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## ESSAY

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### HOW SAUSAGE IS MADE: A RESEARCH AGENDA FOR CAMPAIGN FINANCE AND LOBBYING

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DANIEL P. TOKAJI<sup>†</sup> & RENATA E. B. STRAUSE<sup>‡</sup>

“Laws are like sausages, it is better not to see them being made.”  
–Attributed to Otto von Bismarck, probably mistakenly<sup>1</sup>

#### INTRODUCTION

The constitutional law governing campaign finance regulation is back up for grabs. The late Justice Antonin Scalia was an unwavering member of the U.S. Supreme Court majority that cast a skeptical eye on all forms of campaign finance regulation, save disclosure requirements. His death leaves the remaining Justices sharply and evenly divided on the crucial question of what government interests may justify campaign finance regulation. In addition to Justice Scalia, the other justices who made up the majority—Chief Justice Roberts, and Justices Kennedy, Thomas, and Alito—take the position that the only acceptable justification for restricting campaign contributions and expenditures is to prevent the appearance or reality of corruption that stems from the quid pro quo exchange of money for a political benefit.<sup>2</sup> By contrast, the dissenters—Justices Breyer, Ginsburg, Sotomayor, and Kagan—understand corruption in a broader sense, one that includes the superior access and influence that big donors and spenders may enjoy.<sup>3</sup>

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<sup>†</sup> Charles W. Ebersold and Florence Whitcomb Ebersold Professor of Constitutional Law, The Ohio State University, Moritz College of Law.

<sup>‡</sup> J.D., 2013, Yale Law School.

<sup>1</sup> Steven Luxenberg, *A Likely Story . . . and That's Precisely the Problem*, WASH. POST (Apr. 17, 2005), [http://www.washingtonpost.com/wp-dyn/content/article/2005/04/16/AR2005041600154\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2005/04/16/AR2005041600154_pf.html) [<https://perma.cc/3BVC-N5RZ>].

<sup>2</sup> *Citizens United v. FEC*, 558 U.S. 310, 345, 356-61 (2010).

<sup>3</sup> See *McCutcheon v. FEC*, 134 S. Ct. 1434, 1466-68 (2014) (Breyer, J., dissenting) (arguing that the anticorruption definition relied on by the majority does not take into account corruption “that

If the Court is to embrace equality as a rationale for restricting the flow of campaign dollars, it will require empirical research on how the current system is actually functioning. Since *Citizens United v. FEC*, independent expenditures have increased dramatically at the federal level, in terms of both the total amount spent and the number of groups engaged in such spending.<sup>4</sup> Yet relatively little is known about how this influx of outside spending affects the process of governance. Our 2014 report *The New Soft Money: Outside Spending in Congressional Elections* explored these topics,<sup>5</sup> but much more work remains to be done.

What became abundantly clear to us over the course of researching *The New Soft Money* is that the money flowing into election campaigns is only half the story. To understand its real-world impact, one must also understand lobbying. For it is through the legislative and administrative process that interest groups are able to pass government policies that benefit those who donate to election campaigns. If campaign contributions and expenditures are where an investment is made, then lobbying is where the payoff occurs. To understand the current system of campaign finance, including the inequalities of access and influence endemic to this system, we must also understand how our lobbying system works.<sup>6</sup>

We would therefore disagree with Bismarck, were he actually responsible for the sausages quotation. At this crossroads moment in the history of campaign finance regulation, it is essential to understand how sausages—by which we mean laws—are made. This requires engaging in careful study of the relationship between what happens at the front end of the political process, when campaign contributions and expenditures are made, and at the back end, when the lobbying takes place. The remainder of this Essay sets forth guidance on what that might mean for future researchers. First, we review the theoretical concern that disparities in wealth cause inequalities of political access and influence. Second, we discuss—based largely upon our experience in writing *The New Soft Money*—the practical problems inherent

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can destroy the link between public opinion and governmental action” and therefore is not consistent with the Constitution).

