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INITIATIVES OR OTHER BALLOT PROPOSITIONS:
WHAT EVIDENCE IS NEEDED TO JUSTIFY A
PARTICULAR REGULATORY REGIME?

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Drawing on the insightful synthesis of recent Supreme Court cases on expenditure and spending limits on ballot propositions by Richard Hasen,¹ I briefly review the justifications for regulating levels of campaign contributions and expenditures in the initiative/referendum process based on claims about the critical importance of money in politics. My focus here will be on evidentiary issues rather than jurisprudence, per se. I focus on the important question “where’s the beef?” that is, exactly what evidence is needed to demonstrate that money can play a sufficiently pernicious and pervasive role in the initiative campaign process such that a balancing test against the scope of impingements on First Amendment rights is appropriate? I argue that the state of social science knowledge is not yet such that universal generalizations about the role of money in politics can be supported. Nonetheless, it is reasonable for courts to allow legislatures regulating the initiative process to rely on informative case studies as their grounding for the regulatory options chosen, rather than “waiting for

* Professor of Political Science and Fellow, Center for the Study of Democracy, University of California, Irvine. I am indebted to Clover Behrend for bibliographic assistance on this paper, and to helpful conversations on campaign finance issues with Amihai Glazer and Scott Thomas. An earlier version of this essay was presented at the USC-U.C. Irvine Symposium on The Impact of Direct Democracy on January 14–15, 2005.

1. Richard L. Hasen, *Rethinking the Unconstitutionality of Contribution and Expenditure Limits in Ballot Measure Campaigns*, 78 S. CAL. L. REV. 101 (2005).

Godot” in the form of definitive social science research.² I also provide some suggestions as to the types of research that would both serve as important theoretical contributions in political science and would be helpful for the courts in the future.

I share Hasen’s view that recent decisions by the Court offer avenues to pursue in subsequent litigation that may erode any hard-and-fast distinctions between constitutionally permissible justifications for regulating campaign finance and constitutionally permissible justifications for regulating contributions or expenditures on ballot initiatives. But, in addition to this dichotomy—one that is Hasen’s primary focus—I briefly revisit two other dichotomies common in the campaign finance cases that are also discussed in Hasen’s article: regulation of campaign expenditures versus regulation of political contributions, and regulations affecting corporate speech rights versus regulations affecting the speech rights of individuals.

In particular:

(1) In light of evidence about the frequent intertwinement of political parties (and sometimes individual candidates) with particular initiatives, I argue that the distinction made by the Supreme Court between the high corruption potential of money in political *campaigns for office* and the supposed absence of a nexus between money and direct political influence buying vis-à-vis support for *ballot propositions*³ is empirically misguided.

(2) In light of a formal mathematical equivalence in the “limit”⁴ between campaign contribution limitations and campaign expenditure limitations, and for various other reasons, I argue that the *Buckley v. Valeo*⁵ distinction between the constitutional issues involved in regulating *political contributions* and those involved in regulating *campaign expenditures* needs to be reconsidered.

(3) I argue that the speech rights of corporations in the political arena should be limited unless it can be shown that the corporation is being used to solve a collective action problem for its shareholders, in which case the

2. My perspective on these evidentiary issues comes from the lessons learned from three decades of service as an expert witness and federal court-appointed consultant, in cases such as *Thornburg v. Gingles*, 478 U.S. 30 (1986), involving the Fourteenth and Fifteenth Amendments and the Voting Rights Act of 1965, that have familiarized me with the problems involved in developing judicially relevant research.

3. See *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 788–92 (1978).

4. See *infra* Part II.

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

distinction between *corporate* speech rights and the speech rights of *individuals* would disappear. In such cases, the corporation is best seen not as a person but as a set of persons. However, absent such a showing, corporations, as such, should have no right to spend money to influence political outcomes in contexts other than those involving direct business necessity.

