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Book Review

Mixing Metaphors: Voting, Dollars, and Campaign Finance Reform

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Bruce Ackerman and Ian Ayres. *Voting with Dollars: A New Paradigm for Campaign Finance.* New Haven and London: Yale University Press, 2002. 320 pp./$29.95.

NOTWITHSTANDING THE CURRENT POLITICAL CLIMATE'S preoccupation with terrorism, the economy, and corporate scandals, the esoteric and seemingly impenetrable subject of campaign finance reform has remarkably found its way upon the political agenda. Congress has debated and passed a campaign finance reform statute, which, as is the destiny of all important public policy questions, is currently wending its way to the Supreme Court for that body's constitutional wisdom. Thus, it appears as if campaign finance issues will be with us for a long time to come. As such, Professors Ackerman and Ayres's thoughtful and provocative book, *Voting with Dollars: A New Paradigm for Campaign Finance*,[1] is certainly timely and relevant. Moreover, *Voting with Dollars* is easy to read, the chapters are relatively short, and the ideas are presented lucidly and argued persuasively.[2] It is also written in a style that does not eschew technical concepts but avoids arcane language. The resulting product is a book that remarkably speaks to policymakers (to whom the book seems to have been primarily directed), academics, practitioners, and all relatively informed readers.[3]

The book merges two ideas previously presented separately by the authors—a twist on public funding by Ackerman[4] and anonymity in campaign contributions by Ayres.[5] The paradigm shift referenced in the book's title is the conception that campaign contributions are akin to voting. According to the authors, some of the rules that apply to the franchise, specifically equality and anonymity, should also apply to campaign finance. *Voting with Dollars* is quite persuasive and particularly so when the authors' arguments are taken on their own

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

[2] For example, professors wishing to assign part of the book have the option of assigning chapter 1, which is less than twelve pages but presents an informative thumbnail sketch of the Ackerman-Ayres paradigm.

[3] In contrast to most legal academic writing, the authors have given serious thought to the feasibility of their proposal. *Voting with Dollars* includes a model statute and numerous appendices intended to demonstrate the ease with which *Voting with Dollars* may be readily implemented.

[4] Bruce Ackerman, *Crediting the Voters: A New Beginning for Campaign Finance*, 13 AM. PROSPECT 71 (1993). For other prominent voucher-based proposals see Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CAL. L. REV. 1 (1996); Edward B. Foley, *Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204 (1994).

[5] Ian Ayres & Jeremy Bulow, *The Donation Booth: Mandating Donor Anonymity to Disrupt the Market for Political Influence*, 50 STAN. L. REV. 857 (1998).

terms. But *Voting with Dollars* also raises some unanswered questions.

The first part of this review lays out the authors' basic framework. The remainder of the review addresses some of the very interesting and thought-provoking issues that the book raises. The second part inquires whether the campaign-financing scheme preferred by *Voting with Dollars* is sufficient to adequately finance federal campaigns. The third part examines whether *Voting with Dollars* has convincingly identified the problem in campaign finance that necessitates reforming. Part Four offers some preliminary thoughts on political equality in campaign finance.

THE NEW PARADIGM

Voting with Dollars offers one overarching theme with two distinctive contributions. First, the book provides the "democratic tradition centered on the franchise" as the guiding paradigm for campaign finance reform.[6] The authors argue that traditional campaign finance reformers have treated democratic politics as if they were regulating the economy. Consequently, the reformers have responded to problems in campaign finance by employing one of three methods: command and control regulation; bureaucratic subsidies; or complete disclosure. As they note, "[w]henever a policy wonk confronts the widget market, it is second nature to ask whether widgets generate harms to third parties that require command and control regulation, whether widget producers need subsidizing to achieve optimal levels of production, and whether widget consumers require better information to make informed choices."[7] They conclude that these preferred reform methods are "part of the problem, not part of the solution."[8]

According to *Voting with Dollars*, the proper foundation for resolving campaign finance problems begins with the understanding that donating money to a campaign is a form of political participation akin to voting. Indeed, the authors note, campaign contributions perform the same legitimating function as elections:

> If the deliberations of democratic citizens are crucial in the legitimation of market inequality, we cannot allow market inequalities to have an overwhelming impact on these deliberations. If this happens, we can no longer say that we, as citizens, have authorized the pervasive inequalities we experience as market actors. Politics will have been transformed into a forum in which big money praises itself.[9]

Thus, "[e]ven when our votes count equally, inequality of private wealth may distort public deliberation in ways that are inconsistent with our mutual recognition as equal citizens."[10] In addition, the consequence of "malcontributions"[11] in electoral campaigns is that political actors are less responsive to the populace as a whole and more responsive to large contributors.[12]

From the lessons provided by voting as the center of the new paradigm, the authors derive two important animating principles that constitute the two distinctive contributions as well as the core of the new paradigm: equality and anonymity.[13] For *Voting with Dollars*, the relationship between equality in voting—one person, one vote—and equality in campaign finance is fairly straightforward. Equality in the distribution of the franchise is a foundational component of a democratic polity. "Citizens are given equal voting power"[14] and each "citizen expects his ballot to have equal weight" in an election.[15] If equality is such an important concern with respect to the franchise, why not extend the principle to campaign contribu-

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[6] Ackerman and Ayres, *supra* note 1, at 4.
[7] *Id.*
[8] *Id.*
[9] *Id.* at 13; *see also id.* at 73 ("The more big money shapes the direction of American politics, the less democratic politics can serve as a primary legitimator for economic inequality. If economic inequality is to remain (relatively) legitimate in our society, democratic politics must retain its integrity as a sphere of (relative) equality").
[10] *Id.*
[11] My word, not theirs.
[12] *Id.* at 14.
[13] *Id.* at 9 ("We call this 'voting with dollars' because it mimics two core attributes of the franchise: Citizens are given equal voting power, but they must exercise this power anonymously").
[14] *Id.*
[15] *Id.* at 4.

tions? Thus, "[j]ust as [a voter] receives a ballot on election day, he should also receive a special credit card to finance his favorite candidate as she makes her case to the electorate."[16] *Voting with Dollars*, terms this credit card the Patriot card and it would be funded by Congress with "Patriot dollars," a form of public subsidy.

