Michigan Law Review

Volume 101 | Issue 6

2003

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Recommended Citation
Jamin B. Raskin, *The Campain-Finance Crucible: Is Laissez Fair?*, 101 MICH. L. REV. 1532 (2003).
Available at: https://repository.law.umich.edu/mlr/vol101/iss6/8

THE CAMPAIGN-FINANCE CRUCIBLE: IS LAISSEZ FAIR?

*Jamin B. Raskin**

UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM. By *Bradley A. Smith*. Princeton: Princeton University Press. 2001. Pp. xiv, 286. Cloth, $26.95; paper, $17.95.

VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE. By *Bruce Ackerman* and *Ian Ayres*. New Haven: Yale University Press. 2002. Pp. x, 303. $29.95.

The 2001 passage of the Bipartisan Campaign Reform Act ("BCRA"), popularly known as "McCain-Feingold," set the stage for a momentous constitutional conflict in the United States Supreme Court in the 2003-04 Term. Among other things, the new legislation bans "soft money" contributions to the national political parties by corporations, labor unions, and individuals; prohibits state parties that are authorized to accept such contributions to spend the proceeds on activities related to federal elections; forbids federal candidates to participate in raising soft money; doubles the amount of "hard money" an individual can contribute in a federal election from $1,000 to $2,000 and increases the amount an individual can give in aggregate to all federal candidates, parties, and political action committees ("PACs") in a year from $25,000 to $30,000; bans all federal contributions by minors; and prohibits the expenditure of corporation and union treasury funds on "electioneering communications," defined as television- or radio-broadcast advertisements that refer to a federal candidate (or candidates) and appear within thirty days of a primary election or sixty days of a general election.[1]

The new law opens a pandora's box of constitutional brain teasers that the Court will have to solve. But it takes our polity further down a certain road. This is the road of compromise regulation of our multibillion-dollar campaign-finance regime. On this middling path, we accept the fundamental and intractable role of private money in public elections, but we do our best to regulate both its attendant "corruption," defined narrowly as the trading of campaign contribu-

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1. *See generally* Bipartisan Campaign Reform Act of 2002, 2 U.S.C. §§ 431-56 (2003).

tions for political influence and favor, and also its attendant "appearance of corruption."[2] This latter concept is odd since we do not usually conclude that the appearance of a problem creates a sufficiently compelling interest to override freedom of speech. For example, while we can certainly legislate within the bounds of the First Amendment to criminalize obscenity[3] or incitement to imminent lawless action,[4] we cannot constitutionally criminalize the appearance of obscenity or the appearance of incitement to imminent lawless action. How can preventing the appearance of corruption constitute an interest sufficiently compelling to justify burdens on speech?

In any event, we have chosen the middle path of modest regulation against two alternative paths that lead in opposite directions: a totally deregulated free market in campaign contributions and expenditures in which political money is treated as simply a proxy and vehicle for speech; and a public-finance regime in which we do our best to abolish the power of private money and treat campaigns as a public process like the election itself.

If the Supreme Court upholds the BCRA, we will likely continue on this middle road. Individual private-campaign contributions will grow rapidly, perhaps even doubling in the 2004 elections given the increased giving limits. Corporations and unions, perhaps now forbidden to contribute soft money and produce "electioneering" ads, will have a diminished role for a while but will soon enough find other ways to make their influence felt. We will see no sharp policy departures that either deregulate or substitute for the present market in campaign-finance capital.

Yet, if the Court invalidates large chunks of the BCRA, as it is likely to do, the forces of reform will have to conclude that the century-long effort to contain and channel private money has reached a dead end. The only viable progressive alternative to the status quo will be some kind of national public-financing regime written in such a way as to permit candidates to opt out and go private if they like, as is required by the Court's decision in *Buckley v. Valeo*,[5] but otherwise gives candidates the public means to run a serious campaign in return for forswearing private contributions. In the meantime, the ambiguities, contradictions, and gaps in the current compromise regime will give greater political impetus to Senator Mitch McConnell (R-Ky.) and other conservatives who think that political money, regardless of its source or its destination, should run free like a river. After the invalidation of the BCRA, reform will focus on creating a parallel

2. Buckley v. Valeo, 424 U.S. 1, 25-26 (1976) (per curiam).

3. Miller v. California, 413 U.S. 15 (1973).

4. Brandenburg v. Ohio, 395 U.S. 444 (1969).

5. 424 U.S. 1 (1976) (per curiam).

public regime and conservative resistance will focus on throwing away even the skeletal regulations we have.

Thus, it is a fine time to examine two books — Bradley Smith's *Unfree Speech: The Folly of Campaign Finance Reform*,[6] which will appeal to conservatives, and Bruce Ackerman and Ian Ayres's *Voting with Dollars: A New Paradigm for Campaign Finance*,[7] which may intrigue liberals — that imagine sweeping changes to our campaign-finance regime.

I.

