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# The Refund Booth: Using the Principle of Symmetric Information to Improve Campaign Finance Regulation

Ian Ayres  
*Yale Law School*

Bruce Ackerman  
*Yale University*

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## The Secret Refund Booth

Bruce Ackerman† & Ian Ayres††

In *Voting with Dollars*,<sup>1</sup> we urged progressives to move beyond the tired mantras of the campaign reform movement—including the holy-of-holies that demands mandatory publicity for all contributions. Though its appeal to transparency is attractive, mandatory publicity promises much more than it delivers.

To be sure, it enables the general public to learn who contributed how much to whom by consulting the information provided by the Federal Elections Commission (FEC). But very few ordinary people take advantage of this opportunity. Mandatory publicity provides transparency in name only (TINO, rhymes with RINO<sup>2</sup>)—informational equality is provided de jure, but not de facto, and that's a big difference.

At the same time, TINO does nothing to change each candidate's information about her own contributor base. Though constituents may remain ignorant, Candidate Sarah Smith is perfectly aware that John Doe has just given her *X* thousand dollars, and she remains free to reciprocate by advocating positions that are in Doe's interests. Though TINO promises to put candidates and constituents on the same informational playing field, it actually creates radical asymmetries that

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† Sterling Professor of Law and Political Science, Yale University.

†† William K. Townsend Professor, Yale Law School. Alex Aleinikoff, Emma Coleman, William Corbett, Vicki Jackson, Greg Klass, Adam Lioz, Sanju Misra, Salvador Valdés-Prieto, and audience members at Georgetown provided helpful comments.

<sup>1</sup> Bruce Ackerman and Ian Ayres, *Voting with Dollars: A New Paradigm for Campaign Finance* (Yale 2002).

<sup>2</sup> Republican In Name Only, pronounced "rhino": a traditional Republican, as seen in right profile. See, for example, Rick Klein, *Party Divided on Mission: GOP Divided on Core Mission*, Boston Globe A7 (Aug 30, 2004) (noting the use of the term to describe moderate Republicans).

politicians regularly exploit on behalf of special interests. Despite the cries of self-righteousness from generations of reformers, their heavy investment in TINO has made them apologists for a system in which special interests win a sustained, and appreciative, response from the political class through the expenditure of vast sums of money.

There is a better approach: rather than praise the virtues of a superficial transparency, it is more sensible to create a “veil of ignorance” over individual contributions, depriving both politicians and the general public of reliable information. Once politicians cannot know who gave them how much, they cannot reward big givers with political favors. The veil of ignorance serves the cause of good government better than superficial transparency, liberating politicians to elaborate a conception of the public good that will appeal to the broad majority of their constituents.

To operationalize the veil of ignorance, *Voting with Dollars* proposed the creation of a “secret donation booth.”<sup>3</sup> Donors could give as much as they liked (up to a high statutory maximum), but they could only give it to a blind trust, operated on each candidate’s behalf by the FEC. The agency would keep secret the names of donors who had given substantial amounts: if Doe gave \$5,000 to Candidate Smith’s account, the FEC wouldn’t provide this information either to the candidate or the public. It would simply tell Smith (and the public) the aggregate amount that had accumulated in her account, allowing her to write checks on this sum for her campaign. Since it would no longer be possible for Smith to determine whether Doe was a big giver or a small fry, it would no longer make sense for her to skew her political conduct to favor Doe’s special interests. The secret donation booth delivers a level playing field—the candidates and their constituents are relative equals behind the veil.<sup>4</sup>

Our initiative took a great leap forward when Chile became the first country to introduce a secret donation booth in political elections.<sup>5</sup> In contrast to our proposal, Chile provides its largest donors

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<sup>3</sup> See Ackerman and Ayres, *Voting with Dollars* at 6 (cited in note 1) (recounting how the secret ballot revolutionized voting by increasing the difficulty of selling votes, and proposing the establishment of a similar “cheap talk” regime for political donations).

<sup>4</sup> As we explain below, no system generates perfect symmetry; we only claim that our approach generates “relative” equality behind the veil. See Part II. This is not the place to explore the philosophical foundations of our approach, but its relationship to some Rawlsian ideas should be obvious. See especially John Rawls, *A Theory of Justice* 195–201 (Harvard 1971) (suggesting the use of different kinds of “veils of ignorance” at different stages of the lawmaking process).

<sup>5</sup> See *Sobre Transparencia, Límite y Control Del Gasto Electoral* (On Transparency, Limits and Control of Campaign Expenses), Ley No 19.884 (Chile 2003), and its modifications, Ley No 20.053 (Chile 2005) (establishing a mixed regime of anonymous and fully disclosed political donations). Following a suggestion by the Code of Judicial Conduct that a judicial “candidate should not be informed of the names of his contributors unless he is required by law to file a list

with the option of donating anonymously or fully disclosing their contribution.<sup>6</sup> But otherwise, the scheme operates in the way we envision, and it successfully survived its first real-world test in municipal elections of October 30, 2004.<sup>7</sup> As practical experience accumulates, other countries will begin paying more serious attention: just as an Australian experiment catalyzed a more general consideration of the secret

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of their names.” E. Wayne Thode, *Reporter’s Notes to Code of Judicial Conduct* 99 (ABA 1973), ten different American states experimented with anonymous contributions for judicial elections in the 1970s. See Stuart Banner, Note, *Disqualifying Elected Judges from Cases Involving Campaign Contributors*, 40 Stan L Rev 449, 473 n 130 (1988) (noting that the ten adopting states were Arkansas, Nebraska, North Dakota, South Carolina, South Dakota, Tennessee, Utah, Washington, West Virginia, and Wyoming).

<sup>6</sup> The Chilean reform is the brainchild of Salvador Valdés-Prieto, an MIT-trained economist at Chile’s Centro de Estudios Públicos (Center for Public Studies), online at <http://www.cepchile.cl/> (visited Oct 17, 2006), who helped shepherd it through the legislative process. See Bertram J. Levine, *Campaign Finance Reform in the United States Congress: A Critique*, 28 Crime L & Soc Change 1, 20–23 (1997) (suggesting a similar “blind” donation reform but arguing that large donations, such as those made to the general fund of a political party, should not be made anonymous). See also Salvador Valdés-Prieto, *Temores de Extorsión en INDAP: Soluciones*, La Segunda (Santiago, Chile) 13 (Jan 12, 2006). The law distinguishes between three sizes of donations, which we will call small, intermediate, and large. See Ley No 19.884, Título II, Párrafo 1. Small donations are less than 20 Unidad de Fomento (UF). (As of 2006, 1 UF is approximately \$34, so contributions below \$680 are essentially unregulated.) These donations are not tax deductible and neither anonymous nor disclosed. See *id* at Título II, Párrafo 3.

Intermediate donations are contributions above 20 UF but below prespecified amounts, varying from \$51,000 (or 10 percent of the spending limit, if less) for presidential candidates to \$20,000 (or 10 percent of the spending limit, if less) for mayoral candidates. It is these donations that must be made through a secret donation booth. See *id* at Título II, Párrafo 1.