I. FINANCIAL REGULATION OF CAMPAIGNS FOR OFFICE VERSUS FINANCIAL REGULATION OF SUPPORT FOR BALLOT PROPOSITIONS

Since the principal reason why the initiative was put into place in the early part of the twentieth century was the belief that voters needed a mechanism to counteract the influence of special interests (especially monied interests) in the legislature, it seems *more* peculiar to have fewer restrictions on contributions (or campaign spending) to initiatives than to candidates. If anything, from this history, money should be *more* closely regulated in the initiative process than in the context of ordinary campaigns so as to preserve this element of countervailing power against the danger of being trumped by money!⁶ But there is another reason why the constitutional arguments that can be used to legitimate regulation of campaign contributions or spending in the context of political campaigns should also apply to contributions and spending in the context of initiatives and other ballot propositions: intimate intertwining among candidates, parties, and initiatives.⁷ Increasingly, politicians use initiatives as, in effect, running mates.⁸ Indeed, California Governor Schwarzenegger has raised this connection to a new art form by repeatedly forming his own committees to support ballot propositions, as well as by pioneering government by threat of plebiscite—using the initiative process as a stick

6. As my colleague A Wuffle once put it: "The struggle to achieve democracy is the struggle to overcome 'one tank, one vote,' and/or 'one dead prophet (e.g., Marx), no meaningful votes,'" while the struggle to strengthen democracy is often the conflict between the principle of 'one person, one vote,' and the reality of 'one dollar, one vote.'" (personal communication, Apr. 1, 2000).

7. See Daniel A. Smith & Caroline J. Tolbert, *The Initiative to Party: Partisanship and Ballot Initiatives in California*, 7 PARTY POL. 739, 753–54 (2001).

8. See Anthony M. Salvanto, *Initiatives as Running Mates: The Impact of a Candidate-Centered Initiative Campaign* (1998) (unpublished manuscript, available at <http://www.democ.uci.edu/papers/Salvanto.htm>). Salvanto studies California Governor Pete Wilson's support of Proposition 187, concerning government services for non-citizens, and shows that support for the proposition and for the Governor's candidacy were found together among voters who otherwise voted a straight or nearly straight Democratic ticket, but the same was not true for other Republican candidates who had not associated their fate with that of the initiative. See *id.*

with which to beat (or threaten to beat) the Democrats who control the California legislature.

Money spent on initiatives may raise turnout among particular groups, thus benefiting the party and candidates whose support from those groups is the greater;⁹ or an initiative may raise the salience of particular issues, thus changing the calculus of voter choice so as to increase support for the party and candidates more closely associated with the more popular point of view on the initiative;¹⁰ or the debate surrounding an initiative may shift voters' attitudes on that issue, thus changing preferences across candidates who have expressed (or to whom may be imputed) a particular position on the issue. Initiatives or other ballot propositions may thus be put on the ballot for purposes that have little or nothing to do with actually enacting policy changes.¹¹ For example, there can be initiatives intended to function as "wedges" to split off voters whose general position would incline them to vote one way, but who may be tilted to vote for candidates of the other party if a given issue rises in salience.¹² This was arguably the case for the initiatives in 2004 involving the legality of same-sex marriages—initiatives that raised the salience of so-called moral values.

Since candidates and parties can benefit directly from having an initiative on the ballot in the ways identified above, contributions to ballot propositions may sometimes simply be a way to bypass campaign contribution (or spending) limitations. Those who give money to support an initiative position that helps a given candidate or party are, in effect, contributing to that candidate's election campaign or to that party's war chest.¹³ And contributors to initiative campaigns can be rewarded by winning candidates and political parties in exactly the same way that direct

9. Thad Kousser & Mathew D. McCubbins, *Social Choice, Crypto-Initiatives and Policy Making by Direct Democracy*, 78 S. CAL. L. REV. 101, 128–30 (2005) (discussing "jack" effects, that is, "jacking up [voter] turnout in one targeted portion of the electorate").

10. See Scott L. Feld & Bernard Grofman, *Stuck in Space: The Neglected Importance of Issue Salience for Political Competition* (Aug. 1 2001) (unpublished manuscript, available at <http://www.econ.au.dk/epcs/papers/grofman-feld.pdf>).

11. McCubbins and Kousser refer to initiatives whose sponsors' motives are not simply to affect policy as "crypto-initiatives." Kousser & McCubbins, *supra* note 9, at 121–22. I do not like that terminology since people rarely do things for only one reason, and because groups of people doing the same thing may not have identical reasons for their actions. Still, the phenomenon that Kousser and McCubbins call attention to is a very real one.

12. *Id.* at 128–30 (discussing "wedge" issues).

13. Sometimes the connection between a party's interests and those of a given initiative may be disguised. However, knowing which political apparatchiks are working on an initiative campaign can be a strong clue, since many campaign professionals work only for one party and would work only on initiative support (or opposition) campaigns that would be seen as in that party's interests. Discussion at the USC-U.C. Irvine Symposium on The Impact of Direct Democracy (Jan. 14–15, 2005).

contributions to a candidate or party may be rewarded: with access, with government contracts, with tax breaks, with political influence over the exact wording of bills, etc.

