

***A Methodological Critique of The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function***

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I. INTRODUCTION

Vernon Palmer and John Levendis offer a rather confusing and contradictory paper on the impact of campaign contributions on voting behavior by Louisiana Supreme Court justices.<sup>1</sup> The first two sentences provide a very good example of the paper's fundamental flaws. The first sentence asserts that "little" literature exists to guide their study, ignoring over twenty-five years of scholarly work directly related to the question of interest.<sup>2</sup> The second sentence provides the paper's central thesis—that it supplies statistical evidence that contributions have influenced justices.<sup>3</sup> Yet a careful reading of the literature suggests that this paper contains no such evidence. In an even more puzzling twist, footnote 14 of Palmer and Levendis' (hereafter the authors are referred to as P&L) paper states that it will assert no such causal relationship.<sup>4</sup> Our assessment is the authors have made a serious error in methodology and their conclusions, therefore, should not go unchallenged. Further, this methodological mistake may be compounded by serious errors made by the authors in the construction of their data.

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1. Vernon Valentine Palmer & John Levendis, *The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function*, 82 TUL. L. REV. 1291 (2008).

2. *Id.* at 1292.

3. *Id.*

4. *Id.* at 1294 n.14.

## II. PRIOR RESEARCH ON CAMPAIGN CONTRIBUTIONS AND VOTING DECISIONS

The first step in any academic study is a careful review of the relevant literature. The first sentence of the P&L paper begins with the observation that, “[t]he effect of campaign contributions on judicial decision making has been the subject of widespread interest and debate, but little empirical research.”<sup>5</sup> Like much of the paper, the first sentence misses the mark. In fact, there is extensive literature in economics investigating the impact of campaign contributions on the decisions of recipients. Understanding the problems with the P&L paper requires first placing it in the context of the literature.

While most of the extant evidence comes from empirical research on the relationship between campaign contributions and decisions of legislators, the methodological issues are identical for examining the same relationship with respect to decisions made by judges. Beginning with Henry Chappell’s seminal paper,<sup>6</sup> the accepted approach for empirical research on this topic must explicitly recognize the probable simultaneity between the effect of campaign contributions on judicial decisions and the effect of judicial decisions on campaign contributions.<sup>7</sup> His paper is of particular importance because it reveals a fatal flaw in the P&L analysis and points to the appropriate methodology the authors should have employed for estimation of this type of model. The necessity of addressing the simultaneity issue was explicitly stated in an influential study by Thomas Stratman,<sup>8</sup> which states in the introduction: “All studies addressing the question of whether

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5. *Id.* at 1292.

6. Henry W. Chappell, *Campaign Contributions and Congressional Voting: A Simultaneous Probit-Tobit Model*, 64 REV. ECON. & STAT. 77 (1982).

7. Chappell’s contribution is among the first articles to appear when one searches Google Scholar under “contributions” and “voting.” Google Scholar Search Results, <http://scholar.google.com/scholar?q=contributions+and+voting&hl=en&lr=&btnG=Search> (last visited Oct. 22, 2008). As to Chappell’s *Campaign Contributions* piece, Google Scholar shows 145 citations to this article alone. Google Scholar Citation Search Results, <http://scholar.google.com/scholar?hl=en&lr=&safe=off&cites=2051836317387457909> (last visited Oct. 22, 2008). Many subsequent studies reference his methodology, and a number of those appear in the top-rated journals in both economics and political science. *See, e.g.*, Robert Baldwin & Christopher Magee, *Is Trade Policy For Sale? Congressional Voting on Recent Trade Bills*, 105 PUB. CHOICE 79 (2000); Stacy Gordon, *All Votes Are Not Created Equal: Campaign Contributions and Critical Votes*, 63 J. POL. 249 (2003).

8. Thomas Stratman, *Campaign Contributions and Congressional Voting: Does the Timing of Contributions Matter?*, 77 REV. ECON. & STAT. 127 (1995).

campaign contributions influence congressional voting behavior must address the issue of whether campaign contributions are endogenous in the vote equation. The issue is whether contributions influence the voting behavior or whether the expected voting behavior influences contributions.”<sup>9</sup>

This mandate applies equally to all studies addressing the question of whether campaign contributions influence the decisions of judges. Thus, both studies seriously call into question P&L’s conclusion of a causal link between contributions and judicial decisions. After Chappell’s work, essentially every serious work on the topic must address the fact that there are at least two relationships of interest, not one as their article implies. When there are two sets of decision-makers (judges and contributors), both must be modeled. To assume that one can ignore the decision calculus of contributors is a fundamental error in both the use of economic theory and econometrics. It is difficult to argue that contributors do not take into account judicial temperament and philosophy when deciding how to allocate their scarce dollars. And, it is naïve to assume that a judge’s temperament and judicial philosophy cannot be known in advance.

