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## Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers

Richard L. Hasen

*This Article proposes a market-based alternative to our current unpopular regime for financing federal election campaigns. Under the proposal, each voter receives vouchers for federal elections to contribute either to candidates directly or to interest groups; with limited exceptions, only funds from the voucher system could be spent to support or oppose candidates for elected federal offices. Using public choice theory, Professor Hasen argues that the voucher plan would promote an egalitarian political market in which each person has roughly equal political capital regardless of pre-existing disparities in wealth, education, or organizational ability. After demonstrating that the current campaign finance regime favors wealthy and well-organized interests at the expense of the poor and those with diffuse interests, the author identifies four distinct benefits of the voucher proposal. First, the voucher proposal minimizes the role of wealth in the political process and facilitates the organization of those individuals who currently lack political capital. Second, the proposal is likely to promote a stable transition to a more egalitarian political order and a more chaotic, though fairer, legislative process. Third, the voucher proposal's market orientation registers the intensity of voter preferences well. Finally, the proposal has a realistic chance of being enacted and of passing constitutional muster. The author concludes by demonstrating the superiority of the voucher plan under the four criteria to non-voucher public financing of Congressional campaigns, proportional representation, and group-based political solutions.*

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# Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers

Richard L. Hasen†

## INTRODUCTION

Perhaps nothing is more certain in American society than a cycle of disgust with the political process followed by calls for electoral reform.<sup>1</sup> The moment for reform has arrived yet again. Indeed, widespread public and scholarly disillusionment with the current political process may provide the first opportunity for serious campaign finance reform since Congress passed the post-Watergate amendments to the Federal Election Campaign Act (FECA).<sup>2</sup>

Public dissatisfaction with politicians and the political process is at an all-time high. In 1992, three-quarters of all Americans believed that the government was "pretty much run by a few big interests looking out for themselves" rather than "for the benefit of all people."<sup>3</sup> By contrast, fewer than one-third of all Americans believed that in 1964.<sup>4</sup> This widespread perception that our political system is corrupt or anti-egalitarian, along with growing concern over Washington "gridlock,"<sup>5</sup> suggests that the American public may be willing to consider radical solutions for political reform.

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1. Such disgust has become as inevitable as death and taxes. Apparently it was Benjamin Franklin who, in 1789, first commented upon their inevitability. "Our Constitution is in actual operation; everything appears to promise that it will last; but in this world nothing is certain but death and taxes." JOHN BARTLETT, *FAMILIAR QUOTATIONS* 348 (Emily Morison Beck ed., 15th ed. 1980).

2. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 [hereinafter FECA Amendments].

3. University of Michigan Center for Political Studies, American National Election Studies 1952-1990, Table 4.13 (unpublished data, on file with author). The actual figure is 76%. *Id.*

4. *Id.* The 1964 figure of 29% rose in each subsequent National Election Survey, with the exception of the 1982 and 1984 surveys. *Id.*

5. Far from distancing themselves from gridlock, some Republicans recently have embraced it. See Gloria Borger, *Giving the Voters a False Choice*, U.S. NEWS & WORLD REP., Oct. 24, 1994, at 63 ("So now comes a new political treatise, touted by Republicans everywhere. It is the Good Gridlock Theory of Government, and it is based on an appealing, common-sense calculation: Stopping bad legislation is a good idea.").

What else explains both the widespread support for a quirky Texas billionaire perceived as "too rich to be bought," and the rising number of state initiatives aimed at limiting the terms of elected officials<sup>6</sup> and the size of campaign contributions?<sup>7</sup>

Legal scholarship has begun to mirror the public disgust with the current money-driven campaign finance system. Members of the Supreme Court and some legal scholars have been chipping away at the constitutional underpinnings of *Buckley v. Valeo*,<sup>8</sup> the main legal roadblock to fundamental campaign finance reform. In the 1976 *Buckley* decision, the Court upheld the FECA amendments' limits on campaign contributions,<sup>9</sup> but struck down its various expenditure limits.<sup>10</sup> However, by 1990, the Court began to voice concern over the "corrosive and distorting effects of immense aggregations of wealth" on American politics, and for the first time it upheld limits on independent campaign expenditures.<sup>11</sup>

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6. Before the Supreme Court struck down Congressional term limits passed by state initiative in *U.S. Term Limits, Inc. v. Thornton*, 115 S. Ct. 1842 (1995), supporters of such term limits had prevailed at the polls in 22 states. Linda Greenhouse, *In Term Limits Debate, Justices Take Up a 'Very Hard' Case*, N.Y. TIMES, Nov. 30, 1994, at B9.

7. See Wade Goodwyn, *States Push for Campaign Finance Reform* (National Public Radio Morning Edition broadcast, Feb. 13, 1995), transcript available in LEXIS, Nexis Library, Curnws File (noting the success of initiatives limiting campaign contributions in Oregon, Missouri, and Montana, failure of such an initiative in Colorado, and organization in California for such an initiative to be placed on 1996 ballot). A diverse collection of groups has supported these initiatives, including: The Association of Community Organizations for Reform Now (ACORN), the American Association of Retired Persons, Common Cause, the League of Women Voters, and United We Stand America, the organization that grew out of Ross Perot's 1992 presidential campaign.

8. 424 U.S. 1 (1976).

9. *Id.* at 23-35 (upholding a \$1000 limit on contributions by individuals and groups to candidates and authorized campaign committees); *id.* at 35-36 (upholding a \$5000 limit on contributions by political action committees); *id.* at 38 (upholding a \$25,000 limit on total individual contributions during any calendar year).

10. *Id.* at 39-51 (striking down a \$1000 limit on expenditures relative to a clearly identified candidate); *id.* at 51-54 (striking down a limit on expenditures by candidates from personal or family resources); *id.* at 54-59 (striking down a limit on overall campaign expenditures by candidates seeking nominations for election and election to federal office).

11. *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 659-60 (1990). An independent expenditure is money spent to support or defeat a clearly defined candidate, which is made "without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate." 2 U.S.C. § 431(17) (1994).

Some legal scholars have moved more brazenly, comparing *Buckley* to the infamous case of *Lochner v. New York*, 198 U.S. 45 (1905), and arguing that the Court has no more business preventing legislatures from regulating the political marketplace through campaign finance laws than the Court had preventing the New York legislature from regulating the economic marketplace by limiting the number of hours bakers could work. See, e.g., JOHN RAWLS, *POLITICAL LIBERALISM* 362 (1993) ("The First Amendment no more enjoins a system of representation according to influence effectively exerted in free political rivalry between unequals than the Fourteenth Amendment enjoins a system of liberty of contract and free competition between unequals in the economy, as the Court thought in the *Lochner* era."); Cass R. Sunstein, *Free Speech Now*, in *THE BILL OF RIGHTS IN THE MODERN STATE* 255, 291 (Geoffrey R. Stone et al. eds., 1992) ("We should view [*Buckley*] as the modern-day analogue of *Lochner v. New York*: a decision to take the market status quo as just and prepolitical, and to use that decision to invalidate democratic efforts at reform.") (footnote omitted); see also Bruce Ackerman,

Cynicism with the current political climate is understandable. To take one example, consider the case of Brush Wellman, a Cleveland-based mining company.<sup>12</sup> An 1872 mining law, originally intended to encourage homesteading, has allowed companies like Brush Wellman to purchase publicly owned lands managed by the U.S. Forest Service and Bureau of Land Management for about \$10 an acre. The Utah land that Brush Wellman will purchase for \$26,487 contains a rare bertrandite ore that, when processed, could be worth up to \$15 billion.<sup>13</sup>

Although the Clinton Administration, and particularly Interior Secretary Bruce Babbitt, made overhauling the mining law a major priority,<sup>14</sup> the mining industry prevented passage of a law to place royalties on minerals extracted from these public lands.<sup>15</sup> Brush Wellman, among others, made campaign contributions to key members of Congress in an effort to obtain an exemption from any new mining law. Indeed, in November 1993, two members of Congress who received campaign contributions from Brush Wellman came within 45 votes of exempting the company from the House's proposed legislation requiring higher mining fees and royalties.<sup>16</sup>

If dissatisfaction with the current system provides an opening for true political reform, what type of reform is best? This Article argues for a new system of campaign finance that should appeal to those on the left and the right: a plan for mandatory campaign finance vouchers that supplants, rather than supplements, our current campaign finance system. Under this plan, each voter would have the opportunity to contribute vouchers to candidates or to interest groups in every federal election cycle. The interest groups would use the vouchers to contribute to candidates or to organize independent expenditure campaigns. With limited exceptions, only funds from the voucher system could be spent to support or oppose candidates for elected federal offices.

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*Crediting the Voters: A New Beginning for Campaign Finance*, 13 AM. PROSPECT 71, 78-79 (1993) (citing repudiation of *Lochner* in defense of campaign finance voucher plan). Perhaps the earliest scholarly effort comparing *Buckley* to the *Lochner* era appears in Note, *The Corporation and the Constitution: Economic Due Process and Corporate Speech*, 90 YALE L.J. 1833, 1855 (1981). One scholar has compared *Buckley* to the infamous case of *Plessy v. Ferguson*, 163 U.S. 537 (1896), arguing that *Buckley* gave rise "to an electoral system in which the rich and the poor are radically separate in power but deemed equal in theory." Jamin B. Raskin, *Challenging the 'Wealth Primary'*, THE NATION, Nov. 21, 1994, at 609, 611. To be sure, not all First Amendment scholars accept the *Buckley-Lochner* analogy. See *infra* Part III.D.2, and notes 197-200.

12. See Keith Epstein, *Fortune Hidden Under Desert: Cleveland Firm Wants to Buy Land With Rare Ore for \$26,487*, CLEVELAND PLAIN DEALER, May 22, 1994, at 1A.

13. *Id.*

14. John H. Cushman, Jr., *Congress Drops Efforts to Curb Public-Land Mining*, N.Y. TIMES, Sept. 30, 1994, at A1.

15. *Id.* The bill died in conference. "The House bill would have imposed a royalty of 8 percent on metals, but its negotiators agreed first to 5 percent, then a 4 percent royalty. The Senate's negotiators, on the other hand, agreed to go as high as 3.5 percent, but at that point the Mineral Resources Alliance said that even that figure was too high." *Id.* at A22.

16. Epstein, *supra* note 12, at 14A.

The voucher plan will replace our plutocratic campaign finance system with a system driven by the intensity of voter support for candidates, causes, and ideologies. The plan does not depend upon utopian hopes that politics can become less self-regarding or more altruistic; instead, it reforms the political market with proper incentives and safeguards that channel self-regarding political behavior to produce fair and efficient political outcomes.

In order to explain how a voucher system will reform the political market to make politics better, this Article turns to public choice theory.<sup>17</sup> Part I briefly reviews the methodology of public choice theory and its positive and normative understandings of the political market. Although public choice theory often has been used to justify anti-democratic and anti-egalitarian political reform,<sup>18</sup> this need not be so. Instead, public choice theory, stripped of its wealth-maximizing orientation, can provide a useful means for assessing the relative strengths of different proposals for egalitarian political reform.

To evaluate democratic reform proposals, I replace normative public choice theory's efficiency criterion with the normative goal of promoting an *egalitarian pluralist* political market.<sup>19</sup> By a *pluralist* political market, I mean that (1) political preferences are not distributed randomly across the population, but rather are correlated with membership in groups, such as race, class, gender, and geographical location; and (2) each group's ability to have its political preferences enacted into legislation is a function of the group members' resources, or political capital, relative to other groups. In an *egalitarian* political market, each person has roughly equal political capital regardless of preexisting disparities in wealth, education, celebrity, ability, or other attributes. Egalitarian pluralism therefore recommends efforts

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17. Public choice theory is the application of economic methodology to political science. DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW & PUBLIC CHOICE* 7 (1991) (quoting DENNIS C. MUELLER, *PUBLIC CHOICE* II 1 (1989)). Mueller's book is the best technical introduction to public choice theory; Farber and Frickey's book is the best non-technical introduction. Like Farber and Frickey, I think it is irrelevant whether the analysis I advance below is characterized properly as an application of public choice theory, interest group theory, social choice theory, or positive political theory. See Daniel A. Farber & Philip P. Frickey, *Foreword: Positive Political Theory in the Nineties*, 80 GEO. L.J. 457, 458 n.10 (1992) (recounting how the authors inadvertently became caught in an "academic turf war" between economists and political scientists over the proper meaning of the term "public choice").

18. See *infra* Part I.C.

19. This Article is not intended as a full-scale defense of egalitarian pluralism; in recognition of the law of comparative advantage, I leave that task to others. For a general introduction to and critique of the egalitarian pluralist concept, see Joshua Cohen & Joel Rogers, *Secondary Associations and Democratic Governance*, 20 POL. & SOC'Y 393, 411-16 (1992). To be sure, egalitarian pluralism is not the only way to define political equality; indeed, the concept of political equality has been defined in many inconsistent ways. See generally CHARLES R. BEITZ, *POLITICAL EQUALITY* (1989); RAWLS, *supra* note 11; AMARTYA SEN, *INEQUALITY REEXAMINED* (1992); MICHAEL WALZER, *SPHERES OF JUSTICE* (1983); Ronald Dworkin, *What is Equality? Part 3: The Place of Liberty*, 73 IOWA L. REV. 1 (1987); Ronald Dworkin, *What is Equality? Part 4: Political Equality*, 22 U.S.F. L. REV. 1 (1987); Dennis C. Mueller, et al., *On Equalizing the Distribution of Political Income*, 82 J. POL. ECON. 414 (1974). I discuss criteria for determining whether reform plans meet the goal of egalitarian pluralism *infra* Part III.A.

to cure the problem of group underrepresentation in the political process by redressing inequalities in different groups' political capital.<sup>20</sup>

Part II of this Article uses positive public choice theory to describe the current campaign finance system and presents an egalitarian voucher plan as an alternative. This Part demonstrates that the current political market favors the wealthy and well-organized at the expense of the poor and those who have difficulty organizing for collective action.

Part III describes how a voucher plan would serve egalitarian pluralism by evaluating it under four criteria: egalitarianism, impact on governance, benefits as a preference-aggregation mechanism, and likelihood of enactment.<sup>21</sup> The voucher plan has a number of egalitarian benefits. It minimizes the impact of wealth on the political system and empowers those who currently lack political capital; it is likely to promote a stable transition to a more egalitarian political order and a more chaotic, though fairer, legislative process; its market-orientation registers the intensity of voter preference well; and it is a non-bureaucratic reform plan that has a real chance of being enacted.

Finally, Part IV of this Article uses the four egalitarian pluralist criteria to compare the voucher plan with three other egalitarian pluralist plans: non-voucher public financing of Congressional campaigns, proportional representation, and group-based political solutions. The voucher plan is superior to these plans on a host of grounds. First, in comparison to non-voucher public financing, the voucher plan does a better job of both minimizing the impact of wealth on the political system and of empowering those individuals lacking political capital. It also does a better job of measuring the intensity of voter preferences. Second, the voucher plan is more effective than proportional representation. Although proportional representation measures intensity of voter preferences well, it fails to minimize the impact of disparities in wealth and organizational ability on the political process. In addition, proportional representation may have a negative impact on governance, creating conditions for political instability. Moreover, proportional representation has very little chance of being enacted in the United States any time soon. Finally, the voucher plan is superior to group-based political solutions. Group-based plans raise the level of political capital only for particular "anointed" groups—in the two plans I discuss, these anointed groups are defined either by economic class or group oppression. The anointing process, combined with possible group veto power, undermines basic egalitarian norms. In addition, unlike the relatively stable voucher plan, these group-based plans present a potential for great political instability, which could negate any egalitarian gains that are made. Finally, these group-based plans are unlikely to be enacted in the United States any time soon.

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20. Cohen & Rogers, *supra* note 19, at 412-13.

21. I define these criteria *infra* Part III.

## I

## THE POLITICAL MARKET

Public choice theory encompasses two positive components and a normative theory. The two positive components are interest group theory, which focuses on incentives facing actors in the political market, and social choice theory, which evaluates various preference-aggregation mechanisms.<sup>22</sup> The normative component—normative public choice theory—applies the insights of the two positive theories while seeking to increase overall social wealth without regard to its distribution (a goal known as Kaldor-Hicks efficiency), and to decrease the supposed instability and arbitrariness inherent in all preference-aggregation mechanisms.

In Parts III and IV of this Article, I use interest group theory and social choice theory to evaluate the effectiveness of several proposals for reforming the political system. However, instead of judging the proposals in terms of the wealth-maximizing goals of normative public choice theory, I evaluate the plans along the lines of egalitarian pluralism. I discuss normative public choice theory here only to distinguish it from the two positive branches of public choice theory. The literature on the relationship of public choice theory to the law is voluminous;<sup>23</sup> here, I present only a thumbnail sketch to acquaint (or reacquaint) the reader with basic principles.

*A. Interest Group Theory*

If economics is the dismal science, then the marriage of economics and political science in public choice theory has produced dour children.<sup>24</sup> Indeed, the two children of this marriage—interest group theory and social choice theory—alternatively describe the political system as either venal, self-interested, and vacuous of any concept of the public good, or unstable, chaotic, and driven by strategizing agenda-setters.

Interest group theory focuses on the political market, in which organized interest groups compete with one another to demand goods and services and the implementation of their ideological agendas. The outcome of this struggle is determined by relative group strength, as expressed through

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22. See generally MUELLER, *supra* note 17, at 373-441 (discussing attempts to develop positive theorems about the normative theory of values).

23. In addition to Farber and Frickey's book, see *supra* note 17, many fine law review articles have been written on the relationship between law and public choice. Elhauge provides an excellent, though critical, introduction to the social choice literature. Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31 (1991). Stearns provides a good critical introduction to the social choice literature. Maxwell L. Stearns, *The Misguided Renaissance of Social Choice*, 103 YALE L.J. 1219, 1221-1225 (1994).

24. On the offspring metaphor, see MUELLER, *supra* note 17, at 244 (describing the Landes-Posner theory of the First Amendment as "the fruit" of "dismal science").



the resources, or political capital, available for political competition: the greater a group's political capital, the more it secures from the state.<sup>25</sup>

The interest group model of the political market originates from the pluralist theory of early political science. Classic pluralism described a relatively benign marketplace with competing groups with different ideological agendas and visions of the public good. Intensity of belief drives group strength; sweat and forthrightness determine political outcomes.<sup>26</sup>

Economists then formalized the pluralist model and, in the process, eliminated its rosy, democracy-affirming undertones.<sup>27</sup> They understood political outcomes as depending on groups' political capital, rather than their ideological commitment. For example, small, cohesive groups have an advantage organizing for political activity over large, diffuse groups because they more easily overcome collective action problems.<sup>28</sup> Therefore, small cohesive groups control political capital disproportionate to the interests they represent in society. Similarly, wealthy individuals and corporations also enjoy disproportionate influence: campaign contributions are an important source of political capital, and the wealthy have more wealth to contribute.

When interest groups use their political capital to secure goods from the state, they engage in "rent seeking."<sup>29</sup> Rent seeking occurs when resources are used in order to capture a monopoly right instead of being put to a productive use. For example, when firms compete for the exclusive control of a local television franchise, they use their resources lobbying the local regulatory board, instead of investing those resources productively. Like these potential cable franchisees, organized interest groups expend their resources competing for political favors, such as tax breaks or subsidies, instead of putting them to some productive use. Rent seeking is Kaldor-Hicks inefficient because it leads to an overall decline in social wealth.<sup>30</sup>

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25. See Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371, 380 (1983); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211, 212-13 (1976).

26. See generally ARTHUR F. BENTLEY, *THE PROCESS OF GOVERNMENT* (Harvard University Press 1967) (1908); DAVID B. TRUMAN, *THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND PUBLIC OPINION* (1951).

27. See, e.g., Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335, 337 (1974) (contrasting economic analysis of politics with political scientists' pluralism).

28. See generally MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (2d ed. 1971).

29. For a general, non-technical introduction to rent seeking, see Gordon Tullock, *Rent Seeking*, in *THE NEW PALGRAVE: THE WORLD OF ECONOMICS* 604, 604-09 (John Eatwell et al. eds., 1991).

30. Hovenkamp notes that interest group theorists argue the economic market self-corrects instances of inefficient rent seeking, but the political market is permanently debilitated by it. Herbert Hovenkamp, *Legislation, Well-Being, and Public Choice*, 57 U. CHI. L. REV. 63, 99, 105 (1990). Hovenkamp believes the political market should be just as efficient at eliminating rent seeking as the economic market. *Id.* at 105-06. There are reasons for doubting Hovenkamp's claim, however. Consider the example suggested by Hovenkamp himself, of product differentiation in the economic

So far, I have focused on the demand side of interest group theory. Groups demand goods from the state, and they command those goods in proportion to their political capital. Now turning to the supply side, consider politicians, who create the rents that interest groups seek. Public choice theory adopts the assumption of the politician as "vote maximizer." Politicians will attempt to maximize the votes they get by selling access, influence, or positions on legislation to the different interest groups.<sup>31</sup> The interest groups pay for these goods with their political capital: either they deliver votes directly, or indirectly by manipulating public opinion; or they make campaign contributions which the politician spends on advertising to get votes herself.<sup>32</sup> The politician will accept campaign contributions from interest groups until the marginal cost in votes of taking another contribution is equal to the contribution's marginal benefit.<sup>33</sup>

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market. *Id.* If firms inefficiently seek to increase demand for their products by making them appear different than the products of other firms (and not by creating better products), consumers will not buy the new products. If consumers do not buy the products, the firm loses money producing them and therefore stops producing them. The economic market is self-correcting because consumers send market signals in the form of decreased demand.

