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## Why a New Paradigm?

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# RESPONSE

## WHY A NEW PARADIGM?

*Bruce Ackerman* \*

*Ian Ayres* \*\*

### I. INTRODUCTION

Do we really need a new type of campaign finance reform? Fred Wertheimer and Alexandra Edsall say no. They think we would do just fine if we continued under the regime created by the Supreme Court of the United States in *Buckley v. Valeo*,<sup>1</sup> if the Federal Elections Commission found the political gumption to enforce the recent McCain-Feingold statute, and if we increased the ratio of public matching funds for campaigns.<sup>2</sup>

We disagree. Expanding and enforcing the old paradigm is a fool's errand. Even if current laws were scrupulously enforced, private money from the richest one percent will continue to be the dominant force in politics. The current system simply has no chance of insulating the political sphere from the economic inequalities generated by the free market.

Spending another twenty-five years campaigning to strengthen the enforcement powers of the FEC is just what we don't need. It

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

2. See Fred Wertheimer & Alexandra T.V. Edsall, *Response to Voting with Dollars: A New Paradigm for Campaign Finance*, 37 U. RICH. L. REV. 1111 (2003); see also The Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (to be codified as amended in scattered sections of 2 U.S.C.) [hereinafter BCRA].

is a certain prescription for repeated cycles of evasion, public outrage, and ineffectual response. At some point, this dismal cycle will lead people to think—wrongly—that they might as well give up on the whole enterprise of creating a more democratic system of campaign finance.

Though he does not fully endorse the old paradigm, Richard Hasen also believes that *Buckley* stands in the way of fundamental reform.<sup>3</sup> We don't agree, but that does not mean that we like every aspect of the decision. For example, *Buckley* was wrong in giving plutocrats the constitutional right to finance their own campaigns out of their own unlimited checking accounts. But reformers should rejoice in *Buckley's* clear endorsement of the constitutionality of public funding. Our new paradigm breathes new life into traditional forms of subsidy. By providing Patriot dollars to all voters, we create new incentives for political outreach, a new sense of citizen involvement, and a new constituency for serious campaign reform.

## II. REVITALIZING CITIZENSHIP?

Here is our basic problem with the old paradigm: traditional reformers see campaign finance solely as a threat to citizenship and fail to appreciate how the field may be transformed into a new arena for its revitalization. As a consequence, they respond to the flow of funds in a repressive fashion—imposing severe limits on contributions, restricting the citizen's right to launch independent campaigns, and carefully doling out campaign subsidies to established parties and candidates.

The new paradigm sees campaign finance as an opportunity, not as a threat.<sup>4</sup> Government subsidies should not remain bureaucratic hand-outs, but provide opportunities for every voter to engage in active decisionmaking. Controls over private giving should not degenerate into a proliferating web of command and control regulation that threatens to make good-faith donors into criminals. Citizens should be given wide leeway to support the candidates and causes of their choice without fear of running

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3. See Richard L. Hasen, *Vouchers and Buckley: The Need For Regime Change*, 37 U. RICH. L. REV. 1049 (2003).

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

afoul of complex regulations. By giving each voter fifty Patriot dollars and granting broad freedom to contribute private money via the secret donation booth, the new paradigm seeks to encourage the practice of citizenship, not suppress it.

Nor should we restrict the ability of all citizens—even the wealthy—to speak out on issues of the day. The billions of Patriot dollars flooding the political marketplace will greatly dilute the power of the rich to shape the terms of the on-going debate. With ordinary citizens in firm control of the bulk of campaign finance, there is nothing to fear from independent advocacy. Rather than expanding the power of the FEC to restrict the content of speech by independents, we emphasized the affirmative contribution that independent advocacy can make to the general debate.

The thesis of our book, in short, is that the central aspirations of the McCain-Feingold law are misconceived. We don't need to impose stringent restrictions on the power of rich people to contribute to campaigns nor severely limit their ability to speak out on the leading issues of the day. The new paradigm permits a vast increase in *both* liberty and equality, and does not pursue one aim at the expense of the other.

Given our objectives, the critiques of Kathryn Abrams<sup>5</sup> and Bruce Cain<sup>6</sup> raise a fundamental question. They suggest that the very techniques by which we propose to liberate Americans from the bureaucratic and legalistic morass have the paradoxical consequence of degrading the very notion of citizenship.

Professor Cain takes aim at the secret donation booth. We see it as a surgical strike at the pervasive influence peddling that demoralizes so many Americans about the state of their democracy. The donation booth deprives influence peddlers of their motive for giving, since politicians can no longer tell whether they are making good on their promises to make big donations. In contrast, citizens with good motives will continue giving to the candidates and causes of their choice. Since they aren't looking for a quid pro quo, the secret donation booth will not serve as a deterrent for their continued giving.

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5. Kathryn Abrams, *Hybridizing Citizenship*, 37 U. RICH. L. REV. 935 (2003).

6. Bruce E. Cain, *Cheap Talk Citizenship: The Democratic Implications of Voting with Dollars*, 37 U. RICH. L. REV. 959 (2003).

Behold the best of all possible worlds: conscientious citizens avoid the risk of criminal prosecution while influence-peddlers cease and desist of their own accord.

Professor Cain is unimpressed. He focuses on a relatively peripheral matter. As our book recognizes, some Americans may respond to the donation booth by indulging in puffery and cheap talk—telling candidates that they have just deposited a big check into the donation booth when in fact they have only given a couple of hundred dollars.

Horrors! Cain views us as Pied-Pipers leading our fellow citizens down the path to a miasma of mendacity. Rousseau and Madison would be scandalized.

But name-dropping isn't argument. Rousseau, for one, isn't much of a fan of free speech of any kind—in his famous discussion of the “general will,” he argues that citizens should be given *no* opportunity to “communicat[e] one with another.”<sup>7</sup> Madison is a better guide in suggesting that efforts to destroy political liberty involve cures that are “worse than the disease.”<sup>8</sup> But he was also alert to the danger that powerful factions would seek to divert politics away from the pursuit of the public good.<sup>9</sup> We would like to think that he would applaud our efforts to preserve liberty while depriving factions of their motive to use campaign contributions to divert political attention from the public good.<sup>10</sup> But the truth is that Madison hadn't a clue about the way money distorts politics in the twenty-first century, and it is better to look at that reality in the face, rather than indulge in ancestor worship.

We are quite surprised that a distinguished political scientist like Professor Cain has embraced such an unrealistic vision of democratic life. While he looks with alarm at the possibilities of puffery introduced by the secret donation booth, we refuse to be scandalized—even without the donation booth, political life is full of exaggeration and strategic misrepresentation, as well as unexpected acts of integrity and noble self-sacrifice. Telling a politician that you gave her \$1000 when you actually donated \$250

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7. JEAN JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 28 (Willmoore Kendall trans., 1954).

8. *THE FEDERALIST* No. 10, at 55 (James Madison) (Sherman F. Mittell ed., 1938)

9. *Id.* at 54.

10. See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 310 (1991).

strikes us as pretty small potatoes in the overall scheme of things.<sup>11</sup> Democratic citizenship is a rough and tumble affair—politicians already hear countless exaggerations and have learned to discount them. It is far more important for the donation booth to reduce influence peddling without deterring conscientious giving. Cain's skepticism bespeaks a prissy distortion of political values.

Moreover, it is quite likely that social norms will evolve to respond to Cain's problem. "Don't ask, don't tell" is now the rule so far as voting is concerned—generally speaking, only intimates ask whether you voted for Bush or Gore. The same norm may well develop when it comes to express statements stipulating the precise level of a gift. But if not, this strikes us as a small price to pay for a great reduction of influence peddling, and the decriminalization of sincere giving.

Kathryn Abrams also expresses Mandarin anxieties but directs them at Patriot dollars. She is appalled by the consumerist vision of tens of millions of Americans marching to their ATM machines with charge cards in hand, doling out dollars to the candidate, party, or interest group of their choice. Unless these poor souls are inducted into a "larger project of political elaboration and socialization,"<sup>12</sup> they are all too likely to succumb to the consumerist imagery of it all. Abrams treats us to a wide range of hypothetical possibilities of political debasement in "late capitalist societies."<sup>13</sup> She doubts that ordinary Americans will see their Patriot dollars as a way of wresting citizenship control from big money interests. She views them as late-capitalist thrillseekers who are more apt to treat their Patriots in the manner of spectators at a football game, "purchasing a t-shirt or a pennant for one's favorite team."<sup>14</sup> Since so much of late-capitalist consumption involves flaunting one's purchases "in the eyes of others,"<sup>15</sup> she does not take seriously the notion that millions of card-carrying Americans might experience quiet satisfaction in dis-

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11. Note that our plan allows politicians to verify that givers have contributed \$200. ACKERMAN & AYRES, *supra* note 4, at 201-02 (Citizen Sovereignty Act § 8(h)). So it won't be possible for donors to give nothing and lie successfully. The only issue is whether they are free to exaggerate the size of their gift.

12. Abrams, *supra* note 5, at 958.

13. *Id.* at 940.

14. *Id.* at 941.

15. *Id.* at 943.

charging their civic duty when sending their Patriot dollars to the candidate of their choice.