In practical terms, Ackerman and Ayres would instruct Congress to deposit fifty Patriot dollars in an account—the Patriot account—designated by the voter.[17] Only registered voters would be able to possess a Patriot account and voters can contribute their Patriot dollars to whomever they please, candidates, political action committees ("PACs"), and interest groups. It is worth noting that voters are not limited to contributing Patriot dollars; under the Ackerman-Ayres paradigm, voters can exhaust their personal accounts as well as their Patriot account.[18]

Ackerman and Ayres do not impose many limitations on the manner in which voters may distribute their Patriot dollars, with two exceptions. First, patriot dollars are inalienable—voters cannot sell their Patriot dollars to the highest bidder. Second, the Patriot account is actually subdivided into three separate subaccounts of 10, 15, and 25 dollars to fund House, Senate, and Presidential races, respectively.[19]

The second feature of the new paradigm is the anonymity provision. *Voting with Dollars* preserves the anonymity of the contributor via a mechanism that the book refers to as the "secret donation booth." The secret donation booth is a blind trust to be established by the Federal Election Commission (FEC) that will receive all campaign contributions.[20] Once again, the analogy to the ballot supplies the blueprint for the function of the donation booth. Just as voting is performed anonymously and voters cannot be accompanied into the voting booth as they cast their ballots, they cannot be accompanied to the ATM or to the mailbox to contribute to their favorite political entity.[21] Campaign contributions, like voting, should be a solitary and secret endeavor. The blind trust cannot provide deposit receipts nor can the trust provide a breakdown of individual contributions.[22] The secret donation booth is applicable only to campaign contributions and does not cover non-coordinated issue-oriented campaigns.[23]

Combining these two proposals—Patriot dollars and anonymity—Ackerman and Ayres promise that their new framework will inject at least $5 billion of public money into federal elections;[24] engender a "citizenship ef-

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[16] *Id.*

[17] *Id.* at 14 ("Each American obtains a Patriot account in her capacity as an equal citizen, and it is up to her to decide how best to spend the new patriotic currency").

[18] *Id.* at 35.

[19] *Id.* at 76. Subaccounts are also employed in presidential races when there is an incumbent president running for reelection. *Id.* at 79.

[20] *Id.* 96. The authors describe this device as follows:

> We envision the Federal Election Commission establishing a blind trust that will receive all private contributions to candidates and allied organizations. Donors must follow one central commandment: "Send your checks directly to the blind trust, and don't give them to anybody else." Just as taxpayers make check payable to the Internal Revenue Service, donors will write theirs to the Political Contribution Blind Trust without specifying their beneficiary more precisely. The name of the favored candidate or organization will appear only on a separate form.

Id.

[21] *Id.* at 96–8.

[22] *Id.* at 96.

[23] *Id.* at 97. An exception, however, is made for political parties. All campaign expenditures by political parties are to be made via the donation booth. *Id.* at 124–25. Ackerman and Ayres do not define express and issue advocacy specifically. Instead, they adopt a two-pronged approach to regulating the line between express and issue advocacy. They explore the possibility of (although not expressly advocating) expanding "major purpose organization" status to non-party organizations. *Id.* at 125. In the context of their proposal, PACs that receive patriotic funds would have to use the donation booth to obtain private funds. *Id.* Second, they would authorize the FEC to "seek to capture 'sham' issue advocacy while excluding non-political speech that innocuously refers to political issues." *Id.* at 288 & n.1; see also *id.* at 125. For two important analyses of the constitutionality of the Ackerman and Ayres initiative including the express/issue advocacy problem see Daniel A. Farber, *Dollars and Sense: A "New Paradigm" for Campaign Finance Reform?* (forthcoming University of Richmond Law Review) and Richard L. Hasen, *Vouchers and Buckley: The Need for "Regime Change"* (forthcoming University of Richmond Law Review).

[24] *Id.* at 4, 14, 31, 51. The authors derive the $5 billion figure by assuming that the voters who voted in the 2000 elections also would "vote" with their Patriot dollars. *See id.* at 83 ("To fix ideas, we have been imagining that Patriot had been introduced in time for the 2000 elections, and that the 100 million Americans who cast ballots had also voted with their Patriots during the campaign. This implies a yield of approximately 5 billion Patriots."); *see also id.* at 4.

fect" [25]; and eliminate the role of big money in democratic politics.[26] Taken on its own terms, the Ackerman-Ayres paradigm is fairly attractive and intriguing. Moreover, the proposal is sufficiently concrete and realistic that it would be interesting to see it implemented, particularly on a small scale.

IS PATRIOT SUFFICIENT?

However, before implementing the Ackerman-Ayres campaign finance regime, we must answer some initial questions. First, is the Ackerman and Ayres proposal adequate to finance federal elections? This part argues that Ackerman and Ayres may have overestimated the amount that Patriot will contribute to campaign finance.

An important preliminary question in the assessment of any new campaign-financing scheme, including Patriot, is how much public money it will inject into federal campaigns. This question is critical for at least two reasons. First, the success of a public campaign-financing scheme depends in part upon its ability to finance federal campaigns sufficiently. Second, the authors believe that federal campaigns should be financed primarily by public money. Consequently, even though citizens may vote with private dollars, Patriot must carry the load of financing federal campaigns.

