

ADDRESSING CONSERVATIVES AND (MIS)USING SOCIAL SCIENCE IN THE DEBATE OVER CAMPAIGN FINANCE

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TIMOTHY K. KUHNER, *CAPITALISM V. DEMOCRACY: MONEY IN POLITICS AND THE FREE MARKET CONSTITUTION* (STANFORD UNIVERSITY PRESS 2014) PP. 376. PAPERBACK \$ 27.95.

ROBERT POST, *CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION* (HARVARD UNIVERSITY PRESS 2014) PP. 254. HARDCOVER \$ 31.50.

ZEPHYR TEACHOUT, *CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN'S SNUFF BOX TO CITIZENS UNITED* (HARVARD UNIVERSITY PRESS 2014) PP. 384. HARDCOVER \$ 29.95.

American elections are in the midst of fundamental change. This can be seen in multiple places, from voting rights and movements to ease or restrict ballot access to “voting wars” in election administration.¹ On the one hand, change is always afoot in elections. Think of the transformations wrought by the Australian ballot in the late nineteenth century (where an ascendant norm of vote secrecy was said to have weakened party power)² or the reapportionment mandated by *Baker v. Carr* in 1962.³ On the other hand, in the realm of campaign finance something new and big is clearly underway. The manner in which American elections are financed has changed in dramatic ways in just five years.

Consider some basic evidence. In the 2000 Democratic and Republican presidential primaries, interest groups were responsible for four percent of the ads aired on behalf of John McCain, George Bush, Al Gore and Bill Bradley.⁴ In 2008, again with contested

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1. RICK HASEN, *THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN* 4 (2012).

2. Alan Ware, *Anti-Partism and Party Control of Political Reform in the United States: The Case of the Australian Ballot*, 30 BRIT. J. POL. SCI. 8 (2000).

3. *Baker v. Carr*, 369 U.S. 186 (1962).

4. Michael Franz, *Interest Groups in Electoral Politics: 2012 in Context*, 10(4) F. J. APPLIED RES.

nomination battles on both sides of the aisle—and an open White House for the first time since 1952—outside groups aired just three percent of the ads. In 2012, however, two years removed from *Citizens United v. FEC*⁵ and with super Political Action Committees (PACs) abundant, interest groups accounted for sixty percent of the over 122,000 ads aired during the Republican primary phase.⁶ As of this writing in fall 2015, the trend continues apace, with super PACs responsible for ninety percent of the early ad buys in the 2016 GOP presidential primary campaign.⁷

Interest groups were present also in unparalleled ways in the general election phase of recent campaigns. Pro-Romney groups in 2012 aired over half of all ads that advocated for the GOP candidate. This shattered the previous record, when pro-Kerry groups bolstered his publicly funded general election with one in every four ads (at the time a stunning development in campaign finance) in the fall of 2004.⁸ In congressional elections in 2014, interest groups aired over thirty percent of all Senate ads in the entirety of the election year, up from the five percent investment typical of Senate elections between 2000 and 2006. And in six highly competitive races that year, groups aired over forty-five percent of the ads.⁹

It is hard to overstate these changes, as they have had effects beyond the mere airwaves. Every major candidate for president now announces their campaign in the wake of forming or helping to form super PACs and 501(c)(4) groups that subsequently take on major aspects of the campaign. The two major parties have formed parallel super PAC organizations (House Majority PAC and Majority PAC for the Democrats; Crossroads GPS and others such as American Action Network and Freedom Partners for the GOP) that raise and spend millions to advocate for their congressional candidates. Moreover, many of these congressional candidates have their own super PACs or non-profits staffed and run by former associates (and funded with million dollar checks).¹⁰

These changes (among others) have compelled political scientists to conceptualize political parties as more than the traditional party organizations—long the focus of the scholarship—but now also as networks of affiliated advocacy groups.¹¹ What a party is and means is now very different from what scholars like E.E. Schattschneider wrote

CONTEMP. POL. 62, 66 (2013).

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

6. See Franz, *supra* note 4, at 66.

7. Michael Beckel, *Super PACs Dominate Airwaves in 2016 Presidential Race*, PUBLIC INTEGRITY (Sept. 29, 2015, 2:00 PM), <http://www.publicintegrity.org/2015/09/16/17995/super-pacs-dominate-airwaves-2016-presidential-race>.