Contrast this situation with the political market. Although rent creation may have great social costs, the private cost to the elected official is negligible unless she is blamed for the rent creation. If politicians are able to place the blame for inefficient government or rent seeking on other elected officials, the bureaucracy, and "the system," no one is held accountable for rent creation. A politician disfavors rent creation only when it translates into a loss of political support. See Richard L. Hasen, *An Enriched Economic Model of Political Patronage and Campaign Contributions: Reformulating Supreme Court Jurisprudence*, 14 CARDOZO L. REV. 1311, 1329 (1993). Unlike the situation in the economic market, consumers (voters) in the political market may send no market signal in the form of decreased political support of the elected official. The political market does not always correct itself.

31. Kenneth C. Smurzynski, Note, *Modeling Campaign Contributions: The Market for Access and Its Implications for Regulation*, 80 GEO. L.J. 1891, 1892-93 (1992). Smurzynski believes that the "access" model is most accurate. See *id.* at 1897-99. But even the access model, the weakest of the three forms of political influence Smurzynski considers, offends notions of egalitarian pluralism. Under egalitarian pluralism each person should have equal access to elected officials.

32. MUELLER, *supra* note 17, at 464 ("[T]he money candidates spend does not really buy votes. It buys television commercials, posters, placards and buttons, pollsters, canvassers, and consultants. It buys all of the instruments that modern marketing can devise to influence how an individual votes on election day.").

In general, winners outspend losers. For example, in the 1992 congressional elections, House winners outspent losers by an average of \$543,599 to \$201,263, while Senate winners outspent losers by an average of \$3,930,638 to \$2,034,980. See CENTER FOR RESPONSIVE POLITICS, *THE PRICE OF ADMISSION: CAMPAIGN SPENDING IN THE 1992 ELECTIONS* 8 (1993). The 1994 California Senate campaign of Michael Huffington, who used his own money to outspend his democratic rival Dianne Feinstein \$28 million to \$14 million, see B. Drummond Ayres Jr., *Feinstein Claims Victory in Senate Race*, N.Y. TIMES, Nov. 19, 1994, at 10, demonstrates that while money does not always buy an election, it certainly goes a long way toward doing so: Huffington, a political unknown in most of California before the election, was defeated by only a narrow margin.

33. Hasen, *supra* note 30, at 1328. It is not costless for a politician to continue to take campaign contributions indefinitely. First, the source or size of campaign contributions may create an appearance of corruption; this appearance could cost votes. *Id.* at 1329. Second, to the extent a campaign contribution constitutes an implicit agreement by the politician to favor the contributor's positions in future legislative votes, the politician will be wary of accepting contributions from new contributors whose interests are adverse to current contributors. The politician does not want a reputation among contributors as someone who breaks her word and is therefore not worthy of new contributions.

It does not follow, however, that vote-maximizing politicians will always follow the wishes of their principals. First, in a capitalist society, a politician cannot ignore the wishes of business; she needs a smooth, well-functioning economy in order to be re-elected.<sup>34</sup> Second, the politician cares about the appearance of corruption; she may lose votes if she is seen as selling influence and positions on legislation to interest groups.<sup>35</sup> Therefore, maximizing votes sometimes requires deviating from the wishes of one's chief political supporters.

Conspicuously absent from the interest group model of the political process is any notion of "the public good." Many quarrel with this cynical view of democratic governance; although politics inevitably involves a struggle among groups, should we reduce politics to the struggle itself?<sup>36</sup> But the question confuses the normative with the positive. Interest group theory describes those principles which govern the operation of representative government; it does not purport to describe "good" government. Interest group theory therefore can be useful to evaluate how well a particular political reform meets a normative political goal, be it Kaldor-Hicks efficiency, egalitarian pluralism, or something else.

For these reasons, virtually all scholars analyzing modern politics rely on the interest group model as a positive description of representative government. For example, although a civic republican may *want* representatives to pursue the "general good," perhaps from behind a Rawlsian veil of ignorance,<sup>37</sup> civic republican reform plans should be evaluated using interest group theory that assumes representatives currently do not do so. Even

34. See CHARLES E. LINDBLOM, *POLITICS AND MARKETS* 172-75 (1977).

35. See Hasen, *supra* note 30, at 1329. Public perceptions matter to the vote-maximizing politician, but actual corruption does not. *Id.*

36. "[Most people] wonder, well surely government is about something more than organized, legitimized theft? Surely government is about Truth, Beauty, Justice, the American Way, and the production of Public Goods?" Robert D. Tollison, *Is the Theory of Rent-Seeking Here to Stay?*, in *DEMOCRACY AND PUBLIC CHOICE* 143, 155 (Charles K. Rowley ed., 1987). Michelman describes the absence in interest group theory of any notion of the public good as follows:

Legislative intercourse is not public-spirited but self-interested. Legislators do not deliberate toward goals, they dicker towards terms. There is no right answer, there are only struck bargains. There is no public or general or social interest, there are only concatenations of particular interests or private preferences. There is no reason, only strategy; no persuasion, only temptation and threat. There are no good legislators, only shrewd ones; no statesmen, only messengers; no entrusted representatives, only tethered agents.

Frank I. Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 55 IND. L.J. 145, 148 (1977-78) (footnotes omitted).

37. Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 31 (1985) ("To the republicans, the role of politics was above all deliberative. . . . The ideal model for governance was the town meeting, a metaphor that played an explicit role in the republican understanding of politics."). For a discussion of the veil of ignorance, see JOHN RAWLS, *A THEORY OF JUSTICE* 11-12 (1971); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1569-71 (1988) [hereinafter Sunstein, *Republican Revival*]. For a more critical characterization of the veil of ignorance applied to political decision making, see Michael A. Fitts, *Can Ignorance Be Bliss? Imperfect Information as a Positive Influence in Political Institutions*, 88 MICH. L. REV. 917, 934-38 (1990).

a civic republican like Cass Sunstein acknowledges that "elements of pluralism provide a central feature of modern politics."<sup>38</sup>

### B. Social Choice Theory

In contrast to interest group theory, which describes how individuals and groups influence political outcomes, social choice theory describes how *preference-aggregation mechanisms* influence such outcomes. Specifically, social choice theory focuses on the stability and coherence of various mechanisms for aggregating individual preferences. Majority voting and economic markets are two such preference-aggregation mechanisms.

Nobel-laureate economist Kenneth Arrow is the father of modern social choice theory.<sup>39</sup> In his famous impossibility theorem, Arrow posited that any democratic method for aggregating individual preferences must meet five fairness criteria: (1) "range," allowing all participants to rank all available choices; (2) "universal domain," allowing all aggregate rankings regardless of individual rankings; (3) "unanimity," proceeding with any proposal that leaves at least one person better off and no person worse off; (4) "nondictatorship," disallowing any one participant to impose her preferences on the group; and (5) "independence of irrelevant alternatives," disallowing choices that may be presented in the future to influence decision in any given pairwise vote.<sup>40</sup> Arrow then proved that no preference-aggrega-

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38. Sunstein, *Republican Revival*, *supra* note 37, at 1547. In addition to the normative criticism, some scholars, including Farber and Frickey, have criticized positive interest group theory for its failure to include ideology as an explanatory variable. See, e.g., FARBER & FRICKEY, *supra* note 17, at 30-33. This concern is overstated. First, "ideology" often is inseparable from the financial interests of a representative's constituents and contributors; does a Wisconsin representative's vote for dairy supports demonstrate crass interest group politics or an ideological belief in preservation of the family farm? (For this reason I reject as unworkable Farber and Frickey's call for political reform aimed at prohibiting contributions by "economic" political action committees (PACs) but not "ideological" PACs. See *id.* at 132-35.) Second, there is room for ideological voting on legislation even if the interest group model is correct; politician-agents may deviate from their principals' goals to maintain the economy or to avoid the appearance of corruption. See *supra* notes 34-35 and accompanying text; see also SUSAN ROSE-ACKERMAN, *CORRUPTION: A STUDY IN POLITICAL ECONOMY* 6-10 (1978); Hasen, *supra* note 30, at 1331. Finally, even if interest group theory represents a caricature of the political system, it remains a parsimonious tool for predicting changes to the political system as we alter either the supply or demand side of the political market; the economic model of behavior, while far from perfect, provides "a great intellectual bang for the methodological buck." See Richard L. Hasen, *Beyond the Pursuit of Efficiency: An Enriched Law and Economics Analysis for Constructing Legal Rules* 26-27 (1992) (unpublished Ph.D. dissertation, University of California, Los Angeles, on file with author) [hereinafter Hasen, *Beyond the Pursuit*].

39. For a brief history of social choice theory before Arrow, see Saul Levmore, *Parliamentary Law, Majority Decisionmaking, and the Voting Paradox*, 75 VA. L. REV. 971, 984-90 (1989).

40. See Stearns, *supra* note 23, at 1231 (summarizing criteria). Arrow's theorem first appeared in his 1951 book, *SOCIAL CHOICE AND INDIVIDUAL VALUES*. For a short proof, see MUELLER, *supra* note 17, at 385-87.

tion mechanism meets his five fairness criteria without encountering "cycling" problems.<sup>41</sup>

Cycling occurs when no political outcome is final because each particular outcome has an alternative which is preferred to it. An example illustrates this phenomenon:<sup>42</sup> Suppose that three legislators are deciding whether to locate a new federal facility in Texas, Illinois, or Florida. Each legislator has one vote. Legislator 1 prefers Texas to Illinois to Florida. Legislator 2 prefers Illinois to Florida to Texas. Legislator 3 prefers Florida to Texas to Illinois.<sup>43</sup> In "pairwise" (one-against-one) voting,<sup>44</sup> Texas will beat Illinois, but then Illinois will beat Florida, and finally, Florida will beat Texas, which brings us back to the beginning of the cycle. Every winner can be defeated by some other pairwise proposal, and thus no outcome is final. Pairwise voting will thus lead to an infinite cycle of voting with no final winner. This problem cannot be avoided without jettisoning one of Arrow's five fairness criteria.<sup>45</sup>

Arrow's theorem began a generation-long focus on problems of cycling and the strategies that voters can adopt to manipulate outcomes under various preference-aggregation mechanisms. For instance, in our example, if the first legislator votes for Illinois over Texas in the first round (even though Texas is her first choice), then she can guarantee the victory of Illinois, her second choice, in the next round, rather than seeing Texas defeated by her third choice, Florida.<sup>46</sup>

Social choice theorists quickly recognized that such strategies go beyond simply voting against some of one's preferences. If the order of voting determines the outcome, she who controls the order of voting can also control the political outcome. Social choice theorists have examined the power of these agenda-setters.<sup>47</sup> They also have compared the benefits of different preference-aggregation mechanisms, demonstrating that some

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41. Stearns, *supra* note 23, at 1230-31. Majority rule is not alone in failing to meet Arrow's conditions. Other voting mechanisms and the economic market violate at least one of the conditions set forth by Arrow or may lead to cycling. See *id.* at 1233-47.

42. I draw the following example from Farber and Frickey. See FARBER & FRICKEY, *supra* note 17, at 39-40.

43. *Id.* at 39.

44. We must use pairwise voting because a three-option vote will yield a tie: one vote each for Texas, Florida, and Illinois.

45. Cycling will not occur if the preferences are "unipeaked;" that is, if everyone's preferences may be arranged on a single ideological (left-right) spectrum. See FARBER & FRICKEY, *supra* note 17, at 48. But this is a special case.

46. *Id.* at 40.

47. Farber and Frickey argue that agenda-setting actually serves to promote democratic decision making. For example, although legislative committees act as gatekeepers, committees also develop useful specialized knowledge and they may offer "an opportunity for group deliberation that may be unmanageable on the floor of the legislature." *Id.* at 56; see also Levmore, *supra* note 39, at 1012-31 (comparing the benefits of various parliamentary voting procedures).

systems do a better job than others of registering the intensity of different voters' preferences.<sup>48</sup>

By describing how accurately and effectively different mechanisms translate expressed preferences into political outcomes, social choice theory reveals how well reform proposals measure up against the yardstick of egalitarian pluralism. It tells us whether the political outcomes produced by a preference-aggregation mechanism will be stable, whether the system is susceptible to manipulation, and, most importantly, how accurately political outcomes reflect the intensity of individual voters' preferences.

### C. Normative Public Choice Theory

This section turns to the normative uses of interest group theory and social choice theory. Interest groups are the chief villains of normative interest group theory because they engage in rent seeking. Consider again the example of the firms competing for the exclusive control of a local cable television franchise, who use their resources lobbying the local regulatory board.<sup>49</sup> If the franchise right has a known and fixed value of \$100,000, and there are ten risk-neutral bidders, each with an equal chance, each bidder will bid \$10,000 for the right. Collectively, \$100,000 will be spent to capture \$100,000.<sup>50</sup>

Social spending of \$100,000 on a \$100,000 franchise is not inefficient in itself; the money constitutes simple transfers between parties.<sup>51</sup> Rather, the expenditures are inefficient because resources which could have been used productively are diverted to capture a government monopoly.<sup>52</sup> "No value is created in the process; indeed, the monopolization involves a net destruction of value."<sup>53</sup>

When interest groups seek rents in the political market, they similarly expend valuable resources competing with one another for tax breaks or subsidies, instead of putting their resources to productive use. In a society full of a few powerful interest groups, the state gives away immense rents. Mancur Olson has gone so far as to argue that when rent seeking creates

48. See *infra* notes 148-51 and accompanying text (comparing majority voting to other types of voting procedures in measuring intensity of preference).

49. See *supra* notes 29-30 and accompanying text.

50. See Tollison, *supra* note 36, at 147.

51. Ex ante, each risk-neutral bidder preferred to spend up to \$10,000 for a one-in-ten chance to gain the \$100,000 franchise. But see David E. Bell, *Disappointment in Decision Making Under Uncertainty*, in *DECISION MAKING: DESCRIPTIVE, NORMATIVE, AND PRESCRIPTIVE INTERACTIONS* 358 (David E. Bell et al. eds., 1988) (describing how fear of disappointment or regret affects choices made under uncertainty).

52. Similarly, a bribe itself is not social waste because it involves only a redistribution of income; it is the transaction costs accompanying the bribe that are inefficient. MUELLER, *supra* note 17, at 231; see also ROSE-ACKERMAN, *supra* note 38, at 8 (explaining that corruption by "[i]ts very illegality produces inefficiencies since resources are wasted in keeping transactions secret and in enforcing antibribery statutes").

53. James M. Buchanan, *Rent Seeking and Profit Seeking*, in *TOWARD A THEORY OF THE RENT SEEKING SOCIETY* 1, 7 (James M. Buchanan et al. eds., 1980).

large declines in social wealth, the state loses its position relative to other states and either disappears or is dominated.<sup>54</sup>

Normative interest group theory calls upon the state to prevent such rent seeking so as to maximize overall social wealth. Limits on group participation may be necessary.<sup>55</sup> Some normative interest group theorists have called on the courts to construe narrowly legislation produced by interest group rent seeking.<sup>56</sup> Others have argued for a limit on the size of government: because public officials will inevitably create rents for interest groups in pursuit of their own re-election or continued appointment, the only way to protect the social wealth is to reduce the amount of rents the state can give away.<sup>57</sup>

Note that it is the goal of overall social efficiency, and not the axioms of positive interest group theory or social choice theory, that compels public choice theory towards these anti-democratic and anti-egalitarian solutions. But why strive to maximize efficiency at the expense of all other objectives? Politics is not just about increasing the size of the pie. Suppose it could be demonstrated that rent seeking could be reduced significantly by eliminating the House of Representatives and making it a felony to discuss political issues with members of the Senate or the executive branch. Under the normative efficiency criterion, the plan would be favored if it increases overall social wealth. But politics is about more than the promotion of overall social wealth. It is also about how to divide the pie (distribution of wealth) and about each individual's right to influence the process of representative government.<sup>58</sup> Therefore, we should not necessarily eliminate rent seeking in the political market if it means ignoring other important

54. See generally MANCUR OLSON, *THE RISE AND DECLINE OF NATIONS* (1982). For a penetrating argument that Olson is empirically wrong that the amount of rent seeking is correlated with the decline of nations, see Ronald Rogowski, *Structure, Growth and Power: Three Rationalist Accounts*, in *TOWARD A POLITICAL ECONOMY OF DEVELOPMENT: A RATIONAL CHOICE PERSPECTIVE* 300 (Robert H. Bates ed., 1988).

55. This idea has parallels in both civic republicanism, which calls for legislators to insulate themselves from political pressures, see, e.g., Sunstein, *Republican Revival*, *supra* note 37, and in conservative political science, which sees participation as anathema to economic growth and political stability, see, e.g., SAMUEL P. HUNTINGTON, *POLITICAL ORDER IN CHANGING SOCIETIES* (1968).

56. See Elhauge, *supra* note 23, at 44-45 (citing sources supporting proposition). But see *id.*, *passim* (critiquing the argument). Limiting group participation need not be efficient. Hovenkamp argues persuasively that a "perfect" democracy without interest group rent seeking may be more inefficient than a political market with rent seeking. Under a "one person, one vote" system without rent seeking, a majority of the poor could vote for a wealth-decreasing tax on the wealthy. Yet if a wealthy individual is allowed to engage in rent seeking, she may block efforts to impose the wealth-decreasing tax, thereby increasing social wealth. See Hovenkamp, *supra* note 30, at 52-55.

57. See MUELLER, *supra* note 17, at 244-45; Richard A. Epstein, *Modern Republicanism—Or the Flight From Substance*, 97 YALE L.J. 1633, 1641 (1988) [hereinafter Epstein, *Modern Republicanism*]; Richard A. Epstein, *Property, Speech, and the Politics of Distrust*, in *THE BILL OF RIGHTS IN THE MODERN STATE* 41, *supra* note 11, at 56 [hereinafter Epstein, *Property*]; Jonathan R. Macey, *The Missing Element in the Republican Revival*, 97 YALE L.J. 1673, 1680 (1988).

58. Hovenkamp, *Legislation*, *supra* note 30, at 98. ("Little thought in the public choice critique of legislation is given to . . . [the hypothesis] . . . that the consumers in political markets seek to maximize their total set of utilities, of which wealth is only a part.")

policy goals. Rather, we should minimize rent seeking while concomitantly promoting other goals valued in our society.

More fundamentally, eliminating or even seriously reducing rent seeking in the modern state is a chimerical goal. Suppose we followed the recommendation to shrink the size of the state in an effort to reduce the amount of rents the state could give away.<sup>59</sup> And suppose the state remains in the business only of providing public goods, like national defense, which standard economic theory predicts will be undersupplied by the private market.<sup>60</sup> In which states will military bases be located? Who will be awarded the contract to build military jets, bombs, tanks, ships, submarines, and radar systems? Where will the jobs go? These questions will be decided by the government, and the decisions likely will be the product of rent seeking.<sup>61</sup>

If rent seeking continues to exist, then it makes sense for both egalitarian reasons and efficiency reasons to equalize each individual's ability to seek rents. First, individuals' ability to seek rents depends on the current division of political capital.<sup>62</sup> The current political market is stacked against the poor, who lack the political capital needed to influence politics, as well as against other large, diffuse groups that have difficulty overcoming collective action problems, like some racial minorities.<sup>63</sup> Unlike small, concentrated groups like the mining industry, most groups cannot organize to overcome collective action problems and influence the political process.<sup>64</sup> A method to redistribute political capital equally to all individuals, such as the voucher plan described below, meets the egalitarian and distributional goals in insuring that the rent seeking that inevitably takes place will not favor small, concentrated groups.

Moreover, egalitarian redistribution of political capital likely will increase overall social wealth as well. Redistributing political capital from the hands of the few to the hands of many moves the political market from its current oligopolistic configuration to a competitive one. In a competitive political market, each individual or group would have less political capital, and capital would be proportionate with interests in society. Thus,

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59. See Epstein, *Modern Republicanism*, *supra* note 57.

60. ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 109 (1988).

61. For a classic look at this problem, see James R. Kurth, *Why We Buy the Weapons We Do*, 11 *FOREIGN POL'Y* 33 (1973).

62. Tollison, *supra* note 36, at 154.

63. See *id.* at 152 ("Set in a world of tradition, class, privilege, power, and differential organization costs, rent-seeking most likely promotes more inequality in the distribution of income."). Although most public choice theorists recognize that the political market favors the well-organized and wealthy, not all do. See Becker, *supra* note 25, at 382 (contending that the poor may be more effective than the rich at influencing government action). But see Michael A. Fitts, *The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process*, 136 U. PA. L. REV. 1567, 1583 n.40 (1988) (asserting that Becker downplays "the pervasive effect of transaction costs in ensuring organizational parity between different groups in the general population").

