Book Review

What Ails Us?

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Voting with Dollars: A New Paradigm for Campaign Finance. By Bruce Ackerman[*] & Ian Ayres.[**] *New Haven: Yale University Press*, 2002. Pp. 303. $29.95.

INTRODUCTION

Is American democracy sick? If so, what ails it? More importantly, can the disease be cured? Can its symptoms be alleviated by imaginative and well-crafted laws? Or is it a genetic disorder embedded in the DNA of modern representative government and thus unlikely to yield to therapeutic manipulation?

In recent years, advocates of increased campaign finance regulation have often expressed the view that our democracy is indeed pitifully ill, that it has fallen prey to an inert citizenry and the pervasive and undue influence of money.[1] Reformers implicitly believe, however, that the disease is

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1. The literature is voluminous. A classic in the genre is Ronald Dworkin, *The Curse of American Politics*, N.Y. REV. BOOKS, Oct. 17, 1996, at 19. For but one additional example from many that could be cited, see Burt Neuborne, *The Supreme Court and Free Speech: Love and a Question*, 42 ST. LOUIS U. L.J. 789 (1998). According to Neuborne, "That we suffer from democratic malaise is undeniable," as indicated by the fact that "powerful private actors threaten to turn the free market in ideas into a wealth-driven oligopoly," that there is an "appallingly low

curable, that it was caused by a dysfunctional system of financing political campaigns, and that it could accordingly be remedied simply by overhauling that system. The recently enacted Bipartisan Campaign Reform Act of 2002, commonly known as McCain-Feingold, incorporated many of the new restrictions that most reformers thought ought to be included in that overhaul, including prohibitions on soft-money contributions and regulations on issue ads.[2]

In *Voting with Dollars: A New Paradigm for Campaign Finance*, Bruce Ackerman and Ian Ayres join the chorus of reform advocates who believe that democracy is ailing, that the cause of its illness is a fundamentally flawed campaign finance system, and that it can be cured if that system is properly overhauled. The overhaul they propose, however, departs radically from what reformers have conventionally advocated. Instead of direct public funding of election campaigns, they propose giving citizens public money—"Patriot dollars"—with which to support candidates or causes of their choice. Instead of advocating severe limits on private campaign contributions, or ever-more complete disclosure from the ever-growing number of participants in the political process, they propose mandating contributor anonymity while permitting substantial (although not unlimited) private giving. Ackerman and Ayres make extravagant claims for their new paradigm's ability to transform political life. With Patriot dollars available to them, voters will not remain disengaged and inert: Patriot dollars will rekindle citizen sovereignty and give "renewed vitality to [Americans'] democratic commitments."[3] And by eliminating the ability of contributors to credibly communicate the amount of their gifts to candidates (and thus to secure for themselves a corresponding amount of influence), the secret donation booth will "disrupt the special-interest dealing"[4] we now take for granted. Ackerman and Ayres's proposals for Patriot dollars and the secret donation booth represent genuinely new ideas about how campaign finance should be reformed.

Voting with Dollars was conceived and written before the passage of McCain-Feingold, and published when that law's prospects remained dim despite the fact that it had passed the House. At present, unfortunately for the authors, the book can hardly be considered timely: Although its authors claimed to be putting their paradigm forward as a genuine alternative for Congress to consider *instead of* McCain-Feingold, its publication

level of participation in the democratic process," and that the quality of democratic discourse is "appalling." *Id*. at 793-94.

2. Bipartisan Campaign Finance Reform Act, Pub. L. No. 107-155, §§ 101, 201, 116 Stat. 81, 82-86, 88-90 (2002) (to be codified at 2 U.S.C. § 441).

3. BRUCE ACKERMAN & IAN AYRES, VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE 5 (2002).

4. *See id*. at 9.

practically coincided with McCain-Feingold's enactment.[5] Congress rarely can gather the momentum to engage in serious debate, much less to pass legislation, regarding campaign finance. It is therefore unlikely that Ackerman and Ayres's book will have any practical effect whatsoever: At least for the time being, the legislative debate over campaign finance reform is over.

Nonetheless, the authors are important scholars, their ideas are provocatively imaginative, and the topic of campaign finance is not insignificant just because Congress is not likely to revisit it any time soon. Moreover, Ackerman and Ayres claim to have devised a campaign finance regime that would solve two vexing predicaments—namely, how to kindle citizen engagement in politics and how to purge the legislative process of selfish interest-group rent-seeking. Because it addresses and claims to have answers to these questions, *Voting with Dollars* deserves serious attention.

The principal thesis of this Review is that even in the unlikely event that it were enacted into law, the new paradigm would almost certainly fail to achieve the benefits the authors so confidently predict: Patriot dollars will not ignite citizen interest in politics, nor will the secret donation booth end special-interest legislation. This, I argue, is because both widespread citizen disengagement and a legislative process dominated by interest-group competition (in which moneyed interests are important, but not the only, players) are practically inevitable characteristics of our complex modern democracy. The prevailing system of financing political campaigns is not a but-for cause of these phenomena, nor will reforming that system alleviate them. More particularly, it is quixotic to expect that either citizen disengagement or interest-group competition will yield significantly to the reforms embodied in Ackerman and Ayres's new paradigm, despite its imaginativeness and originality.

Making this argument is not my only object in this Review. The book's manner of exposition also warrants comment, as does its constitutional analysis. It should be noted at the outset, however, that I pay scant critical attention to the details of the new paradigm. That task is best left to a reader who has been convinced that the new paradigm reflects a sound diagnosis and wants to make sure its design is not defective.

5. Conceptually, Ackerman and Ayres's new paradigm is worlds apart from McCain-Feingold. They endorse McCain-Feingold's effort to "sweep soft-money contributions to political parties into the regulatory framework," *id*. at 54, but they criticize what they regard to be its "two important weaknesses," *id*., namely, its use of low contribution limits to prevent corruption and its expansive definition of express advocacy. "Rather than restricting the right of interest groups to endorse candidates, the new paradigm solves the problem of special influence by diluting it with Patriot dollars and constraining it through the secret donation booth." *Id*. Interestingly, Ackerman and Ayres do not mention the key fact that McCain-Feingold rejects the anonymity keystone of the new paradigm in favor of a continued reliance on disclosure.

The Review proceeds as follows. Part I summarizes the book. The summary almost, but not quite completely, eschews criticism or comment. It also contains more than the usual amount of direct quotation, in hopes of conveying not merely the essence of the new paradigm but also a first-hand impression of the authors' rhetorical style. Part II argues that the new paradigm's fatal flaw, one shared by nearly all advocates of campaign finance reform, is a profound misdiagnosis of what ails modern democracy. The problem with our democracy is not how we finance campaigns. It is that the incentives affecting citizen behavior are systematically skewed both to encourage disengagement and to permit most special-interest deal-making to go undetected and unpunished. What democracy most desperately needs is transparent public decisionmaking: Then citizens could more readily understand what their elected officials are doing and hold them to account for it at regularly scheduled competitive elections. Part III comments on the book's exposition and scrutinizes its constitutional analysis.

PART I

A. *The New Paradigm*

Voting with Dollars begins by describing and rejecting what its authors refer to as the "old paradigm"[6] of campaign finance reform. Ackerman and Ayres decry three elements in this old paradigm: command and control regulation (with its emphasis on contribution and expenditure limits), "publicly subsidized campaigns administered by bureaucrats,"[7] and full disclosure. Their claim is that these three elements "are part of the problem, not part of the solution."[8] To set the system right, they propose a "new paradigm" with its own three basic elements: Patriot dollars, a secret donation booth, and selective (instead of comprehensive) restrictions on private money.[9]

The basic idea behind Patriot dollars (which the authors sometimes refer to simply as Patriot) is that, just as every American citizen "receives a ballot on election day, he should also receive a special credit card to finance

6. *Id*. at 3.

7. *Id*. at 9. It is difficult to know precisely what Ackerman and Ayres are referring to when they use this phrase. They discuss this aspect of the "old paradigm" as if it were part of the current debate about how to reform Senate and House campaigns, and the criticisms they offer do seem to be general ones. At present, however, only presidential campaigns are publicly funded, and then only if the candidates agree to cap receipt and spending of private money. Moreover, proposals for public funding of congressional campaigns have always presented such significant design issues (having to do with how to decide which candidates would qualify for public funding and how to cleanse the system of incumbent advantage) that they have not had much political viability.

8. *Id*. at 4.

9. *Id*. at 9.

his favorite candidate . . . . Call it a Patriot card, and suppose that Congress seeded every voter's account with fifty 'patriot dollars.'"[10] Patriot dollars would turn "campaign finance into a new occasion for citizen sovereignty—encouraging Americans to vote with their dollars as well as their ballots, giving renewed vitality to their democratic commitments."[11]

The idea for Patriot emerges from what the authors describe as the threat that "big money" poses to the "standard reconciliation" of the tension between democratic politics, where citizens are moral equals and public decisions serve the public good, and the economic market, where citizens possess unequal assets and are presumed to make decisions in pursuit of their purely private interests.[12] Big money threatens the deliberative process by transforming market inequalities into unequal political power. Thus, "[t]he insulation of democratic politics from the rule of big money is . . . a necessary condition for the legitimation of big money in the marketplace itself."[13]

The authors claim that Patriot will play a significant role in insulating politics from big money, but that is not all they claim it will do. By giving an equal number of inalienable Patriot dollars to each registered voter, by requiring citizens to contribute those Patriot dollars anonymously, and by generally relying on decentralization, flexibility, and individual choice (rather than centralized bureaucracy) to get public money to candidates and causes, their new paradigm will "reshape the political marketplace and enable it to become more responsive to the judgments of equal citizens than to the preferences of unequal property owners."[14] Because they will have Patriot dollars to spend, voters will no longer be passive; rather, they will "take a small but active role throughout the election campaign . . . . Americans will reaffirm their relationship as citizens, charged with the responsibility of steering the republic on a sound course."[15] The authors call this predicted mobilization of voters' interest the "citizenship effect" of Patriot dollars, and they believe that it will produce in turn an "agenda effect" as candidates become less reliant on "the small elite of private-money donors" and adjust their messages to appeal directly to the "patriotic citizenry."[16] Patriot, the authors claim, will solve what they call the "threshold problem" that designers of public subsidies confront, namely, the problem of devising criteria to separate serious from frivolous candidates. "Candidates compete with one another for scarce Patriot dollars, and those who can't persuade citizens to give will quickly fall by

10. *Id*. at 4.
11. *Id*. at 5.
12. *Id*. at 12-13.
13. *Id*. at 13.
14. *Id*. at 14.
15. *Id*. at 15.
16. *Id*.

the wayside."[17] And there will be no need to design different threshold subsidies for third parties, again because if citizens like the third party's platform and candidates, they will support them with their Patriots. Finally, because of our system of winner-take-all elections, Patriot will not lead to a fragmented multiparty politics, and although interparty parity is not guaranteed (as it is under the present system of public funding of presidential candidates), the authors do not think "snowball effects" pose a genuine threat.[18]

The secret donation booth is a product of the authors' rejection of the conventional wisdom that disclosure of contributions is a necessary and effective tool for fighting corruption. In fact, they think disclosure is the problem, not the solution. Why, they ask rhetorically, "*should* candidates [and the public] know how much money their contributors have provided?"[19] Instead, they propose to bar contributors from giving money directly to candidates, requiring them instead to pass their checks through a blind trust and then permitting them (as well as noncontributors) to claim that they have given even more than they actually did. Because neither givers nor nongivers can credibly claim to have given particular amounts to particular candidates, the market for political influence will be so full of noise that it will cease to function. The controlling analogy is the secret ballot:

> Just as the secret ballot makes it more difficult for candidates to *buy* votes, a secret donation booth makes it harder for candidates to *sell* access or influence. The voting booth disrupts vote-buying because candidates are uncertain how a citizen actually voted; anonymous donations disrupt influence peddling because candidates are uncertain whether givers actually gave what they say they gave.[20]

The secret donation booth is also a product of the authors' rejection of another bit of reformist conventional wisdom, namely, the idea that because "private funding [of any kind] violates equality and favors the rich,"[21] it should be abolished altogether. Instead, they argue for a mixed system of private and public funding, asserting that "[f]latly prohibiting private campaign contributions would be a real loss to the civic culture."[22] As they did with Patriot, the authors offer a "cascade of arguments"[23] to support

17. *Id*. at 19.
18. *Id*. at 23.
19. *Id*. at 5.
20. *Id*. at 6.
21. *Id*. at 32.
22. *Id*. at 34.
23. *Id*. at 44.

