

BRENNAN
CENTER
FOR JUSTICE
TWENTY
YEARS

Brennan Center for Justice
at New York University School of Law

120 Broadway
Suite 1750
New York, New York 10271
646.292.8310 Fax 212.463.7308
www.brennancenter.org

Campaign Finance Reform Ordinance Revision Project
Written Comments of Brent Ferguson
Counsel, Brennan Center for Justice at NYU School of Law
Submitted to the San Francisco Ethics Commission
August 14, 2017

Introduction

The Brennan Center has reviewed the Ethics Commission's drafts of the Campaign Finance Reform Ordinance revision and accompanying documents intended to strengthen San Francisco's campaign finance and ethics rules. We fully support the effort to protect the integrity of city government and ensure that city residents have access to meaningful information about campaign spending and the activities of their elected officials, and believe the proposals are a strong step in the right direction. To make them even stronger, we propose several amendments to the new provisions governing contributions by government contractors and disclosure, as explained below. We are available to discuss any of the comments and suggestions in more detail, and work with the Commission on subsequent drafts.

Contributions by Government Contractors

We have focused our review on the provisions that would amend the law regulating contributions and donations made by government contractors and prospective contractors. Our comments will focus on the original draft ordinance presented in March (the "March Draft"), the most recent draft (the "August Draft") and the staff memorandum dated June 21, 2017 (the "Staff Memo").

Most importantly, we applaud the Commission's dedication to strengthening laws designed to curb harmful pay-to-play practices in city government. Courts and legislatures across the country have recognized the special threat of corruption that occurs when those who seek government contracts or other payments are allowed to donate to politicians who make decisions about those contracts.

We read the August Draft to make several significant changes to current law. Among other changes, it:

- (1) Narrows the current ban on contributions by contractors such that it only applies to recipients who are “individual[s] holding a City elective office” (by the omission of current C&GCC §§ 1.126(b)(1)(B)&(C));¹
- (2) Broadens the current ban on contractor giving such that it also includes “behested payments”² to elected officials (§ 1.126(b)(1)); and
- (3) Separately prohibits contributions and behested payments by any person with a financial interest in a land use matter being considered by certain city government bodies (§1.127(b)).

These amendments are narrower than those proposed in the March Draft, and likely reflect the concerns about the breadth of the March Draft expressed in the Staff Memo. We agree with Staff that some of the “public benefits” enumerated in the March Draft are outside the scope of the benefits often contemplated by common ethics and campaign finance laws, and may be difficult to define in some circumstances. For example, if a “public benefit” includes “tax savings resulting from a change in the law,” it would likely be quite difficult to define the proper class of beneficiaries, inform them, and keep track of the individuals and businesses restricted from contributing.

We also agree generally with the Staff’s admonition that legislatures and regulatory bodies should seek and discuss empirical evidence before restricting the ability to contribute, both to improve the efficacy of such restrictions and to ensure their constitutionality. Yet while empirical evidence is desirable, it does not necessarily need to come from within the jurisdiction considering a particular measure. As the U.S. Court of Appeals for the Second Circuit noted when reviewing New York City’s contractor contribution limit, “[t]here is no reason to require the legislature to experience the very problem it fears before taking appropriate prophylactic measures.”³ In fact, legislatures can and should consider evidence from other jurisdictions, social science, precedent, and common sense, as well as local experiences, to determine the best method by which to prevent corruption.⁴ The Brennan Center recently issued a report that categorizes and summarizes the most relevant research on corruption created by contributions (and other spending),⁵ and maintains an up-to-date online database with studies and evidence

¹ We recognize that § 1.126(e) of the August Draft requires individual contractors to attest to awareness “that contractors are prohibited from making contributions to candidates for elective office in the City.” Thus, if the omission of candidates and committees from the prohibition in § 1.126(b)(1) is unintentional, our comments on those sections are inapplicable.

² A behested payment is “a payment made for a legislative, governmental, or charitable purpose made at the behest of a City elective officer or candidate for City elective office.” § 1.126(a).

³ *Ognibene v. Parkes*, 671 F.3d 174, 188 (2d Cir. 2011).

⁴ *See, e.g., id.* at 189 (considering a report finding that government contractors were more likely to give large donations and more likely to give to incumbents, leading to “an appearance that larger contributions are made to secure ... whatever municipal benefit is at issue”); *Wagner v. FEC*, 793 F.3d 1, 16-20 (D.C. Cir. 2015) (reviewing state laws and weighing “the enormous increase in the government’s reliance on contractors,” which “necessarily poses an increased threat of both corruption and coercion,” in upholding federal prohibition on contractor contributions).

⁵ BRENT FERGUSON & CHISUN LEE, DEVELOPING EMPIRICAL EVIDENCE IN CAMPAIGN FINANCE CASES, BRENNAN CTR. FOR JUSTICE 2016, <https://www.brennancenter.org/publication/developing-empirical-evidence-campaign-finance-cases>.

from across the country.⁶ We encourage the Commission to review the database and report while the staff continues to develop a legislative record.

With those considerations in mind, we support the August Draft’s provisions targeting government contracts and those with a financial interest in the city’s land use decisions, though it may be permissible to include other classes of public beneficiaries listed in the March Draft. The final decision on which beneficiaries to include should be based on the considerations discussed in the previous paragraph, as well as the practical limitations of defining groups of affected beneficiaries and ensuring that the law can be fairly and thoroughly applied to them.

With these general comments in mind, we suggest the following specific changes and clarifications:

1) *Prevent those who have recently contributed from contracting with the government.*

Both the August Draft and the codified version of § 1.126 prohibit contributions from prospective contractors starting on the date that contract negotiations begin. Yet those who plan to seek government contracts may make contributions in advance of the commencement of contract negotiations. Thus, we recommend amending § 1.126 such that those who have made contributions in the last twelve months may not enter a contract or contract negotiations with the government. Other jurisdictions have adopted this method of regulation. For example, New Jersey uses an eighteen month limitation for contractors,⁷ and the Securities and Exchange Commission prevents investment advisors from providing paid services to government entities within two years after making a contribution.⁸

2) *Ensure that the government contractor prohibition in § 1.126 applies to candidates and committees controlled by candidates and officeholders.*

The current version of § 1.126(b) prohibits contributions to “individual[s] holding a City elective office,” but does not mention contributions to candidates.⁹ Any contribution ban or limit should apply to all candidates equally, whether they are incumbents or challengers¹⁰ — failing to include candidates could raise constitutional issues and lead to claims that incumbents are disadvantaged. And because challengers may win elections, it is important to ensure that they are not allowed to receive contributions from potentially corrupting donors.

⁶ *Money in Politics: Empirical Evidence Database*, BRENNAN CTR. FOR JUSTICE (2017), <https://www.brennancenter.org/analysis/money-politics-database>.

⁷ N.J. STAT. ANN. § 19:44A-20.14 (“The State . . . shall not enter into an agreement or otherwise contract to procure from any business entity services or any material, supplies or equipment, or to acquire, sell, or lease any land or building, where the value of the transaction exceeds \$17,500, if that business entity has solicited or made any contribution of money . . . within the eighteen months immediately preceding the commencement of negotiations for the contract or agreement.”). The law was upheld in *In re Earle Asphalt*, 950 A.2d 918 (2008), *aff’d*, 966 A.2d 460 (2009).

⁸ 17 C.F.R. § 275.206(4)–5(a)(1) (prohibiting provision of “investment advisory services for compensation to a government entity within two years after a contribution to an official of the government entity is made by the investment adviser”). A similar rule was upheld in *Blount v. SEC*, 61 F.3d 938 (D.C. Cir. 1995).

⁹ See note 1, *supra*.

¹⁰ See *Davis v. FEC*, 554 U.S. 724, 738 (2008) (“This Court has never upheld the constitutionality of a law that imposes different contribution limits for candidates competing against each other.”).

3) Clarify the scope of the “behested payments” prohibition in § 1.126 and § 1.127.

Under § 1.126(a), a behested payment is any payment made for a legislative, governmental, or charitable purpose at the behest of an elected official or candidate. Presumably, the definition intends to include payments made to charities, and possibly independent political groups, at the request or suggestion of a candidate or elected official. However, § 1.126(b)(1) only prohibits behested payments “to” an elected official. Thus, it is not completely clear whether the prohibition includes payments made at the request of that official directly to a charity or another group that is not controlled by that official.

While the language in § 1.127 is clearer because it prohibits all behested payments, rather than those made “to” an elected official, it may still be helpful to clarify that the ban applies to all payments made at the behest of an elected official, even if the official does not control the recipient entity.

Disclosure

We support the Commission’s effort to strengthen disclosure rules: the Staff Memo is correct to point out that since *Citizens United*, states and cities have seen election spenders use creative ways to avoid disclosing their true identities, and it is important to ensure that voters know the true source of the funds behind campaigns and advertisements.

