

# Elections and Change Under *Voting with Dollars*

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Two important events occur in even-numbered years: federal elections and the Olympics. Each is marked by huge amounts of media spending, odd combinations of high ideals, jingoism, fierce competition in some events and preordained results in others, and, especially recently, accusations of partisan judging.

If Bruce Ackerman and Ian Ayres's provocative new book, *Voting with Dollars*,<sup>1</sup> were an Olympic event, it would be the biathlon. The biathlon combines two sports that are usually quite distinct from one another—cross-country skiing and riflery. The biathlon's component events rely on very different skills and approaches. Yoking skiing and shooting together can reveal an athlete's strengths and weaknesses in a way that neither sport alone might do. The biathlon raises the questions of what should count as a sport and whether a streamlined and perhaps romanticized version of what it meant to be a soldier in nineteenth-century Scandinavia should be a model for athletic competition today.

So too with *Voting with Dollars*. The book combines two originally distinct proposals—Bruce Ackerman's idea for decentralized public funding of political campaigns through "Patriot dollars"<sup>2</sup> and Ian Ayres's idea for requiring anonymity in political contributions<sup>3</sup>—and uses them to offer a highly stylized vision of political life in twenty-first century America. Like the biathlon, the combination raises interesting questions, some about how we think about nineteenth-century history and some about how we

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

2. See Bruce Ackerman, *Crediting the Voters: A New Beginning for Campaign Finance*, 13 AM. PROSPECT 71 (1993).

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

should organize modern competitions. Ackerman and Ayres claim that a set of animating ideas about the political process unites their proposals. As I shall suggest, this may not be entirely correct: each of the book's components sheds light on the strengths and weaknesses of the other. But even if the book is simply the serendipitous product of collegial lunches—more like a biathlon made up of figure skating and the javelin rather than a consistent proposal for comprehensively revamping American politics—it illuminates some central issues about the structure of our political process and the prospects for various kinds of reform.

As the book's subtitle "A New Paradigm for Campaign Finance" suggests, *Voting with Dollars* is mostly concerned with dollars, rather than with voting. Thus, when Ackerman and Ayres describe Sam Issacharoff and me as "new hydraulicists,"<sup>4</sup> they are taking issue with our suggestion that campaign finance reform will tend to rechannel, rather than to reduce, political spending. But the new hydraulicism has another dimension: we see political money, like water, as "part of a broader ecosystem"<sup>5</sup> in which campaign finance interacts with single-member districts and winner-take-all elections, partisan and incumbent-protective gerrymandering, term limits, restrictive ballot access, and the rise of direct democracy.<sup>6</sup> Thus, in addition to our skepticism about particular reform proposals, we have expressed skepticism about "whether the current obsession with political spending isn't simply the latest manifestation of the common American belief that the best way to solve a problem is to throw money at it, rather than to think hard about the root causes."<sup>7</sup>

*Voting with Dollars* may itself provide an example of this second form of hydraulicism. Although Ackerman and Ayres's rhetoric focuses primarily on explaining why political spending should be more like voting,

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4. ACKERMAN & AYRES, *supra* note 1, at 8, 251 n.7 (citing Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705 (1999)).

5. Issacharoff & Karlan, *supra* note 4, at 1708; see also Pamela S. Karlan, *A Bigger Picture*, in ROBERT RICHIE & STEVEN HILL, REFLECTING ALL OF US: THE CASE FOR PROPORTIONAL REPRESENTATION 73 (Joshua Cohen & Joel Rogers eds., 1999) ("Low voter turnout, an incumbent retention rate that rivals the Soviet Union's at its height, campaign finance scandals, the turmoil over the role of race in the redistricting process, a legislative inability or unwillingness to confront and solve difficult questions of public policy, and so on: they're all connected, at least in part.").

6. Our casebook, SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* (2001) [hereinafter *THE LAW OF DEMOCRACY*], reflects our belief in that ecosystem. In the casebook, we try to place each of these elements in a broader context.

7. Issacharoff & Karlan, *supra* note 4, at 1734. The work of the Center for Direct Democracy offers a sobering view on the question whether campaign finance reform alone can transform the political process. The Center has consistently been able to predict the outcome and winning margin in the vast majority of congressional races without using any information at all about campaign financing or any specifics about the actual contest, by looking at what it calls "district partisanship"—a measure of the difference between the presidential election results in the district and the presidential election results nationally. See CTR. FOR VOTING AND DEMOCRACY, *MONOPOLY POLITICS 2000* (rev. ed. 2001), available at <http://www.fairvote.org/2000/index.html>.

their proposal will also make voting more like spending. Thus, to understand the benefits and the drawbacks of *Voting with Dollars* first requires understanding voting simpliciter. This Review Essay focuses on three fundamental assumptions about voting in contemporary America: first, that ballots are cast anonymously; second, that citizens are badly informed; and third, that representation is based on geographically defined constituencies. Much of the appeal of Ackerman and Ayres's argument rests on an extremely robust embrace of the anonymity assumption; I shall suggest that the pedigree and extent of anonymity are more complicated than they suggest. The desire to eliminate corruption was not the sole motivation for the secret ballot. There are costs, as well as benefits, to anonymity in the voting process. Moreover, Ackerman and Ayres may be overly optimistic about the degree of anonymity they can create with respect to campaign contributions.

As for voters' level of information, like virtually every other proponent of campaign finance reform, Ackerman and Ayres aspire to create a more informed electorate; I shall explore their theory of how to achieve that goal and suggest that it reveals a potential tension between Patriot dollars and the donation booth. To the extent that Ackerman and Ayres are right about the beneficial effects of Patriot dollars—and I suggest that once again they may be overly optimistic about the effectiveness of their proposal—the donation booth becomes less necessary and more troubling, since it deprives a civically informed electorate of information that sophisticated voters might find useful.

