

“Masters of War”?
The Defense Industry, the Appearance of Corruption,
and the Future of Campaign Finance

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Under modern Supreme Court precedent, campaign finance regulations can only be justified by the need to prevent quid pro quo corruption or its appearance. To develop a new generation of campaign finance reforms that are both effective and judicially survivable, reformists need to answer a key question: does money cause, or follow, voting behavior? Using a unique dataset, this Note develops a novel methodology to untangle this endogeneity problem and uncover the influence of the defense industry on congressional behavior.

The results are striking: the percentage of campaign contributions originating from the defense industry has a statistically significant effect on voting behavior. This effect is visible even after controlling for a legislator’s baseline favorability toward the defense industry, party/ideology, and the importance of the defense sector to a representative’s district economy. A fifty-percentage-point increase in the proportion of contributions originating from the defense industry is associated with a one-standard-deviation increase in a legislator’s favorability toward the industry. What’s more, from the 2002 to 2014 election cycles, the defense industry quintupled their average contributions; over that same time frame, the proportion of campaign contributions tied to the defense industry roughly tripled.

I argue that these findings and methodology lay an evidentiary foundation for a new generation of campaign finance regulations based on

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preventing the “appearance of corruption.” I argue that this appearance can be shown by demonstrating a pattern of individual examples of campaign financing linked to specific policy outcomes which could give rise to the public’s inference of quid pro quo corruption. This Note concludes by suggesting three areas of campaign finance reform in which the findings and methodology presented here may be applicable: democracy vouchers, an expanded disclosure regime, and broader bans on contractor contributions.

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MASTERS OF WAR

“Senate Bill to End U.S. Role in Yemen War Rejected by House Raytheon Executives”

– *The Onion*, Nov. 29, 2018

*Come you masters of war
You that build the big guns
You that build the death planes
You that build all the bombs . . .*

– Bob Dylan, “Masters of War” (Columbia Records, 1963)

INTRODUCTION

In the weeks after journalist Jamal Khashoggi disappeared into the Saudi consulate in Istanbul, pressure mounted in Congress to withdraw U.S. military support for the Kingdom of Saudi Arabia’s war in Yemen.¹ The controversy brought renewed attention to a concurrent resolution introduced by Rep. Ro Khanna (D-CA 17) which would have done just that.² But on November 14, 2018, the House held a procedural roll-call vote that effectively killed Rep. Khanna’s measure.³ The vote immediately sparked accusations that the opponents of the Khanna resolution were in the pocket of the U.S. defense industry, which manufactures weapons sold to the Saudi military for use in the Yemen conflict.⁴ An article from *Sludge*, an online news site that reports on money in politics, provided some facial plausibility

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1. Max Fisher, *How One Journalist’s Death Provoked a Backlash That Thousands Dead in Yemen Did Not*, N.Y. TIMES (Oct. 17, 2018), <https://www.nytimes.com/2018/10/17/world/middleeast/jamal-khashoggi-saudi-arabia.html> [<https://perma.cc/ZMF6-P9PH>].
 2. Directing the President Pursuant to Section 5(c) of the War Powers Resolution to Remove United States Armed Forces from Unauthorized Hostilities in the Republic of Yemen, H.R. Con. Res. 81, 115th Cong. (2017).
 3. Julian Borger, *Republicans Block Yemen War Vote by Sneaking Rule Change on to Wildlife Bill*, GUARDIAN (Nov. 14, 2018), <https://www.theguardian.com/us-news/2018/nov/14/republicans-yemen-war-powers-saudi-arabia> [<https://perma.cc/47ZJ-ALKG>].
 4. *Id.* (“The arms industry may also help explain Republican resistance [to the Khanna resolution] . . . US arms manufacturers must know that if congressional efforts to terminate direct US military support for the Yemen war gain traction, shutting down US arm sales would likely be next.”) (statement by N.Y.U. law professor Ryan Goodman).

to that claim: according to their analysis of campaign finance data from the Center for Responsive Politics, opponents of the Khanna resolution “received, on average, 75 percent more money from the defense industry during the last election cycle than the representatives who voted to keep the resolution privileged under the War Powers Act”⁵ For opponents of the Yemen war and proponents of campaign finance reform, the raw data advanced a compelling narrative.

But on closer inspection, the *Sludge* analysis says very little. A strong majority of representatives voting to kill the Khanna measure were Republicans,⁶ and it is not exactly news that conservatives receive more defense campaign money than do liberals.⁷ On a deeper level, the *Sludge* article does not even attempt to tackle the endogeneity problem that has dogged campaign finance law and scholarship for decades:⁸ did opponents vote against the Khanna resolution because of the defense industry’s financing? Or did the defense industry finance those candidates’ campaigns because those candidates would become the kind of legislators who would

5. Donald Shaw, *It’s Not Just Trump: Defense-Backed Lawmakers Are Also Standing with the Saudis*, SLUDGE (Nov. 23, 2018), <https://readsludge.com/2018/11/23/defense-backed-lawmakers-standing-with-saudi-arabia> [<https://perma.cc/83PY-BXHU>].

6. 164 CONG. REC. H9521-22 (daily ed. Nov. 14, 2018) (Roll No. 418).

7. Richard Fleisher, *PAC Contributions and Congressional Voting on National Defense*, 18 LEGAL STUD. Q. 391, 399-401 (1993) (discussing correlation of conservative ideology and contributions from Political Action Committees linked to the defense industry).

8. Technically speaking, endogeneity occurs when a predictor variable is correlated with the error term. In other words, the causation is calling from inside the house—not from the independent variable. Imagine that the percentage of time you wear slippers is correlated with the number of cats you own. Does wearing slippers make you want to get more cats? Maybe. But it could be that endogeneity is clouding the picture, i.e., that the type of person who often wears slippers also happens to be the type of person who loves cats.

For an early attempt to explore the endogeneity problem of disentangling money and voting records, see Stephen G. Bronars & John R. Lott, Jr., *Do Campaign Donations Alter How a Politician Votes? Or, Do Donors Support Candidates Who Value the Same Things That They Do?*, 40 J. L. & ECON. 317 (1997). Thomas Stratmann refers to this as an instance of “simultaneous-equation bias,” essentially the statistical equivalent of the same phenomenon. Thomas Stratmann, *Can Special Interests Buy Congressional Votes? Evidence from Financial Services Legislation*, 45 J. L. ECON. 345, 346 (2002).

vote against resolutions like Rep. Khanna's? In other words, did the money cause, or follow, policy?⁹

The answers to these questions matter a great deal for the public's understanding of how interest groups exert influence in the halls of power. They also matter for good-government advocates designing regulations to combat the undue influence of the wealthy. Perhaps most importantly for our purposes, they matter for litigators who will have to defend campaign finance restrictions in court.

Those lawyers face an uphill battle.¹⁰ Over the last two decades, the Supreme Court's conservative majority has weakened campaign finance law.¹¹ Of special relevance here, in *Citizens United v. FEC* and *McCutcheon v. FEC*, the Court made clear that the prevention of *quid pro quo* corruption or

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9. Another way of conceptualizing the "money follows votes" hypothesis is as "those with money . . . exploit[ing] a background heterogeneity to select candidates for office with the most agreeable policy preferences, and expend[ing] money to get them into positions of power." Christopher Robertson, D. Alex Winkelman, Kelly Bergstrand & Darren Modzelewski, *The Appearance and the Reality of Quid Pro Quo Corruption: An Empirical Investigation*, 8 J. LEGAL ANALYSIS 375, 376 (2016).
 10. This is especially true after the confirmation of Justice Amy Coney Barrett to replace Justice Ruth Bader Ginsburg. Although Justice Barrett did not rule on any campaign finance cases of which I am aware during her tenure on the Seventh Circuit, there is little reason to believe she will deviate from her new conservative colleagues on such cases. And given that even the most moderate member of the conservative wing, Chief Justice Roberts, is a reliable vote against campaign finance laws, the switch from a 5-4 to a 6-3 court is all but certain to make life even harder for reform advocates before the Court.
 11. For a non-exhaustive list of Supreme Court decisions in the last quarter century weakening or striking down campaign finance reforms, see, for example: *McCutcheon v. FEC*, 572 U.S. 185, 192-93 (2014) (striking down a per-person cumulative federal contribution limit); *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011) (striking down a public financing system that matched privately financed candidate's expenditures and independent expenditures); *Davis v. FEC*, 554 U.S. 724 (2008) (striking down a federal "millionaire's amendment," which had raised the limit on individual contributions that non-self-financing candidates could receive if opponents' expenditure of personal funds exceeded a certain amount); *Randall v. Sorrell*, 548 U.S. 230 (2006) (striking down state campaign contribution and expenditure limits); *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604 (1996) (striking down as unconstitutional limits on uncoordinated party campaign expenditure).

its appearance are the only constitutional interests which can support a restriction on campaign contributions or spending.¹² This emphasis on *quid pro quo* makes discovering whether money causes or follows votes all the more important. At the risk of oversimplification: if money *follows* votes, then no official act has been affected and a regulation of that transaction is more constitutionally doubtful.¹³ But if money *causes* (or appears to cause) votes, then a strong argument can be made for the constitutionality of campaign finance regulations.¹⁴

The Court's cases weakening campaign finance law—especially *Citizens United*—have been roundly criticized. For instance, Ronald Dworkin takes issue with the Court's equalization of First Amendment rights between

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12. See *McCutcheon v. FEC*, 572 U.S. 185, 192 (2014) (“Any regulation [of campaign finance] must instead target what we have called ‘*quid pro quo*’ corruption or its appearance. That Latin phrase captures the notion of a direct exchange of an official act for money. The hallmark of corruption is the financial *quid pro quo*: dollars for political favors.”) (internal citations omitted).
 13. I do not mean to suggest that the public's perception of corruption, even if mistaken, would be insufficient to support campaign finance restrictions. As discussed below, the appearance interest turns on preserving public confidence in government rather than preventing actual corruption, and so alleviating a public inference of corruption could support campaign finance restrictions even if the inference is mistaken. See *infra* notes 91-94 and accompanying text. My point in this Note is simply that the appearance interest would seem to be especially strong where it really does look like money is causing votes.
 14. A related distinction in the literature is between corruption of policy on the one hand and corruption of elections on the other. That is, that instead of buying legislators' votes, moneyed interests may instead choose the candidates predisposed to their policy positions. See, e.g., Robert F. Bauer, *The Varieties of Corruption and the Problem of Appearance: A Response to Professor Samaha*, 125 HARV. L. REV. F. 91 (2012); John M. de Figueiredo & Elizabeth Garrett, *Paying for Politics*, 78 S. CAL. L. REV. 591, 604-09 (2005); Note, *The Ass Atop the Castle: Competing Strategies for Using Campaign Donations to Influence Lawmaking*, 116 HARV. L. REV. 2610 (2003). The Supreme Court, however, has made it clear that only the former—corruption of policy outcomes—counts for constitutional purposes. See *Randall v. Sorrell*, 548 U.S. 230 (2006) (rejecting corruption-of-election rationale that contribution limits “protect candidates from spending too much time raising money rather than devoting that time to campaigning among ordinary voters”).

natural persons and corporations.¹⁵ Richard Hasen argues that *Citizens United* compounded *Buckley's* error in holding that only preventing corruption and its appearance, and not advancing political egalitarianism, can constitute an interest justifying restrictions on campaign financing.¹⁶ Heather Gerken worries that the disclosure requirements upheld in *Citizens United* are not sufficient to prevent dark money and “shadow parties” from drowning the democratic process.¹⁷ Robert Yablon argues that voting rights and campaign finance law should be harmonized by recognizing a “right to participate” that would support stronger campaign finance restrictions.¹⁸ Drawing on the Court’s one-person-one-vote decisions, Nicholas Stephanopoulos has advanced the argument that campaign finance law should recognize the risk that large amounts of money may “produce a misalignment between the preferences of voters and the preferences of their elected representatives.”¹⁹

Others argue from history. In Lawrence Lessig’s view, the Framers would have understood “corruption” to include “systemic dependence” on

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15. Ronald Dworkin, *The Decision That Threatens Democracy*, N.Y. REV. BOOKS (May 13, 2010), <https://www.nybooks.com/articles/2010/05/13/decision-threatens-democracy> [<https://perma.cc/M4HH-RRWB>].
 16. Richard L. Hasen, *Three Wrong Progressive Approaches (and One Right One) to Campaign Finance Reform*, 8 HARV. L. & POL’Y REV. 21, 36 (2014) (“[P]rogressives need to develop a full and complete vision of what it would mean for the Supreme Court to accept a political equality interest which could justify reasonable (but not unreasonable) campaign finance regulation.”); see also *Ognibene v. Parkes*, 671 F.3d 174, 197-201 (2d. Cir. 2011) (Calabresi, J., concurring) (defending political equality rationale); Daniel P. Tokaji, *The Obliteration of Equality in American Campaign Finance Law: A Trans-Border Comparison*, 5 J. PARLIAMENTARY & POL. L. 381, 381-82 (2011) (“Equality is . . . the Voldemort of U.S. campaign finance jurisprudence. It is the idea that must not be named.”).
 17. Heather K. Gerken, *The Real Problem with Citizens United: Campaign Finance, Dark Money, and Shadow Parties*, 97 MARQ. L. REV. 903 (2014).
 18. Robert Yablon, *Voting, Spending, and the Right to Participate*, 111 NW. U. L. REV. 655, 704-05 (2017) (“The explanation implicitly offered in *Citizens United* for its narrow corruption-centered approach seems to be that restrictions on electoral spending are simply incapable of ever enhancing electoral integrity.”).
 19. Nicholas O. Stephanopoulos, *Elections and Alignment*, 114 COLUM. L. REV. 283, 286 (2014).

a few wealthy individuals—what he terms “dependence corruption.”²⁰ Zephyr Teachout believes that the majority’s “replacement of corruption with a quid pro quo formulation is simply untenable as a matter of legal history.”²¹ And so on. The preceding is not intended to exhaust (or disagree with) the extensive literature criticizing *Citizens United*. Rather, it is intended to illustrate that literature’s emphasis on logical and theoretical disagreements with the decision, rather than systematic empirical work.

This Note takes a different approach. It assumes that what Justice Stevens referred to as *Citizens United*’s “crabbed view of corruption” is here to stay.²² In this brave new world, campaign expenditure restrictions can survive court challenge only if they reduce quid pro quo corruption *or its appearance*. Courts skeptical of campaign finance laws may be persuaded by empirical evidence that quid pro quo corruption exists or appears to exist, and that those laws are tailored in light of the empirics.²³

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20. Lawrence Lessig, *What an Originalist Would Understand Corruption to Mean*, 102 CALIF. L. REV. 1, 9, 11 (2014). The dependence variable used in this study, *see infra* Section I.C.2, is entirely different from Lessig’s “dependence corruption” and refers to the proportion of campaign contributions that are coded as originating from the defense industry.
 21. ZEPHYR TEACHOUT, CORRUPTION IN AMERICA 237 (2014); *see also* Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341 (2009).
 22. *Citizens United v. FEC*, 558 U.S. 310, 447 (2010) (Stevens, J., dissenting) (quoting *McConnell v. FEC*, 540 U.S. 93, 152 (2003)). Justice Stevens, of course, is not the only critic of the Roberts Court’s turn to quid pro quo. Many have criticized this formulation of corruption, perhaps none more effectively than the Washington Post’s Alexandra Petri. *See* Alexandra Petri, *But Was It Quid Pro Quo? A Guide*, WASH. POST (Sept. 25, 2019), <https://www.washingtonpost.com/opinions/2019/09/25/was-it-quid-pro-quo-guide> [<https://perma.cc/Y9PZ-2NUY>] (“A: *That is a nice baby you have there. A: Look at my beautiful new chainsaw! A: Please give me \$20. Is this quid pro quo? No. In this example, Person A is trying to engage Person B by making a series of friendly statements. In the first statement, A compliments B’s baby, a friendly, neighborly thing to do. In the second, A shows off A’s new lawn-care purchase. A takes pride in his lawn. In the third statement, A makes an unrelated request. There is no quid pro quo here.*”).
 23. 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, 180-81 (2014) (“[I]t is . . . important to focus attention on the *evidence* that should be amassed to support the next generation of campaign finance reform. First, examination of the effects of money on the political process . . . will be essential in shaping the next generation of campaign finance reforms and shepherding

Using a unique dataset of roll-call votes and defense industry campaign finance data, this Note develops a novel methodology to untangle the cause/follow the Gordian knot of money and policy. The results show that the proposed methodology works. *Even after* accounting for a legislator's prior favorability (or lack thereof) toward the defense industry, more money is associated with more pro-defense voting. Moreover, the results suggest that the traditional way that the law conceptualizes campaign finance—in absolute dollar figures, not proportions—is inadequate. When the *proportion* of contributions originating from the defense industry is considered, *the absolute amount* of defense money does not significantly predict voting behavior. This Note argues that, given the Supreme Court's increasing empirical skepticism of campaign finance regulations, this methodology provides a path to meeting the evidentiary burdens of justifying a restriction on money in politics.

The methodology developed here provides a path to designing and defending campaign finance laws on the basis of the “appearance of corruption” interest. Part II fleshes out this argument more fully, but in brief, the Court has consistently held since *Buckley v. Valeo* that the government has an interest in preventing “public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.”²⁴ The logic is that allowing situations in which the public could reasonably infer the existence of corruption, whether or not quid pro quo corruption was actually occurring, would risk “erod[ing] [trust in government] to a disastrous extent.”²⁵ Based on the underlying logic of the appearance-of-corruption interest and the Supreme Court's (sparse) guidance on the topic, I argue in Section II.A that one can show the appearance of corruption by demonstrating *a pattern of individual examples of campaign financing linked to specific policy outcomes which could give rise to the public's inference of quid pro quo corruption.*²⁶ In Section II.B, I argue

them through the legislative process. Second, documentation of these effects will be necessary in defending these reforms in court.”). Note that empirical evidence of corruption or its appearance is not always required. *Buckley v. Valeo*, for example, held that the risk of quid pro quo corruption was “inherent” in a system that allowed large contributions, without the need for additional evidence. 424 U.S. 1, 27 (1976).

