THE NEW PARADIGM REVISITED

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Let's begin with the very idea of a "new paradigm": are there distinctive ideas organizing our particular proposals, and if so, what are they? Our commentators profess varying degrees of skepticism, and we hope to allay their doubts with a two-part answer. The first emphasizes principle; the second is more pragmatic. We begin with a framework that isolates our basic normative concerns; we continue with an instrumental assessment of the "secret donation booth" as a policy tool; we conclude by asking whether these principled and pragmatic perspectives provide the basis for a "new paradigm"—a distinctive and coherent approach to the problem of campaign finance.

I

FOUR PRINCIPLES OF CITIZEN ENGAGEMENT

Four distinct but interrelated principles define our project: political autonomy, citizen sovereignty, equality, and responsiveness. These principles converge on a final goal: to encourage Americans to take their citizenship seriously and cast their ballots in a relatively considered fashion.

A. Political Autonomy

Our first aim is to establish the autonomy of the political sphere. Legitimate politics is more than the pursuit of private self-interest. Politics gains autonomy to the extent participants can credibly view it as an attempt to elaborate the public good and not merely the private interests with dominant factions.[1]

The collective aspiration toward political autonomy is expressed, in America at least, through the language of private citizenship. When

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1. For the classic statement, see THE FEDERALIST NO. 10 (James Madison); for modern elaborations, see MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983), and SHELDON S. WOLIN, POLITICS AND VISION (1960); for a legal defense, see Cass R. Sunstein, *Interest Groups in American Public Law*, 38 Stan. L. Rev. 29 (1985); for a personal statement, see BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980) [hereinafter ACKERMAN, SOCIAL JUSTICE].

ordinary people call themselves private citizens, they present themselves as complex creatures capable of responding to two different questions: What is good for me? What is good for the country?

Within the sphere of private life, each private citizen has the right to act primarily on the basis of her answer to the first question, but not in the public sphere. Here the polity demands something more. It asks each private citizen to look beyond her private interest and make a good-faith effort to orient herself to the public good.[2]

Professor David Strauss affirms this basic understanding of citizenship responsibility and rightly asserts that it serves as the basis for making political corruption into a crime.[3] If a businessman hands over a million dollars to a congressman in exchange for his vote on a tax break, the bribe substitutes for any good-faith effort to persuade the representative that the tax break is in the public interest. The congressman simply takes the money and suspends his public-regarding point of view. As a consequence, the transaction offends the autonomy principle, and it is appropriately criminalized in any political regime that seeks to preserve its aspirations to define public, and not merely private, interests.

Strauss joins us in rejecting economistic efforts to reduce political motivations to the narrow pursuit of self-interest.[4] Nonetheless, he asks whether the autonomy principle is overextended when applied to campaign contributions. After all, the donor's money no longer goes into the congressman's private pocket, but into his public campaign chest. Isn't this difference significant enough to make such "deals" a legitimate part of the political process?

It depends on the context. Consider an all-too-common case: a firm or industry gives money to both major party candidates to ensure that its private interests are protected regardless of the outcome of the race.[5] Such a strategy makes a mockery of the autonomy principle: the firm is not engaged in a good-faith effort to support its notion of the public good, but

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2. *See generally* BRUCE A. ACKERMAN, WE THE PEOPLE: FOUNDATIONS ch. 9 (1991) [hereinafter ACKERMAN, FOUNDATIONS] (discussing the theory of private citizenship).

3. David A. Strauss, *What's the Problem? Ackerman and Ayres on Campaign Finance Reform*, 91 CALIF. L. REV 723 (2003).

4. *Id.* at 727-34.

5. Several industries were among the top ten contributors to each national party in the 1998 elections. For example, lawyers and law firms gave $42.8 million to the Democrats (making them the largest Democratic Party contributor) and $16.4 million to Republicans (making them the sixth largest Republican Party contributor). Securities firms gave $17.2 million to Democrats (making them the second largest Democratic Party contributor) and $19.4 million to Republicans (making them the third largest Republican Party contributor). The real estate industry contributed $16.5 million to Democrats (making them the third largest Democratic Party contributor) and $21.1 million to Republicans (making them the second largest Republican Party contributor). The Center for Responsive Politics, *Leading Industry Contributors to Each Party*, *at* http://www.opensecrets.org/pubs/bigpicture2000/overview/lead.ihtml (last visited Apr. 13, 2003).

rather to protect its private interests at all costs. Such a strategy subverts the autonomy principle.

At the opposite pole are choices made by citizens with the Patriot dollars issued under the new paradigm. Our program structures each citizen's Patriot decision in a way that virtually guarantees that she is making a good-faith effort to define the public good. First, an individual gift of $50 is so small that it can't possibly be enough to gain a private favor. Second, voting with dollars requires personal effort. A voter spends time talking about the decision with family and friends and walking to the ATM to designate who will receive the contribution. Why would somebody make this effort unless she thought she was contributing to the public good?

After all, she could spend that time on private-regarding activities, like watching TV or mowing the lawn. Indeed, millions of Americans care so little about the public good that they will fail to vote with their Patriot dollars and will allow them to expire at the end of the electoral period. But these millions of abstentions will emphasize the public-interest orientation of the Americans who do take the time and trouble to contribute to their favorite candidates, parties, or interest groups.

To be sure, our program doesn't call upon private citizens to make a very large sacrifice of their private interests—a few minutes will suffice to press some buttons on the ATM—and there is no guarantee that the Patriot holder will spend much thought on his problem in public choice before he gets to the machine.[6] While the Patriot holder may have a superficial view of the public interest, he would not go to the ATM unless he was motivated by a public-regarding concern. In contrast, the big business that gives to both candidates has no such concern. It simply wants to insulate its profits from the outcome of any and all political debate and decision. The Patriot gift affirms political autonomy; the business gift denies it.

Strauss's failure to attend to these contextual differences leads to some misplaced criticism. He finds it puzzling that our proposal allows the Sierra Club or National Rifle Association to publicize the amount of Patriot money they give to candidates but denies big private donors a similar opportunity: "If special-interest deals are a problem, they are a problem even if they are deals for vouchers."[7]

The problem is Strauss's definition of "special-interest deals." He fails to distinguish between deals that are motivated purely by private self-interest and deals motivated by an ideal of the public good with which he disagrees. Only deals of the former sort offend the autonomy principle. For example, consider a doctor who sincerely believes that massive subsidies for drug companies are in the public interest. As a consequence, he gives his fifty Patriots to "Citizens for Preventive Medicine," dedicated to the

6. *See infra* Part I.E.

7. *See* Strauss, *supra* note 3, at 733.

political support of drug subsidies. We might disagree with the doctor's judgment and condemn his citizens' group as a "special interest," but this is hardly enough to condemn the gift under the autonomy principle. After all, our hypothetical doctor may call us "specially interested" when we give our Patriot dollars to organizations he opposes. Only efforts to maximize private interests without regard to any public-regarding commitment violate the autonomy principle.[8]

From this perspective, the "secret donation booth" provides a focused institutional mechanism for eliminating those campaign gifts that violate autonomy. Under conditions of full information, the prospect of a big cash gift encourages a candidate to suspend his concerns about the public interest for the larger goal of fattening his campaign wallet. But there is no longer a serious risk to political autonomy once it is filtered through the donation booth. Since the giver can no longer profit personally, the donation expresses a judgment that a particular candidate's positions further the public interest. Others may believe that the giver's judgment is silly or stupid or evil. But this does not qualify the giver as indulging a "special interest" in violation of the autonomy principle.