Finally, Patriot dollars may substantially change the landscape, making voting less geographically defined. They will create a species of cumulative voting. While *Voting with Dollars* adverts to this possibility, it does not fully explore its implications for aspects of representative democracy other than the financing of political campaigns. These implications suggest some possible modifications of Ackerman and Ayres's proposals. First, Patriot dollars ought to be "tagged" with the same kind of information that accompanies conventional votes—for example, identification by the donor's voting precinct. Second, a citizen's Patriot account should be contingent on her participation in the electoral process.

## I

### ANONYMITY

*Voting with Dollars* wants political spending to mimic "two core attributes of the franchise: Citizens are given equal voting power, but they must exercise this power anonymously."<sup>8</sup> I want to concentrate on the second of these attributes, not because the first one is either unimportant or

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8. ACKERMAN & AYRES, *supra* note 1, at 9.

uncontroversial, but because the discussion of equality in the political process is already so well developed.

*Voting with Dollars* gives the following account of the origin and function of anonymity in voting: During the nineteenth century, deeply corrupt American elections included a "massive black market for votes—with machine politicians buying tons of ballots from the poor and ignorant at bargain prices."<sup>9</sup> The secret ballot prevented this corruption, and purified democracy, by making it impossible for corrupt politicians to ensure the efficacy of their bribes. Thus, "the secret ballot became the foundation for a parallel sphere of life—in which equal citizens, rather than unequal property owners, express their political judgments."<sup>10</sup>

I have some serious doubts about the historical accuracy of this story.<sup>11</sup> Morgan Kousser, for example, describes the movement to, and effect of, secret ballots rather differently, seeing behind it the desire to exclude illiterate and foreign-born immigrants in the North, and blacks in the South:

The publicly printed ticket required the voter, sometimes without any aid from anyone, to scurry quickly through a maze of names of candidates running for everything from presidential elector to county court clerk, a list which was often arranged by office rather than party. He then had to mark an "X" by the names of the candidates for whom he wished to vote, or, in some states, mark through or erase those he opposed. Such a task demanded not merely literacy, but fluency in the English language. An ingenious lawmaker could make voting all but impossible. Florida totally abolished party designations on the ballot. A Populist or Republican who wished to vote for his presidential electors had to count down five, ten, or fifteen unfamiliar names before starting to mark. Voters in one Virginia congressional district in 1894 confronted a ballot printed in the German Fraktur script.<sup>12</sup>

The 1892 campaign song of the Arkansas Democratic Party, *Australian Ballot* (sung to the tune of *The Bonnie Blue Flag*), described this problem more graphically:

The Australian ballot works like a charm,  
It makes them think and scratch,  
And when a negro gets a ballot  
He has certainly got his match.

. . . .

9. *Id.* at 18.

10. *Id.*; see also *id.* at 30, 250 n.6.

11. Ackerman and Ayres's account is, to be sure, the standard version. See *Burson v. Freeman*, 504 U.S. 191, 200-02 (1992) (relying on the conventional place in upholding restrictions on polling-place electioneering).

12. J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTIONS AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910*, at 51-52 (1974).

They go into the booth alone  
 Their ticket to prepare.  
 And as soon as five minutes are out  
 They have got to git from there.<sup>13</sup>

Secrecy is thus not always more democracy-protecting than sunshine. The secret ballot was part and parcel of the change in American politics from what Michael Schudson calls a “democracy of partisanship” to a “democracy of information.”<sup>14</sup> The resulting “democracy of information” prizes rationality, but it also deprecates the importance of mediating institutions like political parties, which can serve as a focus for organizing and mobilization. It is not entirely coincidental that participation declined sharply as voting ceased to be part of a festive ritual of community and affiliation.<sup>15</sup>

More broadly, the secret ballot has entrenched existing political parties. Prior to the introduction of the standardized ballot, each voter could vote for whomever he preferred simply by preparing his personal ballot with that candidate’s name on it. But the standardized ballot limits the voter’s choices to the candidates whose names the government has placed on the ballot. Most general elections limit this choice to the nominees of major political parties (who are given pride of place with its attendant advantages—the “primacy effect”). Many primary elections limit the choice to candidates with the resources to pay filing fees or meet onerous and costly petition requirements.<sup>16</sup> This constraint has hindered voters’ ability to express their preferences.<sup>17</sup>

Even aside from its racially tainted origins and its entrenching effects, the secrecy in voting produced by the Australian ballot is not necessarily an unalloyed good. John Stuart Mill opposed replacing the traditional practice of *viva voce* voting (that is, voice voting among an assembled electorate)

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13. John William Graves, *Negro Disfranchisement in Arkansas*, 26 ARK. HIST. Q. 199, 212-13 (1967). Today, of course, the Voting Rights Act gives every voter the right to the assistance of his choice (except for assistance by his employer or union) within the voting booth. See 42 U.S.C. § 1973aa-6 (1994).

14. See MICHAEL SCHUDSON, *CHANGING CONCEPTS OF DEMOCRACY* (1998), available at <http://web.mit.edu/m-i-t/articles/schudson.html>.

15. See MICHAEL SCHUDSON, *THE GOOD CITIZEN: A HISTORY OF AMERICAN CIVIC LIFE* (1999).

16. This is especially true in states that do not permit, or sharply restrict, write-in voting. See *Burdick v. Takushi*, 504 U.S. 428 (1992); *THE LAW OF DEMOCRACY*, *supra* note 6, at 359-62 (discussing limitations on voter choices).

