Cheap Talk Citizenship: The Democratic Implications of Voting with Dollars

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CHEAP TALK CITIZENSHIP: THE DEMOCRATIC IMPLICATIONS OF *VOTING WITH DOLLARS*

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I. INTRODUCTION

Anyone brave enough to propose a detailed campaign finance plan, such as the one in *Voting with Dollars*,[1] must, out of necessity, have a healthy respect for the ingenuity of those who get paid to frustrate reform efforts, or else be doomed to certain failure. To their credit, Professors Ackerman and Ayres work from the assumption that there will be a conspiracy against them.[2] Unlike paranoids, reformers really do have enemies. Diligently, the authors have accounted for and responded to all the objections they have heard since first unveiling their somewhat counterintuitive ideas several years ago. And far from ignoring the law of unintended consequences,[3] the usual error, Professors Ackerman and Ayres have imagined every conceivable strategy that could be employed to foil their plan and have designed additional institutional features to plug the anticipated leaks.[4]

A good illustration of their exceptional institutional due diligence is the secrecy algorithm,[5] which kicks in when unusually large or concentrated amounts of campaign contributions are

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1. BRUCE ACKERMAN & IAN AYRES, VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE (2002).

2. *See id.* at 8.

3. While the law of unintended consequences applies to almost any attempt to make legislative or institutional change, the idea that it applies especially well to U.S. campaign finance reform has its origins in the growth of political action committees ("PACs") after the federal reforms in the early seventies. *See, e.g.*, FRANK J. SORAUF, INSIDE CAMPAIGN FINANCE: MYTHS AND REALITIES 204 (1992).

4. ACKERMAN & AYRES, *supra* note 1, at 101–27.

5. *Id.* at 49–50 & app. B at 227–31.

given to a candidate through the blind trust.[6] In essence, this algorithm creates random noise in the pattern of unusually large and concentrated daily contributions so that candidates cannot be sure that particular donors have delivered on their promises.[7] The authors employ this methodology because the secret donation booth[8] only works if it is secret, and clever donors might find a way to signal to candidates that they have lived up to their corrupt promises.[9] Will it work? Perhaps, but a corollary to the law of unintended consequences is the law of escalating cleverness: for every smart strategy, there is a smarter counter-strategy. I am reminded of a story about how Italian notables foiled the anonymity of the secret ballot by voting in predesignated patterns for real and dummy candidates, allowing political bosses to verify their vote commitments.[10] Can we be absolutely sure that there is no code that will break the secrecy of the Ackerman-Ayres algorithm?

It is tempting to debate this thoughtful proposal on practical grounds only; for example, to argue simply that the design is flawed or that clever people will constantly look for ways to undermine their regulatory intent. However, while I believe that these practical concerns pose serious problems, they do not constitute the most interesting problems raised by the proposal. Let us assume that there could be constant adjustments and tinkering, and that somehow the regulators could manage to stay ahead of the regulated. Let us take the world of "cheap talk"[11] citizenship seriously, and inquire about its implications. Cheap talk citizenship exists in an as yet only imagined world in which deception is encouraged for the sake of breaking potentially corrupting contracts.[12] How is this different from more traditional norms of citizenship? Is the effect of cheap talk uniformly good? How will

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6. *See id.* at 49.

7. *Id.* at 50.

8. The secret donation booth is one of the primary mechanisms behind the authors' contribution strategy. *Id.* at 6. It is derived from the secret ballot, and it calls for all contributions to pass through a blind trust. *Id.*

9. *See id.* at 49.

10. P.A. ALLUM, POLITICS AND SOCIETY IN POST-WAR NAPLES 189 (1973).

11. The authors use the term "cheap talk" to refer to the possibility that pledges of support might be false and cannot be verified by the candidates. ACKERMAN & AYRES, *supra* note 1, at 6. Drawing an analogy with the secret ballot, they tell us that "[t]he same 'cheap talk' regime will disrupt the special-interest dealing we now take for granted." *Id.*

12. *See id.*

candidates, groups, and parties operate in a cheap talk environment?

Patriot dollar equality extends the logic of "one person, one vote" to campaign contributions.[13] But what effect will this have on group politics, and if the effect is negative, what are the implications for democratic pluralism?

The sections of the paper that follow: (1) consider the ways that deception, which might be useful for preserving the anonymity of the secret voting booth, might undermine democratic representation; (2) weigh the benefits and problems of the Patriot dollar proposal; and (3) consider the possibility that many political groups may opt out of the proposed system because it infringes on their freedoms and limits their influence.

My basic conclusion is that cheap talking citizens will have a harder time finding common ground and forging collective action. Traditional institutions for aggregating preferences and creating group interests will be weakened, reinforcing a suspicious individualism and undermining the system's pluralism. While the Patriot dollar[14] proposal per se has some important advantages over the usual public funding proposals, and while some experimentation with it is beneficial, it raises difficult questions about the nature of equality in U.S. democracy.

