

RHETORIC AND REALITY: TESTING THE HARM OF CAMPAIGN SPENDING

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In its landmark campaign finance decision Citizens United v. FEC, the Supreme Court found that favoritism or influence over elected officials gained by wealthy campaign contributors does not—in the absence of outright corruption—give rise to the sort of constitutional harm that would justify restrictions on campaign spending. The Court was also insistent that any perceptions of ingratiation would not undermine the electorate’s faith in democracy. This paper challenges the doctrinal and empirical underpinnings of those assertions. We argue that a loss of faith by the electorate implicates a central constitutional value and is a sufficiently compelling interest to justify campaign finance regulation. We also demonstrate empirically that the Court should not have been so confident that the electorate’s faith in democracy is unaffected either by the appearance of influence or access due to campaign spending or by independent expenditures.

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INTRODUCTION

“The appearance of influence or access . . . will not cause the electorate to lose faith in our democracy.”¹ The object of this study is to test this claim, propounded by Justice Kennedy for the Supreme Court in *Citizens United v. FEC*, regarding the effects of unregulated

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¹ *Citizens United v. FEC*, 558 U.S. 310, 360 (2010).

campaign spending. Our title borrows from Justice Kennedy, with whom we agree that “[r]hetoric ought not obscure reality.”²

The Court was confident, in its important holding in *Citizens United*, that those who may gain favoritism and influence over elected officials through their financial support are no different from any other person who may agree with the policies of a representative and welcome the outcomes that the representative supports. This is simply “[d]emocracy . . . premised on responsiveness”³ and signals no harm that would supply a basis for government to interfere with a protected right. The Court’s certainty that no harm looms in the absence of outright corruption calls all campaign finance regulation into question. Not only must any regulation be aimed at preventing corruption, under this view, but it must also be necessary to achieve that compelling interest.⁴

This paper challenges the premise of this line of reasoning. The opening quotation presents a seemingly simple assertion of *a priori* truth about the role of money in the electoral process. But it masks two critically important and unresolved issues: First, whether an *actual* loss of faith in democracy would provide a compelling enough government interest to justify restricting campaign spending; and second, whether it is true that campaign spending does not affect the electorate’s faith in democracy. The first is a question of constitutional law and theory; the second is a question of empirical fact.

The Court’s confounding of the two questions has deleterious consequences for the integrity of the analysis of campaign finance laws under the Constitution. While the Court has been quite forceful in challenging the adequacy of most government interests offered to support regulation in this area, it has not been careful to clarify whether its skepticism about government justification rests on the factual assumption that no real harm exists.⁵ The Court certainly has sent strong signals that only *quid pro quo* corruption, or its appearance, can justify government restrictions.⁶ But it has spoken in the context

² *Id.* at 355.

³ *Id.* at 359 (quoting *McConnell v. FEC*, 540 U.S. 93, 297 (2003) (Kennedy, J., concurring in judgment in part and dissenting in part)).

⁴ See *McCutcheon v. FEC*, 134 S. Ct. 1434, 1456–58 (2014) (striking down aggregate limits on individual campaign contributions, in part because they were not sufficiently narrowly tailored to achieve the government’s stated interest).

⁵ See *Citizens United*, 558 U.S. at 360–61 (distinguishing influence, ingratiation, and access from corruption on the ground that they do not amount to a *quid pro quo* exchange of dollars for political favors).

⁶ See *McCutcheon*, 134 S. Ct. 1434, 1450 (2014) (“Th[e] Court has identified only one legitimate governmental interest for restricting campaign finances: preventing corruption or the appearance of corruption.”).

of rejecting specific alternative kinds of harm that it found insufficient.⁷ It has stopped short, however, of saying that, as a theoretical matter, there could never be another government interest—aside from preventing corruption or the appearance of corruption—that could justify restrictions.⁸ Instead, the Court has offered sanguine assurances of fact, such as the opening quotation, suggesting that corruption is the only potential public harm at issue.⁹ But those assertions rest on no factual evidence.¹⁰ Thus, the Court has sketched out a land-

⁷ The Court has rejected several proffered government interests as insufficient to justify restrictions on spending, including: “level[ing] the playing field,”; “level[ing] electoral opportunities,”; and “equaliz[ing] the financial resources of candidates,” *McCutcheon*, 134 S. Ct. at 1450, as well as preventing the “distorting effects of immense aggregations of wealth,” *Citizens United*, 558 U.S. at 348–49 (quoting *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 660 (1990)), and “protecting dissenting shareholders from being compelled to fund corporate political speech,” *id.* at 361.

⁸ The Court appears uninterested in exploring such a theory. In *American Tradition Partnership v. Bullock*, the Court summarily overturned a state court ruling which had upheld a state ban on corporate expenditures as constitutional under *Citizens United*. The Montana Supreme Court had upheld the prohibition because it determined, based on an in-depth factual inquiry, that Montana’s “sparse population, dependence upon agriculture and extractive resource development, location as a transportation corridor, and low campaign costs” made the state “especially vulnerable to continued efforts of corporate control to the detriment of democracy and the republican form of government.” *W. Tradition P’ship v. Att’y Gen.*, 2011 MT 328, ¶¶ 36–37, 363 Mont. 220, 235–36, 271 P.3d 1, 11, *rev’d sub nom.* *Am. Tradition P’ship v. Bullock*, 132 S. Ct. 2490 (2012) (per curiam). Based on this factual record, the Montana Supreme Court had reasoned that the statute at issue was permissible under *Citizens United* because of Montana’s “unique and compelling interests . . . in preserving the integrity of its electoral process, . . . encouraging the full participation of the Montana electorate,” and in preserving the independence and impartiality of its judiciary. *Id.* at 11–12. In a nine-sentence opinion, the Court ruled that Montana’s arguments “were already rejected in *Citizens United*, or fail to meaningfully distinguish that case.” *Am. Tradition P’ship*, 132 S. Ct. at 2491. The per curiam decision did not explain why the factual record failed to establish the compelling interest in preventing corruption that the Court had found wanting in *Citizens United*. *See id.* (Breyer, J., dissenting) (“[E]ven if I were to accept *Citizens United*, this Court’s legal conclusion should not bar the Montana Supreme Court’s finding, made on the record before it, that independent expenditures by corporations did in fact lead to corruption or the appearance of corruption in Montana.”).

⁹ There are many others. For example, “independent expenditures do not lead to, or create the appearance of, *quid pro quo* corruption.” *Citizens United*, 558 U.S. at 360. “Ingratiation and access . . . are not corruption.” *Id.* “Spending large sums of money in connection with elections, but not in connection with an effort to control the exercise of an officeholder’s official duties, does not give rise to such *quid pro quo* corruption.” *McCutcheon*, 134 S. Ct. at 1450. “Nor does the possibility that an individual who spends large sums may garner ‘influence over or access to’ elected officials or political parties.” *Id.* at 1451 (quoting *Citizens United*, 558 U.S. at 359). “[T]he people have the ultimate influence over elected officials.” *Citizens United*, 558 U.S. at 360.

¹⁰ Indeed, the Court eschewed the opportunity to develop any such record. When *Citizens United* was pressing a facial challenge to the constitutionality of § 203 of the Bipartisan Campaign Reform Act, the government advised the district court that it needed time to develop a factual record regarding the facial challenge to § 203. *Id.* at 399 n.4 (Stevens, J., dissenting). When *Citizens United* dropped its facial challenge to § 203, the

scape that places in the foreground the questions taken up in this paper: Could there be an interest, based on the electorate's loss of faith in our democracy, to justify restrictions on spending? If so, can the requisite social harm be shown?

Our study seeks to provide a theoretical and empirical basis for answering those questions. It relies on hypothetical situations presenting respondents with facts about specific campaigns and contributions, and then asks how these facts affect their beliefs about their representatives and their trust in the honest judgments of elected officials.

In Part I of this paper, we take up the theoretical question of why an empirical exploration might be relevant to the constitutional analysis of campaign finance restrictions. After all, skeptics might urge, it is immaterial whether unrestricted campaign spending will or will not cause the electorate to lose faith in our democracy, because even if it did, such a loss of faith does not qualify as the kind of *quid pro quo* corruption that the Supreme Court has signaled may be the only relevant government interest available to justify restrictions on campaign finance.¹¹ Part I responds to this contention and argues that there is a constitutional value involved in such a loss of faith, protection of which supplies government with a sufficiently compelling interest.

