

EMPIRICAL EVIDENCE IN THE DEBATE ON CAMPAIGN FINANCE REFORM

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In the debate about campaign finance regulation, empirical evidence is often overlooked or ignored. The evidence suggests that campaign finance regulations have accomplished the opposite of what their enactors intended. Specifically, limitations have entrenched incumbent candidates, given wealthy candidates an advantage, increased many types of corruption, and led to more negative campaigns. Limits on contributions have also been unsuccessful in limiting the total amount of resources that have been spent on campaigns.

Recently, empirical evidence gained the attention of the Supreme Court in *Nixon v. Shrink Missouri Government PAC*.¹ Justice Breyer's concurrence in particular was interested in several empirical questions.² Even Justice Souter, writing for the Court, seemed open to the consideration of empirical evidence, at least in regard to corruption.³ His ability to interpret correctly the empirical studies that he referenced is another question. Unfortunately, the facts of the *Shrink Missouri* case were insufficient for these issues to receive adequate attention.

Campaign finance regulation has now been tried. The fundamental question is whether it has improved the political system, or whether it has instead aggravated the perceived problems it intended to solve. The available empirical evidence indicates aggravation rather than amelioration.

First, restrictions on the *size* of campaign contributions have hardly affected total expenditures on campaigns. They have

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1. 120 S. Ct. 897 (2000).

2. *See id.* at 913 (Breyer, J., concurring).

3. *See id.* at 907.

spawned higher levels of independent campaign expenditures that have largely offset any declines in candidates' own expenditures. Indeed, independent expenditures did not play a role in any meaningful forum prior to the rules first promulgated in 1974.

Campaign finance rules have attempted to treat symptoms—larger campaign contributions and expenditures—without addressing why contributions and expenditures have increased. The analogy to price controls is pertinent. The results of price controls imposed on gasoline in the 1970s provide a useful example. Price controls did in fact lower the official dollar prices that consumers paid for gasoline. But in effect, as long as the actual value of the gasoline was higher than its official price, people competed in other ways for the resource: consumers simply spent another valuable resource—time—by waiting in lines. If the government forced prices even lower, people spent even larger amounts of time queuing up for gasoline. In essence, time was bartered for gasoline. Consumers were willing to make the exchange because the official price of gasoline had been forced beneath its true value.

Similarly, limits on campaign contributions may succeed in reducing the amount of money given directly to candidates. But if there are benefits to additional expenditures, potential beneficiaries and victims of government actions will find other ways to support candidates who support their positions.⁴

Price controls also generate types of competition more objectionable than queuing. For example, in cities such as Santa Monica and New York, which have price controls on apartment rents, "key money" and other under-the-table payments from tenants to landlords are widespread.⁵

The same thing happens with campaign finance rules. Recently Maria Hsia was convicted of charges stemming from

4. See Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L. J. 1049, 1077-79 (1996) ("[A]ttempts to exclude a particular form of power—money—from politics only strengthen the position of those whose power comes from other, nonmonetary sources, such as time or media access.").

5. See, e.g., Marc Beauchamp, *Bankrupt Landlords in Wonderland*, FORBES, Mar. 20, 1989, at 105 (noting the negative effects of rent control on the rental market in Santa Monica, California); Michael Coakley, *Worms in the Apple: New York City: Love It? Or Leave It?*, CHI. TRIB., May 19, 1985, Magazine, at 18 (noting similar effects in New York).

the 1996 campaign fund-raising activities of President Clinton and the Democratic National Committee.⁶ The crime was arranging a scheme of straw donors—funneling money through many different people—as a way of laundering money for individuals who could not lawfully make additional direct contributions.

Even if our nation reached a consensus that campaign finance needed regulation, it is extremely unlikely that all forms of contribution could be regulated. As long as alternative venues for competition exist, they will be exploited, even if they are less efficient than direct contributions. To take an extreme case, would-be direct donors could instead purchase television, radio, or newspaper advertisements supporting particular candidates. It is difficult to conceive how these types of in-kind contributions could possibly be regulated without infringing on free speech rights.⁷ Not only media customers but media owners have exercised the immense power of this unregulated speech (or non-speech). Media mogul Ted Turner, for example, temporarily refused advertising by corporations that had opposed President Clinton's Kyoto Global Warming Agreements.⁸ Others such as Rupert Murdoch, owner of News Corporation, have used their media holdings to push very different goals.⁹

While the growth of campaign expenditures draws much attention, the reasons behind such growth are rarely discussed. This phenomenon also has its analogy in price controls. My own research indicates that most of the increase in campaign contributions over the last few decades is primarily a simple result of government getting larger. The more favors

6. See Neil A. Lewis, *Longtime Fund-Raiser for Gore Convicted in Donation Scheme*, N.Y. TIMES, Mar. 3, 2000, at A1; Jerry Seper, *Gore Ally Found Guilty on 5 Counts*, WASH. TIMES, Mar. 3, 2000, at A1.