64. See *supra* note 28 and accompanying text.



assuming most individuals would not use their political capital to award special favors to the Brush Wellmans, the Brush Wellmans would lose their ability to receive large rents. Politicians could afford to ignore more interest groups, and each group in the competitive market would have an incentive to pay more political capital or accept less influence than the group's competitors, leading to a decline in the total amount of rent seeking.<sup>65</sup>

Like those scholars pursuing only the goal of wealth maximization, scholars addressing the normative implications of social choice theory tend to recommend anti-egalitarian political reform. These scholars have argued that the instability and chaos of majority rule due to Arrowian cycling justifies a return to judicial protection of private economic rights.<sup>66</sup> Such arguments ignore the obvious problem that appellate court decisions are themselves the product of majority voting and therefore prone to cycling.<sup>67</sup> In addition, many social choice scholars make the mistake of measuring different proposals against a utopian ideal. We should be wary of committing the "mirvana fallacy" of comparing real-world institutions to an "ideal institution [that] has never existed or . . . has been proven impossible to devise."<sup>68</sup> After all, Arrow demonstrated that it is impossible to satisfy all five of his fairness criteria at once without the possibility of cycling. The better use of social choice theory is to compare different preference-aggregation mechanisms against one another.<sup>69</sup>

65. See *infra* notes 167-74 and accompanying text.

66. E.g., William H. Riker & Barry R. Weingast, *Constitutional Regulation of Legislative Choice: The Political Consequences of Judicial Deference to Legislatures*, 74 VA. L. REV. 373, 398-401 (1988). Others have used Arrow's theorem to argue for more expanded judicial review to advance progressive causes. See, e.g., Lynn A. Stout, *Strict Scrutiny and Social Choice: An Economic Inquiry Into Fundamental Rights and Suspect Classifications*, 80 GEO. L.J. 1787 (1992). Stearns argues quite persuasively that Arrow's theorem fails to support (or contradict) Stout's program for reform, however laudatory the program's goals may be. Stearns, *supra* note 23, at 1225 n.18.

67. See Stearns, *supra* note 23, at 1257-85; cf. Elhauge, *supra* note 23, at 81-83.

68. Stearns, *supra* note 23, at 1229-30. Stearns also discusses the "isolation fallacy," whereby "scholars fail to consider that the collective decisionmaking bodies they are studying have never operated, and were never intended to operate, in isolation, but rather were intended to operate in an inherently complementary fashion with other collective decisionmaking institutions," *id.* at 1230, and the "fallacy of composition," whereby "scholars fail to recognize that even if two or more collective decisionmaking institutions are susceptible of cycling, working together they avoid cycling unless they happen to cycle in the same manner and in response to the same factual phenomena," *id.* at 1230-31.

69. See *infra* Parts III & IV, following Stearns, *supra* note 23, at 1231-33. Others have criticized Arrow's five fairness criteria, and specifically Arrow's prohibition on interpersonal comparison of utility. See, e.g., Richard H. Pildes & Elizabeth S. Anderson, *Slings Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121 (1990); see also Bernard Grofman, *Public Choice, Civic Republicanism, and American Politics: Perspectives of a "Reasonable Choice" Modeler*, 71 TEX. L. REV. 1541, 1545 n.9 (1993). As Hovenkamp notes, "cardinality and interpersonal comparability of individual welfare functions are all but inherent in the process of representative decisionmaking . . ." Herbert Hovenkamp, *Arrow's Theorem: Ordinalism and Republican Government*, 75 IOWA L. REV. 949, 955 (1990); see also Pildes & Anderson, *supra* at 2183 ("All complex democratic lawmaking institutions are structured to embody diverse, incommensurable political values and to provide distinct settings that facilitate their rational expression."). If we did not allow comparison of individual utility, we would need to eliminate not only majoritarian voting for office, but also cost-benefit analysis, which forms the basis for the social wealth

In sum, the problem with public choice theory is not its positive description of the political market or preference aggregation, but rather its normative goals. Positive public choice theory, stripped of its anti-egalitarian and anti-democratic normative baggage, is a valuable tool for assessing the relative strengths of various political systems. Parts III and IV use this theory to evaluate various egalitarian reform proposals. First, however, Part II describes the mechanics of a particular egalitarian pluralist political reform: campaign finance vouchers.

## II

### HOW MANDATORY CAMPAIGN FINANCE VOUCHERS WOULD CHANGE CURRENT CAMPAIGN FINANCE LAWS

#### A. *The Current Regime of Campaign Finance Regulation: The 1974 FECA Amendments*<sup>70</sup>

After many failed attempts,<sup>71</sup> Congress finally enacted sweeping campaign finance reform in the 1974 amendments to the Federal Election Campaign Act.<sup>72</sup> Among other things, the FECA amendments placed limits on direct contributions to political campaigns and independent expenditures made in support of or in opposition to a candidate for federal office.<sup>73</sup>

The efficacy of the 1974 reform plan was never tested because it was challenged in court before implementation. In *Buckley v. Valeo*,<sup>74</sup> the Supreme Court upheld the FECA's limits on campaign contributions, but the Court struck down the limits on independent expenditures.<sup>75</sup> What remained was a crazy patchwork of campaign finance regulations that probably would not have been enacted by Congress.<sup>76</sup> The surviving FECA amendments have had four major effects.

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maximization criterion of interest group theory. Cost-benefit analysis "produces cardinality by the simple device of translating all preferences into market values, measured in a constant currency such as dollars." Hovenkamp, *supra*, at 960.

70. The description in this subpart follows David Cole, *First Amendment Antitrust: The End of Laissez-Faire in Campaign Finance*, 9 YALE L. & POL'Y REV. 236 (1991).

71. *Id.* at 253-57 (tracing Congressional efforts at campaign finance reform before *Buckley*); see also FRANK J. SORAUF, *INSIDE CAMPAIGN FINANCE: MYTHS AND REALITIES* 2-9 (1992).

72. FECA Amendments, *supra* note 2.

73. Independent expenditures are expenditures intended to influence an election that are made without the cooperation of any candidate. See *supra* note 11.

74. 424 U.S. 1 (1976).

75. See *supra* notes 9-10.

76. *Buckley*, 424 U.S. at 236 (Berger, C.J., concurring in part and dissenting in part) ("[W]hat remains after today's holding leaves no more than a shadow of what Congress contemplated.") Sorauf calls the FECA "only a tattered remnant of its original self after *Buckley*." SORAUF, *supra* note 71, at 12. The *Buckley* Court also upheld voluntary public financing of presidential campaigns, *Buckley*, 424 U.S. at 85-86, and various contribution disclosure requirements, *id.* at 84. But see *id.* at 74 (recognizing an exception to disclosure requirements when there is "a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties.").

First, individual "fat cat" contributors no longer may make large, direct contributions to candidates. Individuals may donate no more than \$1,000 per candidate per election,<sup>77</sup> and no more than \$25,000 to all candidates in a year.<sup>78</sup> The ability of some individual contributors to influence elections has thereby diminished. However, others have turned to large independent expenditure campaigns, which are beyond regulation under *Buckley* and have probably influenced the outcome of some elections.<sup>79</sup>

Second, political action committees ("PACs"), which can contribute as much as \$5,000 per candidate per election,<sup>80</sup> have come to play a major role in the funding of congressional campaigns.<sup>81</sup> Although scholars debate how influential and corrupting PACs really are,<sup>82</sup> there is little doubt PACs have *some* influence, and their ability to contribute five times what an individual may contribute means they have five times the *relative* political capital of individual voters.

Third, an increasingly large number of groups have begun to act as contribution "brokers;" they "bundle" individual contributions and deliver them to candidates. One of the most famous brokers is EMILY's List, an organization that collects individual contributions and donates them to candidates supporting feminist causes.<sup>83</sup> By aggregating the donations of individual contributors, the brokers arguably have become "the new fat cats of American campaign finance."<sup>84</sup>

Finally, since the 1974 reforms, many groups and individuals have shifted to "soft money" contributions. These contributions are not subject to federal contribution limits but nevertheless are used to influence the out-

77. 2 U.S.C. § 441a(a)(1)(A) (1994).

78. 2 U.S.C. § 441a(a)(3) (1994). Contributors often avoid individual limits by making additional contributions in the name of spouses or children. "Nearly 27,000 contributors to [1990] congressional campaigns were identified as 'housewife,' 'home manager' or such, and more than 1,000 'student' contributions were logged." Peter Montgomery, *Secret Admirers*, COMMON CAUSE, May/June 1991, at 8, 9.

79. Perhaps the most influential independent expenditure campaign has been that which funded the "Willie Horton" ads used against Michael Dukakis in the 1988 presidential elections. See *To Win Friends and Influence Polls*, U.S. NEWS & WORLD REP., May 24, 1993, at 30. One individual, Michael R. Goland, apparently motivated by the pro-Israel policies of Senators Paul Simon and Alan Cranston, funded large independent expenditure campaigns against their opponents; both campaigns caused Goland legal trouble. *United States v. Goland*, 959 F.2d 1449 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1384 (1993); *Citizens for Percy '84 v. Federal Election Comm'n*, No. 84-2653 (D.D.C., Nov. 19, 1984). Arguably, Goland's actions affected the outcomes of both elections, each of which was extremely close. I discuss *Goland* in further detail, *infra* note 106. In an effort at full disclosure, I note that I served as a law clerk to Judge David R. Thompson, author of the Ninth Circuit opinion, when *Goland* was decided.

80. 2 U.S.C. § 441a(a)(2)(A) (1995).

81. They have played a larger role in House races than in Senate races. See SORAUF, *supra* note 71, at 87.

82. Compare *id.* at 163-74 with Daniel H. Lowenstein, *On Campaign Finance Reform: The Root of All Evil is Deeply Rooted*, 18 HOFSTRA L. REV. 301 (1989).

83. The acronym "EMILY" stands for "Early Money Is Like Yeast." Eliza Newlin Carney, *Not Such a Bad Year for Women*, 26 NAT'L J. 2596 (1994). EMILY's List raised at least \$7.5 million in the 1993-94 election period, compared with \$6.2 million for the 1991-92 election period. *Id.*

84. SORAUF, *supra* note 71, at 126.

come of federal elections.<sup>85</sup> For example, the FECA does not place limits on contributions to a state political party; however, such money may be spent in the state for "get-out-the-vote" drives and other efforts to promote the party's candidates for federal elections generally.<sup>86</sup>

In short, although the 1974 FECA amendments have changed the system, they have not made it significantly more egalitarian. Political capital remains unevenly distributed in our political system. Wealthy individuals and groups still exercise disproportionate influence, either through independent expenditures, by working through PACs, by bundling individual contributions, or by donating soft money. Despite attempts at reform, the poor and unorganized still lack an effective and proportional voice.

### *B. The Mechanics of a Campaign Finance Voucher Plan*

Generally, campaign finance reform plans either seek to "level-up," by increasing the ability of those shut out of the political system to participate, or to "level-down," by decreasing the ability of those with disproportionate political capital to exercise greater influence over the political system.<sup>87</sup> A voluntary public financing system, which allows candidates either to accept public funds or solicit private contributions, is a classic level-up program; it amplifies the voice of the poor but does not limit the influence of the rich. A law limiting the amount an individual or PAC can contribute to a candidate is a classic level-down program.

Past proposals to use publicly funded vouchers have been of the level-up variety only. For example, in 1967, Senator Lee Metcalf proposed a plan under which taxpayers would receive campaign vouchers from the government, but politicians could accept private money as well.<sup>88</sup>

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85. *Id.* at 147.

86. Revelations from former Senator Bob Packwood's diaries reveal how easily soft money may be diverted to federal campaigns. See Fred Wertheimer, *The Real Scandal in the Packwood Diaries*, N.Y. TIMES, Sept. 10, 1995, at 17.

87. See generally Joel L. Fleishman & Pope McCorkle, *Level-Up Rather Than Level-Down: Towards a New Theory of Campaign Finance Reform*, 1 J.L. & POL. 211 (1984).

88. Metcalf's plan is described in DAVID W. ADAMANY & GEORGE E. AGREE, *POLITICAL MONEY: A STRATEGY FOR CAMPAIGN FINANCING IN AMERICA* 189 (1975). Adamany and Agree endorsed a modified level-up voucher plan based upon Metcalf's ideas. See *id.* at 199 (commenting that voucher plan "does not replace all private giving"). Adamany and Agree argued against allowing interest groups to collect the vouchers as intermediaries: "Some reservations about the voucher plan arise from the potential for well-organized groups or powerful institutions to collect certificates from members, employees, and other affiliated persons and then to pass along blocs of vouchers to favored candidates." *Id.* at 189-90. As I explain *infra* notes 127-28, however, this "bundling" by interest groups is an advantage of the voucher plan because it serves important egalitarian pluralist goals.

Schmitter also has proposed a voucher plan for funding political activity which differs in significant ways from the voucher program here; Schmitter's voucher proposal is level-up, in that Schmitter would put no limit on the ability of the wealthiest and best organized to outspend or outorganize new groups created with vouchers. Philippe C. Schmitter, *Corporative Democracy: Oxymoronic? Just Plain Moronic? Or a Promising Way Out of the Present Impasse?* 36 (First Draft, 1988) (unpublished manuscript, on file with author) [hereinafter Schmitter, *Corporative Democracy*]. Schmitter responded to critics who have read his unpublished article in a second unpublished article. Philippe C. Schmitter,

Recently, however, Bruce Ackerman and I independently have proposed publicly financed voucher systems which both level-up and level-down.<sup>89</sup> These voucher plans level-up in the sense that all voters, even those voters who have never made campaign contributions before, are given vouchers to contribute to candidates for federal office. Vouchers facilitate the representation of groups which lack a voice in the current system. But these vouchers also level-down by prohibiting all other sources of campaign money; the rich can no longer exercise greater influence through private contributions and independent expenditures.

Here are the key elements of my voucher plan.<sup>90</sup> The government provides every voter with a voucher for each bi-annual federal election. Each voter's voucher has a face value of \$100, but in order to discourage voters from giving the whole sum to one candidate or group, the value of each donation will be reduced to its square root. A \$100 donation is reduced to \$10, while six \$16 donations are reduced to \$4 each. Therefore, the voter who gives one big donation only contributes a total of \$10, but the contributor who makes six different donations could give a total of \$24, assuming \$16 is the smallest donation permissible under the voucher plan.<sup>91</sup>

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Some Second Thoughts about Corporative Democracy: Oxymoronic or Moronic, Promising or Problematic? (Jan. 1991) (unpublished manuscript, on file with author) [hereinafter Schmitter, Second Thoughts]. He also presents a brief published defense of his plan in the symposium on Cohen and Rogers' associative democracy proposal, which I discuss *infra* Part IV.C. See Philippe C. Schmitter, *The Irony of Modern Democracy and Efforts to Improve Its Practice*, 20 POL. & SOC'Y 507 (1992) [hereinafter Schmitter, *Irony*]. Significantly, Schmitter would prevent voucher-funded groups from making contributions to electoral campaigns, political parties, or other associations. Schmitter, *Corporative Democracy*, *supra* at 59.

89. I proposed a voucher plan originally in my unpublished dissertation. See Hasen, *Beyond the Pursuit*, *supra* note 38, ch. 4. Bruce Ackerman then independently proposed a voucher plan in a short article in the journal *American Prospect*. See Ackerman, *supra* note 11. He has not had occasion to provide a scholarly treatment of his plan. Edward Foley discussed Ackerman's voucher plan in an article arguing for "equal-dollars-per-voter" as a matter of constitutional principle. Edward B. Foley, *Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204, 1208-13 (1994). Smurzynski hinted at a voucher plan in his discussion of campaign finance reforms. Smurzynski, *supra* note 31, at 1911 (suggesting that public financing could be done through the "intermediary" of interest groups). This Article is the first published scholarly look at the efficacy and fairness of a post-voucher political system.

90. The plan set forth here differs in certain respects from the ideas of Ackerman and Foley. For example, Ackerman proposes a "pilot program" of voucher financing beginning with a presidential campaign and later extending to congressional elections. Ackerman, *supra* note 11, at 74. The plan discussed here, however, applies to all federal elections. Where there are significant differences between this plan and Ackerman's or Foley's ideas, I describe those differences in the footnotes below.

Regarding the technology for the voucher plan, Ackerman suggests a credit card, called "the Patriot card," for use in these elections. *Id.* at 71. The precise format for disbursing vouchers is unimportant, except that the format must be easy to use, so as not to discriminate against those lacking technical sophistication, and it must contain safeguards to prevent fraudulent use of vouchers.

91. These monetary figures are for illustrative purposes only. The actual amount of the vouchers would depend upon an empirical study of the amount necessary to fund effective campaigns for federal office, and it would have to be large enough so that each person's contribution is meaningful. Perhaps larger amounts would be necessary during presidential election cycles and smaller amounts in other years. Under the square root formula described in detail *infra* Part III.C, the value of the vouchers would be indeterminate before they are allocated by voters; assuming \$16 is the smallest donation

Voters may donate their voucher dollars either directly to candidates, to licensed interest groups, or to political parties.<sup>92</sup> The groups may serve whatever goals they please, whether ideological or economic. Thus, the NRA, NOW, and other ideological groups will compete for voucher dollars with the Beef Industry Council, the AFL-CIO, and other economic groups.<sup>93</sup>

All campaign contributions and independent expenditures in support of or in opposition to a candidate must be made with voucher dollars. Candidates and elected officials cannot receive any other direct donations, honoraria, soft money benefits, in-kind contributions, or other donations.<sup>94</sup> Elected officials may not be taken to dinner by lobbyists and they may not attend all-expenses-paid industry retreats in Maui.<sup>95</sup>

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allowable under the voucher plan, a person could donate to six groups the equivalent of \$4 each (4 being the square root of 16), making the maximum value of the vouchers \$24. If a person donated her entire set of vouchers to one candidate or group, the voucher's value would be the square root of \$100, or \$10. Assuming an initial number of voters at 130 million, *see Ackerman, supra* note 11, at 73, the estimated initial cost for the program therefore would be between \$1.3 billion and \$3.12 billion, exclusive of enforcement costs. I discuss the political viability of a new \$3 billion-plus government program *infra* Part III.D.1.

The initial cost of the program likely would go up. I would provide vouchers to all citizens eligible to vote, and not just to registered voters, as Ackerman and Foley advocate. *See Ackerman, supra* note 11, at 73; Foley, *supra* note 89, at 1243 n.123. An element of egalitarian pluralism is empowerment, and those with the least political capital in society are most likely to fail to register to vote.

Ackerman advocates a \$10 voucher to fund only presidential campaigns at a projected cost of \$1.3 billion. Ackerman, *supra* note 11, at 73. Foley believes Congress should set the total amount to be spent on vouchers as a percentage of the gross domestic product. Foley, *supra* note 89, at 1244. He notes that if the \$2.7 billion spent for electoral politics in 1988 were divided by the 130 million registered voters, the same amount of overall spending could be reached with \$20 vouchers. *Id.* at 1243.

I would limit the voucher plan initially to federal elections. Foley argues the constitutional principle of "equal-dollars-per-voter" should apply to state elections as well. Foley, *supra* note 89, at 1210 n.16. Moreover, I would allow voters to allocate the \$100 in vouchers to whatever federal election or licensed interest group they wish. Thus, a New York resident could give her entire \$100 in vouchers to a candidate for an Ohio Senate seat. *But see id.* at 1254 (suggesting that each voter receive a specific sum of money for each contest in which he is entitled to vote). This right would serve to counteract certain distorting effects of our geographically based electoral system. *See infra* note 130 (discussing cumulative voting, another system aimed to counter the distorting effects of geography).

92. On licensing requirements, *see infra* notes 100-01 and accompanying text. The state would cancel the vouchers of any voter who fails to allocate them in the current election cycle. Foley, in contrast, would allow electoral funds to be saved in accounts from one election cycle to the next, perhaps even earning interest. Foley, *supra* note 89, at 1253 & n.147.

93. Foley would require these organizations to set up separate electoral organizations with separate accounts. *Id.* at 1207-08. At a minimum, separate accounts are required. Schmitter advocates democratic governance of voucher-funded organizations. *See Schmitter, Second Thoughts, supra* note 88, at 9. I would leave governance of the interest groups to private agreement, but I would require disclosure of the groups' financial ledgers.

94. A state or national political party may use only vouchers for any activity that might affect the outcome of a federal election. *Cf.* S. 1219, 104th Cong., 1st Sess. § 221 (1995) (proposing legislation which would impose a similar limit on the use of soft money).

95. Of course, elected officials still may go to dinner with lobbyists or attend the Maui convention. But they must pay their own way to do so.

Independent expenditure campaigns must be financed only through collected vouchers; with limited exceptions,<sup>96</sup> no private funds may be used. Individuals like Ross Perot, Herbert Kohl, and Michael Huffington could not bankroll their own campaigns.<sup>97</sup> Corporations (other than licensed interest groups) could not donate money to candidates or make independent expenditures for or against a candidate.<sup>98</sup> However, political activity not directly endorsing or opposing a candidate would not be subject to any limits.<sup>99</sup>

Only licensed interest groups could collect voucher dollars from others to run independent expenditure campaigns supporting candidates, and only those groups and the voters themselves could contribute vouchers to candidates. Any voter could register for a license to create an interest group, and the license would be free. An independent federal agency would process license requests. The agency could not turn down a group's licensing request for ideological reasons.