She is remarkably fertile in elaborating these disparaging images of her countryman, and remarkably silent about the “larger project of political . . . socialization”<sup>16</sup> she has in store for them. Given her grim analysis of our present situation, we are hardly surprised that she doesn’t have much hope for Patriot—if Late Capitalism is the Problem, Patriot isn’t the Solution, and we hope that Professor Abrams doesn’t wait too long before leading us out of the intellectual wilderness. In the meantime, let’s give Americans some citizenship power in the form of Patriot dollars and see whether they belie Abrams’s grim diagnosis. Perhaps the twilight of “late capitalism” hasn’t condemned them to a life as sleep-walking political zombies; perhaps they might use their Patriotic credit cards to build a new culture of citizenship?

We won’t know until we try.

We have a similar answer to the skepticism expressed by Professors Cain, Farber, and Mayer about the power of money in contemporary politics. According to Cain, “[t]here 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.”<sup>17</sup>

But this ignores the transformative character of our proposal. About \$3 billion private dollars were contributed to all federal candidates during the 2000 election cycle. We predict that private giving will decline under the donation booth regime to the \$1 to \$2 billion range, while Patriot giving will yield approximately \$5 billion.<sup>18</sup> Empirical study of the existing marketplace doesn’t provide a clue about the way politicians will respond to such a massive shift in the financial playing field. Perhaps some will continue relying almost exclusively on private funds. But they will have to contend with a host of rising politicians who will learn to appeal to the interests of Patriot holders.

The resulting competition will increase the capacity of the political system to confront a fundamental issue that Charles Lind-

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16. *Id.* at 958.

17. Cain, *supra* note 6, at 970.

18. ACKERMAN AND AYRES, *supra* note 4, at 7.

blom called the “circularity problem” afflicting liberal democracies.<sup>19</sup> A liberal democratic regime accepts the legitimacy of market-generated differences in wealth provided that they survive the critical scrutiny of democratic citizens. But critical scrutiny requires the political system to function relatively autonomously from the economic system—otherwise politics merely becomes a means by which big money praises itself. The new paradigm breaks this circularity by assuring ordinary citizens sufficient political resources to consider the crucial question of distributive justice on the merits.<sup>20</sup>

It is a mistake to assimilate this point into general talk about the value of equality, as do Professors Cain and Mayer. Citizens operating under the new paradigm may well conclude that very large market-generated inequalities are morally legitimate and economically desirable. But so long as the secret donation booth and Patriot dollars allow them to change their mind later on, the circularity problem has been avoided. To mark this point, we can say that the new paradigm preserves *the autonomy of the polity* from economic domination, regardless of the degree to which citizens use their political autonomy to achieve substantive equality in economic and social life.<sup>21</sup>

The new paradigm, then, is based on a distinctive vision. Democracy, for us, isn’t to be confused with a philosophy classroom. It is a free-wheeling place, full of schemers and statesmen, cheap-talkers and moralizing idealists, and lots of people in-between. But for all these human differences, it is a place where citizens are sovereign and the power of big money is kept in check. As much as possible, we try to achieve this goal without the heavy hand of command and control regulation, but through the creative use of the market itself—by manipulating information conditions, via the secret donation booth, governing gift-giving and by creating a new form of currency that makes citizen sovereignty an effective reality.

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19. See CHARLES E. LINDBLOM, *POLITICS AND MARKETS: THE WORLD’S POLITICAL ECONOMIC SYSTEMS* (1977). Professor Cain finds it ironic that we do not endorse the pluralist theories of our Yale colleague, Robert Dahl. But Lindblom is also a Yalie.

20. This point is discussed at greater length in ACKERMAN & AYRES, *supra* note 4, at 12–24. See also MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* (1983).

21. For more on the distinctive value of political autonomy, see Bruce Ackerman & Ian Ayres, *The New Paradigm Reconsidered*, 91 CAL. L. REV. (forthcoming 2003).



Of course, any new idea is bound to have problems of implementation. We have put forward a specific proposal not with the arrogance of finality, but to “get the ball rolling”—to provoke a more nuanced response to help move forward to a better version of our model statute. Our commentators have helped a lot here. And we move now to a discussion of their criticisms and how we might improve both the anonymity and Patriot aspects of our proposal.

### III. ANONYMITY

The criticisms of anonymity can be usefully divided into two basic claims. One is that our system isn’t workable. And second, even if it is, it will produce untoward consequences. We’ll take up these concerns in turn. But first, we want to respond briefly respond to a spurious constitutional concern expressed by Professor Mayer.

Mayer claims that our core analogy to the secret ballot is inapt.<sup>22</sup> Why? He repeatedly asserts that the secret ballot is an *individual right* that can be waived by the individual:

[T]he secret ballot is a personal right that a voter can waive. The state cannot *compel* me to reveal my vote, but neither may it *prevent* me from doing so if I choose. The donation booth, in contrast, is a mandatory state-imposed obligation that permits me no choice in the matter.<sup>23</sup>

Professor Mayer confidently concludes that our donation booth is “almost certainly unconstitutional.”<sup>24</sup>

This critique reveals a total misunderstanding of our proposal. We entirely agree that the state can’t prevent you from telling people that you voted for Al Gore or George Bush—but the secret voting booth certainly can prevent you from *proving* it. The same is exactly true for the secret donation booth. Our statute doesn’t prevent you from telling people that you contributed money to Ralph Nader, but it does prevent you from proving it. In fact, be-

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22. Kenneth R. Mayer, *Political Realities and Unintended Consequences: Why Campaign Finance Reform Is Too Important to Be Left to the Lawyers*, 37 U. RICH. L. REV. 1069 (2003).

23. *Id.* at 1085 (emphasis added).

24. *Id.* at 1072.

cause our proposal lets you prove that you gave at least \$200, our statute imposes fewer burdens on free-speech rights than either the voting booth or the current system of mandatory disclosure (which obliterates the individual's right to remain silent). Notwithstanding the repeated claim that our proposal is more coercive than the voting booth,<sup>25</sup> the opposite turns out to be true.

Professor Mayer rightly points out that some jurisdictions have created important exceptions to the requirement of anonymous voting. Most importantly, the expansion of the absentee ballots and mail-in voting has created circumstances where voters can prove for whom they've voted. But so what?

Is Mayer arguing that the absentee ballot is constitutionally required? Would the court strike down the secret ballot in jurisdictions that do not give individuals the means of proving for whom they vote? We think not. Certainly nothing in the U.S. Constitution suggests such a limitation.<sup>26</sup> The idea that individuals have a constitutional right to prove for whom they voted is entirely without merit.<sup>27</sup>

## A. *Anonymity Can Be Maintained*

### 1. Small Numbers

Wertheimer and Edsall make a more telling distinction between voting and contribution anonymity that leads them to discount the effectiveness of the donation booth. They correctly point

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25. *Id.* at 1110.

26. Professor Mayer's citation to dicta in state court opinions is not persuasive authority for suggesting that the current federal ballot is unconstitutional. See Ian Ayres & Jeremy Bulow, *The Donation Booth: Mandating Donor Anonymity to Disrupt the Market for Political Influence*, 50 STAN. L. REV. 837, 838–39 (1998).

27. Professor Farber makes a more telling psychological point about the constitutional review. See Daniel A. Farber, *Dollars and Sense: A "New Paradigm" for Campaign Finance Reform?*, 37 U. RICH. L. REV. 979 (2003). We have been quite open in explaining that while donation anonymity is tailored to combat quid pro quo corruption, our real aim in requiring it is to promote equality of citizen influence. Farber responds: "Knowing of the core purpose of the proposal, the Court is all the more likely to be stingy in its appraisal of specific provisions." *Id.* at 993. True, but we are placing our bets on the constraining effects of precedent, and counter to Professor Mayer, many academics, at least implicitly have accepted the constitutionality of our proposal. See, e.g., Hasen, *supra* note 3, at 1059 ("The Ackerman and Ayres proposal appears to fit comfortably on the *Buckley* side of constitutionality.").

out that “[v]ote-buying, by its nature, requires a politician to verify large numbers of votes.”<sup>28</sup> In contrast, “even a small number of contributors breaking through Ackerman and Ayres’s controls could significantly undermine the system.”<sup>29</sup> But our critics are wrong to think a small number of donation booth failures will be sufficient to undermine our system. Even at the presidential level, where we allow \$100,000 gifts, a major party candidate would need to verify scores and probably hundreds of corrupt contributions before there was likely to be a substantial impact in a system that is awash with Patriot dollars.

And as we stressed in the book, the difficulty of verifying goes up exponentially (not just linearly) with the number of gifts that need to be verified.<sup>30</sup> This is because there is an increasingly large incentive for contributors to chisel on their professed gift when they become a relatively small part of the overall pool of claimed contributions.

## 2. Reputation

Though some of our commentators seem rather confident that our system won’t work, they have not offered persuasive explanations for why the donation booth will fail to preserve anonymity. Several suggest that contributor “reputation” will somehow be sufficient to validate the truthfulness of a professed gift.<sup>31</sup> But let’s take a closer look at how different kinds of reputation are likely to play out in the shadow of mandated anonymity. Many business interests feel coerced by politicians to make large contributions to their campaign chests. On their view, these “gifts” are little better than extortionate demands. Given this characterization, why should they feel honor-bound to pay up once the donation booth prevents politicians from monitoring their “gifts”? Or think about the interest groups that currently give to both sides.<sup>32</sup> Shouldn’t we at least say goodbye to these contributions?

