

Rethinking the Unconstitutionality of Contribution and Expenditure Limits in Ballot Measure Campaigns

RICHARD L. HASEN
Loyola Law School (Los Angeles)

Presentation at AALS Workshop on Democratic Governance,
January 6, 2004

Forthcoming, *Southern California Law Review*, Vol. 78, No. 4, May 2005

Draft posted at: <http://ssrn.com/abstract=621321>

Supreme Court precedent dating back to the 1970s and 1980s precludes state and local jurisdictions from limiting financial contributions to committees formed to support or oppose ballot measures or from barring corporate expenditures in ballot measure campaigns. These precedents emerged from the Supreme Court at a time of its greatest hostility to campaign finance regulation, when it viewed such laws as impermissibly impinging on the rights of free speech and association guaranteed by the First Amendment. These precedents are ripe for reexamination in light of the Supreme Court's new-found deference to campaign finance regulation, culminating in 2003's *McConnell v. Federal Election Commission*, a case upholding the major provisions of the Bipartisan Campaign Reform Act of 2002.

This Article considers three potential ballot measure campaign finance regulations and their likelihood of passing constitutional muster under the more recent precedents: a law limiting contributions to ballot measure committees controlled by officeholders; a law limiting contributions to all ballot measure committees; and a law limiting expenditures in ballot measure campaigns by corporations and labor unions. Although all three proposed laws pretty clearly would have been struck down by the Supreme Court in earlier decades, they have a surprisingly good chance of passing muster today.

One (obvious) purpose of this Article is to consider constitutional questions over ballot measure limits that courts inevitably will confront in coming years. But a second and equally important purpose is to use this analysis to consider the role that evidence plays in the Court's campaign finance jurisprudence. The Court's demand for evidence in campaign finance cases is shifting and imprecise. In fact, evidentiary analysis appears often to be a proxy for a determination on the merits made more on faith than evidence. In the final part of this Article, I consider the appropriate role that evidence should play in campaign finance cases. I argue that a more precise and transparent evidentiary inquiry into the connection between the goals of campaign finance laws and the means of achieving them will assist fair-minded judges in the inevitable constitutional balancing. I argue decidedly against the role that evidence currently plays in Supreme Court analysis of campaign finance cases as well as against Professor Pildes's alternative proposed "motive" test for judging campaign finance constitutional challenges.