II. REGULATION OF CAMPAIGN EXPENDITURES VERSUS REGULATION OF POLITICAL CONTRIBUTIONS

In calculus, the definition of “limit” involves the notion of “for any epsilon, there is a delta.” In campaign finance there is a similar kind of “limit” result. To wit: for any limit on campaign contributions there is a corresponding limit on campaign expenditures, since expenditures cannot exceed the sum of contributions. But, if expenditures can be limited by limiting contributions, then, at least for non-billionaires, the notion that expenditure limits are constitutionally *verboten* but contribution limits are permissible seems a bit self-contradictory. Moreover, and more importantly, we need to take seriously the potential for spending (and not just contributions) to corrupt the political process.

We are well aware of the potential for corruption in the buying (at least the ears) of politicians, but good social science evidence on the role of a deluge of persuasive communications on the public does not exist. Is there a Goebbels-like “big lie” possibility, in which statements repeated often enough on a thirty-second ad eventually wear down the resistance of the viewer? Is there a phenomenon in which constant exposure to certain claims convinces viewers that where there’s smoke there’s fire? Do denials and disclaimers ever catch up with first impressions?¹⁴ If the referendum and initiative process exists, in part, to motivate public deliberation and civic involvement in matters of public concern, then, in balancing First Amendment interests against other constitutional goals, we need to look beyond corruption (or the appearance of corruption) in the campaign contribution context to consider whether expenditures sufficient to produce a constant barrage of ads aid or hinder the deliberative process. Can the government constitutionally restrict expenditures to a level that fosters intelligent deliberation and consideration of alternative points of view without allowing spending to drown deliberation out?¹⁵

14. The public’s response to the controversial 2004 “Swift Boat” ads attacking John Kerry’s war record that appeared during the 2004 Presidential Election suggests some unpalatable answers to the three questions asked immediately above.

15. This is an area in which political science and communication research could be directly relevant.

III. REGULATIONS AFFECTING CORPORATE SPEECH RIGHTS VERSUS REGULATIONS AFFECTING THE SPEECH RIGHTS OF INDIVIDUALS

This short Comment is not the place to make a sustained argument about the notion of corporations as persons or about the appropriate limits on commercial speech. But, I do wish to make a simple point about whether, in the context of initiatives, a sensible justification can be made for treating corporate contributions differently from those of individuals. The simple point is: whatever may be the necessity to treat corporations as persons for contractual fidelity reasons and for tort liability purposes, and whatever the arguments for treating commercial ads as equivalent to advocacy for First Amendment purposes, we can, at least in principle, distinguish between corporate spending to influence public decisions in areas of direct business concern and corporate spending that is directed at general public issues. In the latter area, I believe that the only compelling justification for allowing corporations to serve as advocates is that they are resolving a classic collective action problem by representing (at low transaction costs) the aggregate preferences of their stockholders. If sanctions existed for the misappropriation of corporate funds for advocacy purposes then we might not be so concerned with checking corporate spending, but as long as management is separate from ownership, then principal-agent problems are very real. Thus, it seems plausible to me that legislatures may have good reasons to impose greater restrictions on corporate contributions (or spending) than on the contributions (or spending) either of individuals or the kinds of explicit advocacy groups whose funding is based on targeted contributions by their members.¹⁶

IV. RELIABLE EVIDENCE ABOUT THE IMPACT OF SPENDING ON INITIATIVE OUTCOMES

While everybody talks about the pernicious consequences of money in politics, hard evidence about generalizations which are widely accepted is hard to come by ("Where's the beef?").¹⁷ This is true not just for the

16. Whether corporations are usually taking positions favored by their stockholders on initiatives to whose campaigns (pro or con) they contribute is a matter that can be subject to empirical investigation. A showing that they often were not taking favored positions would, in my view, potentially affect the legitimacy of making a legal distinction vis-à-vis the regulation of corporate versus personal contributions or expenditures.

