

VOUCHERS AND *BUCKLEY*: THE NEED FOR “REGIME CHANGE”

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I. INTRODUCTION

Bruce Ackerman and Ian Ayres are the latest in a series of scholars going back to the 1960s recommending the use of campaign finance vouchers in federal elections.¹ Their proposal is noteworthy in three important respects: (1) they combine vouchers with mandatory anonymity of campaign contributions over \$200 (what they term the “secret donation booth”);² (2) they would use vouchers to supplement, not supplant, private financing of elections;³ and (3) they provide elaborate details (in part through a model statute) on how their proposal would work in practice, giving careful consideration to concerns about fraud and a black market in vouchers.⁴

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Thanks to Ned Foley, Beth Garrett, Dan Lowenstein, and Tom Mann for useful comments and suggestions.

1. BRUCE ACKERMAN & IAN AYRES, *VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE* (2002). I have traced the history of the voucher idea back to a 1967 proposal by Senator Lee Metcalf and picked up by Professors Adamany and Agree. See Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Finance Defense of Campaign Finance Vouchers*, 84 CAL. L. REV. 1, 20 & n.88 (1996); see also Bruce Ackerman, *Crediting the Voters: A New Beginning for Campaign Finance*, 13 AM. PROSPECT 71, 72 n.* (1993) (noting Metcalf's ideas). For some reason, Ackerman and Ayres choose to ignore the history of the idea in their book—there are at least twenty-five references to their idea as the “new paradigm” in the first 100 pages of the book. In contrast, the authors readily trace the intellectual pedigree of their “secret donation booth” idea. See ACKERMAN & AYRES, *supra*, at 268–69 n.26.

2. ACKERMAN & AYRES, *supra* note 1, at 96.

3. See generally *id.* at 16–20.

4. See, e.g., *id.* at 213–17 (Citizen Sovereignty Act §§ 19–21).

The authors put forward enough intriguing ideas in each of these three areas to justify further exploration in an essay. For example, the tools they propose to prevent the sale of vouchers allocated through choices made at ATM machines could fruitfully be employed to prevent the sale of votes should jurisdictions decide to adopt Internet voting.⁵

My focus, however, is on the authors' views of the seminal campaign finance case of *Buckley v. Valeo*,⁶ and whether their voucher proposal would be effective and desirable in the absence of a change in the jurisprudence of the Supreme Court of the United States in the campaign finance area. The authors claim that *Buckley*, rather than an obstacle to reform, was more or less correctly decided, and that their program is fully consistent with *Buckley's* mandates.⁷

Unfortunately, the authors underestimate how the *Buckley* framework would limit the benefits of their proposal. *Buckley's* rules on issue advocacy⁸ and individual expenditure limits⁹ would render the voucher program and the mandatory donor anonymity plan far less effective than the authors suggest. Although the voucher plan would still be an improvement on the current system, many of the modern problems of campaign finance would remain. Comprehensive reform must await a fundamental change in our campaign finance regime.

5. See *id.* at 208–09 (Citizen Sovereignty Act § 14(f)–(g)). For the potential fraud problems with Internet voting, see Richard L. Hasen, *Introduction to Symposium, Internet Voting and Democracy*, 34 LOY. L.A. L. REV. 979, 982 (2001). Voter turnout might rise with the use of Internet voting because it will be easier to verify vote buying deals: “The briber stands over the recipient of the bribe and watches her cast the Internet vote. The money is then turned over.” See *id.* Ackerman and Ayres propose that any voting through ATM machines (or presumably over the Internet) would be subject to a five-day cooling off period allowing the voter to change her mind at any point during the period, thereby disrupting the market. ACKERMAN & AYRES, *supra* note 1, at 69.

In general, the authors do a very good job discussing means to assure that allocations of voucher dollars and contributions to political campaigns remain anonymous from candidates and would-be voucher purchasers. They do not seem to consider as serious problems, however, the possibility of fraud or hacking into computer systems running the voucher program or keeping contributions secret. Cf. BILL JONES, CAL. INTERNET VOTING TASK FORCE, A REPORT ON THE FEASIBILITY OF INTERNET VOTING: JANUARY 2000 (discussing feasibility of Internet voting in face of security problems), available at http://www.ss.ca.gov/executive/ivote/final_report.htm.

6. 424 U.S. 1 (1976).

7. ACKERMAN & AYRES, *supra* note 1, at 156.

8. See *Buckley*, 424 U.S. at 47–51.

9. See *id.* at 51–54.

Part II of this essay sets forth the basics of campaign finance law as established in *Buckley*, Ackerman and Ayres’s views on the correctness of *Buckley*, and an analysis of whether the authors’ proposal is consistent with *Buckley*. Part III explains how *Buckley* interferes with the efficient working of the Ackerman and Ayres proposal. It illustrates the problems *Buckley* creates by drawing upon the book’s hypothetical discussion of how the 2000 presidential election would have been conducted had the authors’ proposal been put into place. Finally, Part IV provides some concluding thoughts on why massive reform must await the end of the *Buckley* regime.