II. CHEAP TALK CITIZENSHIP

Perhaps the most counterintuitive aspect of the Ackerman and Ayres proposal is that it purports to combat potential corruption and preserve political equality by encouraging deception.[15] Normally, when donors promise to give significant sums of money to candidates, the candidates can verify that the donors lived up to their end of the bargain with certainty and can subsequently reward these donors with greater access and more favorable legislative and administrative treatment if they so choose. By weaken-

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13. *See id.* at 13–14.
14. For the purpose of expediting the discussion, I will refer to the Patriot dollar proposal as a distinct and separable component of the authors' overall scheme so I can distinguish the secret donation booth from the public financing idea. The term "Patriot dollar" was coined by the authors. *Id.* at 4.
15. *See id.* at 28.

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ing the recipient's ability to know what the donor has really done, the secret donation booth allegedly undermines the implicit contract underlying bribery and related corrupt transactions.[16] If certainty creates secure exchanges, uncertainty undermines them. Setting deception to the task of undermining corruption is ingenious in this sense. Citizens and groups that retract their donations or falsely announce that they have given to a candidate, political group, or party are doing a civic good under the donation booth system.[17] Their deception makes clean politics possible, but it takes only a moment of reflection to see that when it comes to citizenship, this is not, as they say, "your father's Chevrolet."

In the context of games, deception is a prized trait. The poker player who bluffs or the bridge player who puts an unexpected card on a trick to fool others into thinking he or she is void in a suit is playing the game well. Deception challenges the skills of others in the game and can enhance the overall pleasure that players get from their interactions. But in the context of citizenship and democracy, deception is a foreign concept. To be sure, leaders in one country are expected to defend national interests by deceiving others in matters of national security. Spies hide their identities from the enemy in order to send back valuable information about what the enemy is doing. Deception is sometimes a necessary tool in a weakly institutionalized setting like the international arena.[18] Since the capacity of multilateral organizations like the United Nations to keep the peace is uncertain, nations must sometimes use force and deception to protect themselves.

In the more strongly institutionalized setting of the nation-state, deception is less frequently condoned. To be sure, deceptions for reasons of self-defense or when the protections of society have broken down are acceptable. If, for instance, a would-be killer asked a citizen in the street which way his would-be victim had fled, the bystander would not be ethically obliged to tell the truth. If the police asked the same question, however, the citizen surely would be. Business contracts, consumer purchases, and

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16. *See id.*

17. *See id.* "Rather than prohibiting true donors from speaking or sending ancillary signals, our system permits faux donors to send the same signals, and thereby create a regime of cheap talk that makes indisputable gift-giving impossible." *Id.*

18. *See, e.g.,* Eduardo Moisés Peñalver, *The Persistent Problem of Obligation in International Law,* 36 STAN. J. INT'L L. 271, 281 (2000).

market transactions also require the belief that people will do as they say.

At a minimum, the expectations of truthfulness for participants in the political process are no less than in civil society or the marketplace. In reality, they are usually higher. Think of the citizen in Rousseau's writings.[19] A polity makes collective decisions by having individual citizens contemplate the common good.[20] A citizen must not only be truthful, but rightly oriented towards the common welfare.[21] If citizens instead follow the path of self-interest, they can get trapped into a situation with less total common good for all.[22] Needless to say no path to the common good starts with citizen deception.

Even a less demanding theory of citizenship such as Madison's aims at honesty even as it designs institutions with the expectation that citizens will sometimes be fallible.[23] In order for Madisonian institutions to work, citizens must aspire to be good, because the prevalence of voluntary good behavior lowers the monitoring costs. If everyone decided to run red lights as often as they could get away with it, the burden on the police to enforce the traffic laws would be immense and quite possibly overwhelming. Institutions can be robust to occasional lapses, but not widespread malfeasance.

Now we have a further stage in the evolution of the citizen: the donor who lies to confuse campaign finance recipients.[24] One immediate concern is that, once condoned, lying could become more widespread in politics. If donors can deceive candidates, is it permissible for candidates to deceive donors? Donors will be encouraged to claim or suggest that they gave contributions to candidates, when in fact they did not, in order to complicate the quid pro quo exchanges between donors (both groups and individuals)

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19. *See* JEAN JACQUES ROUSSEAU, THE SOCIAL CONTRACT (Willmoore Kendall trans., Henry Regnery Co. 1954) [hereinafter THE SOCIAL CONTRACT] (establishing a theory of social decisionmaking that is founded upon a well-informed public); *see also* JEAN JACQUES ROUSSEAU, *Constitutional Project for Corsica, in* ROUSSEAU: POLITICAL WRITINGS 279 (Frederick Watkins trans. & ed., Thomas Nelson and Sons LTD 1953) (constructing a model constitution for Corsica based on social contract theory).

20. THE SOCIAL CONTRACT, *supra* note 19, at 28.

21. *See id.* at 28–29.

22. *Id.*

23. THE FEDERALIST NO. 37, at 177 (James Madison) (Bantam Books 1982).

24. ACKERMAN & AYRES, *supra* note 1, at 28.

and public officials. But can candidates really claim that in the interest of preventing corruption they should be able to announce false promises to potential donors?

The candidate could reverse the Ackerman and Ayres logic and say that the uncertainty of the likely quid pro quo exchange frees them from the ethical obligation to avoid specific promises to groups and individuals in return for contributions. Perhaps the candidates even have an obligation to add to the cheap talk floating around in the system.