24. *Buckley v. Valeo*, 424 U.S. 1, 27 (1976).

25. *Id.* (internal citation omitted).

26. This Note should not be read to suggest that this is the *only* way one could make a showing under the appearance-of-corruption interest sufficient to sustain a campaign finance restriction.

that the results of this methodology in the defense industry context meet that definition.

To make concrete the potential of this methodology, recall the *Sludge* analysis. That article obviously does not show outright quid pro quo corruption. Nor do I; such a document would more likely be an indictment than a student Note. But the reason analyses like *Sludge's* are not *legally* persuasive is that they do not support the *appearance* of corruption either. For such a simple correlation, the hypothesis that money follows votes is at least as plausible as the hypothesis that money causes votes. The premise of this Note is that to show the appearance of corruption, campaign finance reformers need empirics capable of overcoming this basic follow/cause objection.

I want to pause here to draw an analogy that I hope will help the reader more clearly grasp the legal significance of the endogeneity problem and the appearance interest in campaign finance law. Consider *McCleskey v. Kemp*, the 1987 decision in which the Supreme Court rejected a black death row inmate's Equal Protection challenge to Georgia's application of the death penalty.²⁷ Much of *McCleskey* revolved around a sophisticated statistical analysis conducted by University of Iowa law professor David Baldus and his colleagues, which showed stunning disparities in the rates at which similarly situated white and black defendants were sentenced to death.²⁸ The Court held that, "to prevail under the Equal Protection Clause, McCleskey must prove that the decisionmakers in *his* case acted with discriminatory purpose [But] he relies solely on the Baldus study."²⁹ The Court acknowledged that "the Baldus study indicates a discrepancy that appears to correlate with race," but held that such an appearance was insufficient to sustain McCleskey's challenge.³⁰

Like McCleskey's Equal Protection challenge, quid pro quo corruption requires invidious intent—in the former, to discriminate on the basis of race; in the latter, to act with corrupt purpose.³¹ McCleskey lost because he

27. 481 U.S. 279 (1987).

28. See David C. Baldus, Charles Pulaski & George Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983).

29. *McCleskey*, 481 U.S. at 292-93.

30. *Id.* at 312.

31. Cf. *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 404-05 (1999) ("[F]or bribery there must be a *quid pro quo*—a specific intent to give or receive something of value *in exchange* for an official act."). Note that

showed an appearance of racism in the death penalty system, and an appearance of racism without proof of actual racist intent was not enough. One can easily argue that *McCleskey* was wrongly decided—I, for one, believe that it was. But the point for our purposes is that, unlike the *appearance of racism* in McCleskey’s Equal Protection analysis, the *appearance of corruption* is a sufficient basis for enacting campaign finance regulations. This study matters because, by turning the endogeneity problem’s two-way street into a one-way analysis, this methodology presents a way to show the appearance of corruption. New methods to show the appearance of corruption are potentially powerful weapons to defend campaign finance laws against the ever-encroaching First Amendment.

This paper proceeds in two parts. Part I explains the methodology of this study and presents descriptive statistics and regression results. Part II explores the interest in preventing the “appearance of corruption” in the context of this methodology and suggests areas in which the analysis presented here could inform effective and judicially survivable reforms. Specifically, I apply this methodology in the context of Seattle’s new public financing system, disclosure regimes, and contractor contribution bans.

A decade after *Citizens United*, one could be forgiven for approaching this effort with a certain amount of skepticism. A cynic might ask: does the Supreme Court’s conservative majority really have a problem with a lack of rigorous empirical analysis of the anticorruption interest? Or is it actually just hostile to the entire enterprise of regulating campaign finance? Maybe the goalposts will move again; maybe evidence of the appearance of quid pro quo corruption will not satisfy the Court.

But if ever there were a time to develop new, empirical methods of approaching these questions, it is now. Upon taking control of the House of Representatives in the last Congress for the first time in eight years, Democrats promptly introduced and passed H.R. 1, a package of pro-democracy reforms that prominently features restrictions on money in politics.³² And Democrats reintroduced H.R. 1 after retaking the presidency and the Senate in the 2020 elections.³³ In addition to congressional pressure, top-tier 2020 Democratic presidential candidates made campaign

campaign finance statutes can and do prohibit activities that fall short of criminal bribery, because campaign finance law is prophylactic in a way that criminal law is not.

32. For the People Act of 2019, H.R. 1, 116th Congress (2019).

33. For the People Act of 2021, H.R. 1, 117th Congress (2021).

finance a stump-speech staple.³⁴ During that campaign, President Joe Biden called for a variety of reforms including ending “dark money” groups, banning corporate PAC contributions to candidates, and barring lobbyist contributions to politicians they lobby.³⁵ At the state and local levels, progressives and good-government advocates are advancing new public financing models and disclosure requirements to bring dark money into the light.³⁶ Campaign finance has not seen this level of policy innovation in decades. But without corresponding innovation in the legal defense of these initiatives, any wave of reform will crest on the courthouse steps.

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34. See, e.g., Matt Friedman, *Booker Seeks Distance as Corporate Donations Become Potent Campaign Issue*, POLITICO (Jul. 3, 2018), <https://www.politico.com/states/new-jersey/story/2018/07/03/booker-seeks-distance-as-corporate-donations-become-potent-campaign-issue-494360> [<https://perma.cc/U45W-RX5J>]; Elaine Godfrey, *Elizabeth Warren’s New Fundraising Rule Is More Than a Gimmick*, ATLANTIC (Mar. 5, 2019), <https://www.theatlantic.com/politics/archive/2019/03/elizabeth-warren-rejects-big-donor-events-2020-bid/583951> [<https://perma.cc/E9RW-RU4M>]; Tara Golshan & Li Zhou, *Bernie Sanders Is Running for President Again. This Time, He’s a Frontrunner*, VOX (Feb. 19, 2019), <https://www.vox.com/policy-and-politics/2019/2/19/18200479/bernie-sanders-running-president-2020> [<https://perma.cc/EKF9-326S>].
35. Ella Nilsen, *Warren and Biden Release New Campaign Finance Reform Plans Before the Democratic Debate*, VOX (Oct. 15, 2019), <https://www.vox.com/2019/10/15/20914504/warren-biden-campaign-finance-2020> [<https://perma.cc/6BDX-PAJB>].
36. See, e.g., Savannah Cardon, *Representatives Seek Changes on Campaign Finance Reform Bill*, IDAHO PRESS (Mar. 8, 2019), https://www.idahopress.com/news/local/representatives-seek-changes-on-campaign-finance-reform-bill/article_0b80a997-55f3-5ab7-908e-c7c657ec7f39.html [<https://perma.cc/X7AH-P9Q7>]; Catherine Hinckley Kelley & Austin Graham, *Buying Back Democracy: The Evolution of Public Financing in U.S. Elections*, CAMPAIGN LEGAL CTR. (Oct. 2018), https://campaignlegal.org/sites/default/files/2018-10/2018-Building-Small-Dollar-Democracy_FINAL.pdf [<https://perma.cc/4Q9U-KAXG>]; Dan McKay, *House Passes Campaign Disclosure Bill*, ALBUQUERQUE J. (Mar. 9, 2019), <https://www.abqjournal.com/1290205/house-passes-campaign-disclosure-bill.html> [<https://perma.cc/CR4A-HSLC>]. Note that because public financing and disclosure requirements do not restrict speech directly in the same way that expenditure limits do, they are subject to lesser scrutiny—but new empirical methods may nevertheless help support such proposals.

I. A NEW EMPIRICS OF CORRUPTION³⁷

A new generation of campaign finance reforms deserves a new method of untangling the endogeneity problem.³⁸ This Part attempts to build that methodology, using the defense industry as a starting point. But by no means is the approach described here confined to the military-industrial complex, nor is this Note meant only to illustrate the degree to which Raytheon, Northrup Grumman, and Boeing influence national policy. Rather, this Note seeks to quantify how much those companies influence policy in an attempt to demonstrate the viability of a new empirical approach to campaign finance law.

This study focuses on members of the U.S. House of Representatives. Legislators are included if they were in office from the 108th through the 113th Congresses. A total of 136 representatives met this criterion: 78 Democrats and 58 Republicans. The unit of analysis is a representative in a given Congress. Although a more robust discussion of the methodology can

37. A much earlier version of Part I of this Note was presented at the 2017 International Studies Association conference in Baltimore, Maryland. Although the data used in this study vary somewhat from the data in that paper, the underlying findings are essentially the same.

38. The failure to account for endogeneity probably explains much of the curious fact that a good portion of the literature on contributions and roll-call votes “favors the view that contributions are unrelated to voting behavior.” Rui J.P. de Figueiredo, Jr. & Geoff Edwards, *The Market for Legislative Influence Over Regulatory Policy 2* (2015), available at <http://faculty.haas.berkeley.edu/rui/Edwards%20and%20de%20Figueiredo%20Market%20for%20Influence%20Nov%2010.pdf> [<https://perma.cc/T3DK-RGNX>]; see also *id.* at 2 n.1 (collecting studies finding and not finding an effect of contributions on votes); Brandice Canes-Wrone & Nathan Gibson, *Developments in Congressional Responsiveness to Donor Opinion*, in *CAN AMERICA GOVERN ITSELF?* 69 (Frances E. Lee & Nolan McCarty eds., 2019) (“In contrast to this widely held view [among the public that campaign contributions affect legislative policymaking], the political science literature provides little evidence that congressional roll call voting corresponds to campaign contributions.”). Ferguson et al. critique the “Panglossian complacency” of many of these studies in part based on the studies’ failure to reckon with this endogenous effect. Thomas Ferguson, Paul Jorgensen & Jie Chen, *How Much Can the U.S. Congress Resist Political Money? A Quantitative Assessment*, INST. FOR NEW ECON. THINKING 5 (Jan. 2020), <https://www.ineteconomics.org/research/research-papers/how-much-can-the-u-s-congress-resist-political-money-a-quantitative-assessment> [<https://perma.cc/R4XD-GRPN>].

be found in the appendices, a brief description of the variables here is in order. The dependent variable is a representative's favorability toward the defense industry in a given Congress, measured as the proportion of pro-defense votes that representative took, standardized against their colleagues' votes. The independent variables are (1) ideology (measured by the commonly used DW-NOMINATE scale), (2) party, (3) district economic dependency on the defense industry,³⁹ (4) the representative's favorability score in the prior Congress, (5) the percent of that representative's campaign contributions for that cycle⁴⁰ that the Center for Responsive Politics codes as originating from the defense industry, and (6) the dollar amount of contributions for that cycle coded as defense industry money.

The defense industry is an ideal starting point for this endeavor.⁴¹ First, there is no countervailing, well-funded set of interest groups that injects money into campaigns in opposition to the defense industry.⁴² Compare

39. See *infra* notes 171-173 and accompanying text.

40. In this case, I technically mean the cycle preceding the Congress in which the votes involved are examined. So, for example, when examining voting outcomes in the 110th Congress (January 2007–January 2009), I look to contributions in the 2005–2006 election cycle. In other words, I conceive of corruption as a sort of ongoing, iterative relationship—a circular back-scratching—rather than near-simultaneous, one-off transactions. In my view, this is a fair assumption. It is possible that campaign contributions to a given candidate could affect that legislator's actions in the ongoing Congress, instead of (or in addition to) the subsequent Congress. But if this is occurring, we would expect some of the relationship between money and voting to be captured by the “prior favorability” variable.

41. Of course, I am not the first to argue that the defense industry is a particularly important window into the mechanics of how interest groups exercise political power. See, e.g., GORDON ADAMS, *THE POLITICS OF DEFENSE CONTRACTING: THE IRON TRIANGLE* (1981); J. David Gopoian, *Change and Continuity in Defense PAC Behavior*, 13 AM. POL. Q. 297 (1985); J. David Gopoian, Hobart Smith & William Smith, *What Makes PACs Tick? An Analysis of the Allocation Patterns of Economic Interest Groups*, 28 AM. J. POL. SCI. 259 (1984); Michael S. Rocca & Stacy B. Gordon, *Earmarks as a Means and an End: The Link Between Earmarks and Campaign Contributions in the U.S. House of Representatives*, 75 J. POL. 241 (2013).

42. E. Joshua Rosenkranz made a similar point almost a quarter-century ago, in a persuasive rebuttal to Bradley Smith's 1996 essay attacking the underpinnings of campaign finance regulations. E. Joshua Rosenkranz, *Faulty Assumptions in Faulty Assumptions: A Response to Professor Smith's Critiques of Campaign Finance Reform*, 30 CONN. L. REV. 867, 881 (1998) (“Professor Smith

that with labor groups' campaign financing activities, the analysis of which might be confounded by the diametrically opposed contributions of business interests. The same could be said of the AARP and pharmaceutical companies tussling over drug prices. But, simply put, the U.S. Institute of Peace and Human Rights Watch do not have the financial firepower to cancel out Lockheed Martin and Boeing's campaign financing activities.

Second, the defense industry is unusually unlikely to suffer blowback from the public because of its campaign finance activities. Richard Epstein has asserted that "[p]olitical statements will win a corporation many enemies—enemies who can then boycott your products. The same political statements may win you some friends, but not friends who will double their purchases just because you have taken a stand they find favorable."⁴³ Epstein's hypothesis is somewhat implausible—after all, if companies are so afraid of public blowback from their campaign finance activities, why do so many plow so much money into campaigns? Nevertheless, the defense industry should be largely exempt from the logic of Epstein's hypothesis, because average voters angered by a defense contractor's political activities cannot readily decrease their personal consumption of fighter jets.

Third, intra-sector competition is limited because the benefits of pro-defense policy outcomes are not concentrated among a few firms. One might worry that "defense" campaign spending reflects internecine wrestling between different players within the defense industry. For example, one might believe that a given \$100 million reflects Lockheed and Boeing each spending \$50 million competing for an exclusive and lucrative contract. But Rebecca Thorpe has documented the extent to which ubiquitous subcontracting in the defense industry spreads benefits between firms.⁴⁴ A corollary of her findings is that a decision to acquire a new weapon system or deploy forces to a new country should create a rising tide that lifts most

[asserts] that we ought not be unduly concerned about the influence of money, because 'large campaign contributors are usually offset by equally well-financed interests that contribute to a different group of candidates.' . . . [T]his statement is breathtakingly counter-factual . . . [For example,] the defense industry outspends disarmament groups by 20:1."); *see also infra* note 82 (citing Smith's articles).

43. Richard A. Epstein, *Citizens United v. FEC: The Constitutional Right That Big Corporations Should Have but Do Not Want*, 34 HARV. J. L. & PUB. POL'Y 639, 656-57 (2011).
44. REBECCA U. THORPE, *THE AMERICAN WARFARE STATE: THE DOMESTIC POLITICS OF MILITARY SPENDING* (2014).

or all defense contractors' warships. Therefore, compared to other sectors, there is less concern that the coding of contributions as from the "defense industry" obscures significant intra-sector competition.

Fourth, there are normative reasons to be concerned about the defense industry having too much power in the political process. Questions of war and peace go to the heart of democratic governance. If special interests can buy defense-friendly policies, then the influence of taxpayers and citizens who bear the cost of arms acquisitions, wars, and so on will be necessarily reduced.⁴⁵ And there is cause for concern from a resource-constraints perspective as well. In the classic "guns versus butter" tradeoff, empirical research suggests that investing in guns reduces overall welfare.⁴⁶

A word of caution: for the above reasons, if money appears to cause votes, we would expect to see the effects especially clearly in the defense industry context. But that does not mean similar dynamics are not at play in other industries, even if they are more difficult to uncover statistically. In other words, one should not fall prey to the drunkard's fallacy, assuming one's keys cannot be anywhere but under the streetlight, because that is where the light is clearest.

The remainder of this Part proceeds as follows: Section I.A presents descriptive statistics on the defense industry's increasingly prominent role in campaign financing; Section I.B presents the results of the regression analysis.

45. President Eisenhower made a similar point six decades ago in his famous Farewell Address, which is worth quoting at length:

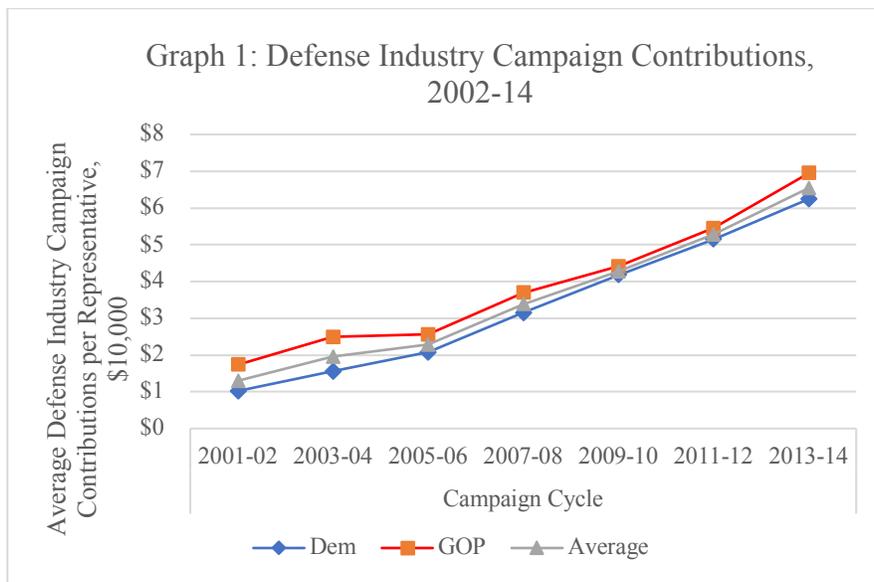
In the councils of government, we must guard against the acquisition of unwarranted influence, whether sought or unsought, by the military-industrial complex. The potential for the disastrous rise of misplaced power exists and will persist. We must never let the weight of this combination endanger our liberties or democratic processes. We should take nothing for granted. Only an alert and knowledgeable citizenry can compel the proper meshing of the huge industrial and military machinery of defense with our peaceful methods and goals, so that security and liberty may prosper together.