II. LIVING WITH THE *BUCKLEY* REGIME¹⁰

A. *Buckley’s Rules*

In brief, *Buckley* upheld various contribution limits contained in the 1974 Amendments to the Federal Elections Campaign Act (“FECA”), including a \$1000 limit on individual contributions to federal candidates.¹¹ It also struck down expenditure limits, including a \$1000 limit on independent expenditures “relative to a clearly identified candidate,”¹² limits on a candidate’s use of personal or family wealth to run a campaign,¹³ and limits on total campaign spending by candidates for federal office.¹⁴

Although recognizing that any law regulating campaign financing was subject to the “exacting scrutiny required by the First Amendment,”¹⁵ the Court mandated divergent treatment of contributions and expenditures for two reasons. First, the Court held

10. Part II.A draws on two earlier articles discussing *Buckley’s* rules. See Richard L. Hasen, Shrink Missouri, *Campaign Finance*, and “*The Thing That Wouldn’t Leave*,” 17 CONST. COMMENT. 483, 486–87 (2000); Richard L. Hasen, *Measuring Overbreadth: Using Empirical Evidence To Determine the Constitutionality of Campaign Finance Laws Targeting Sham Issue Advocacy*, 85 MINN. L. REV. 1773, 1775–77 (2001). For a comprehensive look at *Buckley* and post-*Buckley* campaign finance regulation, see DANIEL H. LOWENSTEIN & RICHARD L. HASEN, *ELECTION LAW—CASES AND MATERIALS* 705–1080 (2d ed. 2001).

11. *Buckley*, 424 U.S. at 23–35.

12. *Id.* at 39–51.

13. *Id.* at 52–55.

14. *Id.* at 55–58.

15. *Id.* at 16.

that campaign expenditures were core political speech, but a limit on the amount of campaign contributions limits only marginally restricted a contributor's ability to send a message of support for a candidate.¹⁶ Thus, expenditures were entitled to greater constitutional protection than contributions. Second, the *Buckley* Court recognized only the interests in prevention of corruption and the appearance of corruption as justifying infringement on First Amendment rights.¹⁷ The Court held that large contributions raise the problem of corruption "[t]o the extent that large contributions are given to secure a political *quid pro quo* from current and potential officeholders"¹⁸ But truly independent expenditures do not raise the same danger of corruption because a *quid pro quo* is more difficult if the politician and spender cannot communicate about the expenditure.¹⁹ Finally, the Court rejected a proposed equality rationale for limiting expenditures, finding the idea was "wholly foreign to the First Amendment."²⁰ Although various members of the Court have since questioned the distinction between contributions and expenditures,²¹ a majority of the Court has repeatedly reaffirmed its adherence to the distinction.

Despite striking down expenditure limits, including limits on what federal candidates could spend on their own campaigns, the Court in *Buckley* held that

Congress may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations. Just as a candidate may voluntarily limit the size of the contributions he

16. *Id.* at 21.

17. See *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496–97 (1985) (“[P]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances.”)

18. *Buckley*, 424 U.S. at 26.

19. *Id.* at 46–47. The Court also remarked that expenditure limits could be circumvented easily, meaning that such limits would serve “no substantial societal interest.” *Id.* at 45.

20. *Id.* at 48–49.

21. See, e.g., *Nixon v. Shrink Mo. Gov't Political Action Comm.*, 528 U.S. 377, 410 (2000) (Thomas, J., dissenting) (arguing that the Court should “subject campaign contribution limitations to strict scrutiny”); *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 678 (1990) (Stevens, J., concurring); *Nat'l Conservative Political Action Comm.*, 470 U.S. at 518–19 (Marshall, J., dissenting). Chief Justice Burger made the same point in his concurring and dissenting opinion in *Buckley* itself. 424 U.S. at 241 (Burger, C.J., concurring in part and dissenting in part) (“For me contributions and expenditures are two sides of the same First Amendment coin.”).

chooses to accept, he may decide to forgo private fundraising and accept public funding.²²

In so holding, the Court approved the system that FECA put in place for financing presidential elections. Note that the *Buckley* standard for coupling public financing with expenditure limits requires voluntariness;²³ whether particular public financing laws are voluntary or coercive continues to be litigated as jurisdictions pass new laws conditioning the receipt of public financing on a candidate agreeing to give up certain fund-raising techniques the law otherwise would allow.²⁴

The Court in *Buckley* also marked out a line between “express advocacy,” which could be regulated, and “issue advocacy,” which could not.²⁵ Through FECA, Congress sought to impose limits on any spending “relative to a clearly identified candidate”²⁶ in federal elections, and to require “[e]very person . . . who makes contributions or expenditures . . . for the purpose of . . . influencing’ the nomination or election of candidates for federal office”²⁷ to disclose the source of such contributions and expenditures. The Court in *Buckley* viewed both of these statutes as presenting problems of vagueness; people engaging in political speech might not know if the statutes cover their conduct.²⁸ Vague statutes violate the Due Process Clause and are a special concern when the danger of chilling the First Amendment rights of free speech and freedom of association comes into play.²⁹

In order to save both statutes from unconstitutional vagueness, the Court construed them as reaching only “communications that in express terms advocate the election or defeat of a clearly identified candidate.”³⁰ The Court explained that such express advo-

22. *Buckley*, 424 U.S. at 57 n.65.

23. *See id.*

24. *See, e.g.,* Daggett v. Comm’n on Governmental Ethics and Election Practices, 205 F.3d 445 (1st Cir. 2000).

25. *Buckley*, 424 U.S. at 41–44.

26. *Id.* at 41 (quoting Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, tit. I, § 101(a), 88 Stat. 1263, 1265, *repealed by* Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, tit. II, § 201(a), 90 Stat. 496).

27. *Id.* at 77 (quoting Federal Election Campaign Act Amendments of 1974, tit. II, § 204(c), *amended by* Federal Election Campaign Act Amendments of 1976, tit. I, § 104).