17. See *THE LAW OF DEMOCRACY*, *supra* note 6, at 348-73 (describing ballot-access regulations and citing sources). It is particularly fitting to note at a symposium sponsored in part by the Brennan Center that the Brennan Center has participated in a series of lawsuits designed to force the New York Republican Party to place the names of undeniably serious candidates (like John McCain and Steve Forbes) on the party’s presidential primary ballot. See, e.g., *Rockefeller v. Powers*, 78 F.3d 44 (2d Cir. 1996), *cert. denied*, 517 U.S. 1203 (1996); *Molinari v. Powers*, 82 F. Supp. 2d 57 (E.D.N.Y. 2000). The need for such an effort is a direct consequence of the adoption of the Australian ballot, since otherwise voters simply could have written in the names of the candidates they preferred.

with secret voting because he thought that secret voting lessened a voter's sense of accountability:

The best side of their character is that which people are anxious to show, even to those who are no better than themselves. People will give dishonest or mean votes from lucre, from malice, from pique, from personal rivalry, even from the interests or prejudices of class or sect, more readily in secret than in public. And cases exist . . . in which almost the only restraint upon a majority of knaves consists in their involuntary respect for the opinion of an honest minority.<sup>18</sup>

That Mill's fears are not illusory is suggested by a well-documented contemporary phenomenon: white voters, protected by the anonymity of the voting booth, often simply lie about their willingness to vote for minority candidates. They claim to pollsters doing exit polls that they have voted for black candidates, but the actual election returns belie their protestations.<sup>19</sup> The most plausible explanation for this behavior is that the voters wish to convey the impression that race played no role in their decision, even when it causes them to vote against their usual pattern.

I do not want to overstate Mill's point. There is of course a countervailing cost to public voting: some voters may feel intimidated from casting ballots for the candidates they prefer because of potential retaliation by the government, employers, or their neighbors. And no one aware of the history of American disenfranchisement can doubt that voter intimidation occurs and that it has been, and indeed remains, a serious problem in some places. But it is worth pausing for at least a minute before extending anonymity within the political process even further.

This should be especially true for Ackerman, given the other strand of his current focus on political reform: the establishment of "Deliberation Day," a national holiday during which citizens will come together to engage in face-to-face discussion and debate of political issues.<sup>20</sup> Deliberation Day reflects, and presumably seeks to build upon, another "core attribute" of voting: its public dimension. While a voter can avoid disclosing the candidates for whom she has voted, the fact that she has voted is a public

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18. JOHN STUART MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 164 (Currin Shield ed., Bobbs-Merrill 1958) (1861).

19. See, e.g., Stephen C. Fehr, *Vote Counting Methods, Race Factor in Polls Leave Plenty of Room for Error; Some Blame Voters for Off-the-Mark Projections*, WASH. POST, Nov. 9, 1989, at A37; Sheryl McCarthy, *What Voters "Don't Tell" Pollsters*, NEWSDAY, Oct. 27, 1993, at 30; Les Payne, *The Lies White Voters Tell to Pollsters*, NEWSDAY, Nov. 12, 1989, at 11; see also Saul Levmore, *The Anonymity Tool*, 144 U. PA. L. REV. 2191, 2222-24 (1996).

20. See BRUCE ACKERMAN & JAMES FISHKIN, *DELIBERATION DAY* (forthcoming 2004); see also Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 668 (2000) (describing how deliberative polling, in which a sample of voters discuss ideas intensively with one another before reaching their final judgments, could serve a critical role in direct democracy).

one.<sup>21</sup> And until the recent rise of unlimited absentee voting, voting by mail, and the prospect of internet voting, the actual act of voting was quite public. Even today, the process of voting at a polling place is

still explicitly designed to remind us that, in principle, we are all equal members of the political community. On Election Day, we must leave our homes and offices, travel to a polling place, and physically mingle with people who are plainly our equals that day, no matter what other differences we have.<sup>22</sup>

The power of this vision was nowhere more dramatically illustrated than in South Africa's first postapartheid elections in 1994, when people waited in line for hours simply to cast a ballot. A white voter who left for the polls at midmorning with a black gardener described the experience:

Here I've been waiting for six hours; some of these people have been waiting for thirty, forty, fifty, sixty years. The country has been waiting for three and a half centuries.

Five o'clock. We are very close now. And each face emerging from those big doors ahead carries the radiant message of fulfillment, of a joy too great to express in words. New ripples of cheerfulness beset the crowd. We have all become members of one great extended family. Black, brown, white: in the course of this one day a quiet miracle has been taking place. . . . We are discovering, through the basic sharing of this experience, that we are all South Africans. It is as simple and momentous as that. Most of us will return to our separate existences tomorrow. In the commotion of the coming days, months, years, much of this day may fade. But there is one thing we cannot ever forget: the knowledge of having been here together; the awareness of a life, a country, a humanity we share. By achieving what has seemed impossible we have caught a glimpse of the possible.

Half past five. Atwell and I have reached the threshold. Briefly, we look at each other. We put our hands on each other's shoulders. Then we go in, each on his own, but sharing a small precious moment of history.<sup>23</sup>

In Ackerman's terms, the 1994 South African election was a constitutional moment in which a kind of higher-track voting was occurring. But even though the encounters will be less dramatic during most elections, they

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21. Ironically, citizens tend to overreport their voting habits, presumably because voting is recognized as such an admirable act. See Allan J. Lichtman & Samuel Issacharoff, *Black/White Voter Registration Disparities in Mississippi: Legal and Methodological Issues in Challenging Bureau of Census Data*, 7 J.L. & Pol'y. 525, 531 (1991).

22. Rick Valesly, *Voting Alone: The Case Against Virtual Ballot Boxes*, NEW REPUBLIC, Sept. 13, 1999, at 20; see also ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 447 (2000).