Notwithstanding the importance of this question, a definitive answer is difficult if not impossible given current informational constraints. As the authors note, in light of the fact that Patriot depends upon citizen initiative, it is difficult to predict how many citizens will vote with their Patriot dollars.[27] The authors posit that if "100 million Americans who came to the polls in 2000 had also 'voted' with their patriot cards during the campaign, their combined contributions would have amounted to $5 billion—overwhelming the $3 billion provided by private donors."[28] This $5 billion figure then serves as an operating fact throughout the remainder of the book: Patriot will contribute 5 billion dollars to federal election campaigns.[29]

I do not object to $5 billion as an operating figure—I understand the factual uncertainty within which the authors are operating and they deserve some leeway. However, Ackerman and Ayres seem to present the 5 billion dollars as a minimum of what we can expect from Patriot. Thus, when Ackerman and Ayres describe the "happier future," of a world in which Patriot is the predominant method of political participation, they remark:

> Our initiative does not create a dismal landscape of financial droughts and swamps. Instead, it generates a wave of enthusiastic citizen engagement—even more Americans vote with their patriotic dollars than go to the polls in November. After all, there will be many more opportunities to show up at the voting station. The result, say, is that 125 million citizens give between $6 billion and $7 billion in Patriots, overwhelming the billion or two in private money flowing through the donation booth.[30]

In contrast, to Ackerman and Ayres's vision, I view the 5 billion dollars estimate more as the absolute maximum amount of public contribution we can expect in presidential years.

Given informational constraints, what is our best estimate of the amount that citizens will contribute with Patriot? What we are actually

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[25] *Id.* at 15. Ackerman and Ayres define "citizenship effect" as the "millions of conversations and small decisions surrounding patriotic expenditure . . . [that] provide[s] an important new social context in which Americans . . . reaffirm their relationship as citizens, charged with the responsibility of steering the republic on a sound course." *Id.*

[26] *Id.* at 25 ("By greatly reducing—if not entirely eliminating—the special-interest dealing and gross inequalities that scar the present reality, the new paradigm will enable Americans to create a culture of publicly responsible private giving that is worthy in its own right."); *see also id.* at 9, 32.

[27] *Id.* at 14.

[28] *Id.* at 4–5; see also *id.* at 14 ("It is hard to guess how many Americans will take advantage of their new patriotic opportunity. But as a thought experiment, suppose that it is the same as the number of voters on election day—this means 100 million Americans will contribute 5 billion Patriot dollars during the year when the presidency is up for grabs.").

[29] *See, e.g.*, *id.* at 31 ("With 5 billon Patriot dollars already in the pool. . . ."); *id.* at 51 ("With citizens voting 5 billion Patriot dollars . . .").

[30] *Id.* at 90–91.

looking for is Patriot turnout—the percentage of eligible individuals who will allocate their voucher dollars. In light of current factual uncertainties, it is reasonable to assume, as Ackerman and Ayres do, that the probable universe of Patriot contributors is composed of individuals who in fact vote.[31] As the authors note, in the 2000 federal elections approximately 100 million American turned out to vote.[32] Ackerman and Ayres by their own admission presume that everyone who voted would also vote with patriot. This presumption is as unreasonable as assuming that everyone who is eligible to vote will vote. Notwithstanding considerable appeal and expenditure of resources by interested parties to get citizens to vote, slightly more than half of all Americans of voting age vote and slightly more than two-thirds of all registered Americans vote in presidential elections.

What is a better baseline? Perhaps a more realistic baseline than that used by Ackerman and Ayres is the *percentage of voter turnout as a parameter for predicting Patriot turnout*—as opposed to using voter turnout as the equivalent of Patriot turnout. Defining voter turnout as the percentage of registered voters who cast a ballot in the 2000 elections, sixty-eight percent of the eligible population turned out to vote in 2000.[33] If we define the eligible population for Patriot as the voters who voted and we assume that sixty-eight percent of them would vote with Patriot, we would expect these voters to contribute about $3.4 billion to federal campaigns in the 2000 elections. Incidentally, this amount is similar to the amount that Ackerman and Ayres maintain that private parties contributed—$3 billion—in the 2000 elections.[34] Note that I selected registered voters over eligible voters as my measure of turnout. The turnout rate for registered voters is greater than that for eligible voters (50% versus 66%). Thus, if we use the 50% as our parameter, Patriot might have contributed approximately $2.6 billion in the 2000 elections.

One may argue that these numbers are still much too optimistic. At least two reasons might support that argument. First, using Patriot entails making some marginal effort beyond voting in the general election. If that is so, using the number of people who vote in the general election would not be a proper baseline for determining Patriot turnout. What we should look for is the number of people who currently make some marginal effort beyond the general election, such as those who turn out in primaries.[35] Turnout for primaries may be a good benchmark because it reflects the type of marginal effort beyond voting in the general election that might be equivalent to using Patriot. Moreover, it is reasonable to assume that a voter who is not sufficiently interested or informed to vote in the primary may be similarly uninterested in using Patriot.

Figure 1 compares turnout in presidential primaries with turnout in the general election from 1968 to 2000.[36] The relevant statistic is the primary vote as a percentage of the general election vote. As commentators have observed, "only a fraction of those who participate in the November general election participate in the presidential nominating process."[37] It is true that as the number of primaries has increased, voter participation has increased correspondingly. However, as Figure 1 demonstrates, the total vote in the presidential primaries has never reached 40 percent of the turnout for the general election.

In the 2000 presidential elections 34% of the voters who participated in the general election participated in the presidential primaries. If the voters who participated in the presidential primaries also contributed with Patriot, their combined contributions would have amounted to

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[31] For example, though possible, it is unlikely that a citizen would vote with Patriot but not for a candidate. Thus, we would expect a fair amount of correlation between the citizens who vote and those who also vote with Patriot.

[32] The exact number listed by the FEC is 105,586,274. See *http://www.fec.gov/pages/2000turnout/reg&to00.htm* last visited 10/19/02.

[33] *Id*.

[34] ACKERMAN AND AYRES, *supra* note 1, at 5.

[35] I am thankful to Dan Farber for raising this point and making the suggestion.

[36] The data for 1968–1996 presidential primaries and general elections come from RHODES COOK, UNITED STATES PRESIDENTIAL PRIMARY ELECTION 196–1996: A HANDBOOK OF ELECTION STATISTICS 7 (2000). The data for the 2000 presidential primary and general election come from the FEC's website at *http://www.fec.gov/elections.html*, last visited on December 10, 2002.

[37] COOK, *supra* note 36, at 7.