8. See Franz, *supra* note 4, at 66.

9. Michael Franz, *Interest Group Issue Appeals: Evidence of Issue Convergence in Senate and Presidential Elections, 2008-2014*, 12(4) F. J. APPLIED RES. CONTEMP. POL. 685, 688 (2015).

10. A review of all the organizational forms available to interest groups is beyond the scope of this review. Super PACs can raise unlimited contributions for candidate advocacy, but they report their contributions in full to the Federal Election Commission. 501(c)(4) groups are non-profit social welfare organizations, and they do not publicly report their donors. They can sponsor candidate advocacy messages so long as it is not their primary purpose. See Holly Schadler, *The Connection: Strategies for Creating and Operating 501(c)(3)s, 501(c)(4)s and Political Organizations*, BOLDER ADVOC. (3d ed. 2012), http://bolderadvocacy.org/wp-content/uploads/2012/10/The_Connection_Ch1_paywall.pdf.

11. MARTY COHEN ET AL., *THE PARTY DECIDES: PRESIDENTIAL NOMINATIONS BEFORE AND AFTER REFORM* 350 (2008).

about in the middle of last century.¹² It is fair to say that the old dichotomy pictured groups and parties as positioned on either end of a seesaw, each teetering up or down in power or influence. Today, scholars see them all as one piece.

There is a deep concern felt by many about this state of affairs. It was the trend towards greater influence of donors (already underway by the mid-1990s, though on a lesser scale) that compelled Congress in 2002 to reform campaign finance, the first major reform in a generation. Gallons of ink have been spilled in various outlets to decry the role of money in elections, especially in the wake of the Roberts Court's dismantling of many aspects of the 2002 reform (begun in *Wisconsin Right to Life*¹³ and *Davis*¹⁴ and advanced aggressively in *Citizens United*).

In the run-up to the 2014 midterm elections, majorities of voting Democrats, Independents, and Republicans in competitive Senate races agreed that super PAC spending was “wrong and leads to our elected officials representing the views of wealthy donors.”¹⁵ Scholar Thomas Edsall asserts that the current campaign finance regime primarily benefits “billionaires like the Koch brothers on the right and Tom Steyer on the left, [but] there is [also] a constituency within the superrich—those who would prefer to keep their political activities concealed from public view—that has also gained special protection” with the use of 501(c)(4)s.¹⁶

It is this perspective that invites the commentary and analysis in the three recent books by Robert Post, Timothy Kuhner, and Zephyr Teachout discussed in this essay. Indeed, these are all brilliant books that situate the developments as outlined above in the scholarship, history, and jurisprudence on campaign finance and offer the reader a perspective from which to advocate for reform. In that sense, they all seek and achieve a rightful place in the canon on campaign finance and democratic theory. They were also a joy to read, all written in beautiful prose and by masters of the questions at hand.

This review will follow two tracks. First, as discussed in Part I, all three books seek to address—to attack head on, in fact—conservative critiques of the regulation of campaign finance. It is important to consider first how these books seek to recast the debate over regulatory politics in campaign finance as “in response to” as opposed to “in spite of” conservative pressure. Second, as Parts II and III explain, all three books address—directly or indirectly; consciously or unconsciously—the role of evidence in the debate over money in politics and elections. They each do so with skill, but not without challenges. All three use evidence to bolster their argument when relevant; disregard counter-evidence selectively; and ignore entirely the complexity of empiricism as a weapon in the question of campaign finance.

12. E.E. SCHATTSCHEIDER, PARTY GOVERNMENT (1942); E.E. SCHATTSCHEIDER, SEMI-SOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA (1960).

13. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007).

14. *Davis v. Fed. Election Comm'n*, 554 U.S. 724 (2008).

15. Denver Nicks, *Poll: Support for Campaign Finance Reform Strong in Key Senate Races*, TIME, July 31, 2015, <http://time.com/3063942/poll-support-for-campaign-finance-reform-strong-in-key-senate-races>.

16. Thomas B. Edsall, *Can Anything Be Done About All the Money in Politics?* N.Y. TIMES, Sept. 16, 2015, http://www.nytimes.com/2015/09/16/opinion/can-anything-be-done-about-all-the-money-in-politics.html?_r=0.