The license-granting agency would be independent of the political branches of government, much like the current Federal Reserve Board. This independence would prevent state officials from manipulating the sys-

96. See *infra* notes 107-09 and accompanying text.

97. Ross Perot spent \$60 million of his own money to mount his independent 1992 presidential campaign. Jamin Raskin & John Bonifaz, *Equal Protection and the Wealth Primary*, 11 YALE L. & POL'Y REV. 273, 329 n.292 (1993). Herbert Kohl used \$7 million of his own money to run for a Wisconsin Senate seat. *Id.* at 329. Michael Huffington used \$28 million of his own money to run for a California Senate seat, which, together with his opponent's \$14 million, easily set a record for amounts spent on a senatorial campaign. Ayres, *supra* note 32, at 10.

Although these men may be among the richest politicians, politics is a rich person's game; at least 51 of the 100 Senators of the last Congress were millionaires, compared to one-half of one percent of the general population. See Raskin & Bonifaz, *supra*, at 289 (citing *Ten Fun Facts About Congress*, ROLL CALL, Apr. 23, 1992, at 3; *More of Everything: New York Compared with the Nation*, WASH. POST, July 12, 1992, at A11); see also *Just Ask Zoë*, THE NATION, Feb. 15, 1993, at 185 ("Millionaires were 62 percent of Reagan's cabinet, 71 percent of Bush's, and so far, 77 percent of Clinton's.").

Ackerman and Foley agree that candidates should be prohibited from using their own funds. Ackerman, *supra* note 11, at 76; Foley, *supra* note 89, at 1239-41.

98. Current law prohibits corporations from making contributions or expenditures in connection with the election of candidates for federal office. See 2 U.S.C. § 441b(a) (1994).

99. Foley would include in his plan electoral activities in support of, or in opposition to, a ballot initiative. Foley, *supra* note 89, at 1249. However, as the plan advanced here concerns federal elections only, ballot initiatives are not a serious concern. Under this plan, the occasional drive to enact a constitutional amendment would be open to unlimited funding.

If voucher plans were extended to state elections generally, however, I agree with Foley that ballot initiatives should be covered. Otherwise, those with greater wealth could make an end-run around the legislature through the referendum process, as has happened already in California. See Peter Schrag, *California's Elected Anarchy*, HARPER'S MAG., Nov. 1994, at 50, 54. The skills necessary to run a successful initiative campaign

have found takers both on the right and on the left: among environmentalists and tobacco prohibitionists on one side, among taxpayer groups on the other, and most emphatically among major industrial and professional groups—the insurance companies, the tobacco companies, the trial lawyers, the doctors—looking to fund special programs, or looking for protection and exemption from regulation or for advantage against other interests.

*Id.*

tem for their own benefit.<sup>100</sup> As a consumer watchdog, the agency would act to prevent fraud; interest groups could use the vouchers for legitimate organizational expenses, but group officers or employees could not use them for their own personal benefit.<sup>101</sup> The agency's chief mission would be to facilitate disclosure of voucher-collecting activities.

Volunteer time presents a tricky administrative issue for the voucher plan. As a preliminary matter, it should be noted that current law is far from clear as to how volunteer time donated to a candidate's campaign counts toward campaign contribution limits.<sup>102</sup> In *Buckley*, the Court held that a volunteer's expenditures undertaken at the candidate's direction properly could be viewed as contributions to the candidate.<sup>103</sup> Since then, the Court has classified payment of a PAC's administrative expenses by an unincorporated association as a contribution.<sup>104</sup> Lower courts have counted as contributions both post-election loan guarantees<sup>105</sup> and money spent to produce a candidate's television commercials.<sup>106</sup>

The post-Watergate FECA amendments exclude from the definition of contribution "the value of services provided without compensation by individuals who volunteer a portion or all of their time on behalf of a candidate

100. See ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* 323 (1989) (discussing the danger posed by allowing the state to regulate political equality). The independent agency could prove to be a lightning rod for criticism of the voucher proposal. According to one report, Colorado's recent attempt to enact an initiative limiting campaign contributions was thwarted by the opposition's characterization of the independent commission charged with enforcing the contribution limit as "more government bureaucracy and more government spending." See Goodwyn, *supra* note 7 (quoting Rick Bainter, Director of Colorado Common Cause). In fact, the initiative was opposed by big labor and big business not because of the agency, but "primarily because of the limitations on funding for PACs." *Id.* (quoting Becky Brooks, lobbyist for the Colorado Education Association).

101. But salaries must be paid to those who run these groups, raising a host of principal-agency problems. See *infra* note 127 and accompanying text.

102. Under current federal law, independent expenditures are not subject to any limits. See *supra* note 10 and accompanying text.

103. *Buckley v. Valeo*, 424 U.S. 1, 36-37 (1976).

104. *California Medical Ass'n v. FEC*, 453 U.S. 182, 198 n.19 (1981).

105. *Federal Election Comm'n v. Ted Haley Congressional Comm.*, 852 F.2d 1111, 1116 (9th Cir. 1988). See also Rich Connell & Frederick M. Muir, *Use of Art In Wachs' Campaign Examined*, L.A. TIMES, Feb. 20, 1993, at B1 (discussing the city attorney's determination whether a valuable donated art design is a contribution exceeding the \$1,000 maximum imposed by city election laws).

106. *United States v. Goland*, 959 F.2d 1449, 1452 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1384 (1993). *Goland* presented the difficulty of drawing the line between contributions and independent expenditures. There, the defendant (whose other efforts I discuss *supra* note 79) contended that he wrote, paid for, and produced television commercials for a third party candidate in a U.S. Senate race in order to draw votes away from the Republican candidate thereby aiding the Democratic candidate. *Id.* at 1451-52. The defendant argued that he did not make an excessive "contribution" in favor of the third party candidate but rather made "independent expenditures" in favor of the Democratic candidate. *Id.* at 1452. The Ninth Circuit rejected the argument, noting that under the FECA independent expenditures must be made "without cooperation or consultation with any candidate." *Id.* (citing 2 U.S.C. § 431(17); 11 C.F.R. 100.16 (1990)). The court held that Goland intended to contribute to the third party candidate's campaign, "and it is immaterial to conviction under [the FECA] that he did so in support" of the Democratic candidate. *Id.* The dissent argued that because Goland did not have the "subjective motive" to make a contribution to the third party candidate, his conviction could not stand. *Id.* at 1454-55 (Pregerson, J., dissenting).



or political committee."<sup>107</sup> The voucher plan would take a similar approach, if only to prevent prosecution for de minimis expenditures and an administrative nightmare.

Under the voucher plan, the value of any services volunteered by an individual would not count as a prohibited campaign contribution or expenditure. Thus, if James Carville or Mary Matalin wish to volunteer for their favorite candidate for no compensation, they are free to do so.<sup>108</sup> Nor would a volunteer's travel expenses or other incidental costs (up to \$200 per candidate per election) incurred in support of or in opposition to a candidate count as a prohibited contribution or expenditure.<sup>109</sup> However, a person could not donate someone else's labor. For example, an employer could not donate her employee's services; such contributions must be paid for with vouchers and thus are limited by that amount.

To better understand these thorny administrability issues, consider three cases: first, a concerned citizen who opposes a particular candidate and wishes to write and distribute a pamphlet explaining why; second, the owner of an advertising agency who wishes to volunteer her time (and that of her employees) by working with the campaign to design political ads; and third, a political commentator for the most influential newspaper in the state, who, without cooperation or consultation with the candidate, writes an op-ed piece endorsing that candidate.

Under the rules of the voucher plan, the would-be pamphleteer can spend all the time she wants writing and creating a pamphlet supporting or opposing a candidate.<sup>110</sup> She can also spend up to \$200 per election cycle on materials to reproduce the pamphlet, incidental to volunteering her time. If she wishes to disseminate the pamphlet further or to produce a glossier version, she has four options: she may (1) register as an interest group and collect vouchers from others; (2) persuade a licensed interest group to spend voucher money on her pamphlets; (3) persuade a candidate to spend voucher money on the pamphlets; or (4) create a bona fide "newsletter" or newspaper that does more than strictly endorse or oppose a candidate.<sup>111</sup>

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107. *Buckley*, 424 U.S. at 36 (quoting the FECA, codified at 8 U.S.C. § 591(e)(5)(A)).

108. Of course, they would remain free to write a "kiss-and-tell" book later. See, e.g., MARY MATALIN & JAMES CARVILLE, *ALL'S FAIR: LOVE, WAR, & RUNNING FOR PRESIDENT* (1994). Campaign volunteers also may take policy-making patronage jobs if their preferred candidate is elected.

109. The candidate must reimburse any expenses incurred by a volunteer over the \$200 limit that are made in cooperation or consultation with the candidate. The \$200 limit on incidental costs allows a volunteer to undertake activities like occasional photocopying but prevents the volunteer from making large scale in-kind contributions of goods under the guise of this exception. For example, a director who volunteers her time to make a television commercial for a candidate could not provide thousands of dollars worth of videotapes as an "incidental cost" of making the commercial.

110. There would be no limit upon the right to disseminate political writings that do not specifically support or oppose a candidate.

111. For a discussion of this admittedly large loophole, see *infra* notes 113-17 and accompanying text.

The advertising executive, like the pamphleteer, may freely volunteer her own time to the candidate's campaign. She may also spend up to \$200 per election cycle on expenses incidental to producing the ads. However, any additional expenses must be paid for with voucher dollars. Also, she cannot compel her employees to work on the political campaign. Time which paid employees spend working on a candidate's campaign must be paid for with voucher dollars.<sup>112</sup> Of course, if the employees volunteered to work on the campaign, their time would not count as a campaign contribution that must be funded with voucher dollars.

The political commentator writing an op-ed piece endorsing a candidate presents the most difficult administrative issue.<sup>113</sup> For several reasons, I side with Ackerman and against Foley: media endorsements should not be counted.<sup>114</sup> First, there is the administrative nightmare of allocating the correct portion of a newspaper's publishing costs to the production of the op-ed piece. More importantly, newspapers and other news media<sup>115</sup> are a valuable source of information for the public. Newspapers help people overcome collective action problems in acquiring information, a classic public good.<sup>116</sup> The media exception to the voucher plan is the same legitimate "loophole" allowed the pamphleteer discussed in the first hypothetical: she, too, provides information other than the strict endorsement of or opposition to a candidate.

To be sure, volunteer and media exceptions allow a greater voice to the advertising agency owner, the newspaper editorialist,<sup>117</sup> and the attorney who donates her time in support of a candidate, than they do to the janitor or farmer. The latter usually cannot donate services to a political campaign as valuable as those which can be rendered by a professional. However, it is necessary to allow this compromise of pristine egalitarian principles in order to have a workable system. And in any case, it is a small price to pay

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112. Hefty criminal penalties with the real possibility of enforcement would be necessary to prevent employers and unions from coercing employees and union members into "volunteering" their time or signing over their voucher dollars. The anti-coercion provision of the law enacting the voucher plan would include a rebuttable presumption that employees or union members "volunteering" their time or voucher dollars at the "suggestion" of their employer or union were coerced into doing so.

113. It also presents a difficult First Amendment issue. See *infra* notes 175-202 and accompanying text.

114. Ackerman, *supra* note 11, at 75-76; Foley, *supra* note 89, at 1252 & nn. 143-44. However, even Foley would limit the prohibition on newspaper endorsements "to publications that expressly support or oppose a candidate or ballot initiative." *Id.* at 1253.

115. Here, I include television, radio, and the Internet as well. If reining in newspapers is difficult, imagine reining in the decentralized "information superhighway." See generally Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805 (1995).

116. See generally COOTER & ULEN, *supra* note 60, at 112-116 (discussing the economics of information).

117. Indeed, Levinson views this inequality as the primary problem with any attempts at campaign reform: why limit what candidates can do when there are no limits on the media? See Sanford Levinson, *Electoral Regulation: Some Comments*, 18 HOFSTRA L. REV. 411, 412-13 (1989). I try to provide a rationale for this dichotomy in the text.

in order to achieve the overall egalitarian benefits of a voucher plan.<sup>118</sup> The volunteer and media exceptions do not affect the voucher plan's prohibition on significant monetary contributions to a candidate, and they do not allow one person to fund a large-scale independent expenditure campaign.<sup>119</sup> The exceptions present neither the serious danger of corruption, nor do they allow immense aggregations of wealth to distort the electoral system.

In order to assess the desirability of vouchers overall, we must consider what the political market would look like under such a system. The next section uses positive public choice theory to determine how well a voucher-based political system meets egalitarian pluralist goals.

### III

#### THE BENEFITS OF A MANDATORY CAMPAIGN FINANCE VOUCHER PLAN

Egalitarian pluralism aims to equalize the ability of different individuals to affect the political process. It seeks to have each interest group's influence reflect the number and devotion of its followers, not the group's wealth or ability to organize.<sup>120</sup> This Part uses positive public choice theory to analyze the voucher plan under four egalitarian pluralist criteria:

- (1) *Egalitarianism*. How well does the proposed plan redistribute political capital from small, cohesive groups to other groups in proportion to their level of support in society?
- (2) *Impact on Governance*. How stable will the political system be after the redistribution of political capital? Will politicians chosen under the proposed plan be able to govern effectively?
- (3) *Benefits as Preference-Aggregation Mechanism*. How well does the preference-aggregation mechanism in the proposed plan work at registering intensity of preference? Is it open to strategic voting or manipulation by agenda-setters?
- (4) *Likelihood of Enactment*. Does the plan have a real chance of being enacted? Is it constitutional?

The first criterion, egalitarianism, is essential to evaluating any system which aims to give every citizen an equal say in the political process.

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118. Even Foley acknowledges "pragmatic" considerations may favor excluding certain activities, like volunteer time, from voucher limits. Foley, *supra* note 89, at 1248. Indeed, pragmatism alone leads me to endorse an exclusion for volunteer time; I disagree with Ackerman that volunteer time should be excluded because citizens who volunteer time are more likely to be acting in "the public interest" than those who donate money. Compare Ackerman, *supra* note 11, at 76 ("Volunteers are not in it for the money, and their energies should not be charged against the campaign's budget.") with Foley, *supra* at 1246-47 (criticizing Ackerman's argument). The choice between donating time and money may depend upon one's marginal cost of each. To an unemployed person, for example, it is cheaper to donate time than money, but for a lawyer charging \$300 an hour, it is cheaper to donate money. This has nothing to do with relative civic virtue.

119. See *supra* note 79 and accompanying text.

120. Cohen & Rogers, *supra* note 19, at 412-13.

Because egalitarian pluralism is based on the principle that disparities in wealth and ability to organize are not relevant to the individual's right to influence political outcomes, egalitarianism is the first and foremost criterion used to evaluate the proposed voucher plan.

I also evaluate the plan in terms of its impact on governance. Reform of the electoral process is meaningless unless we can expect it to lead to better legislative substance. Governance in the ideal egalitarian pluralist system will reflect the true distribution and weight of all societal interests. It also will be stable; individuals who lose political capital under the reform plan will have neither the power nor a strong incentive to return to the status quo. And finally, it must allow the legislature to make coherent public policy rather than causing it to devolve into a fragmented and ineffectual governing body.

Positive social choice theory suggests inclusion of the third criterion, the benefits of the plan as a preference-aggregation mechanism. As noted earlier,<sup>121</sup> some mechanisms are less open than others to strategic voting and agenda setting. Egalitarian pluralism requires that preference aggregation reflect the true distribution and weight of interests in society, not the interests of a few clever manipulators of the system. Moreover, some mechanisms do a better job than others of registering the intensity of individual preferences. A political system should reflect the true distribution and weight of different societal interests by being sensitive to the intensity of individual preferences.

Finally, I include likelihood of enactment as a criterion for evaluating the plan because I believe the window of opportunity for meaningful reform is limited; politicians are under pressure now to reform the political system, and even an ineffective reform plan (like the 1974 FECA amendments that survived *Buckley*) likely will remain in place for a long time. We should pursue proposals with a realistic chance of enactment, rather than proposals that are theoretically sound but politically unacceptable.

As I demonstrate in the rest of this Part and in Part IV, a voucher plan is the best hope for achieving egalitarian pluralism as measured by these four criteria.

### A. *Egalitarianism*

The voucher plan is a perfect method for equalizing political capital to the extent that political capital is coterminous with money spent directly on elections. By providing each citizen with equal resources, the voucher plan guarantees to each an equal fiscal voice in the political process.

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121. See *supra* Part I.B.

However, as explained earlier,<sup>122</sup> political capital is not perfectly correlated with wealth spent to influence elections. An additional key determinant of political capital is organizational ability, which in turn is a function of wealth *not* spent on elections. Wealthy people tend to be better educated, and education causes individuals to be socialized to participate in the political process despite collective action problems.<sup>123</sup> Moreover, wealthy corporations and individuals have the resources available to organize and often gain enough rents individually that it becomes individually rational to engage in lobbying activities.<sup>124</sup> Both factors indicate that the wealthy face fewer collective action problems organizing for political activity.<sup>125</sup> For this reason, financial equalization without organizational equalization will not produce equality of political capital.<sup>126</sup>

By spreading money for use in the political market evenly among all voters, the voucher plan also indirectly redistributes organizational skills. Once each voter has a voucher to spend in the electoral process, and candidates can no longer count on a few large donors to fill their coffers, a new class of political entrepreneurs will emerge who will collect vouchers from voters and deliver them in bundles to the candidates.<sup>127</sup> In the competition

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122. See *supra* Part I.A. But see Lillian R. BeVier, *Campaign Finance Reform: Specious Arguments, Intractable Dilemmas*, 94 COLUM. L. REV. 1258, 1263-64 (1994) (disputing, without empirical support, the claim that the political market is stacked against the poor and minorities).

123. See Richard L. Hasen, *Voting Without Law?*, 144 U. PA. L. REV. (forthcoming 1996) (manuscript at 21-22, on file with author).

124. This explains the the rationality of Brush Wellman's lobbying.

125. Hovenkamp, *supra* note 30, at 108-09 ("The well-to-do, as a general rule, are better represented by lobbying organizations than the poor.").

126. Macey, *supra* note 57, at 1680 n.38. Macey opposes campaign finance reforms on these grounds. BeVier similarly argues that "stacking the deck *against* those 'with wealth' inevitably entails stacking it *in favor* of those with other resources such as time, celebrity status, or a comparative advantage at political, as opposed to private sector, activity." BeVier, *supra* note 122, at 1268. BeVier calls upon those who support equalizing wealth in the political process to "defend these remaining disparities." *Id.* To the contrary, those who support equalizing wealth also should seek to equalize these other factors. The problem, however, is one of administrability. We regulate wealth alone, rather than celebrity status as well, because wealth may be regulated but celebrity status cannot be regulated. Moreover, Levinson points out a key difference between wealth and celebrity status. Although we generally believe there is a correlation between one's political ideas and one's wealth, it is plausible to assume that "celebrities' political views *are* randomly distributed. For every Paul Newman who supports Walter Mondale, there is a Carole King who supports Gary Hart—and a Frank Sinatra who supports Ronald Reagan." Sanford Levinson, *Regulating Campaign Activity: The New Road to Contradiction?*, 83 MICH. L. REV. 939, 949 (1985). Thus, there is a lesser need to regulate use of celebrity status than use of wealth.

127. We should consider from a public choice perspective the motivation for individuals to become entrepreneurs. Although some will be motivated by altruism, many will be motivated by power or money. Because vouchers may be used to pay for interest group organizational support, including for the salaries of group employees, what is to stop the unscrupulous political entrepreneur from setting an extremely high salary for herself? Although this abuse is certainly possible, two factors militate against it. First, the independent agency charged with licensing interest groups will have full access to group books, and it may publicize instances of entrepreneur self-dealing. Second, political entrepreneurs representing competing interest groups will have an incentive to compete for voucher dollars by arguing that a lower percentage of each voucher dollar goes to administrative overhead, including salaries.

for vouchers, entrepreneurs will have the incentive to motivate and organize communities to use their new political capital; entrepreneurs' reputations will be enhanced by delivering votes to politicians along with voucher dollars. Competition should lead entrepreneurs to represent community interests. In sum, a new class of entrepreneurs will help currently underrepresented groups overcome their collective action problems.<sup>128</sup>

The voucher system will also force politicians to take heed of those voters they have traditionally ignored. A candidate seeks the support of the citizenry in two markets: the market for direct votes in elections and the market for indirect votes in the form of campaign contributions. The politician always has the incentive to look to everyone in the market for direct votes; the voucher system will provide the incentive to explore the entire market for campaign contributions as well. Just as she does in the actual election, the politician will have to pursue contributions from the population at large and all the interest groups that represent the voters.

