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Developing Empirical Evidence for Campaign Finance Cases

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Introduction

In recent years, American political spending has risen sharply, and most election money is coming from a small group of wealthy people. Groups like super PACs spend unlimited sums to help elect their favored candidates at all levels of government, and Americans have consistently expressed concern that money influences government policy. Yet in several 5-4 decisions, the Supreme Court has thoroughly transformed the law in the last decade in ways that prevent attempts to reduce the role of money — it has invalidated contribution limits, bans on corporate spending, and public financing laws, concluding that most limits on money in politics are unjustified by a compelling government interest. In making these decisions, the Court has expressed particular views about the ways American politics and campaign finance regulation work.

Often, the Court's opinions have lacked supporting evidence. A close read of the justices' opinions frequently reveals strikingly little consideration of data about the actual effects of regulation on money in politics, or the impacts of that money on the political process. Simply put, much of current campaign finance law rests on the unsupported assumptions of five Supreme Court justices. This shortcoming may explain the disconnect between the Court's and the general public's understanding of money in politics.

Likely changes in the composition of the Supreme Court in the next several years have led many to wonder whether the Court will soon reconsider some of its money in politics jurisprudence. While a change in the Court's membership will not necessarily lead to a new jurisprudence, the Court may be willing to reconsider its recent precedents when it is presented with objective and credible evidence addressing the unsupported assumptions that undergirded those decisions.²

The purpose of this paper is to identify critical assumptions and conclusions upon which the most important campaign finance decisions rest, catalog relevant, already completed research, and identify further studies that would test such assumptions and conclusions. Such studies could be valuable not only to litigants and the courts, as they consider new campaign finance cases, but to policy makers as they attempt to build a record in support of new reforms.

Others have already begun the work of identifying unanswered research questions related to money in politics. Most notably, in 2013, the Campaign Finance Institute and the Bipartisan Policy Center published *An Agenda for Future Research on Money in Politics in the United States*, which advocated immediately studying the impacts of small-donor-based public financing and disclosure of campaign spending, among other things.³ In 2014, Renata Strause and Dan Tokaji released an important paper urging researchers to gather testimonial evidence from

² For example, in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007), the Court overruled a longstanding precedent holding that it was per se illegal under the Sherman Act for a manufacturer and distributor to agree on a minimum price that the distributor could charge for a manufacturer's goods. The decision to overrule precedent was based in part because "[r]espected economic analysts . . . conclude that vertical price restraints can have procompetitive effects").

³ THE CAMPAIGN FINANCE INSTITUTE & THE BIPARTISAN POLICY CTR., *An Agenda for Future Research on Money in Politics in the United States*, Aug. 2013, http://www.cfinst.org/pdf/books-reports/scholarworkinggroup/CFI-BPC_Research-Agenda_Report_Webversion.pdf.

legislators and staffers, empirical research, and press reports to show the conflicts of interest that campaign spending creates.⁴

Indeed, empirical research should be a key feature of the Court's developing jurisprudence: the current case law rests on a number of factual assumptions that may not withstand empirical testing. Of course, social scientists have already made invaluable contributions through study of money's influence on elections. For example, Michael Malbin has provided deep analysis of the effects of small-donor public financing systems,⁵ and Lynda Powell has convincingly shown how campaign contributions affect state legislators.⁶ Yet additional research about money in politics is necessary both to better understand the policies that can solve the most difficult problems and to provide an evidentiary foundation for those policies when they are inevitably challenged in court.

This report has three parts, exploring the types of research that will be most helpful to reach those goals. Part I reviews the campaign finance jurisprudence, explaining the most important Supreme Court holdings and how they limit current options for reform. Part II looks more closely at how the Court has used evidence in campaign finance cases and draws conclusions about when evidence is most important and how it can change outcomes. Part III then identifies key substantive empirical questions in campaign finance law, noting the research that has been done and explaining what additional research will be helpful for courts and policymakers in the future.

I. Campaign Finance Holdings

The Court's general approach to campaign finance jurisprudence has changed significantly in recent years, as widely reported in the wake of *Citizens United*. Yet since its seminal decision in *Buckley v. Valeo*, in 1976, the Court has consistently held that limits on political spending infringe upon First Amendment rights. The outcome of each case depends on the Court's assessment of (1) the degree to which a law infringes on that right, and (2) whether the law's benefits outweigh that infringement. Thus far, the Court has said that limits on contributions and independent political spending are only permissible if they prevent corruption or its appearance. Most importantly, *Buckley* held that limits on contributions directly to candidates are permissible because such contributions may cause corruption; conversely, an individual's independent spending (for example, money that a person uses to buy a TV advertisement) does not cause corruption and cannot be limited.

The Court's definition of corruption has been malleable, and the breadth of the definition is often the principal determinant of whether the Court will uphold a challenged law. In *Austin v. Michigan Chamber of Commerce*, decided in 1990, the Court upheld a ban on corporate spending to support or oppose state candidates by concluding that such spending could cause

⁴ Renata E. B. Strause & Daniel P. Tokaji, *Between Access and Influence: Building a Record for the Next Court*, 9 DUKE J. CONST. L. & PUB. POL'Y 179-221 (2014), <http://scholarship.law.duke.edu/djclpp/vol19/iss2/8> (hereinafter "*Building a Record*").

⁵ Michael Malbin et al., *Small Donors, Big Democracy: New York City's Matching Funds as a Model for the Nation and States*, 11 ELEC. L.J. 3 (2012).

⁶ LYNDIA W. POWELL, *THE INFLUENCE OF CAMPAIGN CONTRIBUTIONS IN STATE LEGISLATURES* (2012) (finding that campaign contributions can affect the content and passage of legislation in state legislatures).

corruption — not quid pro quo corruption, but “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s ideas.”⁷ For years, the Court continued to conceive of corruption broadly. In 2000, the justices upheld Missouri’s relatively low contribution limits and explained that the limits protected against a concern “not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors.”⁸

In the last decade, however, the Court has contracted the definition of corruption, and thereby contracted the scope of permissible campaign finance regulation. Under the Court’s new and changed jurisprudence, the only type of regulable corruption is quid pro quo corruption — “dollars for political favors.”⁹ Thus, the Court invalidated Vermont’s contribution limits for being too low, and invalidated the federal law that put an aggregate limit on the amount an individual could give to candidates, parties, and PACs combined. Most famously, the *Citizens United* Court struck down the federal ban on corporate and union election spending; that decision led to lower court holdings that allowed for super PACs, which are groups that may accept unlimited contributions as long as they don’t give money directly to candidates. And in a lesser-known but quite significant decision, the Court invalidated an Arizona law under which the government provided extra money to publicly-financed candidates if they faced a high-spending opponent.

Advocates, scholars, and the American public have sharply rebuked the Court for these decisions. Many commentators argue for a more fundamental rethinking of the constitutional basis for campaign finance laws. They have put forward various alternatives to simply abrogating *Citizens United*, ranging from an essential redefinition of the anti-corruption interest, to reinvigoration of the political equality ideal, to newer guiding principles like “political opportunity,” participation, and the need for “alignment” between the preferences of elected leaders and their constituents.¹⁰ While these ideas are analytically distinct, by and large they presuppose a common normative ideal for our democracy, one in which elected officials are responsive to all of their constituents and accumulations of private wealth do not play a decisive role in determining the distribution of political power.¹¹

The Court’s acceptance of one or more of these alternatives may shape the type of evidence that will be useful in future cases. For example, if the Court embraced participation as a value that could be considered when weighing the constitutionality of a regulation, evidence that political participation decreases when large donors spend more would be relevant in litigation challenging contribution or spending limitations. If a majority of justices recognized that

⁷ 494 U.S. 652, 660 (1990).

⁸ *Nixon v. Shrink Missouri Government PAC*, 228 U.S. 377, 389 (2000).

⁹ *McCutcheon v. FEC*, 134 S. Ct. at 1441 (quotation marks omitted).