I. RESPONDING TO THE DEREGULATORS

First, with respect to the issue of audience, Robert Post seeks to embrace the First Amendment and situate his rationale for campaign finance reform firmly within it. His book, *Citizens Divided: Campaign Finance Reform and the Constitution*, reflects his two Tanner Lectures at Harvard University in May 2013.¹⁷ In those lectures, Post translates the negative liberty of “Congress shall make no law” to the positive requirement that Congress must consider the legitimacy and integrity of the electoral process. Congress must do so to enhance citizens’ sense that speech in elections can send meaningful signals to elected officials—he terms this “representative integrity.”

Post writes: “To understand First Amendment doctrine . . . and especially the kind of doctrine that is relevant to a decision like *Citizens United*, we must conceive First Amendment rights as designed to protect the processes of democratic legitimation.”¹⁸ These are meant to include a free exchange of ideas and open debate about the strengths of weaknesses of candidates. But he does not want such rights to be abstracted. Processes of democratic legitimation have real meaning only when the act of speaking can be thought to have a measurable or perceived impact on the behavior and actions of elected officials. Post believes that the distribution of money in elections has undermined citizens’ confidence that their speech is heard. He argues that such a weakened link between citizen and leader grants Congress the authority to act in the realm of campaign finance. For Post, the First Amendment only matters if Congress can act to restore citizen confidence.

One of Post’s key contributions is reviewing the primary rationales for regulating campaign finance.¹⁹ The most common rationales—and there is slippage around the boundaries of each—are equality, anti-distortion, and anti-corruption. In his second lecture, Post addresses each in turn.

He is not persuaded that concerns about equality—meant here as equally effective voices in the exchange of ideas²⁰—can inform policy-making and also respect the parameters of the First Amendment. Put simply, there is no requirement in the First Amendment that everyone have an equal influence on policy-makers, only that people have an equal chance to make their case.

Similarly, concerns about anti-distortion, where issue advocates have influence that outstrips the issue’s support among the general public,²¹ fall short, in part because of the fluidity of public opinion.²² Opinion formation is a process that involves a constant flow of information and vigorous give-and-take on political issues. Knowing how to measure distortion in such a context of fluidity is also not a rationale for reform that can

17. ROBERT POST, *CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION* (2014).

18. *Id.* at 41.

19. *Id.* at 44. Indeed, his broad review of American political development (from the strong party organizational era in the nineteenth Century to the Progressive Era and candidate-centered campaigns in the twentieth century) is worth the read regardless of its application to debates over campaign finance.

20. *Id.* at 47.

21. *Id.* at 51. Such a commensurate link between public opinion and its influence on policy can be mistaken for an equality rationale, and therein lays the slippage between them.

22. POST, *supra* note 17, at 53.

easily co-exist with the First Amendment. One can never be sure if a set of speakers is out of sync with a broader and ever changing public opinion.

Anti-corruption is more widely understood to be a sound basis on which to regulate election financing, but the existence of a compelling state interest does not solve the challenge of operationalizing it through sound public policy. Corruption can mean many things to different people, Post asserts,²³ and this argument leads us down a rabbit hole.

To these three, Post adds system legitimacy as a separate rationale, a compelling state interest meant to enhance the speech rights enshrined by the First Amendment. In Post's telling, electoral integrity is a requirement for free speech, lest citizens lose confidence that established rights have real meaning. To be sure, he takes many positions embraced by liberals—for example, that corporations are not people protected under the First Amendment, but his primary goal is to use Free Speech as the cloak for government regulatory policy.

Such an approach is compelling, and it is persuasive. Kuhner and Teachout also seek to engage free speech advocates, but they both do so on different tracks.²⁴ In *Capitalism v. Democracy: Money in Politics and the Free Market Constitution*, Kuhner recognizes that a free market is critical to American life and culture, but his primary argument is that the market suffers under the weight of crony capitalists (he uses the term nineteen times within forty pages²⁵) empowered by *Citizens United*. The market can only perform as we hope it to perform (letting producers of popular and/or important products enter the market and earn a commensurate return) if Congress can treat campaign finance, and the distribution of campaign cash, as a trust it can bust. Market winners should not win because of political connections (leveraged by funding super PACs or non-profit groups, or by acting as “bundlers” of campaign donations) over expertise or ingenuity.