Thus, any serious attempt to address the impact of contributions on the decisions of judges must use econometric techniques that recognize the two-way causality. Assuming away the simultaneity issue, as P&L implicitly have done, represents a fundamentally fatal error in their analysis. The possibility that differences among judges in their decisions or judicial philosophies can influence how campaign contributions are distributed is conceptually identical to the influence legislator predispositions have on the distribution of campaign contributions. This has been well-recognized in economics for decades. For example, Grier and Munger show that specific characteristics of individual legislators attract contributions from some, but not necessarily all interest groups.<sup>10</sup> That is, interest groups that value certain characteristics contribute to the campaigns of legislators who possess those characteristics.

With just a cursory review of the literature, P&L would have found these studies and would have been aware of Stratman’s view that *all* studies *must* address this issue as central to their analysis. Their failure to even cite these studies, much less address the key issue, reveals a fundamental flaw in their study. However, that is not the only important issue raised by the P&L paper. Many

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9. *Id.* at 127.

10. See generally Kevin Grier & Michael Munger, *The Impact of Legislator Attributes on Interest-Group Campaign Contributions*, 7 J. LAB. RES. 349 (1986).

economic studies can miss a key item in the literature or err in methodology. But, over time, subsequent research corrects the errors if the study is deemed interesting *or* research scholars may simply ignore the study, which implicitly deems it as having little value to the discipline.

However, the P&L paper is not the typical academic study. The methodology chosen by P&L, which entirely ignores the simultaneity issue, focuses on voting by specific justices in the Louisiana Supreme Court. The authors conclude that contributions influenced the voting behavior of at least three justices in particular and suggest that it may also be true for the entire court.<sup>11</sup> By naming specific justices and incorrectly asserting that they have produced statistically valid evidence that campaign contributions influenced decisions of the Louisiana Supreme Court, the authors risk tarnishing the reputations of longstanding judges with no scientifically valid evidence to support their claims. In this case, the profession's process of simply ignoring poor scholarship or correcting it over time cannot prevent the immediate damage to reputations that the P&L study will produce under the guise of academic research.

This Critique proceeds by first discussing the problems in P&L's methodology. We then focus on conclusions drawn by the authors and the language used to describe the results.

### III. PROBLEMS IN THE PALMER AND LEVENDIS METHODOLOGY

#### *A. The Effect of Judicial Philosophy on the Decision to Contribute*

The key problem in P&L's methodology is that it fails to adequately model the contributor's decision to donate to campaigns. In fact, the results from P&L's analysis fall apart under closer inspection. To understand the problem, suppose P&L had performed a similar study focusing on whether U.S. Supreme Court Justices were unduly influenced by the support of pro-life or pro-choice groups during confirmation hearings. It would come as no surprise to find that the Christian Coalition and other pro-life groups supported (contributed heavily to) Justices such as Clarence Thomas, while pro-choice groups voiced opposition to Justice Thomas but showed support for (contributed heavily to) Justice Ruth Bader Ginsburg. When one later looks at voting records by justices, the status of plaintiff and defendant may vary. However, regardless of the plaintiff and defendant in the case, Justice Thomas is more likely to favor restricting abortion rights than

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11. Palmer & Levendis, *supra* note 1, at 1314.

Justice Ginsburg. Does this imply that the decisions of the Justices are unduly influenced by support of pro-life or pro-choice groups during the confirmation hearings? No, it simply shows that the judicial temperament and philosophy of justices on this one issue were known by the two groups and therefore influenced their support decisions.