23. André Brink, *A Democratic Dawn: Election Day in South Africa*, HARPER'S, Aug. 1994, at 70.

retain their quiet power to produce a profoundly important "citizenship effect."<sup>24</sup>

Moreover, as a descriptive matter, while it is generally difficult to determine how any particular individual has voted, it is not difficult to make quite intelligent estimates about the choices of voters within a particular category. Predicting future voting behavior is the very lifeblood of modern partisan redistricting, which has become so successful that it is now often more accurate to say that legislators decide who their constituents will be than it is to say that voters pick their representatives.<sup>25</sup> Polling has improved dramatically since the days of the *Literary Digest*'s notoriously misguided prediction that Alf Landon (who carried only Maine and Vermont) would defeat Franklin Delano Roosevelt. And litigation under the Voting Rights Act has required the development of statistical techniques for making ecological inferences—that is, inferring the individual behavior of white and non-white voters from precinct-level election returns.<sup>26</sup> Thus, politicians who have powerful incentives to know where their supporters and opponents live can make very educated guesses.

What are the implications of this decline in the degree of anonymity for *Voting with Dollars*? One implication, of course, is a version of the new hydraulicism: to the extent that politicians want to know the sources of their financial support, there are reasons to think that methods for informing them will develop. More modestly, though, the decline in political and economic anonymity suggests that Ackerman and Ayres may be overly optimistic in believing that "cheap talk" will fool politicians. When they write that "[t]housands may flock to the candidate to promise gargantuan sums which never arrive through the blind trust,"<sup>27</sup> they ignore the fact that it is already relatively cheap for politicians to screen out most cheap talkers. If Ackerman and Ayres are right that private contributions will decline after the introduction of the donation booth, then surely politicians would be warranted in assuming that the kinds of people who do not already give large, access-producing contributions today, when they can claim full credit for their gifts, are unlikely to start giving them tomorrow. Thus, politicians can use knowledge generated by current disclosure laws about the characteristics of big donors today to make informed predictions about the kinds of people who will be big donors in the donation booth regime.

A Democratic congresswoman from Texas, for example, will know that some self-proclaimed donors are talking through their hats, because

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24. ACKERMAN & AYRES, *supra* note 1, at 15.

25. See *supra* note 7 & *infra* text accompanying notes 48-50 (describing the general lack of competitiveness within congressional districts).

26. For a thorough and accessible summary of the various statistical techniques, see Bernard Grofman, *A Primer on Racial Bloc Voting Analysis*, in *THE REAL Y2K PROBLEM: CENSUS 2000 DATA AND REDISTRICTING TECHNOLOGY* 43-80 (Nathaniel Persily ed., 2000).

27. ACKERMAN & AYRES, *supra* note 1, at 28.



they likely lack the assets to make such contributions. She can also feel confident that members of another group have certain demographic characteristics—residence, political party registration, racial or ethnic identification, occupation, or the like—that make it unlikely that they would contribute to a candidate with her views. As for a third group of claimants, she may discount their protestations of affection because they are the kind of people who are unlikely to find buying access to politicians important, either because their interests are not likely to make such access important or because they have characteristics—like serving as intermediaries who can rally substantial political support for a candidate—that make contributing cash unnecessary.

Ackerman and Ayres offer a hypothetical example to illustrate the strength of the donation booth—a world in which BMW dealers must sell cars through a Luxury Car Purchase Fund and would be driven into bankruptcy if they relied on a customer's assurance that he had made a \$75,000 deposit to their account rather than to Cadillac's.<sup>28</sup> But their example actually suggests a version of this problem. Automobile dealers already have a pretty good sense of the market for their different vehicles, even without the incentive to invest in better predictive technology that a Luxury Car Purchase Fund would create. I could not find a specific comparison of BMW and Cadillac buyers, but I came pretty close:

"The person who would buy a Mercedes would never consider buying a Cadillac, and the person considering a Cadillac would never buy a Mercedes," states Chris Cedergren, manager of forecast products, J.D. Powers & Associates. "They really cater to different generations, even different demo groups."<sup>29</sup>

So the universe of cheap talkers who can claim contributions that demand attention is unlikely to be even in the thousands,<sup>30</sup> and the plausible set of donors to any particular congressional candidate is more limited still. Notwithstanding Rambam's discussion of the different levels of *tzedakah* (giving)—in which it is better for a donor to know to whom he gives while the recipient is ignorant of from whom she receives than it is for both donor and recipient to be aware of each other's identity<sup>31</sup>—it seems unlikely

28. See ACKERMAN & AYRES, *supra* note 1, at 102.

29. Brian Bagot, *Brand Report: Lux in Flux*, MARKETING & MEDIA DECISIONS, May 1990, at 87.

30. According to the data Ackerman and Ayres rely on, in 1996, only 235,000 people even contributed \$1,000 to a candidate. ACKERMAN & AYRES, *supra* note 1, at 252 n.8. It seems reasonable to assume that a substantial proportion of this 235,000 are right around the \$1,000 mark. That kind of donation seems far more likely to reflect precisely the kind of ideological giving with which Ackerman and Ayres seem to have no real problem than an attempt to purchase access.

31. Rambam (the twelfth-century Jewish philosopher Moses Maimonides) organized the Talmud's discussion of *tzedakah* into a list. There are eight levels. In ascending order of virtue, these include: (1) Giving begrudgingly; (2) Giving less than the donor should, but giving it cheerfully; (3) Giving after being asked; (4) Giving before being asked; (5) Giving when the donor does not know the recipient's identity, but the recipient knows the donor's; (6) Giving when the donor

that there are large numbers of potential donors who have been dissuaded under the current system by the prospect that the candidate would know their identity.<sup>32</sup>

## II INFORMATION

It is clear what kind of voter Ackerman and Ayres hope their proposals will produce: an engaged and informed citizen who devotes substantial time to politics generally and how to allocate her Patriot dollars particularly.<sup>33</sup> It is also clear what type of person the word "citizen" conjures up for them today: someone who does not vote, does not think she should contribute \$50 of her own money to financing political campaigns, and does not bother to consider the information current disclosure laws produce.<sup>34</sup>

Like most other reformers, Ackerman and Ayres ultimately want to reform not the financing of campaigns, but the thought processes of the mass of citizens.<sup>35</sup> But exactly how do they think Patriot dollars and the donation booth will accomplish this transformation?