their claims about the benefits that the secret donation booth will generate. As the authors summarize their case:

> Voting with both public and private dollars not only promises to enhance the existing culture of active citizenship. It will also significantly improve on the operation of a purely patriotic system of campaign finance. Private dollars flowing through the donation booth will ameliorate problems that otherwise would be generated by the selective attention of most citizens, the tendency of Patriot dollars to starve minoritarian opinions, and the risk of the occasional snowball effect. No less important, it will check and balance tendencies by sitting politicians to starve their electoral opponents by underfunding Patriot.[24]

The third element of the new paradigm—selective instead of comprehensive restrictions on private money—derives from Ackerman and Ayres's conviction that, because there is a "Sisyphean aspect to the struggle for ever-more-stringent and comprehensive controls,"[25] the first priority of reform should not be to impose even more restrictive command-and-control regulation over private contributions. They believe that the secret donation booth will disrupt most of the special-interest deal-making currently targeted by contribution limitations, and that patriotic finance will assure that citizen funding dominates the overall mix of campaign funding. Accordingly, they propose "only very selective controls—targeted only at the very biggest givers."[26] To thwart big contributors from defeating the blind trust's informational blockade, they propose a "secrecy algorithm" (which they describe in an appendix) to create noisy signals and make it difficult for "candidates and donors to establish credible connections between particular deposits and particular increases in trust balances."[27] In addition, Ackerman and Ayres propose a "stratospheric"[28] limit on the amount any individual can contribute,[29] which they defend on both anticorruption and equality grounds. Finally, turning their attention to enforcement, they stress the importance of "genuinely impartial administration" of the new paradigm as well as the clarity of its basic rule: "Never give or accept gifts that haven't passed through the secret donation booth."[30]

24. *Id*.
25. *Id*. at 8.
26. *Id*.
27. *Id*. at 49.
28. *Id*. at 48.
29. The limits they propose are $5000 for House elections, around $15,000 for Senate races, and $100,000 for presidential contests. In addition, they propose an annual contribution limit of $100,000. *Id*. at 154.
30. *Id*. at 52.

The first matter to which the authors address themselves in their description of "The Paradigm in Practice" is the problem of what to do about the precandidate stage of elections, the period during which potential candidates, although reluctant to declare their candidacies publicly, test the waters. They need funds for this exploratory activity, but funds are unlikely to be forthcoming either from Patriot dollars or from the secret donation booth. To meet this need, Ackerman and Ayres resort to the "classic response of the old paradigm: Let readily identifiable donors give private money to politicians, constrained only by full information and contribution limits."[31] They advocate an overall limit on the size of the exploratory fund, and they limit contributions to the amount produced by dividing the fund limit by the "minimum number of donors that will effectively reduce the problem of special dealing."[32]

B. *Patriot*

The authors pose and try to answer several questions about the design of Patriot: "Who should get Patriot dollars? How many? Who may compete to obtain them? Under what terms?"[33] The answers turn out to range from relatively simple to quite complex. I will give a rather truncated summary, but will not omit all the details since their very existence is an important part of the reality that the new paradigm imagines.

Patriot dollars will not automatically land in every bank account. Acquiring them, and learning how to use them, will take some effort on the part of citizens who are eligible to receive them. To open a Patriot account, a citizen must be a registered voter. Once registered to vote, a citizen may open her Patriot account in a variety of ways: by transforming one of her existing credit or ATM cards either when she registers or votes, or by using the Internet, the mail, or a phone. Having activated her Patriot account in Ackerman and Ayres's "brave new world,"[34] she would simply go to her neighborhood ATM and vote her Patriot dollars. Three ground rules would apply: She would have five days in which to change her mind; her contribution would be anonymous; and, to use the ATM, she must have linked her Patriot account to standard electronic cards.[35]

Citizens may send their Patriot dollars to the candidate of their choice, to political parties, or to what Ackerman and Ayres call "patriotic PACs"—political action committees formed explicitly to solicit Patriot dollars and that are required to contribute those dollars to candidates. Such PACs

31. *Id*. at 59.
32. *Id*. at 61.
33. *Id*. at 66.
34. *Id*. at 69.
35. *Id*. at 67-69.

would be forbidden to use Patriot dollars to finance their own speech. Neither political parties nor patriotic PACs would be bound by the anonymity requirement: The amount of their contributions and the candidates to whom they donate would be periodically disclosed.[36]

Ackerman and Ayres assume that the initial amount in each citizen's Patriot account will be $50 and that that amount will then be divided into subaccounts containing appropriate amounts for the open races in the citizen's district: $10 for House races, $15 if there is a Senate race, and $25 for the presidential campaign.[37] Citizens may transfer their House and Senate Patriot dollars to candidates in races outside their own constituencies, a provision that Ackerman and Ayres think will be of particular value to citizens who find themselves in a permanent minority within their own district and thus feel effectively disenfranchised.[38] When incumbent presidents run for reelection, the $25 in the presidential subaccount would be further divided into, say, $10 for the primaries and $15 for the general election. In order to avert a financial drought in the early stages of the campaign, Ackerman and Ayres propose a bonus for early givers: Until 5 percent of available Patriot dollars have reached the candidates, every Patriot contribution will be doubled. The Federal Election Commission (FEC) will "determine, in a fair and impartial way, when the 5 percent threshold has been reached and . . . declare the bonus period at an end."[39]

The initial decision to allocate $50 to every Patriot account is not the only decision to be made with regard to the question of "how much?" Ackerman and Ayres suggest giving the FEC authority to increase the amount should either of two problems materialize. The first problem would be that all campaigns find themselves starved for funds due to a decrease in private giving coupled with relatively few citizens choosing to spend their Patriots. To address this problem, the authors suggest granting the FEC authority during the next presidential cycle to increase the Patriotic allocation in order to insure that "overall funds flowing into the reformed system are no less substantial than those flowing under the old regime."[40] Should the pool of campaign funds be less than fifty percent of the average available at comparable stages of past campaigns, the authors reluctantly suggest granting the FEC power to provide "a compensating bonus to every

36. *Id*. at 72-75.
37. *Id*. at 76.
38. *Id*. at 77-78. The authors do not explain how the ability to give $15 of taxpayer-provided money to a candidate for a House seat in another district could give an individual a meaningfully increased sense of political efficacy.
39. *Id*. at 83.
40. *Id*. at 86.

candidate in proportion to the number of Patriot dollars that he or she has collected."[41]

The second problem would arise if the share of private contributions equals or exceeds the share of patriotic contributions. "Whenever the share of private contributions exceeds one-third of the whole, we consider this a dangerous sign of incipient oligarchy."[42] Ackerman and Ayres propose solving this problem, should it materialize, by granting the FEC the authority to increase patriotic allocations so as to achieve a two-to-one funding ratio.

C. *The Donation Booth*

Ackerman and Ayres describe the design of the secret donation booth in some detail. The reconstituted FEC would establish a blind trust, to which all contributors and allied organizations would be required to send *all* contributions. On a separate form, the contributor would write the name of the donee candidate or organization, each of which will have to open accounts with the trust for receipt of designated donations. The aggregate amount in each account would be reported daily on the Internet, but the FEC would be required to keep secret the names of all contributors giving more than $200. (The authors permit disclosure of the identities of givers of up to $200 because "[t]he problem of special dealing arises only with big gifts."[43]) Candidates for office, as well as political parties and political action committees that they control or influence, would be forbidden to receive identifiable donations from any source except the trust. PACs no longer could serve as intermediaries passing along bundles of contributions from their members. Rigorous internal audits, coupled with the ability of donors to verify their gifts, would check rogue bureaucrats' tendencies to misapply donations to suit their own, rather than the donors', preferences. Revolving-door employment bans, premium salaries, and prohibitions on fraternization with candidates would help guarantee official integrity.[44]

The anonymity feature of the secret donation booth requires additional safeguards. First, in order to prevent donors from showing candidates large checks made out to the FEC's blind trust and thus credibly claiming to have been generous contributors, Ackerman and Ayres would make the environment "noisy [and] full of potentially misleading signals."[45] Donors

41. *Id*.
42. *Id*. at 89.
43. *Id*. at 96. They presumably regard $200 as the genuine threshold and view gifts of anything more as raising the "problem of special dealing," although they never defend the amount of this extremely low threshold.
44. *Id*. at 99-100.
45. *Id*. at 101.

would have a five-day cooling-off period in which they could revoke their gift; their gift checks would be cashed, and their revocation would be honored by a reimbursement check from the FEC. Thus, no candidate could be sure whether donors' gifts have been revoked, even if donors choose to stage elaborate "ritual[s] of honor."[46]

In order to deter "check-bombing"—by which they mean the donation of private contributions large enough to stand out[47]—Ackerman and Ayres propose to secure donor anonymity further through an ingenious device they call the "secrecy algorithm." In response to a sudden surge of large donations, and relying on the algorithm, the trust would sequester some of the donated money so that the candidate would not know of its existence until later. The algorithm itself would be triggered only by a small number of large gifts (rather than by a large number of small ones). And it would aggregate an individual's past contributions and "deter[] gamesmanship by making randomization a function of dollar amounts that are not precisely knowable by either the candidates or contributors."[48]

Ackerman and Ayres appear convinced that both Patriot and the secret donation booth are reforms that could conceivably be enacted, and they suggest that these are ideas whose time may have come. In support, they cite the fact that judicial candidates in sixteen states are prohibited from learning who has donated to their election campaigns.[49] And they note that in South Korea—that fountainhead of modern democracy—donors have the option of contributing anonymously (although they fail to note the important fact that they are not required to do so), that Chile is considering making anonymity a requirement, and that the Conservative Party in Britain has proposed discussing the establishment of a blind trust. And they assert that "[i]n conjunction with patriotic finance, [the donation booth] promises a genuine democratic breakthrough."[50]

The secret donation booth's promise cannot be fulfilled, however, if "big givers simply undertake their own independent media campaigns on behalf of their favorite causes."[51] Thus, in chapter 8, Ackerman and Ayres describe a series of regulations and FEC strategies that will "plug the gaps." Continuing to claim that "[c]ommand-and-control regulation is our last resort,"[52] they nevertheless anticipate and propose methods to forestall big-

46. *Id*. at 103.
47. *Id*. at 104-05.
48. *Id*. at 106.
49. *Id*. at 109. The constitutionality of this prohibition is in some doubt after *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002) (holding unconstitutional the "announce clause" of Minnesota's Code of Judicial Ethics, which prohibited judicial candidates from announcing their views on disputed legal and political issues).
50. ACKERMAN & AYRES, *supra* note 3, at 109.
51. *Id*. at 111.
52. *Id*. at 112.

giver attempts to evade the secrecy algorithm and "gain special influence" by running "their own independent issue advocacy campaigns on behalf of" their favorite candidates.[53] For the former, they propose limits on individual giving during any particular accounting period and overall limits on the amount that any donor can give to all campaigns, political committees, and express advocacy groups during any calendar year.[54] They also suggest granting the FEC power to modify the limits "as it gains more experience in evaluating the variability of private contributions under the new paradigm."[55] Turning to the express advocacy problem, they grudgingly acknowledge that "[s]hort of the abolition of free markets and private property, there is simply no way to eliminate the influence of private money on democratic politics."[56] But to reduce what remains of this pernicious influence after Patriot and the secret donation booth take effect, they propose both a "stabilization algorithm" to "assure that at least two-thirds of total funds come from patriotic sources,"[57] and a set of regulations to assure that only organizations truly independent of candidates may receive donations for issue advocacy. They "treat[] all political parties as their candidates' alter egos,"[58] and they permit only PACs that do not solicit Patriot dollars to raise private funds outside the secret donation booth.