Indeed, it is well understood that not all market behavior is good capitalism—a point made clear by the economic recession of 2008. Kuhner says to that effect: “No defender of capitalism would endorse the behavior of those particular capitalists, who will be remembered, one hopes, as traitors, not traders.”²⁶ He adds: “If the incentives within political markets go against the integrity of capitalism itself, then capitalism and democracy would be allies in the struggle for political finance reform.”²⁷

Indeed, good capitalists should strive for a separation of capitalism and democracy. (By this he means that wealth should not infect or direct democratic policy-making.) It should be a cultural force akin to the constitutional (if still contested) separation of

23. *Id.* at 57. Indeed, it is often defined as inequality in influence or the distortive effects in discourse from disproportionately wealthy speakers.

24. TIMOTHY K. KUHNER, *CAPITALISM V. DEMOCRACY: MONEY IN POLITICS AND THE FREE MARKET CONSTITUTION* 242 (2014); ZEPHYR TEACHOUT, *CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN'S SNUFF BOX TO CITIZENS UNITED* 9 (2014). The arguments of Kuhner and Teachout could be characterized as “gotchas” in the sense that both seem to engage conservatives on their own turf, turning devotion to the free market and originalism into advantages for the liberal position. Another way to say this that Kuhner and Teachout seem to play offense in making their case, while Post's style of argumentation is more defensive.

25. See KUHNER, *supra* note 24, at 242-81.

26. *Id.* at 239.

27. *Id.*

church and state, and also to the institutionalized separation of powers: “Consumers and citizens, and capitalism and democracy are interdependent pairings that depend, curiously enough, on separation.”²⁸ He advances his argument as a “third separation,” one also that needs a constitutional signature.²⁹ Here, again, we see engagement with traditional opponents to regulation. For Post, free speech is an empty gesture absent citizen efficacy; for Kuhner, the free market is an illusion absent oversight and mechanisms to enforce fair play.

In *Corruption in America: From Benjamin Franklin’s Snuff Box to Citizens United*, Teachout too seeks to address the critics. She positions her argument in relation to advocates of constitutional original meaning. She sets up a challenge: to enshrine the views of the Founders as sacrosanct means also to accept or consider their conception of corruption. To wit, historically, corruption—at the Founding, in the early Republic, in the Gilded Age—has been consistently understood as involving more than quid pro quo relationships between donors and election officials. Teachout is apoplectic at the thought that the Supreme Court could be so ahistorical in its consideration of corruption.

Teachout tells compelling stories about various moments in American political development—and she tells them wonderfully—where politicians, citizens, and state and federal courts struggled with conceptions of corruption but more often than not viewed it broadly. Can a law passed by a corrupt legislature (where votes were bought and sold) be invalid on its face? Can the federal government use laws against mail fraud and racketeering to prosecute elected legislators for potentially corrupt behavior? Is it corrupt to accept modest gifts from foreign officials in the course of representing American diplomatic interests? Teachout tells us that many have answered in the affirmative to all three questions—and others—asked in actual controversies. Indeed, she tracks the numerous instances where corruption was viewed as “excessive private interests in the public sphere; [and where an] act is [considered] corrupt when private interests trump public ones in the exercise of public power; [and where] a person is corrupt when they use public power for their own ends, disregarding others.”³⁰

As such, Teachout offers the reader some “liberal originalism.”³¹ If one considers what the Framers understood corruption to mean, Teachout hopes, it can empower contemporary policy-makers by underlining the constitutional legitimacy of aggressive lawmaking. She wonders: “What if we could add ‘anticorruption’ to citizens’ sense of national identity?”³² Indeed, given the structural designs of American government—with separate institutions across federal layers—should it not be obvious that the Framers considered seriously and were concerned about the public sphere’s infection by private

28. *Id.* at 274.

29. *Id.* at 283.

30. TEACHOUT, *supra* note 24, at 9.

31. It seems from the perspective of this writer—a political scientist and not a constitutional law scholar—that originalism as adopted by contemporary conservatives is a convenient trope in either the absence of convincing facts or in the presence of damning facts. See Robert Post, *Liberal Originalism*, THE NEW REPUBLIC, Sept. 17, 2007, <http://www.newrepublic.com/article/liberal-originalism> (9/19/15) (discussing something to this effect in the cited article: “[it creates a] capacity to reshape Supreme Court precedents into a ‘living constitution’ for right-wing convictions”).

32. TEACHOUT, *supra* note 24, at 12.

interests?