This has potential implications for current corruption statutes. Since the nexus is uncertain, illegal activities might plausibly become legal. What if Legislator A announces that he will author a protective tariff for a local industry in his district in reward for their donation? Since Legislator A cannot know with certainty whether he received anything of value in exchange for the performance of a public duty (i.e., introducing the bill), then how do we prosecute for bribery?[25] What if Legislator A tries to extort money by threatening to introduce a punitive bill against a particular industry unless they fork over the appropriate sum? How can we prevent such "tree shaking" in this semianonymous world? Have Ackerman and Ayres opened the door to more attempts at bribery and extortion by adding random noise to the quid pro quo process? How will federal laws opposing the use of the campaign finance system for bribery and extortion be affected?

Of course, their likely answer would be that since both the candidate and the donor cannot know whether the exchange happened for certain, they are on equal footing and nothing will happen. But the reality of the secret donation booth is that it operates on weak, not strong, uncertainty, meaning that the donee will have probabilistic knowledge of the likelihood that a given individual or group made a donation as opposed to having no idea whatsoever. Thus, if Legislator A promises to introduce several specific special interest bills, tells potentially affected groups that they must make the requisite donations, and then observes that his funds have gone up by the amount he asked, would he care which interest group actually gave the money? It

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25. For a good discussion of the elements of bribery, see DANIEL HAYS LOWENSTEIN & RICHARD L. HASEN, ELECTION LAW: CASES AND MATERIALS 660–704 (2d ed. 2001).

certainly does not matter to him because he can then repeat the tactic with impunity since the secret donation gives him a convenient cover from the federal law.

So one problem with the cheap talk regime is that it can be played both ways, and if it is, it might undermine any future anti-corruption efforts against so-called "pay to play" politics.[26] Assume that a candidate assembled a group of vendors and said that a new light speed rail system would not be built unless they came up with $500,000 by the end of the campaign. The vendors might try to lie to the legislators, and would be encouraged to do so. However, if their lie was uncovered, they might lose the contracts. So unless the probability of being discovered is zero, the expected disutility of lying unsuccessfully could be quite large. Legislators who achieve their overall fundraising goal need not know the truth about particular firms. If the totals seem about right, they can act as if the interest groups kept their end of the bargain. It is the interest groups' collective action problem to make that commitment happen, and if it does, authorities would be in a much weaker position to deal with the implicit corrupt bargain.

Another problem with cheap talk citizens is that they will be marginally less well-informed as a consequence of the secrecy of the donation booth. Voters, as political scientists and consultants have found over the years, are often very busy and not willing to invest in becoming well-informed.[27] The so-called "civic slackers," the less-informed, less-active citizens, rely on information cues to make choices.[28] Instead of knowing the detailed policies of competing candidates, voters find that it suffices to know the groups and prominent individuals who endorse particular candidates. Therefore, a trade unionist who wants to vote for pro-worker candidates can see who endorses or supports those candidates. Cam-

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26. *See generally* Fred S. McChesney, *"Pay to Play" Politics Examined, with Lessons for Campaign-Finance Reform*, 6 INDEP. REV. 345 (2002), *available at* http://www.independent.org/tii/media/pdf/tir63mcchesney.pdf. The article analyzes the phenomenon of "pay to play" politics, which is essentially the practice of paying to gain access to politicians and to participate actively in the political marketplace. *Id.* at 346.

27. The theme that citizens are not well-informed is documented in the early voting studies. *See, e.g.*, ANGUS CAMPBELL ET AL., THE AMERICAN VOTER 271–74 (abr. ed. 1960); PAUL F. LAZARSFELD ET AL., THE PEOPLE'S CHOICE: HOW THE VOTER MAKES UP HIS MIND IN A PRESIDENTIAL ELECTION 40–51 (3d ed. 1968).

28. *See* Daniel R. Ortiz, *The Democratic Paradox of Campaign Finance Reform*, 50 STAN. L. REV. 893, 901–03 (1998).

paign contributions are a good indicator of support even for in-
formed citizens, which is why reporters often write campaign fi-
nance stories. Through campaign finance disclosure and press
coverage, voters come to know, in an inexpensive fashion, which
groups support whom. The fact that President George W. Bush
received over $100,000 from Enron in 2000[29] helps many Califor-
nians to understand the administration's energy policy or the
Federal Energy Regulatory Commission's actions during the
state's electricity crisis.

In a cheap talk world, where lots of groups make claims, the
press as well as the politicians will have a hard time sorting out
which contributors gave money to whom. Civic slackers and con-
scientious voters looking for cognitive shortcuts will be barraged
with lots of false claims, encouraged in the interest of preventing
corruption. But how can the voter distinguish the false endorse-
ments from the true ones? How do we track the connections be-
tween moneyed interests and policies? Again, Ackerman and
Ayres would likely respond that since there would be no verifiable
contract between donors and candidates, the market for corrup-
tion would cease. However, the strongest claim they can make is
that their plan will add noise to the potentially corrupt con-
tracts.[30] They cannot plausibly claim that they will have taken
special interests out of the mix. What is certain is that they will
have made it harder for journalists and political scientists to do
their modestly valuable work of reporting the ties between candi-
dates and groups.