¹⁰ In several recent articles, Professor Nicholas Stephanopoulos has argued that the government has a compelling interest in ensuring “alignment between voters’ policy preferences and their government’s policy outputs.” Nicholas O. Stephanopoulos, *Aligning Campaign Finance Law*, 101 VA. L. REV. 1425, 1428 (2015). This report uses the terms “alignment” and “misalignment” consistent with Professor Stephanopoulos’s definitions.

¹¹ See BRENNAN CTR. FOR JUSTICE, *RETHINKING CAMPAIGN FINANCE: TOWARDS A PRO-DEMOCRACY JURISPRUDENCE* (2015), <https://www.brennancenter.org/publication/rethinking-campaign-finance-toward-pro-democracy-jurisprudence>.

political spending may unduly influence legislators' actions, even if they do not engage in direct bribery, it would affect the jurisprudence concerning limits on spending that causes such influence. And if the Court concluded that it is valuable to ensure that people from all parts of society can mount viable political campaigns, regardless of whether they have the support of wealthy donors, it might look differently at various types of laws intended to provide pathways for such potential candidates.

Though there is a widespread movement to rethink campaign finance law, some scholars and political leaders have held fast to their objections to limits on money in politics. Those vocal opponents of regulation contend that spending restrictions would reduce valuable political discussion, silence certain potential speakers, stifle electoral competition and help entrench incumbents. Many such opponents once favored disclosure as a means sufficient to prevent corruption, though in the past few years some have begun to argue that transparency fosters harassment and discourages speech. The empirical evidence research proposed below will attempt to determine the validity of such concerns.

II. The Court's Approach to Evidence

In this Part, we examine how the Supreme Court has approached evidence in campaign finance cases, and we make observations intended to provide guidance to social science researchers who seek to answer empirical questions that will be most useful to the Court in future cases.

Courts unavoidably rely on facts to reach their decisions, either explicitly or implicitly,¹² and constitutional scholars and empiricists are beginning to expand empirical study of constitutional doctrine. Recently, scholars have sought to test several hypotheses or facts relied upon in Supreme Court doctrine, such as: whether the appearance of influence or access by campaign spenders will cause the electorate to lose faith in democracy;¹³ whether majority-minority legislative districts communicate an "expressive harm" to the electorate because of their reliance on race;¹⁴ and whether the best test of truth is an idea's power to be accepted in the unregulated marketplace of ideas.¹⁵

The Court has long recognized a need to determine facts surrounding campaign laws it reviews. In the past, that need led the Court to rely on voluminous record evidence, consisting of empirical studies, legislative testimony, and evidence of public opinion. For example, in *McConnell v. FEC*, the Court reviewed "testimony and declarations of over 200 witnesses and 100,000 pages of material."¹⁶ In *Randall v. Sorrell*, both the controlling opinion and the dissent extensively analyzed studies addressing how Vermont's contribution limits would affect the

¹² See, e.g., David L. Faigman, "Normative Constitutional Fact-Finding": Exploring the Empirical Component of Constitutional Interpretation, 139 U. PA. L. REV. 541, 556-65 (1991); Tom Stacy, *The Search for the Truth in Constitutional Criminal Procedure*, 91 COLUM. L. REV. 1369, 1437 (1991).

¹³ Rebecca L. Brown & Andrew D. Martin, *Rhetoric and Reality: Testing the Harm of Campaign Spending*, 90 N.Y.U. L. REV. 1066 (2015).

¹⁴ Stephen Ansolabehere & Nathaniel Persily, *Testing Shaw v. Reno: Do Majority-Minority Districts Cause Expressive Harms?*, 90 N.Y.U. L. REV. 1041 (2015).

¹⁵ Daniel E. Ho & Frederick Schauer, *Testing the Marketplace of Ideas*, 90 N.Y.U. L. REV. 1160 (2015).

¹⁶ Strause & Tokaji, *Building a Record* at 196.

competitiveness of elections.¹⁷ Even Justice Kennedy, who has led the Court’s majority in *Citizens United* and other recent cases, once proclaimed that his mind could be changed based on evidence about how a system worked, saying he would “leave open the possibility that Congress, or a state legislature, might devise a system in which there are some limits on both expenditures and contributions.”¹⁸

While empirical conclusions still play a role in the Court’s campaign finance jurisprudence, today’s Court has chosen not to verify such conclusions through record evidence. For example, the Court in *Citizens United* famously proclaimed that “independent expenditures . . . do not give rise to corruption or the appearance of corruption”¹⁹ without providing any evidence supporting that conclusion. This tendency has been a major source of disagreement between the five-justice majority and the four justices who have dissented in recent cases.²⁰

There is a strong likelihood that a future Court will once more recognize the need for developing a deep factual record before making conclusions about the operation of campaign finance laws. When that occurs, both the supporters and opponents of the law being challenged will need to be prepared to answer factual questions that the Court has, in some cases, assumed without evidence. Thus, it is crucial for advocates to use social science research to support any claims they plan to make in court.

Though the Court has been reluctant to rely heavily on empirical evidence in recent cases, it has done so to varying degrees in the past. In past cases, the Court has (1) demonstrated a particular concern with evidence addressing specific effects laws may have on elections or campaigns; (2) often suspected that campaign finance reform laws are intended to help incumbents retain their seats; (3) explained that novel arguments for or against campaign finance reform may merit a greater focus on supporting evidence.

1. *Evidence addressing the specific effects laws may have on elections or campaigns*

Starting with *Buckley*, the Court has often sought to answer questions about how a law will alter future elections. Striking down FECA’s limit on independent expenditures, the Court observed that the law “would make it a federal criminal offense for a person or association to place a single one-quarter page advertisement ‘relative to a clearly identified candidate’ in a major metropolitan newspaper.”²¹ As noted by Strause and Tokaji, when it upheld the McCain-Feingold law in *McConnell*, the Court relied on voluminous testimony and documentary evidence “paint[ing] a vivid picture of a Congress besieged by conflicts of interest.”²² The Court was heavily influenced by specific evidence of how national parties peddled access to candidates and officeholders.²³ And, as noted above, the justices in *Randall* looked closely at studies

¹⁷ 548 U.S. at 253, 279.

¹⁸ *Shrink Missouri*, 528 U.S. at 409.

¹⁹ 558 U.S. at 357.

²⁰ *See, e.g.*, 558 U.S. at 457 (Stevens, J., dissenting); *see also* Michael M. Franz, *Addressing Conservatives and (Mis)Using Social Science in the Debate Over Campaign Finance*, 51 TULSA L. REV. 359, 367 (2015) (noting “frustrat[ion] . . . where the Roberts Court sometimes embraces and sometimes dismisses a need for evidence”).

²¹ 424 U.S. at 40.

²² Strause & Tokaji, *Building a Record* at 210.

²³ 540 U.S. at 124-25, 148-49.

concerning how proposed contribution limits would affect the ability of challengers to disseminate their message to the public.²⁴ Similarly, the Court has several times examined public opinion to determine how a decision might affect confidence in our democracy. In *Caperton v. Massey*, for example, the majority noted that “over 67% of West Virginians doubted Justice Benjamin would be fair and impartial.”²⁵

2. Campaign finance reform laws and their effects on incumbency

Other than the concept of corruption, perhaps the most common theme discussed by justices of all ideological stripes is the concern that contribution and expenditure limits are designed by incumbents to protect their seats. Incumbent protection was the principal concern discussed by Justice Breyer in *Randall*,²⁶ and was also addressed by Justices Thomas,²⁷ Souter,²⁸ and Stevens.²⁹ Incumbent protection was also discussed in *Shrink Missouri*,³⁰ by the dissent in *Austin*,³¹ was obliquely mentioned in *Davis*,³² and is commonly discussed in lower court opinions.³³

Justice Breyer’s concern over incumbent protection may be the most significant, since he has generally been amenable to common sense reforms and has relied on evidence in his decisionmaking. While there has already been some research done on how contribution limits affect incumbency rates,³⁴ a more extensive set of empirical data may be necessary. Further, it is not clear whether the justices would express the same concern when assessing a law passed by ballot initiative.³⁵

²⁴ 548 U.S. at 253, 279.