All three authors want their arguments to make sense to conservatives, perhaps even to shift the debate among conservatives. They offer some intellectual heft to the now-stale advocacy in this sphere for equality or anti-distortion. Those latter arguments are still embraced by liberals, and they are popular with the public. But the Court as currently constituted is uninterested in them, and they are dead on arrival in a congressional environment where House Republicans look entrenched. The arguments as presented by Post, Kuhner, and Teachout are new in the sense that they represent repurposed armament for the policy-making left.

There are challenges in these arguments, however. These challenges do not undermine their larger projects, but they represent formidable bumps in the road. It is here that the question of data and empirics is foregrounded.

II. DATA-DRIVEN SOLUTIONS

These three books cry out for the political scientist; in fact they nearly taunt political science to comment. And it is clear that the discipline is “hot” at the moment. In a variety of forms—on blogs and in dialogue with the press³³—political scientists are bent on ramming their way into relevance, both in policy-making and with the Court. This is no truer than in the realm of campaign finance.³⁴

What might a political scientist have to say about such questions more generally and these books specifically? Answering Post is probably the most straightforward. He recognizes the empirical claims inherent in his thesis, but he is entirely uninterested in exploring them. Indeed, he adopts the explicit approach of claiming them as beyond his purview and mandate. He says: “I shall not explore whether electoral integrity is in fact at risk, or whether campaign finance reform will in fact ameliorate that risk. I argue only that the protection of electoral integrity constitutes a compelling state interest.”³⁵ Later, he adds, “[i]f it is indeed true that uncontrolled expenditures threaten to undermine the electoral integrity of our representative system, we also face a potential loss of democratic legitimation if we choose to do nothing.”³⁶

His reaction is frustrating. In the first passage Post sidesteps the empirical question, but in the second he asks the reader to stipulate to its veracity (while also hedging—“a potential loss”). He need not collect and analyze data on the questions at hand, but

33. See, e.g., *The Monkey Cage*, WASH. POST, <http://www.washingtonpost.com/blogs/monkey-cage> (last visited Jan. 1, 2016); see also *Mischiefs of Factions*, VOX, <http://www.vox.com/mischiefs-of-faction> (last visited Jan. 1, 2016).

34. Not forgotten are controversies in social science concerning the use of suspect data. In the summer of 2015, a political scientist was discovered to have falsified data surrounding a landmark publication in *Science*. See Benedict Carey, *Study on Attitudes Toward Same-Sex Marriage Is Retracted by a Scientific Journal*, N.Y. TIMES (May 28, 2015), <http://www.nytimes.com/2015/05/29/science/journal-science-retracts-study-on-gay-canvassers-and-same-sex-marriage.html>. Unrelated to that, but relevant to the point, the *American Journal of Political Science* recently mandated that all accepted papers undergo independent replications, with full data sets and code supplied to the journal and to readers. See *The AJPS Replication Policy: Innovations and Revisions*, AM. J. POL. SCI., Mar. 26, 2015, <http://ajps.org/2015/03/26/the-ajps-replication-policy-innovations-and-revisions>.

35. POST, *supra* note 17, at 65.

36. *Id.* at 91.

sidestepping the key question involves an unjustifiable dodge. For if the distribution of money in elections is not causally related to citizens' perceptions of electoral integrity, then what is the point of the exercise?

It is curious that he also relies on the absence of empirical data to refute the Court's current stance on campaign finance law. He says:

[I]t is an empirical question whether [limits on electioneering by groups] actually diminishes the flow of useful information to the public. *Citizens United* presumes that the public will be better informed after it strikes down [those limits] than in the decades before the *Citizens United* decision. But this is far from obvious.³⁷

He does this also at the end of the book in regards to the Court's current stance on voter ID laws:

The problem with *Crawford*³⁸ [in upholding Indiana's voter identification law] is not the validity of the government interest in confidence, but rather the absence of any factual demonstration that confidence was actually at risk despite severe and demonstrable curtailments of the right to vote. . . . The lesson to be learned . . . is that facile invocations of public confidence, unsupported by any record, and unqualified by any consideration of competing constitutional values, can be very dangerous indeed.³⁹

Indeed. Where is the factual record that links perceptions of democratic legitimacy to variations in campaign finance policy? How do we balance policies as designed and implemented against a clear competing constitutional value of free speech?

Post's book is enriched by the commentaries following his essays. Their authors address Post from a variety of angles, making each well worth the read. Pamela Karlan's response, for example, is steeped in concerns over data and empirical relationships. Moreover, Karlan worries that appeals to electoral integrity might also inspire a range of exclusionary public policies.⁴⁰ That is, voter ID laws might gain greater constitutional justification if Post is successful at advancing perceptions of integrity as a compelling state interest.⁴¹ It seems possible, at least, that stated or assumed causal relationships can become powerful political ammunition.