Finally, observing this culture of numerous specious claims,
will the average voter have more or less faith in the political sys-
tem? Ackerman and Ayres forcefully argue that inequality un-
dermines government legitimacy.[31] If legitimacy is defined as a
shared sense that the majority authorized government policies,
then the perception that policies are actually responsive to mon-
eyed interests can erode public support and confidence in the sys-
tem. Assuming this is true, if lots of groups are claiming to have
made donations, will this restore confidence or increase popular

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29. *See* The Center for Responsive Politics, Enron's Contributions to George W. Bush,
1993–2001 (based on FEC data downloaded Nov. 1, 2001), *at* http://www.opensecrets.org/
alerts/v6/enron_bush.asp.

30. ACKERMAN & AYRES, *supra* note 1, at 50.

31. *Id.* at 12–13.

cynicism? If the public has faith that Ackerman and Ayres's se-
cret algorithm works, then maybe the public will feel more confi-
dent that popular sovereignty has been restored. Since the argu-
ment that deception is good and we are saved from corruption by
cheap talk will seem counterintuitive to many, it is just as likely
that public confidence will be undermined by what it hears. Fur-
thermore, if corrupt candidate cheap talk increases as a result of
the legal impunity the secret donation booth creates, the dangers
of increased cynicism and lower legitimacy might actually in-
crease.

The citizen that Ackerman and Ayres envisions is a far cry
from the constituents in Rousseau's or Madison's world.[32] If Rous-
seau attempted to elevate citizens to a higher level, and Madison
planned for their ethical failure, Ackerman and Ayres want to
take things a step further and lower ethical expectations for the
common good. Even if deception works well in the institutional
setting they have designed, they cannot be sure that deception
once encouraged does not extend to other actors in the system in
the name of the same functional purpose. If it does, will it weaken
the enforcement of current anticorruption laws? Can the authors
be certain that such deception will not weaken the voter's ability
to make informed choices, to act against the influences of special
interests, and to have faith in the legitimacy of government ac-
tions?

III. PATRIOT DOLLARS AND THE QUEST FOR EQUALITY

A less counterintuitive, but equally important aspect of the Ac-
kerman and Ayres proposal is the Patriot dollars idea.[33] In es-
sence, it is a variation on the more standard public financing idea
with an important twist: instead of candidates qualifying for pub-
lic dollars by achieving some threshold of support,[34] registered
voters get to allocate their dollars to the candidates they find ap-
pealing.[35] From the purely practical standpoint of administering a

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32. *See id.* at 111–12 (discussing Rousseau's and Madison's theories).

33. *See id.* at 12–24, 66–92.

34. *See id.* at 18–20 (contrasting traditional finance reform plans with the Patriot sys-
tem).

35. For a discussion regarding voter allocation of funds, see *id.* at 69–70. *See also*
Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian / Public Choice Defense*

public financing scheme, there are some real advantages to letting voters decide which candidates get public money. It avoids, for instance, the arbitrariness of setting up standards for deciding who does and does not receive public funds. Voters will either give their Patriot dollars to a candidate or they will not.[36] There is no arbitrary cut-off level below which the candidate gets nothing, a feature that helps established and front-running candidates, and, in turn, hurts others.[37]

Another advantageous feature of voucher-like systems is that voters can see their dollars going directly to the candidates they support.[38] When the money is mixed into a large pool and distributed by formula, some will fear that their money is being spent for speech they do not like. While this sort of consideration should not bother someone truly committed to the principles of free speech, the harsh reality is that it often does. Being able to direct voter dollars towards candidates that donors support finesses this problem, and creates a more solid psychological basis for public finance schemes.

On its own merits, I have little to say against the Patriot dollar proposal. Whether the details for implementing the scheme are right or not, it deserves an experiment. Implemented in a smaller jurisdiction, it would be valuable to see how many voters take advantage of the opportunity, whether the ATM card system works, whether a black market develops, and the like.[39] In the absence of data, it seems futile to argue about whether Ackerman and Ayres have got the details right.

Rather, I want to examine the democratic theory assumptions and implications inherent in Ackerman and Ayres's Patriot dollars and contribution limits. There are several reasons why one might regulate campaign spending. Preventing quid pro quo corruption is one reason that was previously discussed.[40] In combination with the secret donation booth, Patriot dollars might serve

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of Campaign Finance Vouchers, 84 CAL. L. REV. 1 (1996) (outlining a full-disclosure voucher proposal that forbade private funding).

36. *See* ACKERMAN & AYRES, *supra* note 1, at 14.

37. *See id.* at 18–20.

38. *See id.* at 69.

39. *See id.* at 67–70.

40. *See supra* text accompanying notes 5–12; *see also* ACKERMAN & AYRES, *supra* note 1, at 5–8.

to liberate candidates from the perceived need to pay back large contributions with favors for donors.[41] Another goal of public financing is to increase the number of candidates vying for office,[42] and the Patriot dollars scheme does this in a sensible way by forcing candidates to get their money from voters.[43] Of course, it is hard to say whether an unknown candidate will be able to get public dollars more easily in this scheme than one that requires that they get a certain number of signatures first before applying for the money. This is the sort of empirical conjecture that cannot be settled by argument. However, it is certainly plausible to think that this idea might encourage more candidates who would not otherwise plan to run.