Section 1.114.5(b) of the August Draft prohibits “assumed name contributions” and the Staff Memo suggests that the Commission adopt regulations to ensure it can find the “true source of a person’s donation.” We agree with both the prohibition and the suggestion for the Commission to adopt detailed rules. However, we suggest an alteration to the language of § 1.114.5(b) — the August Draft prevents donors from giving “in a name other than the name by which they are identified for legal purposes,” which may be interpreted only to prevent donors from misidentifying themselves. Some donations may come from legitimate, legally-formed groups whose names provide little information about their true sources of money. We recommend requiring donors to name the “original source” of all contributions, and defining “original source” as funds that are raised from sources such as salary or investment income, not from contributions or gifts. Under the “original source” requirement, any person or group making a contribution will need to report the underlying sources of their money if that money came from contributions by others.

We also strongly support the provisions in the August Draft that require elected officials to report certain contacts with (1) those who they have asked to make large donations to outside groups (§ 1.123(b)(7)), and (2) major bundlers (§ 1.125(b)(5)). Broadening disclosure requirements to cover interactions with donors can both help inform voters about elected officials’ priorities and deter behavior that would create the appearance of corruption,¹¹ such as an elected official repeatedly meeting with a donor to a supportive super PAC. The August Draft requires elected officials to report contacts that occur before the contribution is made; we recommend that the provisions be expanded such that elected officials would also need to report

¹¹ For a lengthier discussion of the utility of disclosure laws that focus on officeholder and candidate activity, see Brent Ferguson, *Congressional Disclosure of Time Spent Fundraising*, 23 CORNELL J.L. & PUB. POL’Y 1 (2013).

the same type of contacts if made within twelve months after the contribution. Thus, the rule would cover donors who give money before an election in the hope of favorable treatment afterwards.

Conclusion

Once again, we fully support the Commission's goal of reducing the influence of wealthy donors and providing more thorough information to city residents. We hope that these comments have been helpful and we are prepared to discuss in greater depth these and other changes the Commission may consider.

BRENNAN

CENTER

FOR JUSTICE

TWENTY
YEARS

DEVELOPING EMPIRICAL
EVIDENCE FOR CAMPAIGN
FINANCE CASES

Brent Ferguson & Chisun Lee

ABOUT THE BRENNAN CENTER FOR JUSTICE

The Brennan Center for Justice at NYU School of Law is a nonpartisan law and policy institute that seeks to improve our systems of democracy and justice. We work to hold our political institutions and laws accountable to the twin American ideals of democracy and equal justice for all. The Center's work ranges from voting rights to campaign finance reform, from ending mass incarceration to preserving Constitutional protection in the fight against terrorism. Part think tank, part advocacy group, part cutting-edge communications hub, we start with rigorous research. We craft innovative policies. And we fight for them — in Congress and the states, the courts, and in the court of public opinion.

ABOUT THE BRENNAN CENTER'S DEMOCRACY PROGRAM

The Brennan Center's Democracy Program works to repair the broken systems of American democracy. We encourage broad citizen participation by promoting voting and campaign finance reform. We work to secure fair courts and to advance a First Amendment jurisprudence that puts the rights of citizens — not special interests — at the center of our democracy. We collaborate with grassroots groups, advocacy organizations, and government officials to eliminate the obstacles to an effective democracy.

ABOUT THE BRENNAN CENTER'S PUBLICATIONS

Red cover | Research reports offer in-depth empirical findings.

Blue cover | Policy proposals offer innovative, concrete reform solutions.

White cover | White papers offer a compelling analysis of a pressing legal or policy issue.

© 2016. This paper is covered by the Creative Commons "Attribution-No Derivs-NonCommercial" license (see <http://creativecommons.org>). It may be reproduced in its entirety as long as the Brennan Center for Justice at NYU School of Law is credited, a link to the Center's web pages is provided, and no charge is imposed. The paper may not be reproduced in part or in altered form, or if a fee is charged, without the Center's permission. Please let the Center know if you reprint.

ABOUT THE AUTHORS

Brent Ferguson serves as counsel on the money in politics team in the Brennan Center's Democracy Program. He joined the Brennan Center in 2013 after working as a law clerk to Judge Michael Chagares of the U.S. Court of Appeals for the Third Circuit and Senior Judge Jeffrey Miller of the U.S. District Court for the Southern District of California. He has authored several publications, including *After Citizens United: The Story in the States* (October 2014), and has published academic articles on campaign finance reform and criminal justice in the Emory Law Journal Online, the Cornell Journal of Law & Public Policy, the Hastings Constitutional Law Quarterly, and the New Mexico Law Review. He received his J.D. from Columbia Law School, where he served on the administrative board of the *Columbia Law Review*.

Chisun Lee serves as senior counsel at the Brennan Center, focusing on money in politics. She previously covered legal issues as a staff reporter for ProPublica, where her work was co-published with *The New York Times*, *The Washington Post*, NPR, *The National Law Journal*, and PBS "Frontline," among other outlets, and earned industry honors. She has also represented indigent clients in federal trial and appeals courts as a criminal defense attorney and served as a law clerk to the Honorable Gerard E. Lynch, then of the U.S. District Court for the Southern District of New York. She received her A.B. from Brown University and her J.D. from Harvard Law School.

ACKNOWLEDGEMENTS

The Brennan Center gratefully acknowledges Carnegie Corporation of New York, Democracy Alliance Partners, Lisa and Douglas Goldman Fund, The Charles Evans Hughes Memorial Foundation, ImpactAssets as recommended by Ian Simmons, The JPB Foundation, The Kohlberg Foundation, Inc., John D. and Catherine T. MacArthur Foundation, The Mertz Gilmore Foundation, Open Society Foundations, The Overbrook Foundation, Rockefeller Brothers Fund, Jennifer and Jonathan Allan Soros Foundation, and The WhyNot Initiative for their generous support of our money in politics work.

We are grateful to the many people who helped guide and produce this paper. Professor of Political Science Michael J. Malbin (University at Albany-SUNY), Professor of Political Science Lynda W. Powell (University of Rochester), Assistant Professor of Political Science Michael G. Miller (Barnard College), and Professor of Political Science David Kimball (University of Missouri-St. Louis) provided extensive feedback on multiple drafts. Among our colleagues at the Brennan Center, Research and Program Associate Ava Mehta provided exceptional research assistance and editing, and former Research and Program Associate Katherine Valde also assisted with research; Deputy Director Lawrence Norden, Democracy Director Wendy Weiser, President Michael Waldman, and attorneys Daniel Weiner, Ian Vandewalker, and Johanna Kalb gave helpful input and suggestions; Naren Daniel provided important communications assistance; and interns Jordan Proctor, Mitchell Brown, and Kaia Austin also performed research and editing. Professor of History Saul Cornell (Fordham University), gave helpful guidance on constitutional history. We also appreciate input on an early version of this paper from the participants of the legal symposium *Democracy by the People: Reforming Campaign Finance in America Today*, organized by Free Speech for People at Seton Hall University School of Law.

TABLE OF CONTENTS

INTRODUCTION	1
I. CAMPAIGN FINANCE LAW AT THE SUPREME COURT	3
II. THE COURT'S APPROACH TO EVIDENCE	5
A. Effects on Behavior of Candidates, Supporters, and the General Public	5
B. Effects on Incumbency	6
C. Novel Arguments For or Against Campaign Finance Reform and the Evidence Supporting Them	6
III. EVIDENTIARY CONCLUSIONS AND RESEARCH QUESTIONS	8
A. Political Spending	8
B. Limits on Contributions	14
C. Public Financing and Laws to Encourage Its Use	18
D. Disclosure as the Best Regulation to Prevent Corruption	21
E. The Role of Corporations, Other Business Entities, and Unions	23
ENDNOTES	26

INTRODUCTION

In recent years, American election spending has soared but has come from fewer donors giving more money.¹ Candidates now view the support of unlimited, sometimes anonymous, outside entities such as super PACs as practically essential to compete.² Against this backdrop, Americans have consistently expressed the concern that wealth unfairly influences policy outcomes.³

Yet, as powerful as these developments may seem, it is important to remember that their legal justification emerged for the most part from just a handful of recent 5-to-4 decisions by the U.S. Supreme Court beginning in 2007.⁴ That five-justice majority has since lost one member. Whatever the political context of filling the vacancy, to assume change will not come would be to miss a significant opportunity to shape the role of money in American elections.