7. See U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . .").

8. See Tucker Carlson, *Al Gore's Globaloney*, WEEKLY STANDARD, Oct. 20, 1997, at 21; *Climate Change: CNN Pulls Industry Anti-Treaty Ads*, GREENWIRE, Oct. 3, 1997.

9. See, e.g., James Bates, *Watch the Money*, L.A. TIMES, Jan. 31, 1999, Magazine, at 10 (noting Murdoch's large contributions to the California Republican Party, as well as his open criticism of the Clinton Administration); Neil Hickey, *Is Fox News Fair?*, COLUM. JOURNALISM REV., Mar./Apr. 1998, at 30 (discussing the conservative bent of the Fox News Network, a cable news station run by Murdoch's News Corporation); Ken Silverstein, *His Biggest Takeover: How Murdoch Bought Washington*, NATION, June 8, 1998, at 18 (discussing Murdoch's lobbying activities in Washington).

government has to give out, the more resources people are willing to spend to try to get their own candidates elected to office.

Another frequently-mentioned concern, both in the courts and elsewhere, is the appearance of corruption.¹⁰ The concern is that even if politicians' votes are not in fact being bought, voters will *perceive* that they are and lose confidence in the electoral process. Academics and groups advocating reform regularly point out that those candidates who receive the most money tend to vote most in accordance with the interests of their donors. But this simplistic analysis commits a common error: it fails to distinguish between correlation and causation. This distinction is not easy to make. The evidence is equally consistent with two hypotheses: (1) the donor may be giving money to cause a politician to *alter* her vote; or (2) the donor may contribute because the candidate *already* takes policy positions favored by the donor. The hundreds of studies that prove simply a correlation between donations and voting patterns do *not* differentiate to any degree between these two different hypotheses.

In my previous work, I have outlined a fairly simple test to try to differentiate between the two hypotheses: how do politicians vote in their final terms?¹¹ If donations *do* alter how a politician votes, then when a politician is in her last term¹² (and no longer concerned about the threatened loss of campaign donations), we would expect to see certain systematic changes in her voting pattern. But in fact, the evidence shows that politicians' voting patterns are remarkably consistent over time, from their very first terms in office until their very last. For example, if a politician is a strong conservative when first elected, he is likely to be a strong conservative through his final term. In fact, even in cases in

10. See, e.g., *Nixon v. Shrink Mo. Gov't PAC*, 120 S. Ct. 897, 902 (2000) (citing "the perception of corruption 'inherent in a regime of large individual financial contributions' to candidates for public office as a source of concern 'almost equal' to *quid pro quo* improbity") (quoting *Buckley v. Valeo*, 424 U.S. 1, 27 (1976)).

11. Stephen G. Bronars & John R. Lott, Jr., *Do Campaign Contributions Alter How a Politician Votes? Or, Do Donors Support Candidates That Value the Same Things That They Do?*, 40 J. L. & ECON. 317 (1997).

12. "Last term," as used here, takes into account whether the politician is going to get a government job, engage in lobbying, or be otherwise dependent on the political system after he leaves office.

which labor or conservative PACs contributed or withdrew hundreds of thousands of dollars of support, politicians' voting patterns changed less than a few tenths of one percentage point. One might observe an alteration in one of every 450 votes.

Justice Breyer's concurrence in *Shrink Missouri* raised another issue not addressed in the case's evidence: what impact do campaign finance regulations have on incumbency?¹³ The evidence from the public choice and political science literature shows clearly that the types of campaign finance rules that we have observed tend to entrench incumbents, both in theory and in fact.

The rate at which incumbents lose re-election bids has dropped to half of what it was before the major campaign finance rules were instituted. Similar changes can be observed at the state level. Those states that have more restrictive donation limits have experienced greater increases in the rates at which incumbents win reelection. The reason for this is simple addition. If donation limits are set very low, it is much easier for an incumbent, whose higher public profile and tenure enables her to accumulate a long list of donors, to fill her war chest with many (necessarily small) donations from many different donors. A challenger typically lacks such visibility and breadth of support; the rules prevent him from catching up with a few large donations.

Contribution limits also increase the influence of those who make in-kind contributions. For example, favorable news coverage by television and radio stations becomes more important. Candidates who are favored by the media will benefit from contribution restrictions. It is impossible to regulate contributions that take the form of favorable coverage. In-kind contributions can take many other forms. For example, if a movie star makes an appearance on a candidate's behalf, he is in essence making a contribution to the candidate.