28. *Id.* at 45, 76–77.

29. *Id.* at 77.

30. *Id.* at 44; *see also id.* at 80 (construing the term “expenditure” to have the same meaning in § 434(e) as the Court earlier construed it in § 608(e) of FECA).

cacy required “express words of advocacy of election or defeat, such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ [or] ‘reject.’”³¹ So construed, the Court still struck down the spending limits as violating the First Amendment,³² but it upheld the disclosure requirements.³³

The upshot of this part of *Buckley* is that advertisements intended to influence the outcome of an election, but lacking words of express advocacy, are unregulated by FECA. Such advertisements have come to be referred to as “issue advocacy,” even though the prime issue at stake in many of these advertisements is the election or defeat of a candidate.³⁴ I refer to such advertisements as “sham issue advocacy.” Thus, an advertisement lacking “magic words” of express advocacy but criticizing Senator Smith in the weeks before an election is not subject to disclosure under FECA, may be paid for with corporate or union funds, and is subject to no contribution limits.³⁵ The conduct escapes FECA because the advertisement ends with something like “Call Smith and tell her what you think of her Medicare plan” rather than “Defeat Smith.”

Sham issue advocacy has exploded on the federal election campaign scene. Individuals, political parties, interest groups, labor unions, and corporations spent as much as \$150 million in 1996 on such advertisements.³⁶ The figure climbed to at least \$250 million during the 1998 election,³⁷ and reached \$509 million for the 2000 election cycle.³⁸ Political parties have been especially fond of issue advocacy. By declining to use express advocacy, the parties have raised unlimited amounts of “soft money” from individuals,

31. *Id.* at 44 n.52.

32. *Id.* at 48–49.

33. *Id.* at 80–81.

34. See *Nixon v. Shrink Mo. Gov't Political Action Comm.*, 528 U.S. 377, 406 (2000) (Kennedy, J., dissenting).

35. See Glenn J. Moramarco, *Beyond “Magic Words”: Using Self-Disclosure To Regulate Electioneering*, 49 CATH. U. L. REV. 107, 118–21 (1999) (exploring the origins of the term “express advocacy” as well as the “magic words” required by the Court in its *Buckley* analysis).

36. DEBORAH BECK ET AL., *ISSUE ADVOCACY ADVERTISING DURING THE 1996 CAMPAIGN 3* (1997) available at <http://www.appcpenn.org/reports/1997>.

37. Lorie Slass, *Spending on Issue Advocacy in the 2000 Cycle*, in *ISSUE ADVERTISING IN THE 1999–2000 ELECTION CYCLE 3, 4* (2001), available at <http://www.appcpenn.org/political/issueads/1999-2000issueadvocacy.pdf>.

38. *Id.*

corporations, and unions to pay for advertisements promoting their candidates,³⁹ and, more often, defeating their opponents.⁴⁰

The new Bipartisan Campaign Reform Act (“BCRA”)⁴¹ bans some forms of soft money⁴² and regulates some forms of sham issue advocacy through a “bright line” electioneering test aimed at radio and television advertising featuring a clearly identified candidate in a sixty-day period before a general election or a thirty-day period before a primary.⁴³ Corporations, unions, and interest groups receiving corporate or union funds cannot pay for such advertisements except through separate segregated funds.⁴⁴ Further, anyone running such advertising over a certain dollar threshold must disclose contributions and expenditures funding the advertising.⁴⁵ Soon enough, the Supreme Court may consider the constitutionality of these provisions.⁴⁶

B. Ackerman and Ayres on *Buckley*’s Rules

Ackerman and Ayres criticize those would-be reformers who call for the Supreme Court to overrule *Buckley* as “apolog[ists]” operating under the “old paradigm.”⁴⁷ They make a two-pronged attack. First, the authors claim that their “new paradigm authorizes massive changes *now*,”⁴⁸ a claim evaluated in the next part of this essay. Second, they claim that *Buckley* was correctly decided

39. Parties must disclose the source and amount of such contributions under regulations promulgated by the Federal Election Commission. 11 C.F.R. § 104.8(e)–(f) (2002).

40. These advertisements tend to be more negative than campaign advertising containing magic words. See BECK ET AL., *supra* note 36, at 9–10 (noting that issue ads contained more “pure attack” style ads than did other campaign advocacy formats).

41. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (to be codified in scattered sections of 2 U.S.C.) [hereinafter BCRA].

42. *Id.* sec. 101(a).

43. *Id.* sec. 201(f)(3)(i).

44. *Id.* sec. 203(b)(3)(B). See generally LOWENSTEIN & HASEN, *supra* note 10, at ELECTION LAW—CASES AND MATERIALS: 2002 UPDATE 29–39 (2d ed. Supp. 2002), available at www.lls.edu/academics/faculty/pubs/electionlaw-2002update.pdf.

45. BCRA sec. 201(f)(1).

46. The constitutionality of BCRA is currently being challenged in *McConnell v. FEC*, No. 02-582 (D.D.C. filed Mar. 27, 2002). See Complaint for Declaratory and Injunctive Relief, *McConnell* (No. 02-582), available at http://www.law.stanford.edu/library/campaign_finance/mcconnell.3.27.2002.pdf.