²⁵ 556 U.S. at 875. *See also* *FEC v. Wisconsin Right to Life*, 551 U.S. 470 n. 6 (using a poll about voter knowledge to conclude that television viewers would not always conclude that ads mentioning candidates were election-related).

²⁶ *Id.* at 253, 255-56. Vermont’s statute addressed this concern to some degree, limiting incumbents to 85% or 90% of the expenditure limits applied to challengers. *Id.* at 237-38.

²⁷ *Id.* at 268.

²⁸ *Id.* at 287.

²⁹ *Id.* at 279.

³⁰ 528 U.S. at 389 n.4; *id.* at 402 (Breyer, J., concurring).

³¹ 494 U.S. at 692-93 (Scalia, J., dissenting).

³² 554 U.S. at 741.

³³ *See, e.g.,* *Lair v. Bullock*, 697 F.3d 1200, 1209-11 (9th Cir. 2012); *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 305 (4th Cir. 2008). *But see* *Ognibene v. Parkes*, 671 F.3d 174, 192 (2d Cir. 2011) (“The doing business limits here . . . seek to avoid stacking the deck in favor of incumbents, to whom donors with business dealings disproportionately contribute.”).

³⁴ Ciara Torres-Spelliscy, Kahlil Williams, & Dr. Thomas Stratmann, BRENNAN CTR. FOR JUSTICE, *Electoral Competition and Low Contribution Limits* (2009) <http://www.brennancenter.org/sites/default/files/legacy/publications/Electoral.Competition.pdf> (concluding that “contribution limits of \$500 or less for individual contributors and political action committees (PACs) made elections for state assembly more competitive”).

³⁵ Courts sometimes express concern with incumbent protection even when limits in question were passed by ballot initiative rather than by the legislature. *See* 697 F.3d at 1209-11.

3. Novel arguments for or against campaign finance reform and the evidence supporting them

Part of the reason that use of evidence varies between cases is because courts are more willing to uphold laws based on long-recognized interests or long-running problems. In *Shrink Missouri*, for example, the Court upheld Missouri’s fairly low contribution limits even though the state provided only modest evidentiary support.³⁶

Viewed another way, it could be argued that if a campaign finance restriction has a long pedigree, the evidentiary burden will be switched to the party attempting to invalidate the restriction.³⁷ In *Shrink Missouri*, after explaining that the state need not present voluminous evidence in support of its law, the Court noted that the challengers had not provided any indication that the contribution limits would “have any dramatic[ally] adverse effect on the funding of campaigns and political associations.”³⁸ The plaintiffs in *Randall* did provide such evidence, and the Court invalidated Vermont’s contribution limits. Significantly, Justice Breyer voted to uphold the limits at issue in *Shrink Missouri*, but voted with the plurality in *Randall*.

Similarly, previous decisions matter greatly: a record may need to be more thoroughly developed if a previous case has come to a conclusion that conflicts with current evidence, even if the first case was not based on evidence. While judges have shown an inconsistent willingness to seriously review evidence, they are probably less willing to look at evidence demonstrating that a court’s prior conclusion is incorrect, even if the prior conclusion was a factual or quasi-factual one made without the benefit of evidence. *Randall* helps exemplify this trend. In that case, the state provided evidence of the damaging effects that occurred when candidates spent excessive time fundraising. While Justice Souter’s dissent discussed the evidence and took it seriously, Justice Breyer relied on *Buckley* to reject the argument without seriously reviewing the new evidence, despite the fact that the other parts of his opinion relied heavily on evidence.³⁹

III. Evidentiary Conclusions and Research Questions

This part identifies important research questions that will encourage studies designed to help courts assess the effects of proposed campaign finance reforms. When such policies are enacted, the resulting research will provide courts with data demonstrating whether the laws serve their purposes. To provide background and guidance, this part also summarizes existing research relevant to the topics covered. (We attempt only to summarize the research that has been done in each subject area, and do not purport to provide an exhaustive list of relevant

³⁶ 528 U.S. at 391. In *Wagner*, the D.C. Circuit upheld the federal government’s ban on contributions from contractors citing historical evidence of corruption in the contracting process starting in the 1930s. 793 F.3d 1 at 11.

³⁷ *But see McCutcheon*, 134 S. Ct. at 1452-56.

³⁸ 528 U.S. at 395.

³⁹ *Id.* at 245 (“In our view, it is highly unlikely that fuller consideration of this time protection rationale would have changed *Buckley*’s result. The *Buckley* Court was aware of the connection between expenditure limits and a reduction in fundraising time.”). The Court acted similarly in *FEC v. NCPAC*, 470 U.S. 480 (1985), a case in which the plaintiffs challenged a federal law limiting the independent expenditures of groups supporting presidential candidates who accepted public financing. Though the Court had already held in *Buckley* that independent spending was not corrupting, the FEC submitted significant evidence attempting to demonstrate corruption and its appearance, including evidence showing that the Reagan Administration provided government appointments to those connected with groups that spent on campaigns. The Court brushed the evidence aside quickly, simply accepting the district court’s finding that it was inadequate. *Id.* at 499.

studies). It is divided into five sections that correspond to major issues considered by the Supreme Court, several of which are discussed above: (1) limits on independent political spending; (2) limits on direct contributions; (3) public financing laws; (4) disclosure laws; and (5) the role of corporations, other business entities, and unions.

A. Limits on political spending

1. The Court has assumed that independent spending does not cause corruption or its appearance, that such limits do not serve any compelling government interest, and that limits on candidate spending are not necessary to protect the time of incumbent officeholders

In *Citizens United*, the Court held that “independent expenditures . . . do not give rise to corruption or the appearance of corruption.”⁴⁰ Because the Court also said that preventing corruption is the only permissible goal of most campaign finance reforms, its holding has been interpreted to mean that no limits on spending by wealthy individuals, corporations, or super PACs are permissible.

The Court’s holding on independent spending was premised on a number of different empirical conclusions. First, the Court determined — based largely on its review of the *McConnell* record compiled more than a decade ago — that there was no specific evidence of political favors being traded for independent expenditures as a quid pro quo.⁴¹ The Court reasoned that this was because independent expenditures are “[b]y definition . . . not coordinated with a candidate,” and so can never be expected to inspire a level of gratitude comparable to direct contributions.⁴² “In fact,” the Court claimed, “there is only scant evidence that independent expenditures even ingratiate.”⁴³ This dearth of evidence made sense to the Court because it believed (following *Buckley*) independent expenditures to not be especially valuable to candidates;⁴⁴ indeed, the *Buckley* Court suggested they might often backfire.⁴⁵ As a result, there was no risk of even an appearance of corruption from unlimited independent spending; at most there would be an “appearance of influence or access,” which the Court believed would “not cause the electorate to lose faith in our democracy.”⁴⁶

All of these conclusions could be addressed through new empirical research, starting with the Court’s premise that there is no actual evidence of quid pro quo corruption or its appearance tied to independent expenditures. Additional research would also be useful to address whether so-called independent expenditures actually are “independent” of candidates in any real sense; there is already some indication that many of them are not.⁴⁷ And should the Court adopt a broader view of corruption as described above, a variety of other possible studies would become

⁴⁰ 558 U.S. at 357.

⁴¹ *Id.* at 360.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 357 (quoting *Buckley*, 424 U.S. at 47).

⁴⁵ 424 U.S. at 47 (“Unlike contributions, such independent expenditures may well provide little assistance to the candidate’s campaign and indeed may prove counterproductive.”).

⁴⁶ *Citizens United*, 558 U.S. at 360.

