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CAMPAIGN FINANCE AND ELECTORAL REFORM: A FEMINIST ECONOMICS PERSPECTIVE

KIMBERLY CHRISTENSEN

ABSTRACT

In “Campaign Finance and Electoral Reform: A Feminist Economics Perspective,” we begin by examining the impact of the current regime of campaign finance on the American political system, in terms of the possibilities for corruption, for inegalitarian agenda-setting, and on the quality of representation by office-holders. We then briefly review attempts to regulate this system, from the Tillman Act of 1907 to the 2002 Bipartisan Campaign Reform Act ("McCain-Feingold"). We examine and critique the extant proposals for change, including legislation and/or regulation to “plug the holes” in FECA (the Federal Election Campaign Act of 1971), public financing of all federal campaigns (through either lump-sum payments or “voter vouchers”), and the deregulation of all campaign contributions, combined with immediate reporting of the same. Next, using the work of feminist economist Amartya Sen, we examine the proposals for reform through the lens of feminist economics, critiquing the neoclassically based assumption of individualistic political decision-making on which they are built. We examine the reasons for the decline of “dialogic sites,” institutions and venues where ordinary Americans can debate politics, form coherent political world-views, and pressure candidates and elected officials. Finally, using both the tools of modern communications technology and lessons from the civil rights and feminist movements, we present a tentative list of proposals for reform and democratic renewal of the American political system.
CAMPAIGN FINANCE AND ELECTORAL REFORM: A FEMINIST ECONOMICS PERSPECTIVE

"The two most important things in politics are money and I can’t remember what the other one is."2

I. The Current American Campaign Finance System:

Many observers have recognized the potential for conflict between the market-based (and often profoundly unequal) American economic system and the egalitarian aspirations of the American electoral system. For example, as Bruce Ackerman and Ian Ayres have commented:

Liberal democracy requires an awkward balance between two spheres of life. Within the sphere of democratic politics, we confront each other as moral equals, and we deliberate about our collective future.... The organizing principles of the liberal market are different. We come to the table with unequal assets, often vastly unequal. We bargain to further our private interest, without trying to justify our deals in terms of the greater public interest.... Our collective anxiety about campaign finance testifies to the uneasy coexistence of the spheres.3

Although nominally regulated, the current system of American electoral finance relies heavily on private contributions

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1 The author would like to thank Brian Glick (Fordham Law School), Thomas J. Schwarz, President, Purchase College, State University of New York, Elaine McCrate (University of Vermont, Economics), and Sanford Ikeda (SUNY/Purchase, Economics) for their assistance. This piece is dedicated to the memory of my father, Julien M. Christensen.


3 BRUCE ACKERMAN AND IAN AYRES, VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE 12-13 (2002).
to fund all manner of campaign activity, especially television advertising. For example, in 2000, over three billion dollars of private money was raised and spent on the presidential and congressional elections, and the estimates for the 2004 elections approach four billion dollars. According to the NYU Brennan Center for Justice, the majority of this money goes towards the purchase and design of television advertising, predominantly short (and often negative) spot ads.

This predominantly private funding regime presents several fundamental problems for the democratic nature of the American political system. These include:

1. **Possibilities for quid pro quo corruption**

   First, given the enormous quantity of government procured goods and services, private campaign financing presents myriad opportunities for quid pro quo corruption. For instance, in 2000, direct federal government spending was approximately two trillion dollars, consumption and gross investment by the federal government was over 590 billion dollars, and another, untold amount of money was spent complying with federal environmental, health and safety, and other regulations. Each of these procurement and regulatory decisions was potentially influenced by the possibility or reality of private campaign contributions.

   And, not surprisingly, there is evidence that deals between

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7 *See supra* note 4.
candidates and special interests do occur. For instance, paperwork filed in conjunction with the McConnell challenge to the Bipartisan Campaign Reform Act of 2002⁸ (hereinafter “McCain-Feingold” or “BCRA”) has revealed several cases of probable quid pro quo deals.⁹ One particularly egregious example concerns the promise of a payoff the Republican National Committee demanded in writing from drug giant Bristol-Meyers-Squibb in return for legislation “that will benefit your industry.”¹⁰ Such deals contain the potential to undermine both the representative nature of American democracy and popular faith in that system.

2. Possible impact on agenda-setting and prioritization

Quid pro quo deals are often cited as evidence in favor of the “public choice” theory of politics.¹¹ Briefly stated, public choice theorists believe that information costs, combined with the infinitesimal chance that ones vote will decide an election, will lead most citizens to remain “rationally ignorant” about candidates and electoral issues.¹² This allows small, committed groups¹³ to

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¹² Information has many of the attributes of a “public good”; i.e., that it is impossible to exclude “free riders” (those who have access to the information but who do not pay for it) and that the use of this information by the “free riders” will not increase the costs of production of that information. Under these circumstances, private markets will fail to produce adequate amounts of information. See, e.g., Sanford J. Grossman & Joseph E. Stiglitz, On the
research relevant issues and, through lobbying and strategic campaign contributions, to gain undue influence over government decisions. In particular, public choice theorists believe that these special interest groups will be able to successfully use the legislative and regulatory processes to siphon public funds to their members. The resulting outcomes will be both inefficient and incompatible with the public interest. Crude forms of this theory actually present proposed legislation as a "product" to be "sold" by legislators and "bought" by special interest groups.

But despite the existence of some blatant quid pro quo deals, empirical research casts doubt on simplistic public choice models that view legislation as a market where bills are "sold to the highest bidder." In other words, although such deals may...

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2 Small groups are assumed to have lower transactions costs; i.e., costs of making use of information. Lower transactions costs are presumed to make research, communications, and lobbying more efficient, and hence, less costly.
3 Economists refer to this behavior as "rent-seeking."
5 In 1972, economist Gordon Tullock observed that if campaign contributions are actually "investments" in government decisions, this is a market characterized by an incredible gap between "investment" and "return." As we have seen, in 2000, direct federal spending was approximately two trillion dollars, and consumption and gross investment another 590 billion dollars, with an unknown amount spent complying with federal regulations. Yet private campaign contributions to all federal candidates, parties, and organizations totaled three billion. While three billion is a significant sum, it represents an insignificant percent of the supposed "market" for government contracts and regulations. If campaign contributions were really "investments" in public policy, competition among contributors should have forced private contributors...
occur, blatant congressional vote-buying does not seem to be the norm.

To test the empirical validity of the public choice approach, Ansolabehere, Figueiredo, and Snyder surveyed forty studies which examined the relationship between PAC contributions and congressional roll-call voting. They found that, "[o]verall, PAC contributions show relatively few effects on voting behavior." Ansolabehere, Figueiredo, and Snyder recognize that equations designed to measure the correlation between congressional voting and contributions may be prone to "specification" problems. Ansolabehere, Figueiredo, and Snyder therefore construct their own model to attempt to disentangle these effects. In line with the majority of the forty surveyed studies, their results show that a congressperson's roll-call voting behavior is much more dependent on the legislator's own ideology, his/her party affiliation, and constituent preferences (interestingly, in that order) than it is on campaign contributions.


18 The two most likely are simultaneity and inadequate control variables. Simultaneity is the idea that contributions may influence votes, but votes may also influence contributions., while inadequate control variables means that PACs may want to elect already-"friendly" legislators as well as influence their votes.

19 See supra note 4; see also Stephen Levitt, How Do Senators Vote? Disentangling the Role of Voter Preferences, Party Affiliation, and Senator Ideology, 86 AM. ECON. REV. 425, 425-41 (1996). I am skeptical of the validity of the proxies often used to represent "legislator ideology" in this and similar studies. For example, Ansolabehere, Figueiredo, and Snyder rely on Steven Levitt's work which attempts to empirically separate the roles of constituent preferences, party affiliation, and representatives' ideology in the determination
Even assuming that *quid pro quo* deals are not the norm, however, the money-saturated context in which all legislative and policy-making wrangling takes place can have a profound impact on which issues are put on the agenda in the first place, and on which alternative solutions are considered to be politically feasible.\(^{20}\) Studies that focus strictly on congressional roll-call voting miss the fact that most of the crucial decisions and compromises concerning pending legislation (such as whether it is even brought to the floor for a vote) are made in committees and in other informal settings.\(^{21}\)

Quoting Daniel Lowenstein:

> In reality, the influence of campaign contributions is present from the start, and it interacts in the human mind with other influences in an unfathomable but complex dynamic. It affects the ‘chemistry’ of the ‘mix’ of the legislator’s deliberations. It may or may not affect the legislator’s ultimate actions, but setting aside the most flagrant cases, no one can be sure, perhaps not even the legislator in question. . . . It is not that the entire legislative process or even a great deal of it is corrupt; rather, it is that the corrupt element is intermingled with the entire process, in a way that cannot be isolated.\(^{22}\)

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of senators’ roll call votes. A closer look at Levitt’s model, however, reveals a fundamental problem: Levitt does not employ a direct proxy variable for senatorial ideology (his most statistically significant independent variable). Rather, his coefficient for senatorial ideology is a *remainder* term; i.e., that variance left after the influences of voter preferences and party affiliation have been removed. Since his coefficient for “ideology” could clearly be picking up the impact of un-theorized, omitted variables, his interpretation of this remainder term as the impact of ideology must be seen as merely conjectural.


\(^{21}\) *Id.* at 325.

\(^{22}\) *Id.*
For this reason, rather than focusing on cases of actual or suspected *quid pro quo* corruption, many observers find it more fruitful to discuss campaign contributions using the traditional legal discourse of "conflict of interest." In court cases, it is customary to take institutional steps to minimize these potential conflicts of interests or, if that is impossible, to disqualify a judge or other participant from a process where his/her self-interest might be at stake. Yet the current U.S. system of campaign finance expects legislators and executives (and candidates for these offices) to continually disregard their own self-interest (in being re-elected) in order to serve the public interest. Given the current institutional setting, it may be necessary for candidates, at least occasionally, to "shade" their beliefs and their behaviors in order to survive the campaign fund-raising process. Perhaps we need to question the structure of a system that creates such pressures on our representatives.

3. **Possibility of unequal impact in the electoral and legislative arenas**

Third, even if *quid pro quo* corruption did not exist, and legislators and candidates could somehow make decisions without regard to their own chances for re-election, the wealthy would still have much greater ability to elect candidates who favor their priorities by virtue of their greater control over resources.

There is considerable evidence that American political participation of many sorts - from voting to letter-writing, to making campaign contributions - is related to income and education level. For instance, a study by Public Campaign found that in zip codes where the median per capita income was under $10,000, there were eight contributions to federal campaigns

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23 Id. at 301-367.
25 Public Campaign is an advocacy organization that favors public financing of campaigns. For general information on Public Campaign, and an abbreviated version of the study, see http://www.publicampaign.org. See also Spencer Overton, *supra* note 24.
per 10,000 residents. In zip codes with median per capita incomes closer to the national average (37% higher), residents were three times as likely to contribute to federal campaigns as were those in the poorer neighborhoods. And finally, residents in the wealthiest districts, with per capita incomes over 400% higher than the poorest neighborhoods, were fifty-four times as likely to contribute to federal campaigns as those in the poorest neighborhoods. Clearly, the candidates favored by those in the poorest districts do not, in any meaningful way, have an "equal chance" of being elected as those favored by their more wealthy neighbors. Legal scholars who favor reform contend that this situation contradicts the principle of "one person, one vote" which is central to democracy.

Additionally, current-day income and wealth distribution are not innocent of historic inequalities in terms of race, gender, and other axes of discrimination. Past state-sponsored discriminatory practices such as restrictions on property ownership, exclusion from higher education, etc., combined with the continued existence of less formal discrimination, have resulted in women and/or people of color having lower average incomes and even lower levels of average wealth. Therefore, they tend to make fewer campaign contributions than their white and/or male peers, and hence, have less influence on the outcomes of electoral campaigns. For instance, people of color currently constitute roughly 30% of the U.S. population, but were fewer than 1% of those who contributed to federal electoral campaigns. Says Overton:

[P]ast, state-mandated discrimination against racial

\[26\] See id.
\[27\] Id.
\[28\] Id.
\[30\] See supra note 24.
minorities has shaped the current distribution of property, which in turn hinders the ability of many people of color to participate fully in a privately financed political system. Speech markets treated in the campaign finance context are not 'neutral' or 'fair,' but are based on existing property allocations that have been shaped by illegitimate factors such as past discriminatory public policies. Racial disparities in the existing campaign finance system exacerbate racial disparities in the future allocation of resources.\(^{31}\)

4. Possible impact on the quality of representation

The constant need to raise funds is an unrelenting source of stress for candidates and office-holders, as it forces them to spend time away from their (non-wealthy) constituents and from the business of legislating. Former Pennsylvania Congressperson Bob Edgar, who quit the House of Representatives rather than face another re-election fund-raising cycle, said, "eighty percent of my time, eighty percent of my staff's time, eighty percent of my events and meetings were fund-raisers. Rather than go to a senior center, I would go to a party where I could raise $3000 or $4000."\(^ {32}\)

Vincent Blasi argues for the public financing of all campaigns based on the effect of the current system on campaign finance on candidates and office-holders.\(^ {33}\) Blasi believes that the impact of fund-raising on candidates' time is so severe as to undermine the constitutionally-ordained necessity for constituent representation. "Legislators and aspirants for legislative office who devote themselves to raising money round-the-clock are not, in

\(^{31}\) Id.

\(^{32}\) See supra note 29, at 1188 (quoting Former Pennsylvania Congressperson Bob Edgar)

essence, representatives.\textsuperscript{34}

The "money chase" almost certainly reduces the number of qualified people willing to run for public office, and, as Congressperson Edgar’s comments make clear, it negatively impacts on the ability of all officeholders to perform the jobs for which they were elected.