In *Unfree Speech: The Folly of Campaign Finance Reform*, Bradley Smith has written an impassioned and eloquent defense of a free market in the financing of America's political campaigns. One is tempted to call Professor Smith's work the definitive libertarian statement about campaign finance: indeed, the Cato Institute and other self-described libertarian groups fighting campaign-finance reform have ardently promoted his ideas.[8] But there are revealing evasions in his argument — specifically about the role of private corporations, the public self-subsidies engineered by incumbents, and the acceptability of compulsory-disclosure rules — that complicate and cast doubt on his libertarianism. These equivocations make him, in the final analysis, more the conservative champion of the status quo than the visionary of a systematically deregulated libertarian regime of money in politics or the apostle of law-and-economics seeking to abolish rent-seeking behavior. While he succeeds in exposing the illiberal "folly" of much conventional reform, he ultimately fails to show how we might redesign public institutions to open up our politics to new voices, new choices, greater participation, and more political freedom.

Professor Smith has served since May of 2000 as a Republican-designated member on the Federal Election Commission, a position he secured over the protests of the Brennan Center for Justice, Vice President Al Gore, and other advocates of reform. From this perch, Commissioner Smith battles greater campaign regulation. Yet one hopes that his short-term regulatory agenda does not keep him from

6. Professor of Law, Capital University Law School.

7. Both are professors at Yale Law School.

8. *See, e.g.*, BRADLEY A. SMITH, CAMPAIGN FINANCE REGULATION: FAULTY ASSUMPTIONS AND DEMOCRATIC CONSEQUENCES (Cato Inst. Policy Analysis Paper No. 238, 1995), *available at* http://www.cato.org/pubs/pas/pa238.html (last visited May 30, 2003). The Cato Institute has featured Smith on numerous occasions, including upon publication of *Unfree Speech* at an author's forum on March 21, 2001, where I acted as respondent. *See also* Bradley A. Smith, *Should "Committing Politics" Be a Crime? The Cases for Deregulating Campaign Finance*, FREE SPEECH & ELECTION L. PRAC. GROUP NEWS (Federalist Society, Wash., D.C.), Feb. 27, 1997, *available at* http://www.fed-soc.org/Publications/practicegroupnewsletters/freespeech&electionlaw/fs010202.htm (last visited May 30, 2003).

spelling out a more robust and systematic political libertarianism that could be a meaningful contribution to public discourse.

Smith's greatest offering in this book lies in his polemical demolition of the standard rhetoric of campaign-finance reform. He makes mincemeat of the foggy complaint that "campaign spending is too high" (p. 41), showing that Americans spend "two to three times as much money each year on the purchase of potato chips," and that Philip Morris and Procter & Gamble "spend roughly the same amount on advertising as is spent by all political parties and candidates" (p. 42). He makes a good case that as a society, we spend too *little* money on political communication and campaigning, a point we must keep in mind (p. 45).

Smith also debunks the claim that "money buys elections," pointing to dozens of congressional campaigns where the lesser-financed candidate won, and arguing that the normally high correlation between campaign spending and victory is more likely to *reflect* the popularity of the winning candidate than to *create* it (pp. 48-51). Although Smith does not mention it, Rob Richie and the Center for Voting and Democracy have forcefully documented that campaign funding is a substantially less-important factor in general election victory in congressional races than the engineered partisan and demographic makeup of legislative districts.[9] If you give major-party congressional nominees the choice between having a favorably gerrymandered district and a fundraising disadvantage, or an unfavorably gerrymandered district and a fundraising advantage, all the smart ones will choose the former. (Of course, most incumbents are able to get both.)

Grabbing the bull by the horns, Smith attacks the assumption that "[m]oney is a corrupting influence on the legislature" (p. 51). Here, corruption cannot mean the "personal enrichment of a legislator in exchange for a vote" (p. 52), since that kind of dirty dealing is already proscribed by laws against bribery. Smith asserts "[w]hat reformers mean by 'corruption' is that legislators react to the wishes of constituents; or what, in other circumstances, might be called 'responsiveness.' What makes this particular incidence of responsiveness 'corrupt' is that the constituents involved have taken an active role in supporting the candidate's campaign for election" with money contributions (p. 52). Smith illustrates what he sees as the reformers' fallacy by citing a Common Cause bulletin reporting $14.2 million in campaign contribu-

9. *See* Rob Richie, *Money Doesn't Buy Love — Nor Most Elections*, ROLL CALL (D.C.), July 21, 1997 (concluding that partisan politics ultimately proves more decisive in winning votes than the size of campaign expenditures), *available at* http://www.fairvote.org/reports/monopoly/richie2.html (last visited May 30, 2003).

tions from the "sugar and peanut industries" over several elections.[10] But, Smith argues, this evidence is meaningless with respect to corruption because "[n]o effort is made to show that any congressman or senator, let alone a majority, voted against his conscience or the wishes of his constituency in exchange for votes on the issue" (p. 53). (I think he actually meant to write "in exchange for campaign contributions.")

Smith is correct that if corruption simply means compromising the moral purity or "true beliefs" of the politician, then the claim that money corrupts legislatures seems highly doubtful. The kinds of politicians that receive huge sums from agri-business interests are the kinds of politicians that would robotically serve these interests anyway. Corporate power does not have to buy politicians in American elections; it spawns them. Thus, although Smith fails to provide us with a definition of corruption, we need a definition that does not focus on the impressionable soul of the politician but rather on keeping the channels of popular democracy safe from capture by predatory elite factions, which are always made up of both politicians and the broader interests they serve.

