
THE EMPIRICS OF CAMPAIGN FINANCE

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Thomas Stratmann's *The Effectiveness of Money in Ballot Measure Campaigns*¹ and Richard Hasen's *Rethinking the Unconstitutionality of Contribution and Expenditure Limits in Ballot Measure Campaigns*² form a nice pair. Both question existing understandings of the empirics of campaign finance but from different perspectives. Stratmann investigates the central empirical issue in the area: the connection between campaign spending and campaign success. He questions the body of studies that find surprisingly little impact of the former on the latter, points out the conflict between this result and contemporary political practice, and identifies a methodological flaw common to all the studies. At the end he proposes a different way of modeling such spending—one that takes spending strategy into account—and finds that the influence of campaign spending on outcomes is more robust than the existing body of empirical work indicates.

Hasen's contribution focuses not on the validity of existing empirical studies, but rather on the Supreme Court's use of empirical evidence in its campaign finance cases. After considering the effect on ballot measures of recent Supreme Court cases concerning campaign finance regulation of candidate elections, Hasen turns to a more general task: analyzing "the role that evidence plays in the Court's campaign finance jurisprudence."³ He criticizes the Supreme Court's current use of evidence as unprincipled and strongly argues that the Court should employ empirical evidence in a particular way—to determine whether a law's means are appropriate.⁴

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1. Thomas Stratmann, *The Effectiveness of Money in Ballot Measure Campaigns*, 78 S. CAL. L. REV. 1041 (2005).

2. Richard L. Hasen, *Rethinking the Unconstitutionality of Contribution and Expenditure Limits in Ballot Measure Campaigns*, 78 S. CAL. L. REV. 885 (2005).

3. *Id.* at 887.

4. *Id.* at 887.

These two articles complement each other nicely. Whereas Stratmann asks whether political scientists have been doing their job properly, Hasen asks, if they have, whether the Court has employed their work responsibly. From the law's perspective, both pieces of this project are important. For the law of campaign finance to work sensibly, the underlying empirical work must be trustworthy and the courts must draw on it properly. If either the empirical political scientists or the judges fall down in their part of this important joint project, democracy will suffer.

In this Comment, I address one aspect of each side of this joint project. First, relying on Stratmann's central insight, I explore how other strategic features of campaign spending might further complicate the empirical project. This is in no way a criticism of Stratmann himself, but rather a suggestion for ways that his critique might be extended further. Second, I consider Hasen's thesis that the Supreme Court is now using empirical evidence improperly. This is a more complex issue, I think, than Hasen allows and ultimately I find less reason to be worried. If the Court now employs empirical evidence in a seemingly slipshod way to answer the questions current doctrine makes relevant, that could either be because, as Hasen suggests, the Court is interested only in using evidence to justify after-the-fact decisions that reflect "the simple value judgments of the Justices,"⁵ or because the doctrine itself fails to focus on the actual evidentiary issues that the Court believes constitutional principles make relevant. If the first view is correct, Hasen is right to criticize the Court for acting irresponsibly. If the second is correct, however, the Court could actually be employing empirical evidence in a responsible way. The problem would lie not in the slapdash use of evidence Hasen sees in the opinions, but rather in the doctrinal rules the Court feels it must employ in this area. Its disappointing use of evidence on the surface of its opinions might be seen, in fact, as a way for the Court to escape some of the doctrinal corners into which it has painted itself and to reach outcomes reflecting the proper application of empirical evidence to the cases. This possibility, which I favor, will be difficult to lay out within the limits of this Comment, but I will try, at least, to sketch it adequately.

I. THE BITE OF STRATEGIC CAMPAIGN SPENDING

Stratmann begins by noting a paradox in campaign spending: although the academic literature suggests that campaign expenditures have little

5. *Id.* at 917.

effect on ultimate outcomes, politicians believe and act as if money makes a crucial difference.⁶ Stratmann then points to a factor that he believes explains a large part of this discrepancy: academics have largely looked at the global, overall correlation between spending and outcomes, whereas spenders act strategically.⁷ He argues, in short, that those interested in influencing the ultimate policy outcomes of the legislature as much as possible would spend strategically in ways that would confound traditional correlation analyses. Stratmann rightly points out, for example, that “interest groups may not give much financial support to uncontested incumbents.”⁸ An interest group interested primarily in electing candidates that would support its positions would not contribute much to either sure winners or sure losers.⁹ Money to such candidates would be wasted because it would make no difference to the outcome of the election. When considered from the standpoint of a simple correlation, however, “[t]his fact makes it seem that candidates with few campaign expenditures win easily.”¹⁰ Conversely, “[i]nterest groups may . . . contribute a lot in contested elections.”¹¹ There they could hope to make an actual difference in the outcome. From the perspective of a simple correlation, however, “[t]his makes it seem that a high level of campaign spending makes the race closer.”¹² At the extreme, in fact, these two strategic effects can lead to a correlation suggesting that less spending on a campaign would help it. Since an interest group would spend little money on candidates who were expected to win by a lot—while it would spend much money on candidates in close races—a simple global correlation might well suggest that spending more money hurts a candidate’s chances for election.¹³

6. Compare Stratmann, *supra* note 1, at 1041 (summarizing academic literature on ballot measures), with *id.* at 1042 (describing politicians’ behavior).