Professor Pam Karlan makes a similar mistake. She points out that the donation booth will only provide "partial" anonymity. Politicians might not be able to identify particular donors, but they will hire consultants to determine the aggregate sums contributed by different economic and social interests.[9]

This is correct, but partial anonymity does not violate the autonomy principle. So long as a politician cannot identify a given donor's gift on an individual basis, the donor cannot reasonably expect to gain a private quid pro quo. As a consequence, he will continue giving large sums only when motivated by public-regarding considerations. Since he cannot obtain special favors from the candidate, why would he give a $5,000 donation when he could spend the money on a weekend in Paris? Anonymous gift giving does not make sense unless the donor thinks that the candidate, or her positions, is superior from the public point of view.

Karlan is right to point out that the politician's consultant might be in a position to tell him that X% of his money comes from constituents earning more than $150,000 who support drug subsidies and oppose war.[10] Since the contributions reflect a group's judgment about the public good, candidates do not breach the autonomy principle by taking them into account when fashioning their own stands on the issues. Again, candidates

8. *See* Sunstein, *supra* note 1, at 82-85 (claiming that representatives should not respond mechanically to political power or to existing private preferences).

9. *See* Pamela S. Karlan, *Elections and Change Under* Voting with Dollars, 91 CALIF. L. REV 705 (2003).

10. *See id.* at 712.

only violate the autonomy principle when they pander to their constituent's private interests without filtering them through public-regarding judgments.

B. *Citizen Sovereignty*

Autonomy is a thin, though fundamental, principle. If political participants refuse to accept this constraint on their motivations, they have failed to create a republic in the classical sense of the word: a res publica.[11]

But taken by itself, the principle does not satisfy modern notions of legitimate government. Ancient republics satisfied autonomy despite the fact that they were often extremely aristocratic. A small elite made good-faith efforts to define the common good but excluded everybody else as unfit for the task. Modern republics repudiate this aristocratic premise and commit themselves to a universalistic understanding of citizen sovereignty; all mature citizens should have a say in determining the public good. The principle of universal suffrage expresses this commitment. The Patriot program extends this principle to the domain of campaign finance, allowing every citizen to use her Patriot dollars during the campaign as well as her ballot on election day.

Professor Richard Briffault fails to confront the moral dimension of citizen sovereignty when he compares our plan to familiar tax-subsidy schemes that match private donations with public dollars on a preset formula.[12] These matching schemes do not guarantee that every mature citizen has a say in campaign finance. They only magnify the contributions of those who are rich enough to spare some of their private funds for this purpose. Indeed, the evidence suggests that even pure tax credits, which reimburse 100% of small contributions, are disproportionately used by middle- and upper-class contributors who are more willing to wait several months for the reimbursement.[13] In contrast, our program refuses to force poor people to sacrifice private consumption to gain a matching grant. It does not require them to skip dinner if they want to trigger a matching state grant for the candidate of their choice. Instead, they receive their Patriot dollars as a matter of right, on the same basis that they receive their ballot on election day.[14]

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11. For valuable reflections on the republican ideal, see, for example, PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT (2000), and QUENTIN SKINNER, LIBERTY BEFORE LIBERALISM (1998).

12. Richard Briffault, *Reforming Campaign Finance Reform: A Review of* Voting with Dollars, 91 CALIF. L. REV. 643 (2003).

13. *See* BRUCE ACKERMAN & IAN AYRES, VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE 262-63 n.33 (2002).

14. For a further analysis of matching grants, see Bruce Ackerman & Ian Ayers, *Why a New Paradigm*, 37 U. RICH. L. REV. 1147, 1178-79 (forthcoming 2003).

The real question is whether this extension of citizen sovereignty is morally justified. Professors John Ferejohn and David Strauss express doubts which, if taken seriously, undermine the moral foundations of universal suffrage no less than those supporting Patriot dollars. They ask whether ordinary citizens are really up to the task of spending their Patriot dollars wisely. Will they not ignorantly succumb to the allure of demagogues unconscionably exploiting their ignorance to lead the public down the primrose path? The same thing can be said about access to the ballot box. If Patriot holders succumb to demagoguery during the campaign, why will they not succumb on election day?

Ferejohn worries about the frivolous decisions of ignorant or ideological citizens.[15] Strauss makes this concern more concrete. He notes that our present system encourages unscrupulous incumbents to engineer an "October Surprise" to scare the public into supporting them at the November election. He suggests that the "biggest risk" of our Patriot proposal is that it will create similar incentives during the campaign, with incumbents generating additional "surprises" to get their supporters rushing to the ATMs to overwhelm their opponents with Patriot dollars.[16]

If the danger of a "surprise" is enough to deny citizens Patriot dollars, why not deny them ballots as well? Strauss's objection only makes sense if he believes that existing campaign contributors, who tend to be rich and well organized, are sober enough to withstand the demagogue's "surprise" during campaign season. If this is so, should the suffrage be restricted in a comparable fashion to guarantee that voters will be sober enough to withstand the surprise of October?[17]

These are not rhetorical questions. Doubts about the sobriety of the unwashed and unpropertied provided the staple for opposition to universal suffrage for centuries. The controversy continued throughout the West until recently, with the United States joining the emerging consensus only with the Voting Rights Act of 1965.[18] It is hardly surprising that identical objections arise to an extension of the principle of citizen sovereignty to the campaign season. After all, campaign debate and final vote are merely two phases of a single, integrated process of democratic deliberation and decision. If it is no longer politically correct to question the sobriety of the voters on election day, we may well witness a "return of the repressed" as

15. *See* John Ferejohn, *Playing with House Money: Patriot Dollars Considered*, 91 CALIF. L. REV. 685 (2003).

16. *See* Strauss, *supra* note 3.

17. Strauss's anxieties may not make sense, even conceding his moral presuppositions. Despite his suggestion, it may be better if incumbents tried to generate a large number of "surprises" than if they held off for a single surprise in October. Didn't somebody once claim that you cannot fool all the people all the time? Wouldn't voters rebel and vote against an incumbent who was constantly creating fear and anxiety?

18. Voting Rights Act of 1965, Pub. L. No. 107-377, 79 Stat. 437 (codified as amended at 42 U.S.C. 1971-1974e (2000)).

commentators question the capacity of citizens to use their Patriot dollars wisely.

Ferejohn goes further and seems to reject the entire notion of citizen sovereignty: "Democracy in a large and heterogeneous nation may not require the kind of continuous participatory involvement that was (barely) possible in ancient Athens. Why should people find it a good use of their time to learn about candidates and issues months before an election?"[19]

Of course, if we follow Ferejohn and applaud Americans who consider citizenship a waste of time, the notion of citizen sovereignty seems fatuous. The case for universal suffrage, if there is one, must then be fashioned along the economistic lines originated by Joseph Schumpeter, and taken up more recently by William Riker.[20] On this familiar line, it is a mistake to think that elections provide a mechanism by which voters actually determine the broad contours of public policy after considered electoral debate. The real function of elections is much more modest but no less important. Even if voting outcomes are more or less random, they nevertheless serve the valuable purpose of shaking up established elites and requiring the "Ins" to give way to the "Outs" from time to time. The forced circulation of elites, in turn, reduces the chances of tyranny. According to the Schumpeterians, and apparently the Ferejohnians, this point is enough to justify universal suffrage without any claptrap about "citizen sovereignty."