The key lies in the flooding effect of Patriot dollars. Ackerman and Ayres set up a system in which Patriot dollars will constitute at least two-thirds of the overall funds available to candidates.<sup>36</sup> In this new regime, citizens will become less cynical about the possibilities of politics as they come to see themselves, rather than special interests, as the primary source of politicians' campaign funds. Politicians will now appeal to voters, with their Patriot dollars, rather than respond to the demands of a moneyed few.<sup>37</sup> Citizens' trust will be reinforced by their view that the remaining

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knows the recipient's identity, but the recipient does not know the donor's; (7) Completely anonymous giving; (8) Charity that enables the recipient to become self-reliant. For a discussion of *tzedakah*, see Tzedakah: Charity, at <http://www.mechon-mamre.org/jewfaq/tzedakah.htm> (last visited Dec. 11, 2002). As David Strauss's contribution to this symposium suggests, many current campaign contributions fall into the first category: they are made by donors who would rather not contribute at all, but who feel obligated to contribute to both parties or candidates in order to protect access. See David Strauss, *What's the Problem? Ackerman and Ayres on Campaign Finance Reform*, 91 CALIF. L. REV. 723.

32. There may be a class of donors who want to give for legitimate reasons, but who are dissuaded by disclosure laws. However, I am not sure why we should design a contribution system that protects their anonymity.

33. See, e.g., ACKERMAN & AYRES, *supra* note 1, at 15.

34. See *id.* at 27.

35. For a more extensive discussion of this point, see Issacharoff & Karlan, *supra* note 4, at 1726-28; Daniel Ortiz, *The Democratic Paradox of Campaign Finance Reform*, 50 STAN. L. REV. 893 (1998).

36. Section 27(b) of their model statute provides a mechanism for ensuring this ratio. See ACKERMAN & AYRES, *supra* note 1, at 218-19.

37. This of course raises the question whether there ought not to be far more disclosure of the source of a candidate's Patriot dollars than the model statute provides for. See *infra* text accompanying notes 61-64.

private money in the system reflects ideological commitments rather than grubby self-interest.<sup>38</sup> In addition, citizens will devote time to deciding how to allocate their own Patriot dollars, and this will encourage them to become better informed. Believing that the system has been purified, they will flock back to the polls. Having decided to vote, they will spend time prior to the election becoming better informed.

I want to press this account in two ways. First, *Voting with Dollars* may take an overly optimistic view of what will happen when Patriot dollars hit the market. Second, to the extent that Ackerman and Ayres are right about the beneficial effects of Patriot dollars, the donation booth—the requirement that all non-Patriot contributions be given anonymously—becomes a more troubling provision.

As Ackerman and Ayres rightly recognize, the problem with Big Money in the current political system is not the total amount being spent.<sup>39</sup> But neither is it entirely the source of the money. A substantial part of the problem lies in how the money is spent: on vacuous feel-good spots and attack ads. Sadly, these advertisements apparently work, albeit in pernicious ways that debase political discussion and depress turnout.<sup>40</sup>

If much of the current problem lies in how money is spent, rather than in whom it comes from, this raises the question whether changing the source of a candidate's funds will change the nature of his campaign advertising. Why would a candidate funded by Patriot dollars (particularly if out-of-district ideological groups contribute those dollars<sup>41</sup>) not simply perpetuate (or ratchet up) the quantity of money he spends on precisely the kind of advertising that leads to victory, voter cynicism, and depressed turnout? Voters already tell pollsters and researchers that they dislike negative advertising and disapprove of candidates who run attack ads. Yet they do not punish these candidates at the polls. Beyond the blithe assertion that "political advertising in the patriotic world will carry a different social meaning," because "[t]urning on the TV will become an occasion for citizens to reflect on their own communicative choices,"<sup>42</sup> Ackerman and Ayres offer no explanation of why the campaigns candidates run will change based on the source of funding.<sup>43</sup> If campaigns remain no more

38. I leave to the side the question whether ideology and self-interest can be separated quite as neatly as Ackerman and Ayres suppose.

39. See ACKERMAN & AYRES, *supra* note 1, at 85 ("[W]e reject the frequent claim that Americans are already spending 'too much' on political campaigns.").

40. See, e.g., STEPHEN ANSOLABEHRE & SHANTO IYENGAR, *GOING NEGATIVE: HOW ATTACK ADS SHRINK AND POLARIZE THE ELECTORATE* (1995); MICHAEL PFAU & HENRY C. KENSKI, *ATTACK POLITICS: STRATEGY AND DEFENSE* (1990).

41. See *infra* text accompanying notes 43-45, 58-60.

42. ACKERMAN & AYRES, *supra* note 1, at 15.

43. Indeed, to the extent that candidates remain dependent on media-intensive campaigns, increasing the amount of money candidates receive may simply drive up the revenues of the media conglomerates who sell time and space to candidates. Eben Moglen offers a biting account of the

informative than they are today (and perhaps become even more heated as the struggle for voters' attention becomes more intense), will new funding schemes produce more well-informed and responsibly engaged voters?