The third reason for regulation involves equity considerations,[44] and this is one of the motivations that may underlie many features of the authors' proposal. While the Supreme Court of the United States has allocated a limited role to equity considerations in the area of campaign finance,[45] it has bothered many scholars for some time that so much weight has been given to corruption because of the Court's view about equity.[46] Professors Ackerman and Ayres make the explicit argument that the inequity of wealth expressed through campaign donations undermines basic political equality (e.g., the equally weighted vote), thereby weakening government legitimacy.[47] This is a strong claim that requires some closer examination.

First of all, while it is true that voter equality is a core democratic feature,[48] it is less clear how far the quest for further equality must go if voters are to retain ultimate sovereignty. Clearly, the legitimacy of a government's choices would be compromised if voters believed that their votes did not matter at all, especially if representatives based their decisions primarily on non-electoral

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41. *See id.* at 48–50.

42. HERBERT E. ALEXANDER, FINANCING POLITICS: MONEY, ELECTIONS, AND POLITICAL REFORM 4–5 (4th ed. 1992).

43. ACKERMAN & AYRES, *supra* note 1, at 12–18 (discussing how Patriot dollars work).

44. Bruce E. Cain, *Moralism and Realism in Campaign Finance Reform*, 1995 U. CHI. LEGAL F. 111, 130–39. Concerns regarding equity center around "participation fairness, influence fairness, and outcome fairness." *Id.* at 130.

45. Buckley v. Valeo, 424 U.S. 1, 48–49 (1976).

46. *See* ACKERMAN & AYRES, *supra* note 1, at 10–11; *see also* SAMUEL ISSACHAROFF ET AL., LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS (1998).

47. ACKERMAN & AYRES, *supra* note 1, at 13.

48. *See* ALEXANDER, *supra* note 42, at 3.

motives. Hence, all serious democracies have statutes that prevent pure bribery.[49] The harder case is the possibility of distortion caused by the politician's eagerness to have campaign funds. Assuming that the use of campaign funds is restricted to campaigning purposes and that the secret ballot prevents true voter bribery, campaign dollars are only a means to the end of persuading voters to choose in a particular way. There is no systematic evidence of candidates choosing campaign funds at the cost of votes. Most of the time, candidates receive money from groups due to the compatibility of their voting records and alliances.[50] Perhaps the greatest danger is that interest groups may gain a greater voice on issues to which the public is unaware or indifferent.[51] How much of this is due to the impact of contributions as opposed to lobbying is impossible to tell.[52]

So if we had a reliable measure of perceived legitimacy, could we be sure that it would go up if we could truly limit the amount of money that special interests give? I do not see how. As political

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49. Bribery is "[t]he corrupt payment . . . of a private favor for official action." BLACK'S LAW DICTIONARY 186 (7th ed. 1999). For a discussion of bribery laws enacted by the nations forming the Organization for Economic Cooperation and Development (OECD), see Bruce E. Cain, *Reform: Political, in* 19 INT'L ENCYCLOPEDIA OF THE SOC. & BEHAV. SCI. 12888, 12888–91 (2001). For a specific example of a law against bribery, see 18 U.S.C. § 201 (2000).

50. *See, e.g.,* James B. Kau et al., *A General Equilibrium Model of Congressional Voting,* 97 Q.J. ECON. 271, 288 (1982); Laura I. Langbein & Mark A. Lotwis, *The Political Efficacy of Lobbying and Money: Gun Control in the U.S. House, 1986,* 15 LEGIS. STUD. Q. 413, 430–34 (1990); Jonathan I. Silberman & Garey C. Durden, *Determining Legislative Preferences on the Minimum Wage: An Economic Approach,* 84 J. POL. ECON. 317, 317–19 (1976); Thomas Stratmann, *Campaign Contributions and Congressional Voting: Does the Timing of Contributions Matter?,* 77 REV. ECON. & STAT. 127, 135 (1995); Allen Wilhite & John Theilmann, *Labor PAC Contributions and Labor Legislation: A Simultaneous Logit Approach,* 53 PUB. CHOICE 267, 274 (1987); Al Wilhite, *Union PAC Contributions and Legislative Voting,* 9 J. LAB. RES., 79, 79–90 (1988). *Contra* Henry W. Chappell, Jr., *Campaign Contributions and Congressional Voting: A Simultaneous Probit-Tobit Model,* 64 REV. ECON. & STAT. 77, 83 (1982); Henry W. Chappell, Jr., *Campaign Contributions and Voting on the Cargo Preference Bill: A Comparison of Simultaneous Models,* 36 PUB. CHOICE 301, 309 (1981); Janet M. Grenzke, *PACs and the Congressional Supermarket: The Currency Is Complex,* 33 AM. J. POL. SCI. 1, 19–20 (1989); W.P. Welch, *Campaign Contributions and Legislative Voting: Milk Money and Dairy Price Supports,* 35 W. POL. Q. 478, 493 (1982); John R. Wright, *PACs, Contributions, and Roll Calls: An Organizational Perspective,* 79 AM. POL. SCI. REV. 400, 411–12 (1985).