President Dwight D. Eisenhower, Farewell Address to the Nation (Jan. 17, 1961), available at http://avalon.law.yale.edu/20th_century/eisenhower001.asp [<https://perma.cc/WPP3-URQT>].

46. See, e.g., ROBERT POLLIN & HEIDI GARRETT-PELTIER, *The U.S. Employment Effects of Military and Domestic Spending Priorities*, POL. ECON. RES. INST. (Dec. 2011), <https://www.peri.umass.edu/publication/item/449-the-u-s-employment-effects-of-military-and-domestic-spending-priorities-2011-update> [<https://perma.cc/F665-BH7B>].

A. Descriptive Statistics

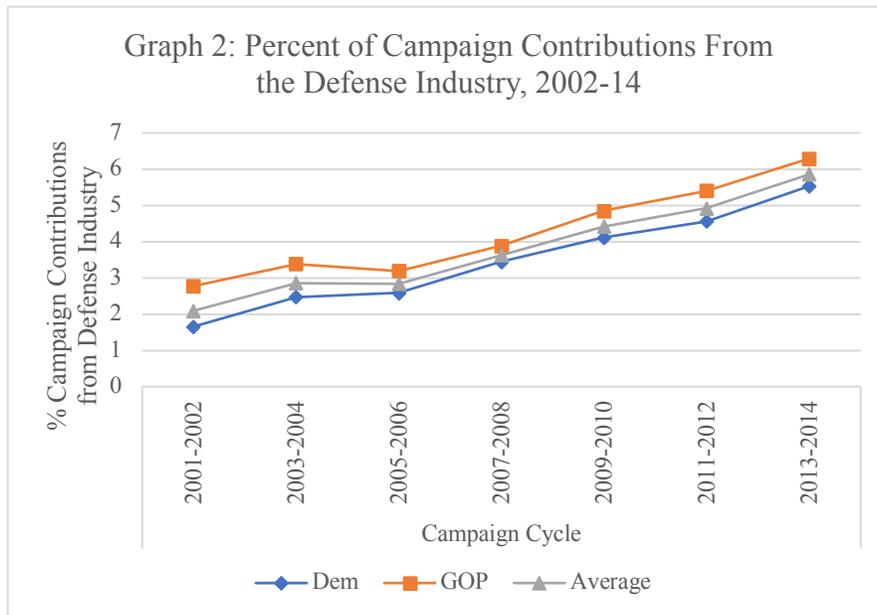
The defense industry dramatically increased its contributions to the studied Representatives from 2002 to 2014. In 2002, Representatives received, on average, \$12,996 from the defense industry; in 2014, that amount had approximately *quintupled* to \$65,419. Average contributions to Democrats increased from \$10,214 during the 2002 election cycle to \$62,424 for the 2014 cycle. Average contributions to Republicans increased from \$17,360 to \$69,446 over the same period. These data are represented in Graph 1.



Moreover, representatives became increasingly dependent on the defense industry’s money from the 2002 to 2014 election cycles. Put differently, the defense industry’s increasing contributions have outpaced the overall increase in money flowing to campaigns. In 2002, representatives received on average 2.09 percent of their campaign contributions from the defense industry.⁴⁷ By the 2014 election cycle, that

47. These proportions are calculated as the contributions coded by the Center for Responsive Politics (CRP) as originating from the defense industry divided by the total contributions categorized by CRP. A fraction of contributions for each candidate are not categorized. Because there is no reason to believe that these uncategorized contributions are more or less likely to come from the defense

number had nearly *tripled* to 5.86 percent. The pattern is roughly the same for both parties. From the 2002 to 2014 election cycles, the proportion of contributions to Republicans from the defense industry increased from 2.77 percent to 6.29 percent. For Democrats, those numbers are 1.66 percent to 5.53 percent, respectively. These data are represented in Graph 2.



These data show an industry pouring more and more money into elections, outpacing the overall increase in contributions. The rest of this Part asks: what, if anything, are defense companies getting for their money?

B. Regression Analysis

Using statistical software (SPSS), I ran the variables discussed above through a stepwise regression program, which iteratively adds and removes variables to arrive at the best model of the inputted variables. In the final model, party, a legislator's favorability toward the defense industry in the prior Congress, and the percentage of contributions originating from the defense industry are significant predictors of a legislator's favorability

industry than coded contributions, the incomplete categorization of the CRP data does not affect this analysis.

toward defense.⁴⁸ These three variables predict 66 percent of the variance in favorability toward the defense industry in a given congress.⁴⁹ In this model, ideology,⁵⁰ absolute defense contributions,⁵¹ and home-district dependency on the defense industry⁵² are not significant. Coefficient values can be found in Appendix A.

Party and favorability toward the defense industry in the previous Congress exhibit a strong correlation: Republicans are much more pro-defense than Democrats.⁵³ Given the stability of legislators' policy preferences between Congresses and the relationship between ideology and defense-related voting, this is unsurprising.⁵⁴ Changing parties from Democrat to Republican increases the predicted favorability of that representative toward the defense industry by 1.044 standard deviations relative to other legislators in that Congress, all else equal.⁵⁵ This matches with Fleisher's finding that conservatism is positively related to pro-defense voting.⁵⁶ And, given Thorpe's finding that district dependency on the defense industry is strongly related to partisanship, party may be capturing some of the effect of district dependency.⁵⁷

A representative's relative favorability toward the defense industry in one Congress is a moderately strong predictor of their stance on defense-

48. $F_{3, 676} = 436.141, p < 0.001$. A p -value is "significant" if it is less than 0.05. A p -value of 0.01 indicates that there is a 99% chance that a given result is not attributable to random chance.

49. $R^2 = 0.659$.

50. $p = 0.519$.

51. $p = 0.953$.

52. $p = 0.648$.

53. $r = -0.783, p < 0.01$.

54. Additionally, it appears (unsurprisingly) that "party" and "ideology" are two sides of the same coin. The Variance Inflation Factor for ideology in the final model is extremely high, at 13.863.

55. $\beta_2(\text{Party}) = 1.044$ (95% C.I.: 0.896, 1.192). Recall that the dependent variable is constructed as a standardized proportion of votes in favor of the defense industry.

56. Fleisher, *supra* note 7.

57. THORPE, *supra* note 44, at 118.

related issues in the subsequent Congress.⁵⁸ Despite the relatively small number of votes recorded for some Congresses in our sample, this time-lagged variable's significance can be interpreted as a sign that it is capturing a substantial amount of the predictive power of pre-existing policy preferences.

In this model, each additional one-percentage-point increase in the proportion of campaign contributions originating from the defense industry increases predicted favorability toward the defense industry by 0.020 standard deviations.⁵⁹ Thus, a one standard-deviation increase in favorability toward the defense industry is associated with a 50 percentage point increase in the proportion of contributions originating from the defense industry.⁶⁰ For comparison, moving one standard deviation in favor of defense takes you roughly from a Rep. Barbara Lee (D-CA) to a Rep. John Boehner (R-OH).⁶¹

One might propose an alternative explanation for this phenomenon. Specifically, it could be that longer-tenured incumbents receive more money from the defense industry than do more junior members, and that legislators become persuaded by pro-defense arguments over time because of exposure to lobbyists or greater familiarity with the subject matter. In this world, the objection goes, increasing money and favorability toward the defense industry are caused by seniority, not each other. There are three responses. First, the notion that more time spent with lobbyists leads to more favorability toward the defense industry should not assuage fears of undue industry influence. Quite the opposite. Second, recall the favorability variable developed here is standardized across the sampled representatives. Those representatives all accumulate seniority at the same rate. Therefore, even if the sample as a whole becomes more pro-defense as a result of more exposure to defense lobbyists, that does not explain why some legislators become more pro-defense *compared to their colleagues*.

58. $\beta_4^* = 0.307$. Note that standardized coefficient values (β^*) should be interpreted carefully here, as the dependent variable is already standardized.

59. $\beta_5(\text{Percent Defense Contrib}) = 0.020$ (95% C.I.: 0.11, 0.29).

60. $1 / 0.020 = 50$.

61. Speaker Boehner had an average standardized favorability score of 0.03, the closest to the mean in this sample, while Rep. Lee had an average standardized score of -1.1. Because these scores are already standardized, a move from 0 to 1 is one standard deviation.

Third, in any case, the underlying assumption is wrong: seniority and contributions are not significantly correlated.⁶²

When party, previous Congress favorability, and the percent of campaign contributions from the defense industry are included in the model, the absolute amount of contributions from the defense industry is not significant in predicting a representative's favorability toward the industry. This suggests that legislators respond to the defense industry's campaign contributions in a broader context of campaign financing, rather than in a vacuum.

In summary: First, the defense industry has dramatically increased the amount of money it pours into politics, and U.S. Representatives have become more dependent on the defense industry's money as a result. The percentage of campaign contributions originating from the defense industry roughly tripled from 2002 to 2014. Second, when the proportion of contributions to a candidate from a given industry is taken into account, the absolute amount of contributions from that industry is not a statistically significant predictor of favorability toward the defense industry. Third, when controlling for party and a representative's previous voting behavior, a fifty-percentage-point increase in the proportion of a candidate's contributions from the defense industry translates to a one-standard-deviation increase in that candidate's favorability toward the industry.

II. DESIGNING AND DEFENDING CAMPAIGN FINANCE REGULATIONS UNDER THE APPEARANCE-OF-CORRUPTION INTEREST

What is the appearance of corruption? And how would a litigator "show" the appearance of corruption in the context of a challenge to a campaign finance regulation? This Note argues that the appearance of corruption in campaign finance law can be shown via *a pattern of individual examples of campaign financing linked to specific policy outcomes that could give rise to the public's inference of quid pro quo corruption*.⁶³ To arrive at

62. Spearman's rho between seniority (instrumentalized as a legislator's seniority ranking within the sample in the 108th Congress) and ranked absolute defense contributions in that cycle is a paltry 0.081. The *p*-value for that correlation is 0.35. The numbers do not change meaningfully if ranked dependency on defense money is used rather than ranked absolute defense contributions. Spearman's rho for that comparison is 0.043, with a *p*-value of 0.62. Note that the nonparametric Spearman's rho is used rather than Pearson's *r* because seniority is an ordinal variable.

63. I do not mean to suggest at all that this methodology is the only way one could show the appearance of corruption.

this definition, Section II.A analyzes the emergence and underlying logic of the “appearance” interest, as well as the types of evidence the Supreme Court has rejected and accepted as showing corruption. Section II.B argues that the methodology developed here can be used to uncover evidence that meets this definition. Section II.C gets specific, using this analysis to argue that three types of campaign finance reform—public financing, using Seattle’s “democracy vouchers” program as a case study; strong and robustly enforced disclosure requirements; and broader contractor bans—can withstand constitutional attack.

A. *Defining the “Appearance of Corruption”*

Litigators can show the appearance of corruption by providing evidence of a pattern of individual examples of campaign financing linked to individual policy outcomes that could give rise to the public’s inference of quid pro quo corruption. This granular focus on individual cases of money linked to policy distinguishes this definition from the generalized, system-level view of corruption previously rejected by the Supreme Court.⁶⁴ In artistic terms, the requisite evidentiary showing is more like a mosaic of particular examples than a painting in broad brushstrokes.

The remainder of this Section explains the above definition. It analyzes the effect of the Supreme Court’s move toward quid pro quo corruption on the underlying logic of the appearance interest. Next, it examines what little the Court has said regarding necessary evidentiary showings in the campaign finance context. Finally, it addresses what the Court has said or implied is *not* necessary to show the appearance of corruption. Given the Court’s lack of exposition on the subject—especially since *Citizens United*—this reasoning from negative space is necessary to understand the appearance interest.

We begin with the only constitutionally permissible justifications for regulating campaign finance: “the prevention of corruption and the

64. See *Citizens United v. FEC*, 558 U.S. 310, 365 (2010) (“*Austin* should be and now is overruled.”) (internal citation omitted); *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 659-60 (1990) (“Michigan’s regulation aims at a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form . . .”).

appearance of corruption.”⁶⁵ After *Buckley v. Valeo*,⁶⁶ the questions of what exactly comprises “corruption” and what kinds of campaign financing activities lead to it were litigated for the next forty-odd years.⁶⁷ In *Citizens United*⁶⁸ and *McCutcheon v. FEC*,⁶⁹ the Supreme Court settled that debate. Prior to *Citizens United*, the government could, at least in theory, regulate campaign finance to prevent “a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form.”⁷⁰ But for better or for worse, “corruption” in the post-*Citizens United* campaign finance context now means quid pro quo corruption: “a direct exchange of an official act for money.”⁷¹ For legislators, the archetypal example is vote-buying, although other official actions (e.g., issuing subpoenas or introducing legislation) could conceivably fall under the quid pro quo

65. *Buckley v. Valeo*, 424 U.S. 1, 25 (1976); *see also Citizens United*, 558 U.S. at 356-58 (elaborating on this sole acceptable justification).

66. We should pause to note that, although *Buckley* remains firmly situated as a foundational case in modern campaign finance law, critics not only from the left, but also from the right, have called for the decision’s overruling. Most prominently, Justice Thomas has for many years argued that *Buckley* ought to be overruled as providing “insufficient protection to political speech.” *Randall v. Sorrell*, 548 U.S. 230, 266 (2008) (Thomas, J., concurring); *see also* *McCutcheon v. FEC*, 572 U.S. 185, 228 (2014) (Thomas, J., concurring) (collecting cases). But there is little risk of Justice Thomas getting his way. For one, of the five other conservatives currently on the court, none has joined one of Justice Thomas’s calls to overrule *Buckley* (although, to be fair, several have not yet had a clear opportunity). For another, the other conservative justices seem perfectly content to roll back campaign finance laws within the existing *Buckley* framework. *See, e.g.,* *Thompson v. Hebdon*, 140 S. Ct. 348 (2019) (*per curiam*) (vacating and remanding a Ninth Circuit decision upholding Alaska’s contribution limits for reconsideration in light of *Randall v. Sorrell*).

67. *See, e.g.,* *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007); *McConnell v. FEC*, 540 U.S. 93 (2003); *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604 (1996); *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990); *FEC v. Nat’l Conservative Pol. Action Comm.*, 470 U.S. 480 (1985).

68. 558 U.S. at 359 (“When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption.”).

69. 572 U.S. 185.

70. *Austin*, 494 U.S. at 660.

71. *McCutcheon*, 572 U.S. at 192 (internal citations omitted).

umbrella.⁷² Thus, the appearance of corruption now means the appearance of quid pro quo corruption.

The Court's pivot to a quid pro quo formulation of corruption is clear enough, but the "appearance" side of the equation remains maddeningly opaque. This is not unique to post-*Citizens United* case law. Modern campaign finance law is frequently said to have begun in 1976 with *Buckley*, but the concept of the "appearance of corruption" emerged three years earlier in *U.S. Civil Service Commission v. Natl Ass'n of Letter Carriers, AFL-CIO*.⁷³ Applying the Hatch Act, the Court in *Letter Carriers* explained that "it is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent."⁷⁴ Extending this principle to campaign finance law, *Buckley* held:

[o]f almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions Here, as [in *Letter Carriers*], Congress could legitimately conclude that the avoidance of the appearance of improper influence 'is also

72. In *McDonnell v. United States*, 136 S. Ct. 2355 (2016), the Supreme Court narrowly defined "official acts" in the context of federal anti-bribery law to mean "a decision or action on a 'question, matter, cause, suit, proceeding, or controversy.'" *Id.* at 2371. Although the case did not arise under campaign finance law, the Court implied that the same reasoning would apply to "a campaign contribution." *Id.* at 2372. See also *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398 (1999) (discussing the boundaries of "official acts"). It is worth noting that at least one study has found in a randomized, controlled setting that the vast majority of the public considers a range of "ubiquitous behavior that virtually any of the 535 Members of Congress engage in every day" to be sufficiently corrupt to justify a grand-jury indictment under federal anti-bribery statutes. Christopher Robertson, D. Alex Winkelman, Kelly Bergstrand & Darren Modzelewski, *The Appearance and the Reality of Quid Pro Quo Corruption: An Empirical Investigation*, 8 J. LEGAL ANALYSIS 375, 380 (2016). This strongly suggests that what the Supreme Court considers to be an "official act" within the meaning of quid pro quo corruption is dramatically underinclusive with regards to what actually appears to the public to be corrupt.

73. 413 U.S. 548 (1973).

74. *Id.* at 565.

critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.⁷⁵

Since *Buckley*, the “appearance of corruption” has had a cameo role in every major Supreme Court campaign finance case.⁷⁶ But even when the Court has treated the “appearance of corruption” as more than a linguistic vestigial appendage to the government interest in reducing actual corruption, it has not fully defined what it means to “appear” corrupt beyond the formulation in *Letter Carriers* and *Buckley*.⁷⁷ The logic underpinning the “appearance of corruption” justification gets us only so far, because the public confidence rationale does not imply that everything that reduces public confidence falls within the “appearance of corruption.” Honest ineptitude, without a whiff of undue influence, may also undermine public confidence in government.⁷⁸ Lower court decisions are not much

75. *Buckley v. Valeo*, 424 U.S. 1, 27 (1976) (quoting *Letter Carriers*, 413 U.S. at 565).