II. Attempts at Regulation

Concern with these possibilities - for quid pro quo corruption, conflicts of interest, undue influence, and the impact on officeholders - has long led U.S. muckrakers and progressive policy-makers to try to regulate the interaction between the private contribution market and the public voting booth.\textsuperscript{35} Back in 1907, under pressure from the Populist Movement, the U.S. Congress passed the Tillman Act\textsuperscript{36} which attempted to ban corporate contributions to political campaigns. However, since Tillman contained no effective enforcement mechanism, corporations simply began to "launder" their contributions through their executives, directors, and employees.\textsuperscript{37} Since Tillman, there have been numerous other attempts to rein in the influence of money on elections. These include the Federal Corrupt Practices Act of 1925,\textsuperscript{38} the Federal Election Campaign Act (FECA) of 1971,\textsuperscript{39} and several sets of Watergate-inspired amendments to FECA, including those of 1974, 1976, and 1979.\textsuperscript{40} The amended FECA originally provided for strict limitations on both private campaign

\textsuperscript{34} \textit{Id.}
\textsuperscript{35} For a succinct summary of these attempts at regulation, see \textit{supra} note 29, at 1160. \textit{See also} CAMPAIGN FINANCE REFORM: A SOURCEBOOK (Anthony Corrado, Thomas Mann, Daniel Ortiz, Trevor Potter, & Frank Sorauf, eds., 1997).
\textsuperscript{36} 2 U.S.C. § 441b (1907). \textit{See also supra} note 29.
\textsuperscript{37} \textit{Id.}
\textsuperscript{40} \textit{See supra} note 29. For a summary of FECA amendments, see also CAMPAIGN FINANCE REFORM, \textit{supra} note 35.
contributions and expenditures by candidates’ campaign committees.\footnote{See supra note 35.}

Since the 1974 amendments to FECA, the income tax check-off system has provided for public financing of American presidential campaigns. In return for raising a threshold level of private contributions and a pledge not to raise further private funds, presidential candidates can receive public funds to conduct their campaigns, including the hiring of staff and the purchase of television ad time. Several states and localities, including Massachusetts, Maine, Vermont, Arizona, and New York City, have adopted some variant of this system for their state/local elections.\footnote{See, e.g., Arizona Citizens Clean Election Act, 16 A.R.S. § 952 (2005); Maine Clean Election Act, 21-A M.R.S. § 1121 (1996); Vermont Clean Election Law, 17 V.C.E.L. § 2801 (2005); New York City Campaign Finance Act, N.Y.C. Admin. Code § 3-701; Massachusetts Clean Elections Law, 55B M.G.L. § 12 (1998), http://www.mass.gov/ocpf/cl_elec.htm (repealed 2003).}

Unfortunately, due to the lack of indexing of the subsidies, the real value of presidential public financing has been significantly eroded since 1974, and the system has become increasingly irrelevant. For instance, by the fall of 2003, presumptive Republican presidential candidate George W. Bush had already declared his intent not to participate in the public finance system.\footnote{See Shrinking from Campaign Reform, N. Y. TIMES, Nov. 7, 2003, at A26.} Similarly, Democratic contenders Howard Dean and John Kerry both announced that they would not be accepting public funding for their primary campaigns.\footnote{Sharon Theimer, Kerry Raises $500,000 Online in Two Days, WASH. POST., January 30, 2004, at A6, available at http://www.washingtonpost.com/wp-dyn/articles/A60848-2004Jan29.html (last visited on March 26, 2006).}

In addition, subsequent Supreme Court decisions and rulings by increasingly conservative Federal Elections Commission (hereinafter “FEC”) commissioners have considerably weakened the original intent of FECA and permitted the growth of end-runs around funding limits.\footnote{See, e.g., Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612 (1976), Nixon v. Shrink Missouri, 528 U.S. 377 (2000); Cal. Med. v. F.E.C., 453 U.S. 182 (1981).} \textit{Buckley} distinguishes between the FECA
limitations on campaign contributions, which it upheld as necessary to prevent "corruption and the appearance of corruption," and limitations on campaign expenditures, which it overturned as a violation of First Amendment freedom of speech. Subsequent Court decisions have reaffirmed and strengthened this distinction between the supply of, and demand for, campaign funds.

The predictable result has been the proliferation of end runs around the original FECA limits. Three of the most troublesome results are the growth of soft money, PAC bundling, and independent issue/express advocacy.

In 1978, the FEC explicitly allowed national political parties to raise soft money (money not subject to FEC contribution limits) from individuals, corporations, and PACs, for purposes of party-building efforts such as voter registration drives, get-out-the-vote (hereinafter "GOTV") campaigns, and the like. Since the mid-1980s, as the specter of Watergate faded from public view, national parties have begun to funnel this soft money into the coffers of presidential candidates, including those who were publicly funded and therefore supposedly operating under strict limits on private contributions and campaign spending. A study by the Brennan Center for Justice found that:

Based on FEC data, in the 2000 campaign, just 8.3% of soft money spent by the Republican and Democratic Parties went to voter education, phone

46 See Buckley, supra note 45, at 26.
47 See, e.g., Nixon, supra note 45 (upholding a Missouri statute that imposed strict contribution limits on candidates for state office); Cal. Med., supra note 45 (1981 (upholding restrictions on contributions to PACs on the grounds of preventing corruption); But cf. F.E.C. v. N.C.P.A.C., 470 U.S. 480 (1985), (overturning FECA limits on PAC expenditures as a violation of the First Amendment); Colorado Republican Federal Campaign Committee v. FEC ("Colorado I"), 518 U.S. 604, 608 (1996) (shielding "independent" expenditures by the national political party from FECA limits).
banks, voter registration, get-out-the-vote drives, and other party-building activities. The party spent 38% of their soft money - far and away the largest expenditure - on issue advocacy (television, radio, and direct mail).  

Bundling is the process by which political action committees (PAC’s) and other special interest groups solicit individual hard money (FEC-regulated) contributions for a candidate, and then deliver them to that candidate in a bundle, thereby taking credit for raising the donations. For example, “You are now receiving $100,000 in individual contributions, courtesy of the National Rifle Association.” Since the individual hard money contributions funneled by the PACs do not exceed the FECA limits for individual donors, they do not violate the letter of the FECA law. However, one could certainly argue that they eviscerate its spirit.

In one particularly blatant example of bundling, George W. Bush’s 2000 and 2004 re-election campaigns created special “clubs” for supporters who bundle large numbers of contributions. Bush bundlers who raised at least $100,000 got to join the “Pioneers”; those who raised $200,000 or more were “Rangers” (presumably named after the sports team Bush once owned), and those who raised $300,000 or more were “Super-Rangers” or “Mavericks.” By July 2003, there were eighteen “Rangers” and numerous “Pioneers.” By Election Day 2004, there were 221 “Rangers” 327 “Pioneers,” and 62 “Mavericks.” Together, these bundlers raised approximately $77 million for George W. Bush’s re-election campaign.

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48 See supra note 6.
51 Id.
Independent issue/express advocacy refers to advertising that clearly opposes or supports a candidate, mounted in the period immediately preceding an election by supposedly independent advocacy groups (such as the Sierra Club, National Right to Life, etc.). Since non-party-connected advocacy groups are not subject to FECA contribution or expenditure limits, this type of advertising (some of it quite defamatory) is a growing factor in many electoral contests. A study by the Brennan Center for Justice found that issue ads and supposedly independent expenditures accounted for over 20% of the election-related advertising.53

Since Buckley,54 the Supreme Court has used a "magic words" test to determine whether a given ad is, indeed, advocating the election of a particular candidate and should therefore be subject to FECA regulations.55 But, only about 10% of candidates' own campaign ads contain any of the Supreme Court's "magic words."56 Clearly, this test leaves room for the growth of campaign advertising by supposedly independent, supposedly grassroots organizations.

III. Public Dissatisfaction and the Prospects for Change

As the end-runs around contribution and spending limits have grown, and the number of attack ads increased, so has public dissatisfaction with the American electoral process. Considerable evidence exists of widespread disenchantment with the way Americans finance and run electoral campaigns.57

54 See supra note 45.
55 Id. (noting magic words could include, for example, "Vote for Candidate X!") or "Elect Candidate Y!")
56 See Brennan Center for Justice, supra note 6.
Poll data consistently reflect skeptical-to-cynical attitudes towards elected officials.\textsuperscript{58} A survey conducted in 1992 by the Gordon Black organization found that 74\% agreed with the statement that "[c]ongress is largely owned by the special interest groups." Similarly, 83\% agreed that "the special interest groups that give campaign contributions to candidates have more influence over the government than the voters," and 85\% agreed that "special interest money buys the loyalty of candidates." \textsuperscript{59}

Perhaps more troubling are the statistics regarding American voter participation. As Curtis Gans has pointed out, the polarization of the electorate and extensive voter mobilization drives pushed voter turnout in the 2004 federal elections to approximately 59.6\% (120.2 million people), the highest level since 1968.\textsuperscript{60} This was up considerably from the 2000 presidential election, when only 54.3\% (105.4 million people) voted, and from 1996, when only 49\% (95.8 million people) voted.\textsuperscript{61} Still, a 60\% voter participation rate in one of the most hotly contested elections in the past century hardly constitutes a ringing endorsement of our electoral system. Turnout for off-year congressional elections is much lower, averaging less than 39\% in 1994, approximately 36\% in 1998, and just over 39\% of eligible voters in 2002.\textsuperscript{62}

These figures are even more disturbing when placed in an international context. The Institute for Democracy and Electoral Assistance compared countries' voter participation rates since 1945 (or whenever the countries began holding elections) and of the 172 countries studied, U.S. voter turnout rate ranked 114\textsuperscript{th}.\textsuperscript{63} Nearly every industrialized democracy ranked ahead of the United

\textsuperscript{58} Id.
\textsuperscript{59} Id.
\textsuperscript{61} Id.
States, including Italy, at 92.5%, Denmark at 83.6%, Germany at 80.6%, Spain at 77.0%, the United Kingdom at 74.9%, Japan at 69.0%, and France at 67.3%. The U.S. voter turnout rate was similar to that of many severely under-developed countries and/or countries which have recently experienced intense political turmoil or election-related violence, such as Uganda at 50.6%, Peru at 48.0%, Nigeria at 47.6%, El Salvador at 44.3%, and Haiti at 42.9%.64

There is also significant evidence of broad-based support for change in the American campaign finance system. First, witness the surprising strength of John McCain’s campaign for the 2000 Republican presidential nomination, a campaign he based primarily upon the issue of campaign finance reform. Despite an enormous financial disadvantage -- by July 1999, George W. Bush had raised 36 million dollars compared to McCain’s three million dollars -- McCain beat Bush in the early primary states of New Hampshire, Michigan and Arizona.65 In March, on Super Tuesday, however, McCain “hit a wall.”66 His traveling-bus approach was not able to compete with the well-financed television advertising

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64 Id. It should be noted that discrepancies exist in how countries measure voter turnout. For example, the US calculates turnout by comparing the number who voted with the number of potential voters, while many European countries compare the number who voted to the number registered to vote. However, since voter registration rates in most European countries are over 90%, the resulting discrepancies are unlikely to invalidate the comparison regarding voter participation. Interestingly, the Institute found that voter turnout rates do not correlate strongly with either average years of formal education, though basic literacy had some positive effect, or with GDP per capita. Two factors were strongly correlated with turnout: the UN’s HDI (Human Development Index) which includes measures of civil liberties and press freedom, and the competitiveness of the electoral system, as measured by the narrowness of the margin of victory of the winning party.

65 See supra note 3, at 166.

66 See id. at 165-167. “Super Tuesday” is the day of thirteen simultaneous primaries, primarily in the South.
blitz of the Bush campaign. Nevertheless, McCain’s early victories sent a message to the Bush campaign, and later to the Bush White House. Despite having spoken publicly against campaign finance legislation, such as that advanced by McCain and Feingold, President Bush signed the “McCain-Feingold Act or “BCRA” in 2002.

Second, witness the surprisingly strong, bipartisan support for the McCain-Feingold Act itself. Although problematic, it nonetheless represents a recognition of the depth of the problems in the American regime of campaign finance. Partly as a result of McCain’s nomination bid, a significant number of Republicans were able to break from their party’s leadership and endorse this legislation. Having passed the House by a margin of 340 to 289, the bill passed the Senate by a margin of 60-40, with eleven Republicans voting in favor.

Third, witness the passage of “clean money” public financing laws in several states, including Maine, Vermont, Massachusetts, and Arizona, and similar public financing of local campaigns in several cities and localities, including New York City.

Last, witness the increasingly vocal dissent to America’s electoral finance system, even from some in the business community. For instance, prior to the passage of the McCain Feingold Act, the Committee for Economic Development, an organization of business leaders and educators, released the results of a poll of 300 senior executives from major firms with annual revenues of $500 million or more. Seventy-eight percent of the executives polled agreed that “the current campaign finance system has spawned an arms race for cash” that is increasingly “out of

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67 See id.
68 See supra note 8.
69 See Alison Mitchell, Vote is 60 to 40: Opponents of Measure Say They Push Battle into Courts, N. Y. TIMES, March 21, 2003, at A-1, A-34.
70 Id.
71 See supra note 42.
control."  Sixty-six percent agreed that the "burdens of fund-raising" have "reduced competition" in congressional elections and "diminished the number of qualified candidates for federal elections." And while three-quarters admitted that political contributions gave them an advantage in shaping legislation, over half also reported that they feared the legislative and/or regulatory consequences if they refused to donate to the campaigns of high-ranking political officials. Perhaps as a result, sixty percent of the executives surveyed supported a ban on all soft money contributions, sixty-six percent supported voluntary spending limits for federal campaigns, and more surprisingly, fifty-three percent supported a publicly-funded system of matching funds for small campaign contributions of under two hundred dollars.

Clearly, there is widespread and far-reaching dissatisfaction with the current American system of electoral finance. We need to rethink this conflict-fraught relationship between the egalitarian aspirations of our electoral system and our market-based economic system which generates such widespread inequalities.

In the remainder of this article, we will examine several proposals recently enacted or currently being debated in the law/public policy literature for changing the American system of campaign finance. These proposals include legislation to plug the FECA loopholes, the public financing of campaigns, either via lump sum subsidies or via citizen vouchers, and the deregulation of all contributions and expenditures, combined with increased disclosure requirements. This list is by no means exhaustive, but rather is meant to be suggestive of the types of proposals currently extant in the literature. Following brief comments on the specifics of each proposal, we will examine all of the proposals through the lens of feminist economics. For although the reform proposals vary

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73 Id.
74 Id.
75 Id.
76 Id.
widely, all are ultimately based on an individualistic, “law and (neoclassical) economics” approach to political decision-making, and on the ideology of a “separative self” so scathingly critiqued by feminist economists. Using the work of Amartya Sen, we will explore what it might mean to view the political process from a feminist economics perspective, i.e. bearing in mind the importance of unpaid family and community labor, and the centrality of economic and political interdependence. We will briefly explore the causes of the decline of institutions supporting community-based political debate. Finally, we will examine several feminist-economics-based proposals for reform. These proposals use the insights of participatory citizen movements such as civil rights and feminism, along with tools of modern communications technology, to increase the possibilities for democratic renewal.

IV. Current Proposals for Reform

The current proposals for reform of the American system of campaign finance fall into four basic categories:

1. “Plugging the holes” in the current regulatory regime.77
2. Public financing via direct subsidies to candidates’ campaigns.78
3. Mixed (public/private) systems: Public financing via contribution vouchers with blind donation booths for private donations.79
4. Total deregulation of contributions and expenditures, combined with immediate reporting.80

77 See, e.g., “McCain-Feingold,” supra note 8,
78 See, e.g., Raskin & Bonifaz, supra note 29.
79 See, e.g., ACKERMAN &AYRES, supra note 3.
Many of the assumptions underlying these proposals vary widely. For example, what are the underlying problems with the American system of campaign finance? Is it *quid pro quo* corruption, the undue influence of the wealthy or of certain racial/gender groups, and/or the lack of low-cost, reliable information on candidates and issues? Additionally, what is the best mechanism for dealing with the underlying problems? What is the proper relationship between government and the market in the realm of campaign finance. Is it direct government regulation of private donations and expenditures, government subsidies to candidates, or market-based reform mechanisms? Similarly, what are the underlying assumptions regarding the optimal distribution of information? Is political information best distributed directly to individuals or via groups such as political parties? Which media most efficiently and equitably distribute political information? And finally, what is the underlying vision of what well-functioning democracy looks like? To what extent are equal rights in the political sphere compatible with the increasingly inequitable American economic system? As we shall see, the proponents of the various approaches to reform hold dramatically differing views on these and other basic questions.