To operate the system, the donor first goes to a bank and deposits his contribution into an election commission account. He receives two receipts: a tax receipt which includes the donor’s name and the amount given (but not the candidate or party receiving the contribution) and a second receipt that merely indicates the amount given but not the donor’s name. The donor takes this second receipt to an Election Commission office, enters a curtained booth, and writes the name of the party or candidate that he wishes to support and places it in a donation box. See *id*.

A different system applies to the largest contributions (in presidential elections, those greater than \$51,000). These donations must be fully disclosed. See *id* at Título II, Párrafo 3. But this requirement may be evaded simply by splitting donations into intermediate-sized chunks, which then are processed through the secret donation booth. Thus, the very largest donors are free to choose either full disclosure or anonymity for their gifts.

This is not an insignificant detail—making the donation booth optional is very much a “third-best” response. See generally Ian Ayres, *Symmetry International: Using the Principle of Symmetric Information to Improve Campaign Finance Regulation* 33 (unpublished manuscript Mar 2006) (on file with author). Despite its optional character, however, 86 percent of the contributions greater than 20 UF were made anonymously during the 2004 municipal elections, and anonymous donations financed between 25 percent and 50 percent of total contributions in the recent presidential election. Emails from Salvador Valdés-Prieto to Ian Ayres (Mar 3 and 15, 2006) (on file with authors).

<sup>7</sup> See Nicholas D. Kristof, *No More Sham Elections*, NY Times A19 (Nov 20, 2004) (contrasting the successful Chilean elections with United States electoral campaigns “that were another embarrassing roll in the hay for politicians and lobbyists”).

ballot in the nineteenth century,<sup>8</sup> so may the Chilean experiment prompt a similar movement in the twenty-first century.

This essay tries to help the process of policy proliferation in a different way. Our original proposal has sparked lots of academic commentary in American law reviews,<sup>9</sup> but it has not made much headway amongst reform leaders in Washington, D.C. Although the recent enactment of the McCain-Feingold law<sup>10</sup> has prompted a good deal of reflection about the future, the leading public interest groups and politicians have failed to take the donation booth seriously as an option.<sup>11</sup> For the moment at least, our frontal assault on the principle of mandatory publicity seems too radical for a generation of leaders who have spent so much time and energy working for “full disclosure.”<sup>12</sup>

Which leads us to suggest a more incremental approach in this essay. Our “second-best” strategy is also based on a veil of ignorance, but it requires much less change in existing law. We call it the *secret refund booth*, and it continues to allow the FEC to report the full amount of each contribution to both the candidate and the general public: if Doe places \$2,000 into Smith’s account, the FEC immediately reports this donation on its internet site, inviting anybody and everybody to follow the running tally.

The new wrinkle comes later: each donor is given a five-day “cooling off” period, during which he may ask the FEC to refund some or all of his gift.<sup>13</sup> If he exercises this option, both the public and

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<sup>8</sup> See John H. Wigmore, *The Australian Ballot System as Embodied in the Legislation of Various Countries* 1–2 (Boston Book 2d ed 1889).

<sup>9</sup> See generally, for example, Symposium, *The Brennan Center Jorde Symposium on Constitutional Law*, 91 Cal L Rev 641 (2003) (symposium issue on *Voting with Dollars*); Symposium, *Commentaries on Bruce Ackerman and Ian Ayres’s Voting with Dollars: A New Paradigm for Campaign Finance Reform*, 37 U Richmond L Rev 935 (2003).

<sup>10</sup> Bipartisan Campaign Reform Act of 2002, Pub L No 107-155, 116 Stat 81 (2002), codified at 2 USC § 431 et seq and 47 USC § 315 (Supp 2002) (prohibiting federal candidates from accepting or spending soft money, raising the maximum for hard money donations, and mandating the disclosure of expenditures in excess of \$10,000 for “electioneering communications,” among other provisions).

<sup>11</sup> See, for example, Fred Wertheimer and Alexandra T.V. Edsall, *Response to Voting with Dollars: A New Paradigm For Campaign Finance*, 37 U Richmond L Rev 1111, 1129–33 (2003) (arguing that candidates and donors would be able to evade the anonymity regime). Proposals in the post-McCain-Feingold era have largely centered around the use of public funding for candidates, such as the “Clean Election” laws passed in numerous states. See Lou Dobbs, *Keeping Elections Clean*, CNN (Oct 11, 2004), online at <http://www.cnn.com/2004/US/10/11/Clean.Elections/> (visited Oct 17, 2006) (noting that Maine, Arizona, New Jersey, New Mexico, North Carolina, and Vermont have passed election laws providing public funding for candidates, and that Connecticut, Hawaii, and California were considering similar bills).

<sup>12</sup> As our quotation marks suggest, current reformers actually do not propose full disclosure, and would not endorse anything approaching fullness. See Part II.A.

<sup>13</sup> For a similar recent proposal in the Chilean context, see Valdés-Prieto, *Temores de Extorsión en INDAP*, La Segunda at 13 (cited in note 6) (proposing a secret refund option for small donors).

the candidate remain in the dark, and it is the job of the FEC to maintain the integrity of the secret refund booth. As with the donation booth, neither the candidates nor the general public will know how much money each donor really has given.

We will say much more about this new design, and how it compares with mandatory disclosure on the one hand and the secret donation booth on the other. But one point suffices for purposes of introduction. The refund booth represents a marriage of a disclosure strategy with an anonymity strategy: the FEC publicly reports that “Doe has given Smith no more than \$5,000, but he really may have given her a lot less.”

This formulation introduces a second major theme of our essay. Since the publication of *Voting with Dollars*, there has been a tendency to view mandatory disclosure and mandatory secrecy as warring sides of a zero-sum debate. But as the refund booth system suggests, this is a mistake: it may also make sense to marry publicity and anonymity into a policy reform that is larger than the sum of its parts. This point suggests the need to reflect further on the normative foundations of our enterprise, leading us to elaborate a distinctive idea.

We call it the *principle of symmetric information*: candidates should not know more than the general public about the identity of their contributors.<sup>14</sup> Both publicity and anonymity strategies should be seen as tools for achieving the larger aim of informational symmetry. The symmetry principle is not an absolute. It competes with other principles of political legitimacy. But it is an important part of the normative mix that is deserving of greater recognition.

The devil is in the details. We aim to show how pragmatic institutional design, informed by basic principles, can make the secret refund booth into a serious policy proposal in a second-best setting. As we will show, the refund booth falls short of the donation booth as an ideal reform strategy. But politics is the art of the possible, and for reasons we explain, the adoption of a secret refund booth would mark an important step toward cleaner and more democratic politics.

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<sup>14</sup> In correspondence with our friend Salvador Valdés-Prieto, we have recently learned that he had a similar insight. See Comisión de Reforma del Estado, *Proposiciones sobre el Financiamiento de la Actividad Política* (The Commission on National Reform, *Report on Political Finance*), in Salvador Valdés-Prieto, ed., *1 Reforma del Estado: Financiamiento Político* 387, 436–38 (Centro de Estudios Públicos 2000) (“The first purpose of regulating information about the sources and amounts of private donations is to achieve the objective of ‘information symmetry’ between politicians and voters: to publicize to citizens everything that the candidate and his party knows about the source of those donations.”) (translated by Salvador Valdés-Prieto).