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28. Wertheimer & Edsall, *supra* note 2, at 1130.

29. *Id.* at 1132.

30. ACKERMAN & AYRES, *supra* note 4, at 239.

31. Mayer, *supra* note 22, at 1095–99; Wertheimer & Edsall, *supra* note 2, at 1031.

32. See Elizabeth Garrett, *Voting with Cues*, 37 U. RICH. L. REV. 1011, 1029 (2003); see also COMMON CAUSE, YOU GET WHAT YOU PAY FOR (2000) (providing figures for various companies and trade organizations, including double-givers and those that gave pri-

Several commentators suggest that our system is unreasonably premised on the willingness of faux contributors to lie.<sup>33</sup> But this is a mistake—our scheme will work equally well if a norm of silence developed, in which most candidates and contributors adopted a “don’t ask, don’t tell” approach concerning their gifts. Puffery and exaggeration are not necessary for the system to operate effectively.

Professor Hasen goes on at great length about his alternative vision of what would have happened in the last presidential campaign if our proposed statute had been in effect.<sup>34</sup> In the end, he suggests that Bush would have won all the more decisively. But on closer inspection, there is just one core difference in our rival prognostications. Bush raised a large chunk of his \$91 million primary campaign chest from a group of about 400 Pioneers who each pledged to raise \$100,000 from their friends and business associates in \$1000 increments.<sup>35</sup> We predicted that this gambit would be far less effective in a world with the donation booth, and that Bush’s vast lead over his opponents in the “money primary” would have evaporated. In contrast, Professor Hasen predicts that the donation booth would barely have any deterrent effect.

Hasen confidently predicts that the Pioneers will still be able to “get their moneyed friends to make very generous donations.”<sup>36</sup> This is where we part company. We don’t think the Pioneers’ friends would still have made generous donations because the Pioneers would not have been able to verify whether their friends actually gave. Bush might have been able to trust the Pioneers (and even here we’re skeptical that he can trust so large a group). But it would have been much harder for Bush to trust that the Pioneers’ friends and colleagues actually gave.

Anonymity disrupts contributions both because the candidate cannot verify the gifts but also because the givers’ own friends

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marily to one party), available at <http://www.commoncause.org/publications/sept00/softmoney/sept00softmoney.pdf>; PUBLIC CAMPAIGN, WHOEVER WINS, THEY WIN (2000) (providing figures relating to top double-givers in 2000 presidential election), available at [http://www.publiccampaign.org/press\\_releases/pr3\\_3\\_00.html](http://www.publiccampaign.org/press_releases/pr3_3_00.html).

33. Mayer, *supra* note 22, at 1095–96.

34. Hasen, *supra* note 3, at 1064–66.

35. John C. Green & Nathan S. Bigelow, *The 2000 Presidential Nominations: The Costs of Innovation*, in FINANCING THE 2000 ELECTION 49, 59 (David B. Magleby ed., 2002).

36. Hasen, *supra* note 3, at 1064.

and associates cannot verify each others gifts as well. Contributors take a good deal of pride in telling others about the extent of their benefactions. Any university fundraiser will tell you that it would eleemosynary suicide for a school to stop reporting the contributor list to other alumni.

Hasen also argues that many contributors “could . . . care less” whether the candidate believes them “because they know he will be good for their interests, even if he grants them no special favors.”<sup>37</sup> But this argument ignores the logic of the “contribution paradox.” Wouldn’t it be even better for a contributor if he could get the benefit of a candidate’s election without contributing? The rational calculus in deciding whether to give \$10,000 does not simply involve comparing whether a Bush presidency is likely to increase your wealth (happiness, etc.) by more than \$10,000. It involves a consideration of how much your own \$10,000 gift will increase the probability of Bush’s election. In a world with Patriot dollars, even a \$100,000 gift should have a vanishingly small impact on the election. So a rational choice model tells each giver to give a token gift of \$250 to George and take a free-ride off of the largesse of other big givers.

We are not naïve rational-choice ideologues. We appreciate and celebrate the big givers who are motivated by ideology and continue giving without consideration of narrow probabilistic calculations. We also celebrate the fact that citizens regularly take the time and trouble to vote, notwithstanding the contrary prediction of game-theory. But voters do so in a system where the fact of voting is very public. Baldly claiming that private contributions will continue “business as usual” in the absence of credible signals to candidates or third-parties is itself naïve.

### 3. Delayed Disclosure

The commentators are on stronger ground when they criticize our proposed system of publicly disclosed audits of the blind trusts to take place ten years after each election.<sup>38</sup> Professor

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37. *Id.* at 1065.

38. Wertheimer & Edsall, *supra* note 2, at 1031.

Mayer argues: "When a false claim becomes known, the people who made it will see their credibility drop to zero . . . ." <sup>39</sup>

Mayer ultimately persuades us to change our proposal in the light of his critique, but we think that he exaggerates the problem. Even if the ten-year audit makes clear to the candidate that Mr. Big Bucks was lying about the size of his gift, the contributor's general credibility will drop to zero only if he had loudly announced it to the world at large. As we have already suggested, many givers and candidates may adopt a "don't ask, don't tell" policy. And even givers who engage in "cheap talk" will typically exaggerate the size of their gift in private conversations to individual candidates. It will be hard to recover these misrepresentations in reliable form ten years later. Clinton may know that you lied to him, but ten years later candidate Kerry won't know, and Clinton will have better things to do with his time than operate a truth brigade. <sup>40</sup>

Still, on balance, we are persuaded that the ten-year audit may be ill-advised. Make no mistake, a ten-year delay will be more than enough to disrupt most quid pro quo deal making. But advances in technology are making even this form of disclosure unnecessary. We initially proposed the ten-year delay to reassure

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39. Mayer, *supra* note 22, at 1096.

40. Professor Cain thinks that mandated anonymity may actually make it easier for candidates to offer quid pro quo deals:

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. . . .

Thus, if [the legislator] 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 gave the money?

Cain, *supra* note 6, at 962.

Cain's interesting argument raises the issue (that we have not previously considered) of whether the donation booth should operate to give candidates absolute immunity from prosecutions for quid pro quo corruption. Because of our concern with the criminalization of politics, we are inclined to think that it should.

But we disagree with his analysis of the effects of such immunity. True, candidates will have a greater demand for corrupt deals (without the threat of criminal prosecution), but they will face a dramatically reduced supply. Sanctioning opportunism generally drives down the net amount of almost any activity. Sure if the law allowed car dealers to take your money without giving you a car, we would see increased efforts by car dealers, but on net we should see fewer car deals. Notwithstanding the de facto or de jure candidate immunity, we think that candidates are much more likely to shy away from express deal-making.

donors who may fear that the agency administering the donation booth had failed to credit their gift to the right candidate. But recent improvements in computerized cryptography will allow donors to verify their contributions immediately while preventing them from sharing this information with others. As a consequence, we will be able to dispense with more old-fashioned forms of delayed verification by the time that our model statute is seriously considered in the halls of Congress.<sup>41</sup>

The foregoing is sufficient to show that anonymity of contributions will be sufficiently maintained (notwithstanding cheap talk and concern with reputation) so as to (i) disrupt substantially each candidate's ability to know the amounts given by contributors; and therefore (ii) substantially reduce the amount of private contributions to candidates.<sup>42</sup> But if you are still unpersuaded,

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41. *Voting with Dollars* mentioned this possibility briefly. ACKERMAN & AYRES, *supra* note 4, at 99. We are especially heartened that more teched-up researchers have recently explored more specifically how encryption technologies could be used (instead of the snail mail blind trust cum delayed auditing proposal). See Ackerman & Ayres, *supra* note 21; Matt Franklin & Tomas Sander, Deniable Payments and Electronic Campaign Finance (Apr. 4, 2000), at <http://www.cfp2000.org/papers/franklin.pdf> (last visited Mar. 18, 2003). Details of an anonymity proposal that excluded the possibility of public audits can be found in Ayres & Bulow, *supra* note 26.

42. Before leaving the issue of feasibility, we think that two other concerns perhaps deserve comments. Mayer worries about government leaks. He argues that "it is inevitable that those with access to the information would find a way to transmit it to candidates or the public." Mayer, *supra* note 22, at 1100; see also Wertheimer & Edsall, *supra* note 2, at 1131 ("government leaks are difficult to contain"). But he overlooks the success of the Internal Revenue Service. We don't know the details of Bill Gate's tax return last year—even though it would probably make very interesting reading.

Mayer is particularly ungenerous when he weaves a tale concerning indirect disclosures by former trust employees:

If John Doe, a prominent CEO, falsely claims to have given \$50,000 to a Senate candidate, and a trust employee publicly states that this claim is false, is there a violation? If the claim is really false and no contribution has been made, then there is no "contributor or contribution to the blind trust" to trigger any secrecy requirements, and trust employees are free to debunk at will.

Mayer, *supra* note 22, at 1104–05.