<sup>4</sup> See DANIEL P. TOKAJI & RENATA E. B. STRAUSE, *THE NEW SOFT MONEY: OUTSIDE SPENDING IN CONGRESSIONAL ELECTIONS* 35 fig.4 (2014) [hereinafter TOKAJI & STRAUSE, *THE NEW SOFT MONEY*] (highlighting that third-party expenditures for “express advocacy” for congressional campaigns increased from \$200 million in 2010 to \$450 million in 2012).

<sup>5</sup> See *id.* at 60-104 (exploring how outside spending affects how campaigns are run and legislation is passed).

<sup>6</sup> Several authors have focused on the relationship between campaign finance and lobbying. See generally Richard Briffault, *Lobbying and Campaign Finance: Separate and Together*, 19 STAN. L. & POL’Y REV. 105 (2008); Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 STAN. L. REV. 191, 213-16 (2012); Heather Gerken, *Lobbying as the New Campaign Finance*, Keynote Address (Nov. 12, 2011), in 27 GA. ST. UNIV. L. REV. 1155 (2011).

in assessing the extent to which this theory manifests in reality, given the ubiquity of money in both electoral campaigns and lobbying. Third, we propose specific research projects that might address this empirical difficulty and which would reveal how wealth disparities affect elections and governance.

## I. THE THEORY: WHY MONEY MIGHT MATTER

For decades, scholars have debated the theories that might be used to justify restrictions on expenditures and contributions.<sup>7</sup> Countless gallons of ink have been spilled on the question of whether the better justification for such limits are based on anticorruption or egalitarian grounds, as well as the different ways of defining these values. The Roberts Court has narrowly defined the permissible basis for regulation. On the other hand, pro-regulatory scholars have advanced broader rationales for limiting the flow of money into political campaigns, some sounding in equality<sup>8</sup> and others in anticorruption.<sup>9</sup>

The only justification that the Supreme Court allows for restricting the flow of money into political campaigns is to prevent the reality and appearance of corruption. Following Burger and Rehnquist Court precedent, most notably *Buckley*, the current Roberts Court has rejected equality as a rationale that may justify restrictions on contributions or expenditures. The Roberts Court's primary difference from its predecessors is its narrow definition of corruption, which it understands to be limited to the quid pro quo exchange of money for political benefits. *Citizens United v. Federal Election Commission* is only the most highly publicized example of the Court's

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<sup>7</sup> For a summary of this debate, see generally 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 (2014) [hereinafter Strause & Tokaji, *Between Access and Influence*].

<sup>8</sup> See e.g., RICHARD L. HASEN, PLUTOCRATS UNITED: CAMPAIGN MONEY, THE SUPREME COURT, AND THE DISTORTION OF AMERICAN ELECTIONS 186-89 (2016) (arguing that another progressive Supreme Court justice is a solution which could undo the "disruption that the Court's [current anticorruption] campaign finance jurisprudence has done to . . . democracy"); Edward B. Foley, *Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204, 1206 (1994) (advocating for a requirement of "equal-dollars-per-voter" instead of the Supreme Court's current prohibition of this principle).

<sup>9</sup> See, e.g., LAWRENCE LESSIG, REPUBLIC LOST: THE CORRUPTION OF EQUALITY AND THE STEPS TO END IT (2015) (describing the risk to U.S. democracy that results from a corrupt system that does not recognize an equality of citizenship for all Americans); Daniel Hays Lowenstein, *On Campaign Finance Reform: The Root of All Evil Is Deeply Rooted*, 18 HOFSTRA L. REV. 301, 338 (1989) ("What is controversial is not whether corrupt practices should be condemned, but whether certain practices should be regarded as corrupt."); Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 398 (2009) (finding the anticorruption principle as held by the Founder's is an important guiding principle for constitutional interpretation).

restrictive approach toward regulation.<sup>10</sup> In its first decade, the Roberts Court:

- struck down one state's limits on individual contributions and expenditures as too low,<sup>11</sup>
- rejected federal restrictions on electioneering communications, except where they can only be reasonably understood as an appeal to vote for or against a candidate,<sup>12</sup>
- disallowed Congress from increasing contribution limits for candidates facing a wealthy, self-financed opponent,<sup>13</sup>
- struck down the federal ban on independent expenditures from corporate treasury funds,<sup>14</sup>
- invalidated a state initiative that provided public funding based on the private contributions and expenditures favoring privately financed opponents,<sup>15</sup>
- summarily rejected a state ban on corporate independent expenditures,<sup>16</sup> and
- struck down a decades-old federal law limiting aggregate contributions to all candidates, parties, and political committees.<sup>17</sup>