47. ACKERMAN & AYRES, *supra* note 1, at 10.

48. *Id.*

for the most part, all the while ignoring *Buckley's* key holding striking down independent expenditure limits.⁴⁹

The authors focus most of their attention on the *Buckley* Court's decision striking down limits on how much a candidate for federal office may *spend* on her campaign.⁵⁰ They argue that overruling *Buckley* on this point would "mak[e] it even easier for incumbents to assure their endless reelection without serious challenge" because challengers need more money than incumbents to make up for the advantages of incumbency.⁵¹ The authors further contend that sitting incumbents "may be delighted by the prospect of 'campaign reforms' that allow them to impose severe limits on overall expenditures."⁵² They conclude, therefore, that "[w]hen viewed from this angle, *Buckley's* twin principles—against expenditure ceilings, for public subsidies—remind us that we have something to fear from entrenched politicians as well as entrenched wealth; and that reformers should not be eager to exchange one master for another in the struggle for democracy."⁵³

In this regard, the authors have set up something of a straw man. Most reformers seek to limit the amount candidates or others can donate to a specific campaign or spend on a candidate's behalf; they do not advocate limits on total campaign spending. As Justice Brennan remarked at the time the Court was considering *Buckley*, it is "hard to see the *nexus*" between the overall limitation and the limitation on contributions and expenditures: "[I]f limitation on contributions and expenditures are valid, the overall-limitation is difficult to justify."⁵⁴ Brennan saw this as a serious equal protection problem, disadvantaging challengers.⁵⁵

Most supporters of vouchers and other radical campaign finance reform measures spend considerable time discussing whether *Buckley* should be overruled to allow for limits on: (1) independent expenditures; and (2) expenditures from a candidate's own personal funds. The authors do not do so in this book. First,

49. See *id.* at 11; *Buckley v. Valeo*, 424 U.S. 1, 39–51 (1976).

50. See ACKERMAN & AYRES, *supra* note 1, at 156.

51. *Id.* at 156–57.

52. *Id.* at 157.

53. *Id.*

54. Richard L. Hasen, *The Untold Drafting History of Buckley v. Valeo*, 2 ELECTION L.J. (forthcoming 2003) (manuscript at 9, on file with author) (quoting Justice Brennan).

55. *Id.*

as a policy matter, they do not favor caps on independent expenditures.⁵⁶ Thus, the authors do not reprise Ackerman’s implausible argument—made in connection with his initial voucher proposal that would have banned independent expenditures—that it would be an “easy constitutional case” to ban the use of “green” money in favor of “red-white-and-blue” vouchers.⁵⁷

Second, they devote very little attention to the problem of self-financed candidates. They briefly argue against the practice, stating that they would reverse *Buckley* on this point if they were on the Court.⁵⁸ They reason that it is inegalitarian for “rich people” to have “special privileges when they compete for public office in democratic politics.”⁵⁹ The authors, however, quickly drop any further discussion on this point—impliedly negating their own point that *Buckley* poses no obstacles to reform—because they believe that “the current majority of Justices” would stick with *Buckley* on the right of candidates to bankroll their own campaigns.⁶⁰

Ackerman and Ayres also flirt with redrawing *Buckley*’s line between express advocacy and issue advocacy.⁶¹ In their model statute, however, they punt on what should be regulated, purporting to regulate advertising “which refers to any candidate or political party or contains such other content of a political nature as the [newly constituted Federal Election Commission] by regulation shall designate.”⁶² A footnote following this section explains “the commission should seek to capture ‘sham’ issue advocacy while excluding non-political speech that innocuously refers to po-

56. See ACKERMAN & AYRES, *supra* note 1, at 32 (rejecting what they term the “abolitionist” position).

57. Ackerman, *supra* note 1, at 79, 80; see also ACKERMAN & AYRES, *supra* note 1, at 44 n.21 (noting that Ackerman has changed his position on this question). For a criticism of Ackerman’s earlier constitutional analysis, see Hasen, *supra* note 1, at 44 n.202. See also Edward B. Foley, *Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204, 1211–12 (1994) (arguing that eliminating private campaign expenditures in favor of voucher-based public financing would require the Court to overrule *Buckley*).

58. ACKERMAN & AYRES, *supra* note 1, at 62.

59. *Id.* It is unclear if the authors would extend this criticism of *Buckley* to attack that part of the opinion allowing rich *non*-candidates to spend unlimited sums on behalf of others.

60. *Id.*

61. See *id.* at 119–20.

62. *Id.* at 187 (Citizen Sovereignty Act § 2(6)).

litical issues.”⁶³ In the body of the book, however, the authors are quite critical of the BCRA’s attempt to redefine the line between express advocacy and issue advocacy,⁶⁴ and they assume the Court would not allow any further regulation in this area beyond the current “magic words” test for express advocacy.⁶⁵

Their alternative route to regulation is modest; they aim to expand the number of organizations whose conduct is regulated not because the organizations use express advocacy, but because their “major purpose” is the election or defeat of candidates.⁶⁶ Currently, political parties count as “major purpose” organizations, and the authors would plausibly extend the definition to include those interest groups organized to collect voucher dollars from voters and to distribute them to candidates.⁶⁷ They do, however, recognize that the obvious consequence of this will be that such groups will simply bifurcate their functions into a “major purpose” group that will accept voucher dollars and follow rules concerning donor anonymity, and an affiliated group that need not follow any of these rules.⁶⁸

C. *The Constitutionality of the Ackerman and Ayres Proposal*

Although the details of the Ackerman and Ayres proposal are exceedingly complex, down to mathematical algorithms for ensuring the secrecy of large donations made to candidates’ campaigns and special formulas for the FEC to use to calibrate the “right” amount of money in the system, the basics are easy to set out. Each voter gets fifty voucher dollars to allocate in an election cy-

63. *Id.* at 288 n.1.