⁴⁷ See Chisun Lee et al., BRENNAN CTR. FOR JUSTICE, *After Citizens United: The Story in the States* (2014), <https://www.brennancenter.org/publication/after-citizens-united-story-states>.

relevant, such as research into the efficacy of independent spending and the actual level of gratitude it inspires from elected officials; its impact on actual policy outcomes; whether unlimited independent spending creates barriers to entry shutting certain actors out of the political marketplace; and whether unlimited independent spending does in fact lead the public to disengage with our democracy (for example by lowering voter turnout). The proposed research will also address whether spending by certain political actors, such as potential government contractors or lobbyists, is especially likely to influence policy outcomes.

In addition to invalidating limits on spending from outside groups and individuals, the Court has held that the government may not limit the amount a campaign spends on an election. In *Randall v. Sorrell*, the State of Vermont argued that such limits were necessary to allow incumbent officeholders to concentrate on their duties of office, rather than on fundraising. The Court rejected that argument with almost no discussion.⁴⁸ Yet data and legislator commentary demonstrates that in our current system many legislators spend between 30% and 70% of their time raising money.⁴⁹ We propose research below to more fully explore how such fundraising effects the operation of government.

We discuss these ideas and several others below.

2. *Research on the effects of independent spending*

Research on whether political spending affects government policy

Several studies by social scientists have indicated that money influences government policy. Many existing studies focus on the influence of direct contributions to candidates rather than on the influence of super PAC and other technically independent spending, likely because contributions are much more easily traceable and until recently dominated political spending. However, we include some research related to contributions here in order to provide a model for the type of research that may be helpful as applied to independent spending.

- LYNDIA W. POWELL concludes that campaign contributions can affect the content and passage of legislation in state legislatures. *THE INFLUENCE OF CAMPAIGN CONTRIBUTIONS IN STATE LEGISLATURES* (2012).
- Daniel P. Tokaji & Renata E.B. Strause, “document the effect of [independent spending] on federal elections, based on conversations with those who are most directly involved.” *The New Soft Money: Outside Spending in Congressional Elections* (2014), <http://moritzlaw.osu.edu/thenewsoftmoney/wp-content/uploads/sites/57/2014/06/the-new-soft-money-WEB.pdf>.
- Martin Gilens and Benjamin I. Page do not directly address the influence of campaign spending, but find that elected officials responded to policy preferences of economic elites and groups representing business interests, but that “the policy preferences of the average American have only a minuscule . . . impact upon public policy.” *Testing Theories of American Politics: Elites, Interest Groups,*

⁴⁸ 548 U.S. at 243.

⁴⁹ See, e.g., Brent Ferguson, *Congressional Disclosure of Time Spent Fundraising*, 23 CORNELL J.L. & PUB. POL’Y 1, 13 (2013).

and Average Citizens, 12 PERSPECTIVES ON POL. 564. 575 (2014), available at https://scholar.princeton.edu/sites/default/files/mgilens/files/gilens_and_page_2014_testing_theories_of_american_politics.doc.pdf.⁵⁰

- Adam Bonica, Nolan McCarty, Keith T. Poole, and Howard Rosenthal posit that “the kinds of government policies that could have ameliorated the sharp rise in inequality have been immobilized” by several factors, including “feedback” from wealthy campaign spenders. *Why Hasn’t Democracy Slowed Rising Inequality?*, 27 J. ECON. PERSPECTIVES 103, 121 (2013), <http://pubs.aeaweb.org/doi/pdfplus/10.1257/jep.27.3.103>.
- Patrick Flavin “finds that states with stricter campaign finance laws devote a larger proportion of their annual budget to public welfare spending in general and to cash assistance programs in particular,” but that “there is no relationship between the strictness of campaign finance laws and spending decisions for non-redistributive policy areas.” *Campaign Finance Laws, Policy Outcomes, and Political Equality in the American States* 68 POL. RESEARCH Q. 77, 77 (2015), <http://prq.sagepub.com/content/68/1/77.full.pdf+html>.

Research on how independent spending affects participation and pre-election debate

- Rebecca L. Brown & Andrew D. Martin use surveys to test citizens’ faith in democracy, and conclude that “it does not take a bribe to corrode [people’s] faith in the democratic process.” *Rhetoric and Reality: Testing the Harm of Campaign Spending*, 90 N.Y.U. L. REV. 1066, 1090 (2015).
- Nathaniel Persily & Kellie Lammie conclude that while “a large majority of Americans believe that the campaign finance system contributes to corruption in government, the data do not suggest that campaign finance reform will have an effect on these attitudes.” *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 120 U. PENN. L. REV. 119, 120 (2004).
- Journalists and watchdogs reported that the 2014 election was the most expensive midterm ever, but was the first election since 1990 in which fewer people gave money than in the previous election. Russ Choma, *Final Tally: 2014’s Midterm Was Most Expensive, With Fewer Donors*, CTR. FOR RESPONSIVE POLITICS, Feb. 18, 2015, <http://www.opensecrets.org/news/2015/02/final-tally-2014s-midterm-was-most-expensive-with-fewer-donors/>.
- Nicholas Confessore, Sarah Cohen, & Karen Yourish explained that a year before the 2016 election, a tiny sliver of the American population accounted for almost half of all election spending. *Just 158 families have provided nearly half of the*

⁵⁰ The study by Gilens and Page was criticized by several political scientists. See Peter K. Enns, *Relative Policy Support and Coincidental Representation*, 13 PERSPECTIVES ON POL. 1053 (2015); Omar S. Bashir, *Testing Inferences about American Politics: A Review of the “Oligarchy” Result*, Research & Pol. Oct. 2015, 2 (4), <http://rap.sagepub.com/content/2/4/2053168015608896.full.pdf+html>; J. Alexander Branham, Stuart N. Soroka, & Christopher Wlezien, *When Do the Rich Win?* (Working Paper), <http://jabranham.com/papers/MPSA-when-do-the-rich-win.pdf>. Gilens and Page have written responses to several of the critiques. See, e.g., Martin Gilens & Benjamin I. Page, *Critics Argued with our analysis of U.S. political inequality. Here are 5 ways they’re wrong*, WASH. POST, May 23, 2016, <https://www.washingtonpost.com/news/monkey-cage/wp/2016/05/23/critics-challenge-our-portrait-of-americas-political-inequality-heres-5-ways-they-are-wrong/>.

early money for efforts to capture the White House, N.Y. TIMES, Oct. 10, 2015, http://www.nytimes.com/interactive/2015/10/11/us/politics/2016-presidential-election-super-pac-donors.html?_r=0.

- Daniel E. Ho & Frederick Schauer used two case studies to test whether “[t]he best test of truth is [an] idea’s power to be accepted in the competition of the market.” *Testing the Marketplace of Ideas*, 90 N.Y.U. L. REV. 1160 (2015).

Research on time and effort spent fundraising

- Vermont elected officials and donors extensively documented the amount of time candidates spent fundraising and the manner in which it affected incumbents’ priorities. See *Randall v. Sorrell*, 548 U.S. 230 (2006), Brief of Vermont Public Interest Research Group 16-19, 2006 WL 325190.
- Mark Alexander has documented statements from legislators about the time and travel required by constant fundraising. *Let Them Do Their Jobs: The Compelling Government Interest in Protecting the Time of Candidates and Elected Officials*, 37 LOY. U. CHI. L.J. 669, 676 (2006).