We're grateful that Mayer has identified an embarrassing lacuna in our model statute. But this oversight is easily amended. Former and current trust employees should, like former and current Supreme Court clerks, simply be prohibited from opining (directly or indirectly) about anything having to do with contributions made during their time working at the trust. We could only have wished that Mayer had spent as much time trying to fix the problems as he spent trying to identify them.

Professor Farber raises a very different kind of concern regarding feasibility. He worries that the multiple candidate bombing that we worried about, ACKERMAN & AYRES, *supra* note 4, at 237, will be easier for candidates to effectuate because "there are so many ways of picking the ten combinations of candidates and contribution dates, the odds that two contributors will happen to pick the same ten in advance are very small." Farber, *supra*

your anxieties can be allayed simply by combining anonymity with the current lowish contribution limits (and prohibitions on soft money). We don't recommend this step. It threatens to criminalize politics and it removes some of the dynamic flexibility from the system (reducing, for example, the ability of the rich to launch campaigns for little known candidates). But it will still reduce the flow of private transactions far better than the present system of full disclosure, which allows candidates to monitor the precise amount of quid and quo.

### B. *Hydraulicism*

Even if our system works, won't big givers respond by shifting their expenditures to "independent" issue advocacy? Rather than giving anonymously to candidates, won't they publicly put their own name on "independent" messages that favor one or another candidate? Since it is unconstitutional to place heavy content restrictions on such speech, won't grateful candidates respond to these advertising blitzes once they gain office? If so, hasn't our reform effort been in vain?

This is the standard "hydraulic" critique that likens campaign money to the mighty Mississippi, which responds to the construction of a dam by flooding some other area with equally devastating effect. Hydraulicism has been fashionable of late, leading many scholars to question whether any type of campaign finance regulation can be effective in constraining the influence of wealth on politics.<sup>43</sup>

Our book provides a two-pronged response. First, it proposes a distinctive approach to the entire problem of "independent" campaign expenditure. Traditional reformers favor expanding FEC

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note 27, at 1008. Multi-candidate bombing of even an unexpected combination of candidates will be severely self-limiting. The more contributors that try this strategy the more noise they provide to the system. Fat Cat A (who says to ten candidates, "look for your blind trust account to increase in this two week period") makes it harder for Fat Cat B to succeed at the same strategy. If there's a short fall, the candidate will not know which fat cat chiseled.

43. See, e.g., Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1736–1737 (1999); Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 688–89 (1997); Wertheimer & Edsall, *supra* note 2, at 1041 ("As the AFL-CIO's political director acknowledged, 'if somebody handed me a magic wand and said there is no election law, I would do exactly what I am doing now.'").



control over the content of messages to restrict speakers' rights to endorse candidates. In contrast, we try to make it more difficult for independents to coordinate their activities with the candidate's campaign. Second, we place high hopes on diluting the impact of independent expenditure by adding billions to campaign chests through the fifty dollar Patriot contributions of ordinary citizens.

We have been skeptical about the McCain-Feingold effort to restrict the power of independent speakers to intervene in political campaigns.<sup>44</sup> The core provision defines as "electioneering communication . . . any broadcast communication which—(I) "refers to a clearly identified candidate for Federal office" and "(II) is made within . . . 60 days of a general . . . election . . . ; or 30 days before a primary . . . election."<sup>45</sup> We doubt that this expansive definition of express advocacy will have more than a modest effect on sham issue advocacy that avoids a reference to a candidate. Advertisers will quickly figure out ways of alluding to candidates without "clearly" identifying them. But more importantly, the restriction is too intrusive on First Amendment rights to engage in genuine issue advocacy at the moment of highest political awareness.<sup>46</sup>

Instead of proceeding further down this repressive path, we think it better to increase the costs of hydraulicism by increasing the costs of coordinating speech. We proposed a two-prong approach to shore up the requirement of non-coordination.<sup>47</sup> The first prong is transactional. Advertisements that are submitted for candidate review, or use candidate-generated content or hire consultants working for the candidates would lose their non-coordinated status. The FEC has recently promulgated new and detailed regulations that usefully expand the definition of transactional coordination.<sup>48</sup> Our second prong focuses on the identity of the speaker. *Buckley* expressly authorizes the regulation of funding if a speaker's "major purpose" is "the nomination or elec-

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44. See ACKERMAN & AYRES, *supra* note 4, at 53–54.

45. BCRA sec. 201, Pub. L. No. 107-155, 116 Stat. 81, 89 (2002) (to be codified at 2 U.S.C. § 434(f)(3)(A)(i)(I)–(II)).

46. The statute also prohibits corporations and unions from spending money on electioneering communications and requires other organizations to disclose the source of their funds. *Id.* secs. 203, 201(f)(e). We do not challenge this aspect of the statute.

47. ACKERMAN & AYRES, *supra* note 4, at 123.

48. See 11 C.F.R. § 100.23 (2002); ACKERMAN & AYRES, *supra* note 4, at 273–74 n.18.

tion of a candidate.”<sup>49</sup> Rather than placing the burden on the FEC to ferret out “major purpose” organizations, the Patriot system gives interest groups incentives to identify themselves when their major purpose is the election of candidates—for this is the only way that our model statute allows them to compete for the substantial pool of Patriot dollars.

Professor Hasen suggests, however, that we have put too much confidence in these antcoordination rules. He confronts us with a very interesting counter argument, suggesting that hydraulicism doesn’t require any coordination with a candidate:

A Bush supporter hires an advertising agency with no ties to the Bush campaign to watch and mimic Bush’s campaign ads. The supporter then spends \$10 million on advertisements replicating Bush’s message but lacking words of express advocacy. The supporter then leaks to the press word that he, indeed, funded the independent expenditure campaigns.<sup>50</sup>

A grateful Bush takes note.

Hasen thinks successful hydraulicists don’t need to coordinate or even communicate with a candidate’s campaign—they only need to copy the public messages of the candidates.

He is right. Just as we said the threat of mimicry was sufficient to undermine the contribution claims of real donors, Hasen argues that mimicry of public candidate messages will be sufficient to communicate credibly the extent of the mimic’s support. Our contribution mimicry undermines quid pro quo corruption, but Hasen’s hydraulic mimicry threatens to give it new credibility—even if the issue advocacy is really taken to be independent of the speaker.

But is Hasen really correct that hydraulic mimicry will be easy? We think not. First, remember that ideological groups who tend to have a divergent message (or a more limited message) will not want to mimic. It will be difficult for the National Rifle Association (“NRA”) to run prescription medicine ads. Second, the hydraulic mimic can’t copy the express advocacy of the candidates—and trying to create the closest issue advocacy substitute will require translation that might impair the quality of the message.

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49. *Buckley v. Valeo*, 424 U.S. 1, 79 (1976).

50. Hasen, *supra* note 3, at 1065.

Third, the mimic cannot replicate one of the key aspects of political ads—their timing. He will have to wait and see what the candidate is saying before preparing his own ads. While these “follow-up” ads may be valuable, they won’t have the same value as those whose timing was determined by the candidates themselves. All these points imply that a dollar in the hands of a mimic will not be as valuable as a dollar in the hands of a candidate. In other words, our beefed-up coordination regime imposes a substantial tax on mimicry, and thereby cuts down the hydraulic effect.

Finally, the independence requirement is likely to raise the costs of fundraising for groups attempting to mimic. To establish their “independence,” they won’t be able to claim that the purpose of the fundraising is to help elect a certain set of candidates. At best, their solicitations may engage in a fair amount of winking and nudging so that donors will understand the real purpose. But these forms of indirection are costly, and threaten the intervention of legal sanctions. They won’t have the same bang for the buck as the more direct appeals for funds made by candidates. Once again, they operate as a tax on covert forms of coordination which will reduce the overall supply.

Nevertheless, Hasen’s thought-provoking critique suggests that we might well require something more than “noncoordination,” something closer to true independence, before speakers can claim First Amendment rights.<sup>51</sup> If a mimic simply taped a candidate ad and mechanically rebroadcast it, she should have to gain the consent of the candidate and raise the money with Patriot dollars. To engage in constitutionally protected advocacy, the speaker must create at least some independent content.

To be sure, this extension of our regulatory regime won’t control more indirect forms of mimicry. But our reinvigorated noncoordination rules will sufficiently raise the costs of indirect mimicry to keep the problem under control.

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51. The antitrust antipathy to conscious parallelism is analogous. See Donald F. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655, 660 (1962). Indeed, unlike competitors who have an independent rationale for meeting the prices offered by their economic rivals, true issue advocates (as opposed to sham issue advocates who really want to influence an election) do not have a strong rationale for consciously mimicking the ad content of candidates and/or major purpose organizations.

Which leads to our second main point. We do not view all independent expenditures with alarm. To the contrary, they add something very valuable to the overall debate, so long as the candidates themselves have plenty of funds to control the main lines of their campaigns. Since billions of Patriot dollars will be flowing into candidates' coffers, a significant increase in independent expenditures shouldn't be considered a serious problem. During the last presidential campaign cycle, "independent" issue advocacy amounted only to \$100 million dollars.<sup>52</sup> Since we expect the candidates to receive something like \$6 or 7 billion under the new paradigm, even a large increase in independent expenditure should be viewed as a benefit, not a cost, of our new initiative.

In contrast to traditional reform efforts, repressive measures are, for us, a last resort. The aim is to achieve more speech and more equality at the same time.