This opportunity does not depend on adopting a particular advocacy stance, but merely requires a commitment to produce objective and reliable empirical research relevant to the major questions of campaign finance law.⁵ The opportunity exists because, simply put, the five-justice majority in its sweeping decisions to eradicate certain contribution limits, corporate spending bans, and public financing features, almost never considered or cited supporting evidence. Though the Court has expressed particular views about the ways politics and campaign finance regulation work, a close read of the justices' opinions reveals strikingly little consideration of the actual effects of money or regulation on the political process. This shortcoming may explain the disconnect between the Court's and the general public's understandings of money in politics. While a change in membership will not guarantee a new campaign finance jurisprudence, a newly composed Court may be willing to reconsider recent precedents when presented with sound data addressing the unsupported assumptions that undergirded those decisions.⁶

This paper aims to identify the key factual assumptions and conclusions that serve to justify the most important campaign finance decisions, catalog relevant existing research, and suggest further studies to test such assumptions and conclusions. Such studies could aid not only litigants and courts as they consider new campaign finance cases, but also policy makers, as they seek to understand problems, craft the best solutions, and build records to defend those solutions against virtually inevitable constitutional challenges.

Several notable efforts to advance empirical research about money in politics have already emerged. In 2013, the Campaign Finance Institute and the Bipartisan Policy Center published the expansive *An Agenda for Future Research on Money in Politics in the United States*, calling for detailed study of public financing, campaign spending disclosure, and independent spending after *Citizens United*, among other things.⁷ One of the leaders of that charge, Michael Malbin, has also provided deep analysis of the effects of small donor public financing systems.⁸ Lynda Powell has shown, through a massive survey-based study, when and how campaign contributions affect state legislators.⁹ In 2014, Renata Strause and Daniel Tokaji published an important paper urging researchers to gather legislator testimony, social science research, and press reports to show the conflicts of interest that campaign contributions and expenditures can create.¹⁰ But a systematic approach to aligning objective research

efforts with the several critical legal questions of money in politics will increase both the social value of such research and the lasting efficacy of legal reform.

This report proceeds in three parts. Part I reviews the current state of campaign finance law, discussing the most important Supreme Court holdings and how they limit options for reform. Part II explains how the Court has considered evidence in deciding campaign finance cases, offering observations about when evidence has been most important and how it can change outcomes. Finally, Part III identifies the key empirical questions in campaign finance law, noting existing relevant research and suggesting additional research that would aid courts and policy makers.

I. CAMPAIGN FINANCE LAW AT THE SUPREME COURT

Though a key aspect of the Court's approach to campaign finance cases has changed significantly in recent years, its overall analytical framework has remained faithful to the seminal *Buckley v. Valeo* decision of 1976.¹¹ In *Buckley*, the Court conceived of political spending limits as standing in opposition to First Amendment free speech rights. The outcome of each case thereafter has depended on the Court's assessment of (1) the degree to which a law infringes on those rights, 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 permissible only if they prevent corruption or its appearance. Importantly, *Buckley* distinguished between campaign contributions and independent spending, holding that limits on the former are permissible because contributions may cause corruption and because limiting contributions imposes a relatively lesser burden on free speech rights. But independent spending may not be limited, the Court reasoned, because it does not cause corruption and because limiting spending more seriously infringes on free speech rights.

Within the *Buckley* framework, the greatest changes have occurred in the Court's definition of corruption. The definition has been 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 candidates by conceiving of corruption as "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."¹² For years, the Court continued to conceive of corruption broadly. In 2000, it upheld Missouri's relatively low contribution limits that 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."¹³

In the last decade, however, the Court has contracted the definition of corruption to a single variety: quid pro quo corruption, or "the direct exchange of an official act for money."¹⁴ It has invalidated numerous regulations, across seven major cases since 2006, that likely would have survived more capacious conceptualizations. It struck down Vermont's relatively low contribution limits, marking the first time the Court had ever invalidated limits on direct donations to candidates.¹⁵ It invalidated an Arizona law permitting the government to give extra money to publicly-financed candidates as triggered by an opponent's high spending, gutting a feature many consider essential to certain public financing systems.¹⁶ It ended the federal cap on how much one donor could give in total to candidates, parties, and PACs.¹⁷ Most prominently, in *Citizens United* it struck down the federal ban on independent corporate and union election spending.¹⁸ That decision enabled lower court decisions that allowed independent spending groups to accept unlimited donations, thus creating super PACs.¹⁹

Many observers have criticized the Court's focus on quid pro quo corruption for being too narrow to honor the fundamental importance of elections in a representative democracy. Beyond simply overruling *Citizens United* — for instance, based on evidence that independent spending *can* lead to quid pro quo corruption — they urge embracing alternative theories altogether for justifying campaign finance regulation, including an essential redefinition of corruption, a reinvigorated political equality ideal,

“political opportunity,” participation, and the need for “alignment” between the preferences of elected leaders and their constituents.²⁰ These ideas, though analytically distinct, by and large presuppose a common vision for our democracy, one in which elected officials are responsive to a majority of their constituents and accumulations of private wealth do not determine the distribution of political power.²¹ Acceptance of this normative view by a future Court majority is far from unimaginable, as only about a decade ago a version of such a view prevailed.²²

Still, the current jurisprudence has many champions. These scholars and political leaders urge that limits on money in politics harm democracy. Spending restrictions reduce valuable political discussion, silence certain potential speakers, stifle electoral competition, and help entrench incumbents, they contend. Recently opponents of regulation have objected even to disclosure laws, once widely accepted as a means to deter corruption, now arguing that transparency enables harassment and thus discourages speech.

Whether the actual effects of money on the political process, and of regulation of that money, support the concerns of these competing views could matter a great deal in future court challenges.

II. THE COURT'S APPROACH TO EVIDENCE

The Supreme Court's approach to evaluating factual questions and evidence in campaign finance cases has varied considerably. Sometimes, as in other areas of constitutional decision-making, the justices have incorporated factual understandings into their reasoning, whether implicitly or explicitly.²³ In some cases, the Court has considered voluminous evidence submitted by the litigants, including empirical studies, legislative testimony, and evidence of public opinion. For example, in *McConnell v. FEC*, upholding the Bipartisan Campaign Finance Reform Act of 2002, the Court reviewed "testimony and declarations of over 200 witnesses and 100,000 pages of material."²⁴ That material included studies of how often candidate advertisements contained words of express advocacy,²⁵ internal organizational documents of campaign spenders confirming that candidates would work closely with interest groups to sponsor issue advertisements,²⁶ and declarations of senators explaining that certain industry donations were the cause of "scuttled tobacco legislation" and tort reform.²⁷ In *Randall v. Sorrell*, striking down Vermont's unusually low contribution limits, both the controlling opinion and the dissent focused on studies addressing how those limits would affect the competitiveness of elections.²⁸ Justice Kennedy, who authored the *Citizens United* majority's opinion, had said in a previous case that evidence about how a system works could change his mind about the validity of a campaign finance law. 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."²⁹

Yet, as many critics have noted, *Citizens United* was decided on an extremely thin factual record.³⁰ The record lacked any empirical basis for the Court to consider whether "independent expenditures . . . do not give rise to corruption or the appearance of corruption," but that did not stop the majority from drawing this conclusion.³¹ This tendency by the five-justice majority to make factual pronouncements without considering factual evidence, emerging in some recent cases, has been a major source of disagreement on the Court.³²

It is reasonable to expect that a future majority will take more seriously the need to consider evidence of actual effects when weighing the harms and benefits of particular campaign finance laws. A review of past cases yields several observations about when justices have seemed particularly concerned about such effects, useful to keep in mind when framing a research agenda. The Court has (1) focused on the effects of campaign finance laws on the behavior, and possibly beliefs, of candidates, supporters, and/or the general public; (2) expressed concern about laws' effects on incumbency; and (3) indicated that novel arguments for or against campaign finance reform may require greater supporting evidence.

A. Effects on Behavior of Candidates, Supporters, and the General Public

Starting with *Buckley*, the Court has periodically expressed concern not just about the principled justifications for or objections to a campaign finance law, but also about how and whether the law would alter actual behavior regarding elections. Striking down the Federal Election Campaign Act'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”³³ 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,” as Strause and Tokaji have put it, deeming such behavior worth changing.³⁴ The Court took detailed note of evidence showing how national parties peddled access to candidates and officeholders.³⁵ In *Randall*, the justices evaluated studies concerning how proposed contribution limits would affect the ability of challengers to disseminate their message to the public.³⁶ Similarly, the Court has several times examined evidence of public opinion that could be affected by the law or rule at issue. In *Caperton v. Massey*, holding that an elected judge’s failure to recuse himself from a case involving a major donor violated due process, the majority noted that “over 67% of West Virginians doubted Justice Benjamin would be fair and impartial.”³⁷

B. Effects on Incumbency

Other than the concept of corruption, the theme that justices of all ideological stripes most commonly discuss is the concern that legislators enact contribution and expenditure limits to protect themselves against challengers. In *Randall*, Justice Breyer focused heavily on incumbent protection,³⁸ and Justices Thomas,³⁹ Souter,⁴⁰ and Stevens⁴¹ addressed the issue as well. Incumbent protection also received attention in *Nixon v. Shrink Missouri Government PAC* — upholding relatively low state contribution limits⁴² — in the dissent to *Austin* — upholding a ban on corporate spending⁴³ — and is commonly discussed in lower court opinions.⁴⁴ Courts have even expressed concern about incumbency advantage in evaluating a law passed by ballot initiative, not by elected officials.⁴⁵

Justice Breyer’s concern about incumbency protection is especially significant to consider for the future of campaign finance law, as he generally has been amenable to arguments for reality-based reforms and shown a willingness to weigh empirical evidence in his decision making. While some existing research addresses how contribution limits affect incumbency rates,⁴⁶ questions persist for other laws and other scenarios.