Part II details the research design and describes the survey experiments in depth. Ultimately, our objective in designing these experiments was to test the following three assumptions made by the Supreme Court in support of its decision in *Citizens United v. FEC*:

First, the appearance of influence or access caused by campaign spending will not cause the electorate to lose faith in our democracy.¹²

Second, the electorate will not refuse to take part in democratic governance because of money spent on political speech.¹³

government dropped its request for a factual record on the issue. *Id.* Thus, when the Court resolved the constitutionality of § 203—which it did inconsistently with its own rules since the petition did not raise that issue, *see id.* at 396 n.2 (“[U]nder this Court’s Rule 14.1(a), only the questions set forth in the petition, or fairly included therein, will be considered by the Court.” (alteration in original) (quoting *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992)))—it denied the government the opportunity to create a record detailing whether electioneering communications by corporations cause material social harms.

¹¹ Interestingly, the vote-buying literature in political science has failed to show a robust causal relationship between campaign contributions and votes in Congress. *See, e.g.*, Gregory Wawro, *A Panel Probit Analysis of Campaign Contributions and Roll-Call Votes*, 45 AM. J. POL. SCI. 563, 563 (2001) (explaining that methodological deficiencies have rendered measurement of the relationship between campaign contributions and votes in Congress difficult).

¹² *Citizens United*, 558 U.S. at 360.

¹³ *Id.*

Third, independent expenditures, because of the absence of pre-arrangement and coordination with the candidate, do not affect the electorate's faith in democracy by giving rise to corruption or the appearance of corruption.¹⁴

As Part III reveals, the results of our study suggest that the Court's first and third assumptions are incorrect, while they do not refute the accuracy of the second.

I

THE FAITH OF THE ELECTORATE

In the wake of the recent campaign finance decisions, scholars have been devoting attention to sorting out the implications of the theoretical questions raised by the Supreme Court's analysis. Some have focused on the question of whether corruption really is the only legitimate basis for the restriction of campaign spending. That is a question addressed through history, interpretative techniques, and constitutional theory. Robert Post, for example, argues that a central constitutional value, which he dubs "electoral integrity," is an implicit component of our representative system of government.¹⁵ It anticipates an expectation that elected officials will, in some broad and general way, remain responsive to protean public opinion.¹⁶ The unfettered ability of the public to express its diverse views enables that responsiveness.¹⁷ His theoretical challenge to the Court, therefore, urges that electoral integrity actually precedes and is constitutive of free speech rights, and therefore cannot be said to be subsumed by those rights. Protecting electoral integrity, Post concludes, is a compelling interest under the proper structural, theoretical, and historical understanding of the Constitution.¹⁸

Others, accepting at least *arguendo* that the government is limited to preventing "corruption," have challenged the narrow understanding of corruption as limited to the kind of *quid pro quo* exchange addressed by bribery laws.¹⁹ Lawrence Lessig has conducted a histor-

¹⁴ *Id.* at 357.

¹⁵ ROBERT C. POST, *CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION* 60 (2014).

¹⁶ *Id.* at 61.

¹⁷ *Id.* at 60.

¹⁸ *Id.* at 63.

¹⁹ This was Justice Breyer's approach in dissent in *McCutcheon*. See *McCutcheon v. FEC*, 134 S. Ct. 1434, 1469 (2013) (Breyer, J., dissenting) (arguing that the Court in *McConnell v. FEC*, 540 U.S. 93 (2003), found BRCA's soft money limits constitutional because they "thwarted a significant risk of corruption—understood not as *quid pro quo* bribery, but as privileged access to and pernicious influence upon elected representatives").

ical inquiry into the original understanding of the concept of corruption as a public harm, and concludes that the Court was mistaken to understand “corruption” in the narrow sense of bribery.²⁰ Rather, the framers of the Constitution understood corruption more broadly to include a “collective sense—the corruption of an institution, or a people, and not just a person.”²¹ This kind of corruption arises when an elected official develops an improper dependence on a “tiny slice of a concentrated interest” that is not representative of the constituent population.²² That kind of dependence could include bribery, but would also encompass an official becoming beholden to the small group of “funders” who are essential to a candidate’s ability to proceed through the electoral process and eventually to prevail.²³ The same theory justifying anti-corruption as a legitimate governmental objective thus applies as well to curbing a corrupting dependency begat by unregulated spending.²⁴

Our study takes a different tack. To situate our empirical investigation, we argue that the Constitution anticipates a relationship between a representative and his or her constituents, which in turn entails trust on the part of those represented that, at the least, their interests will be valued. Thus, if large infusions of money into campaigns have the effect of causing the electorate to lose faith in a communion of interests with their representative—whether or not it also

²⁰ Lawrence Lessig, *What an Originalist Would Understand “Corruption” to Mean*, 102 CALIF. L. REV. 1, 11 (2014); see also Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 408 (2009) (arguing that failure to take seriously the freestanding structural principle of anti-corruption is bad history and bad jurisprudence).

²¹ Lessig, *supra* note 20, at 6.

²² *Id.* at 18.

²³ See *id.* at 7 (arguing that, instead of being “dependent on the people alone,” as the framers intended, Congress has become dependent on the funders of campaigns (quoting THE FEDERALIST NO. 52, at 326 (James Madison) (Clinton Rossiter ed., 1961))).

²⁴ See *id.* at 18–19 (arguing that an originalist perspective should lead the Court to recognize a compelling interest in remedying “dependence corruption,” as it has done for *quid pro quo* corruption).

Some reject even “corruption” as a battleground for reform, arguing instead that the real problem in democratic politics is the massive inequality in wealth that results in very few people participating as funders. See, e.g., Pamela S. Karlan, Commentary, *Citizens Deflected: Electoral Integrity and Political Reform* (arguing there are “a variety of structural features” beyond campaign finance regulations that “may better explain why the link between the public and its representatives has frayed”), in POST, *supra* note 15, at 141, 143; Guy-Uriel E. Charles, *Corruption Temptation*, 102 CALIF. L. REV. 25, 29 (2014) (arguing Lessig’s “real concern is that the private financing of campaigns makes wealth a prerequisite to political participation”). Still others object to the judiciary’s intervention in defining corruption at all, when to do so “requires a theory of the legislator’s role in a democracy,” a complex and delicate determination not unlike matters the Court has declined to consider as political questions. Deborah Hellman, *Defining Corruption and Constitutionalizing Democracy*, 111 MICH. L. REV. 1385, 1389 (2013).

results in actual disregard of constituent concerns—that is a structural harm of great import to the functioning of the republican form of government. This argument supplies the basis for conducting an empirical study that focuses on perceptions of individual voters.

For decades, constitutional theory scholarship has explicitly recognized that constitutional constraints on the electoral process do not end with an election; a representative, once elected, has obligations toward his or her constituents. John Hart Ely's important book, *Democracy and Distrust*, established the foundational principle that the Constitution may be violated when representatives fail "to represent"—that is, by "the denial to minorities of . . . 'equal concern and respect in the design and administration of the political institutions that govern them.'"²⁵ Ely elaborated in a footnote that by being "represented" he meant that those bound to obey the laws "are not to be left out of account or valued negatively in the lawmaking process."²⁶ While his analysis focused specifically on the problem of discrimination, it offers a fuller understanding of representation more generally by speaking to the question of what duties run to the people in a republican form of government.

The history and intellectual pedigree of the American brand of representation support the notion that representatives have an obligation to take the interests of their constituents into account.²⁷ The duty of representation depended, in eighteenth-century thought, on the doctrine of "shared interests"²⁸—which explained how representation could be considered effective and legitimate despite the absence of universal suffrage. The House of Commons in Parliament was understood to represent all legitimate "interests" rather than all citizens of the realm,²⁹ and thus, as long as the interests had representation, it was not a problem that individuals did not. What the doctrine of shared interests had in common with universal suffrage was its assurance that the representatives could not "betray the People without at

²⁵ JOHN HART ELY, *DEMOCRACY AND DISTRUST* 82 (1980) (quoting RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 180 (1977)). For a fuller discussion, see Rebecca L. Brown, *How Constitutional Theory Found Its Soul: The Contributions of Ronald Dworkin*, in *EXPLORING LAW'S EMPIRE: THE JURISPRUDENCE OF RONALD DWORKIN* 41 (Scott Hershovitz ed., 2006).