Let us suppose, though, that Ackerman and Ayres are right, and that the Patriot regime will create or encourage a well-informed, civically engaged citizenry. Under these circumstances, the donation booth is far less attractive. After all, the initial justification for restricting the information available to the electorate was the assumption that voters were indifferent to the source of a candidate's contributions, and that tainted money therefore gains more votes, through the media access it buys, than it loses.<sup>44</sup> In that world, the authors may well be right that the primary function performed by having donors identify themselves and the amount of their donation is to let candidates know whose calls they have to return. But if voters were civically engaged, and especially if the Patriot regime prompted them to think critically about campaign finance, then disclosure of the sources of private money might be something that a substantial number of voters would find useful, either in deciding for whom to vote or in deciding how to allocate their Patriot dollars. And it may well be that the informed voter is every bit as interested in the identity of donors, and the magnitude of their donations, when "ideology" motivated the donors as when they are motivated by self-interest. An engaged voter might well believe that the two motivations are often quite closely linked. In a civically engaged society, we should be "especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good."<sup>45</sup> And this is especially true given the possibility that only voters will be left in the dark in a regime of formal anonymity.<sup>46</sup> Put another way, in a Patriot dollar world, the donation booth may undercut, rather than contribute to, intelligent and informed voter choice.

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parasitic nature of the relationship between media giants and politicians in his discussion of the Telecommunications Act of 1996, which gave existing broadcasters control over new pieces of the public airwaves, asking:

[I]s this a good time to confirm and expand the award of free communications privileges conveying enormous unequal advantage to a few individuals and organizations? Is it relevant that those holding the privileges then sell to politicians the communications advantages awarded to them, as well as donate money to the campaigns and personal fortunes of the legislators?

Eben Moglen, *The Invisible Barbecue*, 97 COLUM. L. REV. 945, 951-52 (1997).

44. See ACKERMAN & AYRES, *supra* note 1, at 27.

45. See 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 464, 503 (1996) (opinion of Stevens, J.); see also *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 768-70 (1976).

46. See *supra* text accompanying notes 26-29 (suggesting that even if contributions go through the donation booth, candidates will often have a fairly good idea of their source).

### III GEOGRAPHY

For me, one of the most intriguing features of *Voting with Dollars* is the implications of Ackerman and Ayres's proposals for voting itself. This effect stems from their decision to let voters spend their Patriot dollars on any electoral contest, rather than only on contests in which they enjoy the entitlement to cast a ballot.<sup>47</sup>

Ackerman and Ayres recognize one of the disturbing realities of American politics: most congressional elections have foreordained outcomes.<sup>48</sup> The redistricting process, generally run by politicians, creates a huge number of safe seats. In the 2000 election, 64 of the 435 House seats were uncontested by one of the two major political parties, the average margin of victory was 40% (meaning the winner got at least 70% of the vote), fewer than one in ten races were won by margins of less than 10%, and 397 of 403 incumbents were re-elected.<sup>49</sup> At least a third of all votes cast (if citizens even bother to vote, and fewer than half do) are wasted ballots: either they are part of an ineffectual minority or they are unnecessary to a landslide victor.<sup>50</sup>

Patriot dollar "votes," by contrast, are not locked into safe districts. A voter can cast these votes anywhere in the country, homing in on (or having an intermediary organization scout out) the few competitive races where additional campaign spending might make a difference.<sup>51</sup> In this sense, Patriot dollars can augment voters' interests in aggregation and governance.<sup>52</sup> While the formal act of casting a ballot and having that ballot count is of course important because it expresses ideals of equal dignity and consent, voting functions not just "to delineate the boundaries of the political community. Rather, it is to combine individual preferences to reach some collective decision"; thus voting is designed to enable each voter "to elect the candidate of her choice."<sup>53</sup> Moreover, since the selection

47. More specifically, each voter's Patriot account contains three subaccounts—one for House races, one for Senate races, and one for presidential races. ACKERMAN & AYRES, *supra* note 1, at 77. Patriot dollars can be spent only on candidates for a particular level of office, but they are not restricted to particular races at that level.

48. For a striking example of this fact, see CTR. FOR VOTING AND DEMOCRACY, *supra* note 7. In August 2000, the Center for Voting and Democracy predicted the winning party and winning percentage in 367 of the 435 congressional races, "without using any information about campaign financing, strength of opponent or any specifics about the race." *Id.* available at <http://www.fairvote.org/2000/results.htm>. Their predictions of the winner were correct in 364 of the 368 cases, and their estimate of the margin of victory was right in 361 of the 368 cases.

49. CTR. FOR VOTING AND DEMOCRACY, DUBIOUS DEMOCRACY 2001, *available at* <http://www.fairvote.org/2001/overview.htm> (last visited Dec. 11, 2002).

50. See *id.* at <http://www.fairvote.org/2001/usa.htm>.

51. See ACKERMAN & AYRES, *supra* note 1, at 77-82.

52. I introduced this taxonomy in Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705 (1993).

53. *Id.* at 1712-13.

of representatives is just a way station on the road to republican decision making, a voter "necessarily will be concerned both with who serves as the representative(s) of her district, and just as centrally, with the overall composition of the governing body" in which her representatives serve.<sup>54</sup> One of the key premises of our articulation of the new hydraulicism is a sense that "a world with 'multiple channels of political influence'"—where voters can engage in out-of-district financial support, as well as in-district electoral support—can be superior to a world in which there is only one avenue of political involvement.<sup>55</sup> In light of the prevalence of safe districting, some citizens can "participate most fully by giving financial support to candidates in other jurisdictions who will *virtually* represent them, or by supporting candidates who will help to change the overall composition of legislative bodies."<sup>56</sup> To the extent that Patriot dollars enhance the opportunity for such participation by providing dedicated funds for political contributions, they can strengthen citizens' opportunity to pursue alternative channels when the opportunity to elect a candidate directly is impossible or insufficient.