In a chapter entitled "Safeguarding the Guardians," Ackerman and Ayres turn to what they regard as the "key pressure point"[59] for their new paradigm—the FEC. Looking for commissioners who will be "men and women whose interests and ambitions will lead them to resist the temptation to turn a blind eye to illegalities perpetrated by powerful donors and candidates,"[60] who will "have also been socialized into the cast of mind necessary for the successful operation of the FEC—cultivating habits of impartiality in the name of the rule of law,"[61] and who will be nonpartisan and decisive, they propose that the FEC be made up of retired federal judges. They propose a five-member Commission, nominated by the President and confirmed for staggered ten-year terms. They would give sole authority to appoint the agency's key bureau chiefs to the Commission in order to provide a "buffer against political pressures."[62] One bureau chief would be charged "with the task of managing Patriot, one with operating the donation booth, one with law enforcement."[63] Enforcement would be

53. *Id*. at 118-19.
54. *Id*. at 116-18.
55. *Id*. at 116.
56. *Id*. at 120.
57. *Id*. at 121.
58. *Id*. at 124.
59. *Id*. at 128.
60. *Id*. at 129.
61. *Id*.
62. *Id*. at 131.
63. *Id*. at 132.

separate from the operating divisions; the head of enforcement would serve as general counsel, with full independence to investigate but no power to indict without the attorney general's review. Fearing a "[b]udgetary [c]ounterattack"[64] from Congress, and worrying that the threat of such attack would be exacerbated by Congress's opaque budgetary processes, they recommend insulating the agency's budget—both Patriot and operating—from annual congressional review. The insulation and reconstruction of the FEC make it possible, according to Ackerman and Ayres, to "eliminate almost all command and control and reserve . . . criminal sanctions to a few simple requirements: Don't bribe Patriot holders. Don't accept any cash or checks from anybody—tell them to send it to you via the secret donation booth."[65] In order to make sure that groups claiming to be devoted to independent advocacy do not sabotage the donation booth by letting themselves be secretly controlled by candidates' campaigns, the authors provide for penal sanctions if the general counsel becomes convinced that sham organizations have proliferated "to the point at which they threaten the integrity of the donation booth."[66]

The book's penultimate chapter subjects the new paradigm to constitutional scrutiny. Perhaps not surprisingly, Ackerman and Ayres discover that their "model statute conforms in all respects to prevailing judicial doctrine,"[67] and, in particular, that it conforms to what they discern to be "*Buckley*'s twin principles—against expenditure ceilings, for public subsidies."[68] Beginning their constitutional analysis with Patriot, they pursue the implications of the fact that the *Buckley* Court sustained the granting of subsidies for presidential candidates who waive their right to receive public funds. They read this aspect of the *Buckley* opinion for all—and more than—it is worth, claiming that it shows the Court to be "remarkably accommodating where governmental subsidies are concerned,"[69] and even as having "suggest[ed] that serious campaign reform should not happen without a significant injection of public funds."[70] They regard the waiver technique that the Court upheld in *Buckley* as a powerful weapon in the fight to curb plutocracy.[71] They view Patriot as having the benign effect of making it "dangerous for an ambitious plutocrat

64. *Id*. at 134.
65. *Id*. at 137.
66. *Id*. at 138.
67. *Id*. at 141.
68. *Id*. at 157.
69. *Id*. at 142.
70. *Id*.
71. *Id*. at 142-43 ("The *Buckley* opinion expressly authorizes Congress to offer plutocrats a deal: The government will give them subsidies provided that they waive their right to spend freely from their bottomless bank accounts.").

to remain outside the subsidy program."[72] They insist that their model statute

> organizes the waiver transaction in precisely the same way as the presidential subsidy program upheld in *Buckley*. . . . The only difference is how the subsidy program structures [a candidate's] choice: While the existing system gives candidates a fixed amount of subsidy, the new paradigm makes the total subsidy depend on the candidate's success in appealing to Patriot holders.[73]

And they insist that this difference is constitutionally irrelevant.

Ackerman and Ayres then move to the two "constitutional issues raised by [their] new approach to private giving,"[74] namely, its threats to free speech and freedom of association. Regarding free speech, the authors note that the Court's "fierce . . . resistance"[75] to restrictions on campaign contributions and expenditures has consistently yielded to measures that "can plausibly be viewed as efforts to reduce the risk—or even the appearance—of corruption."[76] Implicitly collapsing any distinction that might be thought to exist between quid pro quo corruption—the prevention of which the Court permitted in *Buckley*—and more nebulous exchanges of contributions for access or influence, the authors claim that their "approach to private giving is carefully tailored to eliminate only those donations that generate the possibility of influence peddling."[77] (When this assertion is put together with the imposition of anonymity on any contributor donating more than $200, the authors must be taken to claim that all contributions of more than $200 generate the possibility of influence peddling.) Moreover, they claim, since their scheme permits every American to say whatever she wants about how much she has donated and to whom, it does "not in any way trench upon the donor's freedom of speech."[78] Although the requirement that all donations be funneled through the donation booth certainly disrupts communication between candidates, their supporters, and the public, the authors conclude that it is justified by the statute's subordination of "each individual's right to privacy, and to the national interest in maximizing voluntary participation"—not "voluntary" participation in the voting booth, but "voluntary" participation in the pure

72. *Id*. at 144. The word "plutocrat" in this sentence refers to individuals who would finance their campaigns from a combination of their own money and funds raised through private contributions.

73. *Id*. at 146.

74. *Id*. at 147.

75. *Id*.

76. *Id*.

77. *Id*.

78. *Id*. at 148-50.

act of giving.[79] They never explain how any individual's "right to privacy" can be served by a *requirement* not to speak. Finally, the authors claim that, by analogy to *New York Times v. Sullivan*,[80] their plan tolerates and encourages lies in order to use "free speech as a tool for controlling corruption. By allowing small donors to exaggerate, we undermine the capacity of big donors to obtain special influence."[81]

The authors acknowledge that certain features of their scheme may also trench upon freedom of association: The requirement that each donor personally send his own money to the blind trust and the rule prohibiting groups from creating PACs to contribute money directly to candidates both raise such concerns. But both restrictions, they conclude, are legitimate anticorruption measures. The latter, moreover, represents a smaller loss to the freedom of association than at first appears: Groups remain free to collect and spend in their own name on the issues of the day, and they remain free to establish patriotic PACs, the amount of whose gifts to candidates will be made public. Should any doubts on the freedom-of-association front remain, Ackerman and Ayres once again invoke the secret ballot analogy—and they do so in their characteristic rhetorical style:

> Indeed, the threat of corruption is even greater in the case of nonanonymous donations. Vote-buying is perforce a retail operation, but a single instance of financial corruption can affect the entire election—with a candidate selling his position in exchange for big contributions that can be turned into thousands of votes through aggressive advertising campaigns. If the secret ballot is constitutional—and who would claim otherwise?—so is the donation booth.[82]

In their final chapter, Ackerman and Ayres venture a number of predictions about how their "proposal would actually change the concrete terms of American politics."[83] Describing the spirit of their approach as one of "realistic idealism,"[84] and professing to have "staked [a] claim to real-world attention by brandishing a host of shiny technocratic tools,"[85] they say their aim is "to revive the great American tradition of popular sovereignty against the very real threats posed to its survival."[86] They describe the challenge as enabling

79. *Id*. at 148-49.
80. 376 U.S. 254 (1964).
81. ACKERMAN & AYRES, *supra* note 3, at 150.
82. *Id*. at 154.
83. *Id*. at 161.
84. *Id*. at 160.
85. *Id*.
86. *Id*.

> twenty-first century people to build new forms of citizenship out of the ordinary materials of modern life—and from this perspective, there is no better place to look than the neighborhood ATM. By voting with their dollars, each American will be killing two birds with one flick of the credit card. Symbolically, he will be reaffirming his own commitment to citizenship—taking the time and trouble to pick out the candidates and groups that best represent his hopes for America. Practically, he will be contributing to a flow of citizen choices that will overwhelm the national drift to oligarchy. Merging symbol with practical power, he will be doing his bit to carve out a special space for democratic citizenship—in which ordinary people confront one another as equals as they hammer out the basic terms of their ongoing social contract.[87]

Ackerman and Ayres's more concrete predictions begin with a thought experiment that replays the 2000 election with Patriot dollars and the secret donation booth. By a process of reasoning that is nothing if not surreal, they conclude that Elizabeth Dole would have been elected President. They then turn their attention to predictions about losers and winners under the new paradigm. They first address the "big losers—the political interests that currently push their agendas with large private contributions," which they then identify as "corporate America."[88] Special dealing with big business, the authors predict, will become rarer. As a consequence, there will be less "pork of a certain kind, in which a concentrated group of industrial producers use state power to exploit a large group of unorganized consumers."[89] They predict that the substantial dollar savings on this kind of pork could well exceed the costs of funding Patriot. They acknowledge, however, that a different kind of pork will be common. "Rather than pushing projects that reward a few big private givers, congressmen will look for those that could generate lots of patriotic cash from ordinary constituents. This means more neighborhood centers for the masses, fewer irrigation projects for desert agriculture."[90]

The winners under the new paradigm are harder to predict. In general, they will consist of individuals and groups who are effective in the competition for Patriot dollars. Sociological and ideological interest groups and political parties will be the main contenders, but the authors concede that there is no way to foresee which of them will prevail from time to time: "The game isn't obviously biased in favor of liberals or conservatives."[91] Nevertheless, Ackerman and Ayres anticipate that

87. *Id*. at 161.
88. *Id*. at 171.
89. *Id*. at 172.
90. *Id*.
91. *Id*. at 175.

> the new paradigm [will] open[] up new possibilities for serious debate on issues of social justice. With corporate dominance removed and Patriot dollars diffused broadly, liberals have a chance to raise the question of economic equality with new seriousness. It is up to them to come up with a serious program that might persuade a skeptical public.[92]

The authors concede that "hard-edged predictions are impossible,"[93] which suggests that the important feature of the new paradigm is not that it purports to manipulate the future but rather that it "provides a flexible response to changing public views of the public agenda"[94] and will place "ordinary Americans firmly in the driver's seat."[95]

Finally, the book contains a forty-page model statute, along with four appendices that describe the stabilization and secrecy algorithms, explain how the regulations of last resort were designed, and calculate the total annual costs of operating the new paradigm.

PART II

A. *The Diagnosis*

Ackerman and Ayres claim that their new paradigm for campaign finance will cure what ails American democracy. That claim rests on the two premises that constitute their diagnosis, namely, that American democracy is sick, and that "big money" is what ails it. They expend surprisingly little intellectual energy either defending their diagnosis or articulating the assumptions upon which they base it. Instead, they concentrate on designing a foolproof method for administering the cure.

It is their diagnosis, however, that raises the truly significant issues. My principal thesis in this Review is that the authors' diagnosis is off the mark. It goes astray because it is fundamentally incomplete. To the extent that its empirical claims can be discerned through the rhetorical fog that obscures them, many are questionable and some are plainly inaccurate. And to the extent that it represents not a descriptive account of our democracy but a normative one, its theoretical underpinnings remain unspecified.

Begin with the "standard reconciliation," which anchors the authors' claim that "big money" is what ails American democracy. It turns out to be a useless construct. It is so pat that one might think it nothing more than a stray bit of rhetorical overkill but for the fact that the authors deploy it as

92. *Id*. at 176.
93. *Id*.
94. *Id*.
95. *Id*. at 177.

the cornerstone of their analysis. Reasoning from the standard reconciliation is what leads Ackerman and Ayres to their conclusion that "[b]ig money *is* the problem,"[96] but it does so only by suppressing realities and questions that surely would have warranted a more nuanced, less confidently categorical judgment. Acknowledging the realities they suppress and raising the questions they leave unasked would have rendered their analysis more complete and might even have led them to challenge their glib conclusion that big money is *the* problem.

Ackerman and Ayres claim that the standard reconciliation

> is a straightforward two-step argument. Step one begins by conceding that the single-minded pursuit of self-interest may generate pervasive inequalities and inefficiencies. But if these prove unacceptable, we can always move to step two: It's our job as citizens to deliberate together and take corrective action—redistributing wealth from rich to poor and taking regulatory actions when markets fail.[97]

"Democratic citizens," they continue,

> can alter economic outcomes whenever they find them seriously deviating from their ideals of social justice. . . .
>
> . . . [But] big money threatens to undermine the standard reconciliation.
>
> The problem is obvious. 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 that we experience as market actors. Politics will have been transformed into a forum in which big money praises itself.
>
> . . . [Therefore, t]he insulation of democratic politics from the rule of big money is, under the standard reconciliation, a necessary condition for the legitimation of big money in the marketplace itself.[98]

The standard reconciliation clearly embodies a normative political theory, although the authors do not spell it out. Instead, they defend it with what they portray as a realistic account of how democracy could actually

96. *Id*. at 14.
97. *Id*. at 12.
98. *Id*. at 12-13.

work if only it worked as it should. As a description of what would actually be required in the real world to reconcile "liberal markets with democratic equality,"[99] however, their defense is deficient on a number of grounds. First, the fact that "single-minded pursuit of *self-interest* [by market actors in the private sector] may generate pervasive inequalities and inefficiencies" is only half the story. The no less important other half is that citizens acting collectively in single-minded pursuit of the *public interest* may also generate inequalities and inefficiencies with the programs they enact. The standard reconciliation implies that the move from step one to step two is a "straightforward" one that will eliminate inequalities and inefficiencies. Instead, the move will merely rearrange and redistribute inequalities and inefficiencies; there is no warrant in the actual experience of any country in the world for thinking that it will eliminate them. Only a fraction of the genuinely hard task of resolving the democratic dilemma, therefore, can be accomplished by identifying the inequities and inefficiencies that the private sector pursuit of private interest generates. One must also try to predict the inequities and inefficiencies that corrective collective action is likely to produce and then try to discern what steps to take should these, in their turn, "prove unacceptable." And one must compare the costs and benefits of private and public sector inequities and inefficiencies, and prescribe a move from one to another only if a net social gain can realistically be anticipated.[100] Ackerman and Ayres's analysis fails to grapple with any of these genuinely difficult issues.