²⁶ ELY, *supra* note 25, at 82 n.33.

²⁷ This discussion is elaborated more fully in Rebecca L. Brown, *Liberty, the New Equality*, 77 N.Y.U. L. REV. 1491, 1512–20 (2002).

²⁸ JOHN PHILLIP REID, *THE CONCEPT OF REPRESENTATION IN THE AGE OF THE AMERICAN REVOLUTION* 45 (1989).

²⁹ See *id.* (quoting John Adams as saying to the Continental Congress, "Reason, justice, & equity never had weight enough on the face of the earth to govern the councils of men. It is interest alone which does it, and it is interest alone which can be trusted.").

the same time betraying themselves.”³⁰ The commonality of interests guaranteed that “if they act for themselves, (which every one of them will do as near as he can) they must act for the common Interest.”³¹ The shared interests, therefore, supplied an essential structural protection against oppression.

The American colonists did not accept the idea that their interests were adequately represented in Parliament, for which they did not vote.³² But their attack was not on the principle that representation implies shared interest. Rather, they simply disagreed that, so far away and in such a different setting, their interests could be considered sufficiently similar to guarantee them a meaningful voice in a body that they did not elect³³: “If we are not their constituents, they are not our representatives.”³⁴

When the Constitution developed its own unique form of representation, the importance of shared interests survived within it. John Adams called for a representative body “in miniature an exact portrait of the people at large. It should think, feel, reason and act like them.”³⁵ Still essential to the understanding of representation was the idea that the people and their elected officials would share “underlying traits.”³⁶ This kind of sympathy between representatives and constituents was not just a luxury; it was an essential component of the protection of liberty, grounded in the expectation that “the interests of elector and elected were one.”³⁷

James Madison explained how shared interests could provide a check on the legislature:

³⁰ *Id.* at 46 (quoting English Whig politician William Pulteney).

³¹ *Id.* at 48 (quoting a New Yorker speaking in 1732).

³² See EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* 242 (1988) (describing colonists’ denial that virtual representation could extend beyond the shores of Great Britain).

³³ See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 177–78 (1969) (discussing disparities in interests and burdens between Americans and their fellow subjects in England).

³⁴ *A Letter from a Plain Yeoman*, *PROVIDENCE GAZETTE*, May 11, 1765, reprinted in *PROLOGUE TO REVOLUTION: SOURCES AND DOCUMENTS ON THE STAMP ACT CRISIS, 1764–1776*, at 76 (Edmund S. Morgan ed., 1959).

³⁵ John Adams, *Thoughts on Government* (1776), reprinted in 4 *THE WORKS OF JOHN ADAMS* 195 (photo. reprint 1969) (Charles Francis Adams ed., 1850–56).

³⁶ JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 204 (1996).

³⁷ *Id.* at 233. Both Madison and Brutus “knew that representative institutions can fulfill the ideal of self-government only if there is ‘reasonable ground for public trust’ that representatives speak for the people who elect them.” POST, *supra* note 15, at 15 (quoting *Essays of Brutus No. IV*, N.Y. J., Nov. 29, 1787, in *THE ANTI-FEDERALIST* 129 (Herbert J. Storing & Murray Dry eds., 1985)). See generally *id.* at 13–16 (explaining the historical importance of connection and trust between representatives and constituents).

[A] circumstance in the situation of the House of Representatives, restraining them from oppressive measures, [is] that they can make no law which will not have its full operation on themselves and their friends, as well as on the great mass of the society. This has always been deemed one of the strongest bonds by which human policy can connect the rulers and the people together. *It creates between them that communion of interests and sympathy of sentiments of which few governments have furnished examples; but without which every government degenerates into tyranny.*³⁸

Theorists widely agree that the Constitution envisioned a reciprocal relationship between representatives and the represented as an essential part of the engine driving self-government.³⁹ Representatives would have a communion of interests with those they represented,⁴⁰ and thus would have a duty not to disregard those interests entirely.⁴¹ This communion of interest also provided an assurance to the electorate that participation in self-government would be a meaningful exercise. Any remedy was at the ballot box.⁴² While such an arrangement does not suggest the existence of any enforceable individual right to particular actions or outcomes in the legislative process, it does, at the very least, dignify the protection of the representative-represented relationship with the status of a legitimate—if not essential—concern of constitutional government: shared interests and constituents' trust.

This two-way relationship is affected by money. One problem with an unlimited flow of funds into campaigns, as sanctioned by recent campaign finance decisions, is that it necessarily disrupts the communion of interests that is a structural element of our system of representative government. Lessig has shown that various characteristics of the current electoral system conspire to create a candidate's dependence on relatively few donors who can supply the funds necessary to proceed and prevail in the election processes.⁴³ These "funders" need have no relationship with the constituents represented

³⁸ THE FEDERALIST NO. 57, *supra* note 23, at 320–21 (James Madison) (emphasis added).

³⁹ See POST, *supra* note 15, at 10 (describing the framers' debates about representation); see also Lessig, *supra* note 20, at 8–9 (noting that the Constitution created "intended dependencies").

⁴⁰ Note, in this regard, that both representatives and senators are constitutionally required to be inhabitants of the states that they represent. U.S. CONST. art. I, §§ 2–3.

⁴¹ ELY, *supra* note 25, at 82 n.33.

⁴² See POST, *supra* note 15, at 13 ("Elections empowered the people to 'choose' their representatives and thereby to affirm a commonality of interests with those whom they decided to select.")

⁴³ Lessig, *supra* note 20, at 4–5 (discussing data showing that, among other things, 84% of House candidates and 67% of Senate candidates who raised more money than their opponents in the 2012 election cycle won their races).

by the official whose election they enabled.⁴⁴ Thus, to the extent that the generosity of funders depends on their general satisfaction with the elected official's job performance, an interest has been interjected between the representative and his or her constituents, distorting the communion of interests contemplated by the Constitution.

This distortion is not entirely different from the distortion occasioned by the colonies' supposed virtual representation in Parliament, which led to the framers' insistence on establishing a system of representation under the Constitution that preserved shared interests. Recall that, speaking of the members of Parliament across the ocean whose judgments were guided by interests vastly different from their own, colonists insisted: "If we are not their constituents, they are not our representatives."⁴⁵ The disrespect for a communion of interests robbed the laws of their legitimacy, indeed rendered them "pretended Legislation," in the words of the Declaration of Independence.⁴⁶

Recent studies have shown that, as a group, affluent Americans have different interests from those of lower-income Americans.⁴⁷ Thus, statistically, the assurances occasioned by a requirement of a communion of interests are lost when representatives are systematically diverted to consider the interests of their funders rather than their constituents in making policy judgments. The constituents to whom the official is loyal tend to become the financiers instead of the voters.⁴⁸ Symmetrically, the electorate's threat of using the ballot box as a reprisal for any breach of the duty to take their interests into account is dampened considerably by the powerful effect of financial contributions in elections.⁴⁹ There is a hollow ring, therefore, in the

⁴⁴ As Lessig puts it, "the immediate influence of the money election produces a subtle, perhaps camouflaged bending to keep the funders in the money elections happy." *Id.* at 4.

⁴⁵ *A Letter from a Plain Yeoman*, *supra* note 34.

⁴⁶ THE DECLARATION OF INDEPENDENCE para. 15 (U.S. 1776).

⁴⁷ See MARTIN GILENS, *AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA 77–78* (2012) (exploring the disparity in policy responsiveness where preferences diverge across income levels); Adam Lioz, *Breaking the Vicious Cycle: How the Supreme Court Helped Create the Inequality Era and Why a New Jurisprudence Must Lead Us Out*, 43 SETON HALL L. REV. 1227, 1232–34 (2013) (citing several studies from 2011–2013 demonstrating significant differences in the population based on wealth, including on issues related to prioritizing job creation over reducing the deficit; the role of the government in the economy; and the minimum wage); Benjamin I. Page, Larry M. Bartels & Jason Seawright, *Democracy and the Policy Preferences of Wealthy Americans*, 11 PERSP. ON POL. 51, 52 (2013) (detailing the range of differing policy preferences and priorities between wealthy and average Americans).