The two most recent presidential campaigns demonstrate how incumbents have benefited from campaign finance rules. In 1996, because President Clinton did not face a challenger in the primaries (as is typical for incumbents), he was able to keep in reserve the approximately \$40 million he was allowed to

13. *Shrink Mo.*, 120 S. Ct. at 913 (Breyer, J., concurring).

spend for the primaries.¹⁴ Senator Dole, on the other hand, in a tough primary campaign, had virtually reached his spending limit by March.¹⁵ Thus, between March and when the candidates received their disbursements for the general election, Dole was a sitting duck. When Clinton spent his money on advertising to attack Dole, the senator was unable to spend in response.¹⁶

Though the effect is particularly strong in the case of incumbents, Governor Bush hoped for a similar advantage in the 2000 election. By declining public financing and its concomitant overall spending limits,¹⁷ he presumably strategized that Vice President Gore would reach his limits prematurely. Then, unrestrained by limits, Bush could advertise against Gore without the prospect of retaliation. As of March the strategy seemed to be working: Gore had spent about seventy-five percent of the \$40 million he was allowed to spend,¹⁸ while Bush remained free to raise and spend more.

A final question that has not been adequately answered is this: in what sense are expenditures too large? As compared to what? In fact, there are some important reasons to believe that they are too small. This year, approximately \$1.4 billion will be spent on election campaigns at the federal level,¹⁹ a figure some would regard with dismay.²⁰ But the federal government alone is projected to spend nearly \$2 trillion this year.²¹ As a result,

14. See, e.g., *FEC Gives More Funds to McCain*, CHATTANOOGA TIMES/FREE PRESS, Apr. 30, 2000, at A18; Ken Herman, *Bush, Gore Preparing for a Long Campaign*, ARK. DEMOCRAT-GAZETTE, Apr. 3, 2000, at A1; Stewart M. Powell, *Onslaught of "Issue Ads" Up Next on Your TV*, TIMES UNION (Albany), Mar. 5, 2000, at A5.

15. See, e.g., Bill Sammon, *Clinton Rips Bush for Forgoing Federal Funding for Campaign*, WASH. TIMES, Oct. 21, 1999, at A15.

16. See *id.*; Linda Feldmann, *The Race Before the Race—It's a Money Thing*, CHRISTIAN SCI. MONITOR, Apr. 23, 1999, at USA-2.

17. See Don Van Natta, Jr., *Party Time—Holy Grail of Campaign 2000: Money and the Middle*, N.Y. TIMES, Jan. 23, 2000, § 4, at 1.

18. See, e.g., Jennifer G. Hickey, *Four Give Up, Some March On*, INSIGHT ON THE NEWS, Apr. 3, 2000, at 8.

19. See *2000 Presidential Race: Total Raised and Spent*, at <http://www.opensecrets.org/2000elect/index/AllCands.htm> (basing report on data released by the FEC October 26, 2000); *Election Overview: The Story So Far*, at <http://www.opensecrets.org/2000elect/storysofar/index.asp> (basing report on data released by the FEC October 27, 2000).

20. See, e.g., Robert B. Morgan, *Saying Yes to Better Elections*, NEWS & OBSERVER (Raleigh), June 7, 2000, at A23.

21. See Laura M. Beall & Sean P. Keehan, *Federal Budget Estimates, Fiscal Year 2001*, SURV. CURRENT BUS., March 1, 2000, at 16.

the total spending on all campaigns at the federal level this year will be equivalent to a tiny seven-tenths of a percent (.007) of government spending.

Viewed in this light, campaign spending does not seem particularly large. It seems even smaller when compared to commercial product advertising. For example, Apple Computer spent over \$100 million introducing the iMAC.²² A comparable amount—\$135 million—represents the total public funds allocated to the 2000 general election for the Republican and Democratic presidential candidates.²³ As another example, Ford Motor Company spent \$800 million to introduce the Taurus. The total amount being spent on campaigns this year is just three or four times what Ford spent five years ago introducing one car model.

Economists have studied price controls for a long time. It is difficult to find any instance in which price controls have satisfactorily produced the intended results. Justice Breyer's concurrence in *Shrink Missouri* opens the door for the Court to examine empirical evidence when considering the (counterproductive) results of campaign finance regulation. In view of the overwhelming evidence from political scientists and economists, a strong case has emerged that regulations could be successfully challenged on those grounds.

22. See Bradley Johnson, *\$100 Mil iMAC Blitz Is Tops in Home Computer History: Apple Targets Current Users of Macintosh and Aspiring Web Surfers*, *ADVERTISING AGE*, Aug. 17, 1998, at 43.

23. See *FEC Press Release, Aug. 31, 2000: FEC Approves Matching Funds for 2000 Presidential Candidates*, available at <http://fecweb1.fec.gov/press/083100cert.htm>.