#### IV. ANONYMITY IS A GOOD IDEA

But is anonymity a good idea? Here we turn to three criticisms that move beyond the workability of our proposal and question its desirability.

##### A. *Legitimacy*

Several commentators suggest that anonymity will undermine the legitimacy of the electoral system itself.

Professor Farber argues that anonymity may encourage "the cynical assumption that large donors call the tune [and] could jeopardize the willingness of voters to take part in democratic governance."<sup>53</sup>

Farber is right that voter perceptions are important. And at the end of the day, voters may worry that the candidates have somehow verified their big gifts—notwithstanding the donation booth (and all of our secrecy algorithms).

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52. ACKERMAN & AYRES, *supra* note 4, at 120.

53. Farber, *supra* note 27, at 988 (quoting *Nixon v. Shrink Mo. Gov't Political Action Comm.*, 528 U.S. 377, 390 (2000)).

But keep in mind what voters will know. They will know the proportion of contributions that come from Patriot dollars. If this is not the bulk of a candidate's funding, they have reason to worry about the rich dominating a candidate's decisionmaking. But if Patriot dollars bulk large, why should voters be concerned? We also allow candidates voluntarily to place lower caps on their private contributions so that voters would be able to assure themselves that they are not under the interest of a small group of fat cats. And finally, consider the analogous problem arising under the secret ballot. Secret voting also might have created a huge potential for impropriety—how do we know that the registrar doesn't simply make up the results? After all, no individual can prove that her vote was misattributed. But experience suggests that perceptions in the shadow of mandated anonymity need not conform to the worst-case scenario.

### B. *Contribution Cues*

Several commentators express concerns about the donation booth impairing voters' ability to learn the true predilections of particular candidates. Professor Cain, for example, argues that voters "will be marginally less well-informed as a consequence of the secrecy of the donation booth."<sup>54</sup> Professor Garrett provides the most sustained elaboration. She helpfully develops the concept of voter "competence" as a benchmark to judge the costs of moving to a system of mandated anonymity.<sup>55</sup>

The commentators are clearly right that mandated anonymity keeps voters in the dark.<sup>56</sup> And they are also correct that contributor information can help voters identify the likely future positions of office holders. Information about contributor identity is of course not as important in a system where candidates are also kept in the dark—because voters don't need to worry about polic-

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54. Cain, *supra* note 6, at 965; *see also* Mayer, *supra* note 22, at 1098–99; Wertheimer & Edsall, *supra* note 2, at 1124.

55. Garrett, *supra* note 32, at 1022–40.

56. Professor Cain is also worried that the donation booth will keep researchers in the dark: "What is certain is that [Ackerman and Ayres] will have made it harder for journalists and political scientists to do their modestly valuable work of reporting the ties between candidates and groups." Cain, *supra* note 6, at 966. As much as we personally profit from empirical scholarship, its preservation does not provide a sufficient rationale for preferring the disclosure requirement.

ing quid pro quo corruption. But apart from smoking out corruption, it might still provide information about a candidate's true leanings. A candidate in private meetings with a potential contributor might have somehow sent credible signals about what she intended to do that induced a particular class of contributors to pony up some cash.<sup>57</sup> Contributor information thus is one type of "voting cue" that theoretically could make voters more competent.

But we believe that this point is largely theoretical, without any real impact in the real world. Contribution cues currently have very small effects in candidate elections. This should not be surprising. Any voting cue effect that does arise is likely to be self-limiting. Why give money that hurts your cause? And our system still gives voters a lot of information about group-based support. The remainder of this section takes up these issues in further detail.

But before diving into the details, it is (once again) useful to realize that we accept the same kind of informational impairment created by the secret ballot. As a theoretical matter, information about voter identity could also provide a valuable voting cue. Who did Ross Perot vote for in the 2000 election? We can't really be sure. At a broader level, we intentionally disrupt a kind of voting cue when states refuse to release voting results until all the polling places have closed. Let's remember that our polity does not endorse all cues that increase voter information.

### 1. Contributor Cues Are Self-Limiting

There are several factors that will tend to limit the electoral impact of contributor voting cues. Professor Garrett herself admirably lays out many of the reasons why the cues may fail to inform. Cues about contributor identity are often noisy. Some contributors give to both sides in an election (or to both parties).<sup>58</sup>

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57. But even here, we should interrogate how exactly the candidate credibly communicates her true plans to a potential contributor.

58. Garrett, *supra* note 32, at 1029; see COMMON CAUSE, *supra* note 32; PUBLIC CAMPAIGN, *supra* note 32; see also Brody Mullins, *The Democrats' New Donations*, NAT'L J., Sept. 22, 2001, at 2928 (noting that giving patterns change when the party in power of Congress shifts). Although ideological groups may also change their activities to account for changes in the balance of power in government, they generally do so in ways that preserve or clarify their reputations. For example, the American Civil Liberties Union

And opponents often mischaracterize the nature of a candidate's support.<sup>59</sup> Even clear cues will often have dual effects—causing some people to vote for, others against, a contributor's candidate.

But to our mind, the strategic manipulations by the contributors go much deeper. Most importantly, we shouldn't expect contributors to make gifts that, through the cueing effect, will impose net damage on their favored candidate. So this by itself should eliminate all those contributions where the number of "turn-offs" is larger than the number of "turn-ons" (including the number of "turn-ons" generated by the contribution itself). And if the candidate is risk averse, contributions that are too close to call or promise slight net benefit are also likely to evaporate.

Voters trying to make inference from contributions should also worry about the strategic manipulation of cues. If a contribution from Jane Fonda is a net detriment in a Georgia Democratic primary, then why shouldn't we expect Fonda to give to candidates that she *doesn't* want—thus helping her preferred candidate.

Of course, this is not to say that contribution cues could not still on the margin increase voter competence and affect elections in our current system.<sup>60</sup> An unmistakable signal that trial lawyers financially support Gore or that tobacco executives overwhelmingly support Bush might have both "turn-on" and "turn-off" voting effects but nonetheless help the contributors' candidates. Indeed, we're on record as claiming that candidates almost invariably prefer a dirty contribution (i.e., a contribution from a notorious contributor) to no contribution at all.<sup>61</sup> But it is safe to say that there are good theoretical reasons for expecting that the size of the contributor cue effects under the current disclosure regime will be muted, at best.

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("ACLU") recently hired former Representatives Dick Armey and Bob Barr to advance their issues in the new Republican Congress. See Jill Lawrence, *Conservative Favorites To Join ACLU*, USA TODAY, Nov. 25, 2002, at 2A. This decision was motivated by the Republican majorities in both houses after the 2002 elections, but it also clearly signals that the ACLU's agenda is often more libertarian than it is politically liberal.

59. Garrett, *supra* note 32, at 1032.

60. For example, voting cues may not be as flappable in the general election. Nationally voters may respond negatively to Fonda giving to Gore, but may just be perplexed if she were to give to Bush.

61. ACKERMAN & AYRES, *supra* note 4, at 27.

## 2. Taking the Initiative

Notwithstanding these theoretical arguments, several authors take us to task for not sufficiently responding to the empirical evidence on voting cues. Professor Mayer, for example, claims: “A significant literature attests to the importance of information shortcuts, or cues that voters use to evaluate candidates.”<sup>62</sup>

But voters use many cues. The critical question is whether there is evidence linking contribution information to voting behavior. The answer is that the only data involves elections concerning issues (legislative initiatives and referenda), while there is absolutely no evidence making this link in elections involving candidates. Yet our proposal is only directed to candidate elections.

Professor Garrett reviews the evidence in this way:

Shaun Bowler and Todd Donovan found that heavy, one-sided spending in initiative campaigns may increase negative voting if the spending reveals that some disfavored group, like tobacco companies or insurance companies, is a major supporter of the ballot proposal.<sup>63</sup>

But Garrett’s evidence on candidate elections is meager. The closest she comes is pointing to the evasive tactics used by the pharmaceutical industry to obscure their sponsorship of an issue advocacy campaign—which trotted out Art Linkletter to endorse a Medicare prescription drug program advocated by Republican candidates.<sup>64</sup> But this is a long way from showing that the pharmaceutical ads actually shifted votes.

The failure to establish a connection in candidate races isn’t surprising. After all, voters have many better cues in assessing candidates than they do when confronting referenda. Most obviously, party affiliation provides a useful cue. And except for total

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62. Mayer, *supra* note 22, at 1096.

63. Garrett, *supra* note 32, at 1033 (citing SHAUN BOWLER & TODD DONOVAN, DEMANDING CHOICES: OPINION, VOTING, AND DIRECT DEMOCRACY 53–55 (1998)). Arthur Lupia has also showed that on insurance-related ballot initiatives, particular types of voters were more likely to vote against an initiative if they learned that it had been financially supported by the insurance industry. Arthur Lupia, *Shortcuts Versus Encyclopedias: Information and Voting Behavior in California Insurance Reform Elections*, 88 AM. POL. SCI. REV. 63 (1994) (discussed by Garrett, *supra* note 32, at 1028).