7. *Id.* at 1042.

8. *Id.*

9. This analysis focuses on spending of only one type: that which aims to elect certain types of candidates or ballot measures. It does not take into account spending that aims directly to influence a legislator. For this reason an interest group might, of course, spend money on a candidate whose election is assured.

10. Stratmann, *supra* note 1, at 1042.

11. *Id.*

12. *Id.*

13. *Id.* at 1051 (discussing correlation analysis of spending of proponents and opponents of a hypothetical gun control initiative and finding that a “simple correlation between voter support and advertising will show that more support spending is associated with fewer voters supporting the initiative. This makes it seem that advertising will be ineffective in changing the minds of voters. In fact, it would seem that spending less would help pass such initiatives.”).

Stratmann considers at length how just this one aspect of strategic spending could undermine traditional empirical analysis in this area. While I think he is right, strategic spending has even further ramifications. If interest groups spend rationally—that is, in ways that maximize the impact of their spending—they will direct their spending disproportionately not only to races in which it will more likely make a difference to the outcome—that is, closer races—but also to those races in which, if their candidates win, the payoff will be larger. In other words, Stratmann focuses on one element of strategy—perhaps the most important one—but there are other important elements that can complicate analysis even further.

Consider the choice an interest group faces between funding two incumbents, one of whom enjoys little seniority, has positions on relatively unimportant committees, and belongs to the minority party, and the other, who has much seniority, holds powerful positions on plum committees, and plays a major leadership role in the majority party. If everything else is equal, the interest group will clearly spend more money on the second candidate. If victorious, that candidate will be in a much better position to further the interest group's goals in the legislature. That candidate simply has much more power to get things done. In addition to voting on the floor with the first legislator, where the candidate will formally have equal power, the candidate's committee votes concern matters of greater importance and the candidate may be able to use party position to better influence the votes of many others. In short, the one candidate represents a much better investment than the other.

To complicate matters further, different candidates will matter differently to different interest groups and not all interest groups spend equally. Consider here two different interest groups and two different candidates of equal seniority who are both chairs of powerful committees. If one committee has jurisdiction over matters that concern one interest group while the other has jurisdiction over matters that concern the other, everything else being equal, there will be little question as to which candidate each interest group will fund: the one heading the committee with jurisdiction over each of their interests. There is no reason to believe, however, that each interest group will have the same amount of money to spend. One might represent a broad and loose coalition in which the benefits and burdens of regulation are widely diffused, whereas the other might represent a small and tight group of players in which the benefits and burdens of regulation are focused. Since the first group will find collective

action more difficult than will the second,¹⁴ everything else being equal, the second could be expected to spend more. Thus, the amount of spending can depend critically not just on the competitiveness of a particular race and the power of a particular candidate, but also on the candidate's position in the legislature and on the wealth and economic structure of the interests themselves.

To make things even more complicated, representatives on some committees might have not one well-focused, well-financed interest group keen to influence their votes, but several, and, if these groups found themselves on different sides,¹⁵ the result could be a funding race among them. Money contributed to influence rather than to elect a candidate will thus in part reflect things like seniority and leadership roles, which may in turn reflect a relatively high degree of preexisting support within the candidate's district. If this is the case, any analysis of the impact of spending on election outcomes faces a great endogeneity problem. The amount candidates spend reflects in large part the amount they have available to spend, which in part reflects their preexisting support. Any study must thus take into account a candidate's preexisting support to measure the impact of spending itself. A well-entrenched incumbent, for example, may well receive much money and spend it, although it can gain that incumbent relatively few additional votes.

In any particular spending decision, everything else will not be equal, of course. Nonetheless, these examples demonstrate how a rational strategy of seeking the "biggest bang for the buck" could lead an interest group to spend in ways that might confound traditional analyses. Stratmann's own example of strategic spending on competitive as compared to less competitive races is the most powerful instance, of course, because it shows how strategic spending might lead to a correlation describing things exactly backwards.¹⁶ Spending aimed more to influence than to elect would have less predictable effects. Both types of strategic spending, however, need to be addressed if a study is to persuade. Let us hope that the additional complexity does not make the whole enterprise impossible.

14. MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 5–65 (1965) (discussing the free-rider problem and implications of group size and behavior).