1. "Plugging the Holes": The Bipartisan Campaign Reform Act of 2002 ("McCain-Feingold")

The Bipartisan Campaign Reform Act of 2002 is the most recent attempt to plug the holes in the existing FECA-based regulatory regime for federal campaign finance. This legislation contains three major provisions:

a. **Soft money**: Prohibits any national political party from receiving or spending any soft money whatsoever. State and local political parties are permitted to raise and spend

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81 See supra note 8.
up to $10,000 annually for voter registration and GOTV efforts.\textsuperscript{82}

b. **Hard money:** Increases the limits on an individual’s contributions to a given candidate from $1000 to $2000 annually, and indexes this limit to inflation. It also increases the amount an individual can give in a two-year election cycle, from $50,000 to $95,000, and indexes this limit to inflation.\textsuperscript{83}

c. **Issue ads/Express advocacy:** Prohibits corporations, unions, and nonprofit organizations from paying for express advocacy advertising that refers to a specific candidate for thirty days before a primary, or sixty days before a general election. Instead, payment for such advertising must come only from hard money contributions to the candidates’ campaigns.\textsuperscript{84}

**Proposal-specific critiques:**

Proponents of McCain-Feingold hope that the bill’s provisions will help to shore up the beleaguered FECA regulations that have been weakened by Supreme Court and FEC decisions, and by the proliferation of end runs around FECA limitations on contributions and expenditures. In this way, supporters of BCRA hope to restrain the influence of special interests on the country’s electoral process and its governance.

During the debate over Shays-Meehan, the companion bill to the Senate’s McCain-Feingold, John Lewis (D-GA) said that:

Now is the time for us to do what is right. It is time to remove the corrupting influence of soft money on the political process. It is time to open up the political process and let the average person come in and participate. It is time to let all of our citizens have an equal voice.\textsuperscript{85}

\begin{itemize}
\item \textsuperscript{82} *Id.* at § 101.
\item \textsuperscript{83} *Id.* at §§ 212-214.
\item \textsuperscript{84} *Id.* at §§ 201-204. This legislation defines “express advocacy” in terms of the “magic words test.” (quoting language from Supreme Court decisions such as Buckley v. Valeo, *supra* note 45).
\item \textsuperscript{85} See Excerpts from the House Debate on the Shays-Meehan Campaign Finance
BCRA is a well-intentioned and long-sought attempt to rein in some of the worst abuses of the current American system of campaign finance. However, serious drawbacks exist to this approach to reform. First, opponents of BCRA argue that such regulation will simply cause political money to shift from more accountable national political parties to less accountable state parties and advocacy organizations. They also argue that BCRA will deny American citizens, via their unions and nonprofit organizations, their constitutionally-protected rights to free speech. Led by Senator Mitch McConnell (R-KY), opponents of BCRA filed a “Buckley challenge” to its constitutionality based largely on First Amendment grounds.

The Supreme Court ruled in favor of McCain-Feingold and upheld its constitutionality. However, there is reason to believe that at least some of the opponents’ objections may have merit. For instance, even while the Court was hearing the McConnell challenge to the BCRA, moneyed interests were already finding

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86 See Isaacharoff & Karlan, *supra* note 80, at 1706-08.


89 *Id.* (holding that “Congress’s legitimate interest . . . extend[s] beyond preventing simple cash for votes corruption to curbing ‘undue influence on an officeholder’s judgment and the appearance of such influence,’” especially through the “manner in which parties have sold access to federal candidates and officeholders”). Relying on an extensive factual record of post-Buckley end-runs around FECA, the court found soft money and electioneering communications to be “loopholes” which BCRA attempts to narrow through means “reasonably tailored to the task.”
new ways to funnel funds into political campaigns.\textsuperscript{90} The \textit{New York Times} reported on the increasing use of nonprofit, tax-exempt, election-related organizations (hereinafter "527's") that funneled over $400 million to presidential and congressional candidates in the 2004 elections.\textsuperscript{91} 527's were particularly active in support of Democratic presidential candidate John Kerry, spending over $188 million on his campaign.\textsuperscript{92} After two days of hearings in April 2004, the FEC decided not to attempt to regulate 527's prior to the November 2004 presidential election, though they held out the possibility of future regulation.\textsuperscript{93} Similar use of 501(c)(3)'s, another form of non-profit, tax-exempt organization, has also been reported.\textsuperscript{94} Clearly, this process of loophole-plugging will be a constant struggle for advocates of this approach to reform.

A second concern for opponents of BCRA is that its new funding restrictions and filing requirements may disproportionately impact on those with fewer resources, such as grassroots groups and third party candidates who cannot afford full-time lawyers and accountants.\textsuperscript{95} This would be a troubling result from legislation designed to reduce the impact of economic inequality on the political process.

Similarly, some progressives worry about the impact of BCRA on traditionally-marginalized candidates.\textsuperscript{96} Jason Conti points out that women and/or people of color usually enter the campaign process as challengers rather than as incumbents.\textsuperscript{97} Incumbency confers on a candidate enormous advantages, from

\textsuperscript{91} \textit{Id.}
\textsuperscript{93} \textit{FEC Hearings on Regulating 527's} (C-SPAN television broadcast, April 14-15, 2004).
\textsuperscript{94} NOW: The PBS Weekly Newsmagazine (PBS television broadcast, January 11, 2004) (Bill Moyers interviewing Chuck Lewis from the \textit{Center for Public Integrity}).
\textsuperscript{95} See Sandler, \textit{supra} note 89.
\textsuperscript{96} See, e.g., Conti, \textit{supra} note 2, at 99-161.
\textsuperscript{97} \textit{Id.}
greater visibility in the media, to the ability to respond to constituents' requests, and to franking privileges. Indeed, in the 2002 midterm elections, 98% of congressional incumbents running for re-election were returned to office. Given this incumbency advantage, challengers generally need to amass much larger war chests to defeat current office-holders. Traditionally, women and/or people of color candidates have relied for this financial support upon national parties and/or ideologically-driven PACs, both of whose influence will be greatly reduced by the BCRA. Additionally, as Conti and Overton point out, the increased "hard money" contribution limits will be less beneficial to these candidates, whose contributors generally have lower income levels. In short, if BCRA is strictly enforced, we need to be certain that it would not act as an additional "incumbency protection system" for predominantly wealthy, white male office-holders.

Finally, the express advocacy portions of BCRA do raise some troubling First Amendment questions. For example, do we want to support legislation that prohibits Planned Parenthood or the Feminist Majority Foundation from buying television time right before an election to inform voters about the pro- or anti-choice positions of the candidates? Do we want to prohibit the Sierra Club from buying ads to publicize the positions of candidates on "new source review" in the Clean Air Act? Are we

98 The "franking privilege" grants an elected official the right to send mail through the postal system for free, often simply by signing his or her name where the postage stamp would normally be placed.
99 See supra note 94.
100 See Conti, supra note 2, at 98. Some believe that if BCRA is strictly enforced, only those who have substantial name recognition and/or who can self-finance their campaigns, will be able to successfully challenge incumbents. See Interview with Thomas J. Schwarz, President, Purchase College, State University of New York. (March 25, 2004).
101 See, e.g., Emily's List, www.emilyslist.org. Emily's List is a political network that supports pro-choice Democratic women candidates.
102 See, e.g., Conti, supra note 2; Overton, supra note 24.
not troubled by campaign legislation that acts to limit (rather than expand) access to information? Shouldn’t our goal be to find a way to equalize political power from the bottom up rather than from the top down, by providing greater access to information, opinion, and debate?

2. Public financing of campaigns via direct subsidies to candidates:

As we have seen, the 1974 amendments to FECA provided an income tax check-off system for the public financing of American presidential campaigns. Jamin Raskin and John Bonifaz and many reform organizations advocate the indexation of the presidential campaign subsidies, the expansion of this system to federal congressional campaigns, and legislation (such as the BCRA) to tighten the current loopholes in FECA.

Like many other reformers, Raskin and Bonifaz believe that the debate over campaign finance reform must not be framed in terms of the “free speech rights” of the wealthy and special interest groups. Rather, it should be formulated in terms of “a paradigm of equal protection,” i.e., the right of all citizens, regardless of wealth, to participate meaningfully in the campaign and electoral process. This equal protection framework is based on Supreme Court rulings responding to the Civil Rights Movement of the 1960s, which struck down impediments to electoral participation, such as poll taxes and exorbitant

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104 See supra note 29, at 1160-1203.
105 Id.
106 See supra note 29.
107 See Harper v. Virginia Board of Elections, 383 U.S. 663, 666 (1966) (striking down Virginia’s poll tax, and holding that “a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard. Voter qualifications have no relation to wealth.”).
candidate filing fees.\textsuperscript{108} Raskin and Bonifaz also cite civil rights-era court decisions which require equal treatment of citizens in reapportionment cases on Fourteenth Amendment grounds.\textsuperscript{109}

Like most others who support the public financing of campaigns, Raskin and Bonifaz argue for a system of public subsidies given directly to the candidates' campaign committees.\textsuperscript{110} To qualify for such funding, a candidate would be required to raise a large number of small (e.g., $5) "qualifying contributions" from his/her district/state. In addition, prior to the primary, the candidate would be allowed to solicit private "seed money" in $100 amounts for start-up costs, such as paying workers to solicit qualifying donations, setting up an office, etc. Assuming that s/he collected the required number of qualifying donations and agreed not to accept further private donations, s/he would then receive a one-time grant, equal to that of every other publicly funded candidate, for the primary election. Those candidates who survive the primary would then receive a subsequent grant for the general election. In addition, if candidates who chose not to participate in the public funding program out-spend the publicly-funded candidate(s), Raskin and Bonifaz propose that publicly-funded candidates receive supplemental matching funds to equal the expenditures of their privately-funded competitors. To ensure that soft money and other end-runs do not undermine the integrity of their scheme, Raskin and Bonifaz support strict, McCain-Feingold-type limits on

\textsuperscript{108} See Bullock v. Carter, 405 U.S. 134, 143 (1972). In Bullock, the Court struck down the high filing fees that Texas required of all primary candidates, saying that such fees have a "patently exclusionary character" that eliminated from competition "potential office seekers lacking both personal wealth and affluent backers."

\textsuperscript{109} See, e.g., Wesbury v. Sanders, 376 U.S. 1, 7-8 (1964); Reynolds v. Sims, 377 U.S. 533 (1964); cf. Shaw v Reno, 509 U.S. 630 (1993). See also Terry Smith, \textit{Race and Money in Politics}, 79 N.C. L. REV 1470, 1470-1522 (2001) (pointing out that the Supreme Court has been less than consistent in applying this one-person-one-vote standard when it comes to race). \textit{See supra} note 29.

\textsuperscript{110} \textit{See supra} note 29.
soft money, bundling, and express advocacy. Finally, like many advocates of campaign reform, Raskin and Bonifaz advocate granting free, or reduced-cost, television time to all candidates.\footnote{See id.}

**Proposal-specific critiques:**

The expansion and strict enforcement of public financing could significantly reduce the possibilities for *quid pro quo* corruption and undue influence-peddling. It could open up the electoral process to candidates from a greater range of income/wealth classes and those with non-mainstream views. And public financing contains the possibility of significantly reducing special-interest-induced "pork-barrel spending." In fact, Raskin and Bonifaz believe that, over time, this reduction in "pork" would pay for the public financing program.\footnote{See id.}

However, the direct subsidy approach raises its own questions of equity and fairness. On the one hand, if the qualifying thresholds are set too high, the number of candidates is reduced and the goals of inclusivity, access, and open debate are compromised. On the other hand, if the qualifying thresholds are too low, you end up with the California recall election of 2003, not to mention a significant expenditure of tax dollars. Therefore, the levels at which the thresholds are set becomes a crucial, and politically charged, question.

Basing current subsidies on the past performance of parties and candidates, not on their current popularity, can lead to troubling results. For instance, the strong showing of Ross Perot's Reform Party in the 1996 presidential election allowed the Reform Party to automatically qualify for public funding in 2000.\footnote{See supra note 3, at 167.} By 2000, however, Ross Perot and his followers no longer controlled the Reform Party.\footnote{See id.} Instead, a well-orchestrated campaign by Pat Buchanan enabled him to capture the presidential nomination of the virtually moribund Reform Party and its public funding.\footnote{See id.}
Buchanan and his sister and campaign manager, Bay Buchanan, used that $12.5 million in public funds to advance their own ultra-conservative agenda, an agenda far removed from that of the 1996 Reform Party.16

The one-size-fits-all nature of the subsidies presents another potential problem. For instance, under Raskin and Bonifaz's plan, Green Party presidential nominee Ralph Nader or the Reform Party's Pat Buchanan would receive equal public funding and equal air time with the more-democratically-nominated Republican and Democratic presidential and congressional candidates. As long as subsidies are based on minimum threshold standards, these problems will persist.

Last and most important, as Raskin and Bonifaz's support for BCRA makes clear, public financing is not a one-shot deal; it requires constant monitoring and loophole-plugging legislation to maintain its integrity and intent.17 At some point, this loophole-plugging may begin to threaten the freedoms of expression and debate in ways that are troubling to even the most committed campaign finance reformer.

3. A Mixed System: Publicly-Financed Contribution Vouchers and "Blind Donation Booths"

Partly in response to criticisms leveled at other public-finance schemes, Bruce Ackerman and Ian Ayres advocate a mixed (public/private), market-based campaign finance system.18 In

16 Id. See also The American Reform Party, at http://www.americanreform.org (last visited on April 1, 2006); The Reform Party USA, at http://www.reformparty.org (last visited on April 1, 2006).

17 See supra note 29.

18 See supra note 3. See also Bruce Ackerman, Crediting the Voters: A New Beginning for Campaign Finance, 4 AMER. PROS. 13, Mar. 21, 1993 (defining "patriot dollars"); Ian Ayres and Jeremy Bulow, "The Donation Booth: Mandating Donor Anonymity to Disrupt the Market for Political Influence," 50 STAN. L. REV. 837 (1998) (defining the "donation booth" or "blind trusts").
particular, they propose publicly funded contribution vouchers (i.e. "Patriot dollars") for all citizens, combined with "blind trusts" for private campaign contributions.\textsuperscript{119} In so doing, they hope to combine what they see as the flexibility and decentralization of market mechanisms with the egalitarianism of publicly funded campaigns. They believe that their system would retain the expressive value of private campaign contributions while ridding those contributions of their worst corrupting influences. In addition, they hope to avoid the threshold issue, the one-size-fits-all subsidy, and other problems associated with traditional public financing systems.