This is a perfectly respectable intellectual position, which requires elaborate consideration before one thoughtfully accepts or rejects it. One of us has devoted the better part of his academic life trying to explain why Schumpeterianism fails to do justice to the aspirations of the liberal democratic tradition in general, and American democracy in particular.[21] This is hardly the place to mount such a critique. But we are hardly surprised that Ferejohn concludes that we "have fallen short of justifying [our] proposal"[22] insofar as this negative judgment proceeds from his Schumpeterian views. Of course, we have fallen short if elections are not to be conceived as modes of self-government by private citizens, but as random shocks that disrupt the ambitions of tyrannizing elites. But as the current and continuing agitation over campaign reform suggests, most Americans are not quite willing to accept Ferejohn's reductionist conception of democracy—at least not quite yet.

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19. Ferejohn, *supra* note 15, at 702.

20. *See, e.g.*, JOSEPH SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY chs. 21-22 (1942); William H. Riker, LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND THE THEORY OF SOCIAL CHOICE ch. 1 (1982).

21. *See* ACKERMAN, FOUNDATIONS, *supra* note 2; BRUCE A. ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998); *see also* ACKERMAN, SOCIAL JUSTICE, *supra* note 1.

22. Ferejohn, *supra* note 15, at 703.

We do not dismiss anxieties about citizen competence and will take them up shortly.[23] For now, it is more important to distinguish criticisms that, like those of Ferejohn and Strauss, undermine the very foundation of citizen sovereignty from those that accept the sovereignty framework and try to consider how it may be realized practically.

C. *Equality*

A surprising feature of this Symposium is the participants' failure to talk much about the value of political equality—perhaps, as Karlan suggests, because "the discussion of equality in the political process is already so well developed."[24] Nevertheless, we hazard a few words on this vast topic. It is an essential part of our case for the new paradigm, despite Ferejohn's surprising claim that it is "easy to characterize [our] reforms as an effort to smuggle in a system of public funding under the guise of reducing the incidence of corruption."[25] Since we are not in the smuggling business, we want to be absolutely clear: The case for Patriot dollars has almost nothing to do with the elimination of corruption and everything to do with the pursuit of citizen sovereignty and political equality.[26]

We do not treat these last two terms as synonyms. Citizens are sovereign when each has some say in determining the shape of the campaign debate and the nature of the final decision. Citizens are equal when they have an equal say.

So conceived, the new paradigm falls far short of political equality—and not only because we allow the rich to continue giving large sums through the secret donation booth.[27] Campaign cash is only one of many resources that count in politics, and the inequalities prevailing in the distribution of all the others remain untouched by our proposal. To take an obvious example, most poor people have never received the high-quality education that should be the birthright of every American citizen. Can they hope to participate as real equals in American politics? The only plausible answer is "no." This will not change anytime soon, and it is utopian to aim for real political equality.

Nevertheless, it is realistic to hope for a balance of power between social elites and ordinary citizens that gives the latter greater control over

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23. *See infra* Part I.E.

24. Karlan, *supra* note 9, at 708.

25. Ferejohn, *supra* note 15, at 688.

26. We hedge a bit because the massive increase in public funding entailed by our program will normally reduce the marginal benefit a candidate obtains from a given private contribution. And, if the prospect of a private gift of, say, $20,000 represents a smaller share of a candidate's entire campaign fund, he will normally be less willing to accept it if it is tied to an explicit or implicit quid pro quo.

In contrast to Patriot, the case for the secret donation booth does heavily depend on the public interest in corruption control.

27. But note that we also take steps to assure that private giving will not be more than one-third of the total.

their ultimate destiny. For more than a century, this rough balance was achieved through the American invention of mass political parties, where ordinary people made a big difference in selecting party candidates and shaping the dominant issues for the campaign. These old-fashioned political parties are largely a thing of the past,[28] and money counts for much more in an age of mass media. The drift to plutocracy is plain enough for those who care to notice. The rise of the "money primary" allows political novices to buy their way into office by hiring fancy consultants for a massive media blitz.[29]

The new paradigm offers some practical tools for confronting the growing imbalance between the elites and citizens. In Strauss's evocative phrase, it promises to "democratize the money primary" by making big contributors less powerful and by making ordinary citizens a potential force in funding nominees.[30] Our proposal is likely to reduce dramatically the 30% of all Political Action Committee ("PAC") giving supplied by corporate PACs in 2000 (and the further 22.5% contributed by PACs connected to trade, membership, and health organizations such as the American Medical Association and trial lawyers).[31] In addition, the massive influx of Patriot dollars will mute the impact of political contributions from rich people.

During the final election campaign, the large pool of Patriot dollars gives candidates powerful new incentives. If they hope to fish successfully in this pool, they had better focus on issues of genuine concern to the majority of citizens. The present system provides different incentives. If candidates want to keep the dollars flowing, they have good reason to focus on the concerns of the big givers and create media packages that allow them to sell big-money issues for mass consumption.

Of course, the new paradigm will not entirely eliminate these incentives, since big givers can continue giving through the donation booth. But the system will dramatically change the relative proportion of the funds flowing from economic elites versus the general public, and therefore the balance of campaign discourse. From the vantage of utopian egalitarians, this shift in political concern may seem a minor matter; yet it makes a big

28. *See generally* DAVID R. MAYHEW, PLACING PARTIES IN AMERICAN POLITICS (1986).

29. As we noted in *Voting With Dollars*, Steve Forbes, Ross Perot, Michael Huffington, and John Corzine "have together spent a quarter of a billion dollars out of their own pockets in recent races." ACKERMAN & AYRES, *supra* note 13, at 64. And Senator Corzine succeeded in spending an average of $37.15 for every vote that was cast for him in the 2000 senatorial race. The Center for Responsive Politics, *Money Wins Big in 2000 Elections: Top Spenders Capture 9 out of 10 Races*, *at* http://www.opensecrets.org/pressreleases/Post-Election2000.htm (Nov. 8, 2000). Our program provides new (and constitutional) mechanisms that make it more difficult for billionaire candidates to succeed in their oligarchic projects. *See* ACKERMAN & AYRES, *supra* note 13, at 64.

30. *See* Strauss, *supra* note 3, at 738.

31. *See* ACKERMAN & AYRES, *supra* note 13, at 171-72.

difference for practical democrats concerned with halting the evident drift to plutocracy before it generates overwhelming momentum.

D. Responsiveness

Of course, our scheme will not work unless citizens use their newfound power over Patriot dollars. The overwhelming majority will simply refuse our invitation to vote with their dollars and allow their Patriots to expire on election day. We can't know until we try, but we believe that tens of millions will heed the call of Patriot dollars and use them to help shape the course of public debate.[32]

Our commentators seem to agree—at least, they don't spend much time wringing their hands over the prospects of truly massive abstention. Instead, they have a lot of interesting things to say about the ways in which Patriot dollars will change existing forms of political participation in America for better or worse. On balance, we remain convinced that Patriot finance will greatly improve the extent to which the political system responds to the changing interests and values of ordinary Americans.

In his thoughtful appraisal, Briffault recognizes many advantages to the Patriot proposal but suggests that we have underplayed important negatives. He contrasts our proposal to traditional subsidies that go directly to well-established political parties or candidates and finds that "Patriot money would . . . be far less effective than flat grants in promoting electoral competition and reducing the burdens of fundraising."[33]

Briffault has reached these conclusions too hastily. He has ignored the crucial role that political parties and interest groups will play in the process of Patriotic fundraising. Many citizens will not give to candidates directly but will give to one or another organization that offers itself as a "broker." They can send their Patriots to the Republicans or Democrats, the Friends of the Earth, or the National Rifle Association and leave it to them to identify the candidates who will use the money to the greatest effect.

These brokers will try to identify incumbents with a tenuous hold on their districts. Having pinpointed a prime prospect, they will pour Patriot money into the vulnerable district on behalf of an attractive challenger, and it will be easier to find high-quality challengers once they are assured adequate campaign funds. Indeed, "brokers" may often take the lead in recruiting such candidates. At the same time, many incumbents will find that the secret donation booth will reduce the flow of large private gifts from grateful contributors they have served over the years.