64. Garrett, *supra* note 32, at 1036. Garrett points to similar evasive tactics used by “notorious groups” seeking to influence issue elections. *Id.* at 1033–37.



novices, candidates have a track record in dealing with key issues. Surely the best way of predicting an incumbent's future conduct is to look at his past votes. Moreover, this job is made easy for individual voters by a broad range of interest groups. From the ACLU to the NRA, a host of organizations provide ratings on incumbents that are available on the internet. Challengers with track records will also frequently obtain ratings as well. Surely an assessment based on past stands on issues is based on far better information than one grounded in cash flows. After all, it isn't enough to assess an interest group's influence simply by looking at its contribution to the campaign; its influence is a function of its share of the total campaign budget, and the interests of other contributors. It is very hard for anybody to get an accurate reading of these proportions in the middle of a campaign. And if the voter isn't an accountant, it is hard for her to get a clear understanding of these matters at any time.

In contrast, many referenda are sponsored by narrowly based interest groups, and funding information is much more salient. Moreover, many of the other cues in candidate races are altogether lacking. Indeed, the demonstrated voting cues often concern corporate initiative backers (insurance, tobacco) who are barred from directly contributing and hence from leaving behind a contribution cue. It is simply a mistake, then, to extrapolate the (relatively weak) evidence concerning referenda to the candidates races which are of central importance to our proposal.

### 3. Nearly Secret Donation Booth

Stepping back, we have assessed both the theory and the facts surrounding contributor cues in the shadow of our current disclosure laws. Now what can be said about how strong these cues are likely to be under our proposed statute? While anonymity will undoubtedly reduce the ability of intermediaries and journalists to inform some voters about the source of some particular financial support, there will still be very significant information about a candidate's financial support.

In her characteristically even handed fashion, Professor Garrett describes the information that remains in the spotlight despite the shadow of our "nearly secret donation booth":

- At the individual's option, the fact that she contributed to a candidate or political organization and the amount that she contributed up to \$200. . . .
- The amount of vouchers and money transferred from political parties to candidates.
- The amount of vouchers contributed to candidates by political organizations.
- The amount of money spent on express advocacy and political communication by political organizations from funds received through the nearly secret donation booth. The identities of those contributing to such organizations through the nearly secret donation booth, along with the amount they contributed up to \$200, can be revealed if the contributors request it.
- At the organizations' option, the amount and source of money spent on political communications by organizations that are unaffiliated with any candidate, political party, or political organization receiving vouchers or money through the nearly secret donation booth. Disclosure can be accompanied by proof that makes it credible. Similarly, individuals who spend money on political communications or express advocacy that is uncoordinated with a candidate, a political party, or a regulated political organization, can reveal, in a credible way, the amount of money that they spent.
- Information about the ratio of vouchers to money in the accounts of candidates and political organizations.<sup>65</sup>

Two types of information are likely to be particularly salient to the general public. The overall ratio of private to Patriot dollars will give voters a summary statistic of each candidate's general dependence on private interests. And voters will also know whether the candidate has capped the maximum size of contributions to some amount less than the statutory ceiling—providing an indication whether the candidate has made a special effort to safeguard against dependence on economic interest.

Second, some voters may find it particularly useful to study the reports on the behavior of the Patriotic PACs that special interest groups will form to solicit patriotic contributions from the general citizenry. When the Patriotic PAC of the Sierra Club or NRA gives to a candidate, citizens can use this as a cue to her likely voting behavior. This will, to a significant extent, compensate for the information lost by virtue of the secret donation booth's operation on private giving.

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65. *Id.* at 1021–22 (footnotes omitted).

#### 4. An Initiative Approach to Regulating “Issue Advocacy”

Professor Garrett’s focus on issue elections pays big dividends on a different issue—not on voting cues, but constitutional law. She provocatively suggests that the Supreme Court’s decisions concerning issue elections might provide a basis for a new way of regulating issue advocacy campaigns.

Specifically, she argues that it may be constitutional to require disclosure of the identity of individuals who fund issue advocacy campaigns:

[I]n *Buckley v. American Constitutional Law Foundation*,<sup>66</sup> the Court . . . suggested . . . that disclosure of the identity of the proponents of a ballot question and the total amount of money spent for a petition campaign was appropriately aimed at the state’s substantial interest in controlling the domination of the initiative process by special interests.<sup>67</sup>

She ingeniously proposes that we might do well also to require disclosure of the identity of people who fund issue advocacy during candidate elections. Her argument has support in the case law dealing with referenda and initiatives. More broadly, there may be valid reasons for treating informational regulation differently from contributions limits. While the Constitution should not tolerate limits on the amounts spent on issue advocacy, perhaps it should accept informational regulation on the transfer of funds.<sup>68</sup>

Our statute already requires networks and other media to report the overall amount of issue advocacy slots that they sell. We could extend the requirement to include disclosure of the people to whom the networks sell.<sup>69</sup> But seller-side disclosure would probably lead to the use of shell purchaser organizations that

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66. 525 U.S. 182 (1999).

67. Garrett, *supra* note 32, at 1039–40.

68. In *Smith v. Doe*, 123 S. Ct. 1140 (2003), the Supreme Court recently upheld Megan’s Law on the ground that information wasn’t a punishment. We disagree with the Court’s conclusion, but it is another indication that regulation of information is exceptional.

69. As Garrett correctly emphasizes “any disclosure statute must allow a method for [groups whose members would be subject to hostility, threats, harassment and reprisals] to avoid publicity of their contributions and spending.” Garrett, *supra* note 32, at 1043–44; see also *Buckley v. Valeo*, 424 U.S. 1, 74 (1976); Richard L. Hasen, *The Surprisingly Complex Case for Disclosure of Contributions and Expenditures Funding Sham Issue Advocacy*, 48 UCLA L. REV. 265, 280 (2000).

shielded the identity of the real buyer in interest. Accordingly, we are attracted to Professor Garrett's idea of simply requiring individuals who provide substantial funding to disclose their identity.<sup>70</sup>

### C. *Associational Rights*

Both Professors Cain and Farber expressed concern about the impact of our anonymity proposal on associational rights.<sup>71</sup> At a minimum, it will become impossible for groups to raise money for express advocacy with private dollars. Even though *Buckley* gave short shrift to associational concerns, we think this is an important interest.

But it is massively counterbalanced by the new associational subsidies generated by the Patriot system. Voters are free to contribute their Patriot dollars directly to candidates, but associational intermediaries will also compete for many of these dollars. While the donation booth will dry up some of the private funds currently going to the Republican Party and the Friends of the Earth, these groups will have the right to compete for the billions of Patriot dollars that have been added to the system. We expect that the increase in Patriot donations will be at least twice the decline in private giving, and we have taken special steps to add even more Patriots in the event of a financial "drought." There is every reason, then, to expect the new paradigm significantly to increase the resources made available to political associations involved in electoral contests.

Of course, all existing associations won't fare equally well under the new regime. Mass organizations with millions of supporters will do better than elite groups that now depend on a few big givers. But what is wrong with that?

So long as all groups are fairly competing for the huge pool of Patriot dollars, those who don't do well can't expect the Court to come to their aid in the name of "associational freedom." Nothing in the existing case law provides a basis for such an extraordinary claim.

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70. Garrett, *supra* note 32, at 1044.

71. Cain, *supra* note 6, at 961 ("cheap talking citizens will have a harder time finding common ground and forging collective action"); Farber, *supra* note 27, at 992-93.

## IV. PATRIOT DOLLARS

Speaking broadly, the Patriot system comes off rather well at the hands of our commentators. Only the essay by Fred Wertheimer and Alexandra Edsall makes a sustained effort to defend traditional forms of subsidy against our critique. Wertheimer and Edsall rightly emphasize that the existing subsidy of presidential campaigns has helped challengers make the race more competitive. But thanks to McCain-Feingold, this is less likely to be true in the future.

To receive federal subsidy, candidates must waive their right to solicit unlimited amounts of “hard money.”<sup>72</sup> But if they refuse the government grant, the sky is the limit on private cash—provided that they obeyed the rules that formerly limited each individual’s contribution to \$1000.<sup>73</sup> Even before McCain-Feingold, some candidates could raise more by rejecting the federal subsidy and relying exclusively on private giving. Most notably, George W. Bush spurned the subsidy offered by the statute during the 2000 primary campaign and managed to outspend his rivals by enormous margins.<sup>74</sup>

With the passage of the McCain-Feingold “reform,” Bush threatens to become a role model for his Democratic competitors in 2004. The new law places stringent restrictions on the use of “soft” money, but as compensation, it increases the “hard money” limit from \$1000 to \$2000 per contributor.<sup>75</sup> This makes it much easier to raise more money privately than one can receive from the federal treasury. Many leading Democratic candidates may well take the private route during the next campaign, making the traditional federal subsidy into an obsolete irrelevancy.<sup>76</sup>

This won’t happen under the Patriot system. While candidates may find it profitable to forego a fixed federal subsidy of the traditional type, it will be much more expensive for them to spurn

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72. 26 U.S.C. 9003(b)(2) (2000); *see also* 2 U.S.C. § 441a(b) (2000).

73. 2 U.S.C. § 441a(1)(A); *see also* BCRA sec. 307, Pub. L. No. 107-155, 116 Stat. 81, 102 (2002) (to be codified as amended at 2 U.S.C. § 441a(a)(1)(A)(changing the limit to \$2000)).