A voucher system will not fully eliminate inequalities in different groups' organizational abilities, however. First, to the extent the poor have less leisure time, they will be less able to investigate the interest groups seeking their vouchers. Second, to the extent that the poor are less educated, they will be more susceptible to manipulation by interest groups that only purport to represent their interests and less likely to be socialized to overcome collective action problems. Finally, a voucher plan tends to favor already existing interest groups because they will have an organizational headstart in the race to collect voucher dollars.<sup>129</sup> Unfortunately, the poor have the fewest resources to give and face great collective action problems, and thus are poorly represented by the current crop of interest groups.

These problems, however, should dissipate as entrepreneurs create new interest groups to seek vouchers from previously unrepresented groups. Also, even if some groups have greater difficulty organizing, their *relative* strength will increase as the more powerful interest groups lose political

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Consider the case of the United Way, whose indicted former president made a base salary of \$390,000 per year. See Tim Weiner, *United Way's Ex-Chief Indicted in Theft*, N.Y. TIMES, Sept. 14, 1994, at A12; Evelyn Brody, Institutional Dissonance in the Nonprofit Sector 36-38 (June 30, 1995) (unpublished manuscript, on file with author). After news spread of the ex-president's "lavish living and questionable corporate spending practices," and he was indicted for stealing more than \$1 million from the organization, contributions to the United Way fell off sharply until United Way cleaned house. Weiner, *supra*, at A12. Similarly, with mandatory full disclosure and incentives to investigate, the voucher-funded interest group market generally should correct abuses of power.

128. One may wonder why voters would bother investigating various groups and candidates seeking vouchers, given the infinitesimal chance of influencing the outcome of an election through the use of vouchers. This argument mirrors public choice arguments made about the so-called paradox of voting: why bother to vote if it is unlikely to make a difference in the outcome of an election? See Hasen, *supra* note 123. I predict voucher use will follow voting patterns. To the extent people do not vote, they probably will not be very interested in the voucher plan unless convinced to be interested by political entrepreneurs. To the extent people vote, we can expect them to take the divvying up of voucher dollars seriously.

129. Schmitter, *Corporate Democracy*, *supra* note 88, at 55.

capital because of the level-down campaign finance limits imposed by the voucher program.<sup>130</sup>

### *B. Impact on Governance*

In evaluating the voucher plan, it is not enough just to ask whether it will improve voters' opportunities for influencing elected officials. We must also consider the reform's impact on the actual operation of government. Ideally, the legislative process will produce laws reflecting the true distribution and weight of societal interests. Moreover, the law-making process should be politically stable and lead to coherent legislative and executive policies.

Under the voucher plan, legislation will better reflect the true distribution and weight of societal interests. Politician-agents will be responsive to the interest group brokers who bundle voucher dollars for politicians. Like the powerful interest groups of today, voucher-based groups will pressure and cajole politicians into voting for legislation that they support, or else run the risk of losing future campaign contributions. However, instead of securing enormous rents for a few wealthy and well-organized groups, the new groups will provide a reasonable and balanced degree of influence to all of society's interests. The voucher plan will replace our current pluralism, in which some groups are shut out of the political market while others dominate and skew it, with an egalitarian pluralism in which everyone has a more equal voice.

This is not to suggest that politicians will be completely beholden to voucher-backed interest groups. The voucher plan does not limit representatives' choices in voting on bills; it still allows for the Burkean exercise of independent judgment.<sup>131</sup> While politicians will care about campaign contributions, there is no reason to believe a voucher plan will limit our leaders' discretion any more than the current system does.<sup>132</sup>

Furthermore, although politicians no longer will be dependent on contributions from business interests, they will still seek out the advice and pay

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130. The voucher program does not protect groups that are very small in number or very diffuse in society, because there will not be enough voucher dollars in the system to create incentives for entrepreneurs to protect their interest. Thus, courts should continue to play a major role in protecting "discrete and insular minorities." See Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 718-22 (1985) (noting tension between pluralist theory and enhanced judicial review for minorities). The voucher plan also leaves the geographical basis of our electoral system untouched; accordingly, additional reforms like cumulative voting or proportional representation might be necessary to overcome these problems. See LARI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* 14-16 (1994) (defending cumulative voting); see also *infra* Part IV.B (discussing proportional representation).

131. Edmund Burke, Speech to the Electors of Bristol (Nov. 3, 1774), in 2 *THE WORKS OF EDMUND BURKE* 89, 95-96 (3d. ed. 1869) (arguing that legislators should exercise independent political judgment rather than simply follow constituents' preferences).

132. For a contrary view, see David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1375-76 (1994).

attention to the concerns of business. Public officials will always need a smooth, well-functioning economy if they hope to be re-elected.<sup>133</sup> Eliminating private campaign contributions will weaken the inordinate influence of big business, but elected officials will continue to seek advice from industry for the valid purpose of coordinating national, regional, and local economic policy.

The voucher system also will eliminate the extremely large rents that powerful interest groups command under the current system. The plan will lead to a proliferation of interest groups, each seeking to make deals with politicians. The absolute number of groups will increase, given the ease with which new groups can be formed and the incentives political entrepreneurs will have to create new groups. As the absolute number of groups increases, however, their relative power will decrease. Like the move from monopoly to oligopoly to a competitive market, an increase in participants in the political market will deny each existing group some market power. Eventually, each group will be able to extract fewer promises from politicians, who will be able to pick and choose among competing interest groups.<sup>134</sup>

The voucher plan is also likely to preserve political stability. Because adopting the voucher system does not directly change our method of choosing our leaders—unlike proportional representation and group-based political solutions<sup>135</sup>—the politics of tomorrow will echo the politics of today, albeit on a more level playing field. Changes in society will be incremental, not rapid or radical. Vouchers ensure stability because they allow for changes in relative power among groups without a major social upheaval. And as the interests and desires of society evolve, those changes will be reflected through the voucher system's market mechanism at the next election cycle. Thus, if a particular issue raises the ire of many voters, voucher dollars will shift to interest groups dedicated to addressing that issue. The fluidity of the funding mechanism assures more responsive political outcomes.

One could argue that the voucher plan would affect governance adversely by causing politicians to spend greater time collecting smaller amounts of money.<sup>136</sup> No doubt time spent fundraising takes away from a politician's ability to engage in fruitful legislative action. However, the voucher plan allows interest groups to act as brokers and bundle contribu-

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133. LINDBLOM, *supra* note 34, at 134.

134. If, as I am predicting here, we see healthy competition between interest groups, interest group collusion is unlikely. My argument in the text implicitly assumes that there are no large areas of legislation untouched by current rent-seeking interest groups. To the extent this assumption is false, the over-all amount of rent seeking could increase even though each group would receive a smaller rent on average.

135. See *infra* Parts IV.B-C.

136. E.g., Frank J. Sorauf, *Politics, Experience, and the First Amendment: The Case of American Campaign Finance*, 94 COLUM. L. REV. 1348, 1364 (1994).



tions;<sup>137</sup> politicians will inevitably court the larger, more influential groups rather than many small groups or the public at large. Gone will be the frequent trips to California to attend yet another \$1,000 per plate dinner. Concerns that politicians under a voucher system will spend more time raising money than they do now are overstated.

Another concern is that because the voucher plan will cause the wealthy and well-organized to lose a great deal of political influence with elected officials, they can be expected to shift their battles to more favorable terrain. New targets for the wealthy and well-organized might include state legislatures and state ballot initiatives,<sup>138</sup> administrative rulemaking and adjudicative procedures, and constitutional amendments. However, the voucher-backed Congress would have the upper hand in the last two of these forums and could do much to block the success of any alternative efforts at rent seeking.

The most substantial threat which vouchers pose to political stability and the efficacy of government is their potential to further weaken political parties. Political scientists have identified political parties as serving important stabilizing and legitimating functions. These scholars argue that political parties insure stability by increasing the size of represented constituencies, thereby allowing interest group bargaining to take place within the confines of the party rather than in the legislative bodies themselves, where it is likely to be a free-for-all.<sup>139</sup> Moreover, party discipline enforced by party leadership within legislatures ensures that politicians are relatively insulated from interest group pressures.<sup>140</sup> Politicians then pass legislation widely supported by parties, who in turn represent large segments of society, thereby legitimating a process of representative government.

In contrast, weak political parties allow special interests to pursue narrow agendas, thereby undermining both stability and legitimacy.<sup>141</sup> Interest groups undermine stability because the party-leadership cannot enforce discipline in passing sensible legislation reached as the result of intra-party compromise, and interest groups undermine legitimacy because political outcomes no longer represent the wishes of a wide spectrum of interests.

Although the voucher plan would weaken political parties, it should not diminish the stability or legitimacy of representative government. Rather than pursuing narrow agendas, the larger (and therefore more influ-

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137. See *supra* text accompanying note 83 (explaining bundling).

138. See *supra* note 99 (discussing whether ballot initiatives should be subject to voucher plan).

139. Fitts, *supra* note 63, at 1612-13. Lowenstein, another legal scholar highly critical of our current system of campaign finance, has proposed a public financing scheme using the legislative party leadership as brokers. Lowenstein, *supra* note 82, at 351-54. Adamany and Agree criticized Senator Metcalf's voucher plan because it "ignored the legitimate role of political parties." ADAMANY & AGREE, *supra* note 88, at 191.

140. Fitts, *supra* note 63, at 1628 (describing as "the political science ideal" the Congress of the late nineteenth and early twentieth century, which was characterized by strong party leadership).

141. See Morris P. Fiorina, *The Decline of Collective Responsibility in American Politics*, DAEDALUS, Summer 1980, at 25, 40.

ential) of the voucher-financed interest groups no doubt would represent relatively broad interests. They would do so because a broad appeal will be necessary to attract a large number of voucher contributions. Being broadly based, these interest groups should be seen as representing important societal interests, not special interests. Certainly, they would be seen as being no less legitimate than the current two dominant political parties in representing the interests of broad constituencies.<sup>142</sup>

That is not to say that political parties have no role to play under the voucher plan. It may be that political parties would offer economies of scale in a voucher-oriented political market and act as a stabilizing agent in the transition to voucher financing. If political parties continue to serve a useful role under the voucher plan, voters will express their support of parties through their vouchers. But strong political parties do not seem indispensable to effective governance under a voucher plan.<sup>143</sup>

Finally, the voucher plan may have a negative impact on governance if it ends up protecting incumbents.<sup>144</sup> Vouchers could benefit incumbents for two reasons: first, campaign contributions follow winners;<sup>145</sup> and second, incumbents generally have greater name recognition than challengers. However, there is no reason to believe that a bias in favor of incumbents will be any worse under a voucher system than it is under the current system of campaign finance. Moreover, the voucher system has several elements that work against incumbents. First, the plan bars the use of the perks of elected office to further electoral goals. Thus the president could not make a campaign trip on Air-Force One without reimbursing the government for the fair market value of a chartered Boeing 747.<sup>146</sup> Also, politicians will be required to disgorge any campaign funds raised before the voucher plan is enacted. Thus, incumbent war chests will not be an obstacle for a challenger entering a race. Finally, some political entrepreneurs probably will capitalize on anti-incumbency feeling by pledging to use

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142. See also Ackerman, *supra* note 11, at 74 (rejecting political party opposition to interest group politics under his voucher plan).

143. Michael Fitts suggests political parties may be strengthened under a voucher plan by mandating that a portion of voucher dollars be allocated to them. See Letter to author from Professor Michael A. Fitts 2 (Feb. 13, 1995) (on file with author). I prefer to let political parties argue their virtues in the voucher marketplace.

144. See ADAMANY & AGREE, *supra* note 88, at 191.

[Senator Metcalf's] voucher plan also does not take into account the variability in constituency characteristics or the advantages of incumbency. A number of factors—one-party electoral domination, the unequal strength of the majority and minority party organizations, and the high visibility of the majority party incumbent—are likely to combine, especially in House districts, to produce substantial inequalities in the numbers of vouchers collected by incumbents and challengers.

*Id.*

145. SORAUF, *supra* note 71, at 24.

146. I draw this example from Foley. Foley, *supra* note 89, at 1245. Foley also notes that incumbency problems could be solved through term limits without violating the principle of "equal-dollars-per-voter." *Id.* Whether term limits are desirable given their impact on governance is beyond the scope of this Article.

voucher dollars donated to them only in support of challengers or to defeat incumbents.<sup>147</sup>

### C. *Benefits as a Preference-Aggregation Mechanism*

A third criterion for determining the merits of the voucher plan is how well it functions as a preference-aggregation mechanism. The principal advantage of the voucher plan under this criterion is that it allows registration of the intensity of preferences.<sup>148</sup> Thus, the plan is more like weighted (or Borda count) voting<sup>149</sup> and cumulative voting<sup>150</sup> than simple majority rule. Under majority voting, each individual has one vote, which cannot be used to express how much the voter likes the candidate or the position she supports.<sup>151</sup> In contrast, mechanisms like the voucher plan allow room to express intensity of preference. In other words, a person does not vote simply AARP > Smith for President > Nature Conservancy, but votes \$50 for AARP, \$30 for Smith, and \$20 for the Nature Conservancy.

Another significant advantage of the voucher plan as an intensity-registering mechanism is that it allows people with strong feelings about particular issues to "plump" all of their support behind a single group or candidate, thereby having greater impact on that issue. In an analogous area, Lani Guinier has argued that the ability to plump through cumulative voting in at-large elections would allow groups previously shut out of the political system to exercise influence more in proportion to their numbers in society.<sup>152</sup>

The possibility of plumping does have a downside, though. Suppose that when the voucher system is enacted, the existing distribution of power

147. Indeed, the voucher plan could be modified to mandate that a portion of voucher dollars be donated either to candidates who have never before run for elected office or to organizations promising to support such candidates. See also *supra* note 143 (discussing an analogous proposal to bolster political parties' strength).

148. See Strauss, *supra* note 132, at 1374 ("[C]ontributions allow voters—that is, contributors—to register the intensity of their views. . . . [A] contributor can spend her money in direct proportion to the intensity of her views.").

149. Jean-Charles de Borda first proposed weighted voting in 1781. ALLAN M. FELDMAN, *WELFARE ECONOMICS AND SOCIAL CHOICE THEORY* 182-83 (1980); MUELLER, *supra* note 17, at 113.

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Under cumulative voting, voters get the same number of votes as there are seats or options to vote for, and they can distribute their votes in any combination to reflect their preferences. Like-minded voters can vote as a solid bloc or, instead, form strategic, cross-racial coalitions to gain mutual benefits. The system is emphatically not racially based; it allows voters to organize themselves on whatever basis they wish.

GUINIER, *supra* note 130, at 14-15; see also Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1500 n.297 (1991).

151. Voting in a winner-take-all election is an exceedingly poor way to measure intensity of voter preference. See ALBERT O. HIRSCHMAN, *SHIFTING INVOLVEMENTS: PRIVATE INTEREST & PUBLIC ACTION* 104 (1982) ("[T]he 'one man one vote' rule gives everyone a *minimum* share in public decision-making, but it also sets something of a maximum or *ceiling*: for example, it does not permit the citizens to register the widely different intensities with which they hold their respective political convictions and opinions.")

152. See GUINIER, *supra* note 130, at 149.

among interest groups is far from your ideal. Since you have only \$100 to give to your preferred groups, you will be tempted to spend all of your voucher dollars on the single group for which your marginal utility per voucher dollar is highest. For example, you might give all of your money to Smith for President and forsake your interest in social security issues or protecting the environment, so that you could at least hope to make a difference on the issue that is most important to you.

Hylland and Zeckhauser recognized this problem in discussing their own intensity-based preference-aggregation mechanism for determining which public goods society should produce.<sup>153</sup> Their solution applied in this context requires voucher dollars with diminishing marginal returns. This is accomplished by awarding interest groups the square root of the voucher dollars donated to them by voters. For example, a \$25 voucher donation would be reduced to \$5, and a \$16 donation would be reduced to \$4. The square root approach will lead individuals to spread their votes in proportion to their marginal valuation of the interest groups.<sup>154</sup> This spreading will occur because individuals will have more influence by using the \$100 in vouchers to make \$16 donations to six groups (thereby donating a total of \$24), than by making \$25 donations to four groups (thereby donating a total of \$20) or by making a \$100 donation to one group (thereby donating \$10).

The square root formula still allows voters to register the intensity of their preferences, but it discourages excessive plumping. In this way, the voucher system will encourage the voter to fund her panoply of interests, not just the most important one. A further benefit of the square root solution is that it does not present strategies for "beating the system;" it will not lead to strategic voting.<sup>155</sup> A disadvantage of the square root formula, however, is that it lacks intuitive appeal to non-economists and accordingly it could undermine the credibility of the voucher plan. The square root solution is a desirable but not a crucial feature of the voucher plan.

As for Arrow's five fairness criteria,<sup>156</sup> the voucher plan, like the Borda count, may violate the "independence of irrelevant alternatives" criterion.<sup>157</sup> But this is equally true of our current system of campaign

153. See Aanund Hylland & Richard Zeckhauser, *Efficient Public Goods Decisions Under an Established Tax System* 13-14 (Aug. 1984) (unpublished manuscript, on file with author).

154. See *id.* at 14-17.

155. See MUELLER, *supra* note 17, at 139; *id.* at 462 (characterizing strategic behavior in the face of the Hylland-Zeckhauser scheme as "both complicated and risky").

156. See *supra* note 40 and accompanying text.

157. Here is how the Borda count may violate Arrow's independence criterion. Suppose two voters are trying to decide between alternatives *x*, *y*, and *z*. Under the Borda count, each voter assigns 5 points to her first choice, 4 points to her second choice and 0 points to her third choice:

For instance, suppose person 1 prefers *z* to *x* to *y*, while person 2 prefers *y* to *x* to *z*. . . . Now alternative *x* gets  $4 + 4 = 8$  points, alternative *y* gets  $1 + 5 = 6$  points, and alternative *z* gets  $5 + 1 = 6$  points. Therefore, for this preference profile, *x* is socially preferred to *y* according to the weighted voting rule.

finance, which also measures intensity of preference in dollars. Rather than compare the voucher plan to some ideal system, we should ask whether there is a better campaign finance reform preference-aggregation mechanism which violates a less objectionable Arrow criterion. I have not found one.<sup>158</sup>

Moreover, it would be a mistake to analyze the voucher plan alone rather than in conjunction with the majority voting that it funds.<sup>159</sup> The voucher plan reduces the risk of cycling in our system of majority voting by limiting the range of realistic electoral choices to those politicians who manage to obtain sufficient voucher funding to run a viable campaign. Majority voting also stabilizes the tumult of the interest group process created by the voucher plan by encouraging voucher dollar spending on candidates likely to obtain a majority vote. In sum, agenda-setting in both markets limits the possibility of Arrowian cycling.

#### D. Likelihood of Enactment

##### 1. Public Opinion

Congressional support for a true campaign finance reform plan, especially a plan as radical as the voucher plan, is likely to be lukewarm.<sup>160</sup> There are obvious agency problems in letting legislators set their own conditions for electoral competition.<sup>161</sup> Therefore, if the voucher plan is to be enacted, it will need widespread public support. The relevant question becomes whether the voucher plan could obtain such support.<sup>162</sup>

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However, suppose person 1 becomes disillusioned with alternative *z*, and his preference ordering changes to *x* over *y* over *z*. If the voting is repeated, *x* gets  $5 + 4 = 9$  points, *y* gets  $4 + 5 = 9$  points, and *z* gets  $1 + 1 = 2$  points. Therefore, given this new preference profile, *x* is socially indifferent to *y*. Society has become indifferent between *x* and *y*, even though neither person has changed his feelings about *x* and *y*! Consequently, weighted voting violates the independence requirement.

FELDMAN, *supra* note 149, at 183; see also *id.* at 199-201 (discussing strategic voting under the Borda count).

158. See Jonathan Levin & Barry Nalebuff, *An Introduction to Vote-Counting Schemes*, J. ECON. PERSP., Winter 1995, at 3 ("Arrow . . . demonstrates that any voting system applied to an unrestricted collection of voter preferences must have some serious defect; we must always choose between flawed alternatives. With conflicting theoretical guidance to help select the least-flawed option, people evaluate a system by its likely effect on the status quo outcome.").

159. See Stearns, *supra* note 23, at 1231-32.

160. See Macey, *supra* note 57, at 1680 n.38 (suggesting that incumbents will pass campaign finance bills "particularly likely to benefit incumbents").

161. See Hasen, *supra* note 30, at 1331.

162. Public opinion likely will be influenced by the views of currently existing interest groups. For this reason, it is important to gain the support of these groups. Existing groups, at least those that expect to receive support under the voucher plan, should do well in the new system because of their organizational headstart over new groups. Schmitter predicts support for his voucher plan from existing groups who expect to come out as winners. See Schmitter, *Corporative Democracy*, *supra* note 88, at 56. Foley argues the "equal-dollars-per-voter" principle should prevent already-existing interest groups from having an organizational headstart in collecting funds; they would have no funds until voters contributed them. Foley, *supra* note 89, at 1254. This adherence to ideological purity might decrease the chances the voucher plan could be enacted by alienating the very groups whose support may be

Public opinion polls indicate that a majority of Americans oppose public financing of congressional elections.<sup>163</sup> This is no surprise, given the pervasive view that government bureaucracy is inefficient and given the public's antipathy to additional taxes.<sup>164</sup> However, public support has never been measured for the specific voucher plan discussed here, which is a market-based, rather than bureaucracy-based, approach to allocating public funds. Indeed, despite the additional tax burden vouchers would impose, the plan may be especially palatable to those on the right, who already have well-financed organizations in place ready to be funded by vouchers and who have advocated using vouchers in other areas, like education.<sup>165</sup> Given the public's current disgust with our political system,<sup>166</sup> this may be an opportune moment for those advocating fundamental change in the relationship between money and politics.