64. *See, e.g., id.* at 119–20.

65. *Id.* at 120. The authors appear confused in this discussion, incorrectly stating that the Court has upheld the power of Congress to “limit independent expenditures that expressly endorse a candidate.” *Id.* at 119. Outside the context of corporations, this statement is plainly incorrect. *See Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990); *see also* Daniel H. Lowenstein, Book Review, 116 HARV. L. REV. (forthcoming 2003) (manuscript at 6–9, on file with author) (reviewing ACKERMAN & AYRES, *supra* note 1, and noting authors’ confusion on this point).

66. *See* ACKERMAN & AYRES, *supra* note 1, at 125. For more on regulating major purpose organizations, *see* Richard L. Hasen, *The Constitutionality of a Soft Money Ban After Colorado Republican II*, 1 ELECTION L.J. 195, 206 (2002).

67. ACKERMAN & AYRES, *supra* note 1, at 125.

68. *Id.*

cle to candidates, parties, or interest groups.⁶⁹ Voucher allocations are secret.⁷⁰ Private individuals may donate up to \$100,000 to candidates for president, \$5000 to congressional candidates, and a significant sum to Senate candidates based on a population formula.⁷¹ These donations are secret, except a contributor could get proof she had donated up to \$200 to a campaign.⁷² Contributions to fund independent expenditure campaigns using express advocacy to support or oppose candidates for federal office are limited to \$5000 per year per organization, with a \$25,000 overall cap.⁷³

Candidates who wish to accept voucher dollars may not contribute funds to their campaigns exceeding the contribution limits applicable to others.⁷⁴ Interest groups who have registered to collect voucher dollars may transfer them to candidates, but cannot use the funds for independent expenditure campaigns.⁷⁵ Interest groups that do not take voucher dollars can, however, collect unlimited contributions and spend unlimited sums from any source (including corporate, labor, and foreign money) on sham issue advocacy.⁷⁶

The Ackerman and Ayres proposal appears to fit comfortably on the *Buckley* side of constitutionality. The voucher program is voluntary for candidates.⁷⁷ The proposal allows very generous contribution limits (with an inflation index),⁷⁸ which are much higher than the low limits the Court approved in *Buckley*⁷⁹ and

69. *See id.* at 209–10 (Citizen Sovereignty Act §§ 15–16(a)). The authors favor sub-allocations of the fifty dollars across presidential, Senate, and House races. *See id.* at 76.

70. *Id.* at 199 (Citizen Sovereignty Act § 8(a)).

71. *Id.* at 204 (Citizen Sovereignty Act §10(e)). The proposal also allows candidates to accept larger contributions for exploratory committees. *See id.* at 206–07 (Citizen Sovereignty Act § 12(a)).

72. *Id.* at 201–02 (Citizen Sovereignty Act § 8(h)(1)).

73. *Id.* at 204 (Citizen Sovereignty Act § 10(f)).

74. *Id.* at 205–06 (Citizen Sovereignty Act § 11(b)).

75. *Id.* at 211 (Citizen Sovereignty Act § 16(f)).

76. *Id.* at 205 (Citizen Sovereignty Act § 10(k)). Section 10(k) allows nonaffiliated interest groups to accept any funds from any source without limitations to spend on anything other than contributions or expenditures. *Id.* Expenditures are limited to those for express advocacy only, unless the commission can and will craft regulations reining in some of this sham issue advocacy. *See supra* notes 62–65 and accompanying text. But the authors appear to believe that such regulations likely would be unconstitutional. *See supra* note 65 and accompanying text.

77. ACKERMAN & AYRES, *supra* note 1, at 205–06 (Citizen Sovereignty Act § 11(b)).

78. *See id.* at 112–13.

79. *Buckley v. Valeo*, 424 U.S. 1, 58 (1976) (upholding a \$1000 limit on individual con-

Shrink Missouri.⁸⁰ The proposal also puts no limit on individual independent expenditures,⁸¹ and appears to do very little, if anything, to change the definition of express advocacy.⁸²

I suppose the most serious challenge to the proposal would concern its mandatory anonymity of contributions.⁸³ Mandatory anonymity is a bad idea for two reasons. First, it deprives voters of useful information about who is supporting candidates.⁸⁴ Second, it fosters a relationship of mistrust between elected officials and potential donors.⁸⁵ The reality is that elected officials depend upon donors (and of course others) to provide information to make good legislative decisions. Encouraging lying is hardly a way to instill trust in other areas of the relationship. Indeed, the mandatory anonymity proposal may drive trustworthy donors from the market.⁸⁶

But bad policy alone does not make a plan unconstitutional. The proposal does not stop anyone from saying anything or from using money to pay for a political message. It simply provides tools for others to make false claims about donations made to

tributions to federal candidates).

80. *Nixon v. Shrink Mo. Gov't Political Action Comm.* 528 U.S. 377, 382–83 (2000) (upholding a Missouri law that limited individual contributions to statewide candidates to \$1075).

81. ACKERMAN & AYRES, *supra* note 1, at 205 (Citizen Sovereignty Act § 11(a)). On the constitutionality of limiting contributions to groups funding independent expenditure campaigns, see *Lincoln Club of Orange County v. City of Irvine*, 292 F.3d 934 (9th Cir. 2002).

82. ACKERMAN & AYRES, *supra* note 1, at 120.

83. *See id.* at 211 (Citizen Sovereignty Act § 16 (d)).