74. ACKERMAN & AYRES, *supra* note 4, at 165-66.

75. BCRA sec. 307, Pub. L. No. 107-155, 116 Stat. 81 at 102.

76. Thomas B. Edsall, *Privatized Primaries? Some Leading Democrats May Eschew Public Funding in '04*, WASH. POST, July 10, 2002, at A6.

the Patriot system and rely exclusively on private finance. They will not only forfeit their right to fish in a vast subsidy pool containing billions of Patriot dollars. They will also make life easier for their closest competitors, who will be able to raise more Patriot funds if their rivals remove themselves from the pool.

Suppose, for example, that Y is X's closest competitor for the Democratic nomination, and that the two candidates are attractive to Patriotic donors who, in the aggregate, will be contributing \$100 million during the primary season. If X waives his private fundraising option, and fishes in the Patriot pool, he will split the \$100 million with Y; but if he goes private, Y gets it all. This means that X must expect to raise at least \$100 million private dollars merely to break even!

This is not an option that will seem attractive except under very rare circumstances. In contrast, McCain-Feingold makes it quite attractive for candidates to spurn the fixed subsidy available to them under the traditional system, condemning it to obsolescence.

Wertheimer and Edsall also fail to deal adequately with the perverse impact of the traditional scheme on third parties. To qualify for a subsidy, the third party must gain more than five percent of the vote in the previous presidential election.<sup>77</sup> If, for example, a voter wished to provide a subsidy for the Green Party in 2004, he had to cast his ballot for Nader in 2000. Under the new paradigm, in contrast, a voter would be free to vote his Patriot dollars for Nader while casting his final ballot for Gore. This could well have changed the result in Florida in 2000. Campaign finance should never be allowed to distort election results in this way.

The traditional subsidy also had an unfortunate result on the political "right" in 2000. Since Ross Perot had crossed the subsidy threshold by winning more than five percent of the vote in 1996, his Reform Party was entitled to a federal subsidy check of \$ 12.5 million in 2000.<sup>78</sup> When Perot refused to run again, the Reform Party was left without a nationally prominent candidate. But politics abhors a vacuum. Pat Buchanan entered the race for Reform's nomination in order to get the big federal check—despite

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77. See ACKERMAN & AYRES, *supra* note 4, at 167.

78. See *id.* at 20–21.

the fact that his far-right views were incompatible with the Reform Party's centrist orientation. Buchanan's invasion led to the effective destruction of this interesting third force in American politics. Wertheimer and Edsall note that this is a "problem"<sup>79</sup>—but they do not suggest how it can be solved effectively under the old paradigm.<sup>80</sup>

In contrast, the new paradigm eliminates the problem completely. No political party gets a big check under Patriot on the basis of its performance in the previous election. As a consequence, it would no longer make sense for Buchanan to destroy the Reform Party in an effort to appropriate the party's big federal check. Instead, he would launch a direct appeal for Patriot dollars to his ideological supporters and create his own hard-right party to serve as his election vehicle. This would permit the Reform Party to continue functioning as a plausible third party for center-right views in future campaigns.

Wertheimer and Edsall do no better analyzing the Patriot system's impact on electoral competition between the two major parties. They correctly point out that incumbents come into the campaign with the great advantage of name recognition. But they move too quickly from this valid point to a problematic conclusion. So far as they are concerned, the incumbent's name recognition will make it easier for him to get more Patriot dollars than his relatively unknown opponents; in contrast, the traditional subsidy gives an equal amount to both major party candidates, thereby canceling the incumbent's advantage in the Patriot market.<sup>81</sup> As a consequence, they suggest that the traditional scheme makes it easier for challengers to launch an effective campaign.<sup>82</sup>

But this argument ignores the crucial role that interest groups and political parties play as "brokers" in the Patriot scheme. Each major party and interest group will ask voters to send them their Patriot dollars, claiming that they are in a better position than individual voters to determine which races represent the best po-

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79. Wertheimer & Edsall, *supra* note 2, at 1121 n.84.

80. They suggest that the traditional system might be modified to reflect a party's strength in the current election. *Id.* But how is this to be done in a reliable way and at an early enough time for the party to deploy its resources in an effective way? Perhaps there is an institutionally effective way to answer this question, but we have not yet seen a serious proposal that seriously confronts the difficulties involved.

81. Wertheimer & Edsall, *supra* note 2, at 1120.

82. *Id.* at 1120–21.

litical investments. Millions of citizens will respond by entrusting their Patriot dollars to the party or interest group they think will do the best job. With their coffers full of Patriot dollars, each of these groups will be trying to identify vulnerable incumbents. And when the Sierra Club or the NRA believe they have found a weakness, they will pour large amounts of Patriot dollars into an appropriate challenger's war chest. The activities of these "Patriotic brokers" will vastly increase the number of effective challenges to vulnerable incumbents.

If the new paradigm were applied to Congress, the resulting pattern of money would be very different from that obtaining under a traditional scheme. No longer will each challenger and incumbent get an equal amount. Patriotic brokers will funnel large sums into the relatively small number of districts where incumbents are potentially vulnerable. This will give challengers the resources they need to overcome the incumbent's preexisting advantages. Moreover, the prospect of a large campaign chest will invite far more attractive challengers into the race in the first place. This means that more incumbents will face really serious challenges than they do at present.

To be sure, many office holders are so secure that no amount of campaign money will suffice to unseat them. It will always be hard for a Democrat to win a Senate seat in Utah; and thanks to gerrymandering, an overwhelming majority of House incumbents gain easy reelection.<sup>83</sup> Challengers in these races will get less than they would under the traditional approach—but they didn't have much of a chance of winning anyway. The only way to make a big difference here is to devise new schemes that prevent partisan gerrymandering at decennial reapportionments. But campaign finance can have an impact if it abandons the traditional paradigm and allows Patriot "brokers" to pinpoint vulnerable incumbents and funnel large sums to attractive candidates.

An incumbent president poses distinctive problems. He will generally come into the Fall contest with great advantages. But in contrast to congressional races, the major party challenger will also have broad name recognition. If either candidate has trouble

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83. In 1998, 89.7% of Senate incumbents and 98.3% of House incumbents won reelection. See ACKERMAN & AYRES, *supra* note 4, at 260 nn.21-23.



getting his fair share of Patriot dollars, he has nobody to blame but himself.

What is more, the creation of a vast pool of Patriot dollars will create powerful new incentives to reach out to broad constituencies. At present, about half of the electorate is content to sit on the sidelines during presidential elections. If a challenger could convince even ten percent of these potential voters to march to the ATM machines and send him their Patriot dollars, he will not only gain a financial edge, but his activities will help create a more invigorated citizenry. The traditional program creates no similar incentive—both major party candidates simply get a big check without needing to make a special effort to broaden their appeal.

Perhaps in recognition of this weakness, Wertheimer and Edsall endorse a modification of one feature of the traditional program. During the presidential primary season, each candidate's federal subsidy is calculated using a "matching grant" formula. The present formula matches the first \$250 of each gift with federal money on a one-to-one basis until the candidate reaches a fixed ceiling. Wertheimer and Edsall would make the formula more generous—matching the first \$500 of each gift on a three-to-one basis.<sup>84</sup> The prospect of getting \$2000 from a \$500 gift would undoubtedly give candidates a new incentive to reach out to potential gift-givers—if they are economically rational, they sometimes might invest almost \$2000 on the margin to get an extra gift! Americans who are in the habit of giving \$500 would find themselves targeted by all sorts of civic appeals: "Come to a dinner conversation with your favorite candidate, or his favorite celebrity stand-in, and join your fellow citizens in an evening of civic celebration!" With \$2000 in play, candidates might serve up quite fancy and enticing events for free, betting that at least one in four guests will fork over \$500 at the end of the event.

But there is one catch. The folks getting all this attention will be a smallish group—in 1996, 630,000 gave more than \$200 to any federal candidate, about .325% of all eligible voters.<sup>85</sup> About half of these givers had an annual family income of \$250,000 and

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84. Wertheimer & Edsall, *supra* note 2, at 1123.

85. See ACKERMAN & AYRES, *supra* note 4, at 251–52 n.8.

fully eighty percent were above the \$100,000 mark.<sup>86</sup> In short, the matching-grant “reform” proposed by Wertheimer and Edsall may have the perverse effect of increasing yet further the time that candidates spend catering to the economic elite.

But even a better designed “matching-grant” system won’t do much good. With average family income at about \$40,000, it is hardly surprising that only six percent of Americans give anything at all to political campaigns.<sup>87</sup> Most people have many more pressing needs to fill with their scarce dollars, and many others use their discretionary income to favor churches and other charitable causes that are competing with candidates for donations. Givers won’t respond to a matching grant by making a massive change in their donative preferences. Any plausible matching scheme will encourage candidates to lavish their attention on a small percentage of the population coming disproportionately from the upper classes.

Contrast Patriot. Unlike a matching grant, it doesn’t invite the average American family to choose between giving fifty dollars to their favorite candidates or spending the fifty dollars on a night with the kids at the movies. It offers a different choice—either give fifty Patriot dollars to candidates or do nothing and let the money return to the treasury at the end of the election. We expect these alternatives to generate a far different response from millions of ordinary Americans.