A major argument against the voucher plan is that it will lead to an increase in interest group rent seeking, causing a decline in overall social wealth.<sup>167</sup> I have already explained reasons for rejecting Kaldor-Hicks efficiency as the sole criterion applied to creating a good political process.<sup>168</sup> Moreover, the plan probably would not decrease social wealth. As explained above, there is probably a *negative* correlation, rather than a *positive* one, between the number of interest groups and the total amount of social wealth lost by rent seeking.<sup>169</sup>

The voucher plan becomes all the more appealing when one considers the tremendous rents that a single group, like Brush Wellman, can command from the government.<sup>170</sup> The cost-effectiveness of a \$3 billion bian-

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required for enactment. For this reason, I oppose prohibiting existing interest groups from using their current organizational benefits.

163. For example, a 1994 CBS/*New York Times* public opinion poll showed 38% of Americans favored public financing and 54% opposed it. American Political Network, Inc. Poll Update, *CBS/NY Times: Dole Feels the Health Care Heat, Too*, Sept. 13, 1994, available in LEXIS, Nexis Library, Curnws File. But public opinion may depend upon how the question is asked. Indeed, a 1993 poll conducted for Public Citizen, a group that supports public financing of congressional elections, found 72% support for extending public financing to congressional elections, where the proposed reform included campaign spending and contribution limits. Paul D. Wellstone, *True Election Reform*, CHRISTIAN SCI. MONITOR, Mar. 22, 1993, at 18. Senator Mitch McConnell suggested Public Citizen rigged its 1990 poll to produce results showing 58% support for public financing. Robert T. Garrett, *McConnell's Change in Campaign Bill is Killed*, LOUISVILLE COURIER-JOURNAL, July 31, 1990, at B1, B3.

164. Sorauf explains the lack of serious proposals for full-public funding considered by Congress by reference to such plans "political unpopularity." Sorauf, *supra* note 136, at 1357 n.36.

165. Republican Senator Daniel Coats and conservative activist William J. Bennett have advocated school vouchers as part of their 19-bill "Project for American Renewal." Cheryl Wetzstein, *Coats Seeks Taxbreak for Social Welfare Aims*, WASH. TIMES, Sept. 7, 1995, at A5. Of course, the possibility that the voucher plan could strengthen interest groups on the right may lead those on the left to oppose the plan despite its egalitarian benefits.

166. See *supra* notes 3-4 and accompanying text.

167. See, e.g., Epstein, *Property*, *supra* note 57, at 56; BeVier, *supra* note 122, at 1265-66.

168. See *supra* Part I.C.

169. See *supra* note 134 and accompanying text.

170. See *supra* notes 12-16 and accompanying text (describing Brush Wellman's rent seeking).

nual voucher plan<sup>171</sup> is quite evident in light of just this one \$15 billion instance of rent seeking, and all the more so when one considers all the other special deals made by those with enormous political capital. As Senator Paul Wellstone has noted, “[f]or a fraction of the estimated \$500 billion it is costing to fix the damage done by savings-and-loan lobbyists who pressed for weakened thrift regulations, we could finance decades of honest, democratic elections.”<sup>172</sup>

Some may argue that the voucher plan will enhance the power of “special interests” at the expense of the public interest.<sup>173</sup> This argument is flawed in two respects. First, it compares the voucher plan to some idealized political system rather than to our current system, which is already overrun by interest groups. Second, the argument ignores the important role interest groups play in overcoming collective action problems and monitoring legislative performance. Although individual voters very rarely have adequate incentives to monitor legislative action, interest groups do.<sup>174</sup> Thus, interest groups in and of themselves are not objectionable; interest group competition, when well-regulated to equalize political capital and prevent excessive rent seeking, serves important public interests.

## 2. *Constitutionality*

Even if public pressure forced Congress to enact a voucher plan, the plan would be challenged on constitutional grounds. Although just a few years ago the caselaw seemed hostile to fundamental campaign finance reform, times have changed. Recent Supreme Court decisions and the writings of some legal scholars suggest the voucher plan might pass constitutional muster.

In *Buckley v. Valeo*, the Supreme Court squarely rejected the argument that Congress could limit independent campaign expenditures in an effort to equalize the political influence of different groups in society. “[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

171. See *supra* note 91 (describing costs of voucher plan). The costs easily could surpass \$3 billion when we consider the possibly high enforcement costs necessary to police the various prohibitions of the voucher program. Even considering extremely high enforcement costs, running into the tens of millions of dollars annually, the voucher program still would be cost effective if it prevents instances of rent seeking like the Brush Wellman example. The political problem arises because enforcement costs are budget items for all to see, while rent-seeking activity is often hidden from public view. Thus, the asymmetric availability of information about the social costs of having or not having a voucher program could affect public attitudes towards it. See Richard L. Hasen, Comment, *Efficiency Under Informational Asymmetry: The Effect of Framing on Legal Rules*, 38 UCLA L. REV. 391, 395 (1990) (explaining the “availability” heuristic).

172. Wellstone, *supra* note 163, at 18.

173. Recall that earlier campaign finance voucher plans prevented interest groups from collecting the vouchers in order to prevent increased power for such groups. See *supra* note 88.

174. BeVier, *supra* note 122, at 1273-75; see also FARBER & FRICKEY, *supra* note 17, at 98 (“[C]ompetition between interest groups helps keep the system honest.”).

First Amendment . . . ."<sup>175</sup> Instead, the *Buckley* Court considered whether Congress' campaign finance regulations could be justified by the government's compelling interest in preventing actual corruption and the appearance of corruption.<sup>176</sup> The Court held that limits on campaign contributions "entail[ ] only a marginal restriction upon the contributor's ability to engage in free communication."<sup>177</sup> When balanced against the government's compelling interest in preventing corruption, the limits were constitutional. In contrast, limits on independent expenditures "appear to exclude all citizens and groups except candidates, political parties, and the institutional press from any significant use of the most effective modes of communication."<sup>178</sup> But corruption or the appearance of corruption is unlikely with independent expenditures.<sup>179</sup> Accordingly, the Court declared limits on independent expenditures unconstitutional.<sup>180</sup>

Until recently, the Court stuck to the corruption rationale and distinguished between permissible contribution limits and impermissible

175. *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976). The Court failed to consider whether the equalization rationale justified *contribution* limits because it held such limits were justified to limit the "actuality and appearance of corruption." *Id.* at 25-26; see *infra* note 189.

176. *Buckley*, 424 U.S. at 25-29. Indeed, preventing corruption is the only compelling state interest the Court has recognized as justifying a restriction upon campaign contributions. *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985).

The Court continues to see corruption as the primary basis for campaign finance regulation. Last term, the Supreme Court held that the First Amendment barred an Ohio statute prohibiting the distribution of anonymous campaign literature supporting or opposing a local ballot proposition. *McIntyre v. Ohio Elections Comm'n*, 63 U.S.L.W. 4279 (1995). In *McIntyre*, the Court carefully distinguished the state's interest in requiring disclosure of the author of a handbill relating to a *ballot initiative* on the one hand, and the state's interest in requiring disclosure of the source of campaign contributions or independent expenditures in *candidate elections* on the other:

Not only is the Ohio statute's infringement on speech more intrusive than the *Buckley* disclosure requirement, but it rests on different and less powerful state interests. The Federal Election Campaign Act of 1971, at issue in *Buckley*, regulates only candidate elections, not referenda or other issue-based ballot measures; and we construed "independent expenditures" to mean only those expenditures that "expressly advocate the election or defeat of a clearly identified candidate." [*Buckley*, 424 U.S.] at 80. In candidate elections, the Government can identify a compelling state interest in avoiding the corruption that might result from campaign expenditures. Disclosure of expenditures lessens the risk that individuals will spend money to support a candidate as a *quid pro quo* for special treatment after the candidate is in office. Carriers of favor will be deterred by the knowledge that all expenditures will be scrutinized by the Federal Election Commission and by the public for just this sort of abuse. Moreover, the federal Act contains numerous legitimate disclosure requirements for campaign organizations; the similar requirements for independent expenditures serve to ensure that a campaign organization will not seek to evade disclosure by routing its expenditures through individual supporters. See *Buckley*, 424 U.S., at 76. In short, although *Buckley* may permit a more narrowly drawn statute, it surely is not authority for upholding Ohio's open-ended provision.

*McIntyre*, 63 U.S.L.W. at 4285 (footnotes omitted). But see *id.* at 4293 (Scalia, J., dissenting) (stating that "[o]ur primary rationale for upholding" the disclosure provision in *Buckley* "was that it served an 'informational interest' by 'increas[ing] the fund of information concerning those who support the candidates,'" and that the Ohio provision at issue in *McIntyre* "serves the same informational interest" as well as other more important interests) (citing *Buckley*, 424 U.S. at 81).

177. *Buckley*, 424 U.S. at 20-21.

178. *Id.* at 19-20 (footnotes omitted).

179. *Id.* at 45-48.

180. *Id.* at 58-59.



independent expenditure limits. But in *Austin v. Michigan State Chamber of Commerce*,<sup>181</sup> the Court for the first time upheld government regulation of independent expenditures on what appear to be egalitarian grounds.<sup>182</sup> The law at issue in *Austin* barred corporations, other than media corporations, from using general treasury funds for independent expenditures in state election campaigns.<sup>183</sup> In upholding the law, the Court radically expanded the definition of the kind of "corruption" that can serve as an interest compelling enough to justify restrictions on freedom of speech: "Michigan's regulation aims at a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."<sup>184</sup>

Whether the voucher program will run into First Amendment problems depends upon whether the Supreme Court continues to move in the direction of *Austin* or backs away from it. To be sure, the *Austin* decision limited itself to corporate independent expenditures.<sup>185</sup> But its reasoning applies outside of the corporate context. Indeed, Justice Scalia, dissenting in *Austin*, saw no principled difference between corporate wealth and wealth used for campaign expenditures. "Why is it perfectly all right if advocacy by an individual billionaire is out of proportion with 'actual public support' for his positions?"<sup>186</sup>

Justice Scalia is correct. Although the state-sanctioned nature of corporations gives the government an added interest in regulating their activities, the corporate form is irrelevant to whether wealth distorts the political system. Moreover, Justice Scalia is correct that the traditional definition of "corruption" as the political quid pro quo does not include the "corrosive" effects of wealth on the electoral process.<sup>187</sup> Truly independent expenditures<sup>188</sup> in an electoral campaign may allow wealth to distort the political system, but they do not involve a quid pro quo.

181. 494 U.S. 652 (1990).

182. *Id.* at 655, 659-60. The Court hinted at such a distinction in *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986). For a useful discussion of the relationship between this case and *Austin*, see Cole, *supra* note 70, at 261-71. Ashdown provides a good general overview of *Austin*. See Gerald G. Ashdown, *Controlling Campaign Spending and the "New Corruption": Waiting for the Court*, 44 VAND. L. REV. 767 (1991). Justices Scalia and O'Connor have been criticized for their failure to explain their decisions to concur in *Massachusetts Citizens for Life* but to dissent in *Austin*. See, e.g., Daniel H. Lowenstein, *A Patternless Mosaic: Campaign Finance and the First Amendment After Austin*, 21 CAP. U. L. REV. 381, 382 n.3 (1992).

183. *Austin*, 494 U.S. at 654-55, 666-67.

184. *Id.* at 659-60.

185. *Id.* at 676 (Brennan, J., concurring).

186. *Id.* at 685 (Scalia, J., dissenting) (finding "entirely irrational" the Court's limitation of its decision to corporate expenditures).

187. Justice Scalia termed this argument by the *Austin* majority, the "New Corruption." *Id.* at 684.

188. Just how "independent" such expenditures usually are is open to serious question. See Adam Clymer, *Page By Page, A Chronicle Of Misdeeds*, N.Y. TIMES, Sept. 8, 1995, at A1, D16 (describing

But whereas Justice Scalia concludes that the Michigan law cannot pass muster under *Buckley*, I believe the better approach is to acknowledge the logical implications of the Court's reasoning and accept political equality as an interest adequate to justify regulating campaign expenditures.<sup>189</sup> This compelling interest in political equality justifies not only the plan at issue in *Austin*, but also the voucher program proposed here.

Legal scholars already have advanced the argument that egalitarianism should be considered a compelling interest to be weighed against traditional free speech interests.<sup>190</sup> Cass Sunstein, for example, has called for a "New Deal" for free speech, allowing greater government regulation of speech in order to promote certain democratic values.<sup>191</sup> The New Deal for free speech would sound the death knell for *Buckley*, just as the New Deal for property rights spelled the end of the *Lochner* era.<sup>192</sup> This new approach

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how former Senator Packwood cooperated with supporters making nominally independent expenditures).

189. In *Buckley*, the government asserted that an "ancillary" reason for contribution limits was "to mute the voices of affluent persons and groups in the election process and thereby to equalize the relative ability of all citizens to affect the outcome of elections." *Buckley v. Valeo*, 424 U.S. 1, 25-26 (1976). The Court did not determine the persuasiveness of this argument, holding instead that contribution limits could be upheld based solely upon the government's compelling interest in preventing the actuality and appearance of corruption. *Id.* at 26. In any case, the Court noted that "[c]ontribution limitations alone would not reduce the greater potential voice of affluent persons and well-financed groups, who would remain free to spend unlimited sums directly to promote candidates and policies they favor in an effort to persuade voters." *Id.* at 26 n.26.

190. E.g., Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 COLUM. L. REV. 1281 (1994). Blasi argues for another compelling interest justifying the enactment of campaign finance reform: candidate time protection. According to Blasi, candidates' preoccupation with fund-raising impedes the quality of representation, thereby invoking constitutional concerns. *Id.* at 1302-09. Blasi believes that his new-found compelling interest in protecting a candidate's time would not preserve a voucher plan against First Amendment attack. "Candidates facing or fearing tight races will be preoccupied with fund-raising (or voucher raising) under any system that does not restrict total spending." *Id.* at 1284. *But see supra* notes 136-37 and accompanying text (arguing that voucher-raising would be less time consuming than fundraising under the current campaign finance system).

191. "[I]n some circumstances, what seems to be government regulation of speech actually might promote free speech, and should not be treated as an abridgement at all. . . . [Moreover,] what seems to be free speech in markets might, in some selected circumstances, amount to an abridgement of free speech." Sunstein, *supra* note 11, at 267; *see also* CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 93-101 (1993) [hereinafter *SUNSTEIN, DEMOCRACY*] (discussing speech regulation in context of campaign finance reform); CASS R. SUNSTEIN, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390 (1994) [hereinafter *Sunstein, Political Equality*]. In these two recent works, Sunstein states that "we should look closely at the benefits and risks created by" Ackerman's voucher proposal. *SUNSTEIN, DEMOCRACY, supra* at 100; *see Sunstein, Political Equality, supra* at 1412-13. Although this position is heartening to those who favor voucher plans, Sunstein might ultimately reject the voucher plan because it will promote (albeit on a more equal playing field) the interest group politics Sunstein has criticized in his articles on civic republicanism. *See, e.g., Sunstein, Republican Revival, supra* note 37, at 1569-71. "[O]n pluralist assumptions it is unclear why laws should not be bought or sold like commodities in a marketplace. . . . But for those who believe in a deliberative function for politics, the marketplace metaphor will be misguided. . . ." *Id.* at 1545. Unlike Sunstein, I do not premise any arguments for reform on the emergence of new civic virtue among either the population at large or legislators.

192. *See supra* note 11 and accompanying text. As Sunstein explains:

would allow the government to "tone down or amplify particular voices in order to promote speaker diversity."<sup>193</sup>

Sunstein's New Deal for free speech would allow campaign finance reform plans like the voucher plan to pass constitutional muster if they were narrowly tailored to the goal of achieving egalitarian pluralism.<sup>194</sup> In his discussion of Ackerman's voucher plan, Sunstein notes that it would "promot[e] political equality . . . without threatening to diminish aggregate levels of political discussion."<sup>195</sup>

Although "aggregate levels" of political discussion will remain constant under a voucher plan, a wealthy individual's ability to promote her views will face limits. Consider the extreme case: an individual with unpopular political ideas is prevented from spending her own money to run for federal office. To the extent that money facilitates speech, the voucher plan will stifle an unpopular political view. Nichol, however, argues persuasively that the current campaign finance system denies a right to speak to the great majority of Americans who could not afford it, a more objectionable result.<sup>196</sup>

Not all First Amendment scholars believe radical campaign finance reform could pass constitutional muster.<sup>197</sup> Kathleen Sullivan, for example, argues against the New Deal for speech movement and in favor of "progressive free speech libertarianism."<sup>198</sup> Sullivan contends that speech is qualitatively different from the goods and services which the government regulates under the New Deal. "[S]peech might be uniquely privileged as

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The real problem is that *Buckley* removes many difficult issues of campaign finance reform from the democratic process and resolves them through judicial fiat. The Court did not explain why it was constitutionally illegitimate for Congress to say that economic inequalities could not be translated into political inequalities in the form of wide disparities in political expenditures.

SUNSTEIN, *DEMOCRACY*, *supra* note 191, at 98.

193. Julian N. Eule, *Promoting Speaker Diversity: Austin and Metro Broadcasting*, 1990 SUP. CT. REV. 105, 106. Note that this language parallels the idea of leveling-up and leveling-down. See *supra* note 87 and accompanying text. The voucher plan, by leveling-down and leveling-up, seeks to tone down some voices and amplify others.

194. The voucher plan is narrowly tailored to meet the goal of egalitarian pluralism. Rather than the government preventing speech, the plan gives each individual the opportunity to volunteer unlimited time for or against political candidates, to volunteer unlimited time and donate an unlimited amount of money for or against any other political activity not directly connected with political candidates, and to donate an equal (though limited) amount of voucher money to candidates running for federal office, either with or without an interest group intermediary.

195. SUNSTEIN, *DEMOCRACY*, *supra* note 191, at 100.

196. See Gene R. Nichol, *Money, Equality and the Regulation of Campaign Finance*, 6 CONST. COMMENTARY 319, 324-25 (1989) ("If a \$1,000 expenditure limit threatens to render a potential \$10,000 speaker ninety per cent censored, what is the status of a citizen who would like to engage in mass speech but has no money?").

197. See, e.g., Kathleen M. Sullivan, *Free Speech Wars*, 48 SMU L. REV. 203 (1994); BeVier, *supra* note 122, at 1260-69; Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, in *THE BILL OF RIGHTS IN THE MODERN STATE*, *supra* note 11, at 225, 228-29.

198. Sullivan, *supra* note 197, at 213. The Sullivan article is based upon a lecture. Sullivan calls her thoughts "the tentative beginnings" of a response to the New Deal for speech movement. *Id.* at 213.

the currency of peaceful political change."<sup>199</sup> Moreover, Sullivan believes there are reasons to "mistrust government regulation of speech more than we mistrust government regulation of markets for goods and services."<sup>200</sup>

The constitutional debate has just begun and the Supreme Court's personnel has changed since both *Buckley* and *Austin*.<sup>201</sup> If the current trend toward the erosion of *Buckley* continues, the Supreme Court should hold the voucher plan constitutional.<sup>202</sup> But such an outcome is far from certain. Should the Supreme Court reject egalitarianism as a compelling state interest or find that the voucher plan is not narrowly tailored to meet that interest, a constitutional amendment would be required. Obviously, the voucher plan's prospects diminish if it must be enacted under the stringent requirements for amending the Constitution.

#### IV

##### THE INFERIORITY OF EGALITARIAN PLURALIST ALTERNATIVES

The voucher plan is only one of many possible egalitarian pluralist political reform plans. In this Part, I consider three alternatives: (1) non-voucher based public financing plans, (2) proportional representation, and (3) group-based political solutions. I contrast these plans to the voucher plan using the same four criteria used to evaluate the voucher plan: egalitarianism, impact on governance, benefits as a preference-aggregation mechanism, and likelihood of enactment.

All three alternatives aim for an egalitarian pluralist market, but they use vastly different means to achieve it. Direct public financing, like the voucher plan, aims to affect political representation indirectly by changing

199. Sullivan, *supra* note 197, at 213.

200. Sullivan, *supra* note 197, at 214. The three reasons Sullivan suggests are:

First, speech regulation may be more intractably ineffective than other forms of regulation . . . . Second, there may be a greater risk of error when government regulates speech than when it regulates commercial markets . . . .

Third, there might be special dangers in trusting government to change culture even if we trust it to reallocate some aspects of material power.

Sullivan, *supra* note 197, at 214. Note that the voucher plan presents fewer dangers on this score, because allocation of speech is directed by the people through the equalized market mechanism rather than through government fiat.