After tracking the "faulty assumptions of campaign finance reform," Smith argues that past reforms have "actually exacerbated many of the problems they were intended to solve, and created new problems along the way" (p. 65). This is the familiar conservative argument of "perversity": that the effects of any well-intended reform will just make matters worse. Here Smith is not nearly so convincing. In the first place, he ignores important structural reforms of the past, notably the federal-statutory ban beginning in 1907 with the Tillman Act on any contributions from corporation treasuries directly to candidate campaign treasuries.[11]

Smith's silence on the Tillman Act is eerie. Does he favor such a ban on corporate contributions to federal candidates or does he oppose it? Has this ban succeeded in breaking the cash nexus between the for-profit corporate sector and legislative politics? Is this a permissible and desirable goal? Although he explores and attacks practically every other campaign-finance regulation, he tiptoes around this one. If corporations have the political free-speech rights of citizens, surely this policy collides with Smith's free-speech principle. While he quite amazingly takes issue with the Court's democracy-reinforcing decision in *Austin v. Michigan Chamber of Commerce*,[12] which affirmed a

10. *See Pocketbook Politics*, COMMON CAUSE, Feb. 24, 1998 (summarizing campaign contributions from various special-interest groups), *available at* http://www.commoncause.org/pressroom/profiles.html (last visited May 30, 2003).

11. *See* Tillman Act, Pub. L. No. 59-36, ch. 420, 34 Stat. 864 (1907) (codified as amended at 2 U.S.C. § 441(b) (2003)).

12. P. 150; Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990).

Michigan law forbidding corporate-treasury expenditures on candidate races, he does not tell us what he thinks of the Tillman Act's ban on direct corporate-treasury contributions to candidate campaigns. Smith's shyness about this fundamental problem may have been born of his ambitions to serve on the FEC, but perhaps it reflects an unwillingness to follow his libertarian rhetoric to its logical conclusion: if corporations are political citizens, then they should be able to give on an unlimited basis not just to initiative and referendum campaigns but directly to candidates as well.

This would be a most revealing confession on his part if he would own up to it, for it is clear that an unhampered "corporate democracy" is the kind of society conservative libertarians have in mind. Smith himself likens inequalities in political wealth and media power to the distribution of natural talents and attributes in society: "There are a great many sources of political influence. These include direct personal attributes, such as speaking and writing ability, good looks, personality, time and energy, and organizational skills, as well as acquired attributes, such as wealth, celebrity, and access to or control of the popular press" (p. 1077). We are thus implicitly invited to humanize corporations, naturalize their wealth and power, and constitutionalize their right to participate in politics.

Yet, unwilling to follow the logic of his argument all the way to lifting the ban on corporate contributions to candidates, Smith instead stacks up unconvincing policy arguments against reforms past and present. Focusing on the 1974 amendments to the 1971 Federal Election Campaign Act,[13] he argues that contribution limits, like the $1,000 limit on giving to candidates for Congress, "favor incumbents by making it relatively harder for challengers to raise money and thereby make credible runs for office" (p. 66). This claim is deeply suspect since incumbents have overwhelmingly disproportionate access to large givers, which means that contribution limits will tend to even things out a bit. Now that the $1,000 giving limit has been lifted to $2,000 with McCain-Feingold[14] for example, incumbents are able to rake in large numbers of $2,000 checks where their prior sums were half of that. Smith may have in mind certain Republican challengers to Democratic incumbents who would like to be able to draw on several $100,000 contributors. But contribution limits obviously help most challenger candidates marginally close the gap with incumbents, even though incumbents continue to enjoy extraordinary fundraising advan-

13. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974) (amending Federal Election Campaign Act of 1971, Pub. L. No. 92-225m, 86 Stat. 3 (1972) (codified as amended at 2 U.S.C. §§ 431-56 (2003))).

14. Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § 441a(a)(1).

tages.[15] Lifting contribution limits would, on the whole, make matters worse for challengers and better for incumbents who have broad access to big donors and vast amounts of highly motivated special-interest money.

Many of Smith's other claims about the consequences of past reform are equally doubtful: that reform has "inhibited the robust discussion of public issues" (p. 73), or that it has "promoted influence peddling, reduced legislative accountability, and caused dereliction of duty" (p. 76). The basis for this latter set of claims is that, by forcing candidates to collect contributions in tiny $1,000 morsels rather than in, say, efficiently satisfying $250,000 chunks, the candidates must "divert the legislative attention away from official duties and toward fundraising" (p. 78). The need to impress so many different donors, Smith asserts, sounding suddenly like a Common Cause lobbyist, also reduces the willingness of officials to take prudent risks: it "promote[s] shirking by increasing the pressure on legislators not to offend contributors" (p. 78).