⁴⁸ See GILENS, *supra* note 47, at 193 (noting "an important general trend: the strengthening of policy responsiveness for affluent Americans"); Lessig, *supra* note 20, at 4 (describing how elected officials become dependent on funders).

⁴⁹ See Lioz, *supra* note 47 at 1251–52 (showing that, in 2012, 84% of U.S. House of Representatives and 67% of U.S. Senate who outspent their opponents won their

Supreme Court's dismissal of such concerns when it said that "[i]t is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies."⁵⁰ While that statement is no doubt true, it vastly understates the potential threat to the authentic deliberation based on constituent interests that the Constitution contemplates. If the electorate ceases to be the elected official's constituency, then the official ceases to be a representative.

More significantly for the goals of this project, the Supreme Court's minimization of concerns over the influence and access of contributors overlooks the importance of the public's confidence that its interests are represented. The communion of interests comprises not only the fact of faithful representation, but also the voters' confidence in it. The essential role played by the "confidence of the people," as framer James Wilson put it, was self-evident to those of the founding generation.⁵¹ Without trust and confidence, there is no genuine representation.⁵² Thus, any protection of the communion of interests essential to the constitutional design would not be limited to proscribing actual disregard or negation of constituent interest; it would also include measures that preserve the constituents' belief in the communion of interests with their representatives.

The Supreme Court's emphasis on *quid pro quo* corruption turns the analysis on its head. While it is true that corruption indeed threatens the communion of interests and thus "is a subversion of the political process,"⁵³ it is not the case that every subversion of the political process takes the form of *quid pro quo* corruption. The history and theory underlying the constitutional system of representation show that bribery is a subversion of the political process precisely because it is a particularly egregious example of a failure of representation.⁵⁴ It does not, however, exhaust the category.

In short, the theoretical foundation of this study relies on the following argument. The Constitution anticipates and relies upon the public's confidence that its elected representatives are duty-bound to

elections, and discussing the complex, but essential, influence of funding on electoral victories).

⁵⁰ *Citizens United v. FEC*, 558 U.S. 310, 359 (2010) (quoting *McConnell v. FEC*, 540 U.S. at 297 (Kennedy, J., concurring)).

⁵¹ 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 49 (Farrand ed. 1911).

⁵² See POST, *supra* note 15, at 16 & n.101 (discussing the importance of confidence to a republican system of government).

⁵³ *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985).

⁵⁴ See *Buckley v. Valeo*, 424 U.S. 1, 26–27 (1976) (per curiam) (explaining that if contributions are made in exchange for political favors, "the integrity of our system of representative democracy is undermined").

represent it, which requires that external loyalties or dependencies not divert the judgments that representatives are called upon to make. If the sympathies or interests of the representatives are affected such that they no longer can be said to coincide with the sympathies or interests of the constituents, then the requisite constitutional structure has been compromised. This undermines the premises upon which the American experiment in authentic self-government was grounded and threatens the values of accountability and public participation in the electoral process. Thus, there are powerful reasons to believe that protecting against those harms is a public concern of the highest order and therefore might justify government regulation of campaign finance.

The Court has recognized that, under First Amendment doctrine, the prevention of *quid pro quo* corruption is a compelling government interest sufficient to justify restrictions on the right to make campaign expenditures.⁵⁵ The integrity of the political process and proper functioning of democracy are essential concerns of government.⁵⁶ The communion of interests, a fundamental and indispensable structural feature of our constitutional democracy, is of a similar order; if it is indeed threatened, government should have the power to protect it. While the Supreme Court has never straightforwardly articulated the criteria for finding an interest compelling,⁵⁷ it has often recognized compelling interests having to do with the integrity of government and the political process.⁵⁸ Protecting the structural importance of the communion of interests, therefore, is an appropriate candidate for rec-

⁵⁵ *Id.* at 26.

⁵⁶ See *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 563–64 (1973) (discussing limitations on political activity by government employees in order to promote fair and effective government).

⁵⁷ The Court often avoids an assessment of the strength of government interests by finding that a measure fails the narrow-tailoring requirement of strict scrutiny. See, e.g., *McLaughlin v. Florida*, 379 U.S. 184, 197 (1964) (Harlan, J., concurring) (describing the Court's "necessity test" for protecting speech by denying government power to restrict speech broadly if narrower means will suffice).

⁵⁸ E.g., *Buckley*, 424 U.S. at 27 (finding sufficient interest in preventing corruption to justify individual contribution limits); *Nat'l Ass'n of Letter Carriers*, 413 U.S. at 565 (finding the danger to "fair and effective government" posed by partisan political conduct by government employees sufficient to justify restrictions); *Cox v. Louisiana*, 379 U.S. 559, 565 (1965) ("A State may . . . properly protect the judicial process from being misjudged in the minds of the public."); see also Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 *UCLA L. REV.* 1267, 1278–80 (2007) (discussing the Court's use of strict scrutiny in Free Speech cases); cf. Aziz Z. Huq, *Preserving Political Speech from Ourselves and Others*, 112 *COLUM. L. REV. SIDEBAR* 16 (2012) (contrasting the Court's relative sympathy for national security interests with its treatment of campaign finance interests in justifying restrictions on political speech).

ognition as a compelling interest quite separate and apart from the governmental interest in preventing corruption.

Whether unlimited campaign spending can disrupt the communion of interests by destroying the voters' confidence that they are being represented is a question of fact to which we turn in Part II.

II RESEARCH DESIGN

Any power in the government to restrict the constitutionally protected activity of campaign spending will depend on a showing of harm to the structural interests that the government has a responsibility to protect. Because the Supreme Court has denied the existence of these harms, we sought to test empirically the veracity of a series of claims regarding how the source, magnitude, and levels of coordination in campaign contribution affect the faith citizens have in democracy. Our strategy involves using "survey vignettes" to expose opinion survey respondents randomly to various factual situations to see how they respond.⁵⁹ This approach more accurately measures respondent opinion than the abstract questions that tend to characterize opinion surveys.⁶⁰ Our study uses panel survey experiments in The American Panel Survey (TAPS) to distill the impact, if any, that the magnitude and source of electoral contributions and the level of coordination between candidates and contributors has on citizens' faith in democracy.⁶¹ In this Part, we posit our specific hypotheses, survey design, and analytical strategy.

⁵⁹ We are aware of the literature calling into question the value of public opinion surveys to judgments about campaign finance matters. See Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. PA L. REV. 119 (2004) (arguing that trends in public perception of corruption have little to do with the campaign finance system). We hope that our project avoids some of the pitfalls of such an approach by measuring individual reactions to specific factual scenarios rather than asking respondents about facts in the world.

⁶⁰ See Cheryl S. Alexander & Henry Jay Becker, *The Use of Vignettes in Survey Research*, 42 PUB. OPINION Q. 93 (1978) (discussing the advantages of vignettes).

⁶¹ The American Panel Survey (TAPS) is conducted by the Weidenbaum Center on the Economy, Government, and Public Policy at Washington University in St. Louis. THE AMERICAN PANEL SURVEY (TAPS), <http://taps.wustl.edu> (last visited Aug. 12, 2015). The Appendix contains technical details about TAPS and how our experimental survey vignettes were implemented.

A. *Hypotheses*

The Court has made testable claims that political spending has little or no effect on the public's perceptions of democracy.⁶² Accordingly, we explore whether conditions exist under which campaign contributions *do* appreciably affect citizens' faith in democracy. Here, we consider faith in democracy to be the constituents' perception of elected officials as both representatives of their interests and uncompromised by the pressures of financially endowed special interests.

Specifically, we present three separate, but related, hypotheses:

First, citizens experience a decrease in their faith in democracy as the magnitude of reported reelection campaign contributions from organizations increases.

Second, the loss of faith in democracy that citizens experience as a result of evidence of reelection campaign contributions is greater if the donor is a for-profit corporation than if it is a non-profit corporation.

Third, citizens experience a decrease in their faith in democracy based on evidence of reelection campaign expenditures on behalf of a candidate, whether or not expenditures are explicitly coordinated with the candidate's campaign.