This means that, contrary to Briffault's suggestion, the new paradigm will generate many more competitive races than would a standard subsidy

32. Our model statute takes special steps to offset the dangers of low levels of participation if this should prove particularly serious during the early years of the new program. *See id.* at 223.

33. Briffault, *supra* note 12, at 674.

scheme. Under the latter formula, the two major party candidates receive the same number of dollars in subsidy, regardless of incumbency. Since challengers typically need much more money to fight their uphill battle, the subsidy approach provides a great deal of security for incumbents—especially those who would be targeted as vulnerable by brokers under the new paradigm.

Briffault's second big complaint requires refinement before it can be analyzed. He says that the new paradigm will fail to reduce the burden of fundraising when compared to traditional subsidy schemes.[34] A proper response requires a distinction between two sorts of burdens—the burden on the candidate and the burden on his organization. So long as Briffault's subsidy scheme allows private fundraising, the new paradigm will reduce, not increase, the personal burden on the candidate. The secret donation booth undercuts the candidate's incentive to engage in long personal conversations with big donors to persuade them that he is a good political investment. Since the candidate can no longer know whether putative big givers have actually carried through on promises made to him personally, he will delegate more of the job to his fundraising staff. This will enable him to devote personal time to more rewarding pursuits, such as reaching out to mass constituencies and developing legislation.

Briffault is right to suggest that the new paradigm will increase the workload on the candidates' staff,[35] but the significance of this point can readily be exaggerated. The traditional subsidy scheme merely requires a bureaucrat to write out a single big subsidy check to a qualifying candidate. In contrast, the Patriot program requires each campaign organization to raise money in small bits, and this can be very expensive. But this transaction-cost disadvantage dissolves when one considers how candidates will go about raising Patriot funds. Rather than making personal appeals to individuals for small chunklets of Patriot dollars, the candidate and his organization will reach out to mass constituencies through advertising on issues that will bring additional Patriot contributions. In short, the best fundraising strategy will be effective political communication. Briffault recognizes this point elsewhere when he remarks that the new paradigm blurs the line between fundraising and political communication.[36] We would go further: it doesn't blur the line, it obliterates it entirely and thereby eliminates the persuasiveness of Briffault's objection.

Finally, Briffault criticizes the new paradigm on the ground that it will "reward early popularity."[37] This is an odd objection when applied to the primary phase of the electoral contest. We think it is a plus, not a minus,

34. *Id.* at 665-68.
35. *Id.* at 674.
36. *Id.*
37. *Id.* at 673.

that our scheme allows serious candidates to raise substantial Patriot funds while fringe candidates get little or nothing. In contrast, conventional subsidy schemes give equal amounts of money to all primary candidates who can jump over a low threshold of voter support. Since serious candidates must share equally with the fringe, they typically get too little money to run genuinely informative campaigns.

Briffault is on stronger ground when it comes to the fall election. A major party nominee may be such a flop that his early failures to generate Patriot funding may "snowball" to the point where he is virtually silenced by his more popular opponent.

Snowballing will be a particular problem in some House districts where, thanks to partisan gerrymandering, it is virtually impossible for a challenger to deprive the incumbent of his seat. In such cases, the challenger will have trouble persuading party loyalists and organizational brokers to send their Patriot dollars to his account rather than to other, more competitive, districts. Briffault's point does apply here, but it seems wrong to blame the new paradigm, rather than partisan gerrymandering, for the resulting financial imbalance. In contrast, snowballs seem unlikely in more competitive districts and in the contest for the presidency. Given large numbers of party loyalists on both sides, as well as a host of brokering organizations, only a very unpopular candidate will have trouble raising enough funds to make his case to the public. Moreover, if a political party occasionally blunders and puts up a bad candidate in a competitive race, why shouldn't it be punished financially? A devastating defeat may be the only way to encourage the collective soul searching required to reorient a party for victory in subsequent elections.

We concede that an occasional snowball may have an unfortunate effect, but this is a price worth paying for one of the new paradigm's greatest virtues—responsiveness to voter interests and values.[38] As candidates try to define the big issues for their campaigns, they will be focusing on the billions of Patriot dollars held by American citizens. If they strike a responsive chord amongst their constituents, they will strike it rich and maybe win the election. Patriotic finance will constantly pressure candidates to keep up with changing values and encourage creative acts of "issue entrepreneurship." If candidates or parties manage to put a new issue on the agenda that attracts widespread support, their efforts will be rewarded by a sudden, and sometimes massive, flow of financial support.

Issue entrepreneurship can be a risky business; a flop can sharply reduce the flow of Patriot funds and lose the election. Nonetheless, the system creates a powerful new incentive to keep searching the horizon, and

38. This is especially true when competitiveness is analyzed at a system level. Our book repeatedly emphasizes that campaign finance regulation should not be driven by its effect on particular races, but rather by its effect on the aggregate behavior of elected legislators.

when an issue entrepreneur strikes it rich, he will not be the only one who benefits. His discovery will enrich the ongoing repertoire of political debate. An entrepreneur's successes will soon define the issues taken up by other candidates in other races in order to gain similar advantages in their own campaigns.

Conventional forms of subsidy exert no similar pressure. Each serious candidate gets the same amount of money, regardless of what she says and does. In contrast, the pressure for entrepreneurship under the Patriot system is never-ending. Suppose that candidates expect about 50% of the citizenry to take the trouble to use their Patriot dollars during a presidential election, the same proportion that goes to the polls on election day. If one of them manages to define an issue that induces this proportion to move from 50% to 60%, he may gain a substantial financial advantage down the homestretch. Once again, such a success will not only benefit the individual issue entrepreneur, but the general good as well by drawing in millions of citizens who would otherwise stand on the sidelines of a political conversation they find pointless.

Where we see a dynamic cycle of engaged conversation and broader participation, Ferejohn glimpses a darker prospect: "Alienated, ignorant, and irresponsible voters will . . . form a fertile ecology for the ideological groups that will likely dominate the new landscape."[39] He does not define "ideology," but it seems to operate as a negative term in his lexicon. We prefer a more neutral term, "public interest" groups, and define the concept broadly to include the Sierra Club and the National Rifle Association as well as interest groups focusing on bread-and-butter issues like "Citizens for Lower Taxes" or "Americans United for a New Prescription Drug Benefit!"

We see no reason to predict, a priori, that "alienated" and "ignorant" citizens will give their Patriots to one kind of group rather than another or that engaged and knowledgeable voters will systematically make different choices. We suspect that the market share of different public interest groups will rise and fall over time as the nation confronts different challenges and as values evolve. If we shift the focus from particular groups to the entire political system, we think that there will be a strongly positive effect. As politicians and groups compete more vigorously to reach out to more voters, the proportion of "alienated" and "ignorant" citizens will decline.

Ferejohn makes a second prediction. He thinks that Patriot finance will promote single-issue groups at the expense of (multiple-issue) national political parties.[40] We are not so sure. The only certainty is that the national parties will have greater incentives to reach out to ordinary citizens and try

39. Ferejohn, *supra* note 15, at 689.
40. *Id.* at 700-01.

to persuade them to support the general political orientation denoted by "Democrat" or "Republican" instead of lavishing their Patriot dollars on a single cause. Rather than confidently predicting that the parties will fail in this effort, we think that their success will vary over time. While Democrats and Republicans will have a great incentive to elaborate a more compelling political identity, it will be up to the general citizenry to make the final decision, and different citizens will decide differently on different occasions.