76. *See, e.g., McCutcheon*, 572 U.S. at 192 (“Any regulation must . . . target what we have called ‘*quid pro quo*’ corruption or its appearance.”); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 478 (2007) (“This Court has long recognized the governmental interest in preventing corruption and the appearance of corruption in election campaigns.” (internal citations and quotation marks omitted)); *McConnell v. FEC*, 540 U.S. 93, 142 (2003) (“Congress enacted § 323 [of FECA] as an integrated whole to vindicate the Government’s important interest in preventing corruption and the appearance of corruption.”); *FEC v. Beaumont*, 539 U.S. 146, 155 (2003) (asserting that Congress may “counter the appearance and reality of corruption”); *FEC v. Nat’l Conservative Pol. Action Comm.*, 470 U.S. 480, 496-97 (1985) (“[P]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances.”).

77. *See, e.g., Nixon v. Shrink Mo. PAC*, 528 U.S. 377, 390 (2000) (“Leave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance.”); *see also* Adam Samaha, *Regulation for the Sake of Appearance*, 125 HARV. L. REV. 1563, 1601 (2012) (“[T]he appearance justification [for campaign finance regulations] has always been theoretically stunted.”).

78. The most prominent study in this area found that a variety of variables, including approval of the current President and an individual’s general level of trust in others, better explain public perception of corruption than do campaign finance laws. Nathaniel Persily & Kelli Lammie, *Perceptions of*

help either, because they tend to follow the Supreme Court's lead. Although the lower courts will sometimes say certain arrangements appear to be corrupt or that a law (in)appropriately targets the appearance of corruption, as a general rule they do not explain what it *means* to appear corrupt or to adequately tailor a regulation to that appearance.⁷⁹

Beyond the internal logic of the appearance-of-corruption interest, we next look to the Court's guidance on the evidence necessary to vindicate this interest. At various points, the Supreme Court has hinted at what evidence would support a regulation intended to prevent the appearance of corruption. These breadcrumbs can be found in the Court's criticism or praise of different evidentiary records in challenges to campaign finance regulations. In *Citizens United*, the majority criticized the record in *McConnell v. FEC* and the legislative record of the McCain-Feingold Bipartisan Campaign Finance Reform Act (BCRA) for not containing "direct examples of votes being changed for expenditures."⁸⁰ One can fairly extrapolate that if the Court were speaking on the parallel track of the appearance of corruption, they would have said something like "examples of votes that appear to have been changed for expenditures." Four years earlier, in *Randall v. Sorrell*, the Court struck down a Vermont campaign finance regulation in part because "[t]he respondents have not shown, for example, any dramatic increase in corruption or its appearance in Vermont."⁸¹ In upholding contribution limits in *Nixon v. Shrink Missouri*

Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law, 153 U. PA. L. REV. 119 (2004).

79. For example, in a recent Sixth Circuit case, the Court of Appeals acknowledged the existence of the appearance-of-corruption interest but either referred to it in conjunction with the anti-corruption interest or seemed to conflate it with an interest in preventing future corruption. *See Schickel v. Dilger*, 925 F.3d 858 (6th Cir. 2019); *see also Ala. Democratic Conf. v. Att'y Gen.*, 838 F.3d 1057 (11th Cir. 2016) (upholding a state campaign finance statute under the appearance-of-corruption interest without examining the internal logic or boundaries of that interest); *Green Party of Conn. v. Garfield*, 616 F.3d 189, 205 (2d Cir. 2010) (same).
80. *Citizens United v. FEC*, 558 U.S. 310, 360 (2010) (quoting *McConnell v. FEC*, 251 F. Supp. 176, 560 (opinion of Kollar-Kotelly, J.)). *But see Am. Tradition P'ship, Inc. v. Bullock*, 567 U.S. 516 (2012) (per curiam) (overruling the Montana Supreme Court's factual finding "that independent expenditures by corporations did in fact lead to corruption or the appearance of corruption in Montana.").
81. 548 U.S. 230, 234 (2006).

Government PAC, the Court cited “newspaper accounts of large contributions supporting inferences of impropriety,” affidavits from state legislators that large contributions could buy votes, and voters’ overwhelming support for contribution limits in upholding campaign finance regulations.⁸²

We now turn to reasoning from negative space: what the appearance of corruption *is not*, and what *is not* required to vindicate that interest. We know that the “appearance of corruption” cannot be taken to mean the appearance of the systemic distortion of the political system in favor of the wealthy. This “antidistortion rationale,” canonically framed in *Austin v. Michigan Chamber of Commerce*,⁸³ was unceremoniously jettisoned in *Citizens United*.⁸⁴ The comparison between the treatment of evidence of specific examples in *Citizens United*, *Sorrell*, and *Shrink Missouri* on the one hand, and *Austin* on the other, reveals a crucial analytical distinction: litigators defending campaign finance regulations must show a pattern of specific injections of money into the political system, tied (or that look like they could be tied) to specific policy outcomes.⁸⁵ A broad, inchoate sense à la *Austin* that money stalks the halls of power is not enough.

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82. 528 U.S. at 393–94. It is true, of course, that *Shrink Missouri* cast doubt on the weight of academic statistical studies in the “appearance of corruption” inquiry. *Id.* at 394–95 (“Given . . . the absence of any reason to think that public perception has been influenced by the studies cited by [opponents of the contribution limits at issue], there is . . . no reason to question the existence of a corresponding suspicion among voters.”). This fact should not be over-emphasized in discounting the present analysis, however. *Shrink Missouri*’s skepticism was directed at studies showing *no* effect of contributions on voting, and the Court credited conflicting studies suggesting such a link. Additionally, the now-decades-old journal articles cited by the campaign finance regulation’s opponents for the proposition that contributions are not corrupting did not actually present any original statistical evidence to that effect. See Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049, 1067–71 (1996); Bradley A. Smith, *Money Talks: Speech, Corruption, Equality, and Campaign Finance*, 86 GEO. L.J. 45, 58–59 (1997).
83. 494 U.S. 652, 659–60 (1990) (“Michigan’s regulation aims at a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form.”).
84. 558 U.S. at 365 (“*Austin* should be and now is overruled.” (citations omitted)).
85. Samuel Issacharoff advances a similar conception of corruption:

Next, we can use what little the Supreme Court has said or implied is *not* necessary to justify a campaign finance regulation under the appearance interest. First, justifying a campaign finance regulation under the anticorruption interest does not require any showing of corrupt intent, either explicit or tacit. If it did, the appearance interest would simply collapse into the anti-corruption interest.⁸⁶ *Buckley* forecloses this line of argument, and no subsequent Supreme Court case has purported to overrule that particular holding.⁸⁷ The make-or-break requirement of quid pro quo bribery is corrupt intent,⁸⁸ but the public confidence rationale relies on the public's ability to *infer* corrupt intent rather than the *actual existence* of that intent.⁸⁹ A contributor-candidate relationship might involve only parties with intentions as pure as driven snow, but if an outside observer

[T]he underlying problem is not so much what happens in the electoral arena but what incentives are offered to elected officials while in office. Although the question of holding office remains key to this incentive structure, the focus shifts to how the electoral process drives the discharge of public duties.

Samuel Issacharoff, *On Political Corruption*, 124 HARVARD L. REV. 118, 126 (2010).

86. It is possible, of course, that the Court might simply decide to collapse the “appearance” and actual-corruption rationales. It could also jettison the appearance interest altogether, just as *Citizens United* jettisoned *Austin*'s anti-distortion rationale. But advocates of campaign finance reforms have to work with the doctrine as it exists. And, as noted above, there appears to be little willingness among the conservative justices (aside from Justice Thomas) to revisit *Buckley*, the decision that canonized the appearance of corruption interest. *See supra* note 66. As long as the “appearance of corruption” argument remains available—and it does—campaign finance reformers should use it.
87. *Buckley v. Valeo*, 424 U.S. 1, 27–28 (1976) (“But laws making criminal the giving and taking of bribes deal with only the most blatant and specific attempts of those with money to influence governmental action.”).
88. The definition of “corrupt intent” is notoriously slippery. *See* Albert W. Alschuler, *Criminal Corruption: Why Broad Definitions of Bribery Make Things Worse*, 84 FORDHAM L. REV. 463 (2015). But it is undeniable that whatever the contours of *mens rea* in the bribery context, some type of invidious purpose is required for a finding of criminal quid pro quo.
89. *Cf.* Samaha, *supra* note 77, at 1575–76 (discussing appearance arguments in which there is “the possibility that appearances diverge, perhaps radically, from reality”).

could fairly wonder whether corruption was afoot, the appearance-of-corruption interest remains in play. Thus, defending campaign finance regulations promulgated under the “appearance of corruption” interest should not require an iota of proof regarding the state of mind of either funders or policymakers.⁹⁰

Second, the appearance interest does not require that a given measure have a prophylactic effect against actual corruption.⁹¹ Some scholars have occasionally advanced this theory.⁹² Whether or not the law twenty years ago could have evolved into requiring the “appearance of corruption” to be targeted at preventing a slide into actual corruption, subsequent decisions have foreclosed that reading. As Professor Samaha points out, “[I]n *Citizens United v. FEC* . . . the Court took the orthodox approach [to the appearance-of-corruption interest]. Again, the feared consequence was sagging public confidence, not more actual corruption.”⁹³ Although the appearance interest can be correctly understood as prophylactic, the evil intended to be prevented is the “ero[sion]” of “confidence in the system of representative Government,” not actual graft.⁹⁴

Third, a showing under the appearance interest need not involve evidence that the measure actually reduces public perception of corruption. Even if public opinion of general corruption in government once mattered

90. In this way, the relationship between the appearance of corruption and corruption interests is analogous to the relationship between the “disparate impact” and “invidious purpose” theories of antidiscrimination law. This analogy, of course, has its limits. *See infra* note 91.

91. Samaha, *supra* note 77, at 1602. This is where the corruption/appearance of corruption and invidious purpose/disparate impact analogy breaks down. For the former two, the underlying interests are fundamentally independent; for the latter two, the underlying interest—preventing unlawful discrimination—is the same.

92. Ronald Levin, for example, has called for transforming the “appearance of corruption” into prophylactic restrictions on actions with a “tendency toward corruption.” Ronald M. Levin, *Fighting the Appearance of Corruption*, 6 WASH. U. J.L. & POL’Y 171, 178 (2001). Although I agree that restrictions targeted at the appearance of corruption (like restrictions intended to prevent corruption) may be prophylactic rather than punitive, Levin’s proposed solution misses the point. The difficulty of determining what “appears” to be corrupt is no greater than the difficulty of determining what has “a significant tendency toward corruption.” *Id.*

93. Samaha, *supra* note 77, at 1602.

94. *Buckley v. Valeo*, 424 U.S. 1, 27 (1976).

for determining what appears to be corrupt,⁹⁵ *Citizens United* appears to close that path by ignoring public polling on perceptions of corruption and campaign finance.⁹⁶ Moreover, the appearance interest is one area in which the Court's holding in *Shrink Missouri*, that the "quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments [regarding the need for campaign finance laws] will vary up or down with the novelty and plausibility of the justification raised," is still operative.⁹⁷ It is inherently plausible and not at all novel to assert that a campaign finance system which could lead a reasonable voter to perceive quid pro quo relationships between politicians and financiers could lead that voter to lose faith in the democratic system. The fact that every major campaign finance case since *Buckley* has reiterated the existence of the appearance interest puts that proposition beyond doubt.⁹⁸ What litigators need to show is not the relationship between the appearance of corruption and public perception, but rather the appearance of a relationship between money and policy outcomes.

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95. See Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. PA. L. REV. 119 (2004). Although Persily and Lammie find that campaign finance regulations have no discernible impact on public perception of corruption, *id.* at 144, their analysis should be taken with three grains of salt. First, Persily and Lammie found that the limits in BCRA were independent of public perception of corruption. Their data say little about whether other types of campaign finance restrictions might reduce perceptions of corruption. Second, data from the 1990s and early 2000s may not hold for public opinion in the post-*Citizens United* era. The legal fallout of *Citizens United* aside, it is undeniable that the decision prompted a sea change in the salience of and public sentiment surrounding campaign finance. See, e.g., PEW RESEARCH CTR., *THE PUBLIC, THE POLITICAL SYSTEM AND AMERICAN DEMOCRACY* 73 (Apr. 26, 2018) (noting that 65 percent of Americans now believe new laws would be effective in reducing the role of money in politics). Finally, and relatedly, it would be intellectually dishonest for a court to rely on political-science research suggesting that a given campaign finance regulation will not reduce perceptions of corruption while ignoring more recent public-opinion research showing that the public actually believes regulations will reduce corruption.
96. *Citizens United v. FEC*, 558 U.S. 310, 360–61 (2010) (criticizing the *McConnell* record but omitting any mention of public polling); *id.* at 450 n.64 (Stevens, J., concurring in part and dissenting in part) (noting that the *Citizens United* majority ignores opinion polling regarding public perceptions of corruption).
97. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 (2000).
98. See *supra* note 76 (citing cases).

In summary: we know that the appearance-of-corruption interest is intended to prevent the public from reasonably inferring that corruption is occurring. Specifically, we are trying to prevent the inference that discrete official acts are being exchanged for money, rather than a system-level inference that policymaking is distorted by and in favor of those with money. We know that certain kinds of evidence, such as examples of individual votes that appear to have been affected by money, are helpful for vindicating the appearance-of-corruption interest. And we know that the appearance interest is not limited by a campaign finance law's ability to ferret out corrupt intent, prevent actual corruption, or measurably improve public confidence in government. Putting this together provides the definition set out at the beginning of this Part: the appearance of corruption can be demonstrated with a pattern of individual examples of campaign financing linked to specific policy outcomes which could give rise to the public's inference of quid pro quo corruption.

B. How a New Empirical Approach to the Appearance of Corruption Can Support Campaign Finance Reforms

Defining the “appearance of corruption” is not the same as showing it, of course. As Daniel Tokaji and Renata Strause argue:

Even if the Court's composition shifts, such that there is no longer a majority hostile to campaign finance regulation, the Court is unlikely to give a blank check to legislators in regulating campaign money The evidence amassed in support of regulation will therefore be essential not only in crafting legislation, but also in demonstrating that legislation is appropriately tailored.⁹⁹

So, is the methodology presented above the kind of evidence that could show the “appearance of corruption” as defined here? I believe so.

Let us break down the definition above to see how. First, we start with *a pattern of individual examples of campaign financing*. We have that in this kind of study. The analysis here covers the defense sector's contributions to 136 legislators over seven cycles. That comes out to just under a thousand examples of individual representatives' dependence on the defense industry in a given cycle. And, of course, future studies building on this type of analysis could cover far more ground.

99. 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, 181 (2014).

Next, these examples of campaign financing are *linked to individual policy outcomes*. We have favorability scores based on actual voting records on defense policy. Of course, we cannot prove that any one donor check changed any one vote. But recall that we do not need to.¹⁰⁰ The appearance-of-corruption interest allows government regulation broader than the kind of anti-bribery laws that would require proving actual causation on any given vote. We can measure how much increasing dependency on the defense industry's money is associated with a representative's favorability toward the industry. That is the link to policy outcomes that we care about.

Finally, all this *could give rise to the public's inference of quid pro quo corruption*. Put another way, the public is entitled to believe that, when there is smoke, there is usually fire. We do not know that money changed any given vote in this study. But we can see that more money and more pro-defense voting go hand in hand, even after accounting for legislators' policy priors. The point of the appearance-of-corruption interest is to ensure that "confidence in the system of representative Government is not . . . eroded to a disastrous extent."¹⁰¹ Given evidence like this, it is far more plausible that the public would make "the cynical assumption that large donors call the tune"¹⁰² than it is to maintain the belief that the public will view Congress as a bastion of moral purity because, strictly speaking, they do not have proof that any specific vote has been bought.

One might object that the analysis presented here is still too reliant on general trends rather than individual examples and that, although this methodology is more granular than previous efforts, it still falls under the now-defunct *Austin* conception of corruption as an inchoate distortion of politics.¹⁰³ Not so. True, this study establishes significant relationships

100. See *supra* notes 86–90. Cf. *Libertarian Nat'l Comm., Inc. v. FEC*, 924 F.3d 533, 544 (D.C. Cir. 2019) ("Critically . . . even if through some omniscient power courts could separate the innocent contributions from the nefarious, an appearance of corruption would remain. Although 'Congress may not regulate contributions simply to reduce the amount of money in politics,' it may certainly do more than ask the public to place groundless faith in a bribery-prevention scheme that has failed to thwart corruption in the past." (quoting *McCutcheon v. FEC*, 572 U.S. 185, 191 (2014))).

101. *Buckley v. Valeo*, 424 U.S. 1, 27 (1976) (quoting *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973)).

102. *Shrink Mo. Gov't PAC*, 528 U.S. at 390.

103. On some level, the granularity requirement elucidated by the Court is ripe for goalpost-moving. A pointillist painting may look like a Rothko under a microscope. And obviously the Court has the power to revise its earlier

between sets of votes and sets of contributions rather than individual votes and individual contributions. But the crucial point is this: in light of the statistical significance of the relationships described above, a voter could reasonably look at any vote and any contribution and fairly worry that there is a causal link. It is precisely this possibility that distinguishes the appearance interest from the anticorruption interest.

The methodology in this Note provides a framework for designing and defending campaign finance regulations under the appearance-of-corruption interest developed in the foregoing Section. In my view, the relationships studied here between defense industry contributions and pro-defense voting are sufficiently granular under controlling precedent; they focus on individual congresspersons in specific Congresses. That allows this analysis to avoid the now-defunct *Austin* definition of corruption—“the corrosive and distorting effects of immense aggregations of wealth.”¹⁰⁴ The approach developed here is designed to focus not on the forest, but on the relationships between the trees, and what arboreal assumptions the public could fairly make.

C. *Defending a New Generation of Campaign Finance Reform*

To be clear, I do not expect that this Note will lead directly to a rollback of *Citizens United*,¹⁰⁵ *McCutcheon*,¹⁰⁶ and other decisions weakening campaign finance regulations. For one, the Center for Responsive Politics data in this study do not cover independent expenditures, the mechanism of campaign financing at issue in *Citizens United* and in contemporary debates over dark money groups.¹⁰⁷ Second, even if this study directly disproved the Court’s conservative majority’s factual assumptions about

precedents to exclude this analysis from what would previously have been considered sufficient evidence to support a campaign finance regulation. But to hold that a methodology in which the unit of analysis is a given legislator in a given Congress is akin to the system-wide *Austin* conception of corruption rejected in *Citizens United* would be more than moving the goalposts; it would be more like sneaking onto the playing field and stealing the goalposts in the dead of night.

104. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990).

105. 558 U.S. 310 (2010).

106. 572 U.S. 185 (2014).

107. This is not, of course, to say that a similar analysis of independent expenditures would not reveal comparable results.

campaign finance, it seems unlikely that the Court would simply reverse course.¹⁰⁸

My hope is instead that the methodology and results presented here will inform the creation and defense of a new generation of campaign finance reforms within the Court's existing legal framework. Although this type of study could be applied to a variety of regulations, I use three as illustrations: democracy vouchers, a more robust disclosure regime, and broader bans on contractor contributions. These three areas of campaign finance law—public financing, disclosure, and contribution bans—are not chosen to the exclusion of other proposals but rather to illustrate the range of scenarios in which this analysis may be applicable.

1. Democracy Vouchers

The methodology developed by this Note can be used to defend innovative public financing systems by converting political-equality rationales into the interest in combating the appearance of corruption.¹⁰⁹ In 2017, the city of Seattle pioneered its first-of-a-kind "Democracy Vouchers" program.¹¹⁰ Under this initiative, voters receive four \$25 vouchers—funded

108. Professor Allison Orr Larsen's work on the epistemology of legislative facts in the Supreme Court makes particularly interesting reading in this regard. See Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255 (2012); Allison Orr Larsen, *Constitutional Law in an Age of Alternative Facts*, 93 N.Y.U. L. REV. 175 (2018). Further cautioning against an optimistic prediction of this Note's impact is the *Citizens United* Court's skepticism of law-student scholarship, 558 U.S. at 358 (criticizing a student Note that contradicts the Court's opinion), and the Chief Justice's general aversion to statistical evidence, especially in the election-law context, Transcript of Oral Argument at 40, *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (No. 16-1161) (referring to political-science research as "sociological gobbledygook").

109. Professor Nicholas Stephanopoulos argues that vouchers are an especially attractive policy option in light of the rise of what he terms "quasi campaign finance," or interest group "funding for communications with voters that are nonelectoral yet rely on an electoral mechanism to be effective." Nicholas O. Stephanopoulos, *Quasi Campaign Finance*, 70 DUKE L.J. 333, 341, 402-05 (2020).

110. Daniel Beekman, *Seattle Council Approves Changes to First-In-The-Nation 'Democracy Vouchers' Program*, SEATTLE TIMES (June 25, 2018), <https://www.seattletimes.com/seattle-news/politics/seattle-council->

by a property tax—that they can allocate to participating candidates of their choice.¹¹¹ The conservative Pacific Legal Foundation, on behalf of two Seattle property owners, challenged the program almost immediately under a “compelled speech” theory,¹¹² an argument that became stronger (or at least somewhat less silly) after the U.S. Supreme Court decided *Janus v. AFSCME* in 2018.¹¹³ Although the Washington Supreme Court upheld Seattle’s program against the compelled-speech attack and the U.S. Supreme Court denied certiorari,¹¹⁴ a revived compelled-speech doctrine could yet prove to be a serious threat to all manner of public campaign financing programs at the federal level.¹¹⁵ If subsidies provided to private individuals (as in Seattle) or perhaps even to candidates (as in more common public financing schemes) are held after *Janus* to be the compelled subsidization of “private speech,” the Court’s new direction on compelled speech could set a time bomb for what has been a relatively stable area of campaign finance law.¹¹⁶ To be clear, I am not saying that the Court will subject public-financing programs like Seattle’s to heightened scrutiny, and I am certainly not saying it should. I am saying it is a possibility that proponents of campaign finance reform should be prepared for. After all, in addition to adopting a somewhat blasé attitude toward 1970s Supreme Court

approves-changes-to-first-in-the-nation-democracy-vouchers-program
[<https://perma.cc/N2QV-YMY3>].

111. *Id.*

112. *Elster v. City of Seattle*, 444 P.3d 590 (Wash. 2019), *cert. denied* 140 S. Ct. 2564 (2020) (mem.). For a useful discussion of the case, see Comment, *Elster v. City of Seattle: Washington State Supreme Court Holds ‘Democracy Voucher’ Program Constitutional*, 133 HARV. L. REV. 1121 (2020).

113. 138 S. Ct. 2448 (2018); *see also* Mark Joseph Stern, *Janus Unleashed*, SLATE (Dec. 26, 2018), <https://slate.com/news-and-politics/2018/12/seattle-democracy-vouchers-elster-janus.html> [<https://perma.cc/XA8Z-7ZN3>].

114. *Elster*, 444 P.3d 590, *cert. denied* 140 S. Ct. 2564 (mem.).

115. *See* William Baude & Eugene Volokh, *Compelled Subsidies and the First Amendment*, 132 HARV. L. REV. 171, 191–94 (2018) (discussing possible interaction of *Janus* and political subsidies).

116. Kate Andrias, *Janus’s Two Faces*, 2018 SUP. CT. REV. 21, 35–38 (2018) (arguing that “the Court has held that the government may compel us to fund the speech of private actors, including political candidates through the public financing of political campaigns...but has provided little reasoned justification for the distinction” between public financing and unconstitutional compelled speech).

precedent, *Janus* overturned a case that itself cited *Buckley*, which upheld a public financing program.¹¹⁷

Obviously, democracy vouchers cannot be challenged as a direct restriction on wealthy donors' First Amendment right to spend money in elections. And they lack the particular constitutional infirmities of the public financing systems at issue in *Davis* and *Bennett*.¹¹⁸ But if the "compelled speech" attack gains traction,¹¹⁹ defenders of democracy vouchers—and of public financing generally—may need to more fully substantiate the state interests described in *Buckley* to justify this constitutional burden.¹²⁰ The

117. See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234 (1977) (citing *Buckley v. Valeo*, 424 U.S. 1, 22–23 (1976)). I do not mean to suggest that "*Janus* means public financing is unconstitutional" is the best understanding of compelled-speech doctrine, or even a particularly good one. Rather, it is a newly available argument if the Court's conservative and generally campaign finance regulation-averse majority could explore if so inclined.

118. *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011); *Davis v. FEC*, 554 U.S. 724 (2008). The common issue in both *Bennett* and *Davis* was basically that the amount of money one candidate had was tied to the amount their opponent had. In contrast, a recipients' decision to give her democracy vouchers to one candidate in no way affects how much money that candidate's opponent can raise or spend. Therefore, democracy vouchers are free of the forbidden "'beggar thy neighbor' approach to free speech" forbidden by *Bennett* and *Davis*. *E.g.*, *Bennett*, 564 U.S. at 741.

119. Gilad Edelman, *The First Amendment vs. Democracy*, WASH. MONTHLY (Apr. 2019), <https://washingtonmonthly.com/magazine/april-may-june-2019/the-first-amendment-vs-democracy> [https://perma.cc/3RVJ-VU83] ("The [*Elster*] plaintiffs argue that the system violates their First Amendment rights by using their taxes to subsidize the speech of candidates they don't support. The case . . . could ultimately make it up to the U.S. Supreme Court. The suit still looks like a long shot—a distant legal meteor destined to burn up in the atmosphere. But the Roberts Court has proven receptive to more than a few outlandish conservative legal challenges, and it has struck down both of the public financing schemes it has considered.").

120. Preventing corruption and its appearance are not the only ways public financing can be constitutionally justified under present doctrine. *Buckley* upheld a public financing system against First Amendment attack, reasoning that the program was "a congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people. Thus, [the program] furthers, not abridges, pertinent First Amendment values." 424 U.S. at 92–93 (footnotes omitted). If the Court

problem is that proponents of “democracy vouchers” (and other public-financing advocates) tend to justify these programs on grounds that sound suspiciously like the rejected political-equality interest.¹²¹ For example, Richard Hasen based his influential 1996 article proposing the forerunner of democracy vouchers on a full-throated endorsement of vouchers’ egalitarian benefits.¹²² Assuming—as seems likely—that courts import *Buckley’s* bar on political-equality interests into this particular area of campaign finance, defenders of democracy vouchers must advance a different, constitutionally valid rationale.¹²³

reverses its position to place public financing within the compelled speech doctrine, this could change.

121. See, e.g., Rachel Dovey, *Did Seattle Elections Experiment ‘Get the Big Money Out’?*, NEXTCITY (Aug. 2, 2017), <https://nextcity.org/daily/entry/seattle-campaign-finance-experiment-big-money> [<https://perma.cc/TE59-2ULD>] (“Alan Durning . . . helped write I-122 [the Seattle initiative] . . . It has assisted several candidates in competing with well-funded rivals, he said.”); Editorial, *In Seattle, a Campaign Plan That Voters Control*, N.Y. TIMES (Nov. 7, 2015), <https://www.nytimes.com/2015/11/08/opinion/sunday/in-seattle-a-campaign-finance-plan-that-voters-control.html> [<https://perma.cc/WP9Y-6NX2>] (“[S]upporters said [the Seattle democracy vouchers initiative] was a reaction to the ability of affluent donors to dominate campaigns.”); Casey Jaywork, *What Can and Can’t Go Wrong with Democracy Vouchers*, SEATTLE WEEKLY (Jan. 10, 2017), <https://www.seattleweekly.com/news/what-can-and-cant-go-wrong-with-democracy-vouchers> [<https://perma.cc/88MF-5RSC>] (“The idea is to counterbalance the influence of large political donors by increasing the number of small political donors, so that elected leaders have an incentive to be more responsive to the 99 percent.”); Jennifer Heerwig & Brian J. McCabe, *Democracy Vouchers Broadened Seattle’s 2017 Donor Base*, BRENNAN CTR. FOR JUSTICE (May 28, 2018), <http://www.brennancenter.org/blog/democracy-vouchers-broadened-seattles-2017-donor-base> [<https://perma.cc/5LRN-Y7J5>] (“Officials from cities around the country are watching to see how effective the program will be in creating *more equitable, fair elections*.” (emphasis added)).
122. Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CALIF. L. REV. 1, 6–7 (1996) (arguing that democracy vouchers advance “[e]galitarian pluralism . . . [that] recommends efforts to cure the problem of group underrepresentation in the political process by redressing inequalities in different groups’ political capital.”).
123. The Supreme Court has already gestured in this direction. See *Bennett*, 564 U.S. at 748-55 (holding that the public-financing system intended to “level the playing field” could not withstand strict scrutiny). See generally Daniel P.

Enter the appearance of corruption. Proponents of democracy vouchers could conduct a study similar to this one regarding an industry or major company with serious political pull in a given jurisdiction, for example, tech companies in Seattle or agribusiness in Iowa.¹²⁴ If, as in this study's analysis of U.S. Representatives and the defense industry, it is a candidate's *proportional dependence* on a given source of financing that correlates with voting patterns rather than *absolute* contributions or expenditures, democracy vouchers' "equality" rationales can be converted into the appearance interest. By placing more money in the system from the broadest number of sources possible, politicians will be proportionally less dependent on any one of those sources—such as Microsoft, in the Seattle example.¹²⁵ Legally, the interest here is *not* about giving average Seattleites the financial wherewithal to compete with Microsoft's election spending (although the program does that, in a sense). Instead, the interest is in reducing politicians' dependence on Microsoft's campaign dollars—or on any given source—and therefore preventing the appearance of corruption that arises from such dependence. Allowing average voters to compete on more equal turf with deep-pocketed funders is the mechanism, not the goal. The distinction is subtle but important.

The proportional dependence finding of this Note is especially relevant for local public financing programs akin to Seattle's democracy vouchers for two reasons.¹²⁶ First, in relatively less expensive election contexts—like

Tokaji, *The Obliteration of Equality in American Campaign Finance Law: A Trans-Border Comparison*, 5 J. PARLIAMENTARY & POL. L. 381, 381–82 (2011) (discussing the Supreme Court's rejection of political equality rationales).

124. I do not mean to suggest that vouchers would be legally questionable in a jurisdiction absent a singularly important set of actors like Seattle's tech sector. One side effect of the proportional-dependency model is that, because campaign money has to come from somewhere, most politicians will be more or less proportionally dependent on someone, regardless of whether the total amounts are in the thousands or tens of millions of dollars.
125. In the municipal context particularly, hot-button and campaign finance-intensive policy issues (such as development and gentrification) can scramble conventional political alliances. This may present methodological challenges and opportunities that, while beyond the scope of this Note, could prove to be a fruitful area for further inquiry.
126. Such programs are likely to be confined to liberal municipalities for the foreseeable future. Other cities that have considered similar programs include Austin, Texas, Mark Lisher, *Seattle "Democracy Dollars" Case That Could Influence Austin Goes to State High Court*, TEX. MONITOR (Jan. 9, 2019),

local-government elections—a handful of large funders will more easily be able to dominate campaign financing such that it *appears* local politicians are dependent on their financial support. Second and correlatively, in relatively less expensive election contexts, less money is needed to reduce politicians’ proportional dependence on any one source of campaign funds. These two propositions, combined with the proportional-dependence approach advanced here, show how innovative public financing schemes can survive heightened scrutiny.¹²⁷ The former highlights the compelling appearance-of-corruption interest, and the latter provides the foundation to argue that such an approach is narrowly tailored to reducing the appearance of corruption. Of course, this analysis provides only the foundation of the tailoring argument. It is difficult to predict in advance what degree of tailoring courts will require if they find democracy vouchers and similar programs really do compel speech. But campaign finance reformists could, for example, conduct comparative analyses extending this methodology across different jurisdictions to determine at what point, if any, the proportion of campaign money from a different source declines to the point where it is no longer significantly associated with policy outcomes.

2. Disclosure

This Note demonstrates how the “appearance of corruption” can be shown for campaign contributions, an area where disclosure requirements are much stronger and more vigorously enforced than in the independent-expenditure context. Indeed, the analysis presented here is only possible *because* candidates are obligated to release detailed donor information—including large donors’ employment—to the public. But by definition, it would be impossible to perform a similar inquiry into dark money groups.

<https://texasmonitor.org/seattle-democracy-dollars-case-that-could-influence-austin-goes-to-state-high-court> [https://perma.cc/2EUT-YA5R?type=image], and Albuquerque, New Mexico, Andy Luman, *Groups Want ‘Democracy Dollars’ To Bolster ABQ Publicly-Financed Candidates*, N.M. POL. REP. (June 20, 2018), <https://nmpoliticalreport.com/2018/06/20/groups-want-democracy-dollars-to-bolster-abq-publicly-financed-candidates> [https://perma.cc/UYD2-AXS3].

127. *See Bennet*, 564 U.S. at 734, 748 (adopting a strict-scrutiny approach in the context of a public-financing system).

One cannot program a webscraping tool to gather information on 501(c)(4) groups because there is literally nothing to scrape.¹²⁸

This Note supports disclosure requirements in two ways. First, to the extent that existing disclosure rules are challenged as burdening the First Amendment,¹²⁹ the analysis here demonstrates the relationship between those rules and advancing the interest in preventing the appearance of corruption.¹³⁰ Second, if disclosure requirements in the context of campaign contributions allow for this type of analysis, then similar requirements applied to dark money groups could be used to test the hypothesis that independent expenditures do not lead to the appearance of corruption. The remainder of this Section describes the state of play on campaign finance disclosure laws and argues for enhanced disclosure regimes at the state and federal levels.

Disclosure requirements have not faced the same constitutional evisceration as have limits on contributions and independent expenditures.¹³¹ In *Citizens United*, the Court asserted:

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128. Abby K. Wood, *Campaign Finance Disclosure*, 14 ANN. REV. L. SOC. SCI. 11, 13 (2018) (“The regulatory framework for disclosure features loopholes and exemptions that leave a good deal of campaign financing both unlimited and undisclosed.”).
129. See Erin Chlopak, *One of These Things Is Not Like the Other: NAACP v. Alabama Is Not a Manual for Powerful, Wealthy Spenders to Pour Unlimited Secret Money into Our Political Process*, 69 AM. U. L. REV. 1395 (2020) (describing ongoing efforts to challenge disclosure as violating the First Amendment).
130. Unlike contribution/expenditure limits, disclosure can be justified by interests beyond preventing corruption and its appearance. Notably, *Buckley* held that in addition to preventing corruption, “disclosure provides the electorate with information ‘as to where political campaign money comes from and how it is spent by the candidate’ in order to aid the voters in evaluating those who seek federal office.” 424 U.S. at 66–67. For a recent discussion of the informational interest in campaign finance disclosure law, see Lear Jiang, *Disclosure’s Last Stand? The Need to Clarify the “Informational Interest” Advanced by Campaign Finance Disclosure*, 119 COLUM. L. REV. 487 (2018).
131. Katherine Shaw, *Taking Disclosure Seriously*, YALE L. & POL’Y REV. INTER ALIA (2016), https://ylpr.yale.edu/inter_alia/taking-disclosure-seriously [<https://perma.cc/A75R-UXAA>] (“In the last six years, the Supreme Court has directly addressed disclosure on three separate occasions . . . Each time, it affirmed the constitutionality of disclosure requirements in strong and sweeping terms, though with reasoning more broad than deep.”); *id.* (“Lower

With the advent of the Internet, 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. . . . [C]itizens can see whether elected officials are “in the pocket” of so-called moneyed interests. The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way.¹³²

This philosophy regarding disclosure spans the ideological spectrum. As Justice Scalia—certainly no friend to other types of campaign finance regulation—famously stated in his concurrence in *Doe v. Reed*:

Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed. For my part, I do not look forward to a society which . . . campaigns anonymously and even exercises the direct democracy of initiative and referendum hidden from public scrutiny and protected from the accountability of criticism. This does not resemble the Home of the Brave.¹³³

Apart from the as-applied exception recognized in *NAACP v. Alabama* for disclosure that would lead to such severe harassment as to “affect adversely the ability of [the subject of disclosure requirements] to foster beliefs which they admittedly have the right to advocate,”¹³⁴ disclosure

courts have for the most part followed the Supreme Court’s lead, approving the constitutionality of broad disclosure requirements . . .”).