Throughout this period, five Justices have been unequivocally hostile to all forms of campaign finance regulation except for disclosure requirements. All but the first of these cases (*Randall*) were decided by a 5–4 margin and Justice Scalia was part of the majority in every one. The Roberts Court majority recognized only one acceptable interest that can justify restrictions

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<sup>10</sup> 558 U.S. 310 (2010).

<sup>11</sup> See *Randall v. Sorrell*, 548 U.S. 230, 236 (2006) (holding that a Vermont statute limiting campaign expenditures and contributions was inconsistent with the First Amendment).

<sup>12</sup> See *Wis. Right to Life, Inc. v. FEC*, 546 U.S. 410, 411–12 (2006) (per curiam) (vacating a lower court decision that upheld FEC's application of the restrictions in the Bipartisan Campaign Reform Act to "grassroots lobbying advertisements").

<sup>13</sup> See *Davis v. FEC*, 554 U.S. 724, 729, 744 (2008) (striking down a law that would allow new donation limits for "non-self-financing candidate" if their self-financed opponent raised more than \$350,000 because it was "antithetical to the First Amendment").

<sup>14</sup> See *Citizens United*, 558 U.S. at 372 (Roberts, C.J., concurring) (arguing that a statutory limitation on independent expenditures by corporations was unconstitutional and would make "political speech a crime").

<sup>15</sup> See *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2829 (2011) (finding no "sufficient justification" for an Arizona state law that provided additional matching funds to a publically funded candidate).

<sup>16</sup> *Am. Tradition P'ship v. Bullock*, 132 S. Ct. 2490 (2012).

<sup>17</sup> *McCutcheon v. FEC*, 134 S. Ct. 1434, 1448, 1462 (2014) (holding that aggregate limits on campaign donations prevent individuals from exercising "expressive and associational rights" without furthering the government's interest in preventing corruption).

on campaign contributions or expenditures: corruption or its appearance. These justices define corruption narrowly, as consisting of only the quid pro quo exchange of money for political benefits.<sup>18</sup> The dissenting justices—Justices Stevens, Souter, Breyer, Ginsburg, Sotomayor, and Kagan—have taken a more deferential approach that is more generous in what constitutes an allowable rationale for campaign contribution or expenditure limitations.<sup>19</sup> Although the dissenters have not expressly embraced equality as a justification for contribution or expenditure limits, they have come close, most notably in *Davis v. FEC*.<sup>20</sup> The dissenting justices’ conception of corruption has egalitarian undertones insofar as they accept the proposition that the superior resources of wealthy donors and spenders may corrupt the political process by resulting in disparities of political influence. Following the Rehnquist Court’s opinion in *McConnell v. FEC*,<sup>21</sup> a minority of justices declared disparities of access and influence as an acceptable reason for restricting the flow of money into political campaigns.<sup>22</sup>

We favor the explicit recognition of equality as a value that may justify reasonable restrictions on both contributions and expenditures. There are, of course, many different conceptions of equality. We think the most compelling one is the principle sometimes referred to as “anti-plutocracy,”<sup>23</sup> the idea that wealthy individuals and interest groups should not enjoy disproportionate influence in our democracy by virtue of their superior financial resources. That said, we do not believe that there is a major practical difference between the equality rationale we support and the broader anticorruption rationale supported by some scholars and judges. As one of the leading supporters of a broader anticorruption rationale recently acknowledged, both views ultimately rest on the idea that all of us are equal citizens whose voice in democracy ought not be determined by our wealth.<sup>24</sup>

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<sup>18</sup> See *id.* at 1441 (“Any regulation must instead target what we have called ‘quid pro quo’ corruption or its appearance.”).

<sup>19</sup> See *id.* at 1466-67 (Breyer, J., dissenting) (arguing that anticorruption encompasses a broader interest in “maintaining the integrity of our public governmental institutions”).