Undoubtedly, Ferejohn will be right some of the time, but will this be a bad thing? As he notes, the national parties are relatively stronger nowadays than they were in the 1960s and 1970s.[41] Is Congress producing better legislation as a result? Ferejohn is right that the financial strength of national parties currently enables a narrowly divided Congress to pass highly controversial legislation on a party-line basis. He implies that this is a good thing, yet this is not obvious. To the contrary, the desirability of strong national parties is one of the great questions of American political science, and serious scholars have differed on the correct answer for generations.[42] When national parties are weak, it falls to individual congressmen and senators to aggregate conflicting interests, and weigh whether they should lose a potential Patriot contribution from the Sierra Club to gain Patriots from Citizens for Energy Independence. When national parties are strong, it will be the congressional leadership and the president who will play a larger role in this aggregation process.

There are pros and cons to both arrangements.[43] Rather than plunking down hard on one side, we think it wiser to rely on our generalized commitment to the value of responsiveness to carry the day. Let citizens decide, with their Patriot dollars, on the relative strength of parties and single-interest groups. American history reveals that our system can operate under both conditions—with triumphs and failures occurring during periods of weak and strong party control.

The crucial question in each political era is how much the political protagonists attend to the interests of big money, and how much to the

41. *Id.* at 697-98.

42. *Compare* Am. Pol. Sci. Ass'n, *Toward a More Responsible Two-Party System: A Report of the Committee on Political Parties*, 44 AM. POL. SCI. REV. i (No. 3. Part 2. Supp. 1950) (advocating strong parties), *with* ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957) (emphasizing weak linkages between citizen preferences and parties), *and* KENNETH A. SHEPSLE & MARK S. BONCHEK, ANALYZING POLITICS: RATIONALITY, BEHAVIOR, AND INSTITUTIONS (1997) (suggesting possible efficiencies of weak party systems).

43. *See, e.g.*, JOHN H. ALDRICH, WHY PARTIES? THE ORIGIN AND TRANSFORMATION OF POLITICAL PARTIES IN AMERICA (1995); JOHN F. BIBBY & L. SANDY MAISEL, TWO PARTIES—OR MORE? THE AMERICAN PARTY SYSTEM (1998); MAURICE DUVERGER, POLITICAL PARTIES: THEIR ORGANIZATION AND ACTIVITY IN THE MODERN STATE (1969); THEODORE J. LOWI & JOSEPH ROMANCE, A REPUBLIC OF PARTIES? DEBATING THE TWO-PARTY SYSTEM (1998); Theodore J. Lowi, *Toward a More Responsible Three-Party System: The Mythology of the Two-Party System and the Prospects for Reform*, 16 POL. SCI. 699 (1983).

concerns of ordinary voters. The Patriot program pushes the balance decisively in the direction of popular responsiveness. The billions of Patriot dollars will create new incentives for issue entrepreneurship. As politicians continuously search the horizon for rising concerns of the electorate, they will occasionally strike it rich. They also will improve the responsiveness of the entire system as more cautious candidates follow their lead.

No less important, the entrepreneurial dynamic will constantly encourage politicians to reach out to the tens of millions of Americans who currently don't care enough to participate. By framing issues that engage their interest, issue entrepreneurs will help cure one of the greatest embarrassments of American democracy, its low voter turnout.

These are very substantial advantages. Compared to them, our critics' objections seem like pretty small change.

E. Citizen Engagement

Our first four principles—political autonomy, citizen sovereignty, equality, and responsiveness—converge on a final objective. We hope to increase the number of Americans who take their citizenship seriously and cast their ballots in a relatively considered fashion. Our basic strategy is to harness market forces to further the cause of civic engagement. By providing each registered voter with fifty Patriots, we give candidates and political organizations a powerful new economic incentive to connect with ordinary citizens. If they do not succeed, their rivals may scoop up the lion's share of Patriots. In making their particular efforts, each competitor will create public goods that will enrich the civic quality of the entire system. They will not only generate a richer informational environment on more issues of mass concern. They also will try to convince Patriot holders that their political opinions are important, not only on election day, but during the entire campaign period.

The intense struggle for Patriot dollars can't help but encourage ordinary people to consider the candidates' competing claims more carefully as they ponder their choices. The ultimate civic payoff should be measured in terms of the hundreds of millions of conversations about the best way to spend Patriots. Call this our "civic market strategy": the aim is to make markets work to support, not undermine, citizenship consciousness.

This strategy will not yield anything like the ideally informed and publicly concerned citizens of utopian democratic theory. Our success should be measured on the margins. It will suffice if Patriot decreases the number of citizens who abstain entirely from the electoral process and increases the civic seriousness of those who already vote on election day. Given the shockingly low voter turnout and poor information levels

prevailing in America,[44] marginal gains are important even though they fall painfully short of the political ideal. Progress toward better citizenship will come, if it comes at all, in small steps. No single reform can hope to achieve anything like a great leap forward, and many more reforms are required before the country reaches a satisfactory state of affairs.[45] But the slow and difficult nature of progress doesn't justify do-nothing passivity.

Political autonomy, citizen sovereignty, equality, responsiveness, and engagement: In discussing these values, we have assumed that our program can operate as planned under real-world conditions. Although our commentators do not seriously question the feasibility of Patriot financing, they are more skeptical about the secret donation booth. Our next task is to take these doubts seriously.

II

WHO'S AFRAID OF ANONYMITY?

Our commentators worry that anonymity either cannot be maintained or will produce bad consequences.[46] As we consider whether anonymity could usefully be applied to campaign contributions, keep in mind how unthinkable it would be to move away from ballot secrecy. Although Karlan offers a host of rationales for questioning our collective commitment to the secret ballot, even she does not seriously propose abandoning it.

A. Is Anonymity Achievable?

Karlan doubts that the donation booth will actually work. She challenges our claim that "'[t]housands may flock to the candidate to promise gargantuan sums which never arrive through the blind trust.'"[47] Why? Because candidates will immediately find some of these "cheap talkers" incredible. We agree that the poor or well-known Democrats will lose all credibility if they claim to be big givers to the Republican Party. But many

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44. *See* THOMAS E. PATTERSON, THE VANISHING VOTER: PUBLIC INVOLVEMENT IN AN AGE OF UNCERTAINTY (2002).

45. As Pam Karlan notes, Bruce Ackerman and James Fishkin are working on a very different proposal to achieve additional gains in civic competence. *See* Karlan, *supra* note 9, at 710 n.20. It seems sensible to defer further elaboration until their book treating this proposal is published. *See* Bruce Ackerman & James S. Fishkin, *Deliberation Day*, 10 J. POL. PHIL. 129, 129-52 (2002).

46. Before turning to the specifics of their concerns, we should try to shake off a certain status quo bias. As Saul Levmore has noted, people tend to think of whatever regime they have, whether it be anonymity or disclosure, as somehow natural:

> It is common for a faculty member accustomed to open voting to deride secret ballots, especially in votes on promotion, as cowardly and dangerously hospitable to inappropriate motives, while faculty accustomed to closed voting abhor open voting as an example of overdelegation to committees and unsuitable empowerment of deans and regard it as adding to the difficulty of maintaining standards of excellence.

Saul Levmore, *The Anonymity Tool*, 144 U. PA. L. REV. 2191, 2222-23 (1996).