17. As A Wuffle quips: "The influence of money in politics is unlike pornography; you know it even when you don't see it." (personal communication, Apr. 1, 2004).

literature on spending effects on initiative success or failure,¹⁸ but also for the literature on the effects of spending in political campaigns on relative vote shares of incumbents and challengers.¹⁹ Hard evidence is also lacking in numerous other areas, such as in the study of the impact of education expenditures on student performance on standardized tests. For example, in the initiative literature the standard view is that spending by proponents does not seem to matter much, but extensive spending by opponents (especially economic interests) may doom an initiative to failure.²⁰ The failure to get statistically significant results for both proponent and opponent spending can, I believe, be attributed to the difficulties of teasing out causal linkages when the data being investigated is gathered at a single point in time. This failure is also related to at least three different confounding phenomena: (1) correlations between proponent and opponent expenditures, which can create a high level of collinearity in the statistical estimating equations, (2) the fact that most initiatives lose, making it difficult to tease out spending effects that may only be marginal in their impact, and (3) most importantly, endogeneity effects, such that a proposition with a lot of money spent on it may well be an initiative which is in trouble, whereas one with little or no money spent on it is one that may be coasting to an easy success. Unless we can adequately control for the level and depth of a proposition's support prior to the start of a ballot campaign, large N studies are unlikely to give us reliable answers about the effects of campaign spending, since those effects should not be the same across different propositions.

In particular, it is reasonable to expect that money would be far less efficacious on issues about which voters have deeply-rooted beliefs or about which there are reliable signals (for example, partisan cues) about how to vote. With only cross-sectional data, it is very difficult to test the counterfactual that money changes the outcome, since we do not know what the outcome would have been had no money been spent! If, however, we can obtain tracking polls about an initiative's support level and match those to spending data, then we can begin to pin down spending effects. While there are a handful of studies which have done this kind of over-time

18. For a review of the recent literature, see Thomas Stratmann, *The Effectiveness of Money in Ballot Measure Campaigns*, 78 S. CAL. L. REV. 101 (2005).

19. See DENNIS C. MUELLER, *PUBLIC CHOICE* (3d ed. 2003) (reviewing the recent public choice literature).

20. See ELISABETH R. GERBER, *THE POPULIST PARADOX: INTEREST GROUP INFLUENCE AND THE PROMISE OF DIRECT LEGISLATION* 113-20 (1999). For analyses leading to a different conclusion, see Stratmann, *supra* note 18, at 106-113.

tracking of money's effect,²¹ it is difficult or impossible to do this for the entire range of ballot propositions, since, except for a handful of major ballot propositions, the tracking poll data either is nonexistent or is proprietary information.

Given these difficulties, courts that wish to rely on social science evidence likely have to rely on the relatively few case studies that exist involving over-time analyses that show the potential for money to affect greatly the outcomes of particular types of initiatives. Given practitioners' confidence that money can matter, and given the availability of such case studies, courts need not wait for the Godot of the perfect large N study before they acknowledge the pernicious potential of large-scale, one-sided spending on ballot propositions in cases in which voters' positions are not set in cement.²²

V. EVALUATING THE INITIATIVE

Critics of the initiative, among whom I would normally count myself, emphasize the ignorance of the voters in dealing with complex subjects,²³ the hijacking of the initiative by special interests (including not just economic interests, but also parties and candidates), the overload on citizen ability to focus intelligently on any given initiative caused by an overcrowded ballot, and the inability of the voters to make holistic judgments on comparisons across bundles of public policy outputs because of being forced to deal with issues one at a time. But, in response to the extreme form of this critique of the initiative process in Thad Kousser and Matthew McCubbins's article in this Symposium, I would add a few caveats.

First and foremost, it is quite misleading to compare a realistic portrait of the initiative process, warts and all, with an idealized portrait of legislative decision-making. For every absurd ballot initiative one can easily find an equally high proportion of absurd legislative enactments

21. See DANIEL A. SMITH, *TAX CRUSADERS AND THE POLITICS OF DIRECT DEMOCRACY* 11-13 (1998) (studying tax limitation ballot measures in several states to determine whether ordinary citizens rather than special interests motivate direct democracy).

22. Consider the 2004 attempt to repeal the "three strikes" proposition in California. Here it would seem that the last-minute infusion of large amounts of money into the campaign, along with cuing effects from a popular governor, can change outcomes, since a measure which early on seemed likely to win easily, ended up losing. See Joe Mathews, *How Prospects for Prop. 66 Fell So Far, So Fast*, L.A. TIMES, Nov. 7, 2004, at B1.

23. Some proposals are so specialized and/or their language so opaque that, even with the help of the voter information pamphlet prepared by the California Secretary of State's office, figuring out their exact import is beyond the capacities of this political science PhD (at least without a greater expenditure of time and energy than I am prepared to give).