While the Ackerman/Ayres' scheme is complicated, in brief, they advocate that every registered American voter be given $50 in FEC-generated credit, known as Patriot dollars, to be used only for contributions to federal campaigns.\textsuperscript{120} The credit would be imprinted onto people's pre-existing ATM cards and would be divided into allocations for presidential, senatorial, and representative races and further divided into primary and general election components; (e.g., $15 for presidential primary, $15 for the presidential general election, and $20 divided among the other federal races). Citizens would donate their Patriots to the candidates of their choice at FEC-designated ATMs. Ackerman and Ayres hope that these Patriot dollars would become the primary mechanism for funding federal campaigns. In fact, their plan would instruct the FEC to issue additional Patriot allocations if the ratio of Patriots to private funding fell below two-to-one.\textsuperscript{121}

Ackerman and Ayres' Patriot allocations would be supplemented by a secret, or "blind" donation booth for private campaign contributions. Any candidate, political party, or PAC that wanted to receive donations of public Patriot dollars would be required to set up a "blind trust" at an FEC-approved financial

\textsuperscript{119} See Ackerman, supra note 120. For a variation on the Ackerman/Ayres plan, and a discussion of its political and philosophical bases, see Edward Foley, Equal Dollars per Voter: A Constitutional Principle of Campaign Finance, 94 COLUM. L. REV. 1204 (1994).
\textsuperscript{120} See supra note 3, at 182.
\textsuperscript{121} Id. at 82.
Individuals would then be free to make private contributions to this candidate’s trust, but the checks would be made out not to the candidate, but rather, to the financial institution where the candidate had his/her blind trust. The financial institution would then funnel these private donations to the appropriate candidate, party, or PAC’s trust account. The financial institutions would make weekly reports to candidates regarding their financial positions and would publish lists of donors to the various campaigns. However, they would only be permitted to report donation amounts up to $200. Ackerman and Ayres believe that this secret donation booth, which they liken to the secret voting booth, would “ambiguate” the information signals needed for *quid pro quo* to take place. For instance, anyone could claim to have made a $100,000 contribution to candidate X last week, but proving it would be difficult since the canceled check would be made out to a bank, not to the candidate. By rendering secret the amounts and sources of campaign contributions, Ackerman and Ayres hope to greatly reduce the possibilities for “pork,” corruption, and other special interest dealings. Like Raskin and Bonifaz, they believe that this reduction in special-interest government spending could eventually pay for the cost of the publicly-funded portion of their system.

Ackerman and Ayres’ Patriot/donation booth system would be overseen by a newly constituted FEC, consisting of retired federal judges serving for ten-year, non-renewable terms. In this way, they hope to reduce the politicization of the FEC and make it less vulnerable to pressure from incumbent presidents, legislators, and others.

122 *Id.* at 183.
123 *Id.* at 28.
124 *Id.* at 25.
125 *Id.* at 91.
126 *Id.* at 185.
Proposal-specific critiques: If implemented as proposed, Ackerman and Ayres’ mixed system would provide many advantages over the current arrangement. Their secret donation booth would greatly increase the cost of the information needed for effective *quid pro quo* corruption and could result in a reduction in campaign contribution-motivated government spending. Their Patriot plan would reduce many of the problems of current public financing proposals, including the qualifying threshold problem, and the ethically ambiguous one-size-fits-all lump-sum grant. It would eliminate such public-funding absurdities as Pat Buchanan’s capture of the 2000 Reform Party’s $12.5 million in public funding. The Patriot scheme would give citizens a small incentive to investigate and discuss candidates and issues pursuant to spending their Patriot dollars. Because it renders secret, but does not limit, private donations, Ackerman and Ayres’ proposal should be immune to a *Buckley* challenge on freedom-of-speech and related constitutional grounds.

Despite its many laudatory aspects, there are serious problems with Ackerman and Ayres’ mixed system proposal. First, the mechanisms required to maintain the viability of the Patriot ATM system and (especially) the secrecy of the donation booths are labyrinthine in the extreme. For example, to make it impossible for a donor to signal a candidate, and the candidate to confirm, that s/he had just made a major contribution to that candidate’s campaign, the blind trust financial institutions would be required to deposit donations into candidate accounts in accord with a complicated mathematical algorithm. The FEC would be required to constantly monitor the public/private mix of campaign contributions and to periodically adjust citizens’ Patriot allocations, the spending of which would require another trip to the

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128 *See supra* note 3, at 185.
129 *See supra* note 45.
130 *See supra* note 3, at 227-231.
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FEC-designated ATM. Due to the problem of no start-up funds, Ackerman and Ayres' scheme includes a separate set of rules for start-up funds, with bonus Patriot allocations, determined by another complicated formula, for those who spend their Patriots early.\(^\text{131}\) The plan would necessitate the passage and strict enforcement of anti-fraternization laws between candidates and those employed at financial institutions sponsoring blind trusts. In short, the mechanisms of this entire process would not be open and accessible to the average American, rendering participating institutions vulnerable to charges of incompetence or corruption. This is not the way to increase Americans' understanding of and participation in the democratic processes of government.

Second, in the wake of the scandals involving Arthur Andersen and other trusted American financial institutions, it seems naive in the extreme to place the fate of our political system partly in their hands, via their control over the secret donation booths. Questions arise, such as whether they could they be trusted to conscientiously allocate campaign contributions, not to report major donations to favored candidates, and to remain neutral even if, for example, one candidate is advocating economic regulations that would adversely affect their industry. Unlike Ackerman and Ayres, I am not convinced that selective ignorance can indeed be constructive in the realm of campaign finance.

Third, Ackerman and Ayres' entire scheme rests centrally upon the impartiality of their newly constituted FEC, composed of retired judges.\(^\text{132}\) Given the concerns surrounding the 2000 Supreme Court decision in \textit{Bush v. Gore}, some may question the impartiality of even our highest-ranking judges. Given that the Ackerman and Ayres plan would dramatically increase the power of the FEC, it is doubtful whether Americans of any political persuasion would be willing to turn over so much power to a small

\(^{131}\) See \textit{supra} note 3, at 83.

\(^{132}\) See \textit{supra} note 3 at 67-69.
panel of presidentially-appointed ex-judges.

Fourth, there is an inherent tension in the Ackerman/Ayres plan between access and cost. Patriot allocations must be sufficient to provide a real incentive to citizens to investigate candidates and issues, and to go to the trouble of registering their ATM, and spending their Patriots. But if Patriot allocations are sufficient to provide serious incentives to behavior change, they begin to constitute a substantial, long-term drain on the federal budget. This is a serious issue for a system that is built upon broad citizen participation.\textsuperscript{133}

Fifth, as stated above, participation in the Patriot system would require registering ones ATM card, and then using that card to make Patriot donations.\textsuperscript{134} Those without ATM cards could go to Patriot-approved banks and apply for special cards, but this would require a very significant commitment of time and energy.\textsuperscript{135} Given that ATM cards are much more commonly used in higher-income communities, it is reasonable to question whether Patriot contributors, like voters in general, will be more well-off, better-educated, and more likely to be white than the general citizenry. The equity impact of using public funds to multiply the electoral impact of those with above-median incomes raises serious questions of equity and undermines the intended democratic impact of the plan.

\textsuperscript{133} See Guy-Uriel Charles, \textit{Mixed Metaphors: Voting, Dollars, and Campaign Finance Reform}, 2 ELECT L. J. 271, 271-283 (2003) (pointing out that participation in the Patriot system would involve considerable effort on the part of the voter, i.e. registering ones ATM card, researching candidates’ positions, and voting ones Patriot dollars. “The continuing decline in voter participation rates cast serious doubt on the viability of any voucher scheme as a sustainable long-run solution to the problems of private campaign finance”). See also Daniel Farber, \textit{Dollars and Sense: A ‘New Paradigm’ for Campaign Finance Reform}, 37 U RICH L. REV. 979, 979-1010 (2003); \textit{supra} note 29, at 643-684. Ackerman and Ayres estimate of $5 billion in Patriot contributions assumes Patriot participation rates roughly similar to voter participation rates in general elections. But if Patriot participation rates were closer to primary election participation rates (approximately 34% in 2000), the Patriot system would yield less than $1.8 billion in public campaign financing. \textit{See supra} note 3, at 67-69.

\textsuperscript{134} See \textit{supra} note 3.

\textsuperscript{135} \textit{Id.}
Finally, Patriot dollars, like school vouchers, pollution credits, food stamps, Section 8 housing vouchers, and other voucher programs, essentially involve the creation of a parallel money supply to ameliorate the increasing inequalities of wealth and power in American society. As we know from our experience with these other programs, voucher systems sometimes carry unintended and unforeseeable consequences. Examples include the creation of pollution hot-spots in many low-income neighborhoods, and the phenomenon of better-prepared students "vouchering out" of resource-poor neighborhood schools, leaving the remaining children even worse off. It is unclear whether yet another market-based voucher program, this time affecting basic American democratic institutions, would be more successful at addressing political inequality than other voucher programs have been at ending hunger, homelessness, environmental degradation, and inferior educations. Perhaps, rather than attempting to create yet another market-based end-run around inequality, we should begin to ask ourselves more basic questions about the mechanisms which create and sustain so much inequality in the first place.

4. Total Deregulation with Immediate Disclosure

The constitutional and practical difficulties of regulating campaign finance in the context of Buckley have led some to advocate the total deregulation of campaign finance, i.e., an end to all limits on both campaign contributions and expenditure, combined with stricter, often internet-based, disclosure requirements. It would then be left up to the media and opposition candidates to investigate possible connections between campaign contributions and legislative or executive decisions, and

137 See Sullivan, supra note 80, at 668.
up to voters to punish errant officeholders at the next election.

Samuel Isaacharoff and Pamela Karlan believe that the wealthy will always find innovative end-runs around new campaign finance restrictions.138 Given the enormous costs of television advertising, and its demonstrated effectiveness, candidates will continue to need to raise large sums of money, and wealthy individuals and corporations will continue to find ways to give it.139 Rather than stanching the flow of funds, Isaacharoff and Karlan believe that increased regulation will only drive political money away from national political parties towards advocacy groups and other independent expenditures, which are less traceable, less accountable, and less transparent than political parties.140 In addition, they point to the troublesome constitutional and practical dangers, such as selective enforcement, raised by restricting political speech through the regulation of independent advocacy expenditures.141 Last, along with Kathleen Sullivan142 and Daniel Ortiz,143 Isaacharoff and Karlan assert that many campaign reformers hold an unspoken assumption that the majority of Americans are "civic slackers" who do not spend enough time investigating candidates and issues, and whose ignorance allows them to be unduly influenced by attack ads.144 They find this assumption to be deeply inegalitarian and anti-democratic.145

In addition to supporting the deregulation of contributions and expenditures, Isaacharoff and Karlan also advocate several measures to change what they call the "eco-system" of voting, the institutional context in which electoral decisions are made and enacted.146 For instance, they advocate on-site, Election Day, and

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138 See Isaacharoff & Karlan, supra note 80, at 1705-38.
139 Id.
140 Id.
141 Id.
142 Sullivan, supra note 80.
144 See Isaacharoff & Karlan, supra note 80.
145 Id.
146 Many of their proposals would reduce what economists call the "opportunity costs" of electoral participation, including costs both monetary and non-
online voter registration; voting online or by mail; and the expansion of poll hours to multiple days, including weekends, when fewer people are working.\textsuperscript{147} They urge serious consideration of proposals, such as those advanced by Lani Guinier,\textsuperscript{148} to change our winner-take-all electoral system to one of proportional representation.\textsuperscript{149} Finally, they recommend the reconsideration of policies that have the effect of protecting incumbents, such as power over congressional reapportionment, and the franking privileges given to incumbents but not to challenger candidates.\textsuperscript{150}

**Proposal-specific critiques:**

Many of Isaacharoff and Karlan’s critiques of the current eco-system of voting are insightful and deserve serious consideration. For instance, simplifying the process of registration and voting would be particularly helpful to those, disproportionately women, whose child- and/or elder-care responsibilities make it difficult to get to polling places. More basically, Isaacharoff and Karlan, along with Sullivan and others, raise serious and troubling questions concerning the ability of moneyed interests to circumvent new regulatory regimes and of the unintended consequences of loop-hole-closing legislation.\textsuperscript{151} They remind us that we must tread carefully when we regulate political speech, even in the interests of a more egalitarian democratic process.

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\textsuperscript{147} See Isaacharoff & Karlan, supra note 80.
\textsuperscript{149} See Isaacharoff & Karlan, supra note 80.
\textsuperscript{150} \textit{Id}.
\textsuperscript{151} See Sullivan, supra note 80.
With that said, there are serious problems with the deregulate-and-disclose approach. First, as Richard Briffault points out, disclosure advocates may be a bit naive about the willingness and/or ability of the major media to research, comprehend, and publicize in a timely manner the impact of campaign contributions on the behavior of candidates and elected officials. During the 2000 electoral cycle, "[v]ery few newspapers allocated even one reporter's time to the analysis of campaign finance documents." And television networks, from which most Americans get the majority of their campaign information, generally devoted even less time to campaign finance and its impact on congressional and presidential decision-making. This disclosure process is further complicated by the fact that the influence of contributions is often not discernible in simple roll-call votes; rather, they influence agenda-setting, prioritization, and other, less visible aspects of the legislative process.

An alternative to media disclosure of ties between contributions and candidates' positions/behaviors is disclosure by opposition candidates. But as contributions increasingly flow not to official campaigns, but to express advocacy groups and others who are not required to disclose their contributors and finances, even opposition candidates may find it increasingly difficult to obtain the information necessary for effective disclosure. Given all of these complications, it seems highly unlikely that the media and campaign competitors will be able to hold the candidates' "feet to the fire" as disclosure advocates assume. In other words,

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152 Supra note 29, at 643-84.
154 See THOMAS PATTERSON, DOING WELL AND DOING GOOD: HOW SOFT NEWS AND CRITICAL JOURNALISM ARE SHRINKING THE NEWS AUDIENCE AND WEAKENING DEMOCRACY 3-4 (2000). As Thomas Patterson has pointed out, the growth of "soft news" and "infotainment" has exacerbated this problem. From 1980 to 2000, "public affairs stories decreased from 70 percent of news coverage to 50 percent."
155 See supra note 20.
156 See Sullivan, supra note 80.
deregulate- and-disclose is unlikely to address citizens' concerns with the impact of money on politics.

Second, Isaacharoff and Karlan, Sullivan, Ortiz and others are clearly wrong when they accuse reformers of believing that American voters are slackers. Realistically speaking, it is highly unlikely that any one person's vote will decide an election, particularly in an election for a state or national office. Furthermore, the process of procuring candidate/issue information and taking the time to vote can involve significant opportunity costs. In other words, it is perfectly rational for a citizen to devote minimal amounts of time and energy to researching candidates and to making electoral decisions. But, as economists have also recognized since the time of Keynes, the sum of rational individual micro decisions does not necessarily lead to optimal macro outcomes. Individual voter rationality can very well lead to falling participation rates and an increasingly undemocratic political system. It is therefore perfectly macro rational for the citizenry to take measures to ensure the continuing health of its political system, either by reducing the cost of information and/or voting to the electorate, and/or by taking more direct regulatory measures. Although one can certainly disagree with specific proposed reforms, the impetus for reform implies neither citizen irrationality nor reformer condescension.

V. Further Critiques of Current Proposals for Campaign Finance Reform

In addition to the specific difficulties of the individual proposals, two foundational, problematic assumptions are made by

\[^{157}\text{See, e.g., Isaacharoff & Karlan, supra note 80, at 1727.}\]

\[^{158}\text{This is part of what is known as the "disequilibrium" interpretation of Keynes, the idea that the market needs occasional "correcting" by democratic-government intervention. See generally John M. Keynes, The General Theory of Employment, Interest, and Money (1936); Axel Leijonhufvud, On Keynesian Economics and the Economics of Keynes (1968).}\]
most proponents of reform, including many advocates for the public financing of campaigns. First is the assumption that the American airwaves rightly belong to the television-broadcasting corporations that use them, and that airtime for candidates and for disseminating electoral information should be purchased from these broadcasting corporations at significant public and/or private expense. Second is the assumption that the campaign advertising that the public would be financing (via subsidies or vouchers) would enhance the quantity and quality of electoral information and democratic debate. We will examine each of these assumptions in more detail.