84. *See* LOWENSTEIN & HASEN, *supra* note 10, at 987 (discussing the benefits of promoting the informational interest through disclosure). Ackerman and Ayres downplay this informational interest at certain points. *See* ACKERMAN & AYRES, *supra* note 1, at 27 (“Quite simply, if most voters pay scant attention to politics, they won’t take the time to go through the lengthy list of donors published in the name of ‘full information.’”). In so doing, they make an empirical claim that candidates do not turn down largely tainted gifts but offer scant anecdotal evidence to support it. *See id.* at 27 n.3. More importantly, they do not seem to believe their own claim; they “expect the public and the press to sit up and take notice whenever the Federal Election Commission reports the flow of patriotic contributions to each candidate.” *Id.* at 74. Elizabeth Garrett explains that, in fact, the Ackerman and Ayres proposal allows for far more disclosure than the authors suggest. Elizabeth Garrett, *Voting with Cues*, 37 U. RICH. L. REV. 1011, 1020–21, 1037–38 (2003).

85. I credit Tom Mann with making this important point in an informal conversation. The authors claim that the state is not *endorsing* lying. ACKERMAN & AYRES, *supra* note 1, at 29. At the very least, however, it is facilitating misinformation by providing documents falsifying the making of a donation to a candidate.

86. *See* Geoffrey Brennan & Alan Hamlin, *Paying for Politics*, in DESIGNING DEMOCRATIC INSTITUTIONS 55, 63 (Ian Shapiro & Stephen Macedo eds., 2000).

candidates. Nothing in the First Amendment, or in any other provision of the Constitution, appears to bar the mandatory anonymity idea.

III. A TALE OF TWO ELECTIONS: VOUCHERS IN A HYPOTHETICAL 2000 CAMPAIGN

The hostility the authors repeatedly show to reformers who seek to overturn *Buckley* is curious, given that the authors have truncated their own proposal to accommodate *Buckley*'s proscription on capping candidate self-financing and resistance to redrawing the boundary between express advocacy and issue advocacy.⁸⁷ The authors nonetheless claim that their voucher plan will allow for "massive change[s] now,"⁸⁸ without any change in constitutional doctrine.

Whether their proposal indeed would lead to massive changes depends of course upon what "massive" means. Certainly the voucher portion of their proposal would be an improvement over the current system of privately financed congressional campaigns and weak public financing of presidential campaigns.⁸⁹ Public financing will reduce the demand for private dollars by politicians, thereby alleviating some potential corruption and the appearance of corruption. It also may free some time for legislative business that elected officials otherwise might spend raising money,⁹⁰ though my guess is that officials will simply substitute time chasing voucher dollars bundled by interest groups for time now spent raising relatively small private donations.⁹¹ Officials will continue to seek large private donations; certainly a presidential candidate will earnestly court those \$100,000 contributions.

The proposal would also promote a certain kind of egalitarianism by doling out public funds based upon voters' intensity of

87. ACKERMAN & AYRES, *supra* note 1, at 118–20.

88. *Id.* at 10.

89. See generally Anthony Corrado, *Financing the 1996 Presidential General Election*, in FINANCING THE 1996 ELECTION 63, 92–93 (John C. Green ed., 1999), (discussing the weaknesses of the current presidential election system).

90. See 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, 1281–84 (1994) (discussing the benefits associated with candidates spending less time on fund-raising).

91. Hasen, *supra* note 1, at 30.

preference. I have argued elsewhere that campaign finance vouchers are a better means of aggregating preferences than lump sum direct payments given to candidates who pass a (usually low) threshold of signatures or token contributions.⁹² But the point is controversial: it assumes a “barometer” version of equality positing that the amount of expenditures on campaigns should bear some relation to public support for the positions that the expenditures funded. It is an idea that the Supreme Court has cautiously embraced in some of its campaign finance cases,⁹³ but one that is not universally accepted. For example, lump sum public financing payments may be better for third party candidates and candidates who lack name recognition early in campaigns, and in that way may promote a different egalitarian ideal.⁹⁴

Nonetheless, the benefits of the Ackerman and Ayres proposal will not be “massive” because the proposal keeps private money in the system and does not redraw the line between express advocacy and issue advocacy. Money will simply shift to unregulated activities,⁹⁵ leading to the continued potential for corruption, the appearance of corruption, and inequality in campaign financing. And, although the authors suggest that interest groups would be much less likely to receive special interest deals from Congress,⁹⁶ that seems more like wishful thinking than careful analysis.

To illustrate my conclusions more clearly, let us consider—as the authors do in their concluding chapter—how the 2000 election would have looked had it been run with the Ackerman and Ayres proposal in place.

92. *Id.* at 45–48; see also ACKERMAN & AYRES, *supra* note 1, at 20–22.

93. RICHARD L. HASEN, THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM *BAKER V. CARR* TO *BUSH V. GORE* (forthcoming 2003) (manuscript at 227–31, on file with author) (discussing the history of the barometer equality rationale and the Supreme Court’s flirtation with it).

94. See Hasen, *supra* note 1, at 47.

95. The authors term this argument the “hydraulic” critique. See ACKERMAN & AYRES, *supra* note 1, at 118; see also Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1708 (1999). Ayres recognized it more forcefully in his earlier account of his mandatory anonymity proposal. See Ian Ayres, *Disclosure Versus Anonymity in Campaign Finance*, in DESIGNING DEMOCRATIC INSTITUTIONS 19, 40 (Ian Shapiro & Stephen Macedo eds., 2000) (“The predictable, hydraulic shift of contributions toward less accountable issue advocacy—even if only partial—is a reasonable ground for ultimately opposing a mandated anonymity regime.”).