B. *Survey Experiments*

To test these hypotheses we developed two survey experiments that use vignettes. The first experiment addresses the Court's claims regarding financial contributions and our first two hypotheses about the impact of the contribution's magnitude and source. As discussed above, we employed vignettes within our quantitative approach in order to maximize real-world comparability. Respondents were presented with a scenario in which we randomly vary the reported levels and source of monetary contributions to a federal Senatorial campaign. While the vignettes are fictional, their framing and structure mimic a short news excerpt that one might find in a national or regional newspaper covering a consequential political race.

Two features randomly vary in the first experimental vignette: 1) the source of the contribution is reported as either the for-profit Ford Motor Company or the non-profit Center for Auto Safety; and 2) the amount of the contribution is either unspecified or listed as \$10,000 or

⁶² See *Citizens United v. FEC*, 558 U.S. 310, 360 (2010) (campaign expenditures in the absence of *quid pro quo* bargains "will not cause the electorate to lose faith in our democracy"); see also *McCutcheon v. FEC*, 134 S. Ct. 1434, 1450 (2014) ("Spending large sums of money in connection with elections . . . does not give rise to . . . *quid pro quo* corruption.").

\$1 million. Consequently, there are six variations of the vignette that are randomly assigned across the respondent sample population.⁶³ The vignettes are as follows (with variations in the excerpts highlighted in italics):

U.S. Senator Frank Martin is in a tight reelection race with a challenger, Andrew Rosen. Recently released campaign finance reports indicate that Senator Martin has received substantial campaign contributions from (*The Center for Auto Safety (CAS), a non-profit organization whose mission is "to provide consumers a voice for auto safety in Washington."* / *the American automaker Ford Motor Company*). The Federal Election Commission reports that (*CAS / Ford*) (*has contributed / contributed \$10,000 / contributed \$1 million*) to Senator Martin's campaign committee. Martin is currently chair of the Senate Committee on Commerce, Science, and Transportation, which oversees auto safety issues. The committee is expected to consider an auto safety bill that would require a new braking safety feature that would be very costly for automakers to implement.

Following the vignette, respondents are prompted to answer three questions using a Likert-style format of predetermined categories (*e.g.*, very likely to very unlikely) and one four-part grid question with a yes or no response to each part.⁶⁴ Features of these questions correspondingly vary with the assigned vignette and are as follows:

How likely do you think it is that, if reelected, Senator Martin would vote (*for / against*) the auto safety bill even if most of his constituents (*opposed / favored*) it?

How likely do you think it is that, if reelected, Senator Martin will give greater weight to the interests of (*The Center for Auto Safety / Ford*) than to the interests of other constituents?

How likely do you think it is that (*The Center for Auto Safety / Ford*) expects that its contribution will influence Senator Martin's vote on this bill or on other matters that might come before him?

Does the knowledge of (*The Center for Auto Safety's / Ford's*) contribution make it less likely that you will:

vote?

stay informed about candidates and the race?

contribute money to your preferred candidate?

write your Senator after the election to express your views?

⁶³ See *infra* Part II.C and the Appendix for a discussion about the randomization across two survey strobos.

⁶⁴ See Rensis Likert, *A Technique for the Measurement of Attitudes*, 140 ARCHIVES OF PSYCHOLOGY 1, 15-21 (1932) (implementing this multiple, predetermined categories format for limited answer choices).

The recorded responses to these questions form the basis for the two dependent variables used to examine our first two hypotheses.⁶⁵

The second survey experiment addresses our third hypothesis, regarding the Court's claims concerning coordination between interest groups and candidates. Following the general approach of our first experiment, we employ similarly framed and structured vignettes of fictional news excerpts. We sought to mimic one of the central facts of *Citizens United* by presenting a description of a political film, funded by an interest group, containing negative information about a particular candidate. Respondents were presented with a scenario in which we randomly vary whether or not the interest group coordinated with the candidate's opponent in producing the described film. The vignettes are as follows (again, with variations in the excerpts highlighted in italics):

Cable television subscribers can now watch "on demand" a new series entitled Election 2014, which includes in-depth information on the two U.S. Senate candidates in the upcoming election, John Walker and Henry Harrison. The series is produced by the interest group, Americans for a Better Tomorrow, which is funded by donations from individuals and corporations.

One program in the series, titled "Henry: The Truth," has drawn much media attention. The program includes interviews with political pundits and scholars, and outlines a handful of scandals allegedly involving candidate Henry Harrison.

(Americans for a Better Tomorrow has worked closely with Harrison's opponent, candidate John Walker, to produce the programs about their Senate race. / Americans for a Better Tomorrow has produced the programs without any help from Harrison's opponent, candidate John Walker, who is unaware of the series until it was advertised publicly.)

Susan Thompson, a spokesperson for Americans for a Better Tomorrow, said that the people have a right to know the full story on candidate Harrison. "This film has one goal: enlightening the public on what we insiders already know about Henry Harrison. It is our patriotic duty." Election 2014 will be available for viewing until Election Day on Tuesday, November 4, 2014.

Following the vignette, respondents were prompted to answer two questions using a Likert-style format of predetermined categories (e.g., very likely to very unlikely). These questions sought to determine the correlation between coordination with a campaign and lower levels of citizens' faith in democracy. They are as follows:

⁶⁵ The analytical strategy section, *see infra* Part II.C, details our dependent variable construction.

How likely do you think it is that, if elected, Senator Walker would comply with a request from Americans for a Better Tomorrow to support or oppose a bill before the Senate?

How likely do you think it is that, if elected, Senator Walker will give more weight to the policy preferences of Americans for a Better Tomorrow than to the interests of other constituents?

The recorded responses to these questions form the basis for our final dependent variable, described below in Part II.C.

C. *Analytical Strategy*

The administration of these two experiments on TAPS provides an advantageous panel research design because of the two opportunities to test the same respondents. By administering our experimental vignettes in both June and August 2014, we were able to obtain between-respondent and within-respondent variation in both experiments.

In the first experiment, we accumulated cross-sectional data within each panel of TAPS (June and August 2014) for between-respondent comparisons given the six different combinations of magnitude and source of contribution. We also extended the variation across both panels to extract data for within-respondent comparisons. Specifically, we administered the vignette twice to each respondent, once in June and once in August, but randomly varied the contribution amount without changing its source. For instance, a respondent who received the Ford Motor Company and unspecified amount combination in his or her June vignette received the same Ford Motor Company condition, but was randomly assigned an amount of either \$10,000 or \$1 million. This experimental design allows within-respondent comparison and speaks directly to our third hypothesis that interactions between the magnitude and source of campaign contributions have amplified effects on citizens' faith in democracy.

The vignette random assignment within each panel of TAPS (June and August 2014) also allows us to collect cross-sectional data for between-respondent comparisons given the reported presence of spending coordination in the second experiment. As with the first experiment, we extended the variation across both panels to extract data for within-respondent comparisons. Specifically, we administered the reverse of the June wave vignette (coordination versus no coordination) to respondents in the August wave. Since all respondents received both versions of the second survey experiment over the

course of the survey time frame, we were able to compare both between- and within-respondent reactions to coordination.⁶⁶

The construction of our dependent variables—all of which tap some aspects of faith in democracy—provides the key feature of both our cross-sectional and panel data analyses. Recall our characterization of faith in democracy as the perception of elected officials as representatives of their constituents' expressed interests, beholden to the majority opinion and uncompromised by the pressures of financially endowed special interests. While this informs the composition of each survey question, this general definition does not immediately provide a scaled variable necessary for quantitative comparisons. However, the Likert-style format of predetermined categories—very likely, likely, neither likely nor unlikely, unlikely, and very unlikely—does allow qualitative survey responses to be quantitatively indexed as our dependent variable. By assigning a monotonically increasing value to each category, we can assess any change in perception as the magnitude and source of contribution or presence of coordination varies across and within respondents.