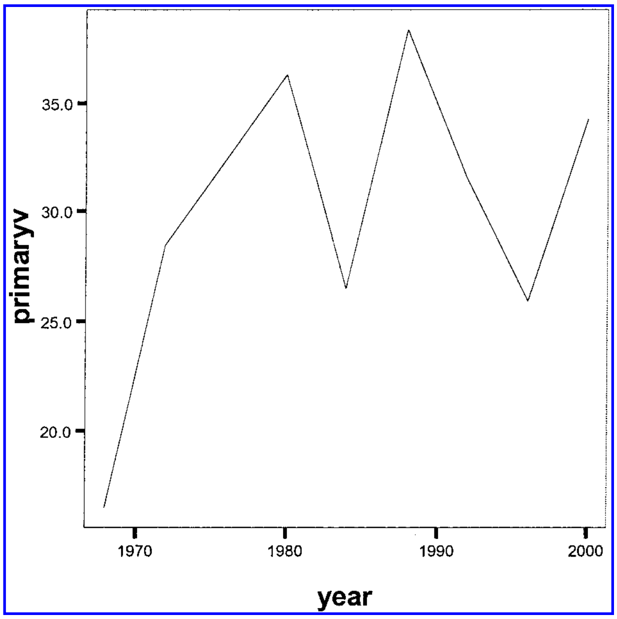

FIG. 1. Primary vote as percentage of general election vote. Source: Rhodes Cook, United States Presidential Primary Elections, 1968–1996.

$1.8 billion. This is obviously a far cry from $5 billion.

There is also a second reason to be skeptical of the claim that Patriot will inject millions of new public dollars into campaign finance. Ackerman and Ayres's proposal is based upon the presupposition that voting and political contributions are equivalent forms of political participation: voting with dollars. However, citizens may not share and may never come to share that view. Perhaps for voters, voting is the highest form of political participation—as both a descriptive and normative matter.[38] Consequently, one should not expect that voters will engage equally in both forms of political participation. In other words, the incidence of voting will always surpass contributions as a form of political participation.

This point finds ample support by examining Minnesota's campaign financing scheme, which is the most analogous comparison to Patriot extant. The state of Minnesota employs a variant of a voucher system for state elective offices. The state will reimburse individual voters, up to $50, for contributions to political parties and candidates who agree to abide by certain spending limits.[39] The state also subsidizes the political campaigns of political parties and candidates provided that they agree to certain spending limits.

Only 8% of Minnesotans took advantage of the subsidy in the 2000 elections.[40] In fact, as Figure 2 demonstrates, the percentage of participating taxpayers has consistently declined for the last thirty years. Interestingly, though participation in the subsidy program has declined, turnout in Minnesota has not suffered an equivalent fate. As Figure 3 shows, turnout has dipped as low as 47% in 1986 and has climbed as high as 71% in 1992.

To the extent that the Minnesota data are indicative of the probable success of Patriot, the situation looks grim. The disparity between voter turnout and subsidized contributions does not indicate the equivalence of these two forms of political participation. That is, it is not clear that voters view casting a ballot and financial contributions as equivalent behavior. Indeed, the opposite conclusion must be drawn from the Minnesota data.

Additionally, the decline of voter participation may indicate that vouchers are not sustainable as a long-term solution to campaign finance reform. As Ackerman and Ayres note, perhaps the Minnesota program imposes too many costs on voters to be useful as an accurate predictor of the probable success of the Patriot program.[41] Ackerman and Ayres may be right. Nevertheless, notwithstanding the availability of private financing and Ackerman and Ayres's stabilizing algorithm,[42] it is necessary

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38 Sidney Verba, Kay Lehman Schlozman, Henry E. Brady, Voice and Equality: Civic Voluntarism in American Politics 9 (1995) ("Voting is the most common and, in a profound sense, the most basic citizen act.").

39 *See* Minn. Stat. § 290.06 subd. 23 (2002); Minn. Stat. § 10A.315 (2002); Minn. Stat. § 10A.322 (2002).

40 *See* http://www.cfboard.state.mn.us/.

41 Ackerman and Ayres, *supra* note 1, at 262–63 & n.33 (noting that the Minnesota subsidy program "requires contributors to take the trouble to obtain a special refund form, file it with the state's Department of Revenue, and wait for reimbursement.").

42 Ackerman and Ayres's initiative would direct the FEC to assure that total contributions (private and Patriot) do not fall below a baseline so as to assure sufficient funding and to assure that Patriot contributions are twice that of private contributions. *See id.* at 223. In spite of these provisions, Ackerman and Ayres's initiative depends upon a minimum amount of broad citizen participation. Otherwise, as another commentator has noted, "a small percentage of the population is going to be controlling the flow of a lot of public money. That would merely recreate the excess influence by small minorities that characterizes current campaign finance." Farber, *supra* note 23, at 19.

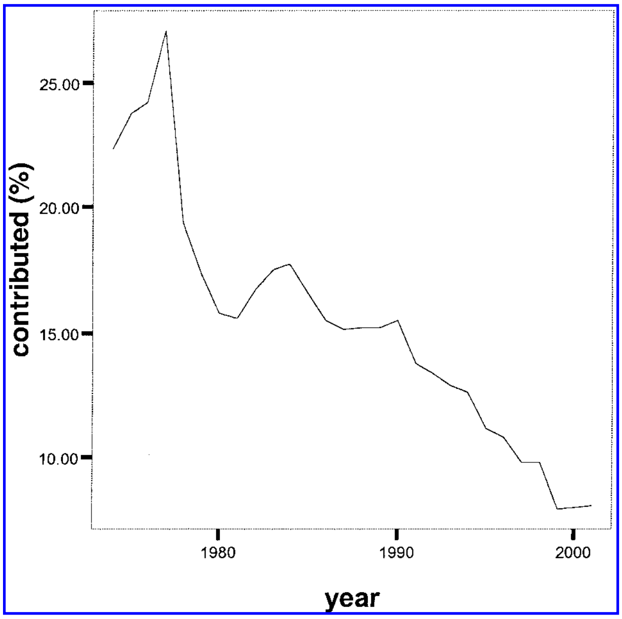

FIG. 2. Percent of voters who participated in subsidy. Source: Minnesota Campaign Finance and Public Disclosure Board.

to better understand how much Patriot will contribute to campaign finance before we implement it on a wide-scale.