(consider, for example, the U.S. House of Representatives taking out its pique on France by renaming "French fries" as "freedom fries" in the House cafeteria). And, whatever the cognitive overload on the public regarding ballot propositions may be, it pales by comparison with the cognitive overload on legislators who must review proposals numbering in the hundreds or even thousands.

Second, there are reasons for regarding the initiative as desirable that have nothing to do with the belief that initiatives make for more intelligent government. The initiative was put into place largely as a control mechanism for the popular will, giving citizens the ability to take power away from legislators who fail to act in conformity with citizen preferences because of the legislators' indebtedness to particular economic or social interests. The initiative is also effective in situations in which legislatures are faced with partisan deadlock or in which particular issues have been lost sight of in the legislative battles over competing priorities, or have been traded-off as parts of a legislative compromise or logroll. The initiative was also seen by its populist supporters as a good thing, in and of itself, because of its educative role and its role in getting citizens involved in the decisions that affect their lives. The educative role of the initiative has been little emphasized in the court cases dealing with regulation of the initiative and, unfortunately, even the social science literature has focused more on outcomes than on the citizenship aspects of direct democracy.²⁴

Democracy is not simply a matter of an electoral system in which citizens get the right to vote and elected officials must compete for the public's favor (or find ways to manipulate the public into favoring them, or rig the electoral system to limit competition, as is too often the case today in America). All systems set up to enact democracy are subject to corrupt manipulations, and that is why the public commitment to democratic involvement is so vital.²⁵

VI. CONCLUSION

In sum, there are three rather different routes to justify regulating the role of money in the initiative process. The first one emphasizes the role of money spent on an initiative in affecting the outcomes of that particular initiative. Here, generating reliable inference is difficult and the best

24. *But see* DANIEL A. SMITH & CAROLINE J. TOLBERT, *EDUCATED BY INITIATIVE: THE EFFECTS OF DIRECT DEMOCRACY ON CITIZENS AND POLITICAL ORGANIZATIONS IN THE AMERICAN STATES* (2004).

25. CORNEL WEST, *DEMOCRACY MATTERS: WINNING THE FIGHT AGAINST IMPERIALISM* 203 (2004).

evidence we presently have comes from case studies; but, we need to recognize that issues differ in the degree to which public opinion is malleable, so that spending impacts can be expected to vary across ballot propositions. The second emphasizes the potential for money to drown out reasoned public discourse. Here, we have all too little reliable knowledge, but much conjecture. The third emphasizes what happens when, as at present, many initiatives are closely linked with particular candidates or parties, or the views those politicians support. Here, I argue that there is potential for corruption in terms of buying access and favors via support for ballot propositions whose effects (as wedge issues, or turnout generators) redound to the benefit of a given party or politician. As noted earlier, spending on initiatives in such cases may be the de facto equivalent of avoiding spending restrictions on candidate campaigns. In such situations, the impact of money on the political process often extends well beyond its effect on outcomes in any particular initiative.²⁶ I believe that much more attention needs to be paid to the latter two types of justifications for regulation of the initiative financing process than has previously been the case.²⁷ We also do not know as much as we should about how the public deliberates on the ballot proposition choices that it is forced to confront.²⁸

26. Both the first and third approach can be thought of as rooted in the "political markets" justification for judicial intervention. See Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998). The second approach can best be thought of as rooted in the "deliberative turn" in recent political theory. See Richard H. Pildes, *Competitive, Deliberative, and Rights-Oriented Democracy*, 3 ELECTION L.J. 685 (2004) (reviewing RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* (2003)). See also RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* (2003) (arguing for a theory of pragmatic liberalism comprised of both a pragmatic theory of democracy and a pragmatic theory of law).

27. However, there is also the question of comparisons across alternative regulatory regimes. Here we call attention to A. Waffle's only partly tongue-in-cheek conjecture that "Money in politics is like an iceberg: the amount is constant, all that changes is how much is below the surface" (personal communication, Apr. 1, 2004).

28. The work of Arthur Lupia on cue-taking is an important exception. See, e.g., Arthur Lupia, *Shortcuts versus Encyclopedias: Information and Voting Behavior in California Insurance Reform Elections*, 88 AM. POLI. SCI. REV. 63, 65-67 (1994); Arthur Lupia, *The Effect of Information on Voting Behavior and Electoral Outcomes: An Experimental Study of Direct Legislation*, 78 PUB. CHOICE 65, 65-66 (1994).