Ironically, the interests that Smith invokes in saving legislators' time for actual legislation make a much better fit for arguments on behalf of public financing that Smith cavalierly rejects elsewhere in his book. These points make hollow arguments for getting rid of contribution limits, however, since big donors will demand much more time from legislators and can themselves — at least on an individual basis — increase the "pressure on legislators not to offend" (p. 78). In any event, legislators will not pass up the opportunity to make the $1,000 calls just because a $5,000 check has already arrived! It is nearly impossible for anyone with even passing familiarity with politics in the real world to believe that raising contribution limits will *reduce* the amount of time the ordinary politician spends on fundraising.

One perverse effect of 1970s reform correctly identified by Smith is the way the reforms propelled "the phenomenon of the 'millionaire candidate' — Donald Trump, John Corzine, Ross Perot, and Steve Forbes" (p. 70). Since the Court in *Buckley v. Valeo* upheld the $1,000 campaign-contribution limit[16] but struck down all limits on what a candidate could spend on his or her own campaign from personal funds,[17] millionaires like Michael Huffington, Herb Kohl, or Jay Rockefeller have automatically become "viable candidate[s] precisely

15. *See, e.g.*, Common Cause, Reporter's Guide to Money in Politics Campaign 2000: Incumbent Advantage, *at* http://www.commoncause.org/pressroom/congress_advantage.html (last visited May 30, 2003) (concluding that incumbents benefit from a marked funding advantage).

16. 424 U.S. 1, 58 (1976) (per curiam).

17. *Buckley*, 424 U.S. at 52.

because personal wealth provides a direct campaign advantage that cannot be offset by a large contributor to the opposing candidate" (p. 70).

Smith is not actually troubled by the broad plutocratic implications of this development, the idea that we may be drifting into de facto wealth and property qualifications — not for voting but for running for public office. What troubles him is that the politically active billionaire is *constrained* in his or her options. "Ross Perot's 1992 presidential campaign was possible because Perot was able to spend millions to advance his own candidacy. However, the contribution limits upheld in *Buckley* made it illegal for Perot to bankroll the campaign of a more plausible challenger, such as General Colin Powell" (p. 70). Similarly, Smith is up in arms about the case of "millionaire publisher Malcolm S. 'Steve' Forbes, Jr., a political neophyte" and candidate for the Republican nomination for president in 1996 who

> indicated that he would not have sought the nomination had former congressman and secretary of housing and urban development Jack Kemp decided to run .... Had Forbes been able to donate to Kemp the $25 million he planned to spend on his own campaign, Kemp might have run and would quite likely have been a frontrunner for the Republican nomination. (p. 71)

Smith recognizes that millionaires have achieved a central place of honor in the current regime. Nonetheless, he invites us to believe that the principal injury inflicted by this system is to their disappointed close friends who should enjoy unfettered access to these private millions as well.

But what about everyone else? Can our circle of democratic empathy extend beyond the class of people that includes Colin Powell and Jack Kemp (not billionaires, it is true, but certainly millionaires)? What about those Americans who have something meaningful to contribute in politics but have neither millions of dollars nor generous close friends with billions in the bank?

In truth, the question of how this or that reform affects our politics is rhetorical window dressing for Smith. The beating, if sometimes muffled, heart of his book is a categorical and absolutist First Amendment defense of the unlimited right to give and spend private money in politics. Thus, Smith does not care that most money in campaigns comes from a rich elite, less than one-tenth of one percent of the people,[18] or that 90% of the American people do not participate in fundraising at all (p. 74). It is of no serious moment to him whether incumbents are benefited or hurt, whether elections are competitive or not, or whether politics is open to the vast many or the well-heeled

18. ACKERMAN & AYRES, p. 31.

few. The key point is that anyone should be able to give as much money to any candidate or group as he or she wishes, and every candidate should be able to spend whatever liquid capital he or she has in order to win. Smith deduces this principle from the First Amendment (pp. 137-66) and understands it as inescapable regardless of its worldly consequences.

Smith grounds this principle in the prevailing free-speech theory of money in politics (pp. 137-66). He endorses the *Buckley v. Valeo* majority's across-the-board invalidation of spending limits as a "direct quantity restriction"[19] on political speech. He castigates the Court for validating $1,000 contribution limits in the interest of fighting "corruption and the appearance of corruption" (p. 33). Smith challenges Judge J. Skelly Wright's opinion in the appeals court ruling in *Buckley* that "nothing in the First Amendment commits us to the dogma that money is speech."[20] "If spending money were not a form of speech," Smith writes, "the First Amendment would become hollow for all but newspapers and other press outlets, since any effort to spread one's message, through advertising or pamphleteering, could be stripped of First Amendment protections simply by attacking the expenditure of money" (p. 113). Indeed, even with respect to newspapers, as Smith recognizes, the Supreme Court found in *New York Times Co. v. Sullivan* that the purchase and sale of newspaper ad space constituted First Amendment protected actions.[21] Thus, even if money is not actually speech — even if it is best seen as "property," as Justice Stevens argued powerfully in *Nixon v. Shrink Missouri Government PAC*[22] — it is still a kind of fungible property practically indispensable to the effectuation of speech and press activity in modern society. Without a free market in political money, Smith suggests, there will be no free market in political speech.