1. Who owns the airwaves?

As we have seen previously, the purchase of television airtime, and the purchase of talent to design advertisements for that airtime, now comprises the majority of American campaign-related expenses at all but the local level. Indeed, more equal access to the airwaves is one of the goals of most public finance proposals.

But a seventy-plus year history of legislative mandate and judicial case law has established that the American public owns the airwaves and that the broadcast corporations use this public resource at the discretion of the American public. The federal government’s involvement in the broadcasting market stems from the physical reality of spectrum scarcity, the limited number of potential radio and television frequencies, which results in a “natural oligopoly.”

The original, deregulated approach to radio frequencies, codified in the Radio Act of 1912, resulted by the mid-1920s in a cacophony on the airwaves, which interfered with reliable signal 

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159 See supra note 6.

160 Monopoly refers to one seller in a given industry; oligopoly refers to a few firms. Monopoly or oligopoly can result from a “natural” or imposed resource scarcity (e.g., spectrum scarcity or government-enforced patents), or when significant economies of scale are present. Economies of scale exist when larger outputs result in lower per-unit costs, which allows larger firms to produce at a lower cost and to “price compete” smaller firms out of the market.

capture and thwarted the commercial potential of radio broadcasting. In the ensuing debate over how best to manage this physically limited, and potentially immensely profitable, resource, labor, religious, and educational leaders argued for a "common carrier" model; i.e., nondiscriminatory access to the airwaves for any individual, group, or organization willing and able to pay for the airtime. Broadcasters, on the other hand, argued that they could best develop audience consistency and profitability via tighter programming and editorial control.\textsuperscript{162} The Radio Act of 1927\textsuperscript{163} and the Communications Act of 1934,\textsuperscript{164} (still the legal charter for American radio and television broadcasting), rejected the "common carrier" model and affirmed the "free speech" rights of broadcasting corporations. In return for virtually free access to radio and television frequencies,\textsuperscript{165} licensees were statutorily required to operate "in the public interest, convenience, and necessity."\textsuperscript{166} The Supreme Court has repeatedly upheld this public interest basis of broadcasting regulation as constitutional.\textsuperscript{167}

The exact content of these public interest obligations has, of course, been the subject of much debate and compromise, as evidenced by the FCC's repeated regulatory attempts at public interest programming guidelines and the changing requirements for license renewal. In 1929, the Federal Radio Commission, which later became the FCC, issued the "Great Lakes Broadcasting Guidelines," which required licensees to maintain "well-rounded"

\begin{footnotesize}
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\item\textsuperscript{163} 47 U.S.C. § 29 (1927).
\item\textsuperscript{164} 47 U.S.C. § 201 (1934).
\item\textsuperscript{165} The F.C.C. charges only minimal processing fees for broadcasting licenses
\item\textsuperscript{166} 47 U.S.C.§ 231 (effective Oct. 1, 1982).
\item\textsuperscript{167} See, e.g., Nat'l Broad Co. v. United States, 39 U.S. 190 (1943); Red Lion Brands v. Fed. Communication Comm'n, 395 US 388, 389 (1969) (upholding the FCC's powers over the broadcast industry and upheld the public interest standard as a legitimate response to frequency scarcity).
\end{itemize}
\end{footnotesize}
programming, and listed the types of programming which would be required for license renewal. These included religious programming, education and instruction, "matters of interest to all members of the family," and music, "both classical and lighter grades." In 1946, the FCC issued the "Blue Book," which further specified the criteria the FCC would employ in assessing a station’s public interest obligations, including an emphasis on local programming, public affairs programming, limitations on advertising, and attention to "niche" audiences. In 1960, the FCC issued its Programming Policy Statement, which listed fourteen specific elements necessary to meet public interest requirements. Among these fourteen necessary elements were political and public affairs programming, children’s programming and programming of interest to minority groups.

With respect to stations’ public interest obligations regarding electoral information, in the early 1970s, Congress enacted the lowest-unit-rate (hereinafter “LUR”) rule, which stipulated that broadcasters must offer airtime to political candidates at the lowest rate applicable to that day, time, and market in the period immediately preceding an election. Although broadcasters have complained that the LUR regulations are bureaucratic and burdensome, they are still in effect.

The 1980s brought about a marked change in the composition and goals of the FCC. Deregulation became the watchword, and the FCC eliminated not only the content regulations for public interest programming, but even record-keeping requirements for most stations. License renewal was to occur, in most cases, via postcard rather than after a lengthy examination of the station’s public interest service. And the FCC

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168 GREAT LAKES BROADCASTING CO., 3 FRC ANN. REP. 929 (1998), in Advisory Committee, supra note 162.
169 Id.
170 For an explanation of the “Blue Book,” see supra note 162, at 22-23.
171 Id. at 23.
173 See supra note 162, at 57.
174 Supra note 162, at 24.
175 Id.
abolished most aspects of the Fairness Doctrine, the requirement to present all sides of an issue fairly, as incompatible with broadcasters' freedom of speech.\textsuperscript{176}

The 1996 Telecommunications Act\textsuperscript{177} (hereinafter "the Act") built on this deregulatory approach, lengthening the period between license renewals from five to eight years, making it even more difficult for the FCC to deny license renewal requests, and increasing the number of stations a given broadcasting corporation could own. In addition, Section 201 of the Act gave away the new, digital (HDTV) spectrum, valued at over $70 billion, to existing licensees "to facilitate the transition from analog to digital television."\textsuperscript{178} This was justified on the basis of the new investments in equipment and in operational changes that would be necessary for the transition. Several Senators from all parts of the political spectrum, including conservatives such as John McCain and Bob Dole, and progressives such as Barney Frank and Paul Wellstone, spoke out strongly against this spectrum give-away.\textsuperscript{179} Instead, they favored measures that would auction off the new digital spectrum, with the money being used to pay for expanded educational and public interest programming. But, under intense lobbying pressure from the broadcast industry, specifically the National Association of Broadcasters (hereinafter "NAB"), the spectrum auction alternative was soundly defeated.\textsuperscript{180}

Attempts to require free airtime for candidates, strongly opposed by the NAB, have also been repeatedly defeated in Congress.\textsuperscript{181} According to the Congressional Research Service, between 1960 and 2000, one-hundred-sixty-three bills demanding

\begin{itemize}
\item \textsuperscript{176} Id.
\item \textsuperscript{177} 47 U.S.C. 228 (1996).
\item \textsuperscript{178} Id. at § 201.
\item \textsuperscript{179} David Denison, \textit{Don't Mess with Television: Al Gore Wants TV to Help Reform Elections. Congress and the Broadcast Lobby Gave Other Ideas}, AMER. PROSPECT June 5, 2000, at 37.
\item \textsuperscript{180} Id.
\item \textsuperscript{181} Id.
\end{itemize}
free or reduced-rate airtime for candidates were introduced into Congress.\textsuperscript{182} The BCRA originally contained a provision for free airtime for all candidates who qualified for public financing. However, due to intense lobbying by the NAB, this provision had to be dropped before then-House Majority leader Trent Lott would agree to bring the bill to the floor.\textsuperscript{183} Even the minimal recommendations for five minutes of free airtime nightly for debates prior to elections were opposed by the majority of broadcasters on the Committee.\textsuperscript{184}

Dissenting from the Committee's tepid recommendations for five minutes nightly of free airtime for political debates, Robert Dechard, of the Belo Corporation, which owns the \textit{Dallas Morning News} and seventeen television stations, Harold Crump, of Hubbard Broadcasting, and William Duhamel, of Duhamel Broadcasting, stated that:

\begin{quote}
Broadcasters should be encouraged to consider, \textit{on a voluntary basis}, a broad range of programming and other options to help elevate political discourse. (Emphasis added) This should not be mandated by the Federal Government; it can and should be a voluntary standard agreed to and promoted by the industry and its leading members.\textsuperscript{185}
\end{quote}

In short, the entire regulatory approach to broadcasting has supposedly been based upon a \textit{quid pro quo} agreement: private broadcasting corporations receive virtually free access to an immensely profitable, scarce public resource in return for agreeing to serve the public interest. But as digital technology dramatically increases the value of that resource, and as the public interest obligations of broadcasters become increasingly attenuated under the mantle of deregulation, perhaps it is time to rethink this entire approach.

The public financing of all federal campaigns, whether by candidate subsidy or citizen vouchers, could definitely increase

\begin{footnotes}
\item[182] \textit{See supra} note 179, at 34.
\item[183] \textit{Id.} at 37.
\item[184] \textit{See supra} note 162.
\item[185] \textit{Id.} at 82.
\end{footnotes}
access to the airwaves for less-well-funded candidates and could help to level the political playing field. But, from an economics perspective, public financing amounts to a substantial subsidy (to the tune of billions of dollars in every election cycle), in perpetuity, to private, profit-making broadcast corporations. Given that the 1996 Act already granted this industry virtually free access to the new $70 billion digital spectrum,\(^{186}\) perhaps we need to replace the public interest quid pro quo with a more consistent approach. That is, either we believe in the virtues of the free, unregulated market, in which case the federal government should auction off leases to the public’s airwaves (with the money being used to subsidize unprofitable public interest programming) OR we believe that natural oligopolies should be regulated. In this case, broadcasters must be forced, on condition of license renewal, to truly serve the public interest via the enforcement of “must carry” rules for educational, electoral and other programming. An industry should not be permitted to avoid the market when it suits them, (e.g., the give-away of the digital spectrum), and then appeal to the sanctity of that same market when faced with reasonable, minimal regulatory obligations. In other words, the American people should not have to pay again for what they already own. Quoting former FCC Chair Newton Minow:

Digital broadcast licenses should not be awarded without a broadcaster’s explicit commitment to provide public service time in campaigns and not sell time. We now have a colossal irony. Politicians sell access to something we own: our Government. Broadcasters sell access to something we own: our public airwaves. Both do so, they say, in our name. By creating this system of selling and buying access, we have a campaign system that makes good people do bad things and bad people do worse things, a system that we do not want, that corrupts

\(^{186}\) Id. at 91.
and trivializes public discourse, and that we have the power and the duty to change.\textsuperscript{187}

A play-or-pay approach to the broadcast industry would drastically change the economics of the entire campaign finance debate. Either via auction revenues or must-carry regulations, play-or-pay would open up vast new possibilities for a host of election-related educational programming. The content of this programming will be discussed further in the next section. I would argue, however, that the American public has a right to adequate low-cost electoral information to further democratic debate via our national medium of television.

2. \textit{What exactly are Americans being asked to pay for?}

In addition to ignoring questions of the economics and obligations of the broadcast industry, most proposals for reform tend to overlook an even more basic question; that is, what exactly would be purchased with this increased public (or private/public) financing? And would these increased expenditures actually increase debate and improve the democratic nature of the American political/electoral system?

As we saw above, most funding for federal campaigns is used for the production and airing of television advertising, much of it short, often negative, and emotionally-laden attack ads.\textsuperscript{188} As Sullivan has pointed out, these ads must be successful at helping candidates to win elections, or campaigns would not continue to pay millions of dollars to produce and air them.\textsuperscript{189} And, in a context where information is opportunity-costly for voters to acquire, and the chances that one's vote will decide an election are extremely small, it is perfectly rational for individuals to remain "rationally ignorant" about candidates and issues and, hence, to be more easily swayed by emotionally-laden appeals.

But although attack ads can be useful in winning elections, increasing the number of people who can afford to run an

\textsuperscript{187} See id. at 93.
\textsuperscript{188} See Sullivan, supra note 80.
\textsuperscript{189} Id.
increasing number of attack ads would not necessarily improve the democratic nature of the American political system. Instead, attack ads, rather than being part of the solution to our electoral troubles, may represent part of the problem. Attack ads, and the negative, scandal-driven political culture they spawn, may marginally increase voters' information about competing candidates. However, the primary long-run impact of this "Willie Horton-ization" of campaigns may be to increase voters' cynicism about all candidates, all government, and about the democratic process in general. In my opinion, increasing public (or private) funding for more 30-second, slick spots will not contribute substantially to democratic debate. Rather, it will only induce Americans to hit the mute buttons on their remotes even more often - and to go the polls even less often.\footnote{The evidence regarding the impact of negative campaigning on voter turnout is mixed. However, the results of one study support the hypothesis that ads that are perceived by potential voters to be "negative" are associated with statistically significant reductions in voter participation rates. See Stephen Ansolabehere & Shanto Iyengar, Going Negative: How Political Advertisements Shrink and Polarize the Electorate (1995). Contra Richard Lau & Gerald Pomper, Effects of Negative Campaigning on Turnout in US Senate Elections, 1988-1998, 5 J. Pol. 63 (2001).}

More basically, the lack of attention to what is being paid for is a symptom of the individualistic, "law and (neoclassical) economics" approach to political information, debate, and decision-making, an approach which underlies virtually the entire debate on campaign finance reform. While many campaign finance reformers would disagree with the policy prescriptions and anti-government-"intervention" orientation of law and (neoclassical) economics, their analyses and proposals are nonetheless profoundly shaped and constrained by that perspective. This is particularly apparent in the pervasive assumption that political information is collected and weighed, and electoral decisions are made, by isolated, atomized individuals.\footnote{See Isaacharoff & Karlan, supra note 80, at 1723-24.}
From the perspective of neoclassical economics, the democratic electoral process is essentially one of a "market for votes," where atomized individuals collect candidate and issue information and make electoral decisions in order to maximize their individual, self-interested utilities. The utility the consumer/voter derives from the widget/candidate is unrealistically presumed to be exogenous to the "market" for widgets/candidates and is also unrealistically not influenced by the widget-/candidate-derived utility of other consumers/voters. The "rational" consumer/voter will research information on widgets/candidates until the marginal cost (including the opportunity cost) of obtaining more information roughly equals the marginal benefit of additional widget/candidate info. S/he will then choose the best combination of widgets/candidates to maximize his/her individual utility subject to his/her budget and time constraints. The process of political decision-making, then, is merely a process of finding the optimal aggregation of these pre-existing, utility-maximizing preferences of individuals.

Feminist economists have devastatingly critiqued the cultural, political, economic, and psychological assumptions underlying this model of human behavior. We have called for a

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192 In economic theory, utility is defined as the pleasure or usefulness a consumer derives from the consumption of a good, service, etc. Hence, in theory, one could derive utility from another's well-being. However, in practice, utility maximization is assumed to correspond to ones individual consumption of goods and services.