3. Proposed questions concerning independent spending

Questions on whether spending affects the actions of elected officials

- Does a person’s contributions to groups that engage in independent spending affect the person’s ability to secure a meeting with an elected official or senior adviser?⁵¹
- Has misalignment⁵² increased, decreased, or stayed the same as political spending has risen in recent years?
- Is policy more or less aligned with public preference in states with greater levels of very large contributions and expenditures?
 - If a state has low or moderate contribution limits but high levels of independent spending, is its misalignment likely to be greater or less than that of a state with similar contribution limits and low levels of independent spending? How would it compare to a state without contribution limits, or with very high contribution limits?
- Do candidates who are supported by super PACs (including single-candidate super PACs) believe that spending by those super PACs is valuable?
- How much do donors with specific policy requests give to single-candidate super PACs?
 - Do those donors overlap with donors to a candidate’s campaign?
 - If so, how extensive is the overlap?
- If a firm’s tax benefits are at stake, does that affect how much business entities and their directors and managers give to independent groups?⁵³

⁵¹ Two political scientists have tested this question with regard to direct contributions to candidates. Joshua L. Kalla & David E. Broockman, *Congressional Officials Grant Access to Individuals Because They Have Contributed to Campaigns: A Randomized Field Experiment* AM. POL. SCI. REV. (forthcoming), <http://cg4tx.org/wp-content/uploads/2014/11/kalla-broockman-donor-access-to-lege.pdf> (study finding that contributors were more likely than non-contributors to be granted meetings with senior policymakers employed by members of Congress).

⁵² See note 10, *supra* (explaining use of the term “misalignment”).

- If campaign spending by a particular industry rises in an election cycle, will that affect policy outcomes that specifically affect the industry in the next legislative session?
- Is there a return on investment for business entities that contribute to super PACs or other independent spending entities?⁵⁴ If so, what is the average return?
- Are there behavioral or other indicators that would reveal whether candidates tacitly agree to give special treatment to contributors/supportive outside spenders (or those who fund outside spenders) once in office?

Questions on whether independent spending from certain spenders is more likely to influence the actions of elected officials

- Does spending by those seeking contracts from the government have a different effect on government action than spending by other entities?
 - Is such spending targeted to government officials who have power over the contract in question?
- Does spending by lobbyists have a different effect on government action than spending by other entities?
 - Is such spending targeted to officials who have significant influence on the issues that are the subject of the spender's lobbying?

Questions on electoral competition and incumbent protection

- Does heavy outside spending have an effect on incumbent reelection rate?
- How frequently does outside spending (above a certain threshold) favor incumbents, and how frequently does it favor challengers?
- Would the application of candidate spending limits more often decrease the spending of incumbents or of challengers? Is the result the same in competitive races?
- Are large political donors more likely or less likely to see their favored candidates elected than small donors or non-donors?

Questions on political participation and opportunity

- Does high campaign spending from large donors in a certain state affect general political participation within that state?
 - Is there a contrast between participation rates in states with high contributions versus those with moderate/low contribution limits but high independent spending?
- If citizens believe that big spenders have more access to government officials, does it affect their willingness to volunteer, make contributions, or vote?
- Do independent expenditure advertisements affect voter turnout?
- Are citizens more or less likely to have an accurate and broad understanding of public policy if there are limits on spending?

⁵³ For a similar analysis with regard to contributions, see Sanjay Gupta & Charles W. Swenson, *Rent Seeking by Agents of the Firm*, J.L. ECON. VOL XLVI (Apr. 2003).

⁵⁴ For a discussion of potential rates of return from political contributions, see Stephen Ansolabehere, James M. Snyder, Jr., & Michiko Ueda, *Campaign Finance Regulations and the Return on Investment from Campaign Contributions* (unpublished manuscript 2004), http://scholar.harvard.edu/jsnyder/files/8_cf.return.regs__0.pdf.

- Is the ability of political groups that rely principally on small donors to purchase valuable media (such as television commercials) affected by rising prices paid by groups that spend more money?
- If a potential candidate has little likely support from large donors, does that affect the likelihood of the potential candidate entering the race?

Questions on the effects of constant fundraising by officeholders

- How much time does the average officeholder spend raising money?
- If the public were aware of the amount of time their representatives or others spend raising money, would that affect their voting behavior or their general political participation?
- Do elected officials spend more time reviewing legislation or performing other duties of office in states in which spending is lower and officials spend less time raising money?

Other questions

- Are most super PACs truly independent of the candidate(s) they support?
- Does influence by lobbyists vary depending on whether the lobbyist or his or her clients spend money on elections? Does it matter whether that money is spent in support of the legislator that is being lobbied?

B. Limits on contributions

1. The Court has concluded that aggregate contribution limits are unnecessary to prevent corruption, and that low contribution limits decrease competition

While the Court in *Buckley* upheld limits on direct contributions to candidates, and such limits are still generally permissible, the Court has twice invalidated contribution limits in recent years. In *Randall v. Sorrell*, the Court struck down Vermont’s contribution limits because they were too low, concluding that the limits imposed “substantial restrictions on the ability of candidates to raise the funds necessary to run a competitive election, on the ability of political parties to help their candidates get elected, and on the ability of individual citizens to volunteer their time to campaigns.”⁵⁵ In *McCutcheon v. FEC*, the Court invalidated the federal rule that limited an individual’s overall contributions to candidates, PACs, and parties, concluding that the limits did “little, if anything” to “serv[e] the permissible objective of combatting corruption.”⁵⁶

The Court’s decision on Vermont’s contribution limits was premised on several empirical conclusions. First, reviewing conflicting studies, the Court determined that the limits would make it more difficult for challengers to compete with incumbents, because they would receive less money than they had in the past.⁵⁷ Implicitly, this conclusion assumes that a similar reduction in incumbent contribution receipts would not increase challengers’ opportunity to compete. It also presumes that candidates would be unable to adjust to new contribution limits by raising additional money from small contributors, thereby ameliorating any negative fundraising

⁵⁵ 548 U.S. at 253.

⁵⁶ 134 S. Ct. at 1442.

⁵⁷ 548 U.S. at 253.

effect caused by the contribution limits. In its decision, the Court also asserted that there was no evidence in the record demonstrating that low contribution limits were particularly necessary in Vermont, due to an increased threat of corruption.⁵⁸

In its *McCutcheon* opinion invalidating the federal aggregate contribution limits, the Court made several empirical pronouncements as well. Most importantly, the Court concluded that “[s]pending large sums of money in connection with elections, but not in connection with an effort to control the exercise of an officeholder’s official duties,” does not cause corruption.⁵⁹ Likewise, it does not create a risk of corruption even if large spending provides donors with “influence over or access to elected officials or political parties.”⁶⁰ The Court also found that there was not a significant threat that large checks to parties or PACs would be used to circumvent the limits on contributions to existing candidates, and that “there is not the same risk of *quid pro quo* corruption or its appearance when money flows through independent actors to a candidate.”⁶¹

New research would be helpful to determine the validity of the Court’s conclusions about contribution limits. Importantly, it could determine whether low limits indeed disadvantage challengers and prevent them from raising funds that they currently raise through larger contributions. It could examine to what extent large donors to parties and PACs use such contributions to circumvent limits on contributions to candidates. And if the Court adopts a broader definition of corruption that is focused less on direct deal-making, research could determine whether and how large contributions to parties, PACs, and groups of candidates affect policy outcomes.

2. Research on contribution limits

Research on how contribution limits affect electoral competition

- Alexander Fourmaies & Andrew B. Hall look generally at incumbent and challenger fundraising and find that incumbency results in a 20-25 percentage point increase in donations to the incumbent’s party at both the state and federal level. *The Financial Incumbency Advantage: Causes and Consequences*, 76 J. POL. 711 (2014) <http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=9293059&fileId=S0022381614000139>.
- Conor M. Dowling & Michael G. Miller find that higher spending on behalf of incumbents was associated with higher *challenger* vote share, but note that such correlation may be because weak incumbents or strong challengers attract more funding than other candidates. SUPER PAC!: MONEY, ELECTIONS, AND VOTERS AFTER *CITIZENS UNITED* 81-82 (2014).
- Ciara Torres-Spelliscy, Kahlil Williams, & Dr. Thomas Stratmann conclude that “contribution limits of \$500 or less for individual contributors and political action committees (PACs) made elections for state assembly more competitive.” BRENNAN CENTER FOR JUSTICE, *Electoral Competition and Low Contribution Limits* (2009)

⁵⁸ *Id.* at 261.