With this market principle as his lodestar, Smith tells us it "is not exaggeration to say that campaign-finance 'reform' poses the greatest threat to free speech in America since the Alien and Sedition Acts two hundred years ago" (p. 87). In actuality that *is* an exaggeration and quite an unsettling one. Does Professor Smith forget the Palmer Raids, the prosecution of socialists and anarchists for opposing World War I, the incarceration of dissenters for dishonoring the American flag, the internment of Japanese Americans and foreign nationals during World War II, McCarthyism and Smith Act prosecutions and government witch hunts, the massive FBI surveillance and disruption

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

20. P. 112 (quoting J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001, 1005 (1976) (internal quotation marks omitted)).

21. 376 U.S. 254, 266 (1964).

22. 528 U.S. 377, 398 (2000) (Stevens, J., concurring).

of the Civil Rights Movement, Cointelpro and the sweeping prosecutions and jailings of antiwar activists during the Vietnam period? Is it plausible that the "greatest threat to free speech in America since the Alien and Sedition Acts" is the Bipartisan Campaign Reform Act of 2001? What does Professor Smith make of the USA PATRIOT Act, passed in the same year?[23] One can well grasp the temptation experienced by Professor Smith to assert the martyrdom of those newly minted civil libertarians courageously defending the free-speech rights of large corporations and millionaires, but let us not press a good joke too far.

Leave aside the hyperbole that treats denying Philip Morris the right to buy jumbo-shrimp hospitality suites at the major-party national conventions as a greater assault on liberty than, say, sending presidential candidate Eugene Debs to a federal penitentiary for ten years for opposing World War I.[24] In a formal doctrinal sense, the BCRA is not targeted at particular political-speech content, much less specific viewpoints, and any speech forbidden by way of the soft-money ban can be easily effectuated through the expenditure of hard money by individuals. So our most important First Amendment warning signals are simply not flashing.

At the same time, the conservative majority on the Court is likely to strike down the new "soft money" and "electioneering communications" provisions, as well as the provisions barring minors from making any federal contributions. The constitutional calculus involved in these issues is massively intricate, but the basic posture of the Court's ruling majority will be clear: *Buckley*[25] and *Shrink PAC*[26] delineate the outer bounds of campaign-finance regulation to protect against quid pro quo corruption (and its appearance). Therefore, Congress cannot regulate political expression by corporations, unions, political parties, or individuals that does not involve either express advocacy or a direct candidate contribution. Yet, the major provisions of the BCRA sweep well beyond this understanding. This is likely to

23. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("USA PATRIOT Act"), Pub. L. No. 107-56, § 411(a), 115 Stat. 272, 346 (codified in scattered sections of the U.S. Code). For discussion of the USA PATRIOT Act's impact on free speech and other Bill of Rights guarantees, see John W. Whitehead & Steven H. Aden, *Forfeiting "Enduring Freedom" for "Homeland Security": A Constitutional Analysis of the USA PATRIOT Act and the Justice Department's Anti-Terrorism Initiatives*, 51 AM. U. L. REV. 1081, 1096 (2002) (noting the USA PATRIOT Act's "deleterious effect on the sacrosanct protection of the First Amendment right to free speech").

24. *See* RAY GINGER, THE BENDING CROSS: A BIOGRAPHY OF EUGENE VICTOR DEBS (Russell & Russell 1969) (1949). *See generally* EUGENE VICTOR DEBS, WALLS AND BARS 18-39 (Patterson Smith Publishing Corp. 1973) (1927) (recounting autobiographical experiences in three county jails, the state penitentiary, and federal prison).

25. Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam).

26. 528 U.S. 377 (2000).

be the conservative Court majority's reaction, and it makes sense within this conceptual framework.

THE CORPORATION AND CAMPAIGN-FINANCE LAW

But something critical is missing from Smith's approach to the BCRA's ban on soft-money contributions to political parties. Indeed, the theoretical omission that permeates Smith's book is that there is no serious reckoning with the private corporation and what its proper role should be in federal and state political campaign activity.

If private corporations chartered for economic purposes are constitutionally protected political actors like citizens, as Smith repeatedly assumes, then it makes sense to describe a ban on their "issue ads" sixty days before an election as blatant interference with political free speech. If private corporations enjoy the same free-speech rights as membership associations like environmental groups, gun-owners' organizations, and unions, then it makes sense to treat the ban on their soft-money contributions to political parties as interference with the formation of mutual political associations among citizens, as the anti-BCRA plaintiffs allege.[27] If the corporation is guaranteed the right to be an equal participant in elections like individual voters, the leading features of the BCRA surely must fail.

But Smith's unreflective assimilation of private corporations into democratic politics cuts against strong currents in American political and constitutional thought, even among conservatives whose views on contribution and expenditure limits Smith otherwise applauds. The democratic state charters the private corporation to engage in economic activity that produces private wealth for the benefit of the common good. But the corporation is neither a natural-born nor naturalized democratic citizen; nor is it a membership group of citizens. It is a capital-ownership structure and legally defined entity that should enjoy no political rights under the Constitution. It has no constitutional standing outside of the independent individual rights of the people involved with it.