To be fair, Post is not unaware of the empirical questions at hand, and neither is Kuhner. But Kuhner too moves in and out of the question of empirics. He takes the Court's conservatives to task for rejecting evidence in the debate over political rights. In an enlightening discussion of broader theoretical approaches to campaign finance, Kuh-

37. *Id.* at 87.

38. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008).

39. POST, *supra* note 17, at 164.

40. *Id.* at 148.

41. *Id.* at 149.

ner reviews the perspectives of public choice scholars, advocates of republicanism, and the views of “deontological” liberals.⁴² The “deontological” view is one where “fundamental rights can trump social goals.”⁴³ That is, where evidence can be considered irrelevant in evaluating policies and the scope of their impingement on rights (more specifically, where restrictions on campaign spending can be seen as too onerous an infringement on free speech). Kuhner argues that the Court seems to take this position as its lodestar on the broader issue,⁴⁴ all the while relying on assumed empirical relationships to refute many critics:

The Court has told us that the marketplace of ideas produces a great deal of information from diverse sources, informs the electorate, and brings about the changes desired by people. By stipulating to such goals, the Court abandons deontology for consequentialism. Once desirable consequences have been specified, it follows that types of speech that go against those objectives must be regulated.⁴⁵

This frustrates Kuhner, where the Roberts Court sometimes embraces and sometimes dismisses a need for evidence.

But Kuhner’s dismay at a “deontological” perspective seems to push the point too far. It is hard to know how devotion to principle can ever avoid *some* empirical propositions. If one believes in free speech, for example, is it unreasonable to argue for its advantages, an argument that inherently relies on an empirical foundation? Those advocating gun rights because of the Second Amendment clearly argue against gun control policies from a rights-based position, but these advocates assert (with an implication to empirical evidence) that guns help citizens protect both themselves and the community. In other words, it seems likely that a deontological liberal will often make empirical claims in spite of him or herself. A fairer read on the deontological position is this: one can and should defend political rights, and defend them vigorously, against claims that are not fully fleshed out or supported with data.

To that point, Kuhner himself makes strong empirical claims. He reminds the reader of a range of studies documenting the wealth disparities between political donors and the general public.⁴⁶ This is refreshing. But at other times he makes claims about “the market of misleading ads . . . [and a] privatized multimedia market . . . saturated by superficial and misleading ads.”⁴⁷ But what exactly is misleading, and what studies have counted or documented the quantity of misleading versus informative campaign messages? He acknowledges that “[l]obbying does not cause policy outcomes that can be pin-

42. KUHNER, *supra* note 24, at 180.

43. *Id.*

44. *Id.* at 187. Ultimately, he dismisses this as the underlying theory of the Roberts Court on campaign finance. It is, he says, something far simpler and more troubling. It is the “right of capital to enjoy political power commensurate to its economic power . . . a purpose too unpopular to be professed.”

45. *Id.* at 181-82.

46. *See, e.g., id.* at 60.

47. KUHNER, *supra* note 24, at 142-43.

pointed in every case,” but adds, “[lobbying] is effective enough to be demanded by those who have much to gain or lose from political outcomes.”⁴⁸ There is a big difference, though, between lobbying as a surefire way to leverage political outcomes and lobbying as a hedge in the process of policy-making. More assertively, he subheads one section “The Effects of Political Markets that Everybody Must Concede”⁴⁹—but that seems more like wishful thinking.

A different way to make this critique about the role of data is to say that policy solutions are largely absent from these books. To make a case for reform and to establish the policy-making authority and space for it are only the beginning. Questions of policy content and reach and the empirical implications of policies on voters or elites are too critical to leave undeveloped.