⁵⁹ 134 S. Ct. at 1450.

⁶⁰ *Id.* at 1451 (quotation marks omitted).

⁶¹ *Id.* at 1452.

- <http://www.brennancenter.org/sites/default/files/legacy/publications/Electoral.Competition.pdf>.
- Thomas Stratmann finds that “elections are more competitive when states restrict contributions.” *Do Low Contribution Limits Insulate Incumbents from Competition?*, 9 ELEC. L.J. 125 (2010).
 - Thomas Stratmann & Francisco Aparicio-Castillo conclude that contribution limits lead to closer elections. *Competition Policy for Elections: Do Campaign Contribution Limits Matter?*, PUBLIC CHOICE, Vol. 127. No 1/2 (2006) at 177-206.
 - Kihong Eom & Donald A. Gross analyze contribution limits and find “no support for an increased bias in favor of incumbents resulting from the presence of contribution limits.” *Contribution Limits and Disparity in Contributions Between Gubernatorial Candidates*, 59 POL. RESEARCH Q. 99 (2006).
 - Kedron Bardwell concludes that “[l]evels of individual contribution limits do not provide an advantage in campaign spending to incumbents or challengers.” *Money and Challenger Emergence in Gubernatorial Primaries*, 55 POL. RESEARCH Q. 653, 662 (2002).
 - The New York City Campaign Finance Board finds that incumbents had “much greater access” to large donations from city contractors than challengers in the 2005 election. *Public Dollars for the Public Good: A Report on the 2005 Elections* 122 (2006) https://www.nyccfb.info/PDF/per/2005_PER/2005_Post_Election_Report.pdf.
 - John R. Lott, Jr. concludes that “campaign donation regulations clearly reduce the competitiveness in political races.” *Campaign Finance Reform and Electoral Competition*, PUB. CHOICE, Vol. 129 No. 3/4 at 263-300 (2006). <http://johnrlott.tripod.com/pubchcampaignfin.pdf>.
 - Donald Gross, Robert Goidel, & Todd Shields conclude that spending limits can have an indirect and negative effect on electoral competition and that contribution limits are associated with increased disparities in candidate spending and increased incumbent spending. *State Campaign Finance Regulations and Electoral Competition*, AMERICAN POL. RESEARCH, Vol 30., No. 2 (2002) <http://mavdisk.mnsu.edu/parsnk/2009-10/POL%20371-summer%2010/State%20Politics/gross%20et%20al.pdf>.
 - Adam Meirowitz provides evidence to support the claim that campaign finance regulation protects incumbents. *Electoral Contests, Incumbency Advantages, and Campaign Finance*, 70 J. POL. 681 (2008).

Research on whether large contributions to parties, PACs, and other candidates can increase a donor’s influence or access

- The Court in *McConnell v. FEC* cited voluminous evidence that “lobbyists, CEOs, and wealthy individuals” donated money to political parties to “secur[e] influence over federal officials” and that such contributions led to “manipulations of the legislative calendar, leading to Congress’ failure to enact, among other things, generic drug legislation, tort reform, and tobacco legislation.” 540 U.S. 93 (2003).
- Jennifer L. Brown, Katharine D. Drake, & Laura Wellman, conclude that firms who give consistently to politicians, including through PACs, are likelier to pay lower tax rates. *The benefits of a relational approach to corporate political activity: Evidence*

- from political contributions to tax policy makers*, 37 J. AMER. TAX. ASS'N 69 (2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2209373&download=yes.
- Michael J. Barber concludes that “senators’ preferences reflect the preferences of the average donor better than any other group” and “diverge dramatically from the preference of the average voter in the state.” *Representing the Preferences of Donors, Partisans, and Voters in the U.S. Senate*, 80 PUB. OPINION Q. 225 (2016) http://static1.squarespace.com/static/51841c73e4b04fc5ce6e8f15/t/56e97017b09f951532074016/1458139160759/POQ_Early_Access.pdf.
 - Lynda W. Powell concludes that campaign contributions can affect the content and passage of legislation in state legislatures. *THE INFLUENCE OF CAMPAIGN CONTRIBUTIONS IN STATE LEGISLATURES* (2012).
 - Christopher Witko demonstrates that “PACs are able to influence voting on non-ideological/non-visible issues, but are more likely to influence participation on ideological/visible issues.” *PACs, Issue Context, and Congressional Decisionmaking*, 59 POL. RESEARCH Q. 283 (2006) <http://prq.sagepub.com/content/59/2/283.short>.
 - Eleanor Neff Powell determines that members of Congress are more likely to vote for legislative priorities of other members who have provided them with financial assistance. *Legislative Consequences of Fundraising Influence* (Working Paper 2015) http://www.eleanorneffpowell.com/uploads/8/3/9/3/8393347/powell__2015_-_legislative_consequences_of_fundraising_influence.pdf.
 - Stephen Ansolabehere, John M. De Figueiredo, & James M. Snyder Jr. review several studies and explain that “[o]verall, PAC contributions show relatively few effects on voting behavior.” *Why is There so Little Money in U.S. Politics?*, 17 J. ECON. PERSPECTIVES 105, 114 (2003).

Research on circumvention of contribution limits

- Paul Blumenthal explains how, after *McCutcheon v. FEC*, parties have set up joint fundraising committees in order to circumvent base contribution limits. *Democrats are Proving Samuel Alito and John Roberts Wrong*, HUFFINGTON POST, Jan. 5, 2016, http://www.huffingtonpost.com/entry/hillary-victory-fund-campaign-finance_us_5682dcf1e4b0b958f65a9501.
- Bob Biersack writes that Democrats’ joint fundraising committee sends checks to state parties, who immediately send them back to the national party. *How the parties worked the law and got their mojo back*, CTR. FOR RESPONSIVE POLITICS, Feb. 19, 2016, <https://www.opensecrets.org/news/2016/02/how-the-parties-worked-the-law-and-got-their-mojo-back/>.

3. Proposed questions concerning contribution limits

Questions on how low contribution limits affect electoral competition

- How do low contribution limits affect the average gap between incumbent fundraising and challenger fundraising?
 - Is that effect different in competitive races?
- When contribution limits have been lowered, how has it affected fundraising in the past, both for challengers and incumbents?

- Is it true that many candidates can alter their fundraising such that lowering contribution limits will have a minimal effect on the total amount they can raise?
- Do lower contribution limits affect the amount of time candidates spend fundraising?

Questions on whether aggregate limits prevent corruption

- Do jurisdictions with base contribution limits, but no aggregate limits, experience greater or lesser misalignment than jurisdictions with both types of limit?
- If a donor gives large amounts to a certain party or elected members of that party, does that affect the likelihood that the donor will be granted a meeting with an elected member of that party?
- Is an elected official likely to be aware of the major donors to his party and other elected officials of his party, even if such donors give no money to that elected official?

Questions on whether donors can circumvent aggregate limits

- Is there evidence that donors to parties or PACs often intend that their donations to be given to certain elected officials, and that the money is often transferred according to the donor's wishes?
- If a donor has given the maximum contribution to a certain candidate, and has also given money to the candidate's party or a supportive PAC, is it likely that the original candidate recipient will receive more support from the party or PAC than she might otherwise receive?

C. Public financing and laws to encourage its use

1. The Court has concluded that trigger funds discourage private election spending by opponents of publicly-financed candidates

In *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, the Court held that the government may not provide extra funding for publicly-financed candidates in response to spending supporting a privately-funded opponent. Arizona and other states had passed public financing laws containing such "trigger" provisions to encourage candidates to enter public financing systems, when they might otherwise be deterred by the threat of overwhelming outside spending. The Court concluded that the law created a burden for privately-financed candidates and their supporters, causing them to "reduce[] their speech."⁶² It relied in part on examples from the record of "specific candidates curtailing fundraising efforts, and actively discouraging supportive independent expenditures, to avoid triggering matching funds,"⁶³ and on expert testimony that "found that privately financed candidates facing the prospect of triggering matching funds changed the timing of their fundraising activities, the timing of their expenditures, and, thus, their overall campaign strategy."⁶⁴ It also concluded that the trigger funds did not reduce corruption, because neither candidate spending nor independent spending

⁶² 564 U.S. 721, 741 (2011).