## I. PRINCIPLES

Begin from the beginning: the ideal of liberal democracy is built on the principle of public accountability, and in general there can be no accountability without lots of information. Ordinary citizens must have access to the relevant facts so that they can participate in free democratic dispute. And they must know how their representatives are exercising power in their name, so that they can throw their representatives out of office if those representatives are making bad decisions.<sup>15</sup>

Politicians and bureaucrats should not be permitted to arrange their affairs to make citizen oversight more difficult than it already is. This is the rationale for one of the great reforms that has swept the world over the past half-century: freedom of information laws place the burden on government to give special reasons for keeping relevant data from its citizens.<sup>16</sup> On this foundational level, there is a presumption for mandatory disclosure, rebutted only by a persuasive showing that secrecy is required for the effective pursuit of competing liberal democratic values.

We not only endorse this basic framework, but we think it explains why *Voting with Dollars* has encountered initial resistance amongst American reformers. If pressed, they would doubtless recognize that the presumption for mandatory disclosure can be rebutted successfully in other contexts—they would have no inclination to challenge the secret ballot, for example. But until recently, reformers had not seriously considered whether secrecy might serve their purposes in the campaign context. They supposed that the only advocates of secrecy were special interests intent upon buying political support at the lowest possible price. *Voting with Dollars* aimed to shatter this complacent mindset. Building on the precedent of the secret ballot, we presented substantial reasons to carve out a secrecy exception for individual contributions—reasons that supported, rather than undermined, the larger liberal democratic project of self-government.<sup>17</sup>

Here is where the principle of informational symmetry—as we have come to understand it—enters the argument. Mandatory disclosure of individual contributions does not in fact generate symmetry; it merely yields TINO, allowing special interests to use their campaign

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<sup>15</sup> See Bruce A. Ackerman, *Social Justice in the Liberal State* 307–10 (Yale 1980) (noting that “the most basic right of any citizen is the right to have his question of legitimacy answered in a liberal conversation”). See generally Bruce Ackerman and James S. Fishkin, *Deliberation Day* (Yale 2004) (proposing a national holiday for citizen deliberation before major elections).

<sup>16</sup> See John M. Ackerman and Irma E. Sandoval-Ballesteros, *The Global Explosion of Freedom of Information Laws*, 58 Admin L Rev 85, 93 (2006) (noting that “[u]nder a FOI law, government documents are assumed to be public unless specifically exempt by the law itself”).

<sup>17</sup> See Ackerman and Ayres, *Voting with Dollars* at 33–44 (cited in note 1).

contributions to deflect representatives from elaborating the views held by the broad majority of their constituents. Under TINO, the public and the politician both learn who contributed, but the politician is much more likely than the public to learn why the contribution is made. It is true, of course, that TINO is less asymmetric than a system that gives special interests the option of contributing without telling anybody (other than the politician!). (We call this option the system of selective secrecy, SSS.) Indeed, if SSS were the only feasible alternative, we would wholeheartedly agree that TINO deserves every democrat's support.

But TINO isn't the most symmetric system we can achieve. Or so, at least, claims *Voting with Dollars*. By depriving politicians, as well as constituents, of the critical information about donors' identity, we come much closer to a level informational playing field, and thereby greatly reduce the politicians' practical capacity to skew their positions in favor of big contributors.

To put our point within the foundational framework of liberal democratic theory: we recognize that the secret donation booth requires a special justification to rebut the general presumption in favor of mandatory disclosure. But we believe that *Voting with Dollars* overcomes this burden by creating conditions of relatively symmetric information. Once placed on the same playing field, voters can have reasonable confidence that their representatives will actually represent *them*, and not the narrow interests of big campaign contributors. This does not imply, of course, that any individual voter will agree with everything that his representatives say or do. But at least he knows that they have the right incentives; at least he can expect them to try to elaborate ideals of the public good that express the values and interests of a broad majority of the community, and not skew their vision to favor big campaign contributors.<sup>18</sup> Call this the *ideal of responsive democracy*, and it should trump the presumption in favor of mandatory disclosure.<sup>19</sup>

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<sup>18</sup> The First Amendment does not place an affirmative obligation on government to divulge information, and there can be no fair question as to the constitutionality of regulatory strategies that rely on the veil of ignorance. See *id.* at 150–54 (noting that the restrictions on the right to associate imposed by the secret donation booth are “narrowly tailored . . . to fit the particular problem—corruption control—which the Court has traditionally recognized as the primary ground for constitutionally legitimate campaign reform”).

<sup>19</sup> We develop this argument further through a comparison with the secret ballot. See *id.* at 6, 93–95 (noting that under a regime of secret balloting, “the promise of a voter to sell his franchise for money became worthless—and as a consequence, vote-buying declined dramatically”). There are also subordinate rationales supporting the exception. For example, the donation booth makes it more difficult for incumbents to coerce regulated industries to give large contributions. See *id.* at 171–72 (“[S]pecial dealing with big business will be far less common—especially as pols learn that enhanced access no longer reliably translates into increased contributions.”).



And yet, in designing the donation booth, we did not push the anonymity strategy beyond reason. We narrowly tailored our system to minimize its impact on the general presumption in favor of disclosure. Consider, for example, our treatment of small gifts under \$200. Since the prospect of these gifts would not unduly influence politicians, we allowed our reformed FEC to report them more fully: “Joan Sixpack has given \$50 to Candidate Smith.”<sup>20</sup> Similarly, for larger donations, the FEC would report that “Doe gave \$200 or more,” providing some information, but not enough to generate a serious asymmetry.<sup>21</sup> We also stressed the importance of publicizing the total amount each candidate received from private donors and comparing it with the total received from public funding.<sup>22</sup> If the FEC regularly reported this “private/public funding ratio,” ordinary citizens could readily assess the degree of each candidate’s overall dependence on private funds.

Since the novel aspect of our proposal was its challenge to mandatory publicity, we emphasized the role of the secret donation booth in our overall design. But our original proposal also sought to maximize publicity, consistent with the larger aim of achieving informational symmetry in the service of responsive democracy.

From this vantage, our new policy idea continues down the same path marked out by its predecessor. The secret refund booth allows for greater information than the secret donation booth. The FEC would no longer report that “Doe has given \$200 or more,” but that he “may have given as much as \$5,000”—allowing the broader public to distinguish him from Roe, who “may have given as much as \$2,500,” and Moe, who “may have given as much as \$10,000.”

The refund booth would also provide the public with a complete list of all the people who have potentially purchased influence and access from the candidate.<sup>23</sup> At the same time, it would serve to disrupt

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<sup>20</sup> We did not make disclosure mandatory, leaving it up to each small donor to decide whether he wanted to make his identity public. See *id.* at 96 (“[N]obody supposes that \$100 can buy influence, so why not allow the trust to confirm the small donor’s gift, and thereby help him to encourage others to mail in \$100 gifts of their own?”). Within this limited context, we believed that the principle of freedom trumped the principle of public accountability—but others might reasonably disagree.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 108–09.