To be sure, Smith's unthinking assumptions about corporations mirror the state of our procorporatist constitutional law. In *First National Bank of Boston v. Bellotti*, the Supreme Court in 1978 struck down a Massachusetts law making it a crime for banks or business corporations to make political contributions or independent expenditures to influence "the vote on any question submitted to the voters, other than one materially affecting any of the property, business or

27. *See* Brief for Appellants/Cross-Appellees Senator Mitch McConnell et al. at 25-31, McConnell v. Fed. Election Comm'n, 123 S. Ct. 2071 (2003). (No. 02-1674 et al.) (alleging that Title I of the BCRA burdens significant speech and associational rights), *available at* http://www.camlc.org/advocacy-court2-34.html (last visited Jan. 28, 2003).

assets of the corporation."[28] The statute, passed out of frustration with corporate spending to defeat initiatives favoring progressive income taxes, defined initiatives respecting individual income taxes as categorically not affecting the interests of banks and corporations.[29] The Massachusetts legislature would have better focused our attention on the underlying problem by categorically banning all corporate-initiative spending and contributions, but its legislation activated the constitutional struggle nonetheless.

The parties to the case, the First National Bank and the Commonwealth of Massachusetts, battled over whether corporations and banks have First Amendment rights to spend and give money in campaigns, a right that the Court had upheld with respect to persons two years before in *Buckley v. Valeo*.[30] But the Court refused to explicitly decide whether corporations have First Amendment rights.[31] It instead focused on whether the proposed speech itself was protected. Justice Powell wrote:

> The speech proposed by appellants is at the heart of the First Amendment's protection. . . . If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual. The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporations, association, union, or individual.[32]

Justice Powell's move was pure metaphysics. Speech does not exist in the abstract, waiting for the right moment to express itself. Speech has an irreducible material basis in the speaker, without whom the speech would not have content, meaning, or existence. So the whole issue was precisely whether corporations chartered by the Commonwealth of Massachusetts had a First Amendment right, in explicit opposition to Massachusetts law, to spend money from corporate treasuries to influence ballot-question campaigns. Recall that there was nothing in state law stopping individual corporate and bank executives, shareholders, or directors from expressing their personal views hostile to the progressive-income-tax initiative and spending their own money to try and stop it.[33] The issue was whether they could take corporate-treasury money out of the till and spend it for these electoral purposes.

28. 435 U.S. 765, 768 (1978) (quoting MASS. GEN. LAWS ANN. ch. 55, § 8 (West 1977) (internal quotation marks omitted)).

29. *See id.*

30. 424 U.S. 1 (1976) (per curiam).

31. *Bellotti*, 435 U.S. at 776.

32. *Id.* at 776-77 (internal footnotes omitted).

33. *Id.* at 787-88.

Since the speech affected was of the highest value, the Court applied strict scrutiny to the state's two suggested interests. The first interest suggested by Massachusetts was protecting democracy itself. The Court agreed that "[p]reserving the integrity of the electoral process, preventing corruption, and 'sustain[ing] the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government' are interests of the highest importance."[34]

But the problem with the state's democracy argument was that it depended on the assumption that corporate spending "would exert an undue influence on the outcome of a referendum vote, and — in the end — destroy the confidence of the people in the democratic process and the integrity of government."[35] If these fears "were supported by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests, these arguments would merit our consideration,"[36] the majority stated. But "there has been no showing that the relative voice of corporations has been overwhelming or even significant in influencing referenda in Massachusetts, or that there has been any threat to the confidence of the citizenry in government."[37]

This analysis left open the possibility that states could indeed ban corporate spending in campaigns if they showed that the corporate voice was "overwhelming" or even "significant," and threatened popular democracy.[38] But the Court then quickly, and paradoxically, observed that: "To be sure, corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it."[39]

This reasoning is, of course, incoherent. The Court says at once that corporate speech might lose protection if it were to become at some point too effective and overwhelming, and then in the next breath, that its effectiveness could not be the basis for regulating it.[40] Which is it?

The majority's embarrassing confusion on this point follows from its own persistent refusal to reckon seriously with what a corporation actually is.[41] This failure becomes glaring in its consideration of the

34. *Id.* at 788-89 (quoting United States v. Auto. Workers, 352 U.S. 567, 570 (1957) (alteration in original)).

35. *Id.* at 789.

36. *Id.*

37. *Id.* at 789-90 (internal footnote omitted).

38. *See id.*

39. *Id.* at 790.

40. *Id.*

41. *See generally* Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577 (1990) (arguing that the Supreme Court's treatment of the

second major interest invoked by Massachusetts to defend its law: its interest in "protecting the rights of shareholders whose views differ from those expressed by management on behalf of the corporation."[42] The majority rejected this alleged interest in protecting dissenting shareholders because the statute was "both underinclusive and overinclusive" for these purposes.[43] The law did not go far enough because it tolerated corporate lobbying to defeat or pass state legislation that certain shareholders might also disagree about and it did not ban corporate spending on public issues that were not the subject of a public referendum.[44] It also failed to target other associations such as unions and business trusts for the same treatment. Conversely, it swept too far because it prohibited "a corporation from supporting or opposing a referendum proposal even if its shareholders unanimously authorized the contribution or expenditure."[45] Justice Powell noted that shareholders who truly object can use the "procedures of corporate democracy" to register their dissent or can bring a "derivative suit to challenge corporate disbursements alleged to have been made for improper corporate purposes."[46]