PROBLEMS WITH PATRIOT?

The second issue that *Voting with Dollars* raises is whether the authors have sufficiently

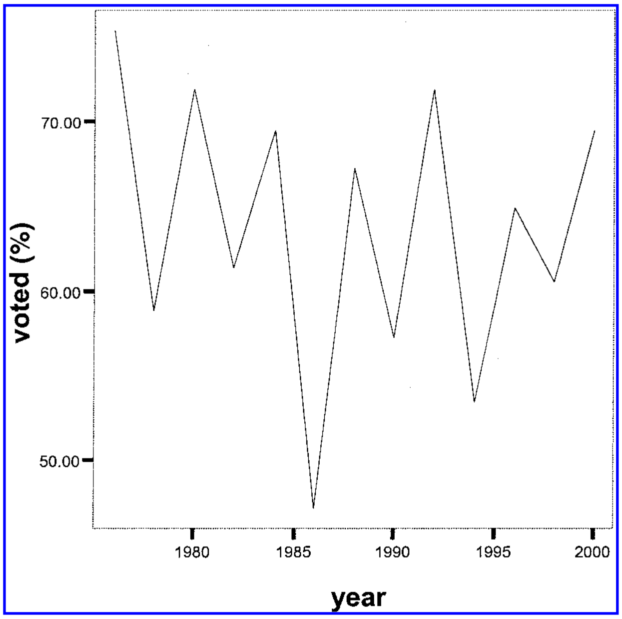

FIG. 3. Turnout by year. Source: Minnesota Secretary of State.

identified the problems with campaign finance that need reform. Reform can be directed at a range of possible concerns and of course the effectiveness of the solution depends in great part upon an accurate diagnosis of the problem.[43] Assessing the probable effectiveness of a proposed solution becomes an even more difficult task when the purpose of the reform is ambiguous.

Voting with Dollars provides possibly four motivations for reform: equality, *quid pro quo* corruption, access, and big money. *Voting with Dollars* presents these four different reasons for campaign finance reform as one overarching concern. Consequently, *Voting with Dollars* does not sufficiently differentiate among these four concerns and oscillates weakly among them. On most occasions *Voting with Dollars* presents "big money" as the problem.[44] On other occasions, the problem is "special access."[45] Still on other occasions the authors strongly imply that the problem is special influence or an illegal *quid pro quo*.[46]

It is not clear what *Voting with Dollars* refers to when it uses the term "big money." Sometimes the book seems to be concerned with the fact that presumably wealthy citizens are able to contribute large sums to political campaigns.[47] But sometimes the book seems to be concerned with simple inequality in campaign contributions: the fact that most citizens do not contribute to campaign finance. Similarly, the book is unclear when it refers to "special influence"[48] or "special dealing."[49] At times, the authors appear to be concerned with inequality in responsiveness: politicians are more responsive to the policy preferences of campaign

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[43] David A. Strauss, *What is the Goal of Campaign Finance Reform?*, 1995 U. CHI. LEGAL F. 141

[44] Ackerman and Ayres, *supra* note 1, at 13 ("The problem requiring reform is the power of big money to undermine free and equal democratic deliberation."); *id.* at 14 ("Big money is the problem. . . .")

[45] *Id.* at 7.

[46] *Id.* at 7; *id.* at 27; *id.* at 28. The corruption case is more clearly made by Ayres elsewhere. *See* Ayres and Bulow, *supra* note 5, at 842 (The corrupting influence of campaign contributions has been a central concern of finance reform."); *see also id.* at 838, 843.

[47] ACKERMAN AND AYRES, *supra* note 1, at 44 (referring to "big donors").

[48] *See, e.g.*, *id.* at 118.

[49] *See, e.g.*, *id.* at 172.

contributors.[50] At other times, the authors seem to be concerned with influence peddling itself: politicians are being bought.[51] If there is a sustained argument in the book with respect to the problem of campaign finance, perhaps it is a combination of those three concerns: wealthy citizens are using campaign contributions to buy political favors from politicians.[52] However, one cannot ignore the authors' contention that enhancing the legitimacy of economic inequality in democratic politics is the "motivating factor" for reforming campaign finance.[53]

Each of these concerns is important in its own right and each might serve as a justification for reform. For example, one can easily justify the public finance aspect of the Ackerman-Ayres system simply on the importance of citizen involvement in all aspects of democratic politics. Monetary contributions, coupled with other aspects of political participation, are important forms of civic engagement. To the extent that money is even in part determinative of the type of politics and policies that our political process produces, citizens can feel a sense of investment and dignity from their involvement in helping to shape the outcomes of democratic politics.

On the other hand, the anonymity prong is sensible only if there is a paramount concern with *quid pro quo* corruption. If the concern is simply big money and its differential impact, from the perspective of pluralism Patriot is less of a safeguard and anonymity is ineffective. That is, if one is concerned that those who contribute are not a representative sample of the voting population one may—and arguably should—be concerned that the resultant policies may not represent the interests of the greater polity or may differentially benefit the interests of those who contribute. However, anonymity is not responsive to such concerns.[54]

Indeed, by effectively removing contribution limits[55] and mandating anonymity, the Ackerman and Ayres paradigm might increase the payoff for contributions and firm up the relationship between contributions and outcomes. Assume that you are a special interest entity or a wealthy individual. You have policy preferences but the donation booth has made it impossible to promote your policy preferences by asking for *quid pro quo* favors or special access. In other words, the donation booth has made it much more difficult to pursue what Professor Lowenstein terms a legislative strategy.[56] For all intents and purposes, in order to promote those preferences you must help elect individuals who share those preferences. This is what Professor Lowenstein refers to as the electoral strategy.[57] If pursuing a legislative strategy is cost-prohibitive or simply unavaible, electoral politics becomes a higher stakes game because it may be the only game in town. Additionally, the payoff may be greater because one might be able to go a long way toward achieving a desired policy objective simply by pursuing an electoral strategy—electing individuals who are inclined to share those preferences.[58] Thus, the combination of anonymity

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[50] *See, e.g., id.* at 93–96.