C. 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 without demanding extensive factual support. In *Shrink Missouri*, for example, the Court upheld Missouri’s fairly low contribution limits in spite of the state’s modest evidentiary showing, because contribution limits had long been recognized (in *Buckley* and since then) as a valid method to prevent corruption.⁴⁷

Viewed another way, the party attempting to invalidate a commonplace restriction may bear the evidentiary burden, rather than the party seeking to justify the law.⁴⁸ In *Shrink Missouri*, after explaining

that the state simply needed not offer more evidence, the Court noted that the challengers had failed to show that the contribution limits would “have any dramatic[ally] adverse effect on the funding of campaigns and political associations” and that invalidating them would therefore be beneficial.⁴⁹ 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*.

Since the Court’s decisions typically determine outcomes in later, similar cases, under the legal principle of *stare decisis*, it is sensible to expect that extensive evidence will be needed when litigants seek to challenge Court precedent. New research may yield evidence that conflicts with crucial judicial conclusions or assumptions in prior cases, emboldening challenges to the prevailing law. This research will have to be strongly credible, closely relevant, and sufficiently comprehensive in scope to stand a chance of persuading even a friendly Court to overturn or sidestep precedent.

III. EVIDENTIARY CONCLUSIONS AND RESEARCH QUESTIONS

This part identifies the most important conclusions the Supreme Court has reached, often without citing much or any supporting evidence, about the effects of money in politics and its regulation. It describes some relevant existing research to provide background and possible models for future studies, and suggests questions for further study in these areas. Additional research could help not only courts to consider challenged regulations, but also policy makers to craft well-tailored regulations in the first place.

The major campaign finance issues the Court has considered are: (1) limits on spending by candidates, independent groups, and people; (2) limits on direct contributions; (3) public financing laws; (4) disclosure laws; and (5) the role of corporations, other business entities, and unions.

A. Political Spending

1. Major Factual Conclusions by the Court

Overall, the Court has concluded: independent spending does not cause corruption or its appearance; limits on independent spending do not serve any compelling government interest; and limits on candidate spending are not necessary to protect the time of incumbent officeholders.

In *Citizens United*, the majority held that “independent expenditures . . . do not give rise to corruption or the appearance of corruption.”⁵⁰ Because the Court also said that preventing quid pro quo corruption is the only permissible goal of most campaign finance reforms, lower courts have interpreted this holding to mean that no limits on independent spending by wealthy individuals, corporations, or super PACs are permissible.

The majority’s holding about independent spending rested on a number of different factual conclusions. First, the Court determined — based largely on its review of the district court opinion in *McConnell*, decided years earlier — that there was no specific evidence of political favors being traded for independent expenditures as a quid pro quo.⁵¹ 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.⁵² “In fact,” the Court claimed, “there is only scant evidence that independent expenditures even ingratiate.”⁵³ This dearth of evidence made sense to the Court because it believed, following the reasoning of the *Buckley* Court, independent expenditures not to be especially valuable to candidates;⁵⁴ indeed, the *Buckley* Court suggested that independent expenditures might often backfire against candidates.⁵⁵ The *Citizens United* Court thus concluded that unlimited independent spending posed little risk of even an appearance of corruption; at most it would create the “appearance of influence or access,” which the Court believed would “not cause the electorate to lose faith in our democracy.”⁵⁶

These conclusions call for new empirical research, in part because such little evidence went before the Court to begin with, and in part because there simply has been a great deal more independent spending — and fundraising by candidates for independent spending, among other related activities — since *Citizens United*. New empirical research could address all of these conclusions, starting with the Court's premise that there is no actual evidence of quid pro quo corruption or its appearance tied to independent expenditures. Other useful research would address whether nominally independent expenditures actually are independent of candidates in any real sense; already some information indicates that many of them are not.⁵⁷

Should a future Court reconceptualize corruption to be broader than mere quid pro quo bargaining, a variety of other empirical questions about independent spending would become relevant. One question involves the efficacy of independent spending in winning electoral outcomes and whether and how elected officials express gratitude for such spending (or fear of it). Another addresses the impact, if any, of independent spending on policy outcomes. Other questions would examine any effects independent spending may have on electoral participation, including whether unlimited independent spending makes it too difficult for certain actors to be heard in the political marketplace, and whether unlimited independent spending — say, in the form of increased attack ads — causes the public to disengage from elections and even affects voter turnout. Questions also arise about whether unlimited 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 independent spending, the Court has held that the government may not limit candidate spending. In *Randall v. Sorrell*, 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.⁵⁸ Yet data and legislator commentary demonstrate that, in an unlimited system, many legislators spend between 30 and 70 percent of their time raising money.⁵⁹

Below we describe some existing research that relates to the most legally significant empirical questions about political spending, and suggest questions for further research.

2. Existing Research on the Effects of Political Spending

Effects on policy outcomes

Several social science studies have indicated that private money influences government policy. These studies have focused on the influence of campaign contributions to candidates rather than on donations to or spending by super PACs and other technically independent entities, likely because contributions are more easily traceable and until recently dominated political spending. Because this is the most relevant existing research on the policy influence, if any, of private political money, we describe some of these studies below.

- Lynda W. Powell conducted a survey of state chambers across the country to determine whether campaign contributions affect the content and passage of legislation. She concluded that the more time lawmakers spend fundraising, the more they prioritize the interests of their donors. Powell also found that contributions may impact the content of the legislation considered. *THE INFLUENCE OF CAMPAIGN CONTRIBUTIONS IN STATE LEGISLATURES* (2012).
- Daniel P. Tokaji and Renata E.B. Strause spoke with congressional candidates, members of Congress, and political operatives to understand the effect of independent spending at the federal level. They found outside spending to be a key determinant in whether a candidate could run in the first place, leading to a high level of cooperation between outside groups and candidates, and ultimately allowing outside groups to “do much of the dirty work” of the campaign. *The New Soft Money: Outside Spending in Congressional Elections* (2014).
- Using grand jury and jury trial simulations, scholars found a significant majority of respondents willing to indict or convict an elected official for corruption where the alleged facts included no direct contributions or gifts but rather a donation by a company with business before the official to an independent group supporting that official’s reelection. The findings indicate that independent spending can give rise to an “appearance of corruption” even under the quid pro quo standard. Christopher Robertson, D. Alex Winkelman, Kelly Bergstrand, and Darren Modzelewski, *The Appearance and Reality of Quid Pro Quo Corruption: An Empirical Investigation*, 8 J. LEGAL ANALYSIS (May 23, 2016).
- Martin Gilens and Benjamin I. Page sought to determine which actors have the most influence over public policy. They employed a database of national survey responses to proposed policy changes, regressed by responses based on income level. While they did not directly address the influence of campaign spending, they found that elected officials responded to policy preferences of economic elites and groups representing business interests while “the policy preferences of the average American have only a minuscule . . . impact upon public policy.” *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSPECTIVES ON POL. 564, 575 (2014).⁶⁰
- Adam Bonica, Nolan McCarty, Keith T. Poole, and Howard Rosenthal determined 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. They based their conclusion on voting and fundraising data collected over decades. *Why Hasn’t Democracy Slowed Rising Inequality?* 27 J. ECON. PERSPECTIVES 103, 121 (2013).
- Patrick Flavin used a regression test to determine the relationship between state campaign finance laws and spending priorities, finding 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.” He noted 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. RES. Q. 77, 77 (2015).
- Anne E. Baker analyzed whether individual contributors outside of a given congressional district can influence House members’ responsiveness to constituent preferences. Based

on contribution data and ideology preference surveys, Baker concluded that “members’ dependency on outside contributions draws them in a more extremely liberal or extremely conservative ideological direction that is counter to the ideological preferences of the districts they represent.” *Getting Short-Changed? The Impact of Outside Money on District Representation*, 97 Soc. Sci. Q. (forthcoming 2016) (manuscript at 2).

