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VOUCHERS AND *BUCKLEY*: THE NEED FOR "REGIME CHANGE"

Richard L. Hasen *

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.


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 \textit{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 \textit{Buckley}, rather than an obstacle to reform, was more or less correctly decided, and that their program is fully consistent with \textit{Buckley}'s mandates.\(^7\)

Unfortunately, the authors underestimate how the \textit{Buckley} framework would limit the benefits of their proposal. \textit{Buckley}'s rules on issue advocacy\(^8\) and individual expenditure limits\(^9\) 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.

\footnotesize{
\begin{itemize}
\item \textit{5.} See id. at 208–09 (Citizen Sovereignty Act § 14(f)–(g)). For the potential fraud problems with Internet voting, see Richard L. Hasen, \textit{Introduction} to Symposium, \textit{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 \textit{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. \textit{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. \textit{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), \textit{available at} \url{http://www.ss.ca.gov/executive/ivote/final_report.htm}.

\item \textit{6.} 424 U.S. 1 (1976).
\item \textit{7.} \textit{ACKERMAN & AYRES, supra} note 1, at 156.
\item \textit{8.} \textit{See Buckley}, 424 U.S. at 47–51.
\item \textit{9.} See \textit{id}. at 51–54.
\end{itemize}}
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* REGIME

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. It also struck down expenditure limits, including a $1000 limit on independent expenditures "relative to a clearly identified candidate," limits on a candidate's use of personal or family wealth to run a campaign, and limits on total campaign spending by candidates for federal office.

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

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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. 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. 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 . . . .” 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. Finally, the Court rejected a proposed equality rationale for limiting expenditures, finding the idea was “wholly foreign to the First Amendment.”

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

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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.”)
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.
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.
25. Buckley, 424 U.S. at 41-44.
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.'" So construed, the Court still struck down the spending limits as violating the First Amendment, but it upheld the disclosure requirements.

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. 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. 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. The figure climbed to at least $250 million during the 1998 election, and reached $509 million for the 2000 election cycle. 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,
corporations, and unions to pay for advertisements promoting their candidates,\(^4\) and, more often, defeating their opponents.\(^5\)

The new Bipartisan Campaign Reform Act ("BCRA")\(^6\) bans some forms of soft money\(^7\) 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.\(^8\) Corporations, unions, and interest groups receiving corporate or union funds cannot pay for such advertisements except through separate segregated funds.\(^9\) Further, anyone running such advertising over a certain dollar threshold must disclose contributions and expenditures funding the advertising.\(^10\) Soon enough, the Supreme Court may consider the constitutionality of these provisions.\(^11\)

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."\(^12\) They make a two-pronged attack. First, the authors claim that their "new paradigm authorizes massive changes now,"\(^13\) a claim evaluated in the next part of this essay. Second, they claim that Buckley was correctly decided

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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).
42. Id. sec. 101(a).
43. Id. sec. 201(f)(3)(i).
45. BCRA sec. 201(f)(1).
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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."\textsuperscript{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."\textsuperscript{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."\textsuperscript{54} Brennan saw this as a serious equal protection problem, disadvantaging challengers.\textsuperscript{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,

\begin{itemize}
\item \textsuperscript{49} See id. at 11; Buckley v. Valeo, 424 U.S. 1, 39–51 (1976).
\item \textsuperscript{50} See ACKERMAN & AYRES, supra note 1, at 156.
\item \textsuperscript{51} Id. at 156–57.
\item \textsuperscript{52} Id. at 157.
\item \textsuperscript{53} Id.
\item \textsuperscript{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).
\item \textsuperscript{55} Id.
\end{itemize}
as a policy matter, they do not favor caps on independent expen-
ditures. Thus, the authors do not reprise Ackerman's implausi-
ble argument—made in connection with his initial voucher pro-
posal 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.

Second, they devote very little attention to the problem of self-
financed candidates. They briefly argue against the practice, stat-
ing that they would reverse Buckley on this point if they were on
the Court. They reason that it is inegalitarian for "rich people"
to have "special privileges when they compete for public office in
democratic politics." 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 be-
lieve that "the current majority of Justices" would stick with
Buckley on the right of candidates to bankroll their own cam-
paigns.

Ackerman and Ayres also flirt with redrawing Buckley's line
between express advocacy and issue advocacy. In their model
statute, however, they punt on what should be regulated, pur-
porting 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 regu-
lation shall designate." 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 "aboli-
tionist" 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 cam-
paign 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 oth-
ers.
60. Id.
61. See id. at 119–20.
62. Id. at 187 (Citizen Sovereignty Act § 2(6)).
political issues. 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, and they assume the Court would not allow any further regulation in this area beyond the current "magic words" test for express advocacy.

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. 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. 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.

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-

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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).
67. ACKERMAN & AYRES, supra note 1, at 125.
68. Id.
Voucher allocations are secret. 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. These donations are secret, except a contributor could get proof she had donated up to $200 to a campaign. 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.

Candidates who wish to accept voucher dollars may not contribute funds to their campaigns exceeding the contribution limits applicable to others. Interest groups who have registered to collect voucher dollars may transfer them to candidates, but cannot use the funds for independent expenditure campaigns. 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.

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

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69. See id. at 209–10 (Citizen Sovereignty Act §§ 15–16(a)). The authors favor suballocations 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.\textsuperscript{80} The proposal also puts no limit on individual independent expenditures,\textsuperscript{81} and appears to do very little, if anything, to change the definition of express advocacy.\textsuperscript{82} I suppose the most serious challenge to the proposal would concern its mandatory anonymity of contributions.\textsuperscript{83} Mandatory anonymity is a bad idea for two reasons. First, it deprives voters of useful information about who is supporting candidates.\textsuperscript{84} Second, it fosters a relationship of mistrust between elected officials and potential donors.\textsuperscript{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.\textsuperscript{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

\footnotesize{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 $1,075).

\footnotesize{81.} ACKERMAN & AYRES, \textit{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).

\footnotesize{82.} ACKERMAN & AYRES, \textit{supra} note 1, at 120.

\footnotesize{83.} See id. at 211 (Citizen Sovereignty Act § 16(d)).

\footnotesize{84.} See LOWENSTEIN & HASEN, \textit{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, \textit{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).

\footnotesize{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, \textit{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.

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 redrawning the boundary between express advocacy and issue advocacy. 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.
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. 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, 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.

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, 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, 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. 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. 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. Bush then took public financing for the general election (in the amount of $67.56 million) 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.

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. 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.” 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. Ultimately,
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. 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. 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.

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.

Ackerman and Ayres are apparently as naïve as the Supreme Court was in Buckley in believing that these independent media campaigns "may sometimes be entirely counterproductive," with a "rather small" overall impact on the election. 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 Turnout Rates, 82 PUB. CHOICE 107, 119 (1995)).

109. See Green & Bigelow, supra note 97, at 59–60.
111. Cf. id.
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”). 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.

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.

IV. CONCLUSION

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

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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”).
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.