Chappell's seminal article pointed out that the same idea holds true for campaign contributions.<sup>12</sup> If the U.S. Supreme Court were elected and received campaign contributions, would one really expect pro-life groups to contribute to Justice Ginsburg? If not, then one is sure to only observe financial contributions to Justice Ginsburg's campaign by pro-choice groups. However, the fact that Justice Ginsburg tends to rule in favor of pro-choice positions has nothing to do with unfair influence by contributors. It just reflects the fact that the Justice votes as anticipated in those cases. Therefore, it seems reasonable to conclude that it was her "voting behavior" that *influenced* the decisions of contributors. Furthermore, it is naïve at best to assume, as P&L do, that one can control for judicial philosophy across a broad range of issues on the basis of the number of times a justice rules for the plaintiff or defendant.<sup>13</sup>

### *B. Improper Statistical Methodology*

Additionally, Kevin Tully and Phelps Gay's rebuttal of the P&L study found a significant number of potentially serious errors in the data P&L constructed for their study.<sup>14</sup> It appears that the authors may have misclassified almost 20% of their 186 cases—an incredibly high error rate for any empirical study.<sup>15</sup> Conclusions based on this data set must be called into question (leaving aside the issue of methodology).<sup>16</sup> An error rate of this magnitude is unacceptable for a scientific study and raises questions about the care taken with other parts of their study.

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12. Chappell, *supra* note 6, at 79.

13. Palmer and Levendis, *supra* note 1, at 1303. *See also* Kevin Tully & E. Phelps Gay, *The Louisiana Supreme Court Defended: A Rebuttal of The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function*, 69 LA. L. REV. 281 (2009).

14. Tully & Gay, *supra* note 13, at 286–287.

15. *Id.* at 287.

16. Another question arises about why P&L chose to eliminate all cases in which no dissent was present. Palmer & Levendis, *supra* note 1, at 1297. If judges were influenced by donations, a unanimous decision would be a rare event. By eliminating all such cases, P&L may have exaggerated their finding of judicial bias.

Given the discussion above, it is not surprising that the P&L paper finds positive correlations between contributions and votes when they test the relationship with more intensive statistical analysis.<sup>17</sup> Their logit results suffer from the same criticisms that apply to Table 3 of their article. Fortunately, Chappell's study developed the appropriate econometric tools to address this issue,<sup>18</sup> which was extended in later work such as Stratman.<sup>19</sup> While the description of the construction of the data set and the specification of the logit model is vague,<sup>20</sup> it is clear that P&L relied on a single equation logit model. This is the fatal flaw in their methodology.

To understand the problem, note that P&L use a specification similar to the single equation specification of Durden and Silberman.<sup>21</sup> Chappell's article was to a large extent written as a critique of the Durden and Silberman study. In essence, Chappell noted that randomly assigning contributors to a candidate ignores the fact that donors tend to contribute to candidates with similar viewpoints.<sup>22</sup> To use our earlier analogy, pro-choice groups would only contribute to candidates viewed as supporting the pro-choice position. Econometrically, this means that the level of contributions is jointly endogenous and mandates the estimation of a second equation.

Chappell correctly addresses the econometric problems using a logit-Tobit approach.<sup>23</sup> Using data from several congressional votes, Chappell's research shows that the single equation model is biased.<sup>24</sup> In Chappell's words:

FIML estimates of the simultaneous probit-Tobit model suggest that the effects of campaign contributions on voting are smaller than single equation probit estimates would indicate. We are generally unable to conclude that contributions have a significant impact on voting decisions; apparently votes are most often decided on the basis of personal ideology or the preferences of constituents. These findings differ markedly from the earlier results of Durden

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17. Palmer & Levendis, *supra* note 1, at 1309.

18. Chappell, *supra* note 6, at 77.

19. Stratman, *supra* note 8.

20. Palmer & Levendis, *supra* note 1, at 1306-08.

21. Jonathan I. Silberman & Garey C. Durden, *Determining Legislative Preferences on the Minimum Approach*, 84 J. POL. ECON. 317 (1976).

22. Chappell, *supra* note 6, at 79.

23. *Id.* at 77.

24. *Id.* at 83.

and Silberman, whose single equation models showed a substantial impact of contributions on voting decisions.<sup>25</sup>

The findings of Chappell and the sample size of the P&L study strongly suggest that all of the evidence of a relationship between contributions and voting by justices would disappear if the correct probit-Tobit specification was used. Given the standard econometric approaches at the time and computing power available, Durden and Silberman's estimation of a single equation model was to be expected. However, P&L's choice of an almost identical single equation model more than forty years later is inexcusable.