Effects of political spending on participation and pre-election debate

- Rebecca L. Brown and Andrew D. Martin used a series of surveys designed to test the extent to which contribution amounts and coordination limits impact citizens’ faith in democracy. They concluded that “it does not take a bribe to corrode [people’s] faith in the democratic process,” but that further research would be necessary to determine whether these perceptions have an impact on participation as measured by being informed, writing a letter, contributing, or voting. *Rhetoric and Reality: Testing the Harm of Campaign Spending*, 90 N.Y.U. L. REV. 1066, 1090 (2015).
- Nathaniel Persily and Kellie Lammie examined survey and polling data from a variety of sources to 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*, 153 U. PA. L. REV. 119, 120 (2004).⁶¹
- Like many other journalists and watchdogs, Russ Choma 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. *Final Tally: 2014’s Midterm Was Most Expensive, With Fewer Donors*, CTR. FOR RESPONSIVE POLITICS (Feb. 18, 2015).
- Nicholas Confessore, Sarah Cohen, and Karen Yourish reported that, as of 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 early money for efforts to capture the White House*, N.Y. TIMES, Oct. 10, 2015.
- Daniel E. Ho and Frederick Schauer used polling information for voters in Manhattan, New York, and Hudson County, New Jersey in the 2012 general election to test whether “[t]he best test of truth is [an] idea’s power to be accepted in the competition of the market.” The study ultimately suggests that “constitutional law should become more empirical” and that “judges should base their decisions on accurate facts.” *Testing the Marketplace of Ideas*, 90 N.Y.U. L. REV. 1160 (2015).
- Robert G. Boatright, Michael J. Malbin, and Brendan Glavin examine how *Citizens United* affected the balance of power among outside groups in Congressional primaries. Based on independent expenditure data from Congressional elections (2006 to 2014) and primaries in which incumbents were challenged (1994 to 2014), they conclude that, since *Citizens United*, independent groups have grown in number and diversity, while increasingly aligning with incumbent office holders. *Independent Expenditures in Congressional Primaries after Citizens United* (forthcoming 2016) (manuscript at 21).

Effects 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 Brief of Respondents, Cross-Petitioners at 16-19, *Randall v. Sorrell*, 548 U.S. 230 (2006) (Nos. 04-1528, 04-1530, 04-1697), 2006 WL 325190, at *16-19.
- Mark Alexander examined statements from legislators about the time and travel required by constant fundraising. He found that candidates must spend "countless hours raising money by courting a limited group of individuals, instead of meeting voters, engaging opponents, debating or voting on legislation, and the like." He argued that expenditure limits are the best solution to this problem. *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 for Further Research Concerning Political Spending

Whether independent spending influences elected officials or creates the appearance of influence

- Does helping to fund independent spending to support an official's election affect an individual's access to — e.g., ability to secure a meeting with — that official?⁶²
- Have changes in political spending over time affected the degree of misalignment of policy making with majority preferences?⁶³
- Is there a correlation between alignment and levels of independent expenditures? Do contributions and independent expenditures have similar or different effects on alignment?
 - What is the level of alignment in states with low levels of direct contributions, but high levels of independent spending from groups that receive large donations?
 - What is the level of alignment in states with high levels of direct contributions and high levels of independent spending from groups that receive large donations?
 - What is the level of alignment in states with high levels of direct contributions but low levels of independent spending from groups that receive large donations?
- Do candidates who super PACs support — including single-candidate super PACs — believe that the super PACs' spending 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?⁶⁴
- 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?⁶⁵ 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?

- Are most super PACs truly independent of the candidate(s) they support?
- Do lobbyists' — or their clients' — political contributions or independent spending affect the lobbyists' influence with elected officials? Does it matter whether that money goes to support the particular legislator being lobbied?

Whether particular types of donors and independent spenders are more likely than others to influence 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?

Whether spending affects electoral competition and incumbent protection

- Does independent spending have any effect on incumbency rates? If so, do amounts of independent spending, types of spender, or other characteristics of the spending matter?
 - How frequently does outside spending — above a certain threshold — favor incumbents, and how frequently does it favor challengers?
- Would candidate spending limits have different effects on spending by incumbents than on spending by challengers? Does the competitiveness of the contest affect respective spending levels?
- Are large political donors more likely or less likely to see their favored candidates elected than small donors or non-donors?

Whether contributions and independent spending affect political participation and opportunity

- Do different levels of campaign contributions and/or independent spending, perhaps as between different states, have different effects on the public's political participation — for instance, voting?
- If citizens believe that campaign donors or independent spenders have more access to government officials, does this belief affect their willingness to volunteer, make contributions, or vote?
- Do independent expenditure advertisements affect voter turnout?
- Do independent spending levels affect the accuracy of potential voters' understanding of public policy issues?
- Has unlimited independent spending affected the diversity of speakers or access to channels of speech, for instance by causing higher prices for advertising?
- To what extent does the support of large donors affect individuals' likelihood of running for office?

Whether fundraising affects officeholders' performance of duties

- How much time does the average officeholder spend raising money?
- If the public were aware of the amount of time their elected representatives spent raising money, would that affect their voting behavior or their general political participation?
- Are there measurable differences in the quality or quantity of performance of official duties by elected officials in states where candidates spend more time fundraising, compared to states where candidates spend less time fundraising? Are there such differences in states where contribution limits and spending levels are lower, compared to in states where these levels are higher?

B. Limits on Contributions

1. Major Factual Conclusions by the Court

Overall, 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, concluding that they were so low as to impose "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."⁶⁶ 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."⁶⁷

The Court made certain factual conclusions to justify its concerns about Vermont's contribution limits. First, reviewing conflicting studies, the Court determined that the limits would make it more difficult for challengers to compete with incumbents, because challengers would receive less money than they had in the past.⁶⁸ Implicitly, this conclusion assumes that a similar reduction in contributions to incumbents would not increase challengers' opportunity to compete. It also presumes that candidates would be unable to offset any negative fundraising that contribution limits cause even if they try to raise additional money from more contributors. 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.⁶⁹

Invalidating the federal aggregate contribution limits in *McCutcheon*, the Court made several unsupported 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.⁷⁰ 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.”⁷¹ 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.”⁷²

New research to determine the validity of the Court’s conclusions about contribution limits would be helpful, as these conclusions constrain even the narrow scope of permissible anticorruption regulation that remains. It could determine whether low limits cause candidates to raise less money than they otherwise would and disadvantage challengers. It could examine whether and to what extent donations to parties or PACs serve to circumvent limits on contributions to candidates, thus raising corruption risks similar to the candidate contribution context. Further, research on any effects of large contributions on policy outcomes will be relevant when the Court almost inevitably considers an argument that limits are justified because they prevent a type of corruption that is broader than *quid pro quo* corruption.

2. Existing Research on Contribution Limits

Effects of contribution limits on electoral competition

- Alexander Fourirnaies and Andrew B. Hall analyzed incumbent and challenger campaign spending at both the state and federal level. They found that incumbency results in a 20 to 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).
- Conor M. Dowling and Michael G. Miller examined the donation and spending patterns of outside groups. They found that higher spending on behalf of incumbents was associated with higher *challenger* vote share, but noted that such a 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, and Dr. Thomas Stratmann concluded that “contribution limits of \$500 or less for individual contributors and political action committees (PACs) made elections for state assembly more competitive.” Their findings were based on a decades-long study of contributions in various states. BRENNAN CTR. FOR JUSTICE, *Electoral Competition and Low Contribution Limits* 2 (2009).
- Thomas Stratmann sought to determine the relationship between varying contribution limits and the competitiveness of elections. He created a dataset of general election results for elections state legislatures, which he then examined in context of the state’s contribution laws and the competitiveness of each race. He found that “elections are more competitive when states restrict contributions.” *Do Low Contribution Limits Insulate Incumbents from Competition?*, 9 ELECTION L.J. 125, 126 (2010).
- Thomas Stratmann and Francisco Aparicio-Castillo analyzed election results and campaign finance laws for state assembly races to conclude that contribution limits lead to closer elections. *Competition Policy for Elections: Do Campaign Contribution Limits Matter?*, 127 PUB. CHOICE 177 (2006).

- Kihong Eom and Donald A. Gross found “no support for an increased bias in favor of incumbents resulting from the presence of contribution limits.” Their conclusions are based on an analysis of the number of contributors and the dollar amount of contributions for gubernatorial candidates in various state elections *Contribution Limits and Disparity in Contributions Between Gubernatorial Candidates*, 59 POL. RES. Q. 99 (2006).
- Kedron Bardwell examined primary election spending data in a variety of gubernatorial elections to understand the extent to which a range of campaign finance laws are correlated with electoral competitiveness. She concluded 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. RES. Q. 653, 662 (2002).
- The New York City Campaign Finance Board analyzed spending and results data of candidates who participated in the city’s campaign finance program during the 2005 election, and found that incumbents had “much greater access” to large donations from city contractors than challengers. *Public Dollars for the Public Good: A Report on the 2005 Elections*, N.Y.C. CAMPAIGN FIN. BOARD 122 (2006).
- John R. Lott, Jr. concluded that “campaign donation regulations clearly reduce the competitiveness in political races.” His findings were based on data for state senate races and state primaries, then compared with demographic and economic variables. *Campaign Finance Reform and Electoral Competition*, 129 PUB. CHOICE 263, 292 (2006).
- Donald A. Gross, Robert K. Goidel, and Todd G. Shields relied on data from gubernatorial elections to 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*, 30 AM. POL. RES. 143 (2002).
- Adam Meirowitz created a model of electoral competition and the level of effort relative to the value of winning office to show that campaign finance regulation protects incumbents. *Electoral Contests, Incumbency Advantages, and Campaign Finance*, 70 J. POL. 681 (2008).