193 Utilities are maximized subject to budget and time constraints. In the long run, it is assumed that if one is unhappy with one's budget constraint, one can choose to work more hours and obtain more income. Note that this assumes that one can always get a job, i.e., that there is always full employment.

more complex model of *homo economicus*, one that recognizes the existence of both selfish and altruistic motives in both the public and private spheres, and which questions that very division. We have called for an economics that recognizes the existence and crucial importance of unpaid caring labor to the health and continued functioning of families and communities, and ultimately, of national economies. And we have also called for a more complex model of the political process than the simple aggregation of supposedly exogenous preferences which characterizes law and (neoclassical) economics.\(^{195}\)

VI. *Towards a Feminist-Economics Theory of the Political Process: The Work of Amartya Sen*

As opposed to a neoclassical perspective, a feminist economics theory of social choice is based upon a much more complex vision of the relationship between the individual and the group. People involved in a social decision-making process will necessarily evaluate choices, public policies, and social outcomes from a variety of locations and perspectives. In what Marianne Hill calls the "matrix" of social identity and domination, each individual may belong to and/or identify with a gender, a sexual identity, a family, a racial/ethnic group, a community, a geographic region, a country, a profession or job, a firm or industry, a union or other workplace organization, a religious organization, various community organizations, a political party or movement, sports teams or hobby groups, and many others markers of social

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location. 196 The lived reality of each of these groups will differ, leading to different perspectives, different epistemologies197

Elizabeth Anderson and others have identified part of the task of moral and political philosophy as developing and evaluating strategies for coming to terms with these evaluative/epistemological differences based on positional variations. The approaches to this problem are widely divergent. 198 For instance:

1. Positional differences as sources of bias to be eliminated:

Many non-feminist philosophers and liberal social theorists consider these local perspectives to be merely sources of error and bias. 199 They strive to eliminate them where possible, or to reduce them to a minimal number, usually two: the “self-interested” and the “universal.” 200 Rawls, for instance, attempts to deduce the universal by forcing social choices from behind a “veil of ignorance,” only after attempting to abstract from social position entirely. 201 As feminist philosophers have made clear, however, this attempt to construct a “view from nowhere” often ends up reconstructing the “view from the dominant” and thereby reinforces social inequality and oppression. 202

197 Id.
198 See Elizabeth Anderson, Sen, Ethics, and Democracy, 9 FEMINIST ECON. 239-61 (2003). See also Iris Marion Young, Justice and the Politics of Difference (1990) and Iris Marion Young, Inclusion and Democracy (2000).
199 See id.
200 Anderson, supra note 198, at 240.
201 See generally John Rawls, A Theory of Justice (1971).
2. Positional differences as inevitable; Radical individuality:

Neoclassical economics, on the other hand, declare the impossibility of constructing anything but intensely local perspectives. Its subjective measures of utility are so local that they cannot even be compared between individuals in the same family. Given this strong assumption, neoclassical social evaluation is reduced to finding the optimal aggregation of these (supposedly exogenous) individual preferences.

Development economist Amartya Sen and other feminist economists believe that these radically subjective measurements of utility are inadequate to the task of evaluating social well-being. First, preferences are adaptable, as people tend to adjust psychologically to chronic deprivation, pain, oppression and/or ignorance. For instance, if an individual has no hope of attaining a valued function (e.g., learning to read), or will be punished by others for attempting to attain that function, s/he will probably, over time, give up the desire to avoid frustration and suffering. Or, alternately, s/he may be deprived of the knowledge that such a function even exists, and therefore not articulate it in her/his set of articulated preferences. For example, Sen observes that, in perspective, in CAROLE MCCANN & SEUNG-KYUNG KIM, FEMINIST THEORY READER: LOCAL AND GLOBAL PERSPECTIVES (2003).


As Kenneth Arrow's Impossibility Theorem makes clear, this is no easy task—any non-dictatorial social preference ordering is problematic, violating the most basic conditions of transitiveness and Pareto optimality. See Kenneth Arrow, Social Choice and Individual Values (1963) (1951) and Wiley & Arrow, A Difficulty in the Concept of Social Welfare, 58 J. POL. ECON. 328-46 (1950).


See Anderson, supra note 198, at 245.

Id. at 244.
surveys conducted in many poor countries, men are significantly more likely to complain about poor health, even though medical statistics show that it is the women in these countries who suffer from greater morbidity and mortality.\textsuperscript{208} Quoting Anderson, “Utility fails to measure deprivations to the extent that the poor and downcast adapt to them or are ignorant of the possibilities.”\textsuperscript{209}

Second, utility-based preference evaluation may not give sufficient weight to questions of agency and free choice.\textsuperscript{210} That is, even if two people have identical outcomes, if one chose that outcome from a variety of possibilities while the other was forced into that outcome for lack of real alternatives, the first person expressed more agency, more choice, and was hence better-off. Sen’s vision of free choice differs considerably from the “freedom to choose” of most neoclassical economists and liberal theorists, who focus almost exclusively on freedom from government “intervention.”\textsuperscript{211} For Sen, for a choice to be truly free, it must not only occur in the context of a lack of legal prohibition, but also be unconstrained by social coercion. For example, it may be “unseemly” for women to go to school, or impossible because of childcare or other household responsibilities. And choice must not be constrained by poverty or by the lack of basic resources.\textsuperscript{212}

This belief in the importance of truly free choice, unconstrained by social coercion and poverty as well as government constraints, has led Sen to measure well-being and

\textsuperscript{208} Amartya Sen, \textit{Capability and Well-Being}, in \textit{The Quality of Life} 135 (Martha Nussbaum and Amartya Sen eds., 1993).

\textsuperscript{209} Anderson, \textit{supra} note 198.

\textsuperscript{210} \textit{Id.}


\textsuperscript{212} See \textit{supra} note 194. Note that equality of freedom of choice does not necessarily imply absolute equality of resources; some people may have higher need for resources to achieve the same level of functioning. Some of these differences in needs may be biological; e.g., pregnant women need more protein than non-pregnant women. But others may be social; e.g., women who are considered to be responsible for childcare and elder care may require additional social resources to achieve an education.
evaluate social arrangements by "capabilities"; i.e., the set of possible achievable functionings that a person or group is able to accomplish, given his/her access to resources, and social and legal constraints.\(^{213}\)

3. Positional differences as an informational resource

Many feminist philosophers agree with Sen that the aggregation of individual preferences does not exhaust the domain of social evaluation.\(^{214}\) The plurality of social positions and evaluative perspectives, rather than being a source or error or bias, should be treated as an informational resource. It is the interaction of these local perspectives, rather than their reduction or elimination, which allows the construction of a more global, more "universal," point of view.\(^{215}\)

This respect for people's positional differences and the necessity of dialogue to establishing knowledge underlies Sen's "pragmatic-epistemic" approach, in which preferences are not taken as fixed or given.\(^{216}\) Rather, people's needs, aims, and assessments cannot be divorced from public deliberation; from

\(^{213}\) See Amartya Sen, Commodities and Capabilities (1985). Sen's capabilities approach has been used to construct measures of development such as the Human Development Index (HDI), which includes political freedoms (the right to vote without interference, freedoms of speech and assembly, etc.), measures of social development (percent literacy, infant mortality, etc.), as well as traditional measures of economic progress (GDP per capita, etc.).


\(^{216}\) See id. See also supra note 200, at 244-246.
learning about other people’s lives.\textsuperscript{217}

Furthermore, Sen believes that participatory democracy, with its guarantees of civil liberties, press freedom, etc., is the optimal system to utilize this positional information for shared social ends.\textsuperscript{218} Democracy is not merely aggregative, as it is in utility-based social welfare theories. Rather, it is deliberate; it has a constructive, \textit{informational} function.

As an example, in some of his early work, Sen compared how the market, and the political systems of post-colonial democratic India and authoritarian China have dealt with the problem of famine; in particular, how well each system obtained and managed the information necessary to prevent this catastrophe.\textsuperscript{219} Briefly, he concluded that aggregate declines in food availability are not the fundamental cause of famine. Rather, famine is caused by a severe decline in the entitlement of one or more segments of the population; a decline in their command over income or other means to acquire food.\textsuperscript{220} Markets suffer from \textit{severe information deficits} in dealing with this problem, as preferences and needs are conveyed only through the price mechanism, which is dependent on the widespread availability of money. Particularly in areas where product and/or labor markets are under-developed, the needs and desires of the poor may register faintly, if at all.\textsuperscript{221} In other words, free markets, by themselves, lack the information-generating and transmission capacities necessary to prevent food disasters.\textsuperscript{222}

Similarly, despite what Sen believes to be the Chinese government’s desire to provide food security for the Chinese people, the authoritarian Chinese system lacked \textit{the informational and feedback mechanisms} necessary to prevent a disaster in 1959-1960. Without a free press, and with severe political disincentives
to reporting what was actually happening in the rural areas, the central Chinese government did not know what was happening until it was too late to prevent widespread starvation. 223

Sen contrasts this situation to post-independence democratic India where, despite low per capita incomes and continuing deprivation, famine has been eradicated. 224 When food shortages arise, a free press brings the situation to public attention. The resulting political pressure, which includes public protests by civic and religious groups and by opposition political parties, forces accountability of officials in the form of food distribution programs. 225 Thus, the information-generating-and-transmitting capacities of a democratically-elected government and a free press are able to overcome the information deficits of the market and prevent disaster.

It is this information-sharing, learning, and policy-correction aspect of democracy that Sen finds so attractive. Freedoms of the press and assembly, and the periodic democratic election of officials, can allow the situation of disempowered and/or deprived segments of the population to be brought to the attention of the public. This new information can force a national conversation on the problem(s) and force accountability from government officials. Democracy is more than the aggregation of individual, supposedly exogenous preferences; it is a constructive information-sharing, learning, and accountability mechanism for the population and office-holders alike. Public discourse can change people’s perceptions of their “needs” and their problems, and of feasible solutions to those problems. 226

[T]he practice of democracy gives the citizens an opportunity to learn from each other, and to re-

223 See Anderson, supra note 198, at 247-248.
224 See id. at 247.
225 See id. at 246-248.
226 See supra note 200, at 250. See also SEN, DEVELOPMENT AS FREEDOM, supra note 194.
examine their own values and priorities, along with those of others. Even the idea of 'needs' (including the understanding of 'economic needs') requires public discussion and exchange of information, views and analyses. . . . Political rights and civil rights, especially those related to the guaranteeing of open discussion, debate, criticism, and dissent are central to the process of generating informed and reflected choices.\textsuperscript{227}

To be effective as an information-sharing and learning mechanism, and to enable citizens to construct a more inclusive point of view, the national conversation must include the voices of all segments of society, including the traditionally disempowered, disadvantaged, and disenfranchised. Many of the challenges of modern democratic practice, including questions surrounding campaign finance, center on this question of inclusion.

In sum, the law and neoclassical economics model of democratic politics views citizens as passive consumers of candidate and issue information, whose duties are limited to determining which candidates optimize their pre-existing preferences. For feminist economists, however, citizens are not regarded as merely consumers of information. Rather, they are viewed as active participants in deliberative democracy, in dialogue with their fellow citizens so that they can share their understandings and experiences and develop more global understandings and better, more inclusive policies. More attack ads will not fulfill these functions, no matter who pays for them. Rather, we need to begin to consider more fundamental changes in the American political/electoral system that could lead to the inclusion of more voices in a truly national conversation.

FECA-type regulation from the top down may be necessary to avoid \textit{quid pro quo} corruption and/or the appearance thereof. But the "deepening of democracy" that we need will require

\textsuperscript{227} See Sen, \textit{Gender and Cooperative Conflicts}, supra note 194; see also \textsc{Irene Tinker}, \textsc{Persistent Inequalities: Women and World Development} 123-48 (1990).
empowerment from the bottom up. The expansion of "dialogic sites" where equal citizens can meet each other for democratic dialogue, and where empathetic cross-identification, new understandings, and new policies can grow. Unfortunately, many of these vital sites are currently in decline.

VII. The Decline of Political Community in America

Revitalizing American democracy, then, is not just a matter of providing better, low-cost information to individualized, atomistic voters. It is also a matter of developing new "dialogic sites" where people can share their experiences with their fellow citizens. Only in community can we voice our concerns, set our priorities, and begin the process of compromise necessary to solve our problems.

In the remainder of this paper, we will very briefly explore the reasons for the decline of some sites for community political discussion and debate. We will look to recent participatory political movements, such as feminism and the civil rights movement, for insights into the development of political community/dialogue. And, finally, we will examine some modest proposals for the invigoration of America’s national political dialogue.

The Decline of Dialogic Sites

The last half of the twentieth century witnessed significant decline in many of the organizations and spaces where Americans once debated political issues. For example:

1. Political parties: Michael Fitts and other scholars have documented the decline in the strength of the major American political parties: "... party identification within the electorate and party strength more generally have diminished, especially since the 1950s, with a majority of voters identifying themselves as either

228 See Anderson, supra note 198.
independents or only loosely affiliated with a party.”  Fitts argues that this decline in party identification is the primary factor behind both the decreases in voter participation and the increasing pro-market (and anti-egalitarian) orientation of much of American politics. Many factors undoubtedly contributed to this decline in Americans' identification with the major political parties; I will mention three.

First, for the Democratic Party, this decline cannot be disconnected from the decline of the union movement. At its height, organized labor provided much of the Party’s labor power and political energy. Second, the 1972 McGovern-Fraser reforms, which provided for the direct election of presidential nominees through primary elections, were designed to reduce the influence of “party bosses.” However, in the process, they also dramatically reduced the operative functions of party delegates and transformed the major party conventions into media-savvy “coronations” instead of sites for political debate. Third, political parties, particularly on the state and local level, rely heavily on the unpaid labor of thousands of volunteers - primarily women - whose energies are increasingly drawn into paid work. Any analysis of the decline (and potential revitalization) of grassroots party politics must take account of this crucial factor.

2. Labor unions: For many working class people, unions and allied organizations were once the primary sites for political education, places where economic and other issues would be

229 Michael Fitts, supra note 11.
232 Id.
233 See Anderson, supra note 198, at 246-248.
raised, explored and debated.\textsuperscript{234} But with only 13.2% of the American workforce currently organized, unions no longer constitute a major national dialogic (or political) force.\textsuperscript{235} The reasons for the decline of the American union movement are complex, but certainly include capital flight and globalization, and the anti-democratic errors of unions themselves, such as racism, sexism, homophobia, anti-immigrant bias, and corruption. But one significant factor is clearly the hostile state of American labor law and regulation.

In 1935, President Franklin D. Roosevelt signed the Wagner Act,\textsuperscript{236} which guaranteed workers the right to bargain collectively through “representatives of their own choosing,” primarily through elections sponsored by the National Labor Relations Board (hereinafter “NLRB”).\textsuperscript{237} In \textit{NLRB v. Jones and Laughlin Steel Co.},\textsuperscript{238} the Supreme Court affirmed the right to organize as a “fundamental right” guaranteed by the freedom of association.\textsuperscript{239} But decades of conservative legislation,\textsuperscript{240} case law, and NLRB rulings have whittled away at that “fundamental right,” until, in 2000, Human Rights Watch declared the United States to

\textsuperscript{234} In some working class communities, the rise of the evangelical church has partly filled this need for social and community support formerly filled by the union movement. However, the possibilities for political dialogue are often severely curtailed in religious spaces, by the hierarchical nature of both the institution and its dominant ideology.

\textsuperscript{235} See David Montgomery, \textit{supra} note 230.

\textsuperscript{236} 41 U.S.C. § 46 (1935).