51. Matthew Jarvis & Justin Buchler, Reassessing the Impact of Campaign Contributions on Legislative Roll Call Votes: Controlling for Heterogeneous Effects 27–28 (2001) (presented at the 2001 Annual Meeting of the American Political Science Association), *available at* http://pro.harvard.edu/abstracts/022/022016JarvisMatt.htm.

52. *See* Stephen Ansolabehere et al., Campaign Contribution and Lobbying Expenditures (2000) (unpublished manuscript, on file with author).

scientists have noted for some time, there are many inequalities in society that have potential political importance.[53] Senior citizens have more time. Young people have more energy. Pundits have a platform, and so on. Any number of these considerations can influence unequally how policy is made. Does legitimacy require erasing all these inequalities? Some might answer that wealth is special,[54] but where is the empirical case? Politically relevant concentrations of money are not always based on income inequalities. As an example, consider the following: unions are the equals of business PACs in U.S. politics, but not because the working class is better paid than the white collar workers. In California, college professors are far less politically powerful than high school teachers even though the former make more than the latter. Why? Because there are more K-12 teachers than professors, and they are better organized for giving money to politicians.

This discussion should not stray too far down this hoary path. Much to the impatience of reformers and even some political scientists recently,[55] the empirical research in this area cautions against wild claims about the ability of money to buy elections or policies. Assume for the moment that this scholarship is wrong: where does the quest for more legitimacy through greater campaign finance equality lead Professors Ackerman and Ayres? I would argue first that their ideal is a world of individual populism; second, that their proposal puts substantial limits on groups that might want to work within their system; and finally, as a result, most groups that can opt out will do so and go the route of independent expenditures.

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53. *See* Cain, *supra* note 44, at 136–37; Nelson W. Polsby, *Moving Toward Equality in Campaign Finance? Another Equivocal Encounter Between Theory and Practice, in* POWER, INEQUALITY, AND DEMOCRATIC POLITICS 263 (Ian Shapiro & Grant Reeher eds., 1988) (arguing that inequality in electoral assets other than campaign contributions can and should be influential in elections).

54. Daniel Hays Lowenstein, *On Campaign Finance Reform: The Root of All Evil Is Deeply Rooted*, 18 HOFSTRA L. REV., 301, 301–02 (1989).

55. *See, e.g.*, Thomas E. Mann, Political Science and Campaign Finance Reform: Knowledge, Politics, and Policy 2–3 (2002) (unpublished manuscript, presented at the 2002 Annual Meeting of the American Political Science Association) (discussing the reforms developing in campaign finance and concluding there is no perfect way to cleanse the system—what must be done is calculated management of the area), *available at* http://apsaproceedings.cup.org/ site/papers/000/000001MannThomas.pdf.

The implicit assumption present in the authors' proposal is that we will get to political equality if Patriot and private dollars are balanced and contributions are limited. Clearly worried that the secret donation booth might not be so secret after all, the authors add contribution limits to the dollar amounts that go into the secret donation booth: $5,000 to a House candidate, $15,000 on average to a Senate candidate, and $100,000 to a presidential candidate.[56] There are also limits on what individuals can give to exploratory committees, limits on contributions to parties and other political groups, yearly individual contribution limits, and so forth.[57] Parties, but not other political organizations, are able to transfer unlimited amounts of private money to candidates as long as their contributions come through the secret donation booth.[58] It is fair to say that Ackerman and Ayres have not replaced the old command and control system, as they claim.[59] Rather, they have abandoned most disclosure, replaced the old presidential public financing system with Patriot dollars, and forced the still limited—although not as limited—contributions through the secret donation booth apparatus. [60] The system is no less complex than before.

The foundation of their private contribution system then is the limited, quasianonymous, individual donation.[61] Even parties and other political groups are built upon this type of donation. It is hard to see how a concern for combating corruption alone would justify this kind of extensive regulation: it requires a strong version of conduit corruption that says that the individuals giving unlimited amounts to a political organization secure an implicit quid pro quo from the candidate when the candidate subsequently accepts that organization's contribution. Reasonable people might dispute that line of argument, but by shifting the rationale to equity, limits on the amount that wealthy individuals give to all candidates and political organizations further the goal of equal voices in the political system. Even if it does not actually change outcomes, it might affect the perception of equality.

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56. ACKERMAN & AYRES, *supra* note 1, at 204.

57. *Id.* app. B, at 203–07.

58. *See id.* at 25–26.

59. *Id.* at 4–5.