A second troubling feature of the standard reconciliation is its implication that market actors pursue their selfish aims with relentless single-mindedness and that they are uniquely self-interested, while citizens deliberating together to "take corrective action to redistribute wealth and correct market failure" are acting in genuine pursuit not of their own self-interest but rather of the broader public good. This implication is troublesome for two reasons. To begin with, it assumes that there is in fact a

99. *Id*. at 12.

100. GORDON TULLOCK ET AL., GOVERNMENT FAILURE: A PRIMER IN PUBLIC CHOICE 11-12 (2002) ("The view that government is the automatic perfect solution to innumerable problems no longer exists . . . . Today, we start from the knowledge that the government also does not function perfectly and then make a selection between two imperfect operational devices in terms of their relative perfection . . . ."). Note also that the comparison between inequities and inefficiencies must be made regarding a move *in either direction*, from private to public or vice versa. "[T]hat the government performs certain functions poorly does not, in and of itself, prove that the market would do better." *Id*. at 12. This is because unintended consequences, whether happily benign or unhappily inefficient, tend to emerge whenever purposive collective action is taken, whether the move is from private to public or from public to private. *See generally* STEVEN M. GILLON, "THAT'S NOT WHAT WE MEANT TO DO": REFORM AND ITS UNINTENDED CONSEQUENCES IN TWENTIETH-CENTURY AMERICA (2000) (recounting several instances in which unintended consequences resulted from purposeful collective action).

"broader public good" about which people of goodwill can agree.[101] But that assumption is questionable if individuals of goodwill have different conceptions of what the broader public good requires because no system has yet been identified by which to aggregate the differing conceptions of many individuals into collective decisions.[102] In addition, the implication assumes that selfish pursuit of their own narrow interests is the sole province of actors with "big money," while advocates for public-sector redistribution and regulatory programs are reliably unselfish and motivated by high-minded, genuinely public-regarding impulses.[103] It is far more plausible, however, that self-interest and virtue are possessed in equal degree by private and public actors, by those with money and those who wish to redistribute it, and by those who resist regulation and those who would impose it.[104] More likely still, alas, is that self-interest dominates everywhere.[105] Failure even to consider this possibility permits the authors to proceed as though the dichotomy they posit—between bad, self-interested people on the one hand and good, publicly interested citizens on the other—is descriptively accurate. This in turn permits them to demonize those whom they characterize as self-interested while putting other actors—

101. The standard reconciliation appears implicitly to posit something like the public-interest model of politics as if it were a reality rather than an aspiration. The public-interest model depends

> at bottom on a belief in the reality—or at least the possibility—of public or objective values and ends for human action. In this public-interest model the legislature is regarded as a forum for identifying or defining and acting towards those ends. The process is one of mutual search through joint deliberation, relying on the use of reason supposed to have persuasive force. Majority rule is experienced as the natural way of taking action as and for a group—or as a device for filtering the reasonable from the unreasonable, the persuasive from the unpersuasive, the right from the wrong, and the good from the bad. Moral insight, sociological understanding, and goodwill are all legislative virtues.

Frank I. Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145, 149 (1977-1978) (citations omitted).

102. *See* KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES 2-6, 59-60, 89 (2d ed. 1963).

103. This assumption is embedded in the standard reconciliation, although Ackerman and Ayres themselves do not in fact seem genuinely to believe it. For example, when offering predictions about how the new paradigm will affect politics in the future, they clearly envision politicians acting in pursuit of personal political gain making appeals for Patriot dollars in terms of their constituents' selfish desires that federal money be spent in their districts: "Rather than pushing projects that reward a few big private givers, congressmen will look for those that could generate lots of patriotic cash from ordinary constituents. This means more neighborhood centers for the masses . . . ." ACKERMAN & AYRES, *supra* note 3, at 172.

104. This, of course, is the premise of Buchanan and Tullock's seminal work in the public-choice tradition. *See* JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY (1962).

105. *Cf.* Frank H. Easterbrook, *The State of Madison's Vision of the State: A Public Choice Perspective*, 107 HARV. L. REV. 1328, 1330 (1994) ("People care more about themselves than about others. . . . [S]elf-love dominates even when people know intellectually that virtuous conduct would be better. When the conflict between self and virtue is irreconcilable, cognitive dissonance leads people to conclude that civic virtue and personal ends coincide.").

ordinary citizens—on something of a pedestal of virtue.[106] Acknowledging that self-interest probably prods *all* actors in the political system—those in the public sector as well as those in the private one—would, at the very least, have enriched Ackerman and Ayres's analysis. It might have saved them, for example, from viewing the potential for Patriot dollars to entice citizens into active engagement through such rose-colored glasses.[107] And it might have caused them to be less inclined to regard big, privately contributed money as the sole source of perverse special-interest influence in the legislative process. Ideological interest groups, with their passionately embraced but narrow agendas, have no monopoly on political virtue—nor do corporate interests have an exclusive claim to political vice.

The standard reconciliation is also troubling because it suggests that, were it not for big-money special interests, it would be easy, costless, and uncomplicated to take collective action—a mere matter of "redistributing wealth from rich to poor and taking regulatory actions when markets fail."[108] Ackerman and Ayres imply that with the stroke of a legislative pen, citizens acting collectively could "alter economic outcomes *whenever* they find them seriously deviating from their ideals of social justice."[109] This glib assertion shoves under the rug the stubborn and disagreeable fact that designing and implementing redistributive programs that generate more benign than perverse consequences for their intended beneficiaries and for their benefactors presents a daunting challenge.[110] Getting rid of "big money" will certainly transform the way the politics of redistribution plays out, but it will not make it any easier to craft workable or effective redistributive policies.[111] The system of campaign finance that prevails at

106. *Cf.* David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1378 (1994) ("One side's chief examples of narrow and self-interested groups will be the other side's examples of groups that pursue the public interest.").

107. *See infra* Section II.B.

108. ACKERMAN & AYRES, *supra* note 3, at 12.

109. *Id*. (emphasis added).

110. *See* Cass Sunstein, *Cash and Citizenship*, NEW REPUBLIC, May 24, 1999, at 42 (reviewing BRUCE ACKERMAN & ANNE ALSTOTT, THE STAKEHOLDER SOCIETY (1999) and criticizing Ackerman and Alstott's plan to grant $80,000 to each high school graduate because of its likely perverse effects on the intended beneficiaries and the more general, and very high, risk of unintended bad consequences); *see also* FINIS WELCH, MINIMUM WAGES: ISSUES AND EVIDENCE 34-38 (1978) (providing evidence that minimum wage laws reduce employment).

111. Ackerman and Ayres insist:

> [T]he new paradigm opens up new possibilities for serious debate on issues of social justice. With corporate dominance removed and Patriot dollars diffused broadly, liberals have a chance to raise the question of economic equality with new seriousness. It is up to them to come up with a serious program that might persuade a skeptical public. If they fail, they will have nobody to blame but themselves.

ACKERMAN & AYRES, *supra* note 3, at 176 (footnote omitted). They do not recount the facts from which they infer that there is a genuine need for "new possibilities for serious debate." *Id*. Nor could they readily do so because debate on issues of social justice—what it consists of, how to achieve it—is a constant of our politics. One cannot avoid the suspicion that what prompts their anxiety is not the absence of debate but the fact that their particular views of social justice have

any time has no bearing whatsoever on the complex problem of designing redistributive mechanisms whose consequences are likely to be on balance socially beneficial. It is perhaps conceivable that the design problem will not prove ultimately intractable, but experience to date has proven it highly resistant to satisfactory solution.[112] Moreover, many of the regulatory actions that we so far have taken to cure market failures have not exactly turned out to be unqualified remedies, and their implementation has frequently exposed serious systemic flaws in the regulatory regimes under which they operate.[113]

A final troublesome aspect of the standard reconciliation is its implication, stemming from its conclusion that "big money" is the problem, that the political influence of moneyed interests can be neutralized simply by enacting the right set of campaign finance reforms. The authors seem to assume that the only important way that big-money interests use their financial resources to acquire political influence is through campaign contributions, and that when these interests can no longer gain access and influence by making such contributions, they no longer will have any incentive to play the political game.[114] The assumption is questionable. Significant evidence exists that corporations, whose influence Ackerman and Ayres are at such pains to dilute, already spend fewer resources on campaign contributions than on other means of achieving access and

not gained much of a foothold among the ordinary Americans they (claim to) aspire to persuade. The more important point in the present context, however, is that if liberals have not yet come up with a "serious program that might persuade a skeptical public," *id*., their failure can hardly be attributed to the absence of opportunities for serious debate. It is far more likely to be the result of the genuine difficulty of coming up with promising new ideas. In fact, it may well be that achieving social justice is a considerably harder task than Ackerman and Ayres imply since the promise of justice through collective action cannot be redeemed without paying a heavy price in prosperity and freedom—and perhaps not even then.

112. *See, e.g.*, HEATHER MACDONALD, THE BURDEN OF BAD IDEAS: HOW MODERN INTELLECTUALS MISSHAPE OUR SOCIETY 155-208 (2000) (describing several public welfare efforts and concluding that they have failed because of flaws in their conception); *see also* GILLON, *supra* note 100, at 43-119 (describing the unfortunate unintended consequences of federal welfare policy since 1935 and of the Community Mental Health Act of 1963).

113. *See, e.g.*, BRUCE A. ACKERMAN & WILLIAM T. HASSLER, CLEAN COAL/DIRTY AIR: OR HOW THE CLEAN AIR ACT BECAME A MULTIBILLION-DOLLAR BAIL-OUT FOR HIGH-SULFUR COAL PRODUCERS AND WHAT SHOULD BE DONE ABOUT IT (1981); *see also* Richard B. Stewart, *Regulation, Innovation, and Administrative Law: A Conceptual Framework*, 69 CAL. L. REV. 1256, 1297-301 (1981) (suggesting that stringent regulation of new sources of air pollution perpetuates the life of old, dirty sources, thereby aggravating rather than alleviating air pollution).

114. If Ackerman and Ayres did not assume this, they would not claim that getting rid of the influence of large private campaign donors would have the impact that they predict for it. They do acknowledge at one point the existence of other "channels of political influence," ACKERMAN & AYRES, *supra* note 3, at 32, but the context of the acknowledgment suggests that they do not regard the alternatives as either important or particularly robust. They imply that the alternative channels are less effective than campaign contributions, that moneyed interests do not use them as much now as they use contributions, and that therefore one need not worry about them. They neglect to account for the likelihood that once they lose the ability to use their big money to make campaign contributions, the big-money people will substitute into these alternative channels of influence.

affecting the political agenda.[115] Getting rid of corporate campaign contributions will not diminish these efforts and doing so in fact seems likely to increase the amount of corporate resources devoted to them. In addition, given the pervasiveness of government and the increasingly high stakes at risk in the political game,[116] moneyed interests will continue to have incentives to acquire and retain political clout. In short, the incentives for those with wealth to attempt to wield political influence, in contrast to their incentives to devise means of evading contribution limitations, will remain undiminished by the secret donation booth even if it is perfectly successful (on its own terms) at eliminating private money as an important factor in the financing of political campaigns. Indeed, if the new paradigm works as Ackerman and Ayres clearly hope it will—by creating popular pressure for massive redistribution—the incentives for the wealthy to remain players in the political game are likely to intensify rather than to diminish.

Because it ignores so many relevant alternative descriptions of political reality, and because it so grossly oversimplifies the task of collectively devising and effectuating workable policies, the "standard reconciliation" that provides the cornerstone for Ackerman and Ayres's "new paradigm" is an illusion. And because it is an illusion, it provides no genuine support for their claim that what ails democracy—and, in particular, what stands in the way of mobilizing citizen support for collectively enacted redistribution—is, purely and simply, "big money."