<sup>20</sup> See 554 U.S. 724, 755 (2008) (Stevens, J., concurring in part and dissenting in part) (recognizing an interest in “reducing both the influence of wealth on the outcomes of elections, and the appearance that wealth alone dictates those results”).

<sup>21</sup> 540 U.S. 93 (2003), *overruled in part by* *Citizens United v. FEC*, 558 U.S. 310 (2010).

<sup>22</sup> *McCutcheon*, 134 S. Ct. at 1469-70 (Breyer, J., dissenting) (“Our cases have firmly established that Congress’ legitimate interest extends beyond preventing simple cash-for-votes corruption to curbing undue influence on an officeholder’s judgment, and the appearance of such influence.”)

<sup>23</sup> See generally HASEN, *supra* note 8 (advocating for campaign finance regulations that promote equality instead of pushing the United States towards a plutocracy); FOLEY, *supra* note 8 (arguing for adoption of an equal-dollars-per-voter principle to create equal financial influence among votes).

<sup>24</sup> Lawrence Lessig, *Frequently Asked Questions*, LESSIG, <https://lessig2016.us/faq/> [<https://perma.cc/AV7U-XPfV>], (“I have come to see that the reason the system is ‘corrupt’ is because it denies a fundamental equality of citizens.”).

The anticorruption-versus-equality debate has effectively reached its conclusion, at least as an academic matter. Whether one embraces the equality rationale or favors a broader anticorruption rationale, the basic idea is the same: the superior access and influence of wealthy interests can justify campaign finance regulation. This shared understanding of the justification for regulation affords reformers an opportunity to focus on a more pressing problem: demonstrating that the proposition that wealthy individuals and groups in fact do enjoy superior access and influence is indeed the reality. Advocates of reform should therefore set aside the theoretical debate in order to engage in an empirical assessment of the effects that present-day independent spending is actually having on elections and governance.<sup>25</sup> Using both qualitative and quantitative tools, researchers should document what is actually happening on the ground. This evidence is essential not only to determine whether or not the theory (or theories) supporting regulation are actually based in reality, but to craft both the next generation of campaign finance reforms.

## II. THE PROBLEM: DOCUMENTING DISPARITIES OF ACCESS AND INFLUENCE

Most Americans intuitively sense that the money spent on campaigns affects public policy outcomes. According to a 2015 *New York Times* poll, fifty-five percent of respondents think candidates who win public office often promote policies that directly help the people and groups who donated money to their campaigns.<sup>26</sup> The same poll found that sixty-six percent believe wealthy Americans have a greater chance of influencing the electoral process than other Americans.<sup>27</sup> Intuition, however, is not enough to make a case. If disparities of access and influence are to be accepted as a rationale for campaign contribution or expenditure limits, courts will require evidence that they actually exist.

Developing an evidentiary record to support the next generation of campaign finance regulation will be challenging for four reasons. First, it will require overcoming the presumption of *stare decisis*. For four decades since the Supreme Court decided *Buckley v. Valeo*, it has been the law that it is “wholly foreign to the First Amendment” to limit the voice of some in order

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<sup>25</sup> By “governance,” we mean the impact of campaign contributions and expenditures on public policy, including legislation. As we have explained elsewhere, the analytic framework that the Court applied during the *McConnell* era allowed for consideration of campaign money’s influence on governance—in particular, the superior access and influence that soft money donors enjoyed. Strause & Tokaji, *Between Access and Influence*, *supra* note 7, at 196-210.

<sup>26</sup> *Americans’ Views on Money in Politics*, N.Y. TIMES (June 2, 2015), <http://www.nytimes.com/interactive/2015/06/02/us/politics/money-in-politics-poll.html> [https://perma.cc/P63T-RPFP].