132. 558 U.S. at 370–71.

133. *John Doe No. 1 v. Reed*, 561 U.S. 186, 228 (2010) (Scalia, J., concurring) (internal citations omitted). It is worth noting that Justice Scalia’s former clerk, Justice Barrett, has not as of writing tipped her hand as to whether her beliefs regarding campaign finance disclosures mirror those of her former boss. More broadly, although three Trump-appointed Justices have joined the bench since *Citizens United*, there are still likely at least five votes for the disclosure requirements upheld there: the three liberals, plus Chief Justice Roberts and Justice Alito, who both joined the section of Justice Kennedy’s opinion upholding BCRA’s disclosure provisions.

134. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462–63 (1958). This concern does not fit neatly into ideological boxes. The ACLU, for example, opposes the DISCLOSE Act because the organization believes “it unconstitutionally infringes on the freedom of speech and the right to

remains one of the few pillars of campaign finance regulation that, legally speaking, has been largely untouched in the last few decades.¹³⁵

In addition to lax rules and underenforcement, two phenomena in particular threaten the role of disclosure in preventing corruption via campaign financing. First, having had little success attacking disclosure in the courts,¹³⁶ moneyed interests are turning to lawmaking and regulatory processes to roll back many of these rules.¹³⁷ Second, the increasing use of

associational privacy.” Letter from ACLU to Congress Re: Vote NO H.R. 1, For the People Act of 2019, 12 (Mar. 6, 2019), *available at* https://www.aclu.org/sites/default/files/field_document/aclu_h.r._1_vote_recommendation_letter.pdf [<https://perma.cc/6DTS-3KLY>].

135. It is not the case that disclosure requirements have been left alone because they are ineffective at tackling corruption. A forthcoming paper in the *American Journal of Political Science* finds that legislators who were randomly audited by the FEC in the 1970s were more likely to retire and to face competitive reelections. These effects were larger for incumbents whose audits turned up violations. Abby K. Wood & Christian R. Grose, *Campaign Finance Transparency Affects Legislators’ Election Outcomes and Behavior*, *AM. J. POL. SCI.* (forthcoming 2020), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3236939 [<https://perma.cc/S4EQ-EHLX>].
136. Caveat: so far. As Erin Chlopak of the Campaign Legal Center has noted, “anti-transparency advocates and others who prefer to influence our politics in secret are pursuing litigation, policy, and public advocacy campaigns to create a mechanism to influence the political process in secret These efforts seek a dramatic expansion of a narrow, as-applied disclosure exemption generally reserved for vulnerable groups like the NAACP in *Jim Crow Alabama*” Chlopak, *supra* note 129, at 1398. The campaign Chlopak describes may be bearing fruit. At the time of writing, the Supreme Court has granted certiorari, *— S. Ct. —* (Jan. 8, 2021), but has not yet heard argument in *Ams. for Prosperity Found. v. Becerra*, No. 19-251. Although this case involves an *NAACP v. Alabama* challenge to donor disclosure rules for charitable nonprofits, rather than political groups, it is possible the decision will ultimately affect First Amendment doctrine in a way that carries over into the campaign finance context.
137. *See, e.g.*, Patricia Cohen, Kenneth P. Vogel & Jim Tankersley, *I.R.S. Will No Longer Force Kochs and Other Groups To Disclose Donors*, *N.Y. TIMES* (Jul. 17, 2018), <https://www.nytimes.com/2018/07/17/us/politics/irs-will-no-longer-force-kochs-and-other-groups-to-disclose-donors.html> [<https://perma.cc/SC46-YXU6>] (“The change, which has long been sought by conservatives and Republicans in Congress, will affect thousands of labor unions, social clubs and political groups as varied as arms of the AARP, the

shell corporations to funnel money to independent-expenditure groups—despite the federal prohibition on straw-donor contributions¹³⁸—has made it far more difficult to track the true source of this money.¹³⁹ This problem has been compounded by the FEC’s chronic deadlock on enforcement actions and the D.C. Circuit’s highly deferential review of FEC No-Action decisions resulting from 3-3 Commission votes.¹⁴⁰

Congress and state legislatures can give campaign finance reformers the tools to defend regulations on money in politics by revitalizing disclosure regimes. The DISCLOSE Act, incorporated in Democrats’ 2019 anti-corruption package, is a good first step.¹⁴¹ In particular, the Act would make it more difficult to obscure the true origin of money funneled through shell

United States Chamber of Commerce, the National Rifle Association and Americans for Prosperity.”).

138. 52 U.S.C. § 30122 (2018) (“No person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution and no person shall knowingly accept a contribution made by one person in the name of another person.”). A “[c]ontribution” is defined as “any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office.” 52 U.S.C. § 30101(8)(A)(i) (2018).
139. Karl Evers-Hillstrom & Kietryn Zychal, *Dark Money: Coming from a Shell Company Near You*, CTR. FOR RESPONSIVE POL. (Jan. 29, 2019), <https://www.opensecrets.org/news/2019/01/dark-money-coming-from-a-shell-company-near-you> [<https://perma.cc/J6KA-XWQR>]. This is a particularly insidious instantiation of the hydraulic theory of campaign finance. See Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1708 (1999) (“[Campaign finance] is ‘hydraulic’ in two senses. First, we think political money, like water, has to go somewhere. It never really disappears into thin air. Second, we think political money, like water, is part of a broader ecosystem. Understanding why it flows where it does and what functions it serves when it gets there requires thinking about the system as a whole.”).
140. See generally Kate M. Harris, *Judicial Review of Deadlock Votes*: Campaign Legal Center & Democracy 21 v. Federal Election Commission, U. CHI. L. REV. ONLINE (Aug. 18, 2020), <https://lawreviewblog.uchicago.edu/2020/08/18/fec-deadlock-harris> [<https://perma.cc/R8EL-QFY8>]. For an example of an especially frustrating fact pattern and D.C. Circuit opinion (in which then-Judge Brett Kavanaugh voted against reviewing the FEC’s deadlocked No-Action decision), see *CREW v. FEC*, 892 F.3d 434 (D.C. Cir. 2018).
141. For the People Act of 2019, H.R. 1, Subtitle B (DISCLOSE Act), 116th Congress (2019).

companies. The DISCLOSE Act would also crack down on dark money expenditures by requiring disclosure of the sources of funds for independent expenditures over \$10,000.¹⁴²

To amplify the disinfecting effect of these provisions, Congress, the FEC, and states should require that these reports be made publicly available in easy-to-use, machine-readable format. These online portals should include employer data so that industry-level analyses of contribution data similar to this study can more easily be performed. Only through the disclosure of this level of detail can the Supreme Court's assertion that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption" be tested.¹⁴³ And if it turns out that independent expenditures and dark money influence voting like the contributions that are the focus of this paper, then it may be possible to begin to roll back some of the Supreme Court's more pernicious campaign finance decisions.¹⁴⁴

One might object that dark money groups will simply change their behavior to hide their influence from these strengthened disclosure requirements. Perhaps. The point is not that the mechanics of campaign

142. *Id.* § 4111(a)(1).

143. *Citizens United v. FEC*, 558 U.S. 310, 357 (2010). Justice Kennedy's notion that independent expenditures cannot corrupt because they are "independent" is a kind of jurisprudential Maginot Line—perhaps defensible in theory but easily circumnavigated in practice. For example, ahead of the 2018 midterms, then-Speaker of the House Paul Ryan flew to Las Vegas to meet with Republican megadonor Sheldon Adelson. Also at the meeting were representatives of the Congressional Leadership Fund (CLF), a GOP-aligned Super PAC (independent-expenditure organization). Ryan "laid out a case to Adelson about how crucial it is to protect the House [GOP's majority]," then "left the room" while CLF representatives "made the ask and secured [a] \$30 million contribution." Jake Sherman & Alex Isenstadt, *Sheldon Adelson Kicks in \$30M To Stop Democratic House Takeover*, POLITICO (May 10, 2018), <https://www.politico.com/story/2018/05/10/adelson-republicans-midterms-579436> [<https://perma.cc/XB6D-9GD2>]. But as long as the Court remains disconnected from the reality of how campaign fundraising works, more disclosure around independent expenditures should be pursued until it becomes impossible to blithely state as a matter of law that "independent expenditures" are, in any meaningful sense, independent.

144. *See Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 855 (1992) (suggesting one reason to overrule precedent is that "facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification").

finance are static, and that the DISCLOSE Act or similar legislation would be a panacea.¹⁴⁵ The point is that including disclosure requirements in campaign finance reform efforts creates a virtuous cycle: as long as disclosure requirements have at least some effect, more disclosure provides more information, more information can strengthen the appearance-of-corruption analysis, and the appearance-of-corruption analysis provides a basis for creating and defending more effective campaign finance regulations.

3. Broadening the Ban on Contractor Contributions

Although a wide range of companies contract with the U.S. government to provide a variety of goods and services, probably no industry is as dependent on federal contracts as the defense sector. This makes the federal ban on contractor campaign contributions particularly salient with respect to the defense industry. Congress could reduce the corrupting influence and the appearance of corruption created by defense industry campaign financing by expanding the federal-contractor contribution ban.

Federal law prohibits “any person . . . who enters into a contract with the United States” to contribute to, or solicit contributions on behalf of, any party, committee, or candidate during the duration of the contract.¹⁴⁶ Under current law, bans on contractor contributions are less susceptible to constitutional challenge than other campaign finance restrictions for two reasons. First, contribution restrictions in general are subject to “closely

145. *See generally* Issacharoff & Karlan, *supra* note 139, at 1705 (“It doesn’t take an Einstein to discern a First Law of Political Thermodynamics—the desire for political power cannot be destroyed, but at most, channeled into different forms—nor a Newton to identify a Third Law of Political Motion—every reform effort to constrain political actors produces a corresponding series of reactions by those with power to hold onto it.”).

146. 52 U.S.C. § 30119(a) (2018). Section 30119 also prohibits federal contractors from making contributions to independent expenditure-only committees (Super PACs). *See* Sophia Gonsalves-Brown, *Federal Contractors Continue to Ignore Contribution Ban and Donate to Super PACs*, CAMPAIGN LEGAL CTR. (Oct. 28, 2020), <https://campaignlegal.org/update/federal-contractors-continue-ignore-contribution-ban-and-donate-super-pacs> [https://perma.cc/35RZ-5CDA].

drawn” scrutiny, rather than “strict” scrutiny.¹⁴⁷ “A regulation satisfies closely drawn scrutiny when the state demonstrates a *sufficiently important* interest and employs means *closely drawn* to avoid unnecessary abridgement of associational freedoms.”¹⁴⁸ This is a “lesser . . . standard of review” than strict scrutiny’s compelling-interest and narrow-tailoring requirements.¹⁴⁹ Second, the fear of corruption or its appearance in the context of contractor contributions is “neither novel nor implausible” under *Nixon v. Shrink Missouri Government PAC*.¹⁵⁰ As the D.C. Circuit Court, sitting en banc, held in a recent challenge to the federal ban on contractor contributions:

There is nothing novel or implausible about the notion that contractors may make political contributions as a quid pro quo for government contracts, that officials may steer government contracts in return for such contributions, and that the making of contributions and the awarding of contracts to contributors fosters the appearance of such quid pro quo corruption.¹⁵¹

The court continued, “[n]o smoking gun is needed where the conflict of interest is apparent, the likelihood of stealth great, and the legislative purpose prophylactic.”¹⁵²

Despite its constitutionality, 52 U.S.C. § 30119 has three loopholes that allow the defense industry to funnel money into campaigns. Congress could address these issues without violating the Constitution.

147. *FEC v. Beaumont*, 539 U.S. 146, 162 (2003); *Wagner v. FEC*, 793 F.3d 1, 6 (D.C. Cir. 2015) (en banc) (“[T]he ‘closely drawn’ standard remains the appropriate one for review of a ban on campaign contributions.”); *Yamada v. Snipes*, 786 F.3d 1182, 1205 (9th Cir. 2015) (“Contribution bans are subject to ‘closely drawn’ scrutiny.”).

148. *Yamada*, 786 F.3d at 1205 (quoting *McCutcheon v. FEC*, 572 U.S. 185, 197 (2014)) (emphasis added) (internal citations omitted).

149. *McCutcheon*, 572 U.S. at 197.

150. 528 U.S. 377, 391 (2000).

151. *Wagner v. FEC*, 793 F.3d 1, 21 (D.C. Cir. 2015) (en banc). In *Wagner*, the D.C. Circuit specifically noted corruption involving the defense industry as evidence supporting the contractor contribution ban. *Id.* at 15–16.

152. *Id.* at 20 (quoting *Blount v. SEC*, 61 F.3d 938, 945 (D.C. Cir. 1995) (alterations omitted)).

First, 52 U.S.C. § 30119 and its implementing regulations do not cover parent or subsidiary companies.¹⁵³ Boeing can legally create a subsidiary named “Lockheed Stinks, LLC” that would have no contracts with the federal government, pour money into the subsidiary, and then have the subsidiary dump that money into candidates’ war chests.¹⁵⁴ Especially in light of the findings presented here, under the “closely drawn” test, Congress could amend section 30119 to include parents and subsidiaries of contractors.

Second, the contractor contribution ban does not bar employees of contractors from making political contributions.¹⁵⁵ However, many of the contributions coded by CRP as “defense” are made by employees of defense companies. One might feel some reticence about banning individual employees from making political contributions with their own money, but recall that under *Citizens United* the First Amendment rights of corporations and individuals are effectively coterminous.¹⁵⁶ A necessary corollary is that

153. *See, e.g.*, FED. ELECTION COMM’N, FIRST GENERAL COUNSEL’S REPORT 1–2 (Nov. 14, 2013), <http://eqs.fec.gov/equsdocsMUR/14044353483.pdf> [<https://perma.cc/VSR4-9SMS>].

154. Under *McCutcheon v. FEC*, “Lockheed Stinks” could contribute the maximum amount to an unlimited number of candidates. 572 U.S. 185, 227 (2014) (striking down aggregate contribution limits as a violation of the First Amendment). And because each subsidiary is treated as an individual legal entity, *see supra* note 153, Boeing could create multiple subsidiaries (say, “Raytheon Stinks,” “Northrop Grumman Stinks,” etc.) and have each subsidiary max out the contribution limit to their preferred candidates. The only potential legal barrier to this strategy is the federal ban on straw donations. *See* 11 C.F.R. § 110.4(b) (2020). But given the FEC’s current interpretation of subsidiaries under 52 U.S.C. § 30119, *see, e.g., supra* note 153, and general uselessness with respect to straw donors, *see, e.g., supra* note 140, the straw-donor bar should not be treated as a panacea.

155. *See* 11 C.F.R. § 115.6 (2020) (“Nothing in this part shall prohibit the stockholders, officers, or employees of a corporation, the employees, officers, or members of an unincorporated association, cooperative, membership organization, labor organization, or other group or organization which is a Federal contractor from making contributions or expenditures from their personal assets.”). There are, of course, limits on corporations’ ability to coerce or convince their employees to make political contributions. *See, e.g.*, 52 U.S.C. § 30118 (2018). My argument here is that Congress could constitutionally ban political contributions by employees of companies that never engage in such activity.

156. 558 U.S. 310 (2010).

if defense companies may be barred from making campaign contributions without violating the First Amendment, so too may individuals employed by those companies if their contributions give rise to corruption or the appearance of corruption. And this Note's analysis suggests that those employees' contributions do so.¹⁵⁷

Third, the contractor contribution ban does not prevent *subcontractors* from making such contributions.¹⁵⁸ But as Rebecca Thorpe's work makes clear, the ubiquitous nature of defense subcontracting means that the relationship between the government and a primary defense contractor is only the tip of the iceberg.¹⁵⁹ The web of interests created by defense contracts justifies including subcontractors in the category of banned contractors defined by 52 U.S.C. § 30119(a).

These suggestions are informed by the analysis in Part I. Clearly, the existing regime for limiting campaign contributions by defense contractors is inadequate to fully vindicate the interest in preventing corruption or the appearance of corruption. If 52 U.S.C. § 30119(a) and its implementing rules were sufficient, none of the results presented in this Note would be statistically significant.

CONCLUSION

As American elections increasingly come to resemble a financial arms race, campaign finance reformists need to develop new policies that are both effective and judicially survivable. That task requires a sound empirical basis, starting with a methodology able to pierce the classic endogeneity problem of campaign finance law: does money cause or follow votes? This Note has begun to answer that question using the defense industry as a case study, developing a unique dataset and novel methodology. Not only did the defense industry quintuple its average contributions from the 2002 to 2014 election cycles, but candidates became three times as proportionally dependent on the defense industry's funds over that period.

157. *Cf.* *Wagner v. FEC*, 793 F.3d 1, 32 (2015) (holding 52 U.S.C. § 30119 constitutional as applied to individual contractors).

158. Assuming the subcontractor does not have an independent contractual relationship with the government, a straightforward reading of 52 U.S.C. § 30119(a) excludes subcontractors from the ban for much the same reason that subsidiaries and parent companies are excluded.

159. THORPE, *supra* note 44.

And that money gets results. Even after controlling for a representative's favorability toward the defense industry in the previous Congress—effectively circumventing the endogeneity problem—as well as party affiliation and district economic dependency on the defense industry, a fifty-percentage-point increase in the proportion of a candidate's contributions originating from the defense industry is associated with a one-standard-deviation increase in that legislator's favorability toward the defense sector. Additionally, when the *proportion* of a candidate's funds originating from the defense industry is taken into account, the *absolute amount* of money that those companies give is insignificant. This suggests that campaign finance law's preoccupation with static contribution limits is misplaced; what matters is how much candidates depend on that money.