One approach in generating the measure of faith in democracy would be to construct an additive scale by coding the Likert-style responses with five values in the range [-2, 2] and the yes/no responses with two values [-1, 1], and summing across all responses for a scaled variable with a range of [-16, 16]. However, this approach implicitly assumes that all responses are equally weighted, which is problematic. For instance, the last survey question of the first experiment considers the impact that campaign finance information might have on an individual's political participation: the potential decrease in likelihood that she will vote, stay informed, contribute money, or write a letter to her Senator. Likelihood of participation in the democratic process helps identify damage to faith in democracy, as an individual who loses faith would be less likely to be politically active. An additive scale of this question indicates that an affirmative answer to any of the four options yields the same amount of loss of faith in democracy.

Yet not all forms of political participation are the same, require or demonstrate the same amount of "faith in democracy," or are indicative of strength in democratic ideals. An individual's loss of faith might be considered more dramatic if she reported a decreased likelihood to vote than a decreased likelihood of contributing to a campaign. Furthermore, combining these activities with the perception of a representative's consideration of special interests in political decisions dubiously assumes that the two contribute equally to one's faith

⁶⁶ See the Appendix for more details about the randomization methodology.

in democracy. Consequently, a purely additive scale would not be a reasonable construction for our dependent variable. Moreover, combining response questions across the two experiments would be inappropriate because each question is about a specific vignette.

Instead, we measure faith in democracy in three parts: fidelity, participation, and responsiveness. We use “fidelity” and “participation” as dependent variables for the first experiment, and “responsiveness” for the second. We measure fidelity with respect to the respondents’ perception of elected officials as representatives of their constituents’ expressed interests, beholden to the majority-held opinion and uncompromised by the pressures of financially endowed special interests. Here, we do employ an additive scale by coding the Likert-style responses with values in the range [-2, 2] and summing across the five corresponding responses (questions 1, 2, and 3 from the first experiment) yielding a combined score in the range [-6, 6]. Thus, the lowest value of -6 indicates an individual who expects the reelected official to act in direct opposition to his constituents’ majority-held opinion and submit to the influence of the relevant interest group in all circumstances. Alternatively, the highest value of 6 indicates an individual who expects the reelected official to be uninfluenced by financial contribution and bound by the majority-held opinion of his constituents in all circumstances.

Second, we gauge “participation” in the context of an individual’s likelihood to participate in the democratic process. To accommodate the challenge that all acts of political participation are not equal or performed in isolation from one another, we offer a categorical construction using the four parts of question four.⁶⁷ Particularly, we devise sixteen mutually exclusive categories as follows:

⁶⁷ See *supra* Part II.B (describing the survey experiments).

*Faith in
Democracy:
Participation*

- 16** No change in likelihood to participate
- 15** Less likely to be informed
- 14** Less likely to vote
- 13** Less likely to contribute
- 12** Less likely to write a letter
- 11** Less likely to be informed and vote
- 10** Less likely to be informed and contribute
- 9** Less likely to be informed and write a letter
- 8** Less likely to vote and contribute
- 7** Less likely to vote and write a letter
- 6** Less likely to contribute and write a letter
- 5** Less likely to be informed, vote, and contribute
- 4** Less likely to be informed, vote, and write a letter
- 3** Less likely to be informed, contribute, and write a letter
- 2** Less likely to vote, contribute, and write a letter
- 1** Less likely to be informed, vote, contribute, and write a letter

Finally, for the second experiment, we measure perceptions of “responsiveness” with respect to whether respondents believe that elected officials are likely to comply with interests of groups with whom they coordinate political expenditures. Again, we use an additive scale by coding the Likert-style responses with values in the range [-2, 2] and summing across the five corresponding responses (questions 1 and 2 from the second experiment) yielding a combined score in the range [-4, 4]. Thus, the lowest value of -4 indicates an individual who expects the reelected official to be particularly responsive to coordinating interest groups. Alternatively, the highest value of 4 indicates an individual who expects the reelected official to be uninfluenced and not responsive to the demands of such groups.

All three of these scales take larger values for higher levels of faith in democracy and democratic processes. The key tests of our hypotheses focus on different levels of faith in democracy based on experimental condition.

III RESULTS

We present our results for each strobe of the survey separately (June 2014 is the First Strobe and August 2014 is the Second Strobe). Tables 1 and 2 contain the results for the fidelity-dependent variable for our first experiment. To test our first hypothesis about the levels of

faith in democracy, we use a one-way ANOVA model, which compares the averages in levels of the fidelity variable across the three groups.

Here we find a statistically significant effect. Respondents had the highest level of faith in democracy when \$10,000 was the amount contributed, followed next by no mention of amount, and with a contribution of \$1 million evoking the lowest average level of faith in democracy. When combining the data and using a repeated-measures ANOVA, the result remains statistically significant, lending strong support for Hypothesis 1 ($F=12.58$, $p<0.001$).

TABLE 1. FIDELITY LEVELS FOR EXPERIMENT 1, FIRST STROBE

<i>Contributor</i>	<i>Mean Fidelity</i>	<i>Standard Deviation</i>	<i>Observations</i>
Non-profit, no amount	-2.39	2.79	195
Non-profit, \$10,000	-2.25	2.64	191
Non-profit, \$1 million	-2.98	2.72	178
For-profit, no amount	-2.75	2.20	197
For-profit, \$10,000	-2.19	2.36	184
For-profit, \$1 million	-2.56	2.20	201
Total	-2.51	2.50	1146

Notes: Summary of levels of *fidelity* for the six experimental conditions for Experiment 1, First Strobe. One-way ANOVA results for Hypothesis 1, using TAPS survey weights: $F=4.64$, $p=0.01$. One-way ANOVA results for Hypothesis 2, using TAPS survey weights: $F=0.01$, $p=0.93$.

TABLE 2. FIDELITY LEVELS FOR EXPERIMENT 1, SECOND STROBE

<i>Contributor</i>	<i>Mean Fidelity</i>	<i>Standard Deviation</i>	<i>Observations</i>
Non-profit, no amount	-2.63	2.46	194
Non-profit, \$10,000	-2.84	2.19	173
Non-profit, \$1 million	-3.03	2.38	195
For-profit, no amount	-2.88	1.93	201
For-profit, \$10,000	-2.14	2.04	176
For-profit, \$1 million	-2.63	2.26	193
Total	-2.69	2.24	1132

Notes: Summary of levels of *fidelity* for the six experimental conditions for Experiment 1, Second Strobe. One-way ANOVA results for Hypothesis 1, using TAPS survey weights: $F=3.73$, $p=0.05$. One-way ANOVA results for Hypothesis 2, using TAPS survey weights: $F=2.27$, $p=0.10$.

We test our second hypothesis, regarding differences in sources of contributions, using the same model, this time comparing the averages in levels of fidelity over two groups. Here the difference is insignificant in both stobes, which means there is no evidence of a difference in levels of fidelity between money that comes from non-profit or for-profit groups.

Tables 3 and 4 contain the results from our first experiment with the “participation” dependent variable (*i.e.*, whether levels of participation in democracy vary with contributions). Unlike the results for the “fidelity” dependent variable, we see an insignificant difference across the three conditions for the first hypothesis in both strobes. In the second strobe we see a statistically significant difference between non-profit and for-profit entities. Yet when we combine the data and estimate a repeated-measures ANOVA, overall we find an insignificant difference ($F=2.19$, $p=0.112$), similar to the results for the “fidelity” dependent variable, an insignificant difference between non-profit and for-profit entities. Taken as a whole, there is no evidence in Tables 3 and 4 that the type of entity or dollar amount affects participation in the democratic process.⁶⁸

TABLE 3. PARTICIPATION LEVELS FOR EXPERIMENT 1, FIRST STROBE

<i>Contributor</i>	<i>Mean Participation</i>	<i>Standard Deviation</i>	<i>Observations</i>
Non-profit, no amount	13.85	3.48	192
Non-profit, \$10,000	13.11	3.93	189
Non-profit, \$1 million	12.93	4.04	174
For-profit, no amount	12.75	4.35	193
For-profit, \$10,000	13.21	4.30	184
For-profit, \$1 million	13.71	3.68	200
Total	13.25	4.00	1132

Notes: Summary of levels of participation for the six experimental conditions for Experiment 1, First Strobe. One-way ANOVA results for Hypothesis 1, using TAPS survey weights: $F=0.18$, $p=0.84$. One-way ANOVA results for Hypothesis 2, using TAPS survey weights: $F=0.15$, $p=0.70$.