⁶³ *Id.* at 744.

⁶⁴ *Id.* (quotation marks omitted).

can cause corruption.⁶⁵ Implicit in the Court’s opinion was a determination that high participation in the public financing program, which could result from trigger funding, could not reduce corruption sufficiently to justify any burden created by the law. The decision also relied on assumptions about independent spending already made in *Citizens United*.

Additional research would be helpful to test some of the Court’s assumptions about public financing. Most importantly, studies could attempt to determine whether elected officials who use public financing are less likely to be influenced by political spending. Some research has already addressed how public financing encourages public participation, but that research could be performed in additional jurisdictions with different public financing systems.

2. Research on public financing laws, trigger provisions, and competition

Research on whether public financing programs affect electoral participation, competition, or citizen confidence

- Michael J. Malbin notes that research on public participation effects of refunds and tax credits is mixed, and that studies of New York City’s matching funds system shows increased participation, but that results have not been replicated in other locations. *Small Donors: Incentives, Economies of Scale, and Effects*, THE FORUM 2013 11(3), 385.
- Michael G. Miller concludes that full public funding can “allow[] candidates to focus solely on the campaign for votes, which results in many more direct interactions with voters.” SUBSIDIZING DEMOCRACY: HOW PUBLIC FUNDING CHANGES ELECTIONS AND HOW IT CAN WORK IN THE FUTURE 62 (2014).
- David M. Primo & Jeffrey Milyo find that public financing laws negatively affect citizens’ belief in their political power. *Campaign Finance Laws and Political Efficacy: Evidence from the States*, 5 ELECTION L.J. 23, 33 (2006).
- Elisabeth Genn, Michael J. Malbin, Sundeep Iyer, & Brendan Glavin conclude that data suggests that New York City’s matching funds program “has contributed to a fundamental change in the relationship between candidates and their donors” and encourages donations from a more diverse set of residents. CAMPAIGN FINANCE INST. & BRENNAN CTR. FOR JUSTICE, *Donor Diversity through Public Matching Funds* (2012), <http://www.brennancenter.org/publication/donor-diversity-through-public-matching-funds>.
- Kedron Bardwell concludes that “[t]he average primary challenger spends only 16% as much money as the incumbent” but that “[p]ublic money makes a run against the incumbent feasible for potentially strong challengers” who cannot effectively raise private money. *Money and Challenger Emergence in Gubernatorial Primaries*, 55 POL. RESEARCH Q. 653 (2002).

⁶⁵ *Id.* at 751.

Research on whether trigger laws discourage candidates or outside groups from spending money

- Conor M. Dowling, Ryan D. Enos, Anthony Fowler, & Costas Panagopoulos determine that in Arizona and Maine there is no evidence that candidate spending is strategic around the triggering threshold, and that there is no empirical evidence that such laws have a chilling effect on political speech. *Does Public Financing Chill Political Speech? Exploiting a Court Injunction as a Natural Experiment*, 11 ELEC. L.J. 302 (2012)
<http://people.hmdc.harvard.edu/~renos/papers/DowlingEnosFowlerPanagopoulos/DowlingEnosFowlerPanagopoulos.pdf>; see also *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011), Brief for Amici Curiae Costas Panagopoulos, Ph.D., Ryan D. Enos, Ph.D., Conor M. Dowling, Ph.D. & Anthony Fowler in Support of Respondents, 2011 WL 686404.
- Michael G. Miller examines data from Arizona and finds no evidence that the trigger provision reduced speech. *SUBSIDIZING DEMOCRACY: HOW PUBLIC FUNDING CHANGES ELECTIONS AND HOW IT CAN WORK IN THE FUTURE* 62 (2014).
- Municipal amici in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett* demonstrate that “high-spending non-participants are simply not forgoing speech opportunities in order to curb a participating opponent’s bonus payments.” 564 U.S. 721 (2011), Municipal Brief Amicus Curiae in Support of Respondents, 2011 WL 1209128.
- Maine Citizens for Clean Elections reviewed Maine’s public financing system and filed an *amicus* brief in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, concluding that “analysis of spending by privately financed candidates in Maine elections for the past decade also shows no evidence of a chilling effect from the trigger provisions.” 564 U.S. 721 (2011), Brief of Amici Curiae Maine Citizens for Clean Elections Lawrence Bliss, Pamela Jabar Trinward, Andrew O’Brien, & David Van Wie in Support of Respondents, 2011 WL 686403.
- Anthony Gierzynski’s study of Maine’s elections finds no evidence for the claim “that the public funding trigger provision ‘chills’ fund raising or spending.” *Do Maine’s Public Funding Program’s Trigger Provisions Have a Chilling Effect on Fundraising?* (Working Paper 2011),
https://www.mainecelelections.org/sites/default/files/research/Do_Public_Funding_Program_Trigger_Provisions_Have_a_Chilling_Effect_on_Fund_Raising.pdf.

3. Proposed questions concerning public financing laws

Questions on whether public financing reduces corruption

- If an elected official has been elected using public financing, does that affect the types of constituents to which the official provides access (such as meetings with top staff)?
- Are officials who are elected using public financing more or less likely to spend time on policy priorities that concern a greater number of constituents or voters?
- Is misalignment affected when a state or locality adopts a strong public financing program?

Questions on political participation and opportunity

- Have small-donor matching or other public financing programs affected voter turnout rate or campaign volunteering? Are those who make contributions under such programs more or less likely to volunteer or vote?
- Have small-donor matching programs in areas other than New York City affected participation by small donors?
- Are candidates who use public financing more likely to consult a broad range of constituents when considering legislative or executive action?
- Are citizens more likely to have a more accurate or broader understanding of public policy if there is public financing? Are candidates who use public financing more likely to discuss issues of concern to a greater number of voters?⁶⁶

D. Disclosure as the best regulation to prevent corruption

1. The Court has seemed to assume that disclosure rules are sufficient to deter corruption

Beyond the question of whether independent spending can foster corruption, the Court has also put forward an implicit corollary: that disclosure requirements are often a sufficient substitute for limits to prevent corruption and other “abuse of the campaign finance system.”⁶⁷ This conclusion rests in significant part on the premise that “modern technology” has made disclosure vastly more effective than it used to be.⁶⁸ The Court noted in *Citizens United* that the BCRA limits it was invalidating “were premised on a system without adequate disclosure,” and suggested that they had essentially been overtaken by changed circumstances.⁶⁹ “With the advent of the Internet,” it proclaimed, “prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters.”⁷⁰ Apart from the efficacy of the Internet, this statement also presumes that it is possible to craft disclosure rules applicable to corporate independent spending that will not be easy to evade. The *Citizens United* Court in fact seemed to think that such rules already existed in federal elections, ignoring the potential disclosure problems that would occur due to the fact that the disclosure law did not contemplate significant corporate and union spending in federal elections; instead of a world with lightning-fast Internet disclosure,⁷¹ more than \$600 million in dark money has been spent in federal races since 2010.⁷² Such reasoning also depends on the Court’s longstanding assumption (which predates even *Buckley*) that transparency actually influences how voters behave, and thus helps to prevent “the corrupt use of money to effect elections.”⁷³ Studies on patterns of election spending and the types of

⁶⁶ On this question, see MICHAEL G. MILLER, *SUBSIDIZING DEMOCRACY: HOW PUBLIC FUNDING CHANGES ELECTIONS AND HOW IT CAN WORK IN THE FUTURE* [pincite] (2014).

⁶⁷ *McCutcheon*, 134 S. Ct. at 1459.

