries-after-CU.pdf.

109. Michael J. Malbin, Peter W. Brusoe, & Brendan Glavin, *Small Donors, Big Democracy: New York City's Matching Funds as a Model for the Nation and States*, 11 ELECTION L.J. 3 (2012), http://www.cfinst.org/pdf/state/NYC-as-a-Model_ELJ_As-Published_March2012.pdf; Elizabeth Genn, Michael J. Malbin, Sundeep Iyer, & Brendan Glavin, *Donor Diversity Through Matching Funds*. THE BRENNAN CENTER AND CAMPAIGN FINANCE INSTITUTE (2012), <http://www.cfinst.org/pdf/state/NY/DonorDiversity.pdf>.

110. Michael J. Malbin, *Small Donors: Incentives Economies of Scale, and Effects*, 11 FORUM 385, 395-397 (2013).

111. Michael J. Malbin, *Predicting the Impact of Democracy Vouchers: Analysis and Questions in Light of South Dakota's Successful Initiative*, CAMPAIGN FINANCE INSTITUTE (December 2016), http://www.cfinst.org/pdf/books-reports/CFI_SD_DemocracyVouchers.pdf.

not mean it is unforeseeable. We are learning much and the conversation needs to continue. As these books have made clear, doing nothing carries its own very serious risks.