Justice White, in his superb dissenting opinion joined by Justices Brennan and Marshall, framed the issue as "whether a State may prevent corporate management from using the corporate treasury to propagate views having no connection with the corporate business."[47] He invoked the traditional "artificial entity" view of the corporation, an understanding that goes all the way back to conservative Chief Justice John Marshall:

> Corporations are artificial entities created by law for the purpose of furthering certain economic goals. In order to facilitate the achievement of such ends, special rules relating to such matters as limited liability, perpetual life, and the accumulation, distribution, and taxation of assets are normally applied to them. States have provided corporations with such attributes in order to increase their economic viability and thus strengthen the economy generally.[48]

But Justice White pointed out the danger that these desirable economic advantages could be converted into tyrannical political power, which could, in turn, be used to perpetuate special privileges for the

personhood of corporations has been erratic and unsystematic, though tilting in a procorporate direction).

42. *Bellotti*, 435 U.S. at 787.

43. *Id.* at 793.

44. *Id.* at 793-94.

45. *Id.* at 794.

46. *Id.* at 794.

47. *Id.* at 803 (White, J., dissenting).

48. *Id.* at 809 (White, J., dissenting).

corporate class: "It has long been recognized . . . that the special status of corporations has placed them in a position to control vast amounts of economic power which may, if not regulated, dominate not only the economy but also the very heart of our democracy, the electoral process."[49] Justice White conceded that *Buckley v. Valeo* rejected any public interest in "equaliz[ing] the financial resources available to candidates," but argued that Massachusetts's interest was quite different from mere equality:

> It is not one of equalizing the resources of opposing candidates or opposing positions, but rather of preventing institutions which have been permitted to amass wealth as a result of special advantages extended by the State for certain economic purposes from using that wealth to acquire an unfair advantage in the political process, especially where, as here, the issue involved has no material connection with the business of the corporation. *The State need not permit its own creation to consume it.* Massachusetts could permissibly conclude that not to impose limits upon the political activities of corporations would have placed it in a position of departing from neutrality and indirectly assisting the propagation of corporate views because of the advantages its laws give to the corporate acquisition of funds to finance such activities.[50]

The only problem with Justice White's opinion was that he characterized the state's democratic insistence on abolishing corporate influence over elections as a social "interest" to be weighed against corporate free-speech rights, rather than a logically prior definitional principle that corporations are not citizens.

In his own fine dissent, Justice Rehnquist evinced his (one hopes) imperishable understanding of that point. To begin with, he seemed to doubt the solidity of the Supreme Court's 1886 decision, declaring the business corporation is a "person" within the meaning of Fourteenth Amendment Equal Protection.[51] He emphasized Chief Justice John Marshall's statement in the Dartmouth College case that a "corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of creation confers upon it, either expressly, or as incidental to its very existence."[52] While Justice Rehnquist correctly defended the Court's prior findings that chartered media corporations have First Amendment freedoms and all propertied corporations have a right not to have their property confiscated without due process of law, he strongly doubted whether ordinary business corporations should be construed to have constitutionally

49. *Id.* (White, J., dissenting).

50. *Id.* at 809-10 (White, J., dissenting) (emphasis added).

51. *Id.* at 823 (Rehnquist, C.J., dissenting).

52. *Id.* at 823 (Rehnquist, C.J., dissenting) (quoting Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819) (internal quotation marks omitted)).

protected *political rights*. He could not see why "liberties of political expression" are "necessary to effectuate the purposes for which States permit commercial corporations to exist.... Indeed, the States might reasonably fear that the corporation would use its economic power to obtain further benefits beyond those already bestowed."[53]

Justice Rehnquist and the other dissenters thus had a much stronger hold on what a corporation really is and how we conceive of its role in our politics. After all, Congress categorically banned corporate contributions in federal election campaigns in 1907 in the Tillman Act,[54] a prohibition that has been an uncontroversial mainstay in federal law ever since. If it is the case that the political speech that corporations want to promote in ballot-issue campaigns is constitutionally protected, as the majority determined in *Bellotti*[55] and as Smith clearly believes, it is hard to see why the long-standing ban on direct corporate contributions to federal candidates is constitutional. It cannot be because an unusual danger of quid pro quo corruption exists within the meaning of *Buckley v. Valeo*.[56] After all, if a reasonable limitation of $1,000 suffices to regulate "the reality or appearance of corruption"[57] for individual contributions, why not corporate ones? Why shouldn't corporate CEOs be allowed to write $1,000 checks — pardon me, $2,000 checks, or actually in Smith's utopia, unlimited checks — to federal candidates right out of their company treasuries whenever the spirit moves them? I do not think that Smith can explain what would be constitutionally wrong with this practice. Indeed, I suppose he figures nothing is.