<sup>23</sup> The FEC should also report how much of each candidate’s overall financial support comes from different classes of large and small donors, after all refunds have been taken into account. This will allow the public to know, for example, how heavily different candidates are depending on a relatively small flow of big gifts over \$1,000 as compared to a big flow of small gifts under \$100. As a technical matter, each category used in the FEC reports should contain a sufficiently large number of gifts so as to make it virtually impossible for the candidate to determine whether any particular giver has exercised his secret refund option. We thank Adam Lioz for suggesting this very useful refinement of the basic scheme.

the potential for undue influence: though Doe, Roe, and Moe may all assure Smith that they haven't withdrawn their checks for \$2,500, \$5,000, and \$10,000 during the five-day "cooling off" period, Smith will begin scratching her head in disbelief when the FEC reports, say, that 40 percent of her pledged funds have been withdrawn, and that she may only write checks on the remaining 60 percent.

## II. SYMMETRY, REFINED

We have already sketched some reasons for thinking that the refund booth is more symmetric than TINO, and that it serves some of the same purposes as the donation booth. This section refines these comparisons. It shows that all systems will predictably fall short of perfect symmetry. Politicians inevitably end up learning more about their contributors than the public. But this does not mean that different regimes are equally asymmetric.

### A. Mandatory Disclosure

Existing federal law requires timely public disclosure of a contributor's name, address, and occupation, but it doesn't require the candidate to tell the public lots of other relevant information.<sup>24</sup> Most fundamentally, the public does not know whether or not the candidate agreed to adapt his policy positions in exchange for the donation. This represents a large breach of symmetry, since the candidate surely knows whether or not she entered into a money-for-influence deal. And, unsurprisingly, candidates are quick to exploit the resulting asymmetries.

Presidential politics provides some vivid examples. In his 2000 campaign, George W. Bush solicited contributions with the aid of a four-digit code, with each number representing a different industry group.<sup>25</sup> For example, Tom Kuhn was one of Bush's 400 "pioneer" fundraisers, but he was also head of the Edison Electric Institute, a lobbying group that represents investor-owned electric utilities. As part of the kick-off to Bush's money-raising effort, Kuhn sent a solici-

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<sup>24</sup> See 2 USC § 434 (2000 & Supp 2005) (requiring, in part, the disclosure of the identities of persons contributing \$200 or more within a calendar year); 11 CFR § 300.36 (2005) (imposing mandatory reporting for all receipts and disbursements of federal funds for federal election activity).

<sup>25</sup> See Andrew Wheat, *George W. Bush, Corporate Candidate: How Money Grows on the "Shrub,"* in *Legalized Bribery*, 21 *Multinational Monitor* 9, 12 (Mar 2000) (noting that the use of identification codes avoids legal prohibitions on physically bundling donation checks). See also Michael Isikoff, *The Money Machine*, *Newsweek* 46, 46-49 (Jan 24, 2000) (describing bundling as "[t]he real key to Bush's unprecedented fund-raising success . . . [O]ne man recruits ten friends willing to chip in the maximum of \$1,000 apiece. They in turn recruit ten more friends each"); Jacob Weisberg, *Ballot Box to Bush: Release the Codes!*, *Slate Magazine* (Jan 19, 2000), online at <http://www.slate.com/id/1004419/> (visited Oct 17, 2006) (discussing whether the use of tracking codes increases competition among major campaign contributors).

tation to the leading executives of Edison's member corporations that read in part:

As you know, . . . a very important part of the campaign's outreach to the business community is the use of tracking numbers for contributions. Both Don Evans and Jack Oliver [Bush campaign officials] have stressed the importance of having our industry incorporate the #1178 tracking number in your fundraising efforts. Listing your industry's code does not prevent you, any of your individual solicitors or your state from receiving credit for soliciting a contribution. It does ensure that our industry is credited and that your progress is listed among the other business/industry sectors.<sup>26</sup>

Solicitations like this permitted lobbyists to obtain full political credit for their industry when the time came to influence policy once the Bush Administration came to power.

This four-digit code served as an intentional deviation from symmetry. The Bush campaign dutifully disclosed the names of individual donors and how much each gave, but it refused—even when asked by journalists—to release the donations associated with each code number.<sup>27</sup> From Bush's perspective, the four-digit code represented an ingenious way of privatizing "PAC bundling."<sup>28</sup>

Each four-digit code represented a "virtual PAC" for a distinct interest group, allowing it to get credit with the Bush campaign for much more than the size of each individual's personal contribution—set, at that time, at a maximum of \$1,000. Electric utilities didn't need to go to the trouble of setting up a special PAC for industry investors and executives. The limited disclosure required by the law allowed the Bush campaign to do it for them.

Of course, the mandatory publicity strategy has its own resources to counter such abuses: why not simply expand reporting requirements to include more and more potentially relevant information?

<sup>26</sup> Wheat, *George W. Bush, Corporate Candidate* at 12 (cited in note 25) (second alteration in original). As Wheat writes: "The Bush campaign reportedly assigns each Pioneer a number that his or her recruits are supposed to write on their contribution checks." Id.

<sup>27</sup> Weisberg, *Ballot Box to Bush: Release the Codes!*, *Slate Magazine* (cited in note 25).

<sup>28</sup> "PAC bundling" more generally refers to a tactic utilized by PACs to evade the \$5,000 limit on donations from organizations. PACs request their members to write out a check to the candidate, but then make sure that the candidate receives the check as part of a bundle from the PAC. This way, the organization receives credit for the check, but since it is technically from a separate individual, it doesn't eat away at their total statutory maximum donation. Through this method, a large PAC can buy hundreds of thousands of dollars in influence from a candidate while technically staying under the \$5,000 limit. See Ackerman and Ayres, *Voting with Dollars* at 97–98 (cited in note 1), citing Fred Wertheimer and Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 *Colum L Rev* 1126, 1140–41 (1994).

Requiring candidates to disclose all written information concerning the amounts and preferences or characteristics of their contributors would shore up the aspiration of symmetric information. By expanding the domain of mandatory disclosure, the public would learn how much was given for each of the industrial codes.

But this is a strategy with dramatically diminishing returns. If, for example, the FEC required the publication of four-digit codes, the next electoral cycle would precipitate a search for an unregulated technique serving the same purpose. An ongoing cycle of cat-and-mouse would ensue, with new regulations seeking to embrace the most recently created asymmetries. The only clear result: more and more paperwork, making technical violations of the rules more and more likely. This, in turn, would generate a greater evil: the further criminalization of politics, as federal prosecutors charge campaigns—especially losing campaigns—with willful violations of the proliferating rules.<sup>29</sup>

A more aggressive regulatory strategy would generate greater dangers. Under this scenario, our hypothetical FEC does not merely require the revelation of particular techniques, but attacks the problem of asymmetry on a broader front. For example, candidates (and high-ranking campaign officials) might be required to report every personal (or telephone) contact with a major contributor—on the theory that contributors without such contacts are less likely to gain special deals. These rules would, once again, invite evasion by using go-betweens who don't qualify as "major" donors. But more fundamentally, they would undermine a crucial element of democratic life. Politics wouldn't be politics if politicians couldn't take informal and confidential soundings with trusted supporters on an ongoing basis. The pursuit of symmetry would come at much too high a price in terms of other democratic values.