96. ACKERMAN & AYRES, *supra* note 1, at 171–73.

I will not recount the details of the 2000 election campaign here; readers unfamiliar with the details can review important articles on the topic in a new anthology on the 2000 elections.⁹⁷ The most notable campaign finance feature of the 2000 election was George W. Bush’s fund-raising. Bush opted out of the presidential matching fund for primary financing and raised an impressive \$94.5 million under the FECA rules—\$91 million from individual contributions of \$1000 or less and the remainder in PAC contributions up to \$5000.⁹⁸ Much of this funding was raised by his group of “Pioneers,” long-time Bush supporters who pledged to raise \$100,000 in contributions from friends and colleagues.⁹⁹ Bush then took public financing for the general election (in the amount of \$67.56 million¹⁰⁰) and helped the Republican party raise soft money. The Republicans spent an estimated \$44.7 million on television advertising supporting Bush, much of it funded by soft money Bush helped raise.¹⁰¹

According to Ackerman and Ayres, here’s how the presidential race likely would have looked under their proposal: Bush would have raised \$1 million for an exploratory committee from close friends, and then would have opted for voluntary voucher financing.¹⁰² The authors reason that he would opt for vouchers because failing to do so would leave the way open for competitors like Elizabeth Dole and John McCain to receive voucher dollars, and Bush would know that his “private fundraising prospects would decline dramatically—thanks to the secret donation booth.”¹⁰³ Dole and McCain would have remained in the race longer thanks to voucher dollars, and Dole, bridging the gender gap, likely would have captured the Republican nomination.¹⁰⁴ Ultimately,

97. See Anthony Corrado, *Financing the 2000 Presidential General Election*, in FINANCING THE 2000 ELECTION 79 (David B. Magleby ed., 2002); John C. Green & Nathan S. Bigelow, *The 2000 Presidential Nominations: The Costs of Innovation*, in FINANCING THE 2000 ELECTION 49 (David B. Magleby ed., 2002).

98. LOWENSTEIN & HASEN, *supra* note 10, at 985.

99. Green & Bigelow, *supra* note 97, at 59.

100. LOWENSTEIN & HASEN, *supra* note 10, at 984.

101. Corrado, *supra* note 97, at 94.

102. See ACKERMAN & AYRES, *supra* note 1, at 167.

103. *Id.* at 167. To the extent this point is correct, it suggests that the voucher plan may be more coercive than voluntary, raising some constitutional concerns.

104. *Id.* at 170.

the authors conclude, she would have beaten Democrat Al Gore to become the first female president of the United States.¹⁰⁵

Not only is this scenario beyond fanciful, it is based upon more unproven empirical assumptions than I can count. Let me focus, however, on just a few assumptions in presenting an alternate scenario that is just as plausible. In spinning out my alternative scenario, it is worth reminding readers that George W. Bush was a popular governor in Texas before he ran for president. He was an accomplished fund-raiser in his state, a good-looking, folksy southerner with a great name. He was anointed early by the Republican elite as representing the best chance for Republicans to take the White House back from the Democrats.

In my scenario, Bush completely opts out of the voucher plan, thereby rallying the Pioneers (many of whom supported Bush in Texas, where the voucher program does not apply to state races) to “put their money where their mouth is” and support his campaign. The Pioneers have the financial ability to make significantly larger donations than the \$1000 currently allowed under FECA because

[m]any Pioneers were business leaders, representing the finance, energy, real estate, and manufacturing sectors in roughly equal numbers, followed by a wide array of the other industries; they included chief executive officers of major corporations, entrepreneurs, and venture capitalists. However, the largest group of Pioneers was lawyers and lobbyists, professional “brokers” in the political process.¹⁰⁶

Some of these Pioneers, therefore, make \$100,000 contributions, as allowed by the Ackerman and Ayres proposal. Many give smaller, but still significant, amounts. They also get their moneyed friends to make very generous donations. And, as a result, Bush is awash in money (remember, he raised \$91 million in \$1000 chunks!).¹⁰⁷ Moreover, the secret donation booth hardly deters anyone from giving money for two reasons.¹⁰⁸ First, many of

105. *Id.* The authors also predict that third party candidates like Ralph Nader and Pat Buchanan would have gotten a smaller share of the vote, because voters could allocate their voucher dollars to these candidates while still casting a vote for a major party candidate. *Id.* at 169–70.

106. Green & Bigelow, *supra* note 97, at 59.

107. See LOWENSTEIN & HASEN, *supra* note 10, at 985.

108. The authors do not quantify how much mandatory anonymity will reduce giving, though they note that the secret ballot is “estimated to have decreased voter turnout by

these Pioneers have been trusted Bush allies since Bush ran for governor, or from when Bush's father was in politics.¹⁰⁹ Second, Bush will believe these Pioneers when they claim to have made large contributions through the state-mandated blind trust. And many could not care less whether Bush believes the claims or not; they are pursuing an electoral strategy, not a legislative strategy.¹¹⁰ The Pioneers want Bush to be elected because they know he will be good for their interests, even if he grants them no special favors.¹¹¹