60. *Id.* at 6. The authors proffer a system where direct donations are barred. *Id.* Candidates obtain money from individuals by way of a blind trust and never ascertain the knowledge of who has donated. *Id.*

61. *See id.* The system is quasianonymous because a voter may in fact tell a candidate they have donated when they have not. *Id.*

But at what cost? Political organizations now have to deal with cheap talk problems on top of contribution limits. Fundraising for the party or for the National Abortion and Reproduction Rights Action League will be hindered by cheap talkers who are encouraged to deceive for the betterment of democracy. This will make fundraising difficult for them. Nonparty political organizations cannot even give their secret donation booth funds to candidates directly.[62] But given that the contributions have been limited and made "anonymously," what is the democratic benefit of not letting nonparty groups make contributions? After all, the secret donation booth allegedly limits the dangers of corrupting candidates.[63] The authors betray a lack of faith in the efficacy of their own proposal when they prohibit nonparty organizations from giving private money raised inside the secret donation booth to candidates.[64] Assuming, as they do, that the potential of corruption is greater by nonparty organizations than the party, Professors Ackerman and Ayres could have allowed the nonparty groups to transfer their quasi-anonymous funds quasi-anonymously to the candidates through the secret donation booth—after all, the money will have gone through a double cleansing process. If this system really works, it should work even better if it is employed twice on a given contribution (i.e., individuals to organizations and organizations to candidates). The reason it does not, one suspects, is that the secret donation booth cannot disguise large donations very well despite their clever algorithms.[65] In the end, the real work in this scheme, as in the current system, is done by prohibitions and limitations, and not by secrecy and cheap talk.

The implicit ideal underlying these concepts is a democracy of equally endowed individuals. Parties and political organizations, it seems, only serve democracy well (i.e., promote legitimacy) when they are built on limited, quasianonymous, individual donors. This is group politics reinvented through individual populism. Groups are merely the sum of equal individuals. The authors do not pause to ask whether this populist model is necessarily more legitimate or better than a pluralist model,

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62. *Id.* at 203.

63. *Id.* at 27–28.

64. *Id.* at 207–08.

65. *See id.* app. B, at 227–31 (providing a secrecy algorithm that translates daily contribution amounts into amounts that are immediately available out of the blind trust).

which is no small irony given that the authors teach at Yale.[66] A pluralist model would allow for inequalities in different policy domains—and regard the effort to eliminate these inequalities as impossible—but would insure that no inequality stretches across all policy areas.[67] This is not to say that it is wrong to believe in the pluralist model, but it is not the only path to democratic legitimacy.

Assuming the authors will not abandon their radical individualism, there is another more important problem with this approach that should be addressed. The system should be discarded because it will prove to be so onerous to the parties and other political organizations that they will likely choose not to invest much effort in raising private money inside the secret donation booth system. The nonparty political organizations in particular will opt for independent expenditures. This will place a great deal of interest group activity outside the regulated system.

IV. THE INDEPENDENT EXPENDITURE LOOPHOLE

Even if the donation booth works as hoped, and the Patriot dollars start to swell the campaign coffers, there is one major loophole for interest groups and nonparty organizations that do not want to work within the system: they can operate as an independent expenditure committee ("IEC").[68] Professors Ackerman and Ayres refer to this as the hydraulic critique.[69] If obstacles block the flow of money in one direction, it will flow in another.[70] So in this instance, if all private money has to flow through the secret donation booth, and the inconveniences of quasianonymity

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66. Pluralist theory is not a concept that is new to Yale. *See, e.g.*, ROBERT A. DAHL, WHO GOVERNS? DEMOCRACY AND POWER IN AN AMERICAN CITY (1961); NELSON W. POLSBY, COMMUNITY POWER AND POLITICAL THEORY (1963).

67. *See* MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 3–30 (1983). The author discusses a distributive model of pluralism and argues that no one thing will reach across the spectrum and dominate the range. *Id.* at 11. These goods are a substitute means for different policy areas. *Id.* No single policy wins; there are struggles and victories for different groups at different times, thus negating the prospect of dominance by any one policy or group. *Id.* at 12.

68. *See* Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1715 (1999) (arguing that IECs have the ability to gain a greater hold on the political process).

69. ACKERMAN & AYRES, *supra* note 1, at 113, 118–26.

70. *See id.* at 112.

and contribution limits prove to be burdensome, then it is likely that groups will look to establishing IECs as an alternative.[71] Since the Court's understanding of corruption precludes the regulation of truly independent expenditures,[72] IECs create a major potential loophole for the authors' proposal.

Ackerman and Ayres anticipate this criticism and consider it serious. They have several responses. First, they remind us, independent expenditures still constitute a relatively small share of total campaign spending.[73] They would have to grow considerably before they "overwhelm the new financial landscape."[74] However, this is not an impossibility. After all, did anyone accurately predict the rapid growth in party soft money in 1992?[75] So, the second answer they give is that, if independent expenditures increase rapidly, their effect will be offset by the combination of Patriot dollars and secret donation booth private funds.[76] But even that could be overly optimistic. The third answer is that their "model statute authorizes the commission to take countervailing steps to offset serious hydraulic effects" so that when "patriotic finance falls below two-thirds of total funding," each citizen's patriotic balance will be increased to reestablish the 2-to-1 ratio over time.[77]

I think this is about as good a response as one can give. Since the IEC money cannot be prohibited, or even limited, the next best strategy is to swamp its effects with increased public money. Of course, this means on a practical level that taxpayers are required to have to make an open-ended commitment to providing Patriot dollars at the requisite level with the possibility that that commitment could increase in real terms as a result of the adjustment mechanism. This might not be an easy sell. Some taxpayers may resent taking on an extra burden because interest groups in which they have no membership spent more than they

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71. *See id.* at 111.