\textsuperscript{237} The Wagner Act did not preclude other paths to union recognition; e.g., card-check, petition, etc. But in 1974, the Supreme Court ruled that an employer was absolved of the duty to bargain without an NLRB-sponsored election, provided that that employer had not engaged in unfair labor practices “too egregious to permit an election.” \textit{NLRB v. Linden Lumber}, 419 U.S. 301, 95 S.Ct. 429 (1974). See also David Brody, \textit{Labor vs. the Law: How the Wagner Act Became a Management Tool}, NEW LABOR FORUM, Spring 2004, at 9-14.

\textsuperscript{238} 332 U.S. 823, 68 S.Ct. 158 (1947).


be in violation of international law and human rights standards for failing to protect the rights of American workers to freely form unions.\textsuperscript{241}

Given this hostile environment and the internal problems of the labor movement, it is not surprising that labor unions now lose the majority of NLRB-sponsored elections, and that the union movement, in the past five years, has lost an average of over one-hundred-thousand members annually.\textsuperscript{242} Stewart Acuff said, "...
the effects on our society of depriving workers of this fundamental right are devastating: declining civic and political activity, a steadily eroding retirement system, an ever-widening wage and income gap, growing poverty, and a dangerous rightward drift of our cultural and political life."\(^{243}\) If the labor movement is going to be reestablished as a major site for political dialogue, this hostile legal and regulatory climate must be changed.

3. Civic organizations: Robert Putnam and others have documented the decline in other American civic institutions, from Lions' Clubs to bowling leagues.\(^{244}\) Putnam believes that the primary reason is the rise of television and the culture of individualistic entertainment it fosters. While I disagree with Putnam concerning the reasons for the erosion of these institutions, they were certainly sites where informal political discussion and debate occurred.\(^{245}\)

Although it is true that television and related media may have contributed to the atomization of Americans, I would argue that a different set of factors is primarily responsible for the decline in American civic institutions, including political parties. Americans now have the longest workweeks, with more family members in the workforce, than anywhere else in the industrialized world.\(^{246}\) This is combined with a stunning lack of supportive


\(^{244}\) See ROBERT PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY (2001).

\(^{245}\) *Id.* I would argue that the rise of "television culture" is primarily a result, rather than a cause, of these broader economic and social changes. As workweeks grow and schedules become more complicated, it is increasingly difficult to find common times for recreation with friends and family - most of whom are also working longer hours. Individualized entertainment for overworked and exhausted individuals may become the only realistic option.

services to help families and communities cope with the resulting decline in unpaid caring labor. On-site childcare, humane and affordable care for the elderly and disabled, flexible work schedules, and paid maternity/paternity leave, are all things that feminist economists have been demanding for years.\textsuperscript{247} In other words, as an increasing percent of women have chosen, or been forced by economic pressures, to trade unpaid labor for paid labor, public institutions have not picked up the slack. The predictable result has been a significant decrease in the amount of unpaid caring labor going into not only individual families, but also into community institutions from Scout troops to political parties.

Feminist economists, myself included, laud many of the results of women's increased labor force participation rates, including our increasing economic self-sufficiency, the increased use of our talents and capabilities, and the increased possibility for social and political equality. Nevertheless, as we fight for equality in the workplace and the public sphere, we must simultaneously fight for policies to mitigate the resulting "crisis in care" in our families and communities.\textsuperscript{248} This is partly for reasons of self-preservation.\textsuperscript{249} But ignoring the "care crisis" is also politically unwise, as the (very real) deficit of labor inputs into families and communities fuels the "family values" backlash against feminism, and makes the struggle for political and economic equality that

\textit{Struggle to Balance Work and Family}, Policy Institute, July 7, 2004, at http://www.epinet.org/content.cfm/webfeatures_snapshots_07072004. See also ELIZABETH WARREN & AMELIA WARREN TYAGI, THE TWO-INCOME TRAP: WHY MIDDLE CLASS MOTHERS AND FATHERS ARE GOING BROKE (2003) (pointing out that rising costs for housing, health insurance, day care, and transportation have "eaten up" any increases in income resulting having two adults in the workforce; the median American family is no better off financially -- and is possibly worse off -- than thirty years ago).


\textsuperscript{248} See \textit{id}.

\textsuperscript{249} See CRITTENDEN, supra note 246. A recent survey of young mothers found that, on average, they were sleeping only five to six hours per night. Many were sleeping only three to four.
much more difficult.

This decline in non-market work and non-market values has also had a major impact on American political culture. In an increasingly mobile, hurried/harried, atomized and fragmented world, citizens increasingly talk to each other about politics, if at all, through the "national communications medium" of television. Rather than using this medium to further alienate and atomize us, perhaps we can use this medium to increase the interest in, and sites for, national political dialogue. Can we use the tools of modern technology to create, rather than undermine, political discussion and political community? I believe that we can - by learning from the feminist and civil rights movements; in particular, from the civil rights movement's commitment to the right of every American to participate in the political process, and from feminism's insights regarding the co-creation of community and knowledge.

Since the early days of the second wave of the women's liberation movement, American feminists have relied upon a community-based process of knowledge creation. This public, consciousness-raising (hereinafter "CR") mode of knowledge creation can serve as an archetypal model for the co-creation of knowledge and community necessary for political revitalization. Given the private nature of so much of women's experience and oppression, the creation of feminist theory and feminist knowledge has necessarily evolved from the shared consideration of our so-called private experiences. Through sharing these private experiences, women have found that our experiences weren't so private after all. Rather, they were widespread and the result of the quotidian functioning of discriminatory institutions and cultural practices, from the lack of affordable childcare to the male orientation of much of American medical research. 250

Many feminists, myself included, have criticized the limitations of this consciousness-raising mode of knowledge production. For one thing, the content of the knowledge created depends critically upon "who is in the room"; i.e., whether those included in the dialogue are sufficiently diverse as to race, class, sexuality, and other axes of difference so that the experiences and issues of varying groups of women will be represented and theorized. However, despite its obvious short-comings, feminists' early decentralized, grassroots mode of knowledge production makes clear the extent to which the validation and interpretation of experience, and the proposition of solutions to the identified common problems, is necessarily a community activity, a process of entering into an ongoing dialogue.

Consistent with Sen's theory of democratic participation, women's CR groups, at their best, used women's differing positions to educate and create empathy for one another, to identify common experiences and problems, and to develop strategies for change. And the culture of CR - of local groups of individuals sharing their concerns and experiences and discussing possible solutions - can perhaps give us direction as we attempt to revitalize dialogic sites and American political culture.

VIII. Some Modest Proposals for Democratic Revitalization

So how can we apply the insights of the feminist movement and other participatory movements to the recreation of dialogic sites in the U.S. today? Can we take advantage of the capabilities of modern communications technology for the dissemination of information without increasing atomization? Despite our increasing workloads and increasing isolation, are there steps we can take to recreate viable dialogic and democratic sites for


Id. Other criticisms include the lack of long-run organizations which resulted from the process and the difficulties of engaging in legislative lobbying and other day-to-day politicking without such an organizational base.
political participation?

The following are a few modest proposals (from the least to the most ambitious) regarding democratic revitalization. They are, by no means, definitive, but rather represent an attempt to stimulate discussion on this vitally important topic.

1. **Use technology to reduce information costs: Centralized election websites**

   In a context where families have less and less time to research candidates and positions, it is vital to reduce both the direct and opportunity costs of procuring accurate political information on candidates and issues. This could be accomplished quite easily via a central FEC-sponsored election website, whose existence could be advertised via brief public service announcements on television. Each qualified candidate for federal office would be allowed a statement of prescribed length to introduce him/herself to the voters and to explain his/her positions on the vital issues of the day. Linked chat rooms could be provided for those who wish to discuss the candidates, and candidates would be expected to maintain active email links from these sites. Similarly, supporters or opponents of an upcoming referendum or ballot question could be granted text space on the website to advocate for their positions.

   Where applicable, the site could contain easily-navigated links to similar state and local websites, where state and local candidates and issues could be similarly introduced. State and local sites could also contain links to maps of election districts and polling places, polling hours, and other helpful voter information. Both federal and state/local websites should be linked to similar sites in languages other than English. Local libraries and schools could play a valuable role in assisting seniors, those with language difficulties, those who cannot afford computers or internet access, and anyone who is less-than-computer-savvy in the operation of the website(s).
An easily downloaded scorecard could be provided on the site where candidates could record their views on pivotal issues, e.g., “Do you support overturning Roe. v. Wade?” “Do you support the continuation of the U.S. military presence in Iraq?” The questions could be submitted by the candidate themselves, by professional journalists, or preferably by an online poll of registered voters.

Assuming reasonable navigability, such websites could dramatically decrease the direct and indirect costs of accessing electoral information, and would hopefully increase voter education and participation, particularly among the more computer-savvy young.

2. Change the electoral eco-system

Those of us who wish to reform the American electoral process need to examine carefully the eco-system within which U.S. elections occur.\textsuperscript{253} Proposals for reform include those to simplify the process of registration and voting, to update and upgrade the technology of voting, to change the primary system, to establish proportional and instant run-off voting, and to abolish the Electoral College.\textsuperscript{254}

Simplify registration and voting

Proposals for improving this aspect of the eco-system include simplifying voter registration (election-day and/or online voter registration), extending polling hours and days (to include at least one weekend day), providing short-term child-care at polling places, experimenting with voting-by-mail, and otherwise making it easier for those with long work hours and/or child and eldercare responsibilities to vote. Such reforms can be moderately successful in increasing voter participation, particularly among the less well-educated and lower-income citizens. For instance, six states, Idaho, Maine, Minnesota, New Hampshire, Wisconsin, and Wyoming, currently have same-day voter registration.\textsuperscript{255} Their voter participation rates, especially among young voters, now average

\textsuperscript{253} See Isaacharoff & Karlan, supra note 80, at 1705.

\textsuperscript{254} See id.

\textsuperscript{255} See PATTERSON, supra note 231.
fifteen percent higher than the rest of the nation. In 2000, states with polls that closed at 8:00 PM or later had turnout rates averaging three percent higher than those with shorter hours. Similarly, the 1993 “Motor Voter Act,” which requires states to offer voter registration at public assistance agencies and motor vehicle offices, has had a moderately positive impact on registration and participation. The FEC estimates that the Act has added at least ten million new voters to the rolls. 

Upgrade and update the technology of voting

The 2002 “Help Americans Vote Act” (hereinafter “HAVA”) was intended to address the voting machine errors and ambiguities, racially biased felon purge lists, and other irregularities in the 2000 elections. However, as Tova Andrea Wang points out, the 2004 election was also characterized by numerous voting irregularities. These ranged from the rejection of voter registration forms in Ohio because they were printed on the wrong weight of paper, to state-to-state inconsistencies in counting provisional ballots, to scarcities of voting machines.
and unacceptably long waiting times, to the (racially disproportionate) "pre-emptive challenges" of 35,000 voters in the swing state of Ohio.

The implementation in 2006 of two HAVA provisions, that the states develop and maintain computerized voter registration databases, and that all voting machines meet minimum standards for technical reliability and accessibility, should solve some of these problems. However, Congress needs to further clarify the regulations for counting provisional ballots, and for voter identification and felon exclusion in federal elections. In addition, many observers believe that, given the polarization of the elections and widespread suspicions regarding the "hackability" of touch-screen machines, Congress should also mandate that all machines leave a "paper trail" and be designed to allow independent post-election audits and recounts.

Reform the primary system

Many observers, from the Republicans' Brock Commission to the Democratic National Committee's Rules and Bylaws Committee, have commented on the need to reform our primary and candidate nomination system. The McGovern-Fraser reforms of 1972 directed state parties to choose their convention delegates through either primaries or caucuses open to all registered party members. As previously stated, they were designed to reduce the power of party "bosses" and "put the voters

voter registration lists but believed they had the right to vote). For instance, while Alaska counted 97% of its provisional ballots, Delaware counted just 6%.

There were vast discrepancies in the number of voting machines per capita, often within a single county. For instance, at largely Democratic Kenyon College in Ohio, there were two voting machines for 1300 registered voters. Nearby, largely Republican areas, had one machine for every 100 registered voters. See Joan Claybrook, Skeptics Ask: Did Bush Win Ohio? President's View, PUBLIC CITIZEN NEWS, Jan./Feb., 2005.

See Wang, supra note 261.


PATTERSON, supra note 231, at 148-149.

See id. at 104.
in charge of the nominating process.” However, they have had several unintended negative consequences. First, the current primary system gives a disproportionate influence to voters in two small, overwhelmingly white, rural states. Although the number of delegates at stake in Iowa and New Hampshire is small, the momentum, press attention, and subsequent fund-raising advantage received by the victors in these states is considerable. Candidates who appeal to urban and/or minority voters may not even survive these early contests. As Patterson says, “there are now two different nominating elections, one formed by residents of early-contest states and one consisting of residents of late-contest states. The first electorate chooses the nominees and is more heavily involved.”

This disproportionate influence of voters in states with early primaries has led to pressure to front-load the primaries and to a bunching effect on Super Tuesday. Although a poorly-funded candidate may be able to survive Iowa and New Hampshire through intensive door-to-door campaigning and a strong volunteer organization, s/he will have a very hard time competing effectively in the dozen-or-so media-intensive primaries held simultaneously on Super Tuesday. Says Patterson, “Super Tuesday is tailor-made for well-funded candidates. Presidential hopefuls need to raise a lot of cash up front to compete in today’s front-loaded system.”

Some observers believe that the current, increasingly front-loaded system also unnecessarily elongates the campaign, making it harder for voters to maintain sustained attention to the candidates and issues involved.

There are many competing proposals for primary reform. They include a single, national primary election (the system

269 See id.
270 See id. at 112-113.
271 For example, note John McCain’s early successes in the Iowa and New Hampshire primaries for the 2000 presidential election, followed by his overwhelming loss on Super Tuesday.
272 PATTERTON, supra note 231, at 114.
favored by most Americans), randomly rotating the states' primaries (to equalize voter influence over time), regional primaries (to reduce candidate travel and expenses), the "Delaware Plan" (an inverted pyramid system, with small states voting first), and the "Patterson Plan" (several small state primaries to winnow the field, followed by "Ultimate Tuesday," a de facto national primary).\textsuperscript{273} In debating the pros and cons of the alternatives, reformers should pay attention to equalizing the influence of voters in the various states, to avoiding a process biased by race, ethnicity, and/or rural/urban distinctions, and to minimizing the influence of funding advantages in the decision-making process.

\textit{Investigate alternatives to "winner-take-all"}

Proposals by Lani Guinier, Jonathan Levin and Barry Nalebuff, and others for changing the U.S. winner-take-all electoral system also deserve further investigation.\textsuperscript{274} For example, a voting system could give each voter multiple votes for each office, allowing him/her to distribute them among the candidates as s/he saw fit. If there were ten candidates for two senatorial seats, a voter could give all of her, say, six votes to one strongly preferred candidate, or distribute her six votes between two or three less-strongly-preferred candidates. Other instant run-off systems could give voters second choices; i.e., if your first-choice candidate loses, your second choice is the one that is recorded. This system could be particularly useful in preventing third-party candidates from acting as spoilers.\textsuperscript{275} These and similar creative systems for more closely matching preferences to outcomes are common in corporate shareholder elections, non-profit corporate governance, and many other venues. Research shows that such systems generally have higher rates of both voter participation and voter

\textsuperscript{273} Id. at 153-155.