*Voting with Dollars* creates a de facto species of cumulative voting. When it comes to congressional elections, voters will get two "votes." One of them consists of the pre-existing right to cast a formal ballot in a specified jurisdiction, directly determining who represents that district. Let us call that the "time-honored vote." The other—the right to spend governmentally conferred Patriot dollars—might be seen as a form of fractional, and divisible, voting. Let us call that "the patriot vote." The patriot vote is fractional because for it to count, it must change form: politicians must transmogrify patriot votes into time-honored votes to achieve electoral victory;<sup>57</sup> their efficacy depends on a time-honored voter's acceptance of the message they fund. Patriot votes are fractional in another respect as well: turning money into votes is likely to be a somewhat inefficient process.<sup>58</sup> For some voters, of course, patriot votes will be the more effective

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54. *Id.* at 1717; see also Jean-Pierre Benoit & Lewis A. Kornhauser, *Assembly-Based Preferences, Candidate-Based Procedures, and the Voting Rights Act*, 68 S. CAL. L. REV. 1503, 1509-10 (1995) (discussing the situations in which a voter's preferences about the composition of an assembly are predominant).

55. Issacharoff & Karlan, *supra* note 4, at 1731 (emphasis in original).

56. *Id.* at 1731-32 (emphasis in original).

57. *Id.* at 1720; see also Bruce E. Cain, *Moralism and Realism in Campaign Finance Reform*, 1995 U. CHI. LEGAL F. 111, 116.

58. Ironically, the reported prosecutions for vote buying suggest that the price for buying an old-style vote on the black market is in the neighborhood of the amount of Patriot dollars Ackerman and Ayres would give to each citizen. See, e.g., *United States v. Daugherty*, 952 F.2d 969, 971 (8th Cir. 1991) (\$3 to \$5); *United States v. Saenz*, 747 F.2d 930, 935 (5th Cir. 1984) (\$45 welfare voucher and a six-pack of beer), *cert. denied sub nom. Solis v. United States*, 473 U.S. 906 (1985); *United States v. Canales*, 744 F.2d 413, 416 (5th Cir. 1984) (\$20 to \$30). For a more detailed discussion of vote buying, see Pamela S. Karlan, *Not by Money but by Virtue Won? Vote Trafficking and the Voting Rights System*, 80 VA. L. REV. 1455, 1460, 1470 (1994).

mechanism for influencing electoral outcomes and the composition of Congress; for others, they will be less. Patriot votes are divisible because a voter is free to divide his patriot vote among candidates; his time-honored vote, by contrast, is indivisible. A voter in the patriot-voting world, like a voter in other cumulative voting systems, is free either to plump or divide his votes: he can decide to cast his old-style vote and his entire patriot vote for a single candidate or he can divide them among several.

A rich literature evaluates the virtues and vices of cumulative voting.<sup>59</sup> That literature suggests the following analogy: cumulative voting is to traditional territorial districting as *Voting with Dollars* is to conventional proposals for public campaign finance. Cumulative voting essentially allows individuals to district themselves, that is, to join together with other voters along the dimensions they individually consider meaningful. If geographic, or geographically correlated, interests seem important to them, they can continue to affiliate along those lines, but if other interests—policy-related, ethnic, gender-based, or socioeconomic—are more central to their political identity, they can coalesce around those interests instead. Moreover, each voter chooses how to identify himself; he can change his affiliation without waiting for decennial reapportionment or depending on incumbent politicians to relocate him.<sup>60</sup>

Similarly, *Voting with Dollars* allows citizens to affiliate politically along ideological, socioeconomic, and self-chosen dimensions, rather than along only geographic ones. It is bottom-up, rather than top-down, public financing. Individual voters, rather than the government, often through the agency of incumbent politicians, decide how to allocate public funding. And there is at least a mild ability to express intensity of preference as well.

In addition to creating a variant of cumulative voting, Ackerman and Ayres may also be creating a variant of the national presidential primary. Voters who live in states whose delegate-election processes take place late

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59. For some representative examples, see DOUGLAS AMY, *REAL CHOICES/NEW VOICES: HOW PROPORTIONAL REPRESENTATION ELECTIONS COULD REVITALIZE AMERICAN DEMOCRACY* (2002); LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* (1994); THE LAW OF DEMOCRACY, *supra* note 6, at 1099-1132; Richard L. Engstrom, *Modified Multi-Seat Election Systems as Remedies for Minority Vote Dilution*, 21 STETSON L. REV. 743 (1992); Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173, 221-36 (1989) [hereinafter Karlan, *Maps and Misreadings*]; Pamela S. Karlan, *Our Separatism? Voting Rights as an American Nationalities Policy*, 1995 U. CHI. LEGAL F. 83 [hereinafter Karlan, *Our Separatism?*]; Michael E. Lewyn, *When Is Cumulative Voting Preferable to Single-Member Districting?*, 25 N.M. L. REV. 197 (1995); Steven J. Mulroy, *The Way Out: A Legal Standard for Imposing Alternative Electoral Systems as Voting Rights Remedies*, 33 HARV. C.R.-C.L. L. REV. 333 (1998).

60. Eben Moglen & Pamela S. Karlan, *The Soul of a New Political Machine: The Online, the Color Line and Electronic Democracy*, 34 LOY. L.A. L. REV. 1089, 1099 (2001); *see also* Lani Guinier, *The Representation of Minority Interests: The Question of Single-Member Districts*, 14 CARDOZO L. REV. 1135, 1169 (1993).

in the nomination process can cast their patriot votes early, sending their patriot votes to the candidates they support in time for those candidates to use that support to garner time-honored votes in the states that pick their delegates earlier. At the same time, candidates who want late-state voters to send them patriot votes to deploy in early-state primaries or caucuses may have to devote more attention to voters in late states, thereby requiring them to run a campaign that is not so heavily targeted toward the unrepresentative electorates of Iowa and New Hampshire.