While the overwhelming majority have too many other needs to spare green money for political giving, they will make good use of their Patriotic dollars rather than allow them to expire on election day. For the first time, campaign finance will become an opportunity for ordinary Americans to assert themselves as citizens at their local ATM machines. And as these fifty dollar contributions add up to billions, Americans will begin to see how their new financial power can reshape politics in democratic directions. Over time, this practical demonstration of citizen sovereignty may shake the cynicism with which so many Americans now view politics. Perhaps ordinary citizens *can* have an effective voice in our democracy?

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86. *See id.* at 252 n.10.

87. *See id.* at 251 n.8.

Some other commentators share some of Wertheimer and Edsall's doubts. As we have seen, Kathryn Abrams thinks we underestimate the stupifications of Americans as they stumble their way through "late capitalism." But we have already responded to this objection. On a more humdrum level, Kenneth Mayer worries about the bureaucratic hassles involved in opening Patriot accounts. We envision voters whisking their credit cards through a card-reader provided by election officials on election day, but Mayer thinks that most Americans will be turned off by the bureaucratic difficulties.<sup>88</sup> Dan Farber suspects that some ATM machines are too primitive to handle the sometimes-complex requirements of a Patriot transaction.<sup>89</sup> We don't mean to minimize such practical problems, but they will become increasingly tractable over time as the next generation of high tech makes registration and transactions quicker and easier.

Farber also suggests that some paradoxical consequences may follow even if our initiative turns out to be successful. He speculates that many citizens will find it too onerous both to vote with their Patriot dollars at the ATM and to vote with their ballots on election day. If they participate in the Patriot system in large numbers, this may only lead to a further decline in voter turnouts.<sup>90</sup>

Farber's psychology strikes us as extremely implausible. After all, it isn't that much trouble to visit an ATM for your Patriotic decision—you can always combine it with the next trip for some cash from your bank account. And the invitation to make the Patriotic decision will encourage you to develop your stance as a citizen—the process of pondering your choices, and discussing them with family and friends, will encourage your engagement with the citizenship project, making it more—not less—likely that you will take the trouble later to vote.

Rather than seeing the Patriot system as a drain on a fixed supply of citizenship energy, we see it as part of a virtuous cycle—encouraging candidates to reach out to the concerns of ordi-

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88. Mayer, *supra* note 22, at 1094–95. Mayer cites the disappointing response rates of Minnesotans to a complex program that provided a tax refund to campaign contributors. As we explain in *Voting with Dollars*, Minnesota's design is far less user-friendly than the one we propose for the Patriot system. ACKERMAN & AYRES, *supra* note 4, at 262–63 n.33.

89. Farber, *supra* note 27, at 998.

90. *Id.* at 1004.

nary citizens, and ordinary citizens to respond by reflecting on their Patriotic choices and following the campaign with greater interest as it reaches its climax at the decisive moment of balloting. With every election year, the cycle of Patriotic and electoral decisionmaking will become further entrenched in the larger public, broadening and deepening citizen engagement over time.

This is, at least, the hope that inspires the new paradigm. And our commentators have not persuaded us to abandon this hope.

## V. CONCLUSION

Beyond the multiplicity of design issues, a larger question looms: Have we made out a case for a radical shift in the direction of reform efforts?

Professor Farber thoughtfully explores different aspects of this issue in his imaginary round-table discussion. We are most interested in the case for caution presented by Farber's eponymous Professor Whyte. Commending the lessons of environmental law, Whyte thinks that

[p]olitics is a very complex system, and predicting how it will react to a radical disturbance is as difficult as predicting the effect of introducing or removing a species in an ecosystem. This is a high-risk gamble. At this point I don't think that Ackerman and Ayres have made the case for rolling those particular dice.<sup>91</sup>

We embrace Whyte's intriguing comparison, but his analogy teaches us a different lesson. Like environmental law, modern campaign finance law got off the ground during the great reform age of the 1960s and early 1970s. Since the major statutory landmarks in both fields were enacted at about the same time, they shared the dominant regulatory philosophy of the era—emphasizing command-and-control regulation and ignoring the great potential of market-like techniques for achieving public purposes.

But in contrast to campaign reform, the critique of the old paradigm has been much more powerful in the environmental field. Even during the 1960s and 1970s, proponents of the new paradigm were already explaining how effluent taxes and other

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91. *Id.* at 1005–06.

market-like solutions could achieve environmental goals more effectively and efficiently.<sup>92</sup> As the decades moved on, the new paradigm became a standard part of environmental reform efforts, regularly shaping new initiatives.<sup>93</sup> The Kyoto Protocol, for example, relies heavily on ingenious forms of market-trading in its effort to respond effectively to the threat of global warming.<sup>94</sup>

In contrast, the old paradigm still dominates campaign reform.<sup>95</sup> And it is unlikely to be superseded by heeding Professor Whyte's call for small bore experiments. If the past is prologue, Congress will enact only one or two significant campaign reforms over the next generation. Since Congressmen have mastered the existing rules, they are extremely reluctant to risk their careers by changing the playing field. They will enact serious reform only under intense public pressure, and even then, they will try to deflect popular concern by tightening up a few loopholes, in the manner of McCain-Feingold. Since the new paradigm really does significantly threaten incumbents, Congressmen will tend to greet Professor Whyte's skepticism with enthusiasm: "By all means Professor Whyte, let Connecticut experiment with the new paradigm, and please report back to me when you obtain social scientific results, perhaps twenty-five years from now. For the immediate future, let's settle for a few Band-Aids of the kind that Mr. Wertheimer is eager to prescribe."

So as Professor Whyte pauses for a generation of experimentation, another cycle of regulatory failure awaits. Over the past forty years, Americans' confidence in their institutions has dramatically declined—how much longer must they wait before they

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92. See, e.g., BRUCE ACKERMAN ET. AL., *THE UNCERTAIN SEARCH FOR ENVIRONMENTAL QUALITY* (1974); J.H. DALES, *POLLUTION, PROPERTY, & PRICES* (1968); Susan Rose-Ackerman, *Effluent Charges: A Critique*, 6 *CAN. J. OF ECON.* 512 (1973).

93. See, e.g., Bruce Ackerman & Richard Stewart, *Reforming Environmental Law*, 37 *STAN. L. REV.* 1333 (1985).

94. *Kyoto Protocol to the FCCC, Conference of the Parties*, 3d Sess., U.N. Doc. FCCC/CP/1997/7/Add.1 (1998); see generally DAVID VICTOR, *THE COLLAPSE OF THE KYOTO PROTOCOL AND THE STRUGGLE TO SLOW GLOBAL WARMING* (2001).

95. As Professor Hasen points out, the Patriot aspect of the program was anticipated by some voucher proposals of the 1960s. In his early work, Professor Ackerman took pains to note these predecessors. See Bruce Ackerman, *Crediting the Voters: A New Beginning for Campaign Finance*, *AM. PROSPECT*, Spring 1993, at 71, 72 n.\*. He prepared a similar note for *Voting with Dollars*, but a last-minute computer error led to its omission. He regrets his failure in this regard, especially since the note took special pains to praise the contributions that Professor Hasen made to the field during the 1990s.

experiment with a brand of campaign reform that might actually renew their confidence in the system?

It is past time for reformers to break with their old infatuation with command-and-control. It was tough for their colleagues in environmental law to make this break, but they have (more or less) done so. And the future of environmental law is far brighter as a result.

By all means, let the states experiment. But reformers should also prepare for the day when the next wave of popular disgust with special-interest politics forces Congress to pass some more break-through legislation. When the day comes, we should not settle for a variation on the themes of McCain-Feingold. We should be working hard for the new paradigm.

This is the reason why our book concluded with a model statute. And we are very grateful to our commentators for spotting holes in our model, proposing concrete correctives and spurring us to revise our thinking. As a measure of their contribution, here are at least five areas that deserve serious attention when the time comes to revisit and revise our model statute:

1. *Eliminating Delayed Disclosure.* Professor Mayer's critique of public audits ten years after each election has convinced us that we would be better off relying on new technology to maintain the reliability of the blind trust.<sup>96</sup>

2. *Mandating True Independence.* Professor Hasen's argument that "issue advocates" might simply mimic candidate speech has led us to consider whether the FEC should demand true independence from issue advocates (and not merely non-coordination).<sup>97</sup>

3. *Immunizing Quid Pro Quo Corruption.* Professor Cain's interesting thought that mandated anonymity may actually make it easier for candidates to offer quid pro quo deals suggests that the statute might expressly immunize politicians from prosecution for quid pro quo corruption.<sup>98</sup>

4. *Restricting Speech by Government Employees.* Professor Mayer is right to notice that our proposed statute failed to pro-

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96. See *supra* note 42 and accompanying text.

97. See *supra* at 1062-66.

98. See *supra* note 40.

hibit a trust employee from pointing out that contributors are making false claims about the size of their gifts. This requires us to amend our statute to prohibit employees from publicly commenting on possible contributions.<sup>99</sup>

5. *Mandating Disclosure of Issue Advocacy.* Professor Garrett's insightful reading of the referenda cases suggests that we consider requiring funders of issue advocacy to disclose their identities publicly.<sup>100</sup>

A few more symposia like this and our statute will be ready for prime time!

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99. *See supra* note 42.

100. *See supra* Part IV.B.4.