Teachout never quite gives us a vision of how anti-corruption works in policy-making practice. Should we limit corporate involvement in the electoral realm? How? Advocating as such only raises concerns about loopholes and the sticky challenge of allowing “genuine” issue advocacy. Do we not already know that limitations in one realm seem likely to move money to another? Should wealthy individuals be allowed to spend their own money on independent expenditures or in running for office? That is, can someone use his or her sizeable private fortune to move the public debate? Or is private interest in a public sphere trending too close to what Teachout considers corruption? Teachout knows these are challenges, but she is unconcerned: “you might conclude that corruption cannot be used in law because its essential imprecision leads to lawlessness, . . . [but] the rule of law cannot survive without anticorruption measures. . . . We should embrace the anticorruption principle’s uneasy role.”⁵⁰

How do we design real solutions to the concerns expressed in these books, however—ones commensurate to the problem as outlined? Post says, for example, that we need “wholesome legislation that nourishes democratic legitimacy.”⁵¹ Teachout flips the uncertain boundaries of the concept of corruption into a positive grant: “[W]hy . . . not take the natural next step and directly engage the foundational questions of the values that anticorruption laws serve and their role in a democracy?”⁵² It is not hard to agree in principle to these views. It is another thing to envision how they work in practice. How do we operationalize “wholesome,” and what policy will in fact nourish? These are hard questions, and they demand a data-driven exposition.

III. DATA-DRIVEN LIMITS

Prioritizing data and empirics makes perfect sense for the social scientist. It is likely frustrating to the jurist and the policy-maker, however. There is a bit of danger, indeed, in placing so much emphasis on empirical relationships. In point of fact, and to the question of campaign finance, there is firepower on both sides. The causal relationship

48. *Id.* at 206.

49. *Id.* at 219.

50. TEACHOUT, *supra* note 24, at 279-89.

51. POST, *supra* note 17, at 89.

52. TEACHOUT, *supra* note 24, at 304.

between the distribution of money and electoral and policy-making outcomes is very hard to discern. Consider the current body of evidence:

- PAC contributions appear not to influence congressional roll call votes.⁵³
- But donors appear to get more access to policymakers.⁵⁴
- Lobbying cash is not a strong predictor of policy success.⁵⁵
- Yet the preferences of the affluent seem more strongly related to policy outcomes than the median voter.⁵⁶

And this is only a smattering of the scholarship.

There is more here, though, than scholarly disagreements. Even evidence itself has fallen victim to politics. *The Economist* noted in 2014:

Perhaps politics is flooded with more data than voters want or can usefully process? Some of those vowing to ‘explain’ the world empirically are sincere: their reverence for data betrays a certain despair among moderates, as they try to construct a canon of basic facts whose meaning right and left may constructively debate. Other data-lovers are partisans in disguise, engaging in an arms race with foes: you sow doubt about global warming with glacier measurements, here are 100 years of sea temperatures to end debate. You say welfare is out of control, my numbers show the worst inequality since the Robber Barons. Each slab of fresh research is a new way of waging old cultural wars. . . . If I hate you, your facts are wrong. . . . In today’s politics everything is a weapon with which to club the opposition. Why should facts be different?⁵⁷

The social scientist should stipulate, then, to these challenges. Facts-as-weapons is part and parcel of contemporary politics, but it should not doom the effort to apply rigor to the issues at hand. Indeed, political science is particularly adept at designing compelling research designs about the role of money and its effect on campaigns. Such approaches, among others, (1) leverage varied state campaign finance laws against voter perceptions,⁵⁸ (2) deploy field experiments of ad effects,⁵⁹ or (3) design laboratory exper-

53. Stephen Ansolabehere et al., *Why Is There So Little Money in Politics?*, 17 J. ECON. PERSP. 105, 114 (2003).

54. Richard Hall & Frank Wayman, *Buying Time: Moneyed Interests and the Mobilization of Bias in Congressional Committees*, 84 AM. POL. SCI. REV. 797, 814 (1990); David Broockman & Joshua Kalla, *Campaign Contributions Facilitate Access to Congressional Officials: A Randomized Field Experiment*, AM. POL. SCI. REV. (forthcoming).

55. FRANK BAUMGARTNER ET AL., *LOBBYING AND POLICY CHANGE: WHO WINS, WHO LOSES, AND WHY* 221 (2009).

56. Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSP. POL. 564 (2014).

57. *When Facts Are Weapons*, THE ECONOMIST, May 3, 2014, <http://www.economist.com/news/united-states/21601516-politicians-have-never-had-access-so-much-data-how-come-their-debates-are-so>.

58. David Primo & Jeffrey Milyo, *Campaign Finance Laws and Political Efficacy: Evidence from the*

iments that test implications of formal models on the effects of campaign negativity.⁶⁰ We are now beyond dismissing such research as endogenous or hampered by lack of good data.