B. *The Cure: Patriot*

For the moment, let us assume arguendo that Ackerman and Ayres's standard reconciliation works in principle—that inequalities and inefficiencies are uniquely characteristic of private markets, and that collective action to redistribute wealth and generally to alter economic outcomes would proceed in a manner less encumbered by inefficiencies and inequities *if* we could insulate political campaigns from the influence of large private contributions. This questionable assumption enables us to assess how likely it is that the new paradigm could achieve its goal.

115. *See* Jeffrey Milyo et al., *Corporate PAC Campaign Contributions in Perspective*, 2 BUS. & POL. 75, 83-84 (2000) (finding that lobbying expenditures were substantially greater than money spent by PACs in campaigns, and that charitable giving by corporations exceeded either kind of spending).

116. *See* JOHN R. LOTT, JR., A SIMPLE EXPLANATION FOR WHY CAMPAIGN EXPENDITURES ARE INCREASING: THE GOVERNMENT IS GETTING BIGGER (Univ. of Chi., Law & Econ. Working Paper No. 52 (2d ser.), 1998) (arguing that recent increases in campaign spending can be explained by higher government spending, and that because it focuses on the symptoms and not the causes of increased spending, the current debate risks changing the form of payments without restricting the amount).

Ackerman and Ayres tout Patriot's ability to achieve the noble objective of making politics "more responsive to the judgments of equal citizens."[117] Patriot reflects their "aim to revive the great American tradition of popular sovereignty against the very real threats posed to its survival."[118] Although they claim that the "ideal of popular sovereignty runs deep in our history,"[119] they neither offer evidence to support the assertion nor define what they denote by the term. If popular sovereignty means that the right to vote is broadly distributed, then the "tradition" is more alive today than ever before. And if popular sovereignty means direct democracy, then the claim that the ideal runs deep in our history would be difficult to support. The Constitution as originally enacted did not reflect a commitment to popular sovereignty in either of these two senses. Each of the original thirteen states severely limited the right to vote, and the Constitution assumed the validity of the provisions of the respective states' election laws. In its own terms, the Constitution dealt with voting in only one provision, and then not to confer the franchise but simply to require that the electors for the House in each state be the same as those for the more numerous branch of the state legislature.[120] Even more importantly, the Constitution created a democratic republic, a government by elected representatives and not by direct citizen participation. And it embodied an institutional design whose structure was carefully tailored to check and balance the potential excesses of national power and majoritarianism.[121]

Judging from the contexts in which they use the term, however, it would seem that Ackerman and Ayres use "popular sovereignty" more to adumbrate an appealing image than to denote a specific phenomenon such as the right to vote or direct democracy. They seem to be referring to a situation in which "the people" as a whole—meaning, presumably, the individuals who comprise the people, qua individuals—set the political agenda, determine the content of political outcomes, and effectively monitor the behavior of their representatives.[122] But if this is a fair characterization of what they mean by popular sovereignty, it is fair in turn to ask them to provide support for the claim that it is either a "great

117. ACKERMAN & AYRES, *supra* note 3, at 14.

118. *Id*. at 160.

119. *Id*.

120. U.S. CONST. art. I, § 2, cl. 1.

121. *See* THE FEDERALIST NO. 10, at 61 (James Madison) (Jacob E. Cooke ed., 1961) (identifying a republican form of government, rather than a direct democracy, as the best "cure for the mischiefs of faction"); *see also* THE FEDERALIST NO. 51, *supra*, at 348 (James Madison) (arguing that different constituencies ought to be represented in the various branches of the federal government, and that doing so would provide incentives for the branches to "keep[] each other in their proper places").

122. They seem also to be implying that at present "the people" are systematically thwarted in the achievement of their preferred political outcomes. With "popular sovereignty," their true desires would presumably emerge and be enacted.

tradition" or that it is a broadly embraced ideal that "runs deep in our history."

Despite waves of populism that have occasionally engulfed political debate, the political agenda has always been set not directly by "the people" but rather by a broad array of mediating institutions, from organized groups pursuing common agendas (i.e., special-interest groups) to political parties to the press. This is not surprising. The task of monitoring the behavior of representatives is beset with collective action problems, problems that become increasingly severe as government takes on more and more projects. In the face of these problems, individual citizens have always had to rely on competing interest groups and the press to do most of the monitoring for them.[123] In addition, political outcomes have never been determined directly by what a majority of the people want at any point in time. At the very least, it is a widely held premise of political scientists that

> it is a naive mistake to speak of a democracy as if it involved rule by a single, well-defined majority over a coherent and constant minority. Instead, normal American politics is pluralistic: myriad pressure groups, each typically representing a faction of the population, bargain with one another for mutual support.[124]

In addition to the imprecision of the meaning of "citizen sovereignty," there is reason to be skeptical about Patriot's ability to make politics genuinely "more responsive to the judgments of equal citizens." Perhaps citizen alienation from contemporary American politics can be attributed in part, as Ackerman and Ayres seem to attribute most of it, to the role of big money. However, the extent to which politics is not responsive to the judgment of ordinary citizens is probably more a function of the fact that, for plausible systemic reasons, ordinary citizens are not responsive to politics.[125] Consider that a well-functioning representative democracy requires that ordinary citizens know and understand the implications of what their elected representatives are doing. Otherwise they will not be able to hold them to account, and politicians will be systematically less "responsive to [citizens'] judgment" than they would be if citizens were reliably knowledgeable. Whenever government officials know more about what government is doing than its citizens—which is bound to be

123. *See* Samuel Issacharoff & Daniel R. Ortiz, *Governing Through Intermediaries*, 85 VA. L. REV. 1627 (1999) (arguing that because most voters are insufficiently engaged to be active principals who carefully monitor the actions of their representative-agents, they are more accurately viewed as consumers of political products produced by others, especially political parties, and analyzing the problems that political intermediaries pose, such as superagency costs and rent-seeking).

124. Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 719-20 (1985).

125. *See generally* ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 260-76 (1957).

practically all of the time—the officials have systematic opportunities to shirk their obligations to their citizen-principals while pursuing interests of their own (or of some special-interest group).[126]

Unfortunately, though, individual citizens have many temptations to free-ride on the information-acquiring efforts and responsible voting of others: The policies of the government that voters elect will provide benefits and create burdens that will accrue to citizens without regard to whether they know what their government is doing and whether or not they vote.[127] In addition, it is costly to vote. Indeed, if voting is considered solely as an act whose aim is to affect the outcome of an election, it is an act with a negative expected value since the chance that anyone's vote will affect the outcome approaches zero.[128] Consider, then, how individual citizens might behave if they were rational maximizers of their own satisfactions, and, in this light, take account of their incentives as individuals to become politically knowledgeable, engaged, and active.[129] From this perspective, individual citizens' ignorance of, and lack of response to, political issues and candidate positions are to be expected. In fact, as a descriptive rather than as a normative matter, these behaviors are rational, or at least understandable, responses to the extremely low probability that any single citizen's vote (or her failure to vote) will make a difference.

Likewise, even with the benefit of Patriot dollars, it would seem rational for an individual citizen to remain disengaged when her Patriot-amplified voice will amount only to one fifty-dollar contribution, spread across three races, out of a total of *three billion* dollars. Ackerman and Ayres fail to explain why citizens might behave differently when *everyone*

126. Gary C. Jacobsen, *Campaign Finance and Democratic Control: Comments on Gottlieb and Lowenstein's Papers*, 18 HOFSTRA L. REV. 369, 369-70 (1989) (arguing that the debate over campaign finance reform must take account of the fact that citizens and their representatives have divergent interests and asymmetrical information, which exacerbates the challenges confronting citizen monitoring).

127. *See* Easterbrook, *supra* note 105, at 1336 ("People who could influence legislators, if they tried, need a good reason to try. If other persons similarly situated will do the job, any particular member of the group can sit on the sidelines and reap the benefits without incurring the costs.").

128. As Dennis Mueller has argued:

> When two candidates compete for the votes of a large electorate, each individual's vote has a negligible probability of affecting the outcome. Realizing this, rational voters do not expend time and money gathering information about candidates. They remain "rationally ignorant" of both the issues in the election and the opposing candidates' positions on the issues.

DENNIS C. MUELLER, PUBLIC CHOICE II, at 205-06 (1989).

129. In fact, Ackerman and Ayres pay shockingly little heed to the question of whether or not citizens will be informed when they vote their Patriot dollars, nor do they address the very important question of whether it matters if they are. For a thoughtful analysis of the tension created by the fact that there is a trade-off between the expansion of the franchise and the quality of individual political engagement, see Daniel R. Ortiz, *The Paradox of Mass Democracy*, *in* RETHINKING THE VOTE: THE POLITICS AND PROSPECTS OF AMERICAN ELECTION REFORM (Ann N. Crigler et al. eds., forthcoming 2004).

has Patriot dollars from the way that they behave when *everyone* has a single vote to spend. The chance that any single individual's Patriot dollars will provide any candidate or cause with the margin of victory, or even that those dollars will supply any candidate with a substantially increased probability of election, would be as discouragingly slim as the chance that her vote would affect the outcome of any election. Moreover, learning how to make use of their Patriot dollars will not be costless for citizens. Ackerman and Ayres disguise this fact by linking Patriot to "your local ATM" and suggesting that pretty much everyone knows how to use those. The fact remains that activating a Patriot account, learning how to deploy Patriot dollars, and deciding how to spend them will require citizens to spend time and effort. Recent experience with ballots in Florida does not permit one to be confident that citizens will readily master Patriot's intricacies.[130] Moreover, given that the appropriable benefits of the effort to learn how Patriot works will approach zero for the citizens who rationally calculate the effect their particular Patriots will have, it is probably a mistake to think that many of them will invest in making it. The point is this: Take big money out of the system. Put Patriot dollars in. The systemic problems created by rational voter ignorance and the lack of powerful individual incentives to vote—much less to become actively engaged in politics—will continue to bedevil and to impoverish democratic dialogue.

Of course, if Patriot dollars were available, not every citizen would react to the small odds of having any genuine impact on an election by being or remaining disengaged. Even without Patriot, many citizens defy the economists' dreary predictions by incurring the real personal costs of becoming politically informed and remaining politically engaged. But who needs Patriot for these citizens? Judging by their actions, they believe themselves to be empowered despite big money. Many citizens neither vote nor become informed, however, and it is those whom Patriot seems designed to entice into active participation. Patriot must redirect the systemic and arguably rational inclinations of the presently uninvolved and uninformed citizens if it is to work as advertised to generate significantly increased citizen political engagement. Yet in making their case for Patriot, Ackerman and Ayres do not come to terms with the possibility that the inclinations of citizens to remain disengaged might be systemic artifacts of the intractable collective action problem that modern representative government confronts, a problem whose enormity is exacerbated by the size of the voting population and the complexity of the issues that face the nation. Patriot is not likely to affect the behavior of significant numbers of

130. *See, e.g.*, ABNER GREENE, UNDERSTANDING THE 2000 ELECTION 137-50 (2001) (describing the confusion that the "butterfly ballots" caused in Palm Beach County in the 2000 election, despite the fact that the ballots had been designed specifically to make voting easier for elderly voters and that samples had been sent to all voters prior to election day).

citizens who have remained disengaged until now because they understand that their individual vote is unlikely to matter and so have decided to find less futile uses for their time than to spend it on becoming informed about politics.

Enact Patriot. The nation will not get smaller and the government's response to the issues that confront it will become neither easier to understand nor more susceptible to being effectively monitored by the cumulative efforts of alert individual citizens. The hard fact is that very few individual citizens can realistically expect to have a meaningful impact on much of anything that the government does, and this reality will hold even if large private contributions could be entirely eliminated. If the lack of citizen participation is a function of rational voter ignorance in the face of the low probability of having an impact on outcomes, Patriot dollars will do little—if anything at all—to increase it.

The authors opine that if their initiative is enacted and nevertheless "fails to generate broad engagement, our country is in worse trouble than we thought."[131] Patriot is unlikely to generate significantly broader engagement than that which presently exists, but this conclusion does not signify that our country is "in trouble." It means only that the problem of generating broad, meaningful, informed citizen political engagement over a government as sprawling and complex in a country as populous and diverse among a population as vibrant and productive as ours cannot be solved by the simple expedient of giving citizens $50 each to spend on their favorite politicians or political groups. Mobilizing citizen engagement in political issues is a project that deserves the sustained attention of serious scholars because a reliably informed, alert, and politically active citizenry is the most effective means of making government accountable. The challenge is momentous because the problem is systemic. It is improbable that it will yield to Patriot's magic wand. The wonder is that Ackerman and Ayres seem to have convinced themselves, and try so hard to convince their readers, that their initiative would have any discernible impact at all.