[51] *See, e.g., id.* at 154 (referencing a concern to vote-buying).

[52] *Id.* at 51.

[53] Ackerman and Ayres, *supra* note 1, at 73.

[54] One can argue that the donation booth could be justified even if the only policy goal is that of equality and not corruption. Under a regime of forced anonymity, private contributions (particularly big private contributions) might dry up. This would reduce the variance at the high end resulting in a more equal campaign finance system. As I discuss *infra*, text accompanying notes 56 to 58, the assumption that contributions might dry up depends upon whether the contributor is pursuing an electoral or a legislative strategy.

[55] *Voting with Dollars* does impose some limitations on contributions as regulations of last resort, but they are much higher than those permitted by existing law. *See id.* at 154–55.

[56] Daniel Hays Lowenstein, *On Campaign Finance Reform: The Root of All Evil is Deeply Rooted*, 18 Hofstra L. Rev. 301, 308 (1989) ("Under the 'legislative' strategy, they make contributions to whomever they think is likely to be elected, in the hopes of influencing the likely winner to pursue the favored policies by reasons of gratitude, a desire to encourage future donations from the same or additional groups, or similar motivations.").

[57] *Id.* ("Under the 'electoral' strategy, they [contributors] make contributions to enhance the chances of victory of candidates who are likely, if they are elected, to pursue the policies the contributors favor.")

[58] *See id.* at 309. This argument may be another way of arguing, as Pam Karlan has done, that under the Ackerman and Ayres paradigm "Patriot dollars and time-honored votes [may] come to be seen as substantially interchangeable, [which] may have unfortunate citizenship effects." *See* Pamela S. Karlan, *Elections and Change Under "Voting with Dollars"*, available at *http://papers.ssrn.com/sol3/papers.cfm?abstract_id5311085,* last visited December 3, 2002.

and extremely high contribution limits might serve the dual perverse purposes of providing an incentive for big donors to contribute disproportionately and skew the political process in favor of large contributors. Needless to say, if the goals of campaign finance reform are to limit the influence of big money or to increase the confidence of citizens in the political process, the anonymity prong of *Voting with Dollars* might undermine these goals.

Further, the authors' failure to define the problem in campaign finance and differentiate among multiple justifications for campaign finance reform precludes them from addressing the fact there is differential empirical support for each articulation of the problem in campaign financing.[59] Consider as an example the proposition that moneyed interest—big money—plays a distinctively large role in campaign financing. In order to answer that question, one must first define "big money." If by "big money" one means average PAC contributions as against average individual contributions, then one can conclude that a fair amount of support exists in support of the proposition. In a recent paper, Ansolabehere, de Figueiredo, and Snyder determined that "the average contribution from an individual to a candidate, party committee or PAC . . . is approximately $155."[60] In contrast, the "average PAC contribution is $1,700;" corporations "give an average contribution of approximately $1,400 to legislators; trade associations and membership groups give average contributions of approximately $1,700, and labor unions give average contributions of $2,200."[61]

If, however, by big money one means total PAC contributions as against total individual contributions, then one will find much less evidence in support of the proposition. Ansolabehere and his colleagues concluded that of the 3 billion dollars that were spent in the 2000 elections, the majority of the money "came from individuals in small amounts."[62] They estimated that "individuals contributed nearly $2.4 billion, the public treasury paid $235 million, and about $380 million came directly from the treasuries of corporations, unions, and other associations."[63] If the goal of *Voting with Dollars* is to reduce the role of big money in politics, perhaps that goal has already been met if big money is defined as money that does not originate from individual contributors. If however, one defines big money as average contributions, *Voting with Dollars* may achieve that goal provided that individuals are induced to use their Patriot dollars and less private money enters the system.

MIXING METAPHORS AND THE TROUBLE WITH EQUALITY

A central, if not the central, animating concept in *Voting with Dollars* is the notion that the campaign contribution is a method of political participation that is like voting. The voting metaphor serves as a blueprint for the prescriptions outlined in the book. The idea that campaign contributions are akin to voting certainly has normative intuitive appeal, but this appeal is purchased at the price of a compelling defense of what equality means in campaign financing. Though I agree with the authors' general suggestion that democratic principles ought to govern campaign finance reform, equality and anonymity in campaign finance can and must be defended on their own terms.

Voting with Dollars explicitly draws from the intellectual and emotional appeal of the Supreme Court's one-person, one-vote cases.[64] Just as the vote of each citizen counts equally, so should their campaign contributions. As the authors explain, it is not "enough to count every vote equally on election day. The American citizen must be given a more equal say in funding decisions."[65] As with many reformers, equality concerns appear to be an important source of motivation for *Voting with Dollars*.

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[59] *Compare e.g.*, Frank J. Sorauf, Money in American Elections, 310–17 (1988) *with* Richard L. Hall & Frank W. Wayman, *Buying Time: Moneyed Interest and the Mobilization of Bias in Congressional Committees*, 84 Am. Pol. Rev. 794 (1990).

[60] Stephen Ansolabehere, John de Figueredo, and James M. Snyder, *Why is There So Little Money in U.S. Politics?*, 9. The paper is available at *http://web.mit.edu/polisci/faculty/J.Snyder.html*, last visited on November 20, 2002.

[61] *Id.* at 9.

[62] *Id.* at 8

[63] *Id.* at 8.

[64] Ackerman and Ayres, *supra* note 1, at 4, 14.

[65] *Id.* at 4.

However, it is unclear what equality means in campaign finance and what state of affairs would satisfy that concern.