201. See Lowenstein, *supra* note 182, at 383 (noting that given the replacement of Justices Brennan and Marshall with Souter and Thomas, *Austin* may end up as "a temporary aberration in the Court's treatment of the campaign finance issue").

202. Ackerman and Sunstein do not believe *Buckley* would have to be overruled. See Ackerman, *supra* note 11, at 77-78; Sunstein, *Political Equality*, *supra* note 191, at 1413. Ackerman's constitutional argument, in part, is that money spent on political campaigns is qualitatively different from the "green" money spent to buy goods and services. Ackerman, *supra* note 11, at 79-80. Although Ackerman's argument might be persuasive if we were writing on a clean slate, I agree with Foley that *Buckley* must be overruled for a voucher plan to be declared constitutional. Foley, *supra* note 89, at 1211-12. It is hard to see how the Court could get around its statement in *Buckley* that "the 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." *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976). Raskin and Bonifaz offer additional arguments for overruling *Buckley*. See Raskin & Bonifaz, *supra* note 97, at 320-30.

the system of financing political campaigns. In contrast, proportional representation and group-based solutions aim to improve representation of marginalized groups directly by changing our system of selecting leaders.<sup>203</sup> The voucher plan has definite advantages over all of these alternatives; it represents the best hope for achieving real political equality.

#### A. Direct Public Financing

Non-voucher based public financing of elections is the most frequently discussed political reform aimed at creating an egalitarian pluralist political market.<sup>204</sup> Most of the public financing plans floating around legal circles these days are of the level-up variety only; they do not place limits on the ability of candidates to raise private funds or the ability of individuals to make independent expenditures. Instead, the plans seek to counteract the disproportionate influence of moneyed interests by providing political candidates with an independent source of campaign funds. I suspect that most of the proponents of public financing plans would prefer a level-down plan prohibiting all private funds but are wary of running afoul of *Buckley*.<sup>205</sup> I therefore analyze public financing plans of both the level-up and the level-down varieties.

Under a true level-down public financing plan, public financing would be mandatory and all independent expenditures would be banned. Under a level-up plan, however, candidates running for public office would have a

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203. Note that some variants of proportional representation and group-based political solutions could work in conjunction with a voucher plan. Cohen and Rogers, authors of the group-based associative democracy plan discussed *infra* Part IV.C, believe voucher plans like the one proposed by Schmitter are good, but certainly not enough to change the political process. See Joshua Cohen & Joel Rogers, *Solidarity, Democracy, Association*, in JOSHUA COHEN & JOEL ROGERS, *SECONDARY ASSOCIATIONS AND DEMOCRACY* (forthcoming 1995) (manuscript at 12 n.23, on file with author) (characterizing Schmitter's voucher plan and similar plans as "not . . . a panacea for current imperfections in pluralist representation"); see also Letter to author from Professor Joel Rogers 2 (Dec. 31, 1994) (on file with author) (stating his agreement with the author's position on campaign finance and noting that "we favor the sort of decentralized, libertarian sort of scheme you propose"). Amy, a proponent of proportional representation, expressed similar views. Letter to author from Professor Douglas J. Amy 2 (Sept. 7, 1995) (on file with author) (arguing that campaign finance reform and proportional representation are "crucial reforms that complement each other").

204. As a form of shorthand, I refer to these non-voucher based plans as "public financing" plans, although I recognize that the voucher plan is also a publicly-financed plan.

I do not mean to imply that all those who advocate public financing have egalitarian pluralism as their goal. Nelson and Magleby, for example, appear to favor public financing in order to increase the competitiveness of elections. See DAVID B. MAGLEBY & CANDICE J. NELSON, *THE MONEY CHASE: CONGRESSIONAL CAMPAIGN FINANCE REFORM 201* (1990) ("The [public financing] grant must be high enough to ensure sufficient seed money for general election candidates to run competitive races."). As before, however, I evaluate reform plans using egalitarian pluralism as the reform goal.

205. See, e.g., Jamin Raskin & John Bonifaz, *The Constitutional Imperative and Practical Superiority of Democratically Financed Elections*, 94 COLUM. L. REV. 1160, 1164 n.10, 1191 (1994) (rejecting *Buckley* but nonetheless proposing a public financing scheme "perfectly consistent with the dictates of *Buckley*"); Marty Jezer et al., *A Proposal for Democratically Financed Congressional Elections*, 11 YALE L. & POL'Y REV. 333, 345 (1993) ("Democratically Financed Elections meet the constitutional requirements of *Buckley* by making public financing voluntary.").

choice between public financing and private financing. If a candidate decides to rely on private funds, her opponent is given certain countervailing advantages, such as public matching funds for each private dollar donated.<sup>206</sup> In order to receive public funding, a candidate must demonstrate some level of political support in the community, such as by collecting nominal contributions from a specified number of individuals.<sup>207</sup> Candidates who meet these requirements are provided with funds for election-related expenses and with vouchers for free television and radio time.<sup>208</sup> Some of the plans place upper limits on the amount of the candidate's overall spending.<sup>209</sup>

Public financing does fairly well under the egalitarianism criterion, although level-up plans certainly do not do as well as the level-down voucher plan. A true level-down public financing plan reduces disparities in political capital by limiting the influence of wealthy and well-organized political groups. However, public financing fails to provide additional political capital to those persons and groups who are underrepresented in the current system.

Indeed, all direct public financing plans, whether level-up or level-down, fail to facilitate the representation of the poor and unorganized. These plans tend to insulate candidates from the political influence of all groups.<sup>210</sup> Unless the threshold of nominal contributions required to receive public financing is extremely high, candidates will not need the political support of any groups. Although this might appeal to those who believe politicians should exercise Burkean independence,<sup>211</sup> unaccountability is a minus under the egalitarianism criterion. Direct public financing will not encourage politicians to seek out the support of underrepresented groups, nor will it create incentives for political entrepreneurs

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206. Raskin & Bonifaz, *supra* note 205, at 1198-99. Their plan also would grant matching funds to allow a candidate to counter an independent expenditure campaign against her as well. Raskin & Bonifaz, *supra* note 205, at 1199; *see also* Jezer et al., *supra* note 205, at 358.

207. MAGLEBY & NELSON, *supra* note 204, at 201; Fred Wertheimer & Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 COLUM. L. REV. 1126, 1149 (1994); Raskin & Bonifaz, *supra* note 205, at 1190; Jezer et al., *supra* note 205, at 346-47. These last two sets of authors endorse the plan put forward by the Working Group for Electoral Democracy, "an association of grassroots activists and researchers who, for the past several years, have been working to catalyze a new democracy movement in the United States." Raskin & Bonifaz, *supra* note 205, at 1189-90. Wertheimer and Manes present the Common Cause plan.

208. Wertheimer & Manes, *supra* note 207, at 1149, 1151-52; Raskin & Bonifaz, *supra* note 205, at 1192-93, 1196-98; Jezer et al., *supra* note 205, at 345, 349-51, 354-59. For a discussion of the issues and problems with broadcast vouchers, *see* Randall Rothenberg, *Politics on TV: Too Fast, Too Loose?*, N.Y. TIMES, July 15, 1990, § 4, at 1.

209. A 1993 Senate reform plan, S.3, proposed spending limits without public financing. S.3, 103d Cong., 1st Sess. (1993); *see* Jezer, et al., *supra* note 205, 342-43 (criticizing S.3's failure to regulate the source of campaign money). The Jezer et al. plan contains no spending limits; the Common Cause plan does. Wertheimer & Manes, *supra* note 207, at 1149-54.

210. This is less true for level-up plans that allow private financing and independent expenditures. Those candidates who opt for the private financing will remain beholden to their political benefactors.

211. *See supra* note 131 and accompanying text.

to help those groups overcome their collective action problems. These plans will not strengthen the voice of the poor and unorganized.

Public financing would have a moderately positive impact on governance. It would reduce interest group rent seeking; politicians would be less dependent on campaign contributions and thus less likely to grant rents. Thus, the collective political capital of all groups would be reduced. Those groups with greater organizational ability, particularly groups which can get out the vote, will fare best.<sup>212</sup> Politics under a public financing regime, then, would look very much like the politics of today. Legislation is unlikely to reflect the interests of those currently shut out of the political system. Nor will politics be more responsive to changing societal interests.

Public financing offers few benefits as a preference-aggregation mechanism. Recall that the voucher plan, especially with its square root formula, does an excellent job measuring the intensity of preferences. The voucher plan allocates financing to candidates and interest groups in proportion to the support that they enjoy among voters. In contrast, public financing relies on a threshold approach to allocate funding. Anyone who collects a finite number of nominal contributions qualifies for financing. The mechanism draws no distinctions between a fringe candidate who barely collects enough contributions to qualify and a wildly popular candidate who easily meets the threshold; both are funded equally. To the extent that financing affects election outcomes, we should want it to reflect the intensity of preference for each candidate—otherwise, we give fringe candidates a better chance than they deserve and perhaps not enough support to popular candidates.

Moreover, because of its potential to increase the number of candidates in an election by lowering the costs to enter an election through government subsidy, direct public finance can only aggravate the problem of Arrowian cycling in majority voting.<sup>213</sup> Indeed, unlike vouchers, public financing lacks any meaningful system for filtering candidates; cycling problems may become acute.

On the final criterion, likelihood of enactment, public financing also compares poorly with the voucher plan. As discussed earlier, people generally oppose public financing plans,<sup>214</sup> probably because they are seen as an additional tax to fund a new, large bureaucracy. As Sunstein notes, voucher systems “reduce some of the problems posed by centralized, bureaucratic control of finances and elections.”<sup>215</sup> Although public attitudes toward

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212. Macey, *supra* note 57, at 1680 n.38.

213. See *supra* notes 41-48 and accompanying text.

214. See *supra* note 163 and accompanying text.

215. Sunstein, *Political Equality*, *supra* note 191, at 1412.

government regulation may shift,<sup>216</sup> at present the bureaucracy-based plan seems a much harder sell than a market-based voucher plan.

### B. Proportional Representation

Most industrialized democracies that have not come under British influence use a system of proportional representation (PR) to choose their legislators.<sup>217</sup> Under PR, "[e]ach group of voters receives the same proportion of the seats in the legislative body as the number of voters in the group is of the total electorate."<sup>218</sup>

There are two major types of PR voting systems:<sup>219</sup> those based on the single transferable vote ("STV" or the Hare system<sup>220</sup>), and those that use party lists ("list PR"). Under STV, voters elect several legislators from each voting district in a process by which each voter ranks all of the available candidates in order of preference. "[B]ecause votes are cast preferentially for individual candidates rather than . . . for parties or slates, the system enables individual voters, in their choice of candidates and order of preferences, to form coalitions of opinion or interest and to indicate their views regarding the relative significance of various issues that may come before the legislature."<sup>221</sup> Therefore, under STV, "the distribution of opinion in the legislature will reflect that found in the electorate at large, undistorted by filtration devices like primaries or the political judgments of party elites."<sup>222</sup>

In contrast to STV, under list PR voters cast ballots for parties rather than individual candidates. Each party receives a percentage of the seats in the legislature proportionate to the percentage of the vote it received in the election. Each party then fills its seats from its "list" of nominees.<sup>223</sup>

[T]he party list system reduces the capacity of individual voters to employ the ballot to register their views regarding the relative significance of the issues before the legislature; instead, they must choose among the limited range of positions set forth in party programs. Thus, whereas STV aims at the proportional representation

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216. See Jezer et al., *supra* note 205, at 359-60 (discussing the political prospects for a public financing plan).

217. BEITZ, *supra* note 19, at 123 n.1.

218. Sanford Levinson, *Gerrymandering and the Brooding Omnipresence of Proportional Representation: Why Won't It Go Away?*, 33 UCLA L. REV. 257, 257 n.1 (1985) (quoting Johnathan W. Still, *Political Equality and Election Systems*, 91 ETHICS 375, 384 (1981)).

219. To be sure, there are more variants, including variants combining PR with geographic- or district-based elections. See BEITZ, *supra* note 19, at 131. I focus on the pure forms of PR here for ease of comparison to the voucher plan.

220. The Hare system was first proposed by Thomas Hare and popularized by Mill. See *id.* at 125.

221. *Id.* at 126-27.

222. *Id.* at 127; see *id.* at 126 n.6 (summarizing the details of STV).

223. *Id.* at 127.



of persons, the list system is more accurately said to aim at the proportional representation of parties.<sup>224</sup>

STV is more egalitarian than list PR,<sup>225</sup> but list PR is the form of proportional representation most commonly used by those states with a PR system.<sup>226</sup> STV has seen a revival of sorts among academic commentators considering alternatives to the winner-take-all system of the United States.<sup>227</sup>

Both varieties of PR are superior to our current system under the egalitarianism criterion. Both plans level-up political capital by raising the value of each individual's vote. PR increases the number of candidates or parties in the legislature who will be accountable to the smaller constituencies that elected them. This reduces the inordinate influence of the relatively few groups currently influencing the two major political parties. In other words, PR promotes egalitarianism by increasing the probability that each vote will count toward choosing a responsive representative rather than be "wasted."<sup>228</sup>

Although PR is an improvement over the current system under the egalitarianism criterion, it is inferior to the voucher plan. Under PR, wealth and organizational ability still may be used to promote candidates for election. Thus, electoral outcomes will remain skewed by the unequal endowments of political capital available to influence the outcomes of elections.<sup>229</sup> Moreover, the threshold set for representation in the legisla-

224. *Id.* at 127-28.

225. *Id.* at 128.

226. STV is currently used in the Republic of Ireland, the Australian Upper House, and Malta. "It was the PR system used by several cities in the United States during the first half of this century, and it remains in use in Cambridge, Massachusetts, today." DOUGLAS J. AMY, *REAL CHOICES/NEW VOICES: THE CASE FOR PROPORTIONAL REPRESENTATION ELECTIONS IN THE UNITED STATES* 18 (1993).

227. See *id.* at 184; see also Richard Briffault, *Lani Guinier and the Dilemmas of American Democracy*, 95 COLUM. L. REV. 418, 435-41 (1995) (reviewing GUINIER, *supra* note 130) (faulting Lani Guinier's proposal for cumulative voting for its failure to consider STV as an alternative); Richard L. Engstrom, *The Single Transferable Vote: An Alternative Remedy for Minority Vote Dilution*, 27 U.S.F. L. REV. 781 (1993) (concluding that STV is preferable to cumulative voting); Mary A. Inman, Comment, *C.P.R. (Change Through Proportional Representation): Resuscitating a Federal Electoral System*, 141 U. PA. L. REV. 1991 (1993) (advocating STV for House elections); Michael E. Lewyn, *How Radical is Lani Guinier?*, 74 B.U. L. REV. 927, 940-43 (1994) (reviewing GUINIER, *supra* note 130) (discussing cumulative voting).

Amy argues that PR could eliminate the following problems of plurality elections: low voter turnout, tweeledum-and-tweedledee candidates, the two-party monopoly, wasted votes, issueless campaigns, underrepresentation of women, lack of minority representation, and gerrymandering. See AMY, *supra* note 226, at 4-9.

228. I say this in contrast to a "winner-take-all" system, where up to 49% of the votes in any election may be "wasted." On the concept of wasted votes, see GUINIER, *supra* note 130, at 94-101. Amy rightfully contends that "[w]orthless votes may be a better term, for these votes produce no representation and have no impact on policy-making." AMY, *supra* note 226, at 22.

229. Amy underestimates the role unequal endowments of political capital would continue to play under a PR system. For example, Amy states that in a PR system

have-not parties would be viable alternatives to the major parties. Even though they might begin with only a small amount of public support, they could nevertheless have a fair chance

tive body means that the interests of some individuals will not be represented under either PR plan.<sup>230</sup>

According to the conventional wisdom, PR plans fare poorly under the impact on governance criterion. PR usually leads to governing majorities based on a coalition of parties.<sup>231</sup> The parliamentary histories of Italy and Israel attest to the instability of PR government.<sup>232</sup> The Israeli experience indicates that small, cohesive parties can often play a pivotal and unstable role in government when none of the major parties are able to capture a majority of the seats.<sup>233</sup> This instability can threaten egalitarianism; extreme anti-egalitarian parties could coerce larger parties into adopting anti-democratic reforms as a condition of coalition membership.<sup>234</sup>

Ronald Rogowski has challenged the conventional wisdom that PR is unstable, arguing that list PR indeed may be more stable than other democratic electoral systems.<sup>235</sup> According to Rogowski, the stability of PR

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at electing at least some representatives to speak for their interests in government. Also, such have-not parties could serve as centers for fund-raising and political organizing.

AMY, *supra* note 226, at 95. Amy fails to explain how the "have-nots" will be able to organize and run a campaign when they initially have "only a small amount of public support," or where the "have-nots" will find the money to donate to these new "centers for fund-raising." Similarly, Amy understates the collective action problems that would face the poor under a PR system. *See id.* at 150 (implying that the poor's political capital would increase under a PR system because, "[i]n theory, what the poor lack in monetary resources, they can partly make up in numbers"); *see also* Amy, *supra* note 203, at 1 ("You are perfectly correct in saying that PR does not address the disparities in wealth in the political system . . . [but] your voucher plan could be similarly criticized for not addressing the political biases present in the winner-take-all election system.").

Amy further states that "PR could undermine the lobbying power of wealthy interests by encouraging stronger, more disciplined, and more ideological political parties . . ." AMY, *supra* note 226, at 96. Yet he fails to marshal any evidence that the degree of rent seeking by the wealthy is any lower in democratic societies using either STV or list PR, where ideological political parties are prevalent.

230. *See* BEITZ, *supra* note 19, at 132 n.18 ("Even in a perfectly constructed scheme of proportional representation a voter might be unlucky enough to vote only for candidates who turn out to accumulate fewer votes than the quota required for election."); MUELLER, *supra* note 17, at 221 n.7 ("[C]itizens who vote for parties with very little support go unrepresented."); IRIS M. YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 187 (1990) ("A system of proportional group representation in state and federal government in the United States might result in no seats for American Indians . . ."); *see also* Levinson, *supra* note 218, at 274 (noting that with a low threshold requirement in a proportional representation system, the Ku Klux Klan "would presumably thrive . . . in all too many states").

231. A notable exception is Austria, whose list PR plan has nonetheless produced only two viable political parties since World War II. Mueller infers from this fact that "the diversity of opinion on major public issues in Austria is adequately captured by two different party positions." MUELLER, *supra* note 17, at 220 n.4.

232. Mueller, *supra* note 17, at 223-26 (citing studies demonstrating the instability of governments under a PR system).

233. Amy attributes Israel's instability not to PR itself, but rather to two unique factors: first, the entire country functions as one large electoral district, encouraging small parties; and second, Israel has a very low legal threshold below which a party cannot win seats. *See* AMY, *supra* note 226, at 169-70.

234. Indeed, using Levinson's example of the Ku Klux Klan party, *see supra* note 230, one could easily imagine a reactionary and dangerous appeasement by a plurality party looking to keep its coalition together.

235. Ronald Rogowski, *Trade and the Variety of Democratic Institutions*, 41 INT'L ORG. 203, 209-12 (1987); *see also* AMY, *supra* note 226, at 157-60 (disputing claims of PR instability).

depends upon the social and economic cleavages in society;<sup>236</sup> PR is more stable than presidential or plurality systems except in societies where voters choose along a single policy dimension. In that particular case, Rogowski argues, PR “offers no apparent advantage—but neither is it remarkably inferior” in terms of stability.<sup>237</sup> Rogowski concludes that, “[a]t most, PR may make governing more difficult once extremists gain a toehold, but extremism apparently arises for reasons that have little to do with electoral systems.”<sup>238</sup> Given these competing accounts of PR, it is premature to draw any firm conclusions about its impact on governance.

The benefits of PR as a preference-aggregation mechanism are unclear. STV does not measure intensity of preference as well as the voucher plan because each individual lists his preferences ordinally; intensity of each preference is not expressed. However, its positive aspect is that almost every vote will be used to elect a more responsive legislator; there are very few “wasted” votes under STV.<sup>239</sup> Moreover, because STV merely replicates the views of society’s members, it also imports the instability of the electorate into the legislature.<sup>240</sup> Thus, if majority preferences among the electorate are cyclical, majority preferences will also be cyclical in the legislature.<sup>241</sup>

List PR does not measure individual preferences as accurately as STV because voters choose entire parties rather than individuals. List PR is likely to be less prone to cycling, however, because the parties serve an important agenda-setting function: List PR “transfer[s] the functions of selecting candidates, composing platforms, and forming coalitions from the voters themselves (as under STV) to party organizations.”<sup>242</sup> The instability of the preferences of the electorate is checked by the parties.

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236. Rogowski describes three types of electorates:

In the first, votes are determined almost entirely by “tribal” loyalties of ethnicity, religion, class, or inheritance . . . rather than by any issues of policy; hence they barely vary from one election to the next. In the second, voters choose more freely among alternative parties and candidates, but their choices are aligned along a single policy dimension, for example, along the classical left-right continuum. In the final case, voters consider more than one dimension, such as a left-right choice in domestic policy and a more aggressive or more pacific stance in external relations.