C. *The Cure: The Secret Donation Booth*

The secret donation booth is the other part of Ackerman and Ayres's proposed cure for our big-money ills. They rightly bemoan the failure of previous campaign finance reform efforts which, due to their transactional focus, have predictably and inevitably generated what they call a "reform-evasion cycle."[132] Ackerman and Ayres explain: "As reformers succeed in

131. ACKERMAN & AYRES, *supra* note 3, at 89.

132. *Id*. at 46. For a good brief account of the many failures of the campaign finance reforms of the 1970s, see GILLON, *supra* note 100, at 200-34. Brief experience to date with McCain-Feingold suggests that we are in for more of the same. *See, e.g*., Thomas B. Edsall, *New Ways To*

abolishing one or another suspect transaction, donors and politicians [and, the authors might have added, their lawyers] respond by skirting the new law and designing new forms of dealing that permit business as usual."[133] The result is that the influence of big money continues unabated. The secret donation booth, they think, will bring an end to this recurring sequence of frustrated attempts to cleanse the political game. By "disrupting the informational conditions under which donors and politicians can deal with one another,"[134] it will eliminate the incentives that they presently have to devise new ways to evade the ever-tightening contribution limitations.

Ackerman and Ayres claim that the secret donation booth is but a variation on the theme of the secret ballot, which was introduced in this country in the late nineteenth century and is widely credited (along with restrictions on electioneering around polling places) with having significantly reduced voter intimidation and fraud.[135] The secret ballot and the secret donation booth both disrupt the exchange of information between corrupt deal-makers and thereby, claim Ackerman and Ayres, bring an end to their deal-making. And, of course, to the extent that neither voter intimidation nor corrupt deal-making between candidates and influence seekers can proceed without the exchange of reliable information, the analogy between the secret ballot and the secret donation booth does seem to work.

On closer analysis, insofar as it suggests that the secret donation booth has the same potential to eliminate the influence of wealthy contributors as the secret ballot had to restrict the ability of corrupt politicians to intimidate voters, the analogy breaks down. It does so not because the disruption of information is in principle a flawed corruption-prevention strategy; to the contrary, the idea of disrupting the flow of corrupt information is an intriguing one, and would be even more so if it were possible to disrupt the flow of corrupt information without also disrupting the flow of legitimate conversations between politicians, their supporters, and voters. If requiring campaign contributors to keep the amounts of their contributions secret could eliminate the undue influence of money in politics, and if we knew how to distinguish between due and undue influence, then the analogy between the secret ballot and the secret donation booth would be a powerful one.

Harness Soft Money in Works: Political Groups Poised To Take Huge Donations, WASH. POST, Aug. 25, 2002, at A1.

133. ACKERMAN & AYRES, *supra* note 3, at 45.

134. *Id*. at 46.

135. *See* Burson v. Freeman, 504 U.S. 191, 206 (1992) (sustaining a Tennessee statute prohibiting the solicitation of votes and the display or distribution of campaign materials within 100 feet of the entrance to a polling place, and tracing victory over the twin evils of voter intimidation and election fraud to a "secret ballot secured in part by a restricted zone around the voting compartments").

In contrast to the secret donation booth, however, the secret ballot was an extremely simple solution, and it was cheap to enforce. Officials needed only to provide voters with a private place to vote and to shield voters' choices from prying eyes until their ballots were safely in the ballot box. Secret ballots required neither elaborate subsidiary rules nor a bureaucracy to ensure that they were carried out. A secret ballot system has no gaps to be plugged, and it does not demand a cadre of administering guardians who themselves need to be guarded from corrupting influences. Indeed, the secret ballot is a virtually self-enforcing solution to the problem of voter intimidation.

On the other hand, an elaborate and complex regulatory structure is crucial to the successful implementation of the secret donation booth in order to thwart big givers' and ambitious politicians' efforts to surmount its informational barriers. Ackerman and Ayres realize this necessity, which explains why they devised so many regulatory bells and enforcement whistles. To be sure, the rules they devise for *donors* are simple, straightforward, and "easily understood by everybody: Never give or accept gifts that haven't passed through the secret donation booth. Any direct transfer of cash is a felony comparable to vote-buying, and punishable accordingly."[136] But the secret donation booth through which the gifts would have to pass is anything but simple, straightforward, and easily understood. It requires an elaborate bureaucratic infrastructure, and a substantial portion of the book addresses the difficulties of designing it (chapter 7), figuring out ways of plugging its gaps (chapter 8), and devising means to safeguard its administrators (chapter 9). Most of the model statute prescribes administrative and bureaucratic details rather than announcing the plain unvarnished rules that would apply to donors. These parts of the book reflect an effort to identify as many potential loopholes as the authors could possibly foresee and to close them before they could be exploited by devious rich guys seeking new ways to donate big bucks and credibly brag about it to the candidates whose favors they seek. They represent an attempt to design a no-exit strategy, to create an airtight system of financing campaigns that will stymie every effort by wealthy contributors and corrupt politicians to evade its confines. However one might describe the system that emerges, one could not accurately describe it as either simple or cheap to enforce.

Whether the no-exit strategy would work even on its own terms is questionable. This is in part because elaborate schemes like the secret donation booth often fail. Their designers are able to foresee neither the entire range of evasive strategies that the regulated parties will adopt when they are confronted with the new legal reality, nor the regulatory

136. ACKERMAN & AYRES, *supra* note 3, at 52.

pathologies that will emerge as the complex bureaucratic structure evolves.[137] Indeed, because of the complexity and inescapable unpredictability of the world, the only certain effect of the full-blown secret donation booth is that few of its consequences can be anticipated. But even if the secret donation booth were implemented as Ackerman and Ayres envision, and even if no loopholes remained to be exploited in the new campaign finance regime, the problems of special-interest deal-making would surely continue to plague our democracy. Rich donors would have reasons to seek avenues to political influence other than by making campaign contributions.[138] More importantly, the dominance of special-interest groups in the legislative process is not a function of big money. Quite to the contrary, special-interest groups, whether they represent business interests, or abortion-rights advocates, or environmentalists, are an artifact of the unyielding reality that collective action problems are endemic to representative democracy.

One reason for the secret ballot's success is that it was designed to solve a relatively constrained problem that was susceptible to a rather simple solution that neither brought about a flood of unintended consequences nor had the potential to make things worse. Voter intimidation posed a genuine threat to self-government: It was not an artifact of representative government's collective action problems, nor was it a necessary corollary of anyone's conception of representative democracy. Thus, mounting a principled argument to the effect that it should be left unregulated was virtually impossible. For this reason, the secret ballot (combined with restrictions on electioneering near polling places) provided a nearly complete solution to the problem it had been designed to address. Voters who could not be harassed as they approached the voting booth, and who could keep their votes secret, were simply no longer susceptible to intimidation. By contrast, the problem that the secret donation booth supposedly solves—the problem of the unequal political influence of wealthy citizens and of special-interest deal-making—is practically boundless. Ackerman and Ayres diagnose big-money contributors as what ails democracy. The cure they prescribe is the secret donation booth. But because big money is not in fact the principal source of

137. *Cf.* GILLON, *supra* note 100, at 235-40 (offering generalizations about why unintended consequences so often emerge from well-intentioned purposive collective action); JEFFREY L. PRESSMAN & AARON WILDAVSKY, IMPLEMENTATION: HOW GREAT EXPECTATIONS IN WASHINGTON ARE DASHED IN OAKLAND (1973) (analyzing and describing the failure of the Economic Development Administration's program to provide permanent new jobs to minorities in Oakland, California).

138. *Cf.* Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1705 (1999) ("[E]very reform effort to constrain political actors produces a corresponding series of reactions by those with power to hold onto it.").

the problem, the secret donation booth, in contrast to the secret ballot, is unlikely to be much of a palliative.

D. *The Prognosis*

Ackerman and Ayres think that their new paradigm—the combination of Patriot dollars and the secret donation booth—will effect significant and systematic changes in "the kinds of policies that might actually get enacted."[139] They identify who they think the big losers will be, who the big winners will be, and what the fate of pork-barrel legislation will be. They also describe the political dynamic that they think is likely to ensue as "parties, ideological groups, and social movements"[140] compete for Patriot dollars. The picture they paint is not convincing.

As this Review has sought to emphasize, the political scene today is dominated by interest-group competition. From the Founding era to the present day, the central organizational dilemma in designing a republican form of government has been to devise ways to control factions. Modern representative government is a colossal collective action problem, beset by incalculable agency costs and pervasive informational asymmetries between citizens, well-organized groups, bureaucrats, and elected representatives. This is reality. It is neither a nightmare nor a utopian dream. It renders the problem of factions perversely intractable. And although they recognize the faction problem, Ackerman and Ayres's depiction of it is little more than a caricature. Because they focus exclusively on big-money special interests, the story they tell is incomplete. Special interests of all kinds are a pervasive phenomenon. The competition among them is fierce—and, again, it is intrinsic to representative government. To Ackerman and Ayres, only one special interest—"big money"—exerts a malign influence on legislative outcomes, and they clearly disapprove of what they think is its agenda on normative grounds.

The authors' narrow focus on big business, however, prevents them from recognizing that *all* interests are special interests—even the interests of ideological groups like the Sierra Club and the NRA, which, along with political parties, would become the principal political intermediaries should Patriot and the secret donation booth be enacted. Special-interest groups of all kinds, whether they represent corporate interests or ideological ones, are an artifact of the collective action problems that all modern republican democracies confront, and they both help to solve and tend to exacerbate the problems.[141] Ackerman and Ayres misconceive the reason why all

139. ACKERMAN & AYRES, *supra* note 3, at 161.

140. *Id*. at 175.

141. *See* Lillian R. BeVier, *Campaign Finance Reform: Specious Arguments, Intractable Dilemmas*, 94 COLUM. L. REV. 1258, 1274-75 (1994) (arguing that special-interest groups provide

special interests, and the informational asymmetries they exploit, threaten democratic governance, which is that the interests they represent are narrow, not that they are normatively inappropriate.

Because they paint such an incomplete picture of what ails modern democracy, Ackerman and Ayres prescribe the wrong remedy and then overestimate its ability to cure. They think that the big losers under their new paradigm will be "the political interests that currently push their agendas with large private contributions," which they simplistically equate with "corporate America"[142] because corporate PACs "contributed 30 percent of all PAC donations in 2000"[143] and because PACs connected to "trade, membership, and health organizations" contributed another 22.5 percent of total PAC donations.[144] In their view, "[i]t doesn't take a rocket scientist to recognize that the new paradigm will reduce the influence of corporate lobbyists."[145] There is no doubt that the new paradigm would *change* the way corporate lobbyists ply their trade, but that does not necessarily mean that it would cause their relative influence to decrease. More likely, the new system would simply divert corporate efforts to exert political influence into new avenues. After all, the new paradigm does nothing to reduce the incentives for corporate lobbyists and others like them to influence political outcomes (nor could it), and because these individuals and organizations already know much more than average citizens about how to be effective with politicians, the odds are long indeed that they will end up permanently as big losers in the competitive struggle for political power.

Ackerman and Ayres predict that "big business [will] provide a smaller share of [the] private money" donated to candidates and groups.[146] This forecast reflects the authors' assumption that moneyed interests contribute money only in order to sway candidates' positions on issues, and that candidates routinely change their positions in accordance with the wishes of their largest contributors. This assumption is not only contrary to a considerable body of evidence,[147] but it also ignores the more likely

a means of overcoming collective action problems caused by individual inertia, but that they also have the potential to exert systemically malign influence as well, particularly in the form of rent-seeking).

142. ACKERMAN & AYRES, *supra* note 3, at 171.

143. *Id*.

144. *Id*. at 171-72.

145. *Id*. at 173.

146. *Id*. at 172.