\textsuperscript{274} See supra note 148; Jonathan Levin & Barry Nalebuff, \textit{An Introduction to Vote-Counting Schemes}, 9 J. ECON. PERSP. 1, 3-26 (1995). See also the discussion pieces that follow the article.

satisfaction than winner-take-all systems such as our own.\textsuperscript{276}

\textit{Abolish the Electoral College}

Finally, as the 2000 election demonstrated, the Electoral College must be abolished and replaced with a system of direct popular election of the president. Quoting Thomas Patterson, "[i]n what other democracy in the world would a [disputed] margin of 537 votes in one state be worth more than a nationwide margin of 537,179 votes?"\textsuperscript{277} Such absurdities undermine faith not only in individual office-holders, but in the legitimacy of the American system.

3. \textit{Support egalitarian redistricting and confront racist stereotyping to truly enfranchise people of color}

As Terry Smith has pointed out, it is vitally important for those of us who favor democratic reform to critically examine the current deployment of race in American electoral politics.\textsuperscript{278} Two issues stand out: redistricting, and race-baiting in campaign advertising. Even if electoral reforms succeed in equalizing influence by those of differing incomes, African Americans and other people of color can be easily \textit{de facto} disenfranchised via discriminatory redistricting. The Supreme Court has repeatedly refused to grant judicial relief to African Americans whose voting strength has been diluted by at-large elections or by redistricting which dismantles "majority-minority" districts and divides the votes of an African American community among predominantly white districts.\textsuperscript{279} Quoting Kenneth Cooper, "[these] legal challenges to majority-minority districts seek to erase mostly Black congressional districts, threatening three decades of gains made

\textsuperscript{276} See Levin, supra note 274.
\textsuperscript{277} Patterson, supra note 231, at 138.
\textsuperscript{278} Smith, supra note 109, at 1470-1522.
\textsuperscript{279} See Mobile, Alabama v. Boulden, 446 U.S. 55, 58 (1980) (refusing to grant judicial relief to African Americans whose voting strength has been diluted by at-large elections or by redistricting). See also Shaw, supra note 111.
since the passage of the Voting Rights Act of 1965.\textsuperscript{280} Whatever the campaign finance regime, discriminatory electoral regulations can still make it very difficult for people of color to elect representatives from their communities.

Second, as Smith and others have pointed out, it is also of vital importance that egalitarian campaign reformers examine and, where necessary, publicly criticize the derogatory representations of people of color in much campaign rhetoric.\textsuperscript{281} This is particularly true of the 30-second attack ads, where race-baiting has become a depressingly familiar campaign ploy. From the “Willie Horton” of George Bush Sr.’s campaign to Jesse Helm’s anti-affirmative action ads (which implied that whites are unemployed because “an unqualified African American took your job”), race has long been used to convince working- and middle-class whites to blame their economic troubles not on wealthy elites and policy-makers, but on stereotyped African Americans.\textsuperscript{282} In other words, race-baiting has been used to convince working-class whites to identify-up with rich whites rather than identify-across with working- and middle-class Blacks.\textsuperscript{283} At least with respect to white men, this strategy has unfortunately been largely successful, and has convinced many working-class white men to vote against what objectively, looks like their own economic interests.\textsuperscript{284} As

\textsuperscript{281}See, \textit{e.g.} Smith, supra note 109.
\textsuperscript{282}See \textit{id.}
\textsuperscript{284}See Lois Weis, \textit{Race, Gender, and Critique: African-American Women, White Women, and Domestic Violence in the 1980s and 1990s}, 27 SIGNS: J. OF WOMEN IN CULTURE & SOCIETY 139 (2001) (discussing the very different ways in which working-class white men vs. white women conceptualize race; i.e., who they hold responsible for their economic and neighborhood troubles. These differences maybe at least partly responsible for the gender gap among white
Smith points out, if the anti-egalitarian effects of this racial stereotyping and scapegoating are not counteracted, they could potentially blunt or even neutralize the egalitarian effects of other campaign reforms.\footnote{Smith, supra note 109, at 1492.}

4. Re-establish dialogic communities

Providing low-cost information about candidates and issues via websites, simplifying the processes of registering and voting, reforming the primary system, and similar changes could increase political participation by overworked, harried Americans. Similarly, reforming the primary system and abolishing the Electoral College will make political outcomes more nearly reflect voter preferences. In the long run, however, increasing democratization will require the re-formation and revitalization of dialogic sites; forums where ordinary citizens can publicly voice their concerns and develop new heuristic frameworks through which they can understand their common problems and possible solutions. Proposals for creating dialogic sites include revitalizing the American labor movement, and encouraging national political dialogue via “mobile town meetings.”

Re-establish dialogic communities: Revitalize the labor movement

Those who advocate a progressive agenda and wish to revitalize American political debate cannot afford to overlook the crucial role the labor movement has played historically in reducing economic and political inequality. Numerous studies have shown that the decline of union density in the U.S. since 1979 correlates strongly with the growth of wage inequality during that same period.\footnote{See David Card, The Effect of Unions on Wage Inequality in the US Labor Market, 54 INDUSTRIAL & LABOR RELATIONS REV. 354 (2001). See also Henry}

\footnote{See David Card, The Effect of Unions on Wage Inequality in the US Labor Market, 54 INDUSTRIAL & LABOR RELATIONS REV. 354 (2001). See also Henry}
correlation between low union density and high wage inequality.\textsuperscript{287}

The labor movement has responded in two ways to the current hostile legal and regulatory climate: by turning to "non-board" (non-NLRB) strategies for union recognition such as "card-check" authorization and neutrality agreements with employers,\textsuperscript{288} and by calling for national labor law reform. One example of such reform is the Employee Free Choice Act (hereinafter "EFCA"), which would amend the National Labor Relations Act such that, under ordinary circumstances, card check could replace an NLRB election for purposes of union recognition and collective bargaining.\textsuperscript{289} In addition, unfair labor practices during a unionization campaign would be subject to injunctions and stiff

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Farber, Nonunion Wage Rates and the Threat of Unionization (2002) (unpublished Working Paper #472, Princeton University) (on file with author); Lawrence Mishel & Matthew Walters, How Unions Help All Workers, Briefing Paper (Economic Policy Institute, 2003) at http://www.epinet.org/content.cfm/briefingpapers_bp143 (finding that over 20% of the increasing wage gap is attributable to declining union density, and Farber shows that "deunionization can explain as much as 50% of the growth in the wage gap between workers with a college education and those with a high school education."); Press Release, Alison Reardon, AFL-CIO, The Employee Free Choice Act Will Guarantee Employee Free Choice Through Democratic Majority Verification Procedures (2004) (stating that unions are particularly important in terms of benefit coverage; unionized workers are 53% more likely to have health insurance than nonunion workers.).
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\textsuperscript{288} Under "card-check" authorization, the employer agrees to recognize the union as the collective bargaining agent for the workers when a majority of workers have handed in signed union authorization cards. By avoiding an NLRB election, a "card-check" campaign avoids captive audience meetings, employee interviews, and other anti-union tactics on the part of employers. "Card-check" campaigns are often combined with "neutrality agreements"; i.e., the employer agrees to remain neutral during the union campaign. UFCW (United Food and Commercial Workers) has been somewhat successful with card check and neutrality in the retail food industry, and HERE (Hotel and Restaurant Employees) has been very successful in organizing Las Vegas casino and hotel workers with these methods. See Benz, supra note 241, at 161.

\textsuperscript{289} This Act is cosponsored by Representative George Miller (D-CA), Representative Peter King (R-NY), and Senator Edward Kennedy (D-MA).
penalties, and mediation and arbitration would be made available for negotiation of the first contract.\textsuperscript{290} Given the current congress and president, supporters of EFCA find their success in the immediate future to be highly unlikely, but they call for a process of educating both Congress and the American public about the current constraints to effective union organizing, and the need for legal remedy.\textsuperscript{291}

However, if the labor movement is to provide sites for true democratization, additional internal changes are needed. A labor movement based on a top-down, undemocratic philosophy of "business unionism" will never be successful in reigniting organizing or democratic debate among American workers. As with the broader electoral system, dissident unions and dissident factions within unions must have access to resources - membership lists, money from union dues, equal space in newsletters - to adequately communicate with union members and potential members. This internal democracy must be enforced, if necessary, through governmental oversight and regulation.\textsuperscript{292}

\textsuperscript{290} See David Brody, supra note 237, at 9-19. See also Peter Olney, National Reform, No Less: Comment on 'Labor vs. the Law: How the Wagner Act Became a Management Tool' by David Brody, NEW LABOR FORUM, Spring 2004 at 21 (stating that other proposals include criminal penalties for employers' unfair labor practices, and giving workers and unions legal standing to sue for monetary damages; the same right that employers now enjoy under Taft-Hartley).

\textsuperscript{291} In fact, in the short term, it may be necessary to defeat a proposal by Representative Norwood (Republican of Georgia) to outlaw card check as a union recognition mechanism.

\textsuperscript{292} As Mike Parker points out, the more democratic unions are often more successful at gaining public support and winning contracts. Witness, for example, the successful 1998 UPS strike. "An important reason for the Teamsters' victory was that, before the UPS strike, the unions had been partially transformed by a struggle to make it democratic [by the TDU, Teamsters for a Democratic Union]. Democracy, it turned out, was not just the icing on the cake, but the very foundation of union power in a critical struggle against a
Finally, if the American labor movement is to attain its potential as a site for democratic debate and political power, other internal changes are needed. Quoting Bill Fletcher and Richard Hurd:

If unions hope to attract a mass influx of new members, they must first address seriously the internal transformation required to build a labor movement of all working people. The highest priority should be on creating a culture of inclusion. We envision a movement that embraces, attracts, and promotes women, people of color, immigrants, and lesbians and gays.\footnote{Bill Fletcher & Richard Hurd, \textit{Is Organizing Enough? Race, Gender, and Union Culture}, NEW LABOR FORUM, Spring/Summer 2000, at 60. See also Robin D.G. Kelley, \textit{Building Bridges: The Challenge of Organized Labor in Communities of Color}, NEW LABOR FORUM, Fall/Winter 1999, at 42 (noting that, by the mid-1990s, white men constituted a \textit{minority} of American union members).}

This internal transformation must begin by seriously coming to terms with the complicated, contradictory, and sometimes shameful history of organized labor's treatment of people of color, immigrants, and/or of women. Incidents range from the refusal of the AFL to admit the all-Black Brotherhood of Sleeping Car Porters to the CIO's abandonment of “Operation Dixie”\footnote{Operation Dixie was a 1950s multiracial organizing campaign in the South, which held the potential to change the face of southern - and national – politics.} to the paltry amount of resources historically devoted to organizing women workers and/or workers of color.\footnote{With respect to women, \textit{see}, e.g., Alice Kessler-Harris, \textit{Where are the Organized Women Workers?}, \textit{in} US WOMEN IN STRUGGLE: A FEMINIST STUDIES ANTHOLOGY, 110 (Claire Moses & Heidi Hartmann, eds.,1995). With respect to people of color, \textit{see} Robin D.G. Kelley, \textit{supra} note 293, at 48-50.}

Kelley and others suggest that a serious grappling with this history would push the labor movement in the direction of “social corporation. Democracy turned the UPS membership from a passive group conducive to scabbing into a strongly united organization of members able to take initiative in the workplace and in the community.” See Mike Parker, \textit{Appealing for Democracy}, NEW LABOR FORUM, Winter/Fall 1998, at 57.
unionism”; towards a vision of a labor movement working in alliance with a myriad of community-based organizations for social and economic justice. As Angela Glover Blackwell and Kalima Rose have said, “labor must recognize the rich fabric of organizations and institutions that support [low-income] communities and that share labor’s reform agenda.” Such coalitions, they believe, could open up the possibility of a revitalized union movement, committed to inclusion and democratic debate, which could once again be a significant political force in American politics.

Re-establish dialogic communities: “Mobile town meetings” (or “Reality TV meets electoral politics”)

Since 1987, in the October of every presidential election year, the Commission on Presidential Debates (hereinafter “CPD”) has sponsored presidential debates between the candidates of the major parties. These debates, which feature questions from professional journalists and some back-and-forth between the candidates, do provide important information to potential voters. However, they are often viewed as staid, “inside the Beltway” affairs among the “chattering classes.” More importantly, they do nothing to foster a sense of participation and involvement by ordinary citizens. Instead of traditional debates, I propose that the CPD begin to organize and subsidize a series of weekly, nationally televised “mobile town meetings” in the three months prior to any federal election.

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296 See Kelley, supra note 293, at 48-50.
297 See Angela Glover Blackwell & Kalima Rose, Overcoming the Obstacles: Forging Effective Labor-Community Alliances, NEW LABOR FORUM, Fall/Winter 1999, at 63 (urging organized labor to work in coalition with these organizations; e.g., lending unions’ technical and financial expertise to CBO’s (community-based organizations) in return for support for labor’s organizing and legal/political initiatives).
298 Id.
299 Over time, I would hope that the national CPD would spawn state
The sites for these town meetings would be determined by the CPD, with attention given to a mixture of rural vs. urban sites, and an eye on racial, and other, diversity. Questions would come not from professional journalists, but from ordinary citizens whose names had been drawn randomly from the voter registration rolls and who had been notified in advance by postcard. (Note that this would give people an additional incentive to register to vote.) Each candidate would open with a five-minute statement, and then the floor would be open for three-minute questions or statements from the randomly chosen citizens, with the candidate(s) given an additional three minutes to respond.

Although the town meetings would be aired during prime time, it is unclear whether any public financing would be necessary. It is quite possible that broadcasters would be able to sell sufficient advertising time to cover the cost of these (probably very non-boring!) gatherings. If this is not the case, then the FCC could invoke pay-or-play as discussed above, i.e., enforce “must carry” regulations or pay for the airtime through the revenues generated from the auction of the digital spectrum. In either case, minimal public monies would be involved.

Undoubtedly, some of the questions asked at these meetings will be silly (of the “boxers or briefs?” variety), and some participants may not ask questions at all, but rather, spend their time haranguing one or more candidates/officeholders, as is their right. But many of the questions will be serious, reflecting the experiences and heartfelt concerns of ordinary Americans. Over time, their questions could open up the range of issues discussed and solutions considered in future debates and in the media. The candidates’ initial statements, given for free on prime time television, could serve as a powerful antidote to the attack ads of our mud-slinging electoral culture. (Why spend millions of dollars on a misleading attack ad when your opponent gets five minutes - free - to refute you?) And, over time, the possibility of public

Commissions on Senate and House Debates, which could sponsor similar “mobile town meetings” around the states featuring senatorial and congressional candidates.
humiliation on prime time television could begin to serve as a powerful tool for accountability among our elected officials.

Finally, the possibility, or reality, of participating in these grassroots town meetings could serve as a powerful incentive for political dialogue and debate in local communities - whether or not they are sponsoring a meeting that electoral season. For once, we could use the modern communications media not to divide and atomize us, but to bring us together in genuine democratic dialogue.

The particular proposals to increase dialogue and participation are, of course, open to debate. But it is clear that those of us who are interested in increasing the democratic nature of American politics must begin to think more imaginatively than just “who pays for the attack ads?” We must begin to use the tools of modern communications technology, the insights we have gained from the feminist, civil rights, and other participatory political movements, and our understandings of feminist economics to create possibilities for genuine citizen involvement and genuine democratic community.