TABLE 4. PARTICIPATION LEVELS FOR EXPERIMENT 1, SECOND STROBE

<i>Contributor</i>	<i>Mean Participation</i>	<i>Standard Deviation</i>	<i>Observations</i>
Non-profit, no amount	13.35	3.66	185
Non-profit, \$10,000	12.69	4.68	170
Non-profit, \$1 million	13.16	4.34	190
For-profit, no amount	13.91	3.46	193
For-profit, \$10,000	13.43	4.19	175
For-profit, \$1 million	12.54	4.76	181
Total	13.19	4.21	1094

Notes: Summary of levels of participation for the six experimental conditions for Experiment 1, Second Strobe. One-way ANOVA results for Hypothesis 1, using TAPS survey weights: $F=0.55$, $p=0.46$. One-way ANOVA results for Hypothesis 2, using TAPS survey weights: $F=3.54$, $p<0.01$.

⁶⁸ It is possible that we would have found an effect if we had disaggregated the four components of participation: being informed, writing a letter, contributing, and voting. We leave that exploration for future research.

Tables 5 and 6 contain the results from our second experiment. Here we compared mean levels of the perception of responsiveness based on whether the interest group making an expenditure helpful to the candidate had explicitly coordinated with that candidate or not. We see statistically significantly higher levels of perception of responsiveness of the representative to constituent interests when there is no coordination between the contributor and the candidate. In other words, when expenditures are truly independent, citizens are more likely to have higher levels of faith in democracy. When the strobes are analyzed together using a repeated-measures ANOVA, the differences are, indeed, significant ($F=114.02$, $p<0.001$).

In order to offer effective vignettes to the respondents, our survey painted very clear lines between expenditures that were absolutely uncoordinated with campaigns and those that were explicitly tied to campaigns. There was no room for nuance in our fictional scenarios regarding whether the expenditures characterized as independent in fact were more subtly controlled by campaigns. Thus, our results do not support a conclusion that in the real world—where such clear boundaries are not possible to draw—citizens have confidence that independent expenditures are truly independent. Our results do demonstrate that it makes a significant difference to respondents whether an entity spending money for political purposes is coordinating with a campaign.

TABLE 5. RESPONSIVENESS LEVELS FOR COORDINATION AND NO COORDINATION IN EXPERIMENT 2, FIRST STROBE

	<i>Mean Responsiveness</i>	<i>Standard Deviation</i>	<i>Observations</i>
No Coordination	-0.37	1.70	578
Coordination	-1.10	2.00	568
Total	-0.72	1.89	1146

Notes: Summary of levels of *responsiveness* for no coordination and coordination conditions in Experiment 2, First Strobe. One-way ANOVA results for Hypothesis 3, using TAPS survey weights: $F=44.72$, $p<0.001$.

TABLE 6. RESPONSIVENESS LEVELS FOR COORDINATION AND NO COORDINATION IN EXPERIMENT 2, SECOND STROBE

	<i>Mean Responsiveness</i>	<i>Standard Deviation</i>	<i>Observations</i>
No Coordination	-0.501	1.78	571
Coordination	-1.15	1.70	572
Total	-0.83	1.77	1143

Notes: Summary of levels of *responsiveness* for no coordination and coordination conditions in Experiment 2, Second Strobe. One-way ANOVA results for Hypothesis 3, using TAPS survey weights: $F=39.95$, $p<0.001$.

We provide Table 7 to summarize our hypotheses and findings from these analyses.

TABLE 7. SUMMARY OF KEY FINDINGS FOR BOTH EXPERIMENTS

<i>Hypotheses</i>	<i>Dependent Variable</i>	<i>Finding</i>
<i>First.</i> Citizens experience a decrease in their faith in democracy as the magnitude of reported election campaign contributions from organizations increases.	Fidelity and Participation (Experiment 1)	Support for the hypothesis with fidelity dependent variable (p<0.001). Faith in democracy highest for \$10,000 contribution, then when no mention of value, then \$1 million contribution. No support for participation dependent variable.
<i>Second.</i> The loss of faith in democracy that citizens experience as a result of evidence of reelection campaign contributions is greater if the donor is a for-profit corporation than if it is a non-profit corporation.	Fidelity and Participation (Experiment 1)	No support for the hypothesis with either dependent variable.
<i>Third.</i> Citizens experience a greater decrease in their faith in democracy based on evidence of reelection campaign expenditures on behalf of a candidate, when those expenditures are coordinated with the candidate’s campaign, as compared with when the expenditures are truly independent.	Responsiveness (Experiment 2)	Confirmed (p<0.001).

CONCLUSION

The data from our survey experiment indicate that there is a public value implicated in campaign spending that is separate and detached from the *quid pro quo* corruption—the only legitimate focus of remedial legislation identified by the Supreme Court. The Court has assumed that, in the absence of such corrupt bargains between candidates and donors, money in politics does not adversely affect the electorate.⁶⁹ Our study suggests that this is incorrect. Rather, when given opportunities to give answers that indicate their levels of confidence in the communion of interests between themselves and their

⁶⁹ See *Citizens United v. FEC*, 558 U.S. 310, 360 (2010) (explaining that campaign expenditures in the absence of *quid pro quo* bargains “will not cause the electorate to lose faith in our democracy.”); see also *McCutcheon v. FEC*, 134 S. Ct. 1435, 1450 (2014) (“Spending large sums of money in connection with elections . . . does not give rise to . . . *quid pro quo* corruption.”).

representatives, citizens have revealed a statistically significant downward effect on that confidence driven by campaign donations. At unspecified levels of magnitude, or at very large ones, citizens doubt the ability of a representative to follow the wishes of her constituents when they diverge from those of the donor. At moderate levels (\$10,000) they retain their faith in the representative relationship.⁷⁰ Simply put, it does not take a bribe to corrode their faith in the democratic process.⁷¹

Our first vignettes posited donations from a corporation to a political campaign, a scenario that is currently prohibited by federal law.⁷² We framed the issue that way for two reasons. First, it was a clear story to present to our respondents to get a sense of whether they would perceive a compromise of a legislator's independent judgment, even in the absence of any evidence of corruption. Because it was a sense of harm that we were seeking to substantiate, it was important to have the interests of the campaign donors in our story clear, but with no suggestion of *quid pro quo* corruption. Second, we relied on studies that have demonstrated that the actual differences between those still-prohibited direct contributions and the "independent" expenditures now permitted after *Citizens United* have proven to be illusory.⁷³

The Court's jurisprudence has treated direct contributions differently from independent expenditures precisely because it believes the former risk corruption while the latter do not.⁷⁴ As the factual distinctions between independent expenditures and campaign contributions are breaking down, however, the legal distinction that has so far per-

⁷⁰ See *supra* Table 7.

⁷¹ As we sought to demonstrate, that faith is not a luxury to constitutional government: it is a necessity. See *supra* Part I (arguing that the constitutional structure anticipates the faith of the electorate in a communion of interests with its representatives).

⁷² See *Citizens United*, 558 U.S. at 320 (describing the prohibition on corporations from using general treasury funds to make direct contributions to candidates under 2 U.S.C. § 441b).

⁷³ See, e.g., DANIEL P. TOKAJI & RENATA E.B. STRAUSE, *THE NEW SOFT MONEY: OUTSIDE SPENDING IN CONGRESSIONAL ELECTIONS* 15–16 (2014), available at <http://moritzlaw.osu.edu/thenewsoftmoney/wp-content/uploads/sites/57/2014/06/the-new-soft-money-WEB.pdf> (providing first-hand accounts from legislators and lobbyists about the ways in which lax rules for independent expenditures since *Citizens United* have operated in circumvention of corporate contribution limits and rendered meaningless any difference between independent and coordinated expenditures).

⁷⁴ See *Buckley v. Valeo*, 424 U.S. 1, 45 (1976) (per curiam) (finding "the governmental interest in preventing corruption and the appearance of corruption is inadequate to justify [the statute's] ceiling on independent expenditures" but sufficient to justify limits on contributions). There is also some difference in the way the Court views the strength of the individual expressive right at stake. See *McCutcheon*, 134 S. Ct. at 1444 (noting expenditure limits may be subject to more exacting scrutiny).

mitted the prohibition of direct corporate contributions is also at risk. Indeed, in 2014, the Court for the first time struck down a statutory limit on direct campaign contributions, as contrasted with independent expenditures.⁷⁵ Consequently, we sought in our study to demonstrate a harm separate from corruption that might apply to both direct contributions and independent expenditures. Our study, therefore, focuses on the perceptions arising from the financial support of a donor to a candidate, and the accompanying governmental interests such perceptions may foster, without reference to the specific provisions of current statutory law.