147. *See* Richard L. Hall & Frank W. Wayman, *Buying Time: Moneyed Interests and the Mobilization of Bias in Congressional Committees*, 84 AM. POL. SCI. REV. 797, 798 (1990) ("[T]he scientific evidence that political money matters in legislative decision making is surprisingly weak."); *see also* FRANK J. SORAUF, MONEY IN AMERICAN ELECTIONS 316 (1988) ("[T]he evidence simply does not support . . . claims about the 'buying' of Congress."); Janet M. Grenzke, *PACs and the Congressional Supermarket: The Currency Is Complex*, 33 AM. J. POL. SCI. 1, 1 (1989) (finding "little evidence that the contributions of 120 PAC's affiliated with 10

possibility that people contribute to candidates who already agree with them.[148] Individuals and groups contribute to candidates, in other words, *because of* those candidates' views—not *in spite of* them. Because it would remain important to business interests to elect like-minded candidates even if the new paradigm were enacted, it seems unlikely that corporate interests would significantly reduce their contributions even if they had to make them anonymously. Still, Ackerman and Ayres assume that there will be significantly less private money under the new paradigm and that whatever "private money [remains] will be diluted by a flood of Patriot dollars."[149] As a consequence of there being less private money in the system, and of most of what there is not being traceable to individual or corporate contributors, they foresee a substantial reduction in a certain kind of legislative pork, namely, that in which "a concentrated group of industrial producers use state power to exploit a large group of unorganized consumers."[150] As a result, they think that "the dollar savings on porkish legislation [such as reduced sugar tariffs and too-lenient environmental regulations] could easily dwarf the costs of running Patriot."[151] They do not apparently believe, nor does it seem to matter to them, that the "dollar savings on porkish legislation" would come from reduced government spending. In fact, they do not make clear how or by whom the savings on too-lenient environmental regulations would be realized, although of course the savings produced by reduced sugar tariffs would be experienced by consumers rather than appearing in the federal budget at all. But they do not expect federal spending itself to decline. To the contrary, they anticipate that, instead of doing the will of industrial polluters, members of Congress will pander to their constituents by funding projects that can "generate lots of patriotic cash from ordinary constituents"[152]—which would result in funding "more neighborhood centers for the masses, fewer irrigation projects for desert agriculture."[153]

organizations affected the voting patterns of House members who served continuously from 1975 to 1982").

148. Larry Sabato, *Real and Imagined Corruption in Campaign Financing*, *in* ELECTIONS AMERICAN STYLE 155, 160 (A. James Reichley ed., 1987). Similarly, David Austen-Smith notes:

> [I]f the rationale for access is informational, access will only be granted to groups whose preferences over consequences are sufficiently close to those of the legislator to permit credible information transmission . . . . Only those groups who fall within this category will be willing to pay for access . . . [and] the legislator will be willing to grant access to such groups independent of any financial incentive.

David Austen-Smith, *Campaign Contributions and Access*, 89 AM. POL. SCI. REV. 566, 566 (1995).

149. ACKERMAN & AYRES, *supra* note 3, at 172.

150. *Id*.

151. *Id*.

152. *Id*.

153. *Id*. Note once again that this prediction appears to represent a tacit acknowledgment that if citizens were given the opportunity to vote with Patriot dollars, they would do so because of self-interested rather than public-regarding motives.

PART III

A. *Rhetorical Style, Rhetorical Substance*

Ackerman and Ayres confidently predict that their "new paradigm will place ordinary Americans firmly in the driver's seat" and that average citizens will no longer be "passive spectators" but "will take charge of the future of politics."[154] As I have argued, because their diagnosis of democracy's fundamental problem is so incomplete, their predictions wildly exaggerate the likely success of their scheme. They also illustrate a characteristic feature of the book's exposition that is worth noting because it creates such an impediment to genuine engagement with their argument. Throughout the book, the authors indulge in so much rhetorical hyperbole that their descriptions of present political reality, their analyses of its problems, and their forecasts for the future are truly impenetrable. For example, they seek to convey the impression that, unless their paradigm becomes law, the country is likely to become a full-blown plutocracy. They relentlessly and obsessively intone their contempt for "big money." They claim that the country is experiencing an "ideological drift toward extreme forms of market capitalism"[155] and a "national drift to oligarchy."[156]

One cannot evaluate such claims or attempt a rigorous refutation of them because these catch phrases lack any discernible empirical content. For all their confident condemnation of it, and despite the fact that they premise their entire argument on its badness, the authors specify neither what makes money "big" nor, except in their profoundly incomplete "standard reconciliation," what makes "big money" bad. They do not describe the facts from which they discern the ideological drift toward extreme forms of market capitalism, nor do they identify what forms of market capitalism they regard as extreme. They never define what they denote when they speak of corruption, nor do they explain why only some kinds of special-interest deal-making ought to be condemned. They extol the virtues of popular sovereignty but fail to provide a meaningful definition of the term. And they let the term oligarchy speak for itself.[157]

The analysis in Part II represents an attempt at a fair interpretation of the authors' claims. Uncertainty about whether my interpretation of their claims is accurate necessarily persists because the opacity of their language confounds any effort to discern the precise meaning of those claims. But I

154. *Id*. at 177.
155. *Id*. at 160.
156. *Id*. at 161.
157. As one anonymous wag has suggested, however, "In a world that contains Saudi Arabia and China, someone who says that the United States is in danger of turning into an oligarchy should be struck about the head and shoulders with his thesaurus."

raise the issue of the authors' rhetorical approach not only to pose a semantic quibble, but also to highlight the fact that it frustrates serious inquiry about whether Ackerman and Ayres have accurately diagnosed the problem that their new paradigm is supposed to solve. The discomforting truth about the book's rhetoric is that it appears expressly designed to foreclose debate on precisely that score.

Ackerman and Ayres apparently assume that what they see (and feel) when they look at the world is also what their readers see. It is possible that their pejorative and melodramatic characterizations have real-world referents for which the characterizations are simply shorthand, and that they thus convey genuine meaning to those who instinctively share the authors' world view and political convictions. But a reader who does not share these convictions will not know precisely what the authors mean and will be unable to form a clear and definite picture of the nature of the phenomena to which they refer. Such a reader is likely to be unhappy at being excluded from the debate. More importantly, she might worry that she has been deliberately stymied in her effort to parse the book's meaning and to evaluate its analysis.

The authors' failure to specify what they mean by corruption, and to deploy the term with more meticulous care, is particularly troubling. In order for their proposals to enjoy even a modicum of constitutional legitimacy, they must be supported by a plausible corruption-prevention rationale: Preventing corruption or the appearance of corruption is the *sole* rationale that the Supreme Court has accepted for campaign finance reform and, "[b]arring a major shift in this area of law, corruption is *the* criterion by which the constitutionality of further reforms in campaign finance regulation will be measured."[158] Of special note, the Court has explicitly rejected equality as a permissible objective of reform.[159] The notion that campaign contributions and expenditures that are not corrupt, or that do not present the appearance of corruption, could be limited or regulated simply as a means of leveling the political playing field has squarely been foreclosed.

That being said, corruption is a notoriously elusive concept. Its meaning is particularly hard to pin down when the context requires that a line be drawn between illegitimate exchanges of money for votes and

158. Thomas F. Burke, *The Concept of Corruption in Campaign Finance Law*, 14 CONST. COMMENT. 127, 127 (1997) (emphasis added).

159. As the *Buckley* Court concluded:

> [T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed to secure the widest possible dissemination of information from diverse and antagonistic sources, and to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.

Buckley v. Valeo, 424 U.S. 1, 48-49 (1976) (citations and internal quotation marks omitted).

legitimate contributions to support politicians and policies with whom the donor is in sympathy. *Buckley* and its early progeny defined corruption quite narrowly to include only explicit (if subtle) deals between contributors and legislators: "Corruption is a subversion of the political process. Elected officials are influenced to act *contrary to their obligations of office* by the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the *financial quid pro quo: dollars for political favors*."[160]

Note that, in principle, the definition of corruption that this excerpt embraces reflects an implicit conclusion that the *amount* of a contribution has no intrinsic bearing on whether it is corrupt. If it is not given in exchange "for political favors," it is not corrupt even if it is very large in amount.[161]

Recent cases have suggested that a broader conception of corruption may be constitutionally acceptable as the predicate for reform efforts. In *Austin v. Michigan State Chamber of Commerce*, for example, the Court seemed to endorse a definition of corruption that embraced the notion that the electoral process itself—and not just elected officials—might be the target of corruption-prevention legislation.[162] And in *Nixon v. Shrink Missouri Government PAC*, it suggested that legislators might legitimately act from "a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors."[163] Parsing the meaning of this statement presents a major difficulty. The Court has not specified the kind of behavior it has in mind when it refers to officeholders as "too compliant."[164] Since it is and always has been appropriate for voters to signal their policy preferences to those who desire to represent them, and it is and always has been appropriate for elected officials in Congress to represent the interests of their constituents, it will be a challenge for the Court to specify when an official who acts according to her constituents' wishes can be said to have been "too compliant." This challenge is particularly daunting since studies indicate that the main factors determining legislators' votes are their party affiliation, ideology, and constituent preferences.[165] Thus, when a

160. Fed. Election Comm'n v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 497 (1985) (emphasis added).

161. *See Buckley*, 424 U.S. at 29-30 (sustaining relatively low contribution limits not on the grounds that contributions over the maximum were necessarily corrupt, but rather on the need to draw a clear line and on the legislature's relative institutional advantage in drawing it).

162. 494 U.S. 652, 659-60 (1990).

163. 528 U.S. 377, 389 (2000).

164. Elizabeth Garrett, *The William J. Brennan Lecture in Constitutional Law: The Future of Campaign Finance Reform Laws in the Courts and in Congress*, 27 OKLA. CITY U. L. REV. (forthcoming 2003).

165. *See* Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049, 1068 (1996) (describing these studies).

legislator's vote correlates with the interests of contributors, it is more likely that contributors have sent money to people whose perspectives are compatible with their own than that, as Ackerman and Ayres seem to think, the legislator changed her position in order to secure the contribution. Indeed, Ackerman and Ayres simply ignore the fact that "[s]tudies that do attempt to control for ideological and constituent preferences find no evidence of any *quid pro quo* manifest in the roll-call votes of members of Congress."[166]

The important fact remains that, while the Supreme Court has yet to define the kind of legislative behavior that can legitimately be deemed corrupt, it has not retreated from its distinction between corruption prevention and equality in the context of candidate elections. Corruption prevention is a legitimate goal for campaign finance reform. Equalization of political power is not.

In the new paradigm, however, talk of preventing corruption provides rhetorical sheep's clothing for what on examination turns out to be an aggressive wolf with a hearty appetite for equalization. Ackerman and Ayres obscure the paradigm's true nature by keeping their definition of corruption opaque. They thereby free themselves to deploy the term to connote whatever meaning serves the purposes of a particular argument. Sometimes, for example, they use the term to refer to the kinds of quid pro quo deals to which the Supreme Court referred in *Buckley*, as when they assert that "[a] victorious politician is guilty of corruption if he delivers the goods to his campaign contributors in too obvious a fashion."[167] Sometimes they use it more loosely, to imply that any contributor access to or influence over politicians is corrupt, as when they praise the secret donation booth because it "makes it harder for candidates to *sell* access or influence" and tout the virtues of anonymous donations because they "disrupt influence peddling."[168] Sometimes they assume that all contributions of more than $200 under the present system are corrupt, as when they justify mandated anonymity of all such contributions by reference to the law's traditional "suspicio[n] of encounters with politicians that end up with a transfer of money" (which in turn leads the authors to conclude that requiring all donations to be anonymous does not violate freedom of association since "nobody has a right to 'freedom of association' for purposes of corruption"[169]). And sometimes they simply equate corruption with inequality, and write as though they were the same phenomenon, as when they call for reshaping "the political marketplace [to] enable it to become more responsive to the judgments of equal citizens than to the preferences

166. Milyo et al., *supra* note 115, at 80.
167. ACKERMAN & AYRES, *supra* note 3, at 5.
168. *Id.* at 6.
169. *Id.* at 151.

of unequal property owners,"[170] or when they refer to the "corrupting influence of unequal wealth."[171]

With such semantic sleights of hand, Ackerman and Ayres disguise both the deep cynicism of their understanding of how our political process works and the fact that their ultimate agenda is not quite what it purports to be. Their agenda is not an attempt to solve a garden-variety corruption-prevention problem. It is, instead, relentlessly redistributive and could be defended on corruption-prevention grounds only by taking as descriptively accurate Ackerman and Ayres's pervasively derisive account of politics today. They imply that candidates and elected officials routinely change their votes on major issues in response to campaign contributions. They imply that there is something amiss when large contributors gain influence with, and access to, elected officials. What worries them is surely neither the fact that politicians can be influenced by their constituents nor that citizens seek access to office holders, for they are surely not claiming that *no one* should have access to, or influence upon, candidates. Rather, what must bother them is that large contributors simply have *more* influence than others. It is thus inequality, not corruption, that they seek to ameliorate.