<sup>27</sup> *Id.*

to enhance the voice of others.<sup>28</sup> A more tolerant approach to regulation will require the Court to overrule precedent, either by expressly adopting an equality rationale (the course we favor) or by broadening the definition of corruption to include disparities in access and influence, the course followed in *Austin* and *McConnell*.<sup>29</sup> To overrule the presumption of *stare decisis* the volume of evidence that advocates will have to muster will be higher.<sup>30</sup>

Second, there have been major changes in the world of campaign finance since the last generation of reform. When Congress adopted the Bipartisan Campaign Reform Act of 2002, its central concerns were the “soft money” flowing through the political parties and electioneering communications masquerading as “issue ads,” both of which were vehicles for evading federal contribution restrictions.<sup>31</sup> The issues of today are quite different. Today’s central concern is the vastly increased amount of money flowing through groups other than the political parties in the form of independent expenditures,<sup>32</sup> which we have termed “the new soft money.”

Our research suggests that the new soft money functions quite differently from the old soft money.<sup>33</sup> While both the old and the new soft money influence policy, they operate through different mechanisms. The old soft money was like a hundred-dollar bill slipped to the nightclub bouncer to pass through velvet ropes, a means by which wealthy interests could ensure that public officials’ doors would be open to their lobbying efforts. The new soft money is more like a menacing bulge in one’s jacket pocket. It is a threat that adverse consequences, in the form of independent spending against an incumbent legislator, will follow if a wealthy interest group’s lobbying demands are denied. Although *The New Soft Money* consistently found that this outside spending functions as a, usually implied, threat, much more research needs to be done to assess how outside campaign spending influences

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<sup>28</sup> 424 U.S. 1, 48-49 (1976) (per curiam).

<sup>29</sup> *McConnell v. FEC*, 540 U.S. 93, 149-50 (2003) (“Our cases have firmly established that Congress’ legitimate interest extends beyond preventing simple cash-for-votes corruption to curbing undue influence on an officeholder’s judgment, and the appearance of such influence.”), *overruled in part by* *Citizens United v. FEC*, 558 U.S. 310 (2010); *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 668 (1990) (holding that Michigan’s limit on corporate political expenditures was narrowly tailored to prevent the undermining of the political process’s integrity), *overruled by* *Citizens United*, 558 U.S. 310.

<sup>30</sup> *Cf. Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 406 (2000) (Kennedy, J., dissenting) (“The justifications for the case system and *stare decisis* must rest upon the Court’s capacity, and responsibility, to acknowledge its missteps. It is our duty to face up to adverse, unintended consequences flowing from our own prior decisions.”).

<sup>31</sup> TOKAJI & STRAUSE, *THE NEW SOFT MONEY*, *supra* note 4, at 13.

<sup>32</sup> *Id.* at 35.

<sup>33</sup> *Id.* at 2 (concluding that the reality of campaign financing has changed since prior Court decisions and statutory enactments).

policy in the current regime. The next section attempts to sketch out these research needs.

Third, the relationship between campaign finance and lobbying needs to be studied more comprehensively. The difficulty in establishing this relationship arises from the pervasiveness of money in our political system—at both the front end (electing candidates) and the back end (making policy). As Professors Pam Karlan and Sam Issacharoff famously hypothesized, political money is like water—when prevented from flowing in one direction, it will naturally flow in another.<sup>34</sup> It is also like water in that it is a ubiquitous element in our political ecosystem, including both election campaigns and policy debates. Understanding the entire ecosystem is key to the success of reforms that seek to reduce inequalities of access and influence. For example, it is simply not enough to study the impacts of spending by “Super PACs” and non-profit organizations, reformers must understand how these new players relate to the old institutions of political parties and leadership PACs. Proponents of reform must understand that relationships between members of Congress and lobbyists are formed and maintained more subtly than simply providing direct campaign contributions. And the deepest possible dive must be taken into the legislative process, to illuminate congressional actions marked by low public salience and high donor demand. In short, reformers must prepare to paint a broad yet detailed picture of our campaign finance and lobbying systems to show how spending influences both elections and governance.

Finally, an evidence-based approach to campaign finance reform must meet the challenge of showing that any future proposed restriction is appropriately tailored. Even if a court can be persuaded to adopt an equality rationale as a basis for regulation, proving the appropriate means–end fit will be no small burden.<sup>35</sup> As such, the project of amassing evidence to support the regulation should begin long before litigation is filed, and even before legislation is considered.