These results are consistent with the other finding of our study, showing a diminished faith in democracy when, instead of direct contributions to candidates, donors make expenditures that are coordinated with the campaigns of candidates. Our experiments did not raise the possibility that contributions could be nominally separate, but in fact coordinated. Based on our data, however, it would be important to citizens to know whether independent expenditures were actually independent, as they were in our vignette. If there were a suspicion on the part of voters that so-called independent expenditures were tacitly coordinated, as studies increasingly show,⁷⁶ then our data suggest that this coordination would impair their faith in the representative relationship.⁷⁷

The Supreme Court has given signs that it cares about the electorate's faith in democracy.⁷⁸ This study suggests that injury to that faith occurs more widely than the Court has believed, and that drawing the line at corruption as the place where injury occurs is artificial. Our data would support at least some limits on campaign contributions in the interest of preventing an erosion of faith in democracy. Our data would also support strong disclosure and fund-segregation laws ensuring that schemes designed to facilitate independent expenditures on behalf of candidates without limit are, in fact, restricted to those expenditures that are truly independent.

This project thus offers an opportunity for further discussion and analysis of where a valid, or even compelling, governmental interest may lie in protecting and preserving the communion of interests that is a theoretical and historical foundation of our republican form of government under the Constitution.

⁷⁵ See *McCutcheon*, 134 S. Ct. at 1448 (emphasizing the burden on First Amendment rights occasioned by aggregate limits on direct campaign contributions).

⁷⁶ See *supra* Table 6.

⁷⁷ See *id.*

⁷⁸ *Citizens United v. FEC*, 558 U.S. 310, 360 (2010) (“The appearance of influence or access . . . will not cause the electorate to lose faith in our democracy.”).

APPENDIX

We conducted our survey experiment on the American Panel Survey (TAPS). TAPS is a monthly survey conducted online to a national probability sample of approximately 2000 adults across the United States. Importantly, the recruited panel closely matches the American population on key demographic characteristics, and most questions focus on the public's political and economic attitudes.⁷⁹ We designed two survey experiments that were implemented as a part of the June 2014 and August 2014 panels of TAPS. The survey includes a battery of demographic questions, including age, sex, race/ethnicity, marital status, religion, religious service attendance, education, employed, occupation, citizenship, household income, personal income, homeownership, ideological self-identification, and party identification.⁸⁰ One distinct advantage about TAPS is the panel nature of the survey, which is essential for evaluating how opinions change over time. TAPS uses an address-based sampling frame (ABS).⁸¹ The survey has a minimum of 1550 completed interviews per month, and is conducted by Knowledge Networks, a highly respected and leading online survey research firm located in Palo Alto, CA.⁸² All analyses reported in this article are conducted using TAPS post-stratification weights, which include adjustments for Internet access.⁸³

Respondents were randomly assigned to one of six groups at the outset of the June 2014 strobe of the survey. Figure 1 shows which version of the vignette each group received in the June 2014 strobe of the survey. Within each group, each respondent was randomly

⁷⁹ *Sampling Methodology and Recruitment*, THE AMERICAN PANEL SURVEY (TAPS), <http://taps.wustl.edu/node/27> (last visited Aug. 12, 2015).

⁸⁰ *Background Variables*, THE AMERICAN PANEL SURVEY (TAPS), <http://taps.wustl.edu/node/31> (last visited Aug. 12, 2015).

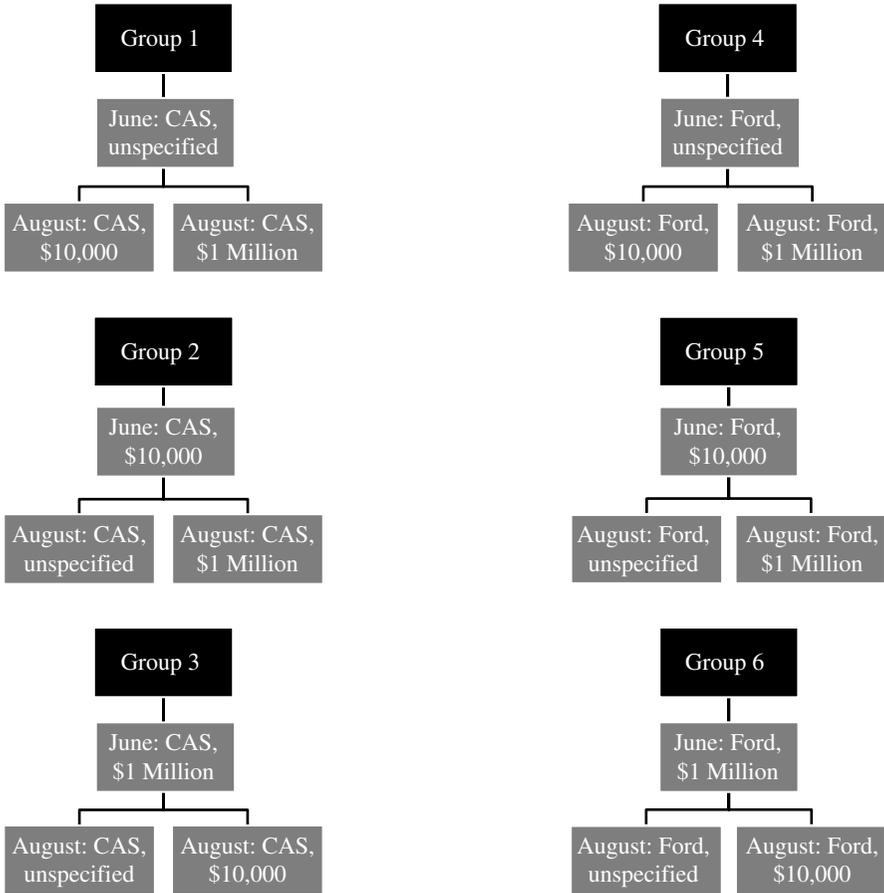
⁸¹ The sampling frame comes "from a random selection of residential addresses, stratified using ancillary data on age and ethnic group[;] a panel of more than 2,000 was recruited." *About The American Panel Survey (TAPS)*, THE AMERICAN PANEL SURVEY (TAPS), <http://taps.wustl.edu/technical> (last visited Aug. 12, 2015).

⁸² Knowledge Networks conducts many high profile and widely used studies, including the TESS (Time-sharing Experiments for the Social Sciences) Program, which is funded by the National Science Foundation. More information on Knowledge Networks is available on their website. *Academia*, KNOWLEDGE NETWORKS, <http://www.knowledgenetworks.com/ganp/academia.html> (last visited Aug. 12, 2015). The bibliography details over 400 published studies that use Knowledge Networks data, and is available through their website as well. *GfK BIBLIOGRAPHY: ARTICLES AND PRESENTATIONS BASED ON GfK'S COLLECTED PANEL DATA, ANALYSIS, OR METHODOLOGY (2012)*, <http://www.knowledge-networks.com/ganp/docs/KN-Bibliography.pdf>.

⁸³ These weights were supplied to us by TAPS and were constructed according to their policies on sample design and weighting. *THE AMERICAN PANEL SURVEY (TAPS), SAMPLE DESIGN AND WEIGHTING (2012)*, http://taps.wustl.edu/files/taps/imce/sampledesignandweighting062012_0.pdf (last visited Aug. 12, 2015).

assigned into one of two conditions for the August 2014 strobe. In Figure 2 we show how the groups are assigned for Experiment 2 in both the June and August 2014 strobes.

FIGURE 1. RANDOMIZATION FOR EXPERIMENT 1



We conducted covariate balance tests using demographic covariates to ensure that the initial randomization was performed effectively and there were no apparent issues in the formation of the six groups, which is what one would expect from random assignment.

FIGURE 2. RANDOMIZATION FOR EXPERIMENT 2