47. Karlan, *supra* note 9, at 712 (quoting ACKERMAN & AYRES, *supra* note 13, at 28).

thousands remain with the financial means and the political interest to make such claims. We are a nation with more than a million millionaires. And more than 200,000 people gave at least $1,000 to political candidates in 1996.[48]

Karlan fails to recognize this point in her critique of our hypothetical analysis of a Cadillac dealership forced to sell cars through a blind trust.[49] According to her, Cadillac dealers know that only certain rich people are interested in their cars. But so what? There are enough rich people for an anonymity system to work to undermine a quid pro quo system. The dealership would not hand over cars to Yugo owners who have said they paid into the blind trust. But the dealership would quickly go out of business if it gave existing Cadillac owners the right to get new cars in exchange for an unverifiable claim that their check was in the mail to a blind trust account. Anonymity would have a similar disruptive impact on quid pro quo deals in the political realm.

Or imagine what would happen if Stanford only accepted anonymous donations.[50] Perhaps it would dismiss Yalies who claimed to have given a million dollar gift for the new Palo Alto gymnasium. But there would be more than enough cheap-talking Stanford alums to make it very difficult for the university to decide for whom to name the gym.

The university hypothetical hits upon another issue by underscoring how much of charitable contributions are driven by third party status effects. People give to universities in large part as a way of showing off to their classmates. Take away the named contribution list in the back of the alumni newsletter, and contributions would plummet. The same holds true for political contributors who are motivated by the chance to tell their buddies that they spent the night in the Lincoln bedroom. Notwithstanding the ability of candidates (or Cadillac dealerships or universities) to identify those plausibly interested in contributing, there is still likely to be a sufficient group, numbered in the thousands (but even the hundreds would suffice), to disrupt access peddling and the market for influence.

Professor Briffault, in contrast, suggests that the number of cheap talkers will be small not because candidates can identify and ignore implausible claims, but because contributors will be unwilling to misrepresent the amount of their gift. He claims that an effective anonymity regime depends on a "culture of widespread mistrust" and that "[m]any donors are honorable individuals and will do exactly what they say they will do."[51] We think the first claim is overstated, and the second ignores an important

48. *See id.* at 712-14 (disagreeing with ACKERMAN & AYRES, *supra* note 13, at 28, 251-52 n.8.).

49. *See id.* at 713-14.

50. *See* Amihai Glazer & Kai A. Konrad, *A Signaling Explanation for Charity*, 86 AM. ECON. REV. 1019, 1021 (1996) (noting that fewer than 1% of the donations to Yale Law School, Harvard Law School, and Carnegie Mellon University are anonymous).

51. Briffault, *supra* note 12, at 660.

point made by Strauss, who emphasizes the quasi-extortionate character of many campaign contributions.[52]

First, consider that the secret ballot has been effective without creating a culture of widespread mistrust. The voting booth's ability to deter vote buying does not depend on widespread lying; the mere possibility of lying has been sufficient to deter political corruption. Instead of a culture of distrust, the anonymity has given rise to a "don't ask, don't tell" norm making it highly improper for a boss to ask an employee whether she voted for Bush or Gore. The secret donation booth may well give rise to a similar norm.

Second, what does honor demand in the extortion-like cases described by Strauss? Even if candidates don't make explicit extortionate demands, people may just assume that to receive fair treatment from an officeholder, they must have contributed to her campaign. Or they may feel that they have to contribute because their competitors are contributing, and if the candidate prevails, she will, naturally enough, help the people who supported her.[53]

These sorts of givers will see the donation booth as a much-needed protection against political hold-ups. And if a candidate explicitly asks how much they gave, they won't find it "dishonorable" to respond by exaggerating the size of their donation.[54] And of course, it will be very difficult for candidates to discriminate accurately between these givers and their more sincere and principled supporters.

Briffault raises a separate and more serious objection concerning public perception. The public may fear that the secret donation booth isn't working and that politicians and donors are actually penetrating the system to make quid pro quo deals.[55] In the shadow of the donation booth, will ordinary folks know whether a candidate knows more than they do about the identity of her biggest givers? Widespread public anxiety may be just as corrosive to the democratic process as the fact of noncompliance itself.

Our first response is to recall the success of the secret ballot. Voting secrecy has its drawbacks, but public fear about secret vote buying is not one of them. Secondly, our system does allow the public to see the proportion of total funds that come from private contributions and to learn the total number of people who give $200 or more to each candidate. This public information will put a real limit on the amount of potential corruption. We predict that the amount of private giving and particularly the

52. *See* Strauss, *supra* note 3, at 741.

53. Strauss, *supra* note 3, at 734.

54. Our proposal allows the blind trust to certify that individual donors have contributed at least $200 to particular candidates, but forbids the trust to say how much more than this sum has been provided. As a consequence, big donors can't credibly lie about whether they have given. At worst, they can only exaggerate, claiming that they have given $20,000 when in fact their check was for $201.

55. Briffault, *supra* note 12, at 663-665.

amount of large gifts will decline under our system (even though we are substantially increasing the contribution limits). Public confidence in a candidate who receives, say, 10% to 20% of her contributions in big gifts is likely to be greater than the confidence levels prevailing under the current system, where candidates routinely raise more than 50% of their contributions in large gifts.[56]

The electorate is also at liberty to punish candidates who are disproportionately funded with large private gifts. Such electoral punishments are few and far between in the current system, where big money finances in a sine qua non. With our program, a new ethos against fat-cat finance may evolve. And while we did not emphasize this in our book, we believe that a candidate should be allowed to instruct the blind trust to refuse any gifts over some maximum amount. Candidates can then compete with one another for the public trust by setting lower and lower limits on the size of their biggest gifts.[57]

Finally, we propose to diminish the perception problem further by taking advantage of Briffault's constructive proposals. We believe that donors have one legitimate concern about the donation booth. They may fear that employees at the blind trust may take a check that they send to Gore and credit it to Bush's account (or vice versa). To counter this fear, we required the blind trust to disclose publicly all donations ten years after the election. Briffault is right to point to a tension between this effort to reassure donors and our more fundamental objective: maintaining candidate ignorance. And he is also right to suggest that technological advances will make it possible to adopt better methods of reassurance which do not require this trade-off.

As he points out, new technologies will allow individual donors to verify their gifts immediately while keeping candidates in the dark. The brave new world of encrypted digital signatures will permit donors to trace the flow of their contributions through a blind trust to the account of

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56. *See* The Center for Responsive Politics, *The Big Picture: The Money Behind the 1998 Elections - Small Donations / Large Individual Donors / PACs*, *at* http://www.opensecrets.org/pubs/bigpicture2000/overview/donations.ihtml (last visited Feb. 28, 2003) ("While the biggest *number* of contributions always comes from small donors, the biggest proportion of *dollars* comes from donors with deeper pockets. In 1997-98, federal candidates and parties raised nearly $464 million from donors giving $200 or more. A slight majority— 54%—went to Republican candidates and committees.").

57. In his 1992 bid for President, Jerry Brown accepted only contributions less than or equal to $100. City of Oakland Office of the Mayor, *Biography*, *at* http://www.oaklandnet.com/government/mayor/biography.html (last visited Feb. 28, 2003). In 2000, Ralph Nader employed a related strategy, accepting only donations from individuals and limiting givers to a maximum of $1,000. The strategy appears to have worked well for Nader, allowing him to raise almost $5 million over the course of his campaign. *See* Eun-Kyung Kim, *Nader's Slow Climb to $5 Million*, ASSOCIATED PRESS NEWSWIRES, Oct. 12, 2000, *reprinted as* Eun-Kyung King, *Nader Turns Trickle of Donations Into $4.7 Million War Chest*, *at* http://www.commondreams.org/headlines/101300-01.htm (last modified Oct. 13, 2000).

particular campaigns—but simultaneously block the campaign's ability to determine the identity of the contributor.[58]

B. *Is Anonymity Desirable?*

Karlan provides a gripping critique of the secret ballot. We learn how the Australian ballot hurt the politically dispossessed, how it entrenched existing political parties, and how John Stuart Mill believed that it reduced voter accountability. One can even go further to suggest that it might have also disrupted the rising power of unions.[59]

But in concocting this tasty dish of historical revisionism, let's keep our eye on the larger menu. Karlan's story is still a story about the powerfully disruptive impact of anonymity. Whatever motives impelled the push to secrecy in the nineteenth century, Karlan has not suggested a twenty-first-century scenario under which a secret donation booth would disadvantage the subordinated classes. To the contrary, an effective system will almost certainly dampen the political power of the rich and thereby increase the incentives for wider popular politics.