Effects of contributions to parties, PACs, and multiple candidates (compared to contributions to a single candidate)

- 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, and Laura Wellman gathered data on PAC contributions, lobbying expenditures, and the annual accounting statements for firms to 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’N. ASS’N 69 (2014).
- Michael J. Barber collected survey information on the policy preferences of voters and in- and out-of-state contributors in the 2012 federal election cycle, concluding 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).
- Christopher Witko examined 20 pieces of legislation proposed in the House of Representatives, focusing specifically on the voting patterns of members who received contributions from PACs that took positions on the bills in question. Witko concluded 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. RES. Q. 283 (2006).
 - Eleanor Neff Powell determined that members of Congress are more likely to vote for legislative priorities of other members who have provided their election efforts with financial assistance. Her findings were based on a dataset of appearances at congressional fundraising events, fundraising event data, and legislative votes in Congress. *Legislative Consequences of Fundraising Influence* (Working Paper 2015).
 - Stephen Ansolabehere, John M. De Figueiredo, and James M. Snyder Jr. reviewed the findings of almost 40 empirical studies, creating models of campaign contributions and spending based on data in the existing literature. They concluded 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).

Circumvention of contribution limits

- Paul Blumenthal referenced the 2016 presidential election to explain how parties have set up joint fundraising committees in order to circumvent base contribution limits, and are able to give more money to such committees because *McCutcheon v. FEC* invalidated aggregate contribution limits. *Democrats Are Proving Samuel Alito and John Roberts Wrong*, HUFFINGTON POST, Jan. 5, 2016.
- Bob Biersack wrote on the use of joint fundraising committees in the 2016 presidential election, explaining that these committees send 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 POL., Feb. 19, 2016.

3. Proposed Questions for Further Research Concerning Contribution Limits

Whether contribution limits affect electoral competition

- Do contribution limits of various sizes affect any existing fundraising gap between incumbents and challengers — taking into account the spending supporting each candidate from outside groups? Does competitiveness of the seat have a separate or additional effect?
- When contribution limits have been lowered, has the change affected total amounts raised — and differently for challengers than for incumbents?
- Do lower contribution limits affect the amount of time candidates spend fundraising?

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?
- Do contributions to a party or to elected members of a party affect the likelihood that a person or group will be granted a meeting with an elected member of that party that has not received a contribution?
- 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?

Whether donors can often 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 directly to a certain candidate, and that donor 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. Major Factual Conclusions by the Court

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 exceeding certain amounts supporting a privately-funded opponent. Arizona and other jurisdictions 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 burdened privately-financed candidates and their supporters, causing them to "reduce[] their speech."⁷³ 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,"⁷⁴ 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."⁷⁵ It also concluded that the trigger funds did not reduce corruption, because neither candidate spending nor independent spending can cause corruption.⁷⁶ The Court's opinion impliedly concluded that high participation in the public financing program, which could result from trigger funding, could not reduce corruption sufficiently to justify any burden the law created. 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 and to determine whether political spending is less likely to influence elected officials who use public financing. 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. Existing Research on Public Financing Laws, Trigger Provisions, and Competition

Effects of public financing on electoral participation, competition, or citizen confidence

- Peter L. Francia and Paul S. Herrnson studied survey response data from a national sample of state legislative candidates who ran for office. Comparing responses by controlling for confounding variables, they found that candidates who used full public funding spent less time fundraising overall. They concluded that “full public funding has the potential to redirect modern campaign efforts away from the “money chase.” *The Impact of Public Finance Laws on Fundraising in State Legislative Elections*, 31 AM. POL. RES. 520, 520 (2003).
- Michael J. Malbin analyzed existing empirical literature to conclude that the effects of tax credits and refunds on public participation are mixed. Studies of New York City’s matching funds system indicated increased participation, but those results have not been replicated in other locations. *Small Donors: Incentives, Economies of Scale, and Effects*, 11 THE FORUM 385 (2013).
- Michael G. Miller concluded that full public funding “allows candidates to focus solely on the campaign for votes, which results in many more direct interactions with voters.” His findings were based on a survey of candidates for state legislative office across several states, focusing on how they spend their campaigning time. He compared responses from candidates who received public funding to responses from those who did not. *SUBSIDIZING DEMOCRACY: HOW PUBLIC FUNDING CHANGES ELECTIONS AND HOW IT CAN WORK IN THE FUTURE* 62 (2014).
- David M. Primo and Jeffrey Milyo determined that public financing laws negatively affect citizens’ belief in their political power. Their conclusions were based on an analysis of survey data measuring political trust and efficacy over decades, regressed to predict how indications of trust changed based on the implementation of various campaign finance laws. *Campaign Finance Laws and Political Efficacy: Evidence from the States*, 5 ELECTION L.J. 23, 33 (2006).
- Elisabeth Genn, Michael J. Malbin, Sundeep Iyer, and Brendan Glavin examined the potential benefits of public financing by comparing donations to New York City’s publicly financed election in 2009 to New York State’s privately financed election in 2010. They discovered that New York City’s matching funds program “contributed to a fundamental change in the relationship between candidates and their donors,” and encouraged donations from a more diverse set of residents. *CAMPAIGN FINANCE INST. & BRENNAN CTR. FOR JUSTICE, Donor Diversity through Public Matching Funds* (2012).
- Kedron Bardwell concluded 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. His assertions were based on an examination of primary election spending data in a variety of gubernatorial elections, focusing on the extent to which a range of campaign finance laws are correlated with electoral competitiveness. *Money and Challenger Emergence in Gubernatorial Primaries*, 55 POL. RES. Q. 653 (2002).

Effects of trigger laws on willingness of candidates or outside groups to spend money

- Conor M. Dowling, Ryan D. Enos, Anthony Fowler, and Costas Panagopoulos looked to Arizona and Maine to understand whether public financing chills political speech. Comparing spending data for candidates who did and did not participate in such programs in each state, they found no evidence that candidate spending is strategic around the triggering threshold, or 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 ELECTION L.J. 302 (2012); see also Brief for Costas Panagopoulos, Ph.D., Ryan D. Enos, Ph.D., Conor M. Dowling, Ph.D. & Anthony Fowler as Amici Curiae Supporting Respondents, *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011) (Nos. 10-238, 10-239), 2011 WL 686404.
- Michael G. Miller studied data from Arizona's state legislative elections, finding no conclusive evidence that the program's trigger provision reduced speech, or had an unequal effect on speech by participating and nonparticipating candidates. *SUBSIDIZING DEMOCRACY: HOW PUBLIC FUNDING CHANGES ELECTIONS AND HOW IT CAN WORK IN THE FUTURE* 131-132 (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." Brief for Municipal amici as Amicus Curiae Supporting Respondents, 564 U.S. 721 (2011) (Nos. 10-238, 10-239), 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." Brief for Maine Citizens for Clean Elections, Lawrence Bliss, Pamela Jabar Trinward, Andrew O'Brien, & David Van Wie as Amici Curiae Supporting Respondents, 564 U.S. 721 (2011) (Nos. 10-238, 10-239), 2011 WL 686403.
- Anthony Gierzynski analyzed fundraising results for privately funded Maine House candidates who ran against publicly funded opponents. His study yielded no evidence that "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).

3. Proposed Questions Concerning Public Financing Laws

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?