To get some leverage on this point, consider Ackerman and Ayres's treatment of what they call patriotic PACs.[66] One of the goals of *Voting with Dollars* is to "disrupt the special interest dealing we now take for granted."[67] The anonymity prong of the Ackerman and Ayres paradigm is specifically designed to effectuate that goal. All contributions are to be anonymous with one curious exception: patriotic contributions to PACs and political parties are exempt from the donation booth. Yet, if the goal of campaign finance reformers is to reduce if not eliminate the ability of moneyed interests to buy access or influence, exempting PACs requires a compelling defense. Assuming that the goal of campaign finance reform is to decrease the role of special interest money or even big money, it would appear to follow that PACs, patriotic or otherwise, are one of the best, if not the best, candidates for application of mandatory anonymity rules. Yet, Ackerman and Ayres disagree. As they explain:

> When we make it hard for candidates to identify contributions with certainty, we make it hard for them to respond readily to the influence of the underlying inequality of private resources. By disrupting potential quid pro quos, we enhance the credibility of the claim that political deliberation and decision is something more than, and different from, the reflexive servicing of economic privilege.
>
> But this rationale does not apply where Patriot dollars are concerned, for these resources are distributed equally, reflecting our status as equal citizens.[68]

When Ackerman and Ayres say that Patriot dollars are distributed "equally," they mean that every voter receives the same amount of money—and, to the extent that a voter decides to contribute, each voter contributes the same amount to a particular PAC. Thus, equality is defined very formally and satisfied rather easily—too easily. By stipulation, all patriotic contributions to PACs will be "equal."

Voting with Dollars's justification for exempting patriotic PACs from the donation booth is unsatisfying on a number of grounds. Two are worth exploring here. First, *Voting with Dollars*' definition of equality is much too narrow and formalistic to satisfy the equality and legitimacy concerns that motivate reform. Ackerman and Ayres believe that there is a relationship between economic inequality and the legitimacy of policy outcomes.[69] Policy outcomes are illegitimate to the extent that they are the product of economic power. This relationship is mediated through the campaign financing system. Campaign financing schemes may undermine democratic legitimacy by "distort[ing] public deliberation in ways that are inconsistent with our mutual recognition as equal citizens."[70] Ackerman and Ayres solve the legitimacy problem by purporting to interject more equality: if political campaigns were financed in a more "equal" manner, we would legitimize economic inequality.

But how persuasive is this argument? Would we really conclude that economic inequality is no longer an issue—that economic inequality is legitimate—because all voters receive the same amount of money and *among those who contribute* all voters contribute the same? Suppose we enacted the campaign financing scheme promulgated by Ackerman and Ayres and later learned that officials are disproportionately responsive to voucher contributors as against non-contributors?[71] What if we also

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66 A patriotic PAC is a PAC that is completely funded by Patriot dollars.

67 ACKERMAN AND AYRES, *supra* note 1, at 6.

68 *Id.* at 73.

69 *Id.* at 13. Of course, they are not the only ones to make that connection. The relationship between economic inequality and political power is a standard argument for campaign finance reformers. *See, e.g.*, Burt Neuborne, *Toward a Democracy-Centered Reading of the First Amendment*, 93 NW. U. L. REV. 1055, 1071–73 (1999) (noting that economic inequalities "create disparities in political power," skew the political agenda, and inappropriately affect political outcomes); Foley, *supra* note 4, *passim*.

70 ACKERMAN AND AYRES, *supra* note 1, at 13; *see also id.* at 73 ("The more big money shapes the direction of American politics, the less democratic politics can serve as a primary legitimator for economic inequality. If economic inequality is to remain (relatively) legitimate in our society, democratic politics must retain its integrity as a sphere of (relative) equality").

71 *Cf.* Strauss, *supra* note 43, at 143–49.

learned that contributions were in part a function of socio-economic status?[72] Even with public subsidization, those voters who were better off and better educated were more likely to vote with Patriot. Suppose further that African-American voters were less likely to contribute than white voters?[73] Finally, what if socio-economic status and race correlated with political viewpoint? What then would be our conclusion with respect to equality in the political process? Once again, would we really conclude that resultant economic inequalities are legitimate because we have achieved political equality?

Perhaps Ackerman and Ayres would define their goal as equality of opportunity to influence the political process regardless of wealth. But as a commentator remarked, "what good is $50 voucher dollars (of which only $25 dollars goes to the presidential campaign) when the wealthy can give presidential candidates $100,000?"[74] In other words, are we satisfied that we have achieved a measure of political equality with Patriot? Is this what we intend by political equality in campaign finance?

There is a second reason for questioning *Voting with Dollars*'s explanation for exempting patriotic PACs from the anonymity requirement. Economic inequality may be illegitimate irrespective of the existing campaign-financing scheme. Consider the following reasoning from Ackerman and Ayres:

> If each citizen received the same number of votes as he had dollars, a majority vote in favor of a tax scheme that placed a heavy burden on the poor would not serve to legitimate the resulting distribution of wealth. But when each citizen gets one vote a majority vote in favor of a regressive tax scheme may represent something different—a judgment by the majority, after due deliberation, that the present distribution of wealth is too equal and that the public good may be served by making it more equal.[75]

Let us assume that all voters participate equally in campaign financing—every eligible voter contributes the exact same amount. Let us then assume that the relevant legislature enacts a regressive tax scheme. Does the manner in which elections are financed preclude us from arguing that the resultant economic inequality is illegitimate? Equalizing participation may remove some reasons for believing that certain viewpoints were not considered or that legislators imposed costs on marginalized, politically or otherwise, groups. But it would not be determinative of the normative question: is the resultant economic inequality just, fair, or legitimate.

As Ackerman and Ayres recognize, economic inequality is ubiquitous. Economic inequality is endemic to the political system and systematically affects all aspects of the political process. The concern with inequality, if it is to be a meaningful enterprise, must extend beyond formal inequalities. Though, reformers are right to be troubled by systemic inequalities, if the legitimacy of policy outcomes depends upon eliminating the effect of socio-economic inequalities in campaign finance, we might need to find a new mechanism for addressing the effect of market inequalities on democratic deliberations.