True, some supporters of Bush may want to make sure he knows they are spending large dollars to benefit his campaign. No problem. A Bush supporter hires an advertising agency with no ties to the Bush campaign to watch and mimic Bush's campaign ads. The supporter then spends \$10 million on advertisements replicating Bush's message but lacking words of express advocacy. The supporter then leaks to the press that he, indeed, funded the independent expenditure campaigns.¹¹²

Ackerman and Ayres are apparently as naïve as the Supreme Court was in *Buckley*¹¹³ in believing that these independent media campaigns "may sometimes be entirely counterproductive,"¹¹⁴ with a "rather small" overall impact on the election.¹¹⁵ How hard will mimicry be? There is no need for coordination; all a mimic needs is television airtime and a large budget. The effects could be tremendous.

about 12 percent." ACKERMAN & AYRES, *supra* note 1, at 30. The sources they cite show at most a 6.9% decline caused by the move to the secret ballot, and it is not at all clear that a decline in giving would match the decline in voting due to declining bribery possibilities. *See id.* at 251 n.6 (citing Jack C. Heckelman, *The Effect of the Secret Ballot on Voter Turn-out Rates*, 82 PUB. CHOICE 107, 119 (1995)).

109. *See* Green & Bigelow, *supra* note 97, at 59–60.

110. *See* Daniel H. Lowenstein, *On Campaign Finance Reform: The Root of All Evil Is Deeply Rooted*, 18 HOFSTRA L. REV. 301, 308 (1989) (explaining the distinction between electoral and legislative strategies).

111. *Cf. id.*

112. Consider, for example, the \$2.5 million that Bush supporter Sam Wyly spent on advertisements attacking John McCain in New York before that state's primary. *See* Richard L. Hasen, *The Surprisingly Complex Case for Disclosure of Contributions and Expenditures Funding Sham Issue Advocacy*, 48 UCLA L. REV. 265, 267–68 (2000) (discussing Sam Wyly's expenditures favoring the Bush candidacy).

113. *Buckley v. Valeo*, 424 U.S. 1, 47 (1976) ("Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive.").

114. ACKERMAN & AYRES, *supra* note 1, at 122.

115. *Id.* at 126.

For example, the National Rifle Association decides that Bush is the best person to be president. It spins off an arm that collects voucher dollars, which decides to let the vouchers expire rather than give them to McCain or Dole. Its separate PAC gives as much money as it can to Bush, and it collects additional contributions from members to run sham issue advertisements supporting the Bush presidential campaign (“Call Al Gore and ask him why he wants to take away our precious constitutional rights”).¹¹⁶ The Republican Party, convinced that Bush is the right person for the job, pumps in its money to promote Bush too.

Al Gore gets the Democratic nomination by virtue of incumbency. He opts for voucher financing, because Democrats have not been as good as Republicans in locating people to make six-figure donations. They find a few, however, who make donations to fund sham issue advocacy, and the election goes down as by far the most expensive in history, all coming down to a recount in Florida; we all know how that story ends.¹¹⁷

Back in Congress, it is business as usual. Many members of Congress have opted for voucher-based public financing. Some have not. Most members know who their friends are, know who ran the independent expenditure and issue advocacy campaigns on their behalf, and know which organizations coughed up their voucher dollars. Rent seeking continues to flourish.

What has changed? Marginally, politicians’ demand for money has decreased. Some organizations gain new clout as the bundlers of voucher dollars. Some people are lying for political advantage (this is news?). But the dynamics are the same as those that exist in Washington today. Only now there is more money in the system and presumably more negative advertising all around.¹¹⁸

IV. CONCLUSION

If we really want “massive” change in our electoral system toward greater equality (and the authors simply assume that we do

116. *See id.* at 97 (noting that their proposal has “absolutely no intention of forcing the secret donation booth on any organization that runs issue-oriented campaigns independent of a candidate’s control”).

117. *See* *Bush v. Gore*, 531 U.S. 98 (2000).

118. *See supra* note 40.

rather than try to convince us of the fact), the Supreme Court must allow for a cap on independent expenditures and a limit on candidate self-financing. It must also allow legislatures to redraw the line between express advocacy and issue advocacy.

Expenditure limits are necessary for egalitarianism and to decrease rent seeking. We need a plan, however, that "levels down" as well as "levels up." What good is a fifty-dollar voucher (of which only twenty-five dollars goes to the presidential campaign) when the wealthy can give presidential candidates \$100,000? Ackerman and Ayres "do not deny the symbolic force" of such an argument,¹¹⁹ but the issue is about *real* unequal influence over the electoral process, not about symbolism.

Redrawing the issue advocacy line is necessary to prevent easy end-runs around the political system. Ackerman and Ayres believe that further regulation in this area is futile because campaign consultants will always find ways around new definitions of express advocacy. There will be significantly lower returns, however, for issue ads that cannot feature the name or likeness of candidates. Regardless of whether the BCRA's redrawing of the line is constitutional, it would likely be effective in curbing much sham issue advocacy. The authors are plainly wrong in stating that "[s]hort of abolition of free markets and private property, there is simply no way to eliminate the influence of private money on democratic politics."¹²⁰

In the end, Ackerman and Ayres have made suggestions that will modestly change the workings of our campaign finance system. Some changes, like public financing of congressional campaigns, will improve the system. Other changes, like mandatory donor anonymity and increasing individual contributions in presidential campaigns to \$100,000, will likely have negative effects. Massive reform, if it ever comes, awaits regime change in the Supreme Court as well as many more people accepting egalitarian notions of campaign finance.

119. ACKERMAN & AYRES, *supra* note 1, at 44.

120. *Id.* at 120.