I am a cautious supporter of cumulative voting.<sup>61</sup> I want to raise two concerns here, however, about Ackerman and Ayres's approach. For reasons I have already explained, time-honored voting is only partially anonymous: while the public will seldom know how any given individual has voted, the general demographic sources of a candidate's support—the neighborhoods in which she prevailed and, based on sophisticated polling data and statistical analyses, the demographic groups that supported her—are quite accessible. Thus, in deciding which candidates to support with his patriot votes, an engaged citizen can consider information about the likely base of a candidate's time-honored support. By contrast, Ackerman and Ayres's model statute fails to provide analogous information about the source of a candidate's haul of patriot votes.<sup>62</sup> Thus, in deciding which candidates to support with his time-honored votes, an engaged citizen is not given information about the source of a candidate's patriot support.

At the very least, voters in a competitive district deserve to know whether a candidate's financial support originates predominantly within the district or outside of it.<sup>63</sup> Perhaps Patriot dollars ought to be "tagged" with the same kind of information that accompanies time-honored votes, for example, identification by the donor's voting precinct (something that could be performed automatically by the administrative agency in the

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61. See, e.g., Karlan, *Maps and Misreadings*, *supra* note 59; Karlan, *Our Separatism?*, *supra* note 59; Moglen & Karlan, *supra* note 60.

62. Section 8(e) of the model statute provides that the blind trust shall publish, with respect to every candidate and political organization, the current available balance of Patriot contributions and transfers, the total of Patriot and non-Patriot contributions and transfers during the past two years, the ratio of Patriot to non-Patriot contributions and transfers during the past two years, and, for every candidate, the date, source, and amount of all transfers of Patriot funds from "major purpose political organizations" during the past two years. ACKERMAN & AYRES, *supra* note 1, at 201. Thus, only with respect to funds from major purpose political organizations is there any disclosure of the source of contributions. Moreover, there appears to be no requirement that a major-purpose political organization—which in the *Voting with Dollars* regime can serve as a conduit, receiving Patriot dollars from individuals and essentially bundling them for transmission to candidates—disclose any information about the source of the Patriot dollars it passes along.

63. That sort of information is available under the current regime. See, e.g., Joseph E. Cantor, *Out-of-State Money in Congressional Elections of 1992, 1994 and 1996: Trends and Policy Issues* (Jan. 10, 1997), available at <http://www.crp.org/candidates/s97-894.htm> (showing that 17% of individual contributions to senatorial candidates and 7% of such donations to House candidates were from out-of-state donors).



process of transferring Patriot dollars from a citizen's account to the account of the candidate or intermediary political organization). That kind of information may be highly relevant to a time-honored voter's decision. Just as Ackerman and Ayres predict that many voters may choose between candidates based on whether their financing is coming predominantly from Patriot dollars or private money,<sup>64</sup> so, too, other voters may make their decision on the basis of whether a candidate's campaign is receiving substantial support from geographic "outsiders." Precisely because outside contributions may reflect well-informed predictions about a candidate's likely positions, details about their general source may be quite valuable to the citizens casting time-honored votes. Certainly, *Voting with Dollars* provides no argument for making a citizen's expenditure of his Patriot dollars more anonymous than his time-honored vote.

Second, if Patriot dollars and time-honored votes come to be seen as substantially interchangeable, this may have unfortunate citizenship effects. At one point, Ackerman and Ayres describe the "happier future" they foresee. Their new paradigm "generates a wave of enthusiastic citizen engagement—even more Americans vote with their Patriot dollars than go to the polls in November."<sup>65</sup> For me, the message sent by a world in which most Americans participate in politics only by writing a check, rather than by casting a time-honored vote, is an ominous one. As I suggested earlier, the physical act of voting carries significant social meaning. It links contemporary citizens to our tradition of self-government. It can remind us of the struggle for dignity by suffragists, blacks, and Latinos, who marched, fought, and died for the right to stand in line to cast ballots. It can remind us through physical proximity that we are all equal citizens in a way that standing in front of an ATM, punching a keypad, and sending some money the government gave us to a candidate halfway across the country is unlikely to do.

Perhaps a citizen's Patriot account should be replenished after an election only if he casts a time-honored vote as well. To the extent that this creates an incentive for armchair participants to perform the central civic act of voting, such a requirement might create a powerful citizenship effect of its own. Moreover, by drawing new voters to the polls, this linkage might make more districts truly competitive. Given Ackerman and Ayres's agreement with Robert Putnam's claim that check writing "is not nearly enough to sustain the civic culture as a vital force in the twenty-first century,"<sup>66</sup> we need to think hard about ways of making sure that citizens are not lulled into thinking that doing an ATM transfer relieves them of the obligation to vote.

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64. See ACKERMAN & AYRES, *supra* note 1, at 108-09, 144.

65. *Id.* at 90.

66. *Id.* at 252 n.12; see also PUTNAM, *supra* note 22.

## CONCLUSION

Groucho Marx famously observed that politics is the art of looking for trouble, finding it everywhere, diagnosing it incorrectly, and applying the wrong remedies. The same may be true of proposals to reform politics. What makes *Voting with Dollars* so intriguing is the ways in which Ackerman and Ayres's new paradigm both sheds light on what's wrong with many of the conventional reform proposals and makes thought-provoking connections between voting and spending. As *Bush v. Gore*<sup>67</sup> taught us, however, the actual mechanics of casting ballots and counting votes can have momentous consequences. Paying attention to those details shows both the possible dividends and the potential costs of Ackerman and Ayres's approach.

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67. 531 U.S. 98 (2000).