I hope this analysis can inform and support a new generation of campaign finance reforms. The three suggested here include defending “democracy vouchers” from constitutional challenge, broadening disclosure requirements for those financing elections, and strengthening the federal ban on contractor contributions. Amid the sustained assault on campaign finance laws, a new empirical focus may provide a path forward. Only by understanding how money corrupts can we address that corruption—and its appearance.

APPENDICES

Appendix A

The initial regression model tested in SPSS is as follows:

$$\begin{aligned} DefFavor = & \beta_0 + \beta_1(Ideology) + \beta_2(Party) + \beta_3(DistrictDependency) \\ & + \beta_4(Previous\ Congress\ Defense\ Favorability) \\ & + \beta_5(Percent\ Defense\ Contrib) \\ & + \beta_6(Absolute\ Defense\ Contrib) \end{aligned}$$

Stepwise analysis confirms that three of these independent variables are significant: Party, Previous Congress Defense Favorability, and Percent Defense Contributions. The output of this stepwise regression is presented in Table 2. The obtained model with robust standard errors is presented in Table 3.

Table 2: Stepwise Linear Regression of Representative Favorability Toward Defense Industry^a

Model	Unstandardized Coefficients	Standardized Coefficients	t	Sig.	95.0% Confidence Interval for B	
					Lower Bound	Upper Bound
1	(Constant) Party					
2	(Constant) Party Prev Congress Fav					
3	(Constant) Party Prev Congress Fav Def % Camp Finance					

a. Dependent Variable: Standardized Favorability toward Defense Industry

Table 3: Robust Standard Errors^a

Model	Unstandardized Coefficients		t	Sig.	95.0% Confidence Interval for B		
	B	Robust Std. Error			Lower Bound	Upper Bound	
1							
	(Constant)	-.527	.047	-11.30	.000	-.618	-.435
	Party	1.044	.098	10.67	.000	.852	1.236
	Prev Congress Fav	.308	.047	6.50	.000	.215	.401
	Def% Camp Finance	.020	.004	4.94	.000	.012	.028

a. Dependent Variable: Standardized Favorability toward Defense Industry

MASTERS OF WAR

Appendix B

Bill	Amendment	Content Summary
108th Congress		
H.R. 1588 (NDAA)	142	Transferred cash from nuclear earth penetrator to conventional bunker-busters
H.R. 3289 (Emergency Supplemental Appropriations for Iraq and Afghanistan)	N/A	Cash for Iraq War
H.R. 3289 (Emergency Supplemental Appropriations for Iraq and Afghanistan)	421	Cut funding for military construction related to GWOT
H.R. 3289 (Emergency Supplemental Appropriations for Iraq and Afghanistan)	415	Cut funding for importation of petroleum into Iraq
H.R. 3289 (Emergency Supplemental Appropriations for Iraq and Afghanistan)	431	Mandated competitive bidding for Iraq Reconstruction Fund
109th Congress		
H.R. 5122 (NDAA)	819	GMD cuts
H.R. 4939 (Emergency Supplemental Appropriations)	746	Strengthened oversight of Iraq contractors
H.R. 3057 (Foreign Aid)	372	Cut to Egyptian military aid
H.R. 2601 (Foreign Relations Authorization Act)	475	Banning space weapons
H.R. 5631 (DoD Appropriations Act)	1072	Banning funding for military operations against Iran

H.R. 1815 (NDAA)	214	Asked POTUS to develop plan for withdrawal from Iraq
110th Congress		
H.R. 5658 (NDAA)	1051	Cut MDA by \$1 billion
H.R. 5658 (NDAA)	1050	Increased MDA by \$719 million
H.R. 5658 (NDAA)	1048	Increased Future Combat Systems by \$193 million
H.R. 1585 (NDAA)	194	Increased BMD funding by \$764 million
H.R. 1585 (NDAA)	188	Reviewed weapons system intended for the Cold War
H.R. 4156 (Iraq emergency appropriations)	N/A	Called for Drawdown in Iraq and Afghanistan
H.R. 2237 (Iraq drawdown bill)	N/A	Called for drawdown in Iraq
111th Congress		
H.R. 2647 (NDAA)	266	Increased MDA funding by \$1.2 billion
H.R. 5136 (NDAA)	661	Cut F-35 JSF Alternate Engine Program
H.R. 3326 (DoD Appropriations)	404	Removed earmarks
H.R. 3326 (DoD Appropriations)	402	Cut AARGM counter-air-defense
H.R. 3326 (DoD Appropriations)	401	Cut EARS System
H.R. 3326 (DoD Appropriations)	396	Cut \$80 million for Kinetic

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		Energy Interceptor Program
H.R. 3326 (DoD Appropriations)	392	Redirected money intended for F22s
112th Congress		
H.R. 1540 (NDAA)	336	Cut GMD funding by \$100 mil
H.R. 1540 (NDAA)	335	Cut LHA 7 Amphib warship funding by \$150 million
H.R. 1540 (NDAA)	334	Cut Mission Force Enhancement Transfer Fund (Slush Fund) by \$350 million
H.R. 1540 (NDAA)	332	Reduced troop levels in Europe
H.R. 1540 (NDAA)	302	Cut V-2 Osprey
H.R. 4310 (NDAA)	1140	Prevented reduction to nuclear triad
H.R. 4310 (NDAA)	1125	Reduced DoD funding by \$8 billion
H.R. 4310 (NDAA)	1123	Prevented reduction in Air National Guard units
H.R. 4310 (NDAA)	1110	Cut GMD funding by \$403 million
H.R. 4310 (NDAA)	1109	Cut LRSB funding
H.R. 4310 (NDAA)	1106	Prevented agencies from requiring contractors to sign labor agreements

H.R. 4310 (NDAA)	1103	Ended War in Afghanistan
H.R. 5856 (DoD Appropriations Act)	1401	Cut Afghanistan Infrastructure Fund
H.R. 5856 (DoD Appropriations Act)	1392	Cut Navy cruiser funding by \$500 million
H.R. 5856 (DoD Appropriations Act)	1391	Cut DDG-51 by \$1 billion
H.R. 2219 (DoD Appropriations Act)	567	Cut Overseas contingency fund by \$3.6 billion
H.R. 2219 (DoD Appropriations Act)	562	Blocked executive order requiring companies bidding on contracts to disclose campaign contributions
H.R. 2219 (DoD Appropriations Act)	520	Eased cost requirements for DoD contracting
113th Congress		
H.R. 4435 (NDAA)	664	AESA radars
H.R. 1960 (NDAA)	171	Cut NDAA funding by \$5 billion
H.R. 1960 (NDAA)	170	Cut Ft. Greely GMD interceptors
H.R. 1960 (NDAA)	159	Cut NDAA funding by \$60 billion
H.R. 1960 (NDAA)	157	Cut Missile Defense
H.R. 1960 (NDAA)	142	Reduced minimum number of

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		aircraft carriers from 11 to 10
H.R. 4870 (DoD Appropriations Act)	928	Prohibiting funds from being used in Afghanistan
H.R. 4870 (DoD Appropriations Act)	903	Preservation of A10 Warthog
H.R. 4870 (DoD Appropriations Act)	896	Allowed for retirement of Minutemen III Missiles
H.R. 4870 (DoD Appropriations Act)	885	Cut funding for USAF cruise missile
H.R. 2397 (DoD Appropriations Act)	400	Preserved C23 aircraft
H.R. 2397 (DoD Appropriations Act)	384	Limited ICBMs
H.R. 2397 (DoD Appropriations Act)	362	Cut East Coast missile defense
H.R. 2397 (DoD Appropriations Act)	357	Cut Ohio class missile submarine R&D

Appendix C

This Appendix describes the methodology employed by this study. Subsection A describes the dependent variable, subsection B the control variables, and subsection C the independent variables. Subsection D addresses robustness and model assumptions.

A. Dependent Variable

Roll-call votes form the basis of the response variable.¹⁶⁰ Some may object to this method, on the ground that roll-call votes do not reflect the agenda-setting activities that determine which issues come up for a vote.¹⁶¹ There are at least three reasons, however, to prefer roll-call votes as the basis for a dependent variable. First, analysis of legislators' time-use and similar agenda-setting activities may well be a superior method of uncovering influence from a political-science perspective, but "ingratiation

160. The use of roll-call votes is par for the course in political-science literature. Stephen Ansolabehere, John M. de Figueiredo & James M. Snyder, Jr., *Why Is There So Little Money in U.S. Politics?*, 17 J. ECON. PERSP. 105, 112 (2003) ("Almost all research on donors' influence in legislative politics examines the effects of contributions on roll call votes cast by members of Congress."). Where this Note diverges from the field is in its use of a custom index built from multiple roll-call votes and especially in its comparison of scores derived from roll-call votes across consecutive Congresses.

161. See, e.g., Clifford Carrubba, Matthew Gabel & Simon Hug, *Legislative Voting Behavior, Seen and Unseen: A Theory of Roll-Call Vote Selection*, 33 LEG. STUD. Q. 543, 544 (2008) ("Roll-call votes are typically not requested randomly by a disinterested party; they are selected by a purposive actor (such as a party leader) with a vested interest in what the vote will reveal about legislative behavior to a particular audience."); Richard L. Hall & Frank W. Wayman, *Buying Time: Moneyed Interests and the Mobilization of Bias in Congressional Committees*, 84 AM. POL. SCI. REV. 797, 802 (1990) ("[T]he object of a rational PAC allocation strategy is not simply the *direction* of legislators' preferences but the *vigor* with which those preferences are promoted in the decision making process. Such strategies should take the form of inducing sympathetic members to get actively involved in a variety of activities that directly affect the shape of committee legislation: authoring or blocking a legislative vehicle; negotiating compromises behind the scenes, especially at the staff level; offering friendly amendments or actively opposing unfriendly ones; lobbying colleagues; planning strategy; and last and sometimes least, showing up to vote in favor of the interest group's position.").

and access, in any event, are not corruption” as a matter of law.¹⁶² Second, roll-call votes may act as a signaling mechanism, which legislators use to indicate their positions to potential donors.¹⁶³ Third, if anything, the ability to uncover a statistically significant effect in roll-call votes even after agenda-setting is taken into account suggests that the influence of money on policy outcomes is particularly strong.¹⁶⁴

Rather than focusing on an individual roll-call vote, I construct a dependent variable based on multiple defense-related votes in a given Congress.¹⁶⁵ In constructing an index based on multiple votes, I follow

162. *Citizens United v. FEC*, 558 U.S. 310, 360 (2010); *see also* *Randall v. Sorrell*, 548 U.S. 230, 243 (2006) (rejecting the argument that campaign finance regulations can be justified by the need to “protect candidates from spending too much time raising money rather than devoting that time to campaigning among ordinary voters”).

163. DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* 64–66 (1974).

164. *See supra* Section I.E.

165. Another objection to the use of roll-call votes in this study and the bulk of similar political-science research is that some votes are more salient than others. This proposition is obviously true on some level; a Senator’s vote on a Supreme Court nominee does and should receive more attention than their vote to rename a post office. Therefore, this analysis’s equal weighting of votes in a given Congress could be problematic. But there are two reasons for choosing the equalized weighting system employed here. First, any “salience” measure would be unacceptably subjective; one cannot measure salience in furlongs or British Thermal Units. Certainly, one can attempt to find proxies for salience, like using *New York Times* coverage or analyzing the budgetary impact of a roll-call vote. *See, e.g.*, Lee Epstein & Jeffrey A. Segal, *Measuring Issue Salience*, 44 AM. J. POL. SCI. 66 (2000) (employing *New York Times* coverage in analyzing the salience of Supreme Court cases). These proxies, however, are too rough to allow for meaningful analysis. Major news outlets rarely cover the kind of granular policy moves analyzed here. And not all of the votes included are expenditures; if CBO scores are to be a proxy for salience, how does one compare a vote to spend \$500 million on a missile system with a vote to withdraw from Iraq? Even if salience were a desirable weighting mechanism in the abstract, the methodological cure would be worse than the disease. Second, if the “signaling” theory of roll-call voting discussed above is correct, legislators should care about cultivating a *consistent* reputation as much or more than the signal sent by any one vote. It is the win-loss record, not only the size of the wins or the losses, that matters.

Richard Fleisher and Rebecca Thorpe.¹⁶⁶ Roll-call votes were selected for each of the studied Congresses based on keywords (e.g., “missile,” “defense,” “Navy,” “military aid,” etc.). Using publicly available roll-call vote records, I recorded how each of the Representatives in this sample voted on every measure. Votes were coded as “pro-defense” if, for example, they approved a new weapons system. Votes that are “anti-defense” would include, for instance, measures to withdraw the United States from Iraq. In layman’s terms, the more often a legislator votes in favor of the defense industry, the higher her defense favorability score; these scores are then adjusted so that they can be compared to that legislator’s voting record in different Congresses.¹⁶⁷

B. Control Variables

1. *Party and Ideology*

Previous research has demonstrated a strong relationship between ideology, campaign contributions, and policy outcomes, including in the defense context.¹⁶⁸ I use two variables to control for this effect: a

166. THORPE, *supra* note 44, at 97–99; Fleisher, *supra* note 8, at 396–97. This approach is preferable to relying on a single vote as a binary dependent variable, which may obscure policy preferences. For example, many Democratic legislators supported the FY2017 National Defense Authorization Act on the whole, but they voted against it to voice their displeasure with provisions regarding protections for LGBTQ employees of military contractors. Bridget Bowman & Niels Lesniewski, *Democrats Draw Line over LGBT Provision in Defense Authorization Bill*, ROLL CALL (Oct. 25, 2016), <http://www.rollcall.com/news/policy/democrats-draw-line-lgbt-provision-defense-authorization-bill> [<https://perma.cc/4MXW-S93S>].

167. In technical terms, pro-defense industry votes are coded as 1, and anti-defense industry votes as 0. Votes where a legislator voted “Present” or did not vote are not included for that lawmaker’s total. The proportion of votes cast in favor of the defense industry is standardized across a given Congress to allow for comparison between different Congresses. Standardization also allows for comparison across varying policy and budgetary environments. The votes used to develop the dependent variable can be found in Appendix B.

168. Fleisher, *supra* note 7; Douglas D. Roscoe & Shannon Jenkins, *A Meta-Analysis of Campaign Contributions’ Impact on Roll Call Voting*, 86 Soc. Sci. Q 52, 59

representative's party and their DW-NOMINATE score after the 113th Congress.¹⁶⁹ DW-NOMINATE, along with closely related datasets created by the same researchers, is commonly referred to as the “gold standard” of efforts to rigorously measure legislators' ideology.¹⁷⁰ Party affiliation is coded as a dummy variable, with Democrats set to 0 and Republicans set to 1. The most conservative representative in this study is Jim Sensenbrenner (R-WI 5), with an ideological score of 1.234. The most liberal is Jim McDermott (D-WA 7), with a score of -0.678.

(2005) (discussing interaction of ideology and contributions in studies of roll-call votes).

169. DW-NOMINATE is commonly used in the political-science literature; a negative value indicates a liberal ideology, a positive value a conservative ideology, and a near-zero value a moderate ideology. Royce Carroll et al., *Measuring Bias and Uncertainty in DW-NOMINATE Ideal Point Estimates via the Parametric Bootstrap*, 17 *POL. ANALYSIS* 261, 265-68 (2009). I use only the post-113th Congress DW-NOMINATE scores, as opposed to the scores after a given Congress for a Representative in that Congress. First, DW-NOMINATE scores tend to be highly stable over time. Keith T. Poole, *Changing Minds? Not in Congress!* 131 *PUB. CHOICE* 435, 447 (2007). Second, because DW-NOMINATE scores are cumulative over a legislator's career, the scores after the 113th Congress include the roll-call votes of each prior Congress included in the study. Using different DW-NOMINATE scores for each individual Congress would weight early votes more heavily than later ones.
170. See, e.g., SARA CHATFIELD, JEFFERY A. JENKINS & CHARLES STEWART III, *POLARIZATION LOST: EXPLORING THE DECLINE OF IDEOLOGICAL VOTING AFTER THE GILDED AGE* 3, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2548551 [<https://perma.cc/LD7F-QR2H>] (referring to NOMINATE scores, a precursor to DW-NOMINATE, as “the gold-standard metric” for measuring political polarization); JAMES A. THOMSON, *A HOUSE DIVIDED: POLARIZATION AND ITS EFFECT ON RAND* 6 (2010), https://www.rand.org/content/dam/rand/pubs/occasional_papers/2010/RAND_OP291.pdf [<https://perma.cc/8X56-ALQG>] (referring to DW-NOMINATE as the “gold-standard measuring system” for political ideology); Matthew Yglesias, *Beto O'Rourke's Voting Record Is More Conservative Than the Average Democrat's*, *Vox* (Dec. 21, 2018), <https://www.vox.com/policy-and-politics/2018/12/21/18150359/beto-orourke-voting-record> [<https://perma.cc/TL9B-XNEJ>] (“The gold standard for measuring these things [political ideology] is a system called DW-NOMINATE . . .”). For our purposes, DW-NOMINATE is preferable to other methods of approximating legislators' ideology. For example, the median ideology of a legislator's home district might be a decent predictor of that legislator's ideology, but DW-NOMINATE more directly measures that ideological position, rather than serving as a proxy.

2. District Dependence on the Defense Industry

A large body of research has documented the relationship between a district's economic dependency on the defense industry and a representative's voting on defense-related issues.¹⁷¹ Essentially, if defense contractors, subcontractors, or the U.S. military make up a large part of a district's economy, one would expect that the Representative of that district would be more pro-defense. Drawing on Rebecca Thorpe's work, representatives are differentiated based on whether their congressional districts are economically dependent on defense contractors or subcontractors.¹⁷² In this sample, 22 representatives represent districts included in Thorpe's list of districts dependent on the defense industry, while 114 representatives in this sample do not.