72. *See* FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 500–01 (1985).

73. ACKERMAN & AYRES, *supra* note 1, at 120.

74. *Id.*

75. *See* Richard Briffault, *The Political Parties and Campaign Finance Reform*, 100 COLUM. L. REV. 620, 630 (2000) (noting soft money accounted for seventeen percent of receipts for parties in 1992).

76. ACKERMAN & AYRES, *supra* note 1, at 120–21.

77. *Id.* at 121.

should have in the previous election. This is not necessarily an insuperable problem, but it is also not trivial.

However, an even more serious question is whether "swamping," even if fully funded, would lessen the effects of independent money. There are two reasons it might not. First, the Patriot dollars will not come back to the candidate at a time when they are needed. If an independent Group X decides to advertise on behalf of Candidate A at time period one, the authors' proposal does not react until time period two. It is therefore untimely in the sense that the adjustment algorithm modifies the Patriot dollar allocation for the next election cycle, which does not help Candidate B, A's opponent, at a time when he presumably needs it most. Secondly, even if the Patriot dollars were instantaneously adjusted on a district-by-district basis—which is not how the proposal reads at the moment[78]—the additional money would have to be allocated to the citizen accounts, and then the citizens would have to decide to allocate it to the candidates. Therefore, for anti-plutocratic purposes, the adjustment algorithm is effectively useless. Group X has affected the outcome of the election in an open and demonstrable way by using the IEC route, and the adjustment algorithm has failed to solve this problem.

Third, "swamping" depends upon the assumption that money has diminishing returns, or that politicians will care less about the smaller share of private money than the larger amounts of public money they receive. There is no evidence, however, that in close races politicians hit a point of diminishing returns, because while the last dollar spent may influence fewer voters than the first dollar spent, the last few voters might determine the outcome in a close race.[79] As a result, the demand for additional money could be quite strong in a close race given the uncertainty about how the last group of undecided voters will choose to vote. The private money could be what gives a candidate an edge, and if so, plutocracy has prevailed once again.

At this point, Ackerman and Ayres would likely revert to another defense they make in their book, echoing a line of reasoning

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78. *Id.* app. B at 218–19.
79. *See generally* GARY C. JACOBSON, MONEY IN CONGRESSIONAL ELECTIONS (1980) (comparing the returns received from spending by incumbents with the returns received by nonincumbents).

present in *Buckley v. Valeo*.[80] If independent expenditures are truly independent, then it is likely that they will work at cross-purposes with the campaign, "spouting the wrong things at the wrong time in the wrong places."[81]

At a minimum, this may cause candidates to discount the value of independent private money as opposed to relying on Patriot and secret donation dollars. Both arguments are highly speculative. Aside from this, they miss an important feature of independent spending: that the calculus rests with the independent spenders. An advantage of independent spending by interest groups is that they get to pick the message in their own ads. If they poll accurately and craft their ads with skill, they might even be more effective than the candidate's own efforts. But for some of these groups, the real value of independent spending may be that it allows them to shape the identity of the candidates on issues that the group and its members care about, and by so doing, harden single issue politics. This might not always be an electoral advantage for the candidate and might even work at cross-purposes, but when it succeeds, there is the possibility of strengthening the ties between the group and the candidate. The interest groups might be more than willing to make that trade-off.

Lastly, given the authors' concerns with the perceived legitimacy of policymaking in a society with great inequalities of wealth, there need to be greater incentives to playing by their rules. It is hard to see why nonparty political groups would sign up for the secret donation booth. They have to raise money in limited amounts under uncertain conditions and then cannot even donate it to candidates. Why not just send a letter to them directly advising them to set up an independent expenditure committee tomorrow? And when the IECs proliferate, the candidate messages will be in their hands. If a commercial interest or a single-issue group visibly sets the campaign messages, why would the public not conclude that the candidate is going to be highly influenced by that group? How would that improve legitimacy of the political process?

At a minimum, the authors need to allow nonparty groups to give donations to candidates, but they need to sweeten the pot

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80.   424 U.S. 1 (1976).

81.   ACKERMAN & AYRES, *supra* note 1, at 122; *see Buckley*, 424 U.S. at 45–47.

with public money if they expect to dampen the temptation to fol-
low the IEC path. In the end, the independent expenditure loop-
hole is as much of a problem for *Voting with Dollars* as it is for
the command and control regulatory structure upheld in *Buckley*.

V. CONCLUSION

The law of escalating cleverness would triumph again if Ac-
kerman and Ayres's proposal were actually implemented, and not
just in the minute details of how ATM cards or signaling between
donors and candidates would work, but in the broader sense that
one cannot plug a constitutional leak with a statutory patch. Con-
stitutional limits give the advantage to those who want to frus-
trate reform.

However, that does not mean that I reject all that they propose.
The Patriot dollar scheme is a worthy experiment that might en-
courage greater citizen awareness and participation. Severed
from the false promises of the secret donation booth, the purpose
of Patriot dollars would be to encourage more candidates to run,
and to help challengers reach a threshold of recognition so that
they can compete for private dollars. That is a more limited goal
than restoring legitimacy and promoting equality in elections, but
a worthy one nonetheless.