This leads to the most important question of all. What sort of research would reveal the impact that campaign spending is having on both elections and governance? As we have previously argued, the evidence that was offered in *McConnell v. FEC* provides a useful model.<sup>36</sup> But it is essential to refine

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<sup>34</sup> See Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1708 (1999) (“First, we think political money, like water, has to go somewhere. It never really disappears into thin air.”).

<sup>35</sup> See *McConnell v. FEC*, 540 U.S. 93, 166-74 (2003) (indicating that once the Court accepts the undue influence anticorruption rationale at the beginning, the tailoring of the challenged provision is then examined), *overruled in part by* *Citizens United v. FEC*, 558 U.S. 310 (2010).

<sup>36</sup> TOKAJI & STRAUSE, THE NEW SOFT MONEY, *supra* note 4, at 74-76 (exploring the evidence in the *McConnell* case that was relied upon to show the influence of “soft money”).

that model, if we are to assess how the current system is working. We now turn to specifics of what that research might look like.

### III. THE SOLUTION: QUALITATIVE RESEARCH ON CAMPAIGN FINANCE AND LOBBYING

For those reformers that advocate for egalitarian campaign finance restrictions, the most urgent challenge is to gather detailed evidence regarding the effects of campaign spending on both elections and governance. Qualitative examinations regarding the impact of economic inequalities on policy outcomes are central to this research agenda. In other words, researchers should lay their theoretical disagreements aside, and focus their efforts on how the sausages are made. Relying on our experience in researching and writing *The New Soft Money*, below we offer our suggestions on what that research might look like.

Our proposed agenda starts with conversations with legislators, preferably on the record. Researchers should ask legislators about their sources of information on particular issues and who they listen to as informal advisors. Do campaign donors play a role in raising issues to a legislator's attention? If so, what relationship do donors have with the legislator's process of gathering and sorting information in policymaking? Does the same hold true for donors who give not only to the legislator directly, but to institutional players such as Super PACs and parties?

Researchers should also explore more fully a topic we touched on in *The New Soft Money*: threats of independent spending. Do legislators perceive there to be threats that outside money will be spent against them if they take certain positions? Are such threats ever made directly and if not, how are they communicated to the legislators? What about promises of help via independent spending?

In addition to legislators, researchers should talk to major donors and small-dollar donors. Why do they choose to spend money on political campaigns? Is there a difference in motivation between low-dollar donors and high-dollar donors? Do they expect anything in return for their money and if so, what? Is there a difference between what is expected in return for a direct donation to a candidate and a donation to a Super PAC supporting just that one candidate? Do the donors receive "thank yous," either officially or through back-channels, from the candidates for Super PAC donations?

Lobbyists are another key source of information, whether on the record or off the record. Much like the novels by former CIA agents that illuminate the tools of spycraft, interviews with retired lobbyists may be a fertile starting ground for understanding the tricks of the trade for developing and maintaining relationships with legislators and their staffs. In particular,

lobbyists could be critical to understanding the relationship between fundraising and agenda-setting by committees, such as in the timing of donations relative to hearings on a particular regulated community.

Along with lobbyists, other institutional players should be interviewed. Organizations that fund Super PACs and other vehicles for independent spending should be questioned. Are all dollars spent for ideological reasons or is there pressure from lawmakers to fund such efforts? Is spending money a necessary condition for having a seat at the policymaking table?

Finally, researchers should talk to staff—both campaign and official—whenever possible. Even if conversations must be off-the-record to start, staff will often hold the keys to understanding how the flow of campaign money makes its way to governance.

#### CONCLUSION

The above ideas are meant to be preliminary and suggestive, aimed at spurring debate and refinement. Our most important point, one on which we hope there will be general agreement, is that there is a pressing need for qualitative research on how increased outside spending affects both elections and governance. One lesson from our experience in writing *The New Soft Money* is that it can be very difficult to persuade insiders to open up, especially those who are wary of campaign finance reform. It is therefore important that researchers ask the right questions, and that legislators, staff, donors, and major political players do their best to answer them. Finally, it is crucial—though extremely difficult in this hotly contested realm—that ideology not cloud methodology. Researchers who hypothesize, as we do, that economic inequalities cause inequalities of access and influence must strive to describe the world as it is, not simply as we would like it to be for the purpose of advancing our own policy agenda.

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