There is, then, a doubly asymmetric character to the traditional reform strategy. Not only does mandatory disclosure generate transparency in name only, but the information we do ask the candidate to disclose is radically incomplete. The candidate is not obliged to share with the general public much of the most important information she may possess about her major contributors.

## B. Donation Booth

The donation booth cuts through these asymmetries in a single blow. Suddenly, the candidate doesn't know what is really going on,

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<sup>29</sup> See Ackerman and Ayres, *Voting with Dollars* at 46–47 (cited in note 1) (“We have already seen the rise of this pathology in the past decade. . . . Unless we change course, it is only a matter of time before a leading statesman will be sent away in handcuffs.”).

any more than the general public. All she sees is a report from the FEC that says that “Doe has given more than \$200.”<sup>30</sup> But does “more” mean \$201 or the statutory maximum?

Nobody can say for sure, and yet, there will still be asymmetries: Doe can always approach the Smith campaign and swear that he has indeed given the maximum, while keeping this information from the general public.

Yet this seems far less serious than the deep problems prevailing under the traditional disclosure regime. Given the donation booth, *everybody* who gives \$201 can tell the campaign that he has contributed much more, and everybody will have an incentive to do so since, if believed, he or she will be treated like a big shot by candidate Smith. The result will be the proliferation of “cheap talk”: when the campaign treasurer adds up all the Does who tell her that they have given the maximum allowable amount, she will find that the cheap talk adds up to much more than the money she sees in her blind trust account. As a consequence, the candidate will continue to be in the dark, and the symmetry condition will more or less hold.

Some of our critics have been unimpressed.<sup>31</sup> And, to some extent, they are right: there may well be a slippage between the pristine predictions of game theory and real world behavior. Smith will probably believe her college roommate when she says that she has maxed out her campaign giving (though even college roommates have been known to run on the dark side).<sup>32</sup> Nevertheless, most big contributions come from big business executives,<sup>33</sup> and most executives don’t have strong personal connections to most candidates. Once a large shortfall appears between cheap talk and the hard numbers coming out of the blind trust, it will be very tough for the candidate to separate the

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<sup>30</sup> Under § 8(h)(1) of the “Citizen Sovereignty Act,” our original proposal for replacing a system of mandatory disclosure with a donation booth, contributions would be anonymous as a default rule, but donors could “specifically request attribution” if they so chose. See *id.* at 201. But we now think that it is better if all big contributors be required to reveal that they have given at least \$200, and we will be comparing a donation booth with a refund booth using this common informational benchmark.

<sup>31</sup> See generally Symposium, 91 Cal L Rev 641 (cited in note 9); Symposium, 37 U Richmond L Rev 935 (cited in note 9).

<sup>32</sup> There is a natural limit to the number of friends and family that each candidate member will trust to keep their word. Beyond this relatively small group, it will be very hard for candidates to separate the cheap talkers from sincere donors. See Ackerman and Ayres, *Voting with Dollars* at 28 (cited in note 1).

<sup>33</sup> See Center for Responsive Politics, *2004 Election Overview: Top Individual Donors*, online at <http://web.archive.org/web/20050320131818/http://www.opensecrets.org/overview/topindivs.asp> (visited Oct 17, 2006) (listing donors by total dollar amounts contributed and share of total figure given to two major political parties).

sheep from the hyenas—all will be professing their innocence, all will be looking perfectly respectable—so who is a poor candidate to trust?<sup>34</sup>

We continue to believe that serious politicians will respond skeptically: they will recognize that, with the exception of personal friends, they, along with the general public, remain pretty much in the dark.

### C. The Refund Booth

At first glance, it may seem that there is only a semantic difference between the donation and refund booth proposals. What difference does it make if the Commission says that “Limbaugh initially gave \$2,000 but might have asked for a refund,” instead of saying “Limbaugh gave at least \$200 but might have given the statutory maximum”?<sup>35</sup> Yet this small change can have big consequences. We begin by explaining why the refund booth scores higher marks on important dimensions before exploring one of its great weaknesses in detail, suggesting that it will probably prove decisive in real world settings, making it second best to the donation booth strategy.

But let’s start with the affirmative case: in theory at least, the refund booth might be more successful in preserving symmetry between politicians and their constituents. Under the donation booth scenario, many big givers will undoubtedly try to convince the campaign of the true extent of their generosity: while they may not be believed, they will tell the candidate things that the public won’t hear. These private statements to the candidate therefore offend the symmetry principle.

This won’t happen with the refund booth. The FEC would now be reporting the maximum amount of Doe’s gift, so he no longer has an incentive to achieve credibility by privately assuring the campaign that he gave what the FEC said he gave. In this respect, the refund booth represents a symmetry improvement over the donation booth: both the candidate and the general public will know the maximum amount that each contributor might have given.

Symmetry may also be easier to maintain over time. Under the donation booth regime, contributors have ongoing incentives to undermine the anonymity system. They will wave their cancelled checks

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<sup>34</sup> Givers who actually approach the campaign and claim to have made big donations are just the folks most likely to be exaggerating. Donors who don’t even bother to contact the campaign are less likely to have been acting for strategic reasons, and so are less likely to exaggerate their contribution. This basic fact makes it even harder for candidates to distinguish cheap talkers from sincere givers who have in fact contributed large sums.

<sup>35</sup> The current statutory maximum is \$2,000, but *Voting with Dollars* favors large increases in this sum, so long as the size of the donations remains secret. See Ackerman and Ayres, *Voting with Dollars* at 204 (cited in note 1) (proposing contribution increases to \$5,000 for House candidates, \$10,000 for Senatorial candidates, \$100,000 for Presidential candidates, and \$100,000 for political parties during presidential election cycles).

to prove that they have contributed (concealing the fact that they have instructed the FEC to refund the money); they will try to bomb the blind trust with large donations and overwhelm the FEC's efforts to keep them secret; they will privately swear on a stack of Bibles that they really gave. *Voting with Dollars* proposed a series of realistic responses to these threats that would sustain the integrity of the system over time.<sup>36</sup>

But the refund booth avoids these shenanigans in the first place and thereby places less pressure on the administrative system. Donors certainly are not going to bomb the refund apparatus by requesting a large refund, since this will only tip off the candidate that some big donor is chiseling on his deal.<sup>37</sup>

The consequences of administrative breakdown would also be less serious. If the FEC leaks confidential information in a donation booth world, candidates may readily identify big givers while the public remains entirely in the dark. A comparable failure will have less devastating consequences in the refund booth regime. In this world, the public *already* knows the maximum amount each donor might have contributed, and so can identify the potential big givers. At the worst, an FEC failure will allow the candidates to learn which givers took their money back. While this is a serious breach of symmetry, it is not as serious as the failure under the donation booth.

These are very real advantages, but it is time to turn to the dark side. Most obviously, the refund booth leaves part of the problem entirely unsolved: since incumbents can still identify big supporters of their challengers, they can punish them for fueling the opposition campaign—refusing to meet with their lobbyists and retaliating with punitive legislation. This prospect, in turn, will deter contributions to the challengers' campaign chests, further increasing the incumbents' electoral advantage.<sup>38</sup>

There is a second problem, which threatens the entire system. In contrast to the donation booth, the refund system crucially depends on the willingness of donors to demand their money back. If they don't exercise their refund option in a big way, a well-administered

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<sup>36</sup> See, for example, Ackerman and Ayres, *Voting with Dollars* at 49 (cited in note 1) (describing precautions against donors concentrating large contributions into a small period in order to make it easier for the candidate to identify their source).