Rogowski, *supra* note 235, at 210.

237. *Id.* at 211.

238. *Id.* at 212 (footnote omitted).

239. *See supra* note 228 and accompanying text.

240. Ronald Rogowski, *Representation in Political Theory and in Law*, 91 *ETHICS* 395, 407 (1981).

241. STV is prone to agenda manipulation as well. Nicolaus Tideman, *The Single Transferable Vote*, *J. ECON. PERSP.*, Winter 1995, at 27, 35 (“The central implication of the Arrow theorem is that STV and other vote-counting rules are subject to inconsistency as the agenda changes, and therefore to agenda manipulation: the introduction of a new candidate, even one that is not chosen, can change the collective ranking of previous candidates.”) (citation omitted).

242. BEITZ, *supra* note 19, at 127.

Finally, most political scientists agree that the likelihood of STV or list PR being adopted in the United States any time soon is virtually nil.<sup>243</sup> Moreover, full proportional representation at the federal level would require a constitutional amendment.<sup>244</sup>

### C. Group-Based Political Solutions

The final pair of egalitarian pluralist plans call upon the state to anoint certain groups as participants in the political order. In this section, I sketch and critique two different group-based political solutions aimed at equalizing the political capital of groups: Joshua Cohen and Joel Rogers' associative democracy plan and Iris Marion Young's plan for empowering oppressed "social groups."<sup>245</sup>

243. See, e.g., AMY, *supra* note 226, at 199 ("In this political environment it is difficult to be sanguine about the chances of PR being adopted [in the United States] any time soon."); BERTZ, *supra* note 19, at 123 ("[P]roportional representation is not a subject of much practical controversy, or even interest, in the United States today; certainly there is no significant chance of its being adopted in the foreseeable future, either at the national level or in most of the states."). Briffault suggested that perhaps Lani Guinier gave no attention to STV and instead has focused exclusively on cumulative voting in her writings because "Guinier feared that STV is so different from districting that it is, as a practical matter, a nonstarter." Briffault, *supra* note 227, at 441.

244. Amy suggests a number of more limited proportional representation plans that he believes would not require a constitutional amendment, including a plan for use of PR "in elections for the U.S. House of Representatives . . . within each state for the election of that state's delegation." AMY, *supra* note 226, at 188; see *id.* at 189 (arguing that under Article I, section 4 of the United States Constitution, such a plan would be constitutional). Significantly, Amy does not advocate abolishing the office of President in the creation of a PR system for the United States. See *id.* at 57. Instead, Amy suggests use of the "alternative vote" mechanism to elect the President, *id.* at 193, whereby

[v]oters mark candidates in order of their preferences by putting numbers beside the candidates' names. If a candidate receives more than 50 percent of the first preferences, that person is elected. If not, the candidate with the smallest number of first preferences is eliminated and those votes are transferred to whomever of the remaining candidates the voter marked as the next preference. This process of ballot transfers continues until one candidate receives more than 50 percent of the vote.

*Id.* at 226-227. This plan would require a constitutional amendment setting up this system and abolishing the electoral college. See U.S. CONST. amend. XII.

245. Both sets of authors distance themselves from the concept of pluralism, presenting their plans as doing more than equalizing the bargaining positions of groups. See YOUNG, *supra* note 230, at 72-74 (criticizing pluralism because it "depoliticizes public life"); *id.* at 190 (interest group pluralism "operates precisely to forestall the emergence of public discussion and decisionmaking"); Cohen & Rogers, *supra* note 19, at 414-15 (criticizing egalitarian pluralism for (1) reducing politics to process without recognizing the value of deliberation, (2) ignoring the possibility of an objectively identifiable "common good," and (3) believing that fair process alone provides enough guidance to "generate determinate judgments about the appropriate objects of solicitude, subsidy, and other sorts of affirmative action"). But I believe it is fair to consider the plans against the egalitarian pluralist goal because a major goal of both plans is to redress disparities of political capital among groups. See YOUNG, *supra* note 230, at 184 ("[A] democratic public should provide mechanisms for the effective recognition and representation of the distinct voices and perspectives of those of its constituent groups that are oppressed or disadvantaged."); Cohen & Rogers, *supra* note 19, at 419 ("[T]he chances to hold office and influence political choices ought to be roughly equal across citizens."); *id.* at 425 ("Where manifest inequalities in political representation exist, associative democracy recommends promoting the organized representation of presently excluded interests.").

Under Cohen and Rogers' "associative democracy" plan, a variation on corporatism,<sup>246</sup> the state identifies a number of representative groups (or "associations") to act as bargaining partners in "(1) the formulation of policy, (2) the coordination of economic activity in the shadow of the law, and (3) the enforcement of administration and policy."<sup>247</sup> These associations would operate at national, regional/sectoral, and local levels.<sup>248</sup>

Cohen and Rogers contend that these associations will not simply pursue their narrow particularistic interests because the size and encompassing nature of these groups will generate a favorable environment for cooperation.<sup>249</sup> Cohen and Rogers look favorably upon Scandinavian-style corporatism in which business and labor are placed on a more equal footing and the "encompassingness" of the coalitions allows the government and associations to make hard choices beneficial for the society as a whole.<sup>250</sup>

Although Cohen and Rogers speak abstractly about "groups" and "associations" generally, their primary concern seems to be with empowering workers' unions and equalizing the class struggle between labor and capital, as modified by the presence of the modern bureaucratized welfare

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246. Under a corporatist system, interest representation (generally big labor and big business) "becomes more directly involved with state law-making and law-enforcing processes." Jane Mansbridge, *A Deliberative Perspective on Neocorporatism*, 20 POL. & SOC'Y 493, 495 (1992). Mansbridge properly characterizes Cohen and Rogers' associative democracy plan as "neocorporatist" rather than merely "corporatist" because the plan "recognizes nontraditional interests." *Id.*

Mansbridge's article is part of a collection of essays discussing the associative democracy plan. Other valuable essays include Paul Q. Hirst, *Comments on "Secondary Associations and Democratic Governance,"* 20 POL. & SOC'Y 473 (1992); Andrew Levine, *Soft on Capitalism: Prospects for Secondary Associations and Democratic Governance*, 20 POL. & SOC'Y 487 (1992); Schmitter, *Irony*, *supra* note 88; Andrew Szasz, *Progress through Mischief: The Social Movement Alternative to Secondary Associations*, 20 POL. & SOC'Y 521 (1992); and Iris Marion Young, *Social Groups in Associative Democracy*, 20 POL. & SOC'Y 529 (1992). The *Solidarity, Democracy, Association* manuscript by Cohen and Rogers, *supra* note 203, contains a reply to some of these critics and represents their current thinking on associative democracy.

Cohen and Rogers emphatically state that, contrary to interpretations of their work by many scholars, their plan is not one that calls for "corporatism for America" or even a "post-modern corporatism expanded to include bargaining partners beyond the traditional social partners of labor and capital and policy arenas beyond the economy." Cohen & Rogers, *supra* note 203, at 2; *see also* Rogers, *supra* note 203, at 1 ("Bringing corporatism to America was certainly not our intent, and on this at least we are authoritative."). Cohen and Rogers' writings speak for themselves; the reader is invited to put the "corporatist" label aside and judge their proposal based not upon any label but on its own merits.

247. Cohen & Rogers, *supra* note 19, at 434.

248. *Id.*

249. *Id.* at 446.

250. *Id.* at 417 (identifying the social democratic practice of Northern Europe as the ideal form of democracy); *see also* OLSON, *supra* note 54, at 47-53 (counterpoising encompassingness to faction); Cohen & Rogers, *supra* note 19, at 429 (discussing encompassingness).

state.<sup>251</sup> Associative democracy, as Iris Marion Young observes, virtually ignores other social categories, such as race.<sup>252</sup>

Young's criticism is not surprising given her own group-based plan. Whereas Cohen and Rogers look to Scandinavia for their model, Young looks to Nicaragua after the Sandanista revolution.<sup>253</sup> Young proposes the following radical program of group representation:

[A] democratic public should provide mechanisms for the effective recognition and representation of the distinct voices and perspectives of those of its constituent groups that are oppressed or disadvantaged. Such group representation implies institutional mechanisms and public resources supporting (1) self-organization of group members so that they achieve collective empowerment and a reflective understanding of their collective experience and interests in the context of society; (2) group analysis and group generation of policy proposals in institutionalized contexts where decisionmakers are obliged to show that their deliberations have taken group perspectives into consideration; and (3) group veto power regarding specific policies that affect a group directly, such as reproductive rights policy for women, or land use policy for Indian reservations.<sup>254</sup>

Young defends specific representation for oppressed groups in decision-making procedures on four grounds. First, such representation assures procedural fairness. Because in our society social and economic privilege is correlated with the right to speak and be heard, policy issues are often defined by the assumptions and priorities of the privileged. "Specific representation for oppressed groups interrupts this process, because it gives voice to the assumptions and priorities of other groups."<sup>255</sup> Second, "group representation better assures that all needs and interests in the public will be recognized in democratic deliberations."<sup>256</sup> Third, group representation "encourages the expression of individual and group needs and interests in terms that appeal to justice, that transform an 'I want' into an 'I am entitled

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251. See, e.g., Cohen & Rogers, *supra* note 19, at 455-64 (discussing associative democracy in terms of its effects on worker representation, vocational training, and occupational safety and health); see also Schmitter, *Irony*, *supra* note 88, at 510 ("Cohen and Rogers are trying to ensure that class—capital and labor in their most encompassing organizational form—will continue to occupy a predominant role in the policy process at the expense of more diversified sectoral and professional cleavages and against the rising tide of less 'productively' defined interests").

252. Young, *supra* note 246, at 530-31.

253. See YOUNG, *supra* note 230, at 191.

254. *Id.* at 184. Young defines oppression along five criteria: exploitation, marginalization, powerlessness, cultural imperialism, and violence. *Id.* at 48-63. Young goes on to list particular groups that she contends are oppressed under at least one of these criteria: women, Blacks, working-class people, gay men, Jews, Arabs, old people, physically and mentally disabled people, and Latinos. *Id.* at 64.

255. *Id.* at 185.

256. *Id.*

to' . . . ."257 Fourth, "group representation promotes just outcomes because it maximizes the social knowledge expressed in discussion, and thus furthers practical wisdom."<sup>258</sup>

Young would exclude interest groups and ideological groups from any specific representation in the political process because they do not constitute "social groups."<sup>259</sup> Thus, groups like Friends of the Whales, the NAACP, and the NRA would not be allowed to participate in group politics.<sup>260</sup> Moreover, social groups that are not oppressed or disadvantaged receive no specific representation. "Privileged groups are already represented, in the sense that their voice, experience, values, and priorities are already heard and acted upon."<sup>261</sup>

Oppressed groups would not be assured proportional representation; rather, Young is concerned with "the representation of group experience, perspectives and interests. Proportional representation of group members may sometimes be too little or too much to accomplish that aim."<sup>262</sup> Like Cohen and Rogers, Young does not believe her proposal would lead groups to pursue their narrow self-interest; instead, it would lead to public-regarding deliberation.<sup>263</sup>

Having sketched these two group-based plans, I contrast them with the voucher plan under the four criteria set forth above. Both plans receive a mixed review under the egalitarianism criterion because each increases the political capital of only a few underrepresented groups. Cohen and Rogers can be faulted for ignoring groups based on race, gender, and sexual orientation as much as Young can be faulted for ignoring class conflict. Some minorities lacking political capital in our current political system get repre-

257. *Id.*

258. *Id.* at 186.

259. *Id.* "A social group is a collective of people who have affinity with one another because of a set of practices or way of life; they differentiate themselves from or are differentiated by at least one other group according to these cultural forms." *Id.*

260. Iris M. Young, *Polity and Group Difference: A Critique of the Ideal of Universal Citizenship*, 99 *ETHICS* 250, 266 (1989).

261. YOUNG, *supra* note 230, at 187.

262. *Id.* at 187.

263.

One might ask how the idea of a heterogeneous public which encourages self-organization of groups and group representation in decisionmaking differs from the interest-group pluralism I [have] criticized. . . . Interest-group pluralism, I suggest, operates precisely to forestall the emergence of public discussion and decisionmaking. Each interest group promotes its own specific interest as thoroughly and forcefully as it can, and need not consider the other interests competing in the political marketplace except strategically, as potential allies or adversaries in its own pursuit. The rules of interest-group pluralism do not require justifying one's interest as right, or compatible with social justice. A heterogeneous public, however, is a *public*, where participants discuss together the issues before them and come to a decision according to principles of justice. Group representation, I have argued, nurtures such publicity by calling for claimants to justify their demands before others who explicitly stand in different social locations.

*Id.* at 190.

sentation under these plans, but others do not. The plans are only selectively level-up.

Moreover, the group-based plans place the state in the position of determining which groups get an assigned voice in the workings of the political process. "If associations are to be *crafted* by public policy the question of the *agency* that accomplishes such crafting becomes crucial. How can state agencies acquire the competence, neutrality, and legitimacy to perform this function of crafting?"<sup>264</sup> Moreover, how can we ensure that the state will make choices based upon egalitarian criteria?

In contrast to group-based plans, the voucher plan better serves egalitarianism because it endows individuals with enough political capital to form groups of their choosing. Schmitter explains that his own voucher plan<sup>265</sup> will "not ensure the predominance of any specific line of cleavage—just equalize the conditions for associability across categories differing in initial resources, numbers, intensities, locations, and so forth."<sup>266</sup>

The group-based plans' lack of flexibility poses major problems for their impact on governance. Both plans anoint specific groups to undertake state-like roles in society, including the distribution of scarce resources. This anointing process will "lock in" some groups and "lock out" others.<sup>267</sup> Young has no mechanism for changing power arrangements should a group's oppression be eliminated or reduced, and although Cohen and Rogers allow a periodic challenge to their sanctioned groups as a safeguard,<sup>268</sup> group entrenchment seems likely under both proposals.<sup>269</sup>

As power becomes ossified around particular groups, the danger of social breakdown increases. Consider the consociational model,<sup>270</sup> a cousin of these group-based plans. In consociational schemes, the state designates certain religious or ethnic groups as power-brokers; each group has a veto over important government decisions.

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264. Hirst, *supra* note 246, at 476.

265. As explained above, Schmitter's voucher plan differs in significant ways from my proposal. See *supra* note 88.

266. Schmitter, *Irony*, *supra* note 88, at 511. As Mansbridge observed, a voucher plan "is designed to be flexible, open to new interests, and responsive to the variety of citizen preferences." Mansbridge, *supra* note 246, at 496.

267. See Schmitter, *Irony*, *supra* note 88, at 509 (discussing the powerful tendency under Cohen and Rogers' plan for existing participants to lock in their power).

268. Cohen & Rogers, *supra* note 19, at 448.

269. Cohen and Rogers have recognized this potential for "sclerosis." *Id.* at 444.

270. For the classic work on consociationalism, see AREND LIJPHART, *THE POLITICS OF ACCOMMODATION: PLURALISM AND DEMOCRACY IN THE NETHERLANDS* (1968). Lijphart's main requirements for consociationalism are: (1) executive power-sharing among the representatives of all significant groups; (2) a high degree of internal autonomy for groups that wish to have it; (3) proportional representation and a proportional allocation of civil service positions and public funds; and (4) a minority veto on most vital issues. See also AREND LIJPHART, *POWER-SHARING IN SOUTH AFRICA* 91-92 (1985) (blaming failure of Lebanese consociationalism on external invasion and not internal political turmoil); David D. Laitin, *South Africa: Violence, Myths and Democratic Reform*, 29 *WORLD POL.* 258 (Jan. 1987) (discussing Lijphart and consociationalism). For a critique of consociationalism, see BRIAN BARRY, *DEMOCRACY, POWER AND JUSTICE* 100-55 (1989).



In Lebanon, a consociational system led to an ossification of power in established ethnic groups and created the conditions for civil war.<sup>271</sup> Although demographics shifted, the Lebanese constitution fixed power relations at the 1940 population level. It mandated that public jobs be parceled out at the ratio of six Christians to five Muslims.<sup>272</sup> The prime minister must be a Sunni Muslim, the president a Maronite Christian, and so forth. Class and ideological interests were not represented to the extent they were not reflected in ethnic politics. Furthermore, as Muslim, particularly Shi'ite, population growth outstripped that of the Christian population, the entrenched powers blocked any change to the constitution or other political arrangements. Although the constitution calls for a periodic census in order to recalculate the ratio, none has been taken since 1932.<sup>273</sup> In Lebanon, consociationalism has led to societal breakdown, civil war, and foreign invasion.

Although the two group-based plans considered here need not lead to such dismal results, there is no doubt the voucher plan is more stable because it does not ossify group interests like group-based plans do. The voucher system allows one's interests to be tied to many groups, or individuals may act together to pool all of their vouchers in one group. The voucher plan also acts as a safety valve by recognizing diverse viewpoints in society. As "group rights" gain in importance, this may lead to an increase in ethnic politics. However, ethnic politics would not be sanctioned by the state through official endorsement of ethnic associations. The voucher plan also assures stability because existing interest groups will have some initial advantage in the new system.<sup>274</sup>

The group based plans also earn mixed reviews as preference-aggregation mechanisms. To the extent Cohen and Rogers' plan actually would lead to encompassing coalitions representing significant interests in society, coalition leaders could serve as good bargaining partners in negotiations with the state and other interests. However, I am skeptical of Cohen and Rogers' emphasis on class as the primary basis for the articulation of interests; if there are other significant interests in society, they will not be represented in the grand bargaining which takes place among these powerful coalitions. It is likely that the interests of many will receive no articulation whatsoever.

Young's plan presents even greater problems. Veto power for particular groups allows even intense majority preferences to be thwarted by a minority with weak preferences on an issue. A veto is an inflexible tool for aggregating preferences, violating both the Arrowian criterion of

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271. See generally DAVID GILMOUR, *LEBANON: THE FRACTURED COUNTRY* (1983) (providing an historical, social, and political account of the events leading to civil war).

272. *Id.* at 28-30.

273. *Id.* at 21.

274. See *supra* note 129 and accompanying text.

"nondictatorship"<sup>275</sup> and fundamental concerns of fairness. Surely, there are less draconian ways of redressing inequality than an absolute veto.

Finally, both plans have no real likelihood of enactment in the foreseeable future. Cohen and Rogers ignore the question of implementation.<sup>276</sup> Young, as a philosopher and political theorist, leaves that question to others.<sup>277</sup> As with PR, changing the fundamental order of power relations directly is a much more difficult task than doing it indirectly through campaign finance reform. Both group-based plans discussed here are truly revolutionary, and thus are as improbable as a revolution.

### CONCLUSION

We may conjure up an infinite number of egalitarian pluralist plans to compare with the campaign finance voucher plan. I have focused here both on plausible alternatives and alternatives that are less plausible but perhaps more interesting. The table below summarizes the differences among the various plans along the four egalitarian pluralist criteria discussed in the text.

TABLE: COMPARISON OF EGALITARIAN PLURALIST POLITICAL REFORMS

REFORM PLAN	CRITERION			
	Egalitarianism	Impact on Governance	Benefits as Preference Aggregation Mechanism	Likelihood of Enactment
Campaign Finance Vouchers	level-up and level-down	positive egalitarian impact; stable; does not remake political order	measures intensity very well	somewhat likely
Public Financing	level-down, but no group empowerment	minor positive egalitarian impact; extremely stable	few benefits; measures intensity poorly	somewhat likely
Proportional Representation	some level-up, but wealth and organizational disparities remain	unclear	measures preferences well; danger of majority cycles	extremely unlikely
Group-based Political Solutions	level-down, but level-up for anointed groups only	potential for great instability and inequality	uncertain benefits; may violate democratic norms through veto or similar device	extremely unlikely

275. See *supra* note 40 and accompanying text.

276. See Szasz, *supra* note 246, at 521 (criticizing Cohen and Rogers for failing to put forward "something like a plausible transition scenario").

277. YOUNG, *supra* note 230, at 190 ("These questions pose a paradox of political origins which is not specific to this proposal, and which no philosophical argument can resolve.").

To be sure, a voucher plan along the lines set forth in this Article is no panacea to the problem of unequal distribution of political capital in the political market. Indeed, there can be no perfect solution given the inherent tension in any society as fiercely committed as the United States to both majoritarian democracy and free market capitalism, and given unequally distributed attributes that bear upon the creation of political capital.<sup>278</sup>

But a commitment to egalitarian pluralism tempered by the realism (and some would say, cynicism) of positive public choice theory leads me to conclude that a voucher plan would be a tremendous improvement over our current campaign finance system. The democratic experiment, especially in a capitalist society, has proven to be exciting and challenging; why not use a market-based approach to promote democratic ideals, allowing intensity of preference rather than the dollars in one's pocket to determine political outcomes?

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278. See Daniel R. Ortiz, *The Engaged and the Inert: Theorizing Political Personality Under the First Amendment*, 81 VA. L. REV. 1, 43 (1995) ("Allowing individuals to parlay their differential economic power into differential political power is in tension with one of the central tenets of democratic theory: the norm of equal political entitlements.").