An agenda to redistribute political power is not necessarily normatively unappealing,[172] but Ackerman and Ayres's semantic strategy of obscuring the fact that that agenda—and not preventing corruption—drives their new paradigm is troublesome. Rather than inviting thoughtful consideration, the effect of the strategy is to avoid joining issue on the most fundamental matters. Meaningful debate about campaign finance regulation cannot proceed unless participants in that debate confront two questions. First, what exactly constitutes the corruption that the Court has said campaign finance regulation might legitimately prevent? And second, should the Court explicitly overrule *Buckley*'s rejection of political equalization as a rationale for campaign finance reform? Unfortunately, Ackerman and Ayres finesse the answers to both.

170. *Id*. at 14.

171. *Id*. at 27.

172. David Strauss suggests that corruption is, in any case, a problem that derives from inequality:

> If somehow an appropriate level of equality were achieved, much of the reason to be concerned about corruption would no longer exist. And to the extent the concern about corruption would persist under conditions of equality, it is actually a concern about . . . the tendency for democratic politics to become a struggle among interest groups [which is inherent in any system of representative government].

Strauss, *supra* note 106, at 1370.

B. *First Amendment Analysis*

Ackerman and Ayres claim that their new paradigm, as embodied in their model statute, "conforms in all respects to prevailing judicial doctrine."[173] This conclusion is not so unproblematic as they would portray it. The reading of *Buckley* upon which they base their argument is, to say the least, idiosyncratic. And much of the support they offer for their view takes the form of conclusory statements rather than reasoned analysis. Finally, the new paradigm raises important First Amendment questions that they fail to ask.

To take up these points in turn, begin with "three large points" about which, on the authors' reading of *Buckley* (but not on anyone else's of which I am aware), the Court had "something important to say."[174] First, they argue that the *Buckley* Court expressed a "preference for subsidies"[175] and even suggested that "serious campaign reform should not happen without a significant injection of public funds."[176] True, *Buckley* did sustain the present system of providing public money for presidential candidates who agree to a limit on private contributions and expenditures, but in the opinion itself the Court neither expressed a *preference* for subsidies nor suggested that "a significant injection of public funds" ought to be part of any serious campaign reform.[177] Moreover, Ackerman and Ayres's claim that *Buckley* was "remarkably accommodating where governmental subsidies are concerned"[178] seems overblown, as does their assertion that the case "expressly authorizes Congress to offer plutocrats a deal: The government will give them subsidies provided that they waive their right to spend freely from their bottomless bank accounts."[179] The remarkable accommodation and express authorization appeared in a single footnote

173. ACKERMAN & AYRES, *supra* note 3, at 141.

174. *Id*. at 159.

175. *Id*.

176. *Id*. at 142. Indeed, Ackerman and Ayres claim that public subsidies were one of the "twin principles" that *Buckley* embraced. *Id*. at 157.

177. In sustaining congressional power to publicly finance election campaigns against a First Amendment challenge in *Buckley*, the Court held that public financing of presidential elections "as a means to reform the electoral process was clearly a choice within [Congress's] power." 424 U.S. 1, 90 (1976). Since "Congress was legislating for the 'general welfare'—to reduce the deleterious influence of large contributions on our political process, to facilitate communication by candidates with the electorate, and to free candidates from the rigors of fundraising," *id*. at 91, it was not for the Court to decide that the chosen means are "'bad,' 'unwise,' or 'unworkable,'" *id*. And in rejecting appellants' claim that public financing of election campaigns ought to be held to violate the First Amendment by analogy to the Religion Clauses, the Court described the provision at issue as "a congressional effort, not to abridge, restrict or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people." *Id*. at 92-93.

178. ACKERMAN & AYRES, *supra* note 3, at 142; *see also id*. ("When it comes to adding public money . . . *Buckley* gives Congress a remarkably free hand.").

179. *Id*. at 143.

stating that "Congress may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations."[180]

The second large point that Ackerman and Ayres claim for *Buckley* is that it expressed a "concern with the power of incumbents."[181] It is difficult to pinpoint the source of this claim, and Ackerman and Ayres do not provide it. The Court addressed incumbent protection only once in the opinion, in response to the argument that the contribution limitations worked an invidious discrimination against challengers. Citing the absence of record evidence to support the argument, the Court rejected it.[182] In a footnote, the Court acknowledged that "the overall effect of the contribution and expenditure limitations enacted by Congress could foreclose any fair opportunity of a successful challenge."[183] It concluded, however, that since the campaign expenditure limitations were invalid, it did not have to express an opinion about whether invidious discrimination would have resulted from the "full sweep of the legislation as enacted."[184] Describing this brief reference, in a 145-page opinion, as one of the opinion's "large points" is, to say the least, a bit of a stretch.

According to Ackerman and Ayres, *Buckley* made a third "large point" of emphasizing "the expressive dimensions of campaign contributions."[185] Perhaps so, but it is equally noteworthy—although Ackerman and Ayres do not note it—that the *Buckley* Court also acknowledged the communicative aspect of contributions[186] and emphasized the informational benefits of disclosure.[187] In addition, it expressly and in no uncertain terms rejected equalization of the "relative ability of individuals and groups to influence the outcome of elections"[188] as a legitimate goal of campaign finance regulation.

When Ackerman and Ayres turn their attention to the specific constitutional issues raised by the secret donation booth, they purport to find themselves "[o]nce again . . . on easy street."[189] The Justices, they say, "[l]ike most sensible people . . . are well aware that big givers can gain special influence over politicians, and they have regularly sustained legislation that can plausibly be viewed as efforts to reduce the risk . . . of

180. *Buckley*, 424 U.S. at 57 n.65.
181. ACKERMAN & AYRES, *supra* note 3, at 159.
182. *Buckley*, 424 U.S. at 30-32.
183. *Id.* at 31 n.33.
184. *Id.*
185. ACKERMAN & AYRES, *supra* note 3, at 159.
186. 424 U.S. at 20-21 ("[Contribution limits entail] only a marginal restriction upon the contributor's ability to engage in free communication. A contribution serves as a general expression of support for the candidate and his views . . . .").
187. *Id.* at 66-67.
188. *Id.* at 48.
189. ACKERMAN & AYRES, *supra* note 3, at 147.

corruption."[190] They go on to insist that their own "approach to private giving is carefully tailored to eliminate only those donations that generate the possibility of influence peddling,"[191] a statement particularly difficult to credit in view of their proposal to require all contributions of more than the paltry sum of $200 to be anonymous. Such a low limit hardly seems "carefully tailored" to eliminate *only* potential influence peddling.[192]

With respect to the anonymity requirement, the authors are content simply to assert that it "do[es] not in any way trench upon the donor's freedom of speech,"[193] apparently viewing as dispositive their model statute's refusal "to impose *any* new restrictions on the things private citizens can say *to one another*."[194] But in forbidding private individuals from directly contributing to candidates and verifiably disclosing the amount of their contributions, the authors' model statute creates an impenetrable barrier to communication and to the flow of information between candidates, their supporters, and the voting public. That private individuals remain free to say anything they want to one another hardly answers whether mandated anonymity trenches on freedom of speech. The real question is whether individuals have a First Amendment right to disclose in a verifiable fashion—to the candidate and to the public—the amount of their support for particular politicians. Ackerman and Ayres do not confront the fact that information about the source and the amount of contributions to candidates is, at the very least, highly relevant to political debate, nor do they convincingly demonstrate that the interest of individuals in truthfully communicating their support of particular candidates is not of First Amendment value. Instead, they assert that permitting small donors "to operate under false pretenses"[195] uses "free speech as an anticorruption tool"[196] because small donors' exaggerations "undermine the capacity of big donors to obtain special influence."[197] They describe this as a decision "to fight corruption by facilitating more speech,"[198] and they think it is "certain to withstand the most searching constitutional scrutiny."[199] When they assess the possibility that the requirement of personal delivery of contributions to the secret donation booth might constitute an impermissible

190. *Id*.
191. *Id*.
192. It is perhaps revealing that, when Ackerman and Ayres set about to defend the claim cited in the text, they do so with an example of a donor contemplating a $10,000 contribution in return for "special favors," about which they conclude that "[s]pecial dealing of this kind has always been barred under the Court's corruption-fighting rationale." *Id*. at 148. Campaign contributions in the $200 range hardly represent special dealing "of this kind."
193. *Id*.
194. *Id*. at 150 (second emphasis added).
195. *Id*. at 149.
196. *Id*. at 150.
197. *Id*.
198. *Id*.
199. *Id*.

restriction of freedom of association, they dismiss it by resorting to the implication that any contribution directly to a politician is by definition "corrupt" and then concluding that, "[b]ecause nobody has a right to 'freedom of association' for purposes of corruption, the new restriction falls outside the zone of constitutional protection, and no further balancing is required."[200]

The biggest source of doubt about the soundness of Ackerman and Ayres's constitutional analysis is its failure to engage in a sustained confrontation with the two questions about the secret donation booth that are likely to pose the most difficulty for the Court. First, the secret donation booth substitutes for the Court's most favored anticorruption tool—disclosure—its exact opposite, anonymity. Despite this, Ackerman and Ayres devote surprisingly few words to defending the key proposition that disclosure is a less effective tool than anonymity—and when they do discuss disclosure, they imply that its principal role in political dialogue is to enable politicians to make corrupt deals with their contributors.[201] They implicitly discount, therefore, the wisdom of the traditional First Amendment view that information in the hands of the public is the best way to fight corruption.[202] Moreover, they utterly fail to confront the Supreme Court's statement in *Buckley* that disclosure serves governmental interests important to the "free functioning of our national institutions [because it] provides *the electorate* with information."[203] Their analysis simply assumes that the Court will readily turn its back on the praise it heaped on the disclosure remedy in *Buckley*.[204] Finally, Ackerman and Ayres offer no support for their implicit claim that the draconian limits imposed in connection with the secret donation booth—namely, that all contributions of more than $200 must be anonymous—represent the least restrictive means of achieving their anticorruption goal.

The second aspect of the secret donation booth likely to be an issue for the Court is that the proposal's coercive mandate for anonymity will require the FEC to meddle constantly in political dialogue. Despite the authors' insistence that they intend to preserve maximum amounts of donor freedom and that they "protect[] more speech than is constitutionally required"[205] by guaranteeing "every American the right to say anything he wants about the size and nature of his donations,"[206] the fact remains that the secret donation

200. *Id*. at 151.

201. *See id*. at 5-6.

202. Grosjean v. Am. Press Co., 297 U.S. 233, 250 (1936) ("[I]nformed public opinion is the most potent of all restraints upon misgovernment.").

203. Buckley v. Valeo, 424 U.S. 1, 66 (1976) (emphasis added, internal quotation marks omitted).

204. *See id*. at 66-67.

205. ACKERMAN & AYRES, *supra* note 3, at 150.

206. *Id*. at 148.

booth is mandatory in every aspect. Indeed, the authors want it to be absolutely the only game in town, and they spend considerable effort making it loophole free. Moreover, they require the FEC to engage in constant fine-tuning—in order to make sure that the public-private funding balance is maintained, for example—which would involve the Commission in almost constant oversight of the campaign process. Thus, whatever else the new paradigm might be, it is most certainly not an embodiment of political freedom. Nor does it appear to be consistent with the principle, affirmed in *Buckley*, that "[i]n the free society ordained by our Constitution it is not the government, but the people—individually as citizens and candidates and collectively as associations and political committees—who must retain control over the quantity and range of debate on public issues in a political campaign."[207]

CONCLUSION

Voting with Dollars is a deeply flawed book. It offers two genuinely new ideas for campaign reform, but when the opaque rhetoric disguising them is stripped away, the weakness of their conceptual underpinnings becomes evident. The utopian premises implicit in its reform proposals are hollow, and the authors' attempt to give them content by outlining a complicated administrative apparatus for their implementation fails. The book provides a simplistic, cynical, and descriptively unsustainable account of what ails modern American democracy. It prescribes a cure that is quite certain to prove ineffective. It defends the constitutionality of the plan it offers with an analysis that is idiosyncratic at best, troublingly incomplete and inaccurate at worst. The topic of the book is of enduring importance, and ideas about what's wrong with democracy and how to fix it are always welcome. But don't look to Ackerman and Ayres for diagnosis or treatment of what ails us because, to borrow a phrase, their medicine cabinet is empty.[208]

207. 424 U.S. at 57.

208. Walter J. Blum & Harry Kalven, Jr., *The Empty Cabinet of Dr. Calabresi: Auto Accidents and General Deterrence*, 34 U. CHI. L. REV. 239 (1967).