Less troubling results in the P&L study might be found in Table 5.<sup>26</sup> Though Stratman's work is not cited, P&L do come to a similar conclusion—timing of contributions may matter.<sup>27</sup> That is, more recent contributions might have a larger impact on voting behavior than contributions made in the past. Stratmann used a three equation model—a probit equation for voting and two Tobit equations for predicting the contributions of donors during the year of the vote and the two years prior to the vote.<sup>28</sup>

P&L state that at least ninety of the contributions in their data set occurred within one year of a decision.<sup>29</sup> Though Stratman's methodology used a system of three equations, his work does offer hope that a single equation model using recent contributions might provide useful results. However, instead of using only those contributions within the last year, P&L use all contributions over a fourteen year period (1992 to 2006) and simply discount the contributions at a 5% rate for every year between the contribution and decision.<sup>30</sup> This methodology makes it impossible to determine whether the results are driven by the recent contributions or the older contributions, particularly since the timing of contributions is likely to vary across justices. The use of a 5% discount to equate historical donations to donations in the case year is arbitrary. Further, the decay effect may not be linear. This figure should be estimated as part of a system of equations.

Interestingly, P&L issue a rather puzzling disclaimer in footnote 14 of their paper related to this issue. Footnote 14 of the P&L piece states: "It is worth observing that this Article does not claim that there is a cause and effect relationship between prior

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25. *Id.*

26. Palmer & Levendis, *supra* note 1, at 1312.

27. *Id.*

28. Stratmann, *supra* note 8, at 128–29.

29. Palmer & Levendis, *supra* note 1, at 1311.

30. *See id.* at 1296, 1312.

donations and judicial votes in favor of donors' positions. It asserts instead that there is evidence of a statistically significant correlation between the two.<sup>31</sup>

In layman's terms, this footnote states that the authors make no assertion with regard to whether the correlations imply that contributions affect voting behavior or instead simply reflect the fact that contributions tend to flow to those that share the donor's point of view. Apparently the authors completely miss the significance of this footnote. *To any trained econometrician, this footnote states that the article makes no assertion that it contains statistical evidence that contributions affect voting behavior of justices.* Thus, this footnote is disingenuous and cannot be squared with their stated conclusions in the text of the paper—conclusions that are *in fact* based upon an assumption about cause and effect. Irrespective of the claim in footnote 14, the econometric technique used in the paper requires the authors to make an assumption about cause and effect, *ipso facto*.<sup>32</sup>

In light of footnote 14, the rest of the paper is completely confusing. The majority of the paper either implicitly or explicitly interprets statistical correlations as implying a causal relationship where donations influence voting.<sup>33</sup> If P&L were really taking an agnostic position on causality, the paper should clearly discuss the alternative explanation discussed above. Given that footnote, all results should be discussed in terms of both possible explanations.

P&L's repeated assertions that donations influence voting behavior directly contradict footnote 14. In light of these assertions, it is very surprising that P&L do not employ the logit-Tobit model that was introduced by Chappell<sup>34</sup> over twenty-five years ago to test for evidence of such a causal relationship.

#### IV. CONCLUSION

This Critique evaluates the P&L *Tulane Law Review* article which asserts that it contains evidence that campaign contributions have influenced voting behavior of Louisiana Supreme Court justices. The key goal of this Critique is to point out fundamental flaws in P&L's analysis and to point other scholars to the appropriate literature describing the correct way to do a study of

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31. *Id.* at 1294 n.14.

32. In simple terms, decisions are modeled as the dependent variable and donations are treated as the independent variable.

33. See, e.g., Palmer & Levendis, *supra* note 1, at 1292, 1314.

34. Chappell, *supra* note 6, at 77–78.

this sort. Chappell's seminal work<sup>35</sup> and later work by Stratman<sup>36</sup> provide the basic methodology for this type of research.

The P&L paper is written as if the authors are discovering new problems and attempting to address them using a new approach. In fact, economists recognized these problems over thirty years ago and developed solutions, which have been thoroughly vetted in leading journals.

P&L's failure to investigate the literature leads them to employ "modern statistical analysis"<sup>37</sup> that Chappell dismissed over twenty-five years ago as inadequate for this problem. The authors seem to grasp this problem in footnote 14<sup>38</sup> where they note that their paper will make no assertion with regard to causality. In essence, footnote 14 states that P&L will not interpret results found in the paper as implying that contributions influence voting behavior. Yet, they repeatedly infer cause and effect despite the admonition contained in footnote 14.

In summation, P&L's failure to investigate this literature leaves them with an article consisting essentially of totally invalid statistical results and unsubstantiated assertions. These failures may be compounded by errors made in the construction of their data—an error rate that is unacceptably large. We hope that future research using more careful econometric analysis might be able to provide more useful evidence on the topic of interest.

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35. *Id.*

36. Stratman, *supra* note 8.

37. Palmer & Levendis, *supra* note 1, at 1314.

38. *Id.* at 1294 n.14.