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Building a Record for the Next Court

Renata E. B. Strause* & Daniel P. Tokaji†

Prepared for Symposium on “The Future of Campaign Finance Reform”
Hosted by the Duke Journal of Constitutional Law and Public Policy
and Center on Law, Race, and Politics

Abstract

This article considers the evidence that should be collected and developed to support the next generation of campaign finance reform before the next Supreme Court. It discusses but ultimately sidesteps theoretical debates over rationales for reform, focusing instead on the practical questions likely to be faced by future policymakers, lawyers, and expert witnesses. Drilling down into the ample evidentiary record in *McConnell v. Federal Election Commission*, the article addresses the evidence that should be amassed by supporters of future regulation. This type of evidentiary record will be essential both in formulating the next generation of campaign finance reforms and in defending them in court. The article argues that, regardless of whether one favors an anti-corruption or egalitarian rationale for regulation, the evidentiary record should focus on *conflicts of interest* – in particular, on whether a reasonable legislator would feel pressure to act in way that is different from the preferences of her constituents or the public interest. This is something more than a showing of unequal access, but something less than a showing of actual influence on policymaking. In the near term, these suggestions are designed to help define a research agenda for qualitative and quantitative empirical researchers. In the long term, they offer a roadmap for legislators shaping and lawyers defending future regulations before a Supreme Court less reflexively antagonistic to reform than the current one.

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I. Introduction

A persistent feature of campaign finance discourse over the decades has been disagreement over rationales for regulation. Proponents and opponents of reform have tangled repeatedly with each other, often in caustic terms, over whether there are any good reasons for restrictions on expenditures and contributions, public financing, and disclosure requirements. The debate among reform-minded scholars and advocates has been almost as fervent. Particularly unrelenting, no doubt interminably so to some observers, is the longstanding debate over whether regulation should be aimed at preventing corruption or promoting equality.

With the Supreme Court having emphatically rejected egalitarian rationales and severely constricted the anti-corruption rationale, this debate is now largely academic – not in a bad sense, but in the sense of being mostly of interest to academics. Five justices firmly adhere to a narrow conception of corruption, limited to quid pro quo transactions. To the extent that there was any lingering doubt about the majority’s narrow conception of corruption, *McCutcheon v. Federal Election Commission* definitively resolves it. There is no good reason to believe that they will change their minds. Thus, as long as the current Court sits, we should not expect to see any significant change in the constitutional law surrounding campaign finance regulation. The anti-corruption rationale will remain narrow, and equality will be off the table. As long as that remains the case, the options available to reform-minded advocates are extremely limited.

While not denying the importance of theoretical debates over the rationales for regulation, we think it more important to focus attention on the *evidence* that should be amassed in support of the next generation of campaign finance reform. This is for two reasons: First, examination of the effects of money on the political process – including the independent expenditures flooding the system since *Citizens United v. Federal Election Commission*¹ – will be essential in shaping the next generation of campaign finance reforms and shepherding them through the legislative process. Second, documentation of these effects will be necessary in defending these reforms in court. Even if the Court’s composition shifts, such that there is no longer a majority hostile to campaign finance regulation, it is unlikely to give a blank check to legislators in regulating campaign money – nor do we think it should, given concerns regarding free speech and entrenchment. The evidence that is amassed in support of regulation will therefore be essential not only in crafting legislation, but also in demonstrating that legislation is appropriately tailored.

¹ 558 U.S. 310 (2010)

Professor Hasen takes issue with Lessig's dependence corruption rationale, particularly the claim that it is really distinct from the equality-based rationale rejected in *Citizens United*.⁷¹ Hasen views dependence corruption as ultimately animated by a concern for inequality, as was the anti-distortion rationale of *Austin*.⁷² Dependence corruption "seeks to justify campaign finance laws on grounds that the laws distribute power fairly and correct a distortion present in an unregulated (or less regulated) system."⁷³ The distortion is the outsized influence of "the funders" over legislative outcomes relative to any popular support for their objectives.⁷⁴ Lessig rejects the equality characterization, but Hasen finds further proof in Lessig's central reform proposal: a voucher system.⁷⁵ Legislators would still be dependent upon a subset of "the People," namely those citizens whose vouchers they received, but because the unequal distribution of wealth is no longer a factor, the resulting skew is no longer a problem.⁷⁶

B. Equality, Corruption, and Conflicts of Interest

Perhaps everything that seems new really is old. A previous incarnation of the debate over the relationship between corruption and equality took place on the pages of the University of Chicago Legal Forum in 1995. In that round, Professors David Strauss and Bruce Cain took up the equality charge, responding to Professor Daniel Lowenstein's thoughtful meditations on corruption published a few years earlier.⁷⁷

Professor Lowenstein's approach bears more than a passing resemblance to the argument that Lessig has more recently made, albeit to a much broader audience. Lowenstein viewed corruption as an "essentially contested concept" in need of an intermediate theory of politics to explain the desired, uncorrupted baseline.⁷⁸ Lowenstein sought to reconcile a legislative process "tainted with corruption" with the recognition that both legislators and lobbyists "by and large, are not corrupt."⁷⁹ Where Lessig found an originalist answer, seeing the problem as a deviation from the Framers' intended dependence, Lowenstein saw the problem functionally, as a conflict of interest.⁸⁰

Taking on the perception of some campaign finance reformers that campaign contributions buy influence with elected officials, Lowenstein observed that the empirical research on the claim was mixed, though in part by taking a too-narrow view of the legislative

⁷¹ Hasen and other scholars have also questioned Lessig's originalist interpretation, although that angle of the debate is beyond our purposes here. See Richard L. Hasen, *Is "Dependence Corruption" Distinct From a Political Equality Argument for Campaign Finance Laws? A Reply to Professor Lessig*, 12 ELECTION L. J. 305 (2013); Seth Barrett Tillman, *Why Professor Lessig's "Dependence Corruption" Is Not a Founding-Era Concept*, 13 ELECTION L. J. (forthcoming 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2342945.

⁷² Richard L. Hasen, *Fixing Washington*, 126 HARV. L. REV. 550, 572 (2012).

⁷³ Hasen, *supra* note 71, at 311.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ See Daniel Hays Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784 (1985); Daniel Hays Lowenstein, *On Campaign Finance Reform: The Root of All Evil Is Deeply Rooted*, 18 HOFSTRA L. REV. 301 (1989).

⁷⁸ Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, *supra* note 77 at 851.

⁷⁹ Daniel Hays Lowenstein, *On Campaign Finance Reform*, *supra* note 77, at 335 (1989).

⁸⁰ See Daniel P. Tokaji, *Lowenstein Contra Lowenstein: Conflicts of Interest in Election Administration*, 9 ELECTION L.J. 421 (2010).