15. The conflicts between banking and securities interests during the battles in the 1990s around the Glass-Steagall Act are one example. See Jonathan R. Macey, *The Business of Banking: Before and After Gramm-Leach-Bliley*, 25 J. CORP. L. 691, 715–19 (2000) (describing the federal government repeal of Glass-Steagall Act as a battle between banks and securities firms).

16. See Stratmann, *supra* note 1, at 1060.

II. THE WRONG QUESTION BEGETS BAD EMPIRICISM

Even if one followed Stratmann's suggestion and placed empirical analysis on sturdier footing by accounting for strategic spending, Hasen lacks faith that the courts would use any empirical analysis properly. After canvassing the Supreme Court's recent campaign finance cases, a group he calls the "New Deference Quartet,"¹⁷ Hasen finds that "[t]he Court's demand for evidence in campaign finance cases is shifting and imprecise."¹⁸ To Hasen, moreover, the Court's sloppy treatment of empirical evidence bespeaks not inattention and carelessness, which would be bad enough, but something even more worrying: the Justices simply "legislating" their own private views of appropriate campaign finance regulation. As Hasen puts it, "[t]he inconsistent pattern that emerges demonstrates that the search for evidence is often a proxy for the simple value judgments of the Justices on the wisdom of particular campaign finance laws."¹⁹

This is a serious charge and there is much evidence to support the first part of it. The Court's treatment of evidence—at least as judged from the pages of its opinions—does seem somewhat cavalier. Take the last member of the New Deference Quartet, *McConnell v. FEC*.²⁰ Compared to the three-judge district court's 1638-page discussion,²¹ the Supreme Court's opinion appears to skim over issues of evidence—and many of law as well. It nowhere, for example, engages the debates over the integrity of the expert evidence underpinning the defense of the Bipartisan Campaign Reform Act, a debate on which much of the district court opinion focused.²²

I do not disagree with Hasen that the Court's opinions in these cases have downplayed empirical evidence. They have. The Court often does not carefully consider evidence bearing directly on those issues that existing doctrine makes relevant. I disagree with Hasen, however, about the import of that observation. Are the Justices using evidence merely to shore up,

17. Hasen, *supra* note 2, at 886.

18. *Id.* at 887.

19. *Id.* at 917. *See also id.* at 887 ("[The Court's] evidentiary analysis often appears to be a proxy for a determination on the merits made more on faith than on evidence."); *id.* at 920 ("It is hard to escape the conclusion that the search for evidence is simply a proxy for the value judgments made by the Justices.");

20. *McConnell v. FEC*, 540 U.S. 93 (2003).

21. The district court's original slip opinion contained 1638 pages. *See McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003).

22. *See id.* at 583–87.

where possible, their “simple value judgments . . . on the wisdom of particular campaign finance laws”?²³ If so, Hasen is right to criticize them. There is another possibility, however, that Hasen does not discuss. The Court may treat evidence somewhat cursorily in its opinions, not because it is proceeding on its instincts or working out the Justices’ individual views of what the political system should look like, but because it has lost faith in the kinds of questions the existing doctrinal apparatus makes relevant. If the Court believes that existing doctrine is asking the wrong questions and therefore making the wrong evidence relevant, and the Court feels unable, for whatever reason, to revise constitutional doctrine to better conform it to what constitutional principle requires, we should expect the opinions to offer unsatisfying evidentiary and doctrinal analyses except in those odd instances in which existing doctrine and the Court’s actual view of constitutional principle point in the same direction. This is not to say, however, that the Court’s *actual* treatment of evidence is cavalier. That would not be true, for example, if the Court considered evidence carefully in applying its infradoctrinal constitutional principles to the facts of the case. But such evidentiary analysis would be invisible from the surface of the opinion itself.

I agree with Hasen, in other words, that the Court’s handling of evidence in its recent opinions suggests that it is following something other than its announced doctrine. I disagree with him, however, when he argues that the Court is following “faith” more than evidence²⁴ and that the Justices are imposing nothing more than their individual views of what the political process should look like. They could well be following a principled—if unannounced—view of what the Constitution requires and, in fact, could be using evidence quite carefully in working out its implications. Under this view, summary evidentiary analyses in the opinions themselves would not signal sloppiness or that the Justices were “legislating” their own personal values, but simply that the real inquiry had moved off the stage framed by traditional doctrine. If the Court’s view of the Constitution changes and, for some reason, its actual doctrine does not keep up, we should not expect fine doctrinal, let alone evidentiary, analysis from the Court. That would be at odds with the actually operative constitutional principle. In this view, we might in fact cheer the Court’s recent unsatisfying evidentiary analysis as a sign that the Court itself is moving in a new and perhaps better direction.

23. Hasen, *supra* note 2, at 917.

24. *Id.* at 887.