At the end of the day, Karlan does not propose a return to the "good old days" when party bosses could tell how each voter cast his ballot. She simply uses the history of voting secrecy as a jumping off point to evaluate the unintended consequences of donation secrecy. Of course, the search for unintended consequences is never-ending. But those identified by the commentators do not provide persuasive reasons for abandoning anonymity.

1. *Loss of Voter Information*

Several of the commentators, including Karlan, point to the fact that voters will lose some potentially useful information when they no longer can tell whether a candidate took money from trial lawyers or tobacco

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58. *See* ACKERMAN & AYRES, *supra* note 13, at 99. We are indebted to Briffault for encouraging us to take the idea more seriously. We are especially heartened that more tech-savvy researchers have recently explored how encryption technologies could be used in place of our proposed snail-mail-blind-trust-cum-delayed-auditing alternative. *See* Matt Franklin & Tomas Sander, *Deniable Payments and Electronic Campaign Finance*, *in* PROCEEDINGS OF THE TENTH CONFERENCE ON COMPUTERS, FREEDOM, AND PRIVACY: CHALLENGING THE ASSUMPTIONS 67 (Lorrie Faith Cranor ed., 2000), *available at* www.cfp2000.org/papers/franklin.pdf.

59. Ian Ayres & Jeremy Bulow, *The Donation Booth: Mandating Donor Anonymity to Disrupt the Market for Political Influence*, 50 STAN. L. REV. 837, 840 n.9 (1998) (citing MICHAEL E. MCGETT, THE DECLINE OF POPULAR POLITICS: THE AMERICAN NORTH 1865-1928 12 (1986), and Walter Dean Burnham, *The Changing Shape of the American Political Universe*, 59 AM. POL. SCI. REV. 7 (1965)):

> The thesis that the Australian ballot was adopted in order to deter vote buying specifically—and cleanse the political system generally—is hotly contested. An alternative interpretation is that these voting reforms were motivated, at least in part, to dampen mass political activism. The "spectacle" of lines of voters marching to the polls with colored ballots in hand might not have indicated that their votes were bought, but instead that their votes were not for sale—a symbol of the solidarity between voters and labor or other mass political movements.

Id.

interests. Even if the candidate cannot tell either, and is thus less susceptible to direct contributor influence, this loss of information may make it more difficult for voters to assess where candidates really stand.

This is true, but it is a mistake to overstate the problem. The donation booth disrupts voters' ability to make an ad hominem inference—such as, if Jane Fonda gave to the campaign, the candidate must be a radical liberal. But this type of inference is of limited value in a world in which voters can look to the words and actions of the candidate herself. As noted in the book, it should not be surprising that researchers to date have not been able to uncover a single instance where "voting cues" about contributor identity affected a candidate election (though researchers found such influences in referenda over complicated ballot initiatives).[60]

Under our system, voters will still have access to a great deal of information. They can, of course, listen to rival campaign promises and consult the many sets of candidate ratings prepared by a host of interest groups ranging from left to right. Consider also that many voters will send their Patriot dollars to PACs established by interest groups, who will then send the funds to their favored candidates. Since these PAC contributions will be public, voters will know when the National Rifle Association or the Sierra Club thinks that a particular candidate is particularly devoted to its cause.

2. *Out-of-State Patriot Gifts as a Cumulative Voting Mechanism*

Karlan has helpfully suggested that we could alleviate part of the information loss by requiring the blind trust to disclose how much Patriot money comes from in-state or out-of-state contributors. After reflection, we don't agree—partly because of another benefit of our system, identified by Karlan: its "cumulative voting" effect.

Thanks to Karlan, we now see that our system allows citizens not only to cast traditional ballots in their own districts on election day, but also to send their Patriot dollars to a candidate in a different district and thereby "vote with their dollars" in a second electoral contest.[61] This second or "cumulative vote" effect ameliorates the present predicament of millions of Democrats or Republicans trapped in congressional districts gerrymandered by their partisan opponents.[62] While these members of a "permanent

60. *See, e.g.*, ELISABETH R. GERBER, THE POPULIST PARADOX: INTEREST GROUP INFLUENCE AND THE PROMISE OF DIRECT LEGISLATION (1999); *see also* ACKERMAN & AYRES, *supra* note 13, at 27.

61. Indeed, they can even send a few dollars to several candidates, although the symbolic effect of dividing one's (small) number of Patriots amongst different candidates may undermine the citizen's sense of efficacy. These adverse symbolic effects may be avoided if a citizen chooses to send her Patriots to a party or interest group who then plays the role of a broker—sending Patriots to a large number of races where the money can do the most marginal good.

62. The art of gerrymandering has become quite a science in this computer age, leading to a sharp reduction in the number of competitive congressional districts. *See, e.g.*, Kristen Silverberg, *The*

minority" will be obliged to waste their "first vote," the new paradigm will allow them to use their "second vote" to support a sympathetic candidate in a closely fought race elsewhere.

The introduction of Patriot dollars does not cure the underlying gerrymandering abuses; this is beyond the power of any reform of campaign finance. But it will provide millions of citizens with a new sense that the electoral system responds to their concerns. Karlan makes her point in connection with congressional races, but it can be extended to presidential races as well, especially in the case of third-party candidacies.[63] Consider the plight of the Green Party voter considering her options in 2000. She could vote for Ralph Nader in the hope that the Greens would get 5% of the vote and thereby qualify for a substantial subsidy in the presidential election of 2004.[64] Alternatively, she could vote for Al Gore in the hope that he would beat George W. Bush, thereby reducing the chance for a Green Party subsidy in 2004. The Patriot option gives her a third choice: donate Patriot dollars to Ralph Nader, but vote for Al Gore on Election Day.

We embrace Karlan's "cumulative voting" effect, but her proposal to disclose the source of Patriot money would detract from its benefits. Giving in-district voters this information simply permits them to retaliate against out-of-district contributors, cheapening the value of their "second vote." If Karlan is right in suggesting that Patriot provides a useful form of cumulative voting, we don't see why she wants to undermine the feature she especially values. After all, in-district voters retain the exclusive power to decide their local races on election day; at the very best, out-of-district donors are simply contributing to better information about the national implications of local choice. This is a valuable enhancement of their power, but a small one, and should not be diluted by selective informational sanctions.

Illegitimacy of the Incumbent Gerrymander, 74 TEX. L. REV. 913, 924-25 (1996). Silverberg remarks that:

> An additional reason gerrymandering was less influential historically is that, without advanced computer technology, line-drawers were unable to determine the precise effects of their districting plans. . . . Today, improved technology makes it possible for a member to know the precise effects of every change in district lines. Census data improvements provide detailed demographic information at the precinct level, and computer software utilized by state redistricting committees permits individual legislators to arrange districts block-by-block. . . . Members know how the changes will affect the racial and socio-economic constituency of their districts and, most importantly, their own re-election chances.

Id. at 924 (citations omitted).