The problem of varied and contradictory evidence, however, is no small matter. To be sure, all three authors want something quite modest, perhaps—a consideration of justifications beyond quid pro quo corruption. But we are not out of the woods with modesty. As Chief Justice Roberts has said: “Where the First Amendment is implicated, the tie goes to the speaker, not the censor.”⁶¹ That is, the evidence must be deep and the causal pathways clear.

Moreover, we can use data to justify new law or new regulations, but we still have a First Amendment that in its simplicity would seem to advantage the conservative side. This is what Roberts is contending with his baseball metaphor. Is it enough to say that free speech was not always so strong a force in the jurisprudence, as all three authors do? Post writes: “[W]e . . . never pause to ask why First Amendment doctrine did not emerge until the aftermath of World War I.”⁶² Does pausing justify anything about the here and now in which the balance of the Court cares deeply about the First Amendment? Is free speech’s relevance all the more powerful today when the causal effects of campaign finance policy on voters or elites is hard to know?

In a sense, all three books perform the sort of “constitutional culture work”⁶³ that is likely necessary to shift the debate. They tell the sort of stories meant to recast campaign finance as constitutionally-based projects. But the role of hard evidence still lurks. The debate over campaign finance needs the social scientist. Because something is difficult—and perhaps unlikely to resolve titanic constitutional challenges—does not diminish its potential value. The judiciary should demand more than anecdotes, and they should listen deeply to what the evidence establishes.

The role of evidence is clear in many other domains. In the debate over the “one person, one vote” standard, the Court was moved deeply by the evidence of malapportionment and the seemingly nonsensical reasons by which states in the first half the twentieth century avoided redrawing district lines.⁶⁴ Social science has devoted considerable effort to conceptualizing, measuring, and testing the role of race in the design and implementation of electoral rules, and more broadly, to documenting the level of racial sentiment still present in society. Social scientists have contributed much of this research to policy-makers considering changes to or reauthorization of the Voting Rights Act.⁶⁵

States, 5 ELECTION L. J. 23 (2006).

59. Alan S. Gerber et al., *How Large and Long-lasting are the Persuasive Effects of Televised Campaign Ads? Results from a Randomized Field Experiment*, 105 AM. POL. SCI. REV. 135 (2011).

60. KYLE MATTES & DAVID REDLAWSK, *THE POSITIVE CASE FOR NEGATIVE CAMPAIGNING* (2014).

61. *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 474 (2007).

62. POST, *supra* note 17, at 41. *See generally id.* at 8-40 (historically documenting why speech and public opinion become so critical to American elections in the aftermath of the Progressive Era).

63. Ken I. Kersch, *The Talking Cure: How Constitutional Argument Drives Constitutional Development*, 94 B.U. L. REV. 1083, 1099 (2014).

64. STEPHEN ANSOLABEHRE & JAMES SNYDER, *THE END OF INEQUALITY: ONE PERSON, ONE VOTE AND THE TRANSFORMATION OF AMERICAN POLITICS* (2008).

65. David C. Kimball, *Judges Are Not Social Scientists (Yet)*, 12 ELECTION L.J. 324 (2013).

President Obama has embedded in his regulatory approach a wider consideration of evidence from behavioral science, most recently with an Executive Order.⁶⁶ The Order asserts: “Where Federal policies have been designed to reflect behavioral science insights, they have substantially improved outcomes for the individuals, families, communities, and businesses those policies serve.”⁶⁷

Using evidence may leave some questions unanswered, especially in the realm of money and elections, but evidence can and should inform the way the courts evaluate whether a policy meets the standard of a compelling state interest. Indeed, liberals may often lose a debate in which evidence plays a primary role. All three authors likely know this. The evidence as we have it now is just too varied to point to a clear way forward. Which is to say, liberals may suffer policy-making defeats even in the context of persuasive “constitutional culture work.”⁶⁸ And so it may be, and perhaps must be, in a political system that puts the First Amendment first.

66. WHITE HOUSE OFFICE OF THE PRESS SECRETARY, EXECUTIVE ORDER: USING BEHAVIORAL SCIENCE INSIGHTS TO BETTER SERVE THE AMERICAN PEOPLE, Sept. 15, 2015, <http://www.whitehouse.gov/the-press-office/2015/09/15/executive-order-using-behavioral-science-insights-better-serve-american>.

67. *Id.*

68. Kersch, *supra* note 63.