Whether public financing affects political participation and opportunity

- Have small-donor matching or other public financing programs affected voter turnout rates 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 small-donor participation?
- How does the use of public financing affect the likelihood that a candidate will consult a broad range of constituents when considering legislative or executive action?
- Does the use of public financing in a jurisdiction cause citizens to have a more or less accurate understanding of politics or public policy? Are candidates who use public financing more or less likely to discuss issues of concern to a greater number of voters?⁷⁷

D. Disclosure as the Best Regulation to Prevent Corruption

1. Major Factual Conclusions by the Court

Beyond the question of whether independent spending can foster corruption, the Court has 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.”⁷⁸ This conclusion rests in significant part on the premise that “modern technology” has made disclosure vastly more effective than it used to be.⁷⁹ The Court noted in *Citizens United* that the corporate spending limits “were premised on a system without adequate disclosure,” and suggested that they had essentially been overtaken by changed circumstances.⁸⁰ “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.”⁸¹ 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,⁸² more than \$600 million in dark money has been spent in federal races since 2010.⁸³ 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 affect elections.”⁸⁴ Studies on patterns of election spending and the types of 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. Existing Research on Disclosure Rules

Effects on corruption

- Stephen Ansolabehere concluded 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.” His determinations were based on an examination of disclosure regulation at the federal level, and in California. *The Scope of Corruption: Lessons from Comparative Campaign Finance Disclosure*, 6 ELECTION L.J. 163 (2007).
- Michael S. Rocca and Lisa Sanchez studied a 2008 survey conducted by the Campaign Disclosure Project, which ranks each state’s disclosure laws at the time on a scale of A to F. They found 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).

Effects on voters’ preferences

- Travis Ridout, Michael M. Franz, and Erika Franklin Fowler conducted an online survey to determine the influence of disclosure on political advertising. Based on the responses, they concluded that ads sponsored by unknown groups are more effective than those run by candidates. The advantage is reduced when the group’s donors are disclosed. *Sponsorship, Disclosure and Donors: Limiting the Impact of Outside Group Ads*, 68 POL. RES. Q. 154 (2015).
- Conor M. Dowling and Michael G. Miller examined whether voters consider information on the source of campaign funds to be an important piece of information when assessing candidates. Using data from the Cooperative Congressional Election Study and an online survey, they concluded that candidates who received a majority of contributions from individuals were rated more highly by potential voters than candidates who received a majority of contributions from interest groups. *Experimental Evidence on the Relationship between Candidate Funding Sources and Voter Evaluations* (Working Paper 2015).
- Conor M. Dowling and Amber Wichowsky found 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.” Their conclusions were based on an experiment in which subjects were randomly assigned to receive fabricated information about an outside group supporting a fictional candidate. *The Effects of Increased Campaign Finance Disclosure: Evaluating Reform Proposals* (Working Paper 2014).

3. Proposed Questions for Further Research 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.

Whether disclosure eliminates corruption

- If misalignment is caused by campaign spending, is that misalignment affected by the existence of effective disclosure laws?
- If elected officials and candidates provide different levels of access to different people based on their status as contributors or super PAC donors, is that effect eliminated if thorough disclosure laws are in place?

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 when it has access to disclosure reports and performs simple investigations?

Whether disclosure affects voter behavior

- Are there a significant number of voters who 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. Major Factual Conclusions by the Court

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 corporate and union independent election spending, 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.”⁸⁵ Several of the assumptions the Court made 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 justifying different treatment under the law. The Court decided that because independent spending by individuals does not “give rise” to corruption, the same is true of corporate spending, 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.⁸⁶

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. Existing Research on the Effect of Corporate Spending

- Jennifer L. Brown, Katharine D. Drake, and Laura Wellman analyzed data on committee and candidate contributions, discovering 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).
- Eleanor Neff Powell and Justin Grimmer found “evidence that corporations and business PACs use donations to acquire immediate access and favor.” Their conclusions were based on an examination of PAC donation behavior alongside Congressional committee membership patterns in Congress. *Money in Exile: Campaign Contributions and Committee Access* (Working Paper 2016).
- John C. Coates, IV examined lobbying and contribution activity by S&P 500 companies to determine 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 LEGAL STUD. 657 (2012).
- Daniel E. Ho and Frederick Schauer tested whether the “marketplace of ideas” is always the best means to reach truth. Based on polling information for voters in Manhattan, New York, and Hudson County, New Jersey in the 2012 general election, they found 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 on the Role of Corporations

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?
- Does the level of spending from business entities and unions within a state affect whether the state is significantly misaligned?

Whether corporate or union spending affects political participation and opportunity

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

ENDNOTES

- 1 Total candidate and outside spending increased from \$2.87 billion in the 2002 midterm election to \$3.85 billion in the 2014 midterm election. Total candidate and outside spending increased by almost 12 percent between the 2008 and 2012 federal elections, both presidential election years (figures adjusted for inflation). *Cost of Election*, CTR. FOR RESPONSIVE POL., <http://www.opensecrets.org/overview/cost.php> (last visited Aug. 9, 2016). Concurrently, election spending has come from fewer sources: almost half of all the early super PAC money funding the 2016 presidential election came from just 50 donors. Matea Gold and Anu Narayanswamy, *The New Gilded Age: Close to Half of All Super-PAC Money Comes from 50 Donors*, WASH. POST (Apr. 15, 2016), https://www.washingtonpost.com/politics/the-new-gilded-age-close-to-half-of-all-super-pac-money-comes-from-50-donors/2016/04/15/63dc363c-01b4-11e6-9d36-33d198ea26c5_story.html. For the first time since 1990, the total number of donors in 2014 declined from the previous midterm election, though total cost of the election went up. Russ Choma, *Money Won on Tuesday, But Rules of the Game Changed*, CTR. FOR RESPONSIVE POL. (Nov. 5, 2014), <http://www.opensecrets.org/news/2014/11/money-won-on-tuesday-but-rules-of-the-game-changed/>.
- 2 Beth Reinhard and Christopher S. Stewart, *Some Candidates, Super PACs Draw Closer*, WALL ST. J., Oct. 25, 2015, <http://www.wsj.com/articles/some-candidates-super-pacs-draw-closer-1445809990?mg=id-wsj>. See also CHISUN LEE, BRENT FERGUSON & DAVID EARLEY, BRENNAN CTR. FOR JUSTICE, *AFTER CITIZENS UNITED: THE STORY IN THE STATES* (2014), available at [http://www.brennancenter.org/sites/default/files/publications/After Citizens United_Web_Final.pdf](http://www.brennancenter.org/sites/default/files/publications/After%20Citizens%20United_Web_Final.pdf); PAUL S. RYAN, THE CAMPAIGN LEGAL CENTER, “TESTING THE WATERS” AND THE BIG LIE: HOW PROSPECTIVE PRESIDENTIAL CANDIDATES EVADE CANDIDATE CONTRIBUTION LIMITS WHILE THE FEC LOOKS THE OTHER WAY (2015), <http://www.campaignlegalcenter.org/sites/default/files/Testing%20the%20Waters-Full%20Paper.pdf> (noting that prospective candidates waited to declare candidacies while raising money for supportive super PACs).
- 3 Nicholas Confessore & Megan Thee-Brenan, *Poll Shows Americans Favor an Overhaul of Campaign Finance*, N.Y. TIMES, Jun. 2, 2015, <http://www.nytimes.com/2015/06/03/us/politics/poll-shows-americans-favor-overhaul-of-campaign-financing.html>.
- 4 See LAWRENCE NORDEN, BRENT FERGUSON & DOUGLAS KEITH, BRENNAN CTR. FOR JUSTICE, *FIVE TO FOUR* (2016), available at <https://www.brennancenter.org/publication/five-four>. The jurisprudence preceding 2007 was also widely criticized, often based on the Court’s distinction between contributions and independent expenditures originally conceived by *Buckley v. Valeo*, 424 U.S. 1 (1976).
- 5 The Brennan Center for Justice generally advocates for reasonable regulations to reduce the influence of money in politics.
- 6 See Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1, 65 (2011) (“[I]t is unclear why factual findings should be equally stable when the world they are describing may not be, and when new research inevitably provides a better and more precise understanding of the world.”). For example, in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 882 (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.”
- 7 THE CAMPAIGN FINANCE INST. & 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.
- 8 Michael Malbin et al., *Small Donors, Big Democracy: New York City’s Matching Funds as a Model for the Nation and States*, 11 ELECTION L.J. 3 (2012).

- 9 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).
- 10 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), available at <http://scholarship.law.duke.edu/djclpp/vol9/iss2/8> (hereinafter "*Building a Record*").
- 11 Buckley v. Valeo, 424 U.S. 1 (1976).
- 12 Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 660 (1990).
- 13 Nixon v. Shrink Missouri Government PAC, 528 U.S. 377, 389 (2000).
- 14 McCutcheon v. FEC, 134 S. Ct. 1434, 1441 (2014) (quotation marks omitted).
- 15 Randall v. Sorrell, 548 U.S. 230 (2006).
- 16 Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, 564 U.S. 721 (2011).
- 17 *McCutcheon*, 134 S. Ct. 1434.
- 18 Citizens United v. FEC, 558 U.S. 310 (2010).
- 19 See, e.g., Speechnow.org v. FEC, 599 F.3d 686 (D.C. Cir. 2010).
- 20 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.
- 21 See BRENNAN CTR. FOR JUSTICE, RETHINKING CAMPAIGN FINANCE: TOWARDS A PRO-DEMOCRACY JURISPRUDENCE (2015), available at <https://www.brennancenter.org/publication/rethinking-campaign-finance-toward-pro-democracy-jurisprudence>.
- 22 See McConnell v. FEC, 540 U.S. 93, 143 (2003) (noting the legitimate government concern over the "threat from politicians too compliant with the wishes of large contributors") (quotation marks omitted).
- 23 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); see also Gorod, *supra* note 6, at 29 (noting prominence of legislative factfinding by appellate courts and using *Citizens United* as an example).
- 24 Strause & Tokaji, *Building a Record*, *supra* note 10, at 196.
- 25 *McConnell*, 540 U.S. at 127, n.18.
- 26 *Id.* at 127-28 & n. 21.
- 27 *Id.* at 150.
- 28 *Randall*, 548 U.S. at 253, 279.
- 29 *Shrink Missouri*, 528 U.S. at 409.
- 30 See, e.g., Zephyr Teachout, *Facts in Exile: Corruption and Abstraction in Citizens United v. Federal Election Commission*, 42 LOY. U. CHI. L.J. 295, 298 (2011) (discussing lack of record in *Citizens United*).
- 31 *Citizens United*, 558 U.S. at 357.
- 32 See, e.g., *Citizens United*, 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").