I use Thorpe's dataset to create a dummy variable, rather than a more granular numerical variable, because she only provides detailed data for the districts she codes as economically reliant on the defense industry.¹⁷³ Thorpe does not provide data on the characteristics of districts classed as *not* economically reliant on the defense industry. In other words, for the 114 districts she codes as not economically reliant on the defense industry, it is simply impossible from the available datasets to attempt a more detailed

171. THORPE, *AMERICAN WARFARE STATE*, *supra* note 45, note 166; Thomas M. Carsey & Barry Rundquist, *Party and Committee in Distributive Politics: Evidence from Defense Spending*, 61 J. POL. 1156 (1999); Eugene Gholz & Harvey M. Sapolsky, *Restructuring the U.S. Defense Industry*, 24 INT'L SEC. 5 (1999); Rebecca U. Thorpe, *The Role of Economic Reliance in Defense Procurement Contracting*, 38 AM. POL. RES. 636 (2010).

172. Representatives whose home districts are dependent on the defense industry are coded as 1; those whose home districts are not dependent are coded as 0. The data on defense-dependent districts are available in Thorpe's *American Warfare State*. See THORPE, *supra* note 44, app. 6.2. This appendix is available online at <https://www.press.uchicago.edu/sites/thorpe> [<https://perma.cc/3TCU-L53F>].

173. I also conducted a simple regression analysis comparing the level of dependency of those Representatives that Thorpe includes as economically dependent against the favorability scores I calculated for the 112th Congress. That Congress was selected because it contained the most roll-call votes of any Congress in the studied timeframe. This calculation did not reveal significant results, which is not particularly surprising given the small sample size (n = 22 Representatives).

rendering of the variable. Any effort to use a more “precise” numerical variable of defense industry/district GDP for the entire sample of legislators studied here would involve an unacceptable and irresponsible amount of guesswork regarding the characteristics of the 114 representatives’ districts that are not reliant on the defense industry. For that reason, a binary variable is preferable.

3. *Defense Favorability in Previous Congress*

Incorporating time into the analysis of contributions and voting behavior is a potentially powerful method of untangling the question of whether money follows or causes voting. In mathematical terms, this is a classic endogeneity problem. As Thomas Stratmann points out, one way to overcome the endogeneity problems “inherent in analyzing cross-sectional data is to exploit the time-series nature of contributions and votes.”¹⁷⁴ Changes in congressional behavior over time serve “as a kind of natural experiment for making . . . [an] empirical case for the importance of political money.”¹⁷⁵ By comparing the same legislators’ voting patterns over time, “it is possible to turn . . . legislators . . . into their own statistical controls.”¹⁷⁶

If more money correlates with a legislator changing their behavior over time, that is much stronger evidence of a money-causing-votes effect than a simple analysis exemplified by the *Sludge* article.¹⁷⁷ Stratmann analyzes two

174. Thomas Stratmann, *Can Special Interests Buy Congressional Votes? Evidence from Financial Services Legislation*, 45 J. L. ECON. 345, 347 (2002). There are other techniques to chip away at endogeneity. For example, Michael S. Rocca and Stacy B. Gordon employ a two-stage ordinary least squares regression technique to find a robust relationship between defense earmarks and campaign contributions from defense industry PACs. Michael S. Rocca & Stacy B. Gordon, *Earmarks as a Means and an End: The Link Between Earmarks and Campaign Contributions in the U.S. House of Representatives*, 75 J. POL. 241 (2013). Although a detailed explanation of 2OLS regression is well beyond the scope of this paper, the idea is to create an estimate of an endogenous term to replace the problematic variable.

175. Ferguson, Jorgensen & Chen, *supra* note 38, at 11.

176. *Id.* at 12.

177. *See supra* note 5 and accompanying text.

votes, separated by seven years.¹⁷⁸ In a comparable change-over-time analysis, Ferguson, Jorgensen, and Chen examine five votes over three years.¹⁷⁹ In contrast, this paper analyzes fifty-seven votes across six consecutive Congresses. This analysis is therefore less likely to fall prey to the potential for idiosyncratic voting patterns that may characterize a handful of roll-call votes.¹⁸⁰ Because we are interested in *changing behavior over time*, only representatives who held their offices over the entire period studied are included in the sample.

This paper addresses the endogeneity problem of money causing or following votes by including a control variable: a representative's favorability score in the previous Congress. The reasoning is straightforward. If money "follows" Representative Smith's policy preferences (e.g., Lockheed Martin throws money at their campaigns because they are pro-defense), then their voting behavior, relative to the other representatives in the study,¹⁸¹ should be highly stable over time. In other words, their favorability toward the defense industry in Congress N should capture the predictive power of the model for their favorability toward the defense industry in Congress N+1; absolute or proportional dependence on the defense industry should have no significant effect on their voting behavior. Put simply, if the industry throws cash at Representative Smith because the industry likes their politics, then their voting behavior should not change with the amount of industry cash.

If, on the other hand, money "causes" Representative Smith's policy preferences (i.e., they are pro-defense because Lockheed Martin throws money at their campaigns), then we would expect: 1) that their behavior in Congress N does not fully predict their behavior in Congress N+1; and 2) that the defense industry's contributions do have a statistically significant effect in predicting their behavior in Congress N+1. It is important to note that because policy preferences remain generally stable over time, we would expect a legislator's baseline favorability to always be significant. As a rule of thumb, Congresspeople do not simply wake up one morning and decide to switch from being a hawk to a dove, or vice versa. So, we are

178. His analysis, therefore, is more like a paired sample test than what is commonly thought of as time-series analysis. Stratmann, *supra* note 174, at 348.

179. Ferguson, Jorgensen & Chen, *supra* note 38, at 42.

180. *See supra* note 161 and accompanying text.

181. *See supra* Section I.A (discussing the use of standardization to permit comparison across and within Congresses).

primarily interested in whether the explanatory power of prior behavior “crowds out” the explanatory power of money.

One might wonder whether the selection criterion of legislators who held their seats continuously for six consecutive Congresses could weight the model toward representatives in safe seats. Perhaps, but this is a necessary limitation that, if anything, strengthens this study’s findings. Because the model developed here relies on using a legislator’s behavior in Congress N as a baseline or control for their behavior in Congress N+1, the dataset is necessarily confined to those legislators in office in consecutive Congresses. To the extent that this makes the legislators included more likely to represent “safe” districts, that would tend to underline, rather than undercut, the results presented here. Other research has already found that campaign financing has larger effects on the voting behavior of more junior/moderate members than that of more senior/ideological members.¹⁸² This makes intuitive sense; members in more endangered/purple seats need money to keep those seats; members in safe seats insulated by incumbency should have more leeway to defy moneyed interests. Thus, the fact that this study finds significant results for those legislators *continuously* in office over the 108th-113th Congresses, who probably disproportionately represent “safe” seats, suggests that the true effect may be even larger.

C. Independent Variables

The campaign finance data for this study are taken from the Center for Responsive Politics’ (CRP) OpenSecrets.org.¹⁸³ I constructed a web scraping

182. See, e.g., Richard Fleisher, *PAC Contributions and Congressional Voting on National Defense*, 18 LEGIS. STUD. Q. 391, 403–04 (1993) (finding greater influence of defense industry campaign spending on moderate legislators than on conservative or liberal legislators); Thomas Stratmann, *The Effectiveness of Money in Ballot Measure Campaigns*, 78 S. CAL. L. REV. 1041, 1062–63 (2005) (finding that “the influence of campaign contributions on the voting decisions of junior representatives is larger than the influence of contributions on the voting decisions of senior representatives”).

183. For some representatives (n=23), CRP does not provide fundraising data for the 2002 election cycle. However, because the 108th Congress (2003–2005) is the first Congress included in this study, there is no “previous Congress favorability score” for Representatives in the 108th. Favorability in the 108th Congress is only included in this analysis as a Representative’s “previous

tool to automatically obtain the relevant data. CRP disaggregates contributions to campaigns by industry (e.g., health, transportation, and construction). Most salient for our purposes is the “defense” categorization. Contributions coded by CRP as “defense” include money from PACs sponsored by defense corporations and money from individuals employed by defense corporations.¹⁸⁴

It is important to note that these numbers do not include disclosed independent expenditures (e.g., Super PACs) or undisclosed “dark money.” This should not be taken to mean that those methods of campaign financing cannot lead to corruption or the appearance of corruption. Nor does the exclusion of such expenditures from this study undermine its empirical and methodological bottom line. Within the realm of independent-expenditure groups subject to donor-disclosure requirements (i.e., Super PACs), corporations have been remarkably minor players—instead, wealthy individuals have largely driven the surge in Super PAC spending since *Citizens United*.¹⁸⁵ Defense contractors are not exempt from the general rule that corporations are not Super PAC high-rollers. As to undisclosed “dark money” (e.g., social welfare groups), the absence of data highlights the

Congress favorability score” for the 109th Congress. The CRP data for the 2002 election cycle plays no part in the regression analysis.

184. See, e.g., *Methodology*, CTR. FOR RESPONSIVE POL., <https://www.opensecrets.org/members-of-congress/industries?cid=N00007360&cycle=2016> [<https://perma.cc/AC95-YYFK>].
185. See Nathaniel Persily, Robert F. Bauer & Benjamin L. Ginsberg, *The State of Campaign Finance in the U.S.*, BIPARTISAN POL’Y CTR. (Jan. 19, 2018), <https://bipartisanpolicy.org/library/the-state-of-campaign-finance> [<https://perma.cc/X4C7-VDU8>] (“[O]ne of the chief changes in the campaign finance system is the shift toward fundraising and spending by a small group of individuals . . . [D]espite the Supreme Court’s decision in *Citizens United*, corporations have not yet taken significant advantage of their newfound ability to engage in independent spending.”); Daniel I. Weiner, *Citizens United Five Years Later*, BRENNAN CTR. FOR JUST. 1 (2015), <http://www.brennancenter.org/publication/citizens-united-five-years-later> [<https://perma.cc/C9PW-PN7U>] (“[F]or-profit corporations have not been the most visible beneficiaries of the Court’s jurisprudence. Instead—thanks to super PACs and a variety of other entities that can raise unlimited funds after *Citizens United*—the biggest money (that can be traced) has come from an elite club of wealthy mega-donors. These individuals—fewer than 200 people and their spouses—have bankrolled nearly 60 percent of all super PAC spending since 2010.”).

question-begging nature of arguments for anonymizing such political spending. Dark money need not be disclosed, the argument goes, because speech purportedly not intended to affect elections cannot give rise to corruption or the appearance of corruption—but without disclosure, we cannot test that proposition. The premise is assumed as evidence. As discussed in Section II.C.2, *supra*, the findings of this paper reinforce the necessity of a disclosure regime for dark money that, unlike the status quo, does not assume absence of evidence is evidence of absence.

This paper uses two independent variables to test if money causes voting: the absolute amount of defense contributions to a candidate in a given cycle and the proportion of total contributions to a candidate in a given cycle coded as originating from the defense industry.

1. *Absolute Defense Contributions*

CRP's database provides the total amount of money that a candidate received from the defense industry in a given election cycle. For example, in the 2004 election cycle, Rep. Nancy Pelosi received \$25,500 from the defense industry: \$24,000 from defense-linked PACs and \$1,500 from individuals.¹⁸⁶ The unit of analysis that is "Nancy Pelosi during the 2004 election cycle/109th Congress" therefore has an absolute defense contribution value of 25,500.¹⁸⁷

186. These numbers include contributions to Representative Pelosi's so-called "Leadership PAC." Leadership PACs are common across the political spectrum and operate as slush funds for the legislators who control them. *See All Expenses Paid: How Leadership PACs Became Politicians' Preferred Ticket to Luxury Living*, CAMPAIGN LEGAL CTR. (Jul. 19, 2018), <https://campaignlegal.org/document/all-expenses-paid-how-leadership-pacs-became-politicians-preferred-ticket-luxury-living> [<https://perma.cc/XQV6-FBGU>]. Given the discretion that legislators exercise over Leadership PACs, they are included in this study along with regular campaign PACs. Leadership PACs can also be thought of as a textbook instantiation of the hydraulic theory of campaign finance. *See* Issacharoff & Karlan, *supra* note 139, at 1713 ("Political actors spend money on politics because they care about political outcomes and think spending money makes it more likely their side will prevail. The money that reform squeezes out of the formal campaign process must go somewhere.").

187. A brief methodological note: CRP occasionally updates its website with newly reported and categorized contributions. Because of these updates, the data on the website may not exactly match the data used in these calculations. The data here are current (based on www.opensecrets.org) as of March 14, 2019.

2. Proportional Dependence on Defense Industry Contributions

In addition to the amount of contributions coded to the defense industry, CRP's industry-level data allow for analysis of how important those contributions were to a candidate's campaign.¹⁸⁸ A \$10,000 contribution matters much in a \$50,000 race than a \$5 million race. The dependence calculation is simple: the absolute contributions coded to the defense industry are divided by the total amount of contributions to that campaign and multiplied by 100 to obtain a percentage. During the 2014 election cycle, Adam Schiff (D-CA) received \$51,000 from the defense industry and \$768,909 overall. His proportional dependence score is:

$$\frac{51,000}{768,909} (100 \%) = \mathbf{6.63277449}$$

For illustrative purposes, the data for Representative Adam Schiff are presented in Table 1.

Congress	Standardized Favorability	Prev. Congress, Standardized Favorability	Defense Industry Campaign Contributions	Total Campaign Contributions (Categorized)	Defense % Campaign Financing
108	-1.0929329	X	\$7,250	\$1,009,780	0.718%
109	-0.2182813	-1.0929329	\$11,300	\$901,971	1.253%
110	-0.7333184	-0.2182813	\$26,500	\$930,911	2.847%
111	-0.9438397	-0.7333184	\$47,950	\$1,037,271	4.623%
112	-0.1872623	-0.9438397	\$56,250	\$1,080,703	5.205%
113	-0.435635	-0.1872623	\$51,000	\$768,909	6.633%

188. Mike Norton and Richard Pildes have documented how the rise of “outside” money—i.e., campaign financing outside the framework of a party's funding apparatus—leads to intra-party fragmentation and polarization, as candidates less reliant on the party's campaign funding become legislators less beholden to the party's policy priorities. Mike Norton & Richard H. Pildes, *How Outside Money Makes Governing More Difficult*, 19 ELECTION L.J. 486, 487 (2019). An analogous mechanism is at play here. As legislators become less reliant on one source (or one group of sources) for campaign money, their policy priorities diverge from that source's positions.

D. Robustness, Assumptions, and Randomized Inference Analysis

When robust standard errors are specified for the model indicated by the stepwise regression described in Appendix A, $F_{(3, 676)} = 615.16$ ($p < 0.0001$) and $R^2 = 0.6593$. All of the explanatory variables—party, previous favorability, and percentage of contributions—remain significant ($p < 0.001$ for each). The coefficients using robust standard errors for this model are provided in Appendix A. Observation of probability plots and the residual scatterplot for the obtained model do not indicate a violation of the assumptions of normality or homoskedasticity.

In addition to checking robust standard errors, probability plots, and homoskedasticity, I also performed a randomized inference analysis in Stata¹⁸⁹ to assuage potential concerns over the fragility of the model specification.¹⁹⁰ In brief, the randomized inference analysis scrambles the percentage of defense contributions originating from the defense industry variable 1,000 times.¹⁹¹ For each of these 1,000 iterations, the coefficient of the percentage of contributions originating from the defense industry is obtained and stored. The “sharp null hypothesis” is that the percentage of

189. Specifically, I used the “ritest” Stata package.

190. For a discussion of randomized inference analysis in the empirical legal context, see John J. Donohue III & Daniel E. Ho, *The Impact of Damage Caps on Malpractice Claims: Randomization Inference with Difference-in-Differences*, 4 J. EMPIRICAL LEGAL STUD. 69 (2007). Although Donohue III & Ho apply this methodology in the context of a binary treatment variable rather than a ratio-numerical variable like the one presented here, the underlying principles are much the same. See also Simon Heß, *Randomization Inference with Stata: A Guide and Software*, 17 STATA J. 630, 639 (2017) (“In the examples below, the variable is always a binary treatment indicator, but in principle, it can be any type of variable.”).

191. I did not scramble the variables for party assignments and previous defense favorability for two reasons. First, randomized inference is a computationally intensive process. The relationship between these two variables and favorability toward the defense industry in a given Congress is intuitive, backed up by previous research (in the case of party identity), and so strongly confirmed in the above model that little to nothing would be gained empirically by running randomized inference on these variables. Second, the most important relationship for purposes of this paper and campaign finance law is the effect of the percentage of contributions originating from the defense industry on favorability; it makes sense to subject this relationship to greater scrutiny than the other explanatory variables.

contributions from the defense industry has zero effect on favorability, i.e., that the coefficient is zero. To test this null hypothesis, the coefficient in our model with the *actual* data is then compared to the distribution of the 1,000 coefficients calculated with randomized data. If the actual coefficient falls in one of the tail ends of the distribution of coefficients, then it is unlikely that the observed effect is due to chance.¹⁹² And this appears to be the case: the randomized inference analysis strongly suggests that observed effect of the percentage of contributions from the defense industry is real.¹⁹³ ($p < 0.0001$).

192. See generally Alwyn Young, *Channeling Fisher: Randomization Tests and the Statistical Insignificance of Seemingly Significant Experimental Results* 134 Q.J. ECON. 557, 557 (May 2019), <https://doi.org/10.1093/qje/qjy029> [<https://perma.cc/VK8M-XEEJ>] (finding that when employing randomization, “only 25 to 50 percent of experimental papers . . . are able to reject the null of no treatment effect anywhere”).

193. The reported p -value for the randomization inference analysis is 0.0000. Out of 1,000 iterations, in no case did the obtained coefficient of 0.20 fall within the confidence interval of the coefficient for the percentage of campaign contributions originating from the defense industry when that coefficient was obtained from randomly generated data.