<sup>37</sup> See *id.* for a discussion of precautions against efforts by donors to "bomb" the donation booth with concentrated gifts so as to facilitate their identification by candidates.

<sup>38</sup> See Ian Ayres, *Symmetry International: Using the Principle of Symmetric Information to Improve Campaign Finance Regulation* 39–40 (cited in note 6) (explaining that initial disclosure of contributions to an opponent exposes a contributor to possible reprisal).

donation booth will get much closer to real world symmetry than its competitors. Since this is a key point, it deserves careful treatment.

### III. THE SECOND-BEST CASE FOR THE REFUND BOOTH

Generally speaking, the refund system won't allow Candidate Smith to know, with absolute certainty, whether Doe has actually requested a refund of all or part of his promised \$5,000, and in that sense, it leaves her in the dark. But if few refunds are requested in the aggregate, Smith will be in a position to make a good guess that Doe is indeed a man of his word and has refrained from exercising his refund option. Under this "low refund" scenario, the system produces results quite similar to those prevailing under the current TINO regime: candidates and the public have a pretty good idea about who gave what, but only the candidates know if there was an implicit or explicit quid pro quo. In contrast, the donation booth strategy doesn't depend on any further action by the contributors—so long as the FEC maintains secrecy, the symmetry benefits of the operation remain secure.

The critical question, then, is whether the "low refund" scenario looks like a high probability in the real world. Unfortunately, our answer is yes.

#### A. "Stay the Course"

To introduce the problem, suppose that the refund booth is in operation, and put yourself in the position of a large contributor: you have sent in a check for \$5,000, and the FEC has credited your contribution to Smith on its official internet registry. To verify your gift, you dial up the internet site, and you see your name glaring at you: John Doe . . . \$5,000.<sup>39</sup>

The site also emphasizes that you have a five-day cooling-off period before the gift is final, and you ponder your next step. You recognize, of course, that you wouldn't be doing anything flat-out immoral if you decided to take the money back, in whole or in part. Cooling-off periods have become a common response to high-pressure sales tech-

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<sup>39</sup> We are engaging in a bit of poetic license here. One could design the system so that specific donations aren't displayed until the cooling-off period has passed (though when the gift is announced, there is no mention of whether the donor has exercised his refund option). This change, however, would not deflect the "stay the course" response: not only does the initial promise already frame the meaning of honorable conduct, but the donor knows that, after the cooling-off period has elapsed, he will be on record as committing himself to a gift of a particular size, and that his relevant public will have reason to suppose that he hasn't welched on his commitment.



niques,<sup>40</sup> and donors traditionally have been given even greater latitude when it comes to rescinding impulsive gifts.<sup>41</sup>

Nevertheless, the fact that you are *already* on official record as giving the money may serve to frame the social meaning of the transaction, generating a sense of personal commitment: “I am a man of my word,” you may well say to yourself, “and I should stick to my word, unless there is something special that I haven’t previously considered that changes my mind.” Call this the “stay the course” response, and if you adopt this interpretive framework, it will greatly reduce the likelihood of making a refund request.

But will the overall impact of “stay the course” be small or large? Suppose, for example, that you have given Smith \$5,000 because you are afraid that she will exact retribution on your business interests if she doesn’t see your name amongst the big givers. Then, “stay the course” may well be dominated by “let’s get my money back from this scoundrel ASAP!” Putting coercive threats to one side, you might take a purely instrumental view of your contributions: “I have no obligation whatsoever to stick to my word; this is politics, not charity. So now that I’ve gotten political credit from Smith, I’ll take my money and run.”

Many more variations are possible, but it is not necessary to spin them out to make our main point. Suppose that, empirically speaking, the overwhelming majority of donors “stay the course” and fail to exercise their refund option. If this turns out to be true, the refund booth will generate a much more serious asymmetry than the donation booth.

To fix ideas, let’s say that every time Smith receives a \$1 million in initial gifts, she loses only \$50,000 through the refund booth. This refund pattern would suffice to generate a severe “asymmetry scenario”: even if Smith has no other information about Doe’s behavior,

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<sup>40</sup> See, for example, Cal Civ Code § 1689.6(b) (West 1985 & Supp 2006) (providing a mandatory seven-day cooling-off period for the home sale of personal emergency response units); ND Cent Code §51-18-02(1) (1999) (providing elderly buyers with fifteen business days to cancel a home solicitation contract); 105 ILCS Ann 425/15.1a(1)(a) (West 1998 & Supp 2005) (providing students with five business days after enrollment to receive a full tuition refund after canceling their registration). The Federal Trade Commission has also mandated a three-day cooling-off period for door-to-door sales. See 16 CFR § 429.1(a) (2001) (defining as unfair and deceptive sales practices in connection with door-to-door sales that fail to notify purchasers of the mandatory three-day cooling-off period). See also Colin Camerer et al, *Regulation for Conservatives: Behavioral Economics and the Case for “Asymmetric Paternalism,”* 151 U Pa L Rev 1211, 1240–44 (2003) (collecting statutes that impose cooling-off periods in consumer protection, family law, and settlement agreement contexts).

<sup>41</sup> See, for example, Colo Rev Stat Ann § 6-16-106(1)(b) (West 2002) (providing that a donor has “until midnight of the third business day” to revoke a solicited charitable pledge); Md Code Ann, Com Law § 14-2603(b)(4) (Lexis 2005) (providing that door-to-door solicitors must inform consumers that they have the “right to a refund or return of any contribution made pursuant to a door-to-door solicitation if requested within 30 days after the contribution is made”).

she can reasonably assume that, with a 95 percent probability, Doe has given what he said he gave, and act accordingly.<sup>42</sup>

To put the point in comparative terms, the “stay the course” scenario has transformed the refund booth into the virtual equivalent of a mandatory publicity regime—with all its unfortunate asymmetries. In our hypothetical example, Smith will treat a reported contribution from Doe of \$5,000 as if it were the “certainty-equivalent” of a contribution of 95 percent of \$5,000, or \$4,750—not a very big difference.

As the percentage of refunded contributions varies between 0 and 100 percent, the refund booth moves from mimicking a system of pure disclosure to a regime that mimics pure anonymity.<sup>43</sup> Within the broad range of intermediate cases, politicians will increasingly discount the informational value of the official contribution reports as the refund rate increases. From the politician’s point of view, the refund booth may impose a stiff “probabilistic tax” on willingness to trade policy positions for special-interest cash. If refund rates turn out to be low, the refund booth is but a pale shadow of the contribution booth. But if rates are substantial, it becomes a more serious competitor.

The crucial question is empirical but, unfortunately, beyond our powers to predict with any pretense at accuracy. It seems reasonable to think that refund rates will not be trivially small. At least some people give only to gain credit in the eyes of observers, and they will leap at the chance of getting their money back: no university, for example, would give their alumni the chance to request a secret refund of their donations to the annual fund—the chances of a significant dip would be too great. But it is one thing to say that refunds would be more than a trickle; it is quite another to predict that the proportion would be large enough to approximate the benefits of perfect anonymity. We therefore continue to support the donation booth as our reform strategy of choice, so long as political conditions are propitious.