63. *See* Karlan, *supra* note 9, at 720-21. She also interestingly notes that Patriot giving can have the effect of "creating a variant of the national presidential primary" in which voters from late primary states have the ability to cast their financial vote earlier by contributing their Patriot dollars to the candidate of their choice. *Id* at 719-20.

64. *See* I.R.C. § 9004(a)(2) (West 2002) (outlining the distribution of Presidential Election Campaign Fund payments).

C. Give Disclosure a Chance

Karlan's suggestions about out-of-district Patriots are part of a more general theme emphasizing how better information helps empower the electorate. She recognizes that the overwhelming majority of citizens don't pay enough attention to notice who is giving how much to which political candidates. She suggests, however, that this may be different in a Patriot world. If Patriot succeeds in mobilizing a more active and engaged citizenry, might not these newly energized citizens start to pay more attention to big gifts of private money? In essence, she suggests that we should give mandated disclosure for private finance another chance.

Karlan's point is analytically sound,[65] but it supposes that our "civic market strategy" will succeed beyond our fondest dreams. Given the low levels of most citizens' engagement, it will be enough of a triumph if the Patriot program generates more serious discussion of the issues without motivating millions to engage in an accounting analysis of candidate revenue flows.

Even if the program creates a truly engaged electorate, there will still be many other data sources available for inspection by citizens. If they want to learn an incumbent's position on big oil or big labor, they can simply look up her voting record; many credible challengers will also have readily available track records. As Ferejohn emphasizes, the crucial constraint is not the availability of data, but the willingness of citizens to make use of them.[66] If our initiative pushes millions over this engagement barrier—Karlan's critical assumption—it will still be easy for them to gain access to other reliable information that can substitute for the gift-giving data concealed by the secret donation booth.

Karlan's defense of mandated disclosure suffers from a final irony. She has been a noteworthy proponent of the "hydraulic" thesis that likens campaign reform to the task of damming the mighty Mississippi: particular reforms will only divert the flow of funds to other points in the system, where they will once again wreak havoc on the countryside.[67] Given this grim view, it is surprising that she fails to acknowledge the hydraulic problem with disclosure itself. If mandated disclosure were effective (either

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65. Although Patriot voters are more likely to vote against candidates who depend heavily on big private donations, we still do not think it is very likely to happen. When push comes to shove, it is hard to vote (especially in the general election) for a candidate of a party with a wildly different political view. And because campaign finance is embedded in a deeply competitive finance structure, it may also be hard to find a clean party for which to vote. The Democrats say they raise so much soft money because the Republicans do—and vice versa. At the end of the day, we still believe that an effective system of anonymity is likely to deter a lot more (explicit and implicit) influence peddling than an effective disclosure requirement—even taking into account the increased citizenship engagement generated by the Patriot system.

66. Ferejohn, *supra* note 15, at 689.

67. *See* Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705 (1999).

now or in the shadow of the Patriot system) in deterring influence peddling, Karlan should argue that big givers will respond by hydraulically shifting to independent issue advocacy and thereby avoid the need for disclosure. Indeed, to remain consistent, hard-core hydraulicists should argue that mandated disclosure will have no effect—even in a world with a highly informed electorate. But no scholar has ever raised a hydraulic concern with mandated disclosure. In our minds, this is fairly strong proof that no hard-core hydraulicists exist. Campaign laws, notwithstanding some hydraulic shifting, can reduce the net flow of contributions. And if this is true of mandated disclosure, it is also true of mandated anonymity.

CONCLUSION: A NEW PARADIGM?

Beyond their particular concerns, our commentators ask a larger question: Do the particular parts of our scheme add up to a coherent whole, or have they merely been scrambled together over lunch in New Haven?

As Ferejohn notes, both Patriot dollars and secret donations create systems in which "the good money will help to drive out the bad money."[68] And both seek to expand the range of accepted ideals of electoral fairness: the secret ballot and "one person, one vote." But we have something deeper in mind in merging our two proposals into a single paradigm.

For starters, we hope to transcend a familiar dichotomy. Policy talk remorselessly explores the tensions between "state" and "market" and too often loses sight of a more hopeful possibility—that we may use the techniques of the marketplace to enhance civic values rather than destroy them. Our new paradigm expresses this more constructive aspiration. Its reform of both public finance and private giving seeks to preserve the great virtues of the marketplace, but in ways that make it responsive to the demands of ordinary citizens, not private power-holders. Rather than replace the market with the command and control of bureaucrats, we seek to redesign the market in ways that further democratic political values.

As Briffault rightly suggests, constructing a "civic marketplace" certainly does not imply the elimination of all bureaucracy. It may well require bureaucrats to become more technocratically sophisticated if they hope to discharge their new task: to assure the smooth functioning of civic markets. The number of bureaucrats may increase, rather than decrease, as the crude methods of command and control are displaced by new methods of market management. The key to the paradigm shift is not the size of the bureaucracy, but its mission. Our proposals, if fully implemented, aim to devolve as much political power as possible to individual citizens and require individual candidates to respond to citizen demands if they hope to gather ongoing financial support.

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68. Ferejohn, *supra* note 15, at 702.

The systematic development of this theme is the hallmark of our new paradigm, but we don't insist that all our proposals be adopted in a single package. To the contrary, our initiative permits for step-by-step implementation. For example, one might introduce a system of Patriot finance on the public side while retaining a traditional system of controls over private giving. Or one might introduce the secret donation booth on the private side, and create a traditional public subsidy providing funds directly to parties or candidates without giving individual citizens a say.[69] Both partial reforms represent an important victory for the new paradigm, even though each falls short of its full realization.

This pragmatic openness to step-by-step reform represents a strength of the new paradigm, not a sign of incoherence. But partial reforms do require special sophistication in institutional design. Reformers can't simply throw elements from the new paradigm into more traditional structures and hope for the best. They must think through the dynamics of particular hybrids and respond to potential pathologies. Particular care is required if the partial reform focuses on the secret donation booth as a first priority. Anonymity will predictably reduce the overall amount of private giving, from $2.5 billion to all federal candidates in the 2000 elections,[70] to something much lower. This decline is a source of concern. We reject the popular belief that too much money is now pouring into politics.[71] Compared to the $13 billion spent on advertising by the auto industry in 1999,[72] $2.5 billion does not seem too much to pay for political communication.

Under the full-blown version of the new paradigm, the anticipated decline in private giving is offset by the large increase in public funding through Patriot. A partial reform with the same objective must combine the secret donation booth with a traditional subsidy program that is big enough to offset the anticipated reduction in private giving.

In glimpsing the prospect for partial reform, we do not advocate a go-slow approach. To the contrary: the legislative window for serious reform seems to open once or twice in a generation, and it would be foolish to refrain from making the most of the next opportunity. To prepare the groundwork, we have proposed a model statute that elaborates the legal infrastructure required for the comprehensive adoption of the new paradigm. While we have been gratified by the thoughtfulness and seriousness of the commentators in this Symposium, our only disappointment is that none has chosen to scrutinize our model statute with care.

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69. A particular state or city, for example, might also consider a pilot project.

70. Joseph E. Cantor, *Campaign Finance in the 2000 Federal Elections: Overview and Estimates of the Flow of Money*, 2001 CONG. RES. SERVICE REP. RL30884, *available at* http://www.cnie.org/nle/crsreports/risk/rsk-57.cfm (published Mar. 16, 2001, accessed Oct. 18, 2002).

71. *See* ACKERMAN & AYRES, *supra* note 13, at 85.

72. *See id.* at 261 n.28.

Such a critique is an absolute necessity before the new paradigm moves forward. Our statute undoubtedly contains serious mistakes and imperfections, and we cordially invite readers of this Symposium to take up the task of critique, however damaging it may prove to our budding reputations as legislative draftsmen!