- 33 *Buckley*, 424 U.S. at 40.
- 34 Strause & Tokaji, *Building a Record*, *supra* note 10, at 210.
- 35 *McConnell*, 540 U.S. at 124-25, 148-49.
- 36 *Randall*, 548 U.S. at 253, 279.
- 37 *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868, 875 (2009). *See also* *FEC v. Wisconsin Right to Life*, 551 U.S. 470, n. 6 (2007) (using a poll about voter knowledge to conclude that television viewers would not always conclude that ads mentioning candidates were election-related).
- 38 *Randall*, 548 U.S. 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.
- 39 *Id.* at 268.
- 40 *Id.* at 287.
- 41 *Id.* at 279.
- 42 *Shrink Missouri*, 528 U.S. at 389, n.4; *id.* at 402 (Breyer, J., concurring).
- 43 *Austin*, 494 U.S. at 692-93 (Scalia, J., dissenting).
- 44 *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.").
- 45 *See Lair*, 697 F.3d at 1209-11.
- 46 *See, e.g.,* CLARA TORRES-SPELLISCY, KAHLIL WILLIAMS, & DR. THOMAS STRATMANN, BRENNAN CTR. FOR JUSTICE, *ELECTORAL COMPETITION AND LOW CONTRIBUTION LIMITS 2* (2009), *available at* <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").
- 47 *Shrink Missouri*, 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. *Wagner v. FEC*, 793 F.3d 1, 11 (2015).
- 48 *But see McCutcheon*, 134 S. Ct. at 1452-56.
- 49 *Shrink Missouri*, 528 U.S. at 395.
- 50 *Citizens United*, 558 U.S. at 357.
- 51 *Id.* at 360.
- 52 *Id.* at 360.
- 53 *Id.* at 360.
- 54 *Id.* at 357 (quoting *Buckley*, 424 U.S. at 47).
- 55 *Buckley*, 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.").
- 56 *Citizens United*, 558 U.S. at 360.
- 57 *See* CHISUN LEE ET AL., BRENNAN CTR. FOR JUSTICE, *AFTER CITIZENS UNITED: THE STORY IN THE STATES* (2014), *available at* <https://www.brennancenter.org/publication/after-citizens-united-story-states>.

- 58 *Randall*, 548 U.S. at 243.
- 59 See, e.g., Brent Ferguson, *Congressional Disclosure of Time Spent Fundraising*, 23 CORNELL J.L. & PUB. POL'Y 1, 13 (2013).
- 60 The study by Gilens and Page was criticized by several political scientists. Peter K. Enns argues that even when the preferences of wealthy and middle-income citizens diverge, policy “end[s] about where we would expect if policymakers *only* followed the economic median.” *Relative Policy Support and Coincidental Representation*, 13 PERSPECTIVES ON POL. 1053 (2015). Omar S. Bashir contends that Gilens and Page’s study underestimates the impact of middle-income citizens and that “average Americans have received their preferred policy outcome roughly as often as elites have when the two have disagreed with each other.” *Testing Inferences about American Politics: A Review of the “Oligarchy” Result*, 2 RESEARCH & POL. 1 (2015), <http://rap.sagepub.com/content/2/4/2053168015608896.full.pdf+html>. See also J. Alexander Branham, Stuart N. Soroka, & Christopher Wlezien, *When Do the Rich Win?* (Working Paper 2016), <http://jabranham.com/papers/MPSA-when-do-the-rich-win.pdf>. Gilens and Page have written responses to several of the critiques, arguing among other things that critics failed to take into account the strength of support for certain policies within income groups. 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, available at <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/>.
- 61 The authors caution against using data on perceptions of corruption in litigation. In a comparative analysis with 15 other countries from 1996 to 2003, they find little to no evidence that the implementation of public financing is actually correlated with any changes in trust in government. Inherent distrust, they explain, is a much more fundamental attitude unlikely to be affected by government policy. *Id.* at 170-73.
- 62 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).
- 63 See *supra* note 20, explaining use of the term “misalignment”.
- 64 For a similar analysis with regard to contributions, see Sanjay Gupta & Charles W. Swenson, *Rent Seeking by Agents of the Firm*, 46 J.L. ECON. 253 (Apr. 2003).
- 65 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.
- 66 *Randall*, 548 U.S. at 253.
- 67 *McCutcheon*, 134 S. Ct. at 1442.
- 68 *Randall*, 548 U.S. at 253.
- 69 *Id.* at 261.
- 70 *McCutcheon*, 134 S. Ct. at 1450.
- 71 *Id.* at 1451 (quotation marks omitted).
- 72 *McCutcheon*, 134 S. Ct. at 1452.
- 73 *Arizona Free Enterprise*, 564 U.S. 721, 741 (2011).

- 74 *Arizona Free Enterprise*, 564 U.S. at 744.
- 75 *Id.* at 744. (quotation marks omitted).
- 76 *Id.* at 751.
- 77 On the question of how much time publicly-financed candidates spend talking to voters, *see* MICHAEL G. MILLER, *SUBSIDIZING DEMOCRACY: HOW PUBLIC FUNDING CHANGES ELECTIONS AND HOW IT CAN WORK IN THE FUTURE* 46-63 (2014).
- 78 *McCutcheon*, 134 S. Ct. at 1459.
- 79 *Id.* at 1460.
- 80 *Citizens United*, 558 U.S. at 370.
- 81 *Id.* at 370.
- 82 *Id.* at 370. (“A campaign finance system that pairs corporate independent expenditures with effective disclosure has not existed before today.”).
- 83 *See* DANIEL I. WEINER, BRENNAN CTR. FOR JUSTICE, *CITIZENS UNITED FIVE YEARS LATER 2* (2015), *available at* <https://www.brennancenter.org/publication/citizens-united-five-years-later>.
- 84 *Buckley*, 424 U.S. at 67 (quoting *Burroughs v. United States*, 290 U.S. 534, 548 (1934)).
- 85 *Citizens United*, 558 U.S. at 357.
- 86 *Id.* at 349.

STAY CONNECTED TO THE BRENNAN CENTER

Visit our website at www.brennancenter.org.
Sign up for our electronic newsletters at www.brennancenter.org/signup.

Latest News | Up-to-the-minute information on our work, publications, events, and more.

Election 2016 Newsletter | Latest developments, state updates, new research, and media roundup.

Justice Update | Snapshot of our justice work and latest developments in the field.

Redistricting Round-Up | Analysis of current legal battles and legislative efforts.

Fair Courts | Comprehensive news roundup spotlighting judges and the courts.

Liberty & National Security | Updates on privacy, government oversight, and accountability.

Twitter | www.twitter.com/BrennanCenter

Facebook | www.facebook.com/BrennanCenter

Instagram | www.instagram.com/BrennanCenter

NEW AND FORTHCOMING BRENNAN CENTER PUBLICATIONS

Judicial Selection for the 21st Century
John F. Kowal

Building a Diverse Bench: A Guide for Judicial Nominating Commissioners
Kate Berry

The Fight to Vote
Michael Waldman

Bankrolling the Bench: The New Politics of Judicial Elections 2013-2014
Alicia Bannon

How Judicial Elections Impact Criminal Cases
Kate Berry

Democracy Agenda
Brennan Center for Justice

Solutions: American Leaders Speak Out on Criminal Justice
Inimai M. Chettiar, Michael Waldman, Nicole Fortier, and Abigail Finkelman

Democracy & Justice: Collected Writings, vol. IX
Brennan Center for Justice

For more information, please visit www.brennancenter.org.

BRENNAN CENTER
FOR JUSTICE
TWENTY YEARS

at New York University School of Law

120 Broadway
Suite 1750
New York, NY 10271

www.brennancenter.org