Paradoxically, exempting patriotic PACs from mandatory anonymity requirements, instead of diminishing their importance, may institutionalize their indispensability as money brokers. Under the Ackerman and Ayres framework one can imagine a two-phased system. In phase one the representative actively solicits contributions for non-Patriotic money. Given the high contribution limits that *Voting with Dollars* favors,[76] this phase will most likely entail targeting contributors with the potential of donating fairly large sums. If our representative is a rational actor seeking to efficiently maximize a scarce resource, her time, she will be personally involved in this phase of fundraising. Phase two, in contrast, should in-

[72] Spencer Overton, *Voices from the Past: Race, Privilege, and Campaign Finance*, 79 N.C. L. REV. 1541 (2001).
[73] *See, e.g.*, Spencer Overton, *But Some Are More Equal: Race, Exclusion, and Campaign Finance*, 80 TEX. L. REV. 987 (2002); Terry Smith, *Race and Money in Politics*, 79 N.C. L. REV. 1469 (2001).
[74] Hasen, *supra* note 23, at 19.
[75] ACKERMAN AND AYRES, *supra* note 1, at 13.
[76] For example individuals can contribute up to $100,000 per year to candidates and political organizations. ACKERMAN AND AYRES, *supra* note 1, at 154, 204.

volve the solicitation of Patriotic funds. By definition, this task will involve soliciting small sums of money. Again, supposing that our representative is rational, we do not expect her to be intimately involved in this phase of the fundraising process. More than likely, some political association will perform this task by acting as a broker: we—the political association—will collect Patriots and deliver them to you—Member of Congress—if you behave. If Patriotic contributions are important to our representative or if she can behave at minimal cost, we expect her to do so.

Ackerman and Ayres seem to anticipate this problem and provide the following defense:

> We do not generally condemn a politician when he shapes his public views to gain the support of a majority of his fellow citizens on election day. By the same token, we should not condemn him for heeding the views of citizens when they are expressed through their contributions to patriotic PACs. To the contrary, the active and public involvement of patriotic PACs is a sign of the vitality of the democratic process.[77]

Perhaps. But the active involvement of patriotic PACs may not be indicative of the active involvement of the citizenry. Citizens may be induced to remit their Patriot dollars to an issue-oriented organization without initial knowledge of the ultimate beneficiary. Thus, *Voting with Dollars* may be correct that the active involvement of patriotic PACs is indicative of an active citizenry or it may be mistaken in which case the active involvement of patriotic PACs is a sign that moneyed interests have found yet another loophole for exploiting campaign finance rules to their own ends.[78]

Ackerman and Ayres are correct that sometimes the concern with inequality in campaign finance is a concern with formal inequalities—voters are not contributing the same amount.[79] However, the problem is that inequality is not an either/or proposition. Or put differently, we should not speak of inequality but of inequalities.[80] A fitting comparison is the one-person one-vote requirement of *Gray v. Sanders*,[81] *Westberry v. Sanders*,[82] and *Reynolds v. Sims*.[83] As many scholars have argued, though one-person, one-vote is an important measure of political equality, it is not the only one.[84] Perhaps more importantly, blind adherence to a formalistic and thin conception of political equality precludes the possibility of developing a more robust and thick conception of political equality.[85]

Fundamentally, reformers must come to terms with what they mean by political equality. Further, they must also come to terms with how their favored campaign finance scheme

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[77] Ackerman and Ayres, *supra* note 1, at 74.

[78] Dan Farber has provided an interesting solution to this problem. Using principles derived from property law, Farber suggests subsidizing donors who contribute via the donation booth. As he explains:

> Indeed, the mere existence of this option might have a strong effect on donors because it changes the nature of the signal they are sending. At present, a public donation says, "I want to support this candidate, and I am willing for the candidate and the public to know I am doing so." But after Rule Five is imposed [subsidization], the same public donation communicates a more specific message: "I want to support this candidate, and I think it is so important to reveal my financial support to the candidate or the public that I am willing to forgo a tax credit to do so." The public is then free to draw its own conclusion about the donor's motivation.

Daniel A. Farber, *Afterword: Property and Free Speech*, 93 Nw. U. L. Rev. 1239, 1258–59 (1999).

[79] *See, e.g.*, Foley, *supra* note 4.

[80] Professor Herzog put the point very nicely: "The grammatically clumsy but correct question may be, what are equality?" Don Herzog, *How to Think About Equality*, 100 Mich. L. Rev. 1621, 1636 (2002); *see also* Guy-Uriel E. Charles, *Constitutional Pluralism and Democratic Politics: Reflections on the Interpretive Approach of* Baker v. Carr, 80 N.C. L. Rev. 1103, 1155 (2002); Jonathan W. Still, *Political Equality and Election Systems*, 91 Ethics 375 (1981).

[81] 372 U.S. 368 (1963).

[82] 376 U.S. 1, 14 (1964).

[83] 377 U.S. 533 (1964).

[84] *See, e.g*, Luis Fuentes-Rohwer, Baker's *Promise, Equal Protection, and the Modern Redistricting Revolution: A Plea for Rationality*, 80 N.C. L. Rev. 1353 (2002); James Gardner, *One Person One Vote and the Possibility of Political Community*, 80 N.C. L. Rev. 1237 (2002); Heather Gerken, *The Costs and Causes of Minimalism in Voting Cases*: Baker v. Carr *and its Progeny*, 80 N.C. L. Rev. 1411 (2002); Sanford Levinson, *One Person, One Vote: A Mantra in Need of Meaning*, 80 N.C. L. Rev. 1269 (2002).

[85] See Charles, *supra* note 80; Gerken, *supra* note 84; Levinson, *supra* note 84; Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 Harv. L. Rev. 1663 (2001); Sanford Levinson, *Gerrymandering and the Brooding Omnipresence of Proportional Representation; Why Won't It Go Away?*, 33 UCLA L. Rev. 257 (1987).

satisfies the concern with political equality. I suspect that, ultimately, the question will be one of meaningful or substantial equality.[86]

Though *Voting with Dollars* significantly moves the debate in a number of directions, I wish Ackerman and Ayres were more explicit about how *Voting with Dollars* contributes to our understanding of political equality in campaign finance.

CONCLUSION

Even if we take into account some of the arguments that this review raises, *Voting with Dollars* remains an important book with new contributions on a timely subject and should be taken seriously. The proposal is well thought out and fascinating. It is sufficiently concrete that it can and should be implemented. Ackerman and Ayres's paradigm provides a fitting alternative for judging past and current attempts at campaign finance reform.

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[86] Charles, *supra* note 80, at 1152–57; Still, *supra* note 80, at 386.