But in America, at least, we are a long way from creating the conditions for such a large regulatory breakthrough. And as a conse-

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<sup>42</sup> This is an application of the “principle of insufficient reason.” More sophisticated inferences may sometimes be plausible. For example, candidates who receive a larger proportion of small donations may find that they suffer a lower proportion of refunds, which might indicate a lower tendency of small contributors to ask for their money back. Candidates might also reasonably believe that donors who hedge their bets by giving to their rivals will be more likely to request refunds, because they are already revealing an emphatically strategic orientation in their giving. Generally speaking, however, it will be impossible to validate many potential refund tendencies by studying patterns of revealed behavior.

<sup>43</sup> To be precise, a system in which 100 percent of contributions were refunded would not mimic an anonymity regime, because there would not be any net contributions. But the closer the system approaches 100 percent refunds, the closer it will resemble a regime of perfect anonymity.

quence, it seems worthwhile to consider whether conditions are ripe for the more interstitial gains promised by the refund strategy.

## B. One Step at a Time?

The refund booth represents much less of a wrench in the regulatory status quo, at least in America. There is no need to repeal the present system of disclosure: donors' contributions will continue to be publicized, in the same manner as they are today.<sup>44</sup> Reform requires tacking on the refund booth as an add-on, and in a way that is familiar in many other settings. For example, the FTC requires door-to-door salesmen to give their buyers a cooling-off period so that they may revoke after the moment of high-pressure salesmanship has passed.<sup>45</sup> A similar rationale applies here: shouldn't campaign contributors be given the right to take back their gifts if they were overwhelmed by political pressure?

The refund booth is our attempt to make peace with disclosure advocates. Voters can continue to obtain a complete list of big contributors from the FEC, as they do today. Only now, some "big donors" really didn't give a large amount of money, once their refund requests are taken into account. Nevertheless, this overinclusiveness will not seriously undermine the quality of the information provided the general public. If a name appears on the big-giver list, the general public is on notice that there is a real possibility of special interest influence.

Moreover, the refund booth promises a further benefit: it will provide a compelling safeguard against political extortion by sitting politicians. There are countless anecdotes involving powerful incumbents threatening to retaliate against special interests who fail to meet their fundraising demands.<sup>46</sup> These threats come in a bewildering variety—implicit as well as explicit—and it is hard to get a grip on the precise size of the problem. Despite the newspaper headlines, perhaps hold-ups by powerful incumbents account for only a relatively small percentage of special interest giving; perhaps not. But even if the percentage is small, there is a special evil here—one that would be entirely eliminated by the refund booth. A powerful politician may force you to

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<sup>44</sup> The current minimum contribution that must be reported is \$200. See 2 USC § 434(e)(3) (2000 & Supp 2005); 11 CFR § 300.36(b)(2)(iv) (2005).

<sup>45</sup> See 16 CFR § 429.1(a) (2005).

<sup>46</sup> See Thomas B. Edsall, *Lobbyists' Emergence Reflects Shift in Capital Culture*, Wash Post A1 (Jan 12, 2006) (pointing out the correlation between lobbyist fundraising and access to elected officials and noting that although "[f]allout from the Abramoff scandal is likely for a time to chill certain aspects of the capital culture, . . . some public interest advocates believe the relationships between lobbyists and politicians have become so institutionalized in recent years that fundamental change is unlikely").

give, but she can't keep you from getting your money back. And once the refund booth makes this clear, extortion will become pointless.<sup>47</sup>

The same logic will eliminate second-order extortion—where employees of private businesses are “encouraged” by their bosses to give to the firm’s favorite politicians. Once again, these extortionary pressures will cease once the boss can’t check up on refunds.<sup>48</sup>

These points, alas, won’t be lost on powerful incumbents, who have the most to lose from the refund booth. Although it may seem like an incremental reform when compared to the donation booth, it will look like a big deal to many sitting politicians, who will fight fiercely to preserve their fundraising advantages over potential challengers. But nobody has ever said that campaign reform is an easy business.

Yet even here, the refund booth’s incremental character may help overcome predictable political resistance. Many reform activists have long-standing commitments to public disclosure. The refund booth allows them to maintain this baseline belief, while experimenting with the potential utility of a veil of ignorance. If it turns out that the refund scheme simply stops extortion, that is a sufficient reason to support it. But if it actually generates very substantial reductions in the flow of special interest money, the stage will be set for more fundamental rethinking. Why not take the next step, and lead a campaign for the donation booth, and its more rigorous pursuit of symmetry between representatives and their constituents?

All things considered, the refund booth seems like a sensible second-best strategy. When the next great scandal hits, and the public once again demands that incumbents “do something” to clean up their act, reformers should be prepared to insist on its enactment.

Nevertheless, it can only serve as a first step. There is a clear and present danger that the refund booth will fail to achieve anything resembling informational symmetry between candidates and their constituents. Although it is a fine thing to stop extortion by politicians and business leaders, this is only part of a much larger problem. Many donors have no trouble appreciating the advantages of having powerful friends in Washington. They don’t need politicians to threaten retribution in order to keep giving large amounts to push their special interest agendas.

And at this point, the limitations of the refund strategy become plain. It may well impose a “probabilistic tax” on these contributions:

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<sup>47</sup> At the same time, the refund booth will give the public and public prosecutors a paper trail if some extortion continues to occur. For example, if all the employees of a particular factory show up on the initial contribution list for some unknown out-of-state candidate, prosecutors might want to ask whether this remarkable pattern was the product of improper employer pressure.

<sup>48</sup> Note, however, that the refund booth will not prevent incumbents from punishing contributors to their challenger’s campaign. See text accompanying note 38.

each time a special interest gives \$1,000, the politician won't credit it with the full thousand, but will reduce it by an *X*-factor representing the amount of refund activity reported by the FEC. This "tax," in turn, will reduce the flow of funds to some extent.

Only the donation booth will get to the root of the problem. Once a virtually total veil of ignorance drops over campaign contributions, it will no longer make sense for special-interest donors to give money in exchange for political influence. The only gifts that will seem worth making are those motivated by nobler sentiments: admiration for a candidate or principled support for his program, without any expectation of special reward. And that's the way it should be.

The secret donation booth will clear a space for these public-interest donations. So long as the flood of special-interest money continues, the motivations of public-spirited donors are inevitably suspect: they may say that they are trying to save the Republic, but are they really in the business of helping themselves?

Once the donation booth eliminates the prospect of self-dealing, these questions will no longer impugn the serious purpose of the donors who remain. To be sure, the politicians won't know whether donors are telling the truth when they declare that they have given largely to the cause. *But the donors will know*—and they will take a justifiable pride in taking their American citizenship seriously.<sup>49</sup> Nothing like this is likely to happen under the refund booth regime.

While the refund booth would be a step forward in the right direction, we should not hesitate before taking two steps forward if the politics are right. Moments for serious campaign reform don't happen very often—once, maybe twice, in a generation will a wave of scandal sweep away, for a moment, the remorseless political resistance by well-entrenched incumbents skilled at milking special-interest groups. Within this realistic temporal horizon, the no-nonsense charms of a "one-step-at-a-time" strategy begin to pale: are we really prepared to wait till 2050 for the scandal-after-the-next-scandal to convince Americans that they need a secret donation booth to level the playing field?