⁶⁸ *Id.*

⁶⁹ 558 U.S. at 370.

⁷⁰ *Id.*

⁷¹ *Id.* (“A campaign finance system that pairs corporate independent expenditures with effective disclosure has not existed before today.”).

⁷² See Daniel I. Weiner, BRENNAN CTR. FOR JUSTICE, *Citizens United Five Years Later* 2, Jan. 15, 2015, <https://www.brennancenter.org/publication/citizens-united-five-years-later>.

⁷³ *Buckley*, 424 U.S. at 67 (quoting *Burroughs v. United States*, 290 U.S. 534, 548 (1934)).

information voters actually use to make decisions, among other things, could serve to illuminate the extent to which disclosure actually is a viable safeguard on its own.

2. Relevant research on disclosure rules

Research on whether disclosure rules eliminate corruption

- Stephen Ansolabehere concludes that “corruption through campaign spending is a small societal problem,” but “[d]isclosure of campaign contributions and expenditures is integral to efforts to regulate the corruption that may occur through the campaign finance system.” *The Scope of Corruption: Lessons from Comparative Campaign Finance Disclosure*, 6 ELEC. L.J. 163 (2007).
- Michael S. Rocca & Lisa Sanchez find “that the strength of state disclosure laws has a negative effect on public corruption conviction rate.” *Campaign Disclosure Laws and Public Corruption Convictions in the U.S. States* (Working Paper 2015) http://www.mpsanet.org/Portals/0/PaperArchive/142907-Midwest_Disclosure_Final.pdf.

Research on whether disclosure affects voters’ preferences

- Travis Ridout, Michael M. Franz, and Erika Franklin Fowler conclude that ads sponsored by unknown groups are more effective than those run by candidates, but that the advantage is reduced when the group’s donors are disclosed. *Sponsorship, Disclosure and Donors: Limiting the Impact of Outside Group Ads*, 68 POL. RESEARCH. Q. 154 (2015), <http://prq.sagepub.com/content/68/1/154.full.pdf+html>.
- Conor M. Dowling & Michael G. Miller find that candidates who have received a majority of contributions from individuals are rated more highly by potential voters than one who received a majority of contributions from interest groups. *Experimental Evidence on the Relationship between Candidate Funding Sources and Voter Evaluations* (Working Paper 2015).⁷⁴
- Conor M. Dowling & Amber Wichowsky “find some evidence that campaign finance information affected candidate evaluations and vote choice, but that subjects’ evaluations were particularly sensitive to whether they were told that out-of-state donors were behind the outside group.” *The Effects of Increased Campaign Finance Disclosure: Evaluating Reform Proposals* (Working Paper 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2483194.

⁷⁴ https://430327f0-a-62cb3a1a-sites.googlegroups.com/site/millerpolsci/docs/pacsourcesource.pdf?attachauth=ANoY7cp1pvP67dcFxfj4Wrs6z1Z1fD0ciE-Ch0a51rtdD_FBxk1mPaYeGQ1eLyNfxSxSx-f-EJ-M6_oAHpR7eSnpaNZeE3pvud-BExsJ7FabX45VSDV8jJ7FuQiIOarJzWAK2HKOinL3mJ2-iY_O61bGVIPqJWnZoMGEiMcQIdsLRpYx2p5VIHrRtntkaU-LPOnn4oaIbnxvV5KM2bRZ0RZt5VbsgZjTxg%3D%3D&attredirects=0.

3. Proposed questions concerning the efficacy of disclosure

While this section lists several possible questions that could determine whether disclosure eliminates corruption, many of the questions in section III.A, above, could be modified to compare similar jurisdictions with different disclosure rules.

Questions about whether disclosure eliminates corruption

- If misalignment is caused by campaign spending, is that misalignment eliminated due to effective disclosure laws?
- If elected officials and candidates are more likely to meet with a constituent who is a donor to a supportive super PAC, is that effect eliminated if thorough disclosure laws are in place?

Questions about whether disclosure laws provide voters with sufficient information

- If people are shown disclosure reports from super PACs that support federal candidates, do most believe that they have an accurate picture of where the super PACs' funding comes from?
 - Is the answer the same in other countries, or in states or cities with the strongest disclosure laws?
- Is the press consistently able to determine the underlying identities of donors to groups like super PACs, with access to disclosure reports and from performing reasonable investigations?

Questions about whether disclosure affects voter behavior

- Are there a significant number of voters that would change their vote based principally on information about a candidate's financial backers?
- Can disclosure of a candidate's financial supporters have an effect on voter behavior if there are allegations that a candidate has taken action to help the supporters' interests?

E. The role of corporations, other business entities, and unions

1. The Court has assumed that corporate spending is not more likely to be corrupting, or create the appearance of corruption, than other spending

While *Citizens United* spawned unbridled outside spending through many channels, the case itself decided only whether the government could limit independent spending by corporations. Federal law banned independent election spending by corporations and unions, but the Court invalidated the ban, concluding that “independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.”⁷⁵ Several of the assumptions made by the Court in reaching this conclusion have been discussed above, Part III.A., *supra*, though its decision also rested on determinations about whether business or labor groups have distinct characteristics that means they should be treated differently by the law. The Court decided that because independent spending by individuals does not “give rise” to

⁷⁵ 558 U.S. at 357.

corruption, the same is true of spending by corporations, despite legal advantages that distinguish them from individuals and other associations. The Court also focused on the need for corporations to engage in electoral spending so the electorate will hear their speech, adopting the “marketplace of ideas” metaphor and concluding (1) such a marketplace will lead to the discovery of truth; (2) corporate spending will provide information the public does not already possess; and that (3) corporate speech has the same worth as other speech in helping the electorate reach that truth.⁷⁶

New research could look more closely at whether corporate or union spending has a distinct effect on elected officials’ actions. It could also examine how the existence of significant corporate spending affects the electorate’s willingness to participate in elections.

2. *Research on the effect of corporate spending*

- Jennifer L. Brown, Katharine D. Drake, & Laura Wellman, conclude that firms who give consistently to politicians, including through PACs, are likelier to pay lower tax rates. *The benefits of a relational approach to corporate political activity: Evidence from political contributions to tax policy makers*, 37 J. AMER. TAX. ASS’N 69 (2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2209373&download=yes.
- Eleanor Neff Powell & Justin Grimmer find “evidence that corporations and business PACs use donations to acquire immediate access and favor.” *Money in Exile: Campaign Contributions and Committee Access* (Working Paper 2016) <http://www.eleanorneffpowell.com/uploads/8/3/9/3/8393347/money.pdf>.
- John C. Coates, IV concludes that firms in heavily regulated industries are more likely to engage in political activity and that in some firms, corporate political activity correlates negatively with corporate value. *Corporate Politics, Governance, and Value Before and After Citizens United*, 9 J. EMPIRICAL L. STUDIES 657 (2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2128608&download=yes.
- Daniel E. Ho & Frederick Schauer begin to test whether the “marketplace of ideas” is always the best means to reach truth, and find that certain speech limitations, like buffer zones around abortion clinics, may “channel speech to a more persuasive kind.” *Testing the Marketplace of Ideas*, 90 N.Y.U. L. REV. 1160 (2015).

3. *Proposed questions concerning the role of corporations*

Questions on whether spending by business entities or unions is more likely to cause corruption than spending by other individuals or groups

- Does spending by a corporation, union, or other business entity have a different effect on government policy than spending by individuals or other types of groups?
 - Are issues of concern to a corporation, union, or other business entity likely to differ from issues of concern to the public?
- Are states that see high levels of spending from business entities and unions more or less likely to be significantly misaligned?

⁷⁶ *Id.* at 349.

Questions on how corporate or union spending affects political participation and opportunity

- Is spending by corporations or unions more likely to affect political participation in a different way than a similar level of spending by individuals or other organizations?
- Does heavy spending by corporate or union groups affect the prominence of issues favored by those groups in the campaign?