Much supports this view, including much in Hasen's own work and specifically in his contribution to this Symposium. As many have noted, the central doctrinal rules the Court has developed in this area have never well fit their official justifications.²⁵ The Court's justification for distinguishing between contributions and expenditures, for example, has long rankled commentators both on and off the Court,²⁶ as has its justification for distinguishing between corporate and personal spending.²⁷ Neither distinction makes sense in the terms in which the Court defends it. The Court, however, seems remarkably comfortable with the distinctions themselves. In *McConnell*, in fact, it employed them to uphold the furthest-ranging campaign finance reform effort in a generation, one which banned "soft money," the major source of funds for recent federal elections, and subjected "issue advocacy," which many had thought constitutionally resistant to regulation, to source bans and disclosure requirements.²⁸ Paradoxically, the Court has become more confident in these distinctions, even as its confidence in their justifications has eroded.

Two reactions are possible. First, one can decry the Court's apparent flippancy here as illegitimate and unjudicial. Is it not the Justices' job to explain what they do convincingly? And, if they cannot persuade that they are following an announced principle, should we not criticize them for just following their own personal predilections? This is Hasen's approach. Second, one can ask whether an unarticulated principle explains what the Court is doing. If such a principle exists, one can possibly criticize it or criticize the Court for not making transparent what the Court is doing. But one cannot fairly criticize the Court as acting without principle according to the Justices' own individual views of the merits of the matter.

Interestingly, Hasen himself offers a view of such a principle. In his recent book, *The Supreme Court and Election Law*, he argues quite convincingly that an equality rationale—publicly repudiated by the Court

25. See, e.g., RICHARD L. HASEN, *THE SUPREME COURT AND ELECTION LAW* 112–14 (2003) (describing tension between the equality rationale and corruption doctrine in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990)); Daniel R. Ortiz, *The Unbearable Lightness of Being McConnell*, 3 *ELEC. L.J.* 299, 300 (2004) (noting that the "central doctrinal rules [of the Supreme Court's campaign finance cases] have never rested well with their official justifications").

26. See, e.g., *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 404–05 (2000) (Breyer & Ginsburg, JJ., concurring); *id.* at 409–10 (Kennedy, J., dissenting); *id.* at 410 (Scalia & Thomas, JJ., dissenting); Ortiz, *supra* note 25, at 303.

27. See, e.g., *Austin*, 494 U.S. at 680–86 (Scalia, J., dissenting); HASEN, *supra* note 25, at 112–13.

28. See *McConnell v. FEC*, 530 U.S. 93 (2003).

long ago in *Buckley v. Valeo*²⁹—actually underwrites the ban on corporate election spending.³⁰ Similarly, he suggests twice in his contribution to this Symposium that the Supreme Court is pursuing a form of equality beneath the surface of some of its recent opinions.³¹ I think this is right. Despite what it said in *Buckley*, the Court is allowing legislatures to pursue equality in some cases. (And, because of what it said in *Buckley*, it is no surprise that the Court has difficulty announcing that.) But that is not all. The Court is pursuing other principles as well. As I have argued, for example, *Buckley*'s distinction between contributions and expenditures, as well as *Austin*'s distinction between corporate and personal spending, make much more sense in terms of political participation rights than in terms of speech and corruption.³²

If Hasen's disappointment with the Court's *public* handling of evidence is well-founded—and I think it largely is—the central criticism in his piece may be misdirected. Perhaps his target should not be the Court's lack of principles but its lack of transparency. That charge, however, involves complex argument, and there is no space to evaluate such argument here. The Court, after all, has been remarkably opaque in other areas³³ and opacity might permit it to pursue the very virtues Hasen celebrates elsewhere: judicial modesty, tentativeness, and malleability.³⁴ It may well be, in fact, that in the campaign finance cases the Court is—invisibly, to be sure—following exactly the course Hasen champions. Perhaps there is virtue in opacity.

29. *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976) (“[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . .”).

30. HASEN, *supra* note 25, at 111–14.

31. Hasen, *supra* note 2, at 886 (noting that “the Court has moved closer toward embracing an equality rationale for campaign finance regulation”); *id.* at 894 (explaining that the *Austin* Court “upheld the law under a tortured definition of ‘corruption’ that looked much more like an equality rationale for regulation”).

32. See Ortiz, *supra* note 25, at 303.

33. *Brown v. Board of Education*, 347 U.S. 483 (1954), may be the most famous example. There the Court relied on sociological studies, which many found dubious, to avoid directly and publicly relying on a constitutional principle that would have morally criticized many citizens in a large part of the country.

34. See HASEN, *supra* note 25, at 10 (describing his book as “argu[ing] in favor of preserving room for Court intervention in the political process . . . that is . . . tentative and malleable . . . and . . . deferential to political branches’ attempts to promote contested visions of political equality”).