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<sup>49</sup> For more, see Ackerman and Ayres, *Voting with Dollars* at 14 (cited in note 1), which would grant 50 "Patriot dollars" to all registered voters for the special purpose of contributing to the support of political campaigns during presidential election years. The Patriot dollar initiative would enable all American voters, and not just the upper class, to use campaign contributions as an occasion for public-regarding citizenship. For more general reflections on American citizenship, see Bruce Ackerman, *We the People: Foundations* 231–43 (Belknap 1991) (comparing and contrasting the political behavior of "private citizens," "public citizens," and "perfect privatists"). See generally Bruce Ackerman, *The Citizenship Agenda*, in Balkin and Siegel, eds, *The Constitution in 2020* (New Press forthcoming).

## IV. PRAGMATICS

The good should not be the enemy of the best. An incremental approach may be the only one that is politically feasible, so it pays to consider how the refund booth might actually operate in the real world. As the following sketch suggests, the technologies of the twenty-first century make the job of implementation a lot easier. It's entirely realistic to design a system that operates with high accuracy and low cost.

Our sketch proceeds in the incrementalist spirit that motivates the entire exercise: the goal is to change the current regulatory regime as little as possible.<sup>50</sup> So far as donors are concerned, the only difference is that they could send a private letter or email to a special FEC address asking for a refund of all or part of their contribution.<sup>51</sup> They would have up to five business days to make this request—or they could, if they like, ask for their refund at the same time they make their donation.

Things get a bit more complicated for candidates and political organizations. They would be required to deposit all contributions into escrow accounts at seasoned trust banks and then wait for their money as the banks report each contributor's name, address, and social security number to the FEC.<sup>52</sup> As the cooling-off period expires for a group of gifts, the Commission's refund facility will calculate the overall percentage of money that must be returned to the original donors. It will then ask each trust bank to forward electronically an appropriate percentage of its escrow receipts to the refund facility. Banks would then release the remaining funds for use in political campaigns.<sup>53</sup>

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<sup>50</sup> See Barry Nalebuff and Ian Ayres, *Why Not? How to Use Everyday Ingenuity to Solve Problems Big and Small* 203–04 (Harvard Business 2003) (arguing for incrementalist change in marketing by redefining the acronym “KISS” as “Keep It Similar, Stupid”).

<sup>51</sup> If a donation were made in connection with a fundraising dinner, sponsors would be required to report the nonrefundable portion of the ticket price that covers the costs of the dinner. Only the remainder could be requested from the refund facility. An analogous practice presently obtains in connection with charitable fundraisers, with tax deductions only allowed for the contribution in excess of costs.

A refund system also must guard against hackers “bombing” the refund facility with millions of fraudulent refund requests. Such requests would be illegal, but they may occur if it is difficult to identify the requestor. The online refund process should discourage the possibility of mass requests by requiring that the requestor prove that she is a human and not a computer program by submitting an appropriate Social Security number (or a personalized identification number received at the time of the contribution).

<sup>52</sup> A similar mechanism is proposed in Ian Ayres and Jeremy Bulow, *The Donation Booth: Mandating Donor Anonymity to Disrupt the Market for Political Influence*, 50 *Stan L Rev* 837, 853 (1998).

<sup>53</sup> If the candidate maintains more than one trust account, the amounts held in escrow would be pooled for these purposes. The percentage rebate should be the same for all escrow

The biggest change would occur at the FEC, which must organize an effective refund facility. Each refund request must be entered into an electronic database, which would determine, on an ongoing basis, whether a contribution has come in to an escrow account with the same social security number.<sup>54</sup>

Once a match has been made, the FEC would send individual checks to the official tax residence of the contributor,<sup>55</sup> drawing the funds from the money received from the relevant escrow accounts.<sup>56</sup> This ongoing operation would require integrity as well as technical competence because the administrators of the facility can destroy the entire system by telling campaigns which contributors have requested refunds.

But the IRS confronts even bigger problems in handling hundreds of millions of financial transactions while keeping them secret from countless creditors and politicians who would love to know the data revealed on income tax forms. Despite the obvious pressures and temptations, the agency has done an admirable job of keeping faith with the public's expectations of privacy.<sup>57</sup> If the IRS can do it, so could the FEC—and we have, in *Voting with Dollars*, spelled out the key steps required to sustain a credible system of confidentiality.<sup>58</sup>

Any system will fail sometimes, but in this case, the refund booth contains distinctive resources that will help cushion the impact of an occasional lapse. If the FEC leaks data to a favored candidate, symmetry loses because the public still will not know who got the refunds.

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accounts, even if some accounts generate more refund requests than others, so that candidates can't easily identify refund requesters.

The logistics for implementing the refund cooling-off period could be handled in a variety of ways, which we will defer until our proposal is taken seriously by serious politicians.

<sup>54</sup> Matching could take place on some combination of contributor name, contributor social security number, and contributor address. Because of error of data entry, alternative matching algorithms are a good idea.

<sup>55</sup> The contributor should not be allowed to send the refund to another address, since this would permit him to specify the address of a campaign loyalist, and thereby undermine the anonymity of the system.

<sup>56</sup> If a particular refund request were so large that it might signal the identity of the originating contributor, the Commission should return the money over a number of periods, using a randomizing algorithm that will serve to disguise the identity of the donor exercising his refund option. Such algorithms are described in Ackerman and Ayres, *Voting with Dollars* at 227 (cited in note 1).

<sup>57</sup> While the IRS is generally excellent, see William V. Roth, Jr. and William H. Nixon, *The Power to Destroy* 213 (Atlantic 1999) (noting that laws are in place "prohibiting the disclosure of taxpayer information"); Shelley L. Davis, *Unbridled Power: Inside the Secret Culture of the IRS* 166 (HarperBusiness 1997) (same), it has occasionally succumbed to heavy political pressure, see John A. Andrew III, *Power to Destroy: The Political Uses of the IRS from Kennedy to Nixon* 13 (Dee 2002) (discussing President Kennedy's use of the IRS to fight organized crime).

<sup>58</sup> See Ackerman & Ayres, *Voting with Dollars* at 128–33 (cited in note 1) (recommending the creation of an FEC consisting of five former judges, appointed by the President and confirmed by the Senate). We further propose separating the management of the enforcement and operating divisions of the agency, as well as other measures to assure its integrity.

But at least it will know how much money the individual gave in the first place. So the public will retain a rough sense of the list of big contributors—the only problem will be that the list is overinclusive, and will include some givers who are really small fry. Once a breach occurs, it will take effective criminal prosecutions to restore the system's basic credibility in the eyes of the general public. Nevertheless, the leak won't do too much damage so long as it is detected in a timely fashion.

As an incremental reform, the refund booth seems solid: it not only cures a serious problem—extortion—but does it in a way that may well display the merits of the veil of ignorance to a larger public. And it will actually work!

Not bad for an incremental reform, so long as you are willing to wait a generation to get the job well and truly done.

But are we?