For those who still have some lingering democratic pride and resistance to corporate aristocracy, the best explanation for our opposition to corporate intervention in politics is within the legislative history of the 1907 Tillman Act. Adam Winkler has written a fine article explaining that, contrary to received wisdom, the "primary purpose of the ban on corporate campaign contributions" in the Tillman Act and parallel state laws was not to limit corporate political power generally, but more specifically "to prevent corporate managers from using stockholders' money to finance electoral politics."[58] Winkler associates the extraordinary early twentieth-century political controversy over corporate and insurance company campaign contributions with the

53. *Id.* at 826 (Rehnquist, C.J., dissenting).

54. Tillman Act, Pub. L. No. 59-36, ch. 420, 34 Stat. 864 (1907) (codified as amended at 2 U.S.C. § 441(b) (2003)).

55. *Bellotti*, 435 U.S. 765 (1978).

56. 424 U.S. 1 (1976) (per curiam).

57. *Id.* at 48.

58. Adam Winkler, Corporate Contribution Bans and the Separation of Ownership and Control in the Early Twentieth Century 1-2 (2000) (unpublished manuscript, on file with author).

profound anxieties caused by "the separation of ownership and control" in the modern corporation.[59] Political reformers of the time "sought to ban corporate contributions primarily because such contributions were seen to be a serious misuse of 'other people's money.' "[60] The "political danger of corporate campaign financing" was not so much to the rest of democratic society but "to the members within the corporate organization, in particular the stockholders."[61] It was their money being used, without their consent or knowledge, often against their own political interests, positions, and values.

Winkler relates how several celebrated cases of life-insurance companies secretly pouring corporate-treasury funds into national Republican Party political campaigns provoked public outrage.[62] The scandal of a New York life-insurance company corruption led to an investigation by the New York legislature's Armstrong Committee that, according to Upton Sinclair, "shook the nation to its depths."[63] The investigation revealed a pattern of corporate managers taking the money of "widows and orphans"[64] out of corporate treasuries to bankroll politicians who wrote laws to entrench the managers' own power in the corporation. According to the *Nation*, the Armstrong investigation — which would propel a little-known corporate lawyer and law professor named Charles Evan Hughes to the governorship of New York and ultimately a seat on the Supreme Court — focused on "the corrupt alliance of insurance companies with great speculators and powerful politicians."[65] In the Tillman Act and similar state laws, the nation resolved to stop corporate managers from using "other people's money" — "the money . . . stolen from men and women who toiled and slaved and saved pennies to pay premiums"[66] — to advance the managers' selfish personal and corporate political agendas.

Most Americans instinctively understand the external threat that corporate wealth and power pose to democratic institutions, but the closely connected logic of the internal threat to the rights of shareholders and employees has largely escaped us in recent times — at least until the Enron scandal broke. Perhaps this heart-breaking scandal will help us to reunite the external and internal dimensions of this old-fashioned critique of political participation by corporate execu-

59. *Id.* at 2.

60. *Id.*

61. *Id.*

62. *Id.* at 3.

63. *Id.* at 31 (quoting UPTON SINCLAIR, THE BRASS CHECK: A STUDY OF AMERICAN JOURNALISM 31 (1919) (internal quotation marks omitted)).

64. *Id.* at 47.

65. *The Week*, 81 NATION 473, 475 (1905).

66. *The Week*, 81 NATION 433, 435 (1905).

tives brandishing other people's money. Top executives at Enron deployed their control over the corporate assets of the shareholders to spread very large soft-money campaign contributions around both political parties.[67] Top Enron and Arthur Anderson executives also contributed direct hard money to a large group of key politicians, including fifty-one out of fifty-six members of the House Energy and Commerce Committee and forty-nine out of seventy members of the House Financial Services Committee.[68] In the decade before Enron's collapse, its leaders pumped nearly $6 million into federal campaigns and the two-party system to guarantee the ideology of energy " deregulation."[69]

The corporate managers' resulting political influence in Congress and in the Republican Party, which went all the way to President George W. Bush and the White House,[70] shielded them from meaningful official scrutiny and allowed them to entrench their power with respect to the shareholders. Enron executives thus used other people's money to enrich themselves beyond belief and to ingratiate themselves with politicians to insulate their lawless power from public accountability. When the company ultimately went bankrupt, the shareholders, many of them Enron employees, saw their life savings shrivel and vanish.

If anything positive can come from this disaster and the crime sweeping corporate America, it will be a recognition that the BCRA's total ban on corporate soft-money contributions to national or state political parties, political committees, or candidates[71] is constitutional because corporations do not have political rights under the Constitution. What is at stake is not just the rights of "dissenting shareholders," for this phrase trivializes the structural transgression. Dissenting or not, citizen-shareholders in democratically chartered corporations have a right not to have their money put to the management's partisan political uses. The rest of us have a corresponding right not to have the corporation — which is endowed with so many government blessings — exploited by incumbent managers to perpetuate and enlarge their own power. We also have a right not to give business-expense tax deductions for corporate political contributions. What is at stake is the unjust enrichment and self-aggrandizement of a class of corporate managers determined to use "other people's money" to buy themselves greater power and freedom from public oversight and accountability.

67. *See* Robert L. Borosage, *Enron Conservatives*, NATION, Feb. 4, 2002, at 4.

68. *See The Great Recusal*, AM. PROSPECT, Feb. 25, 2002, at 2.

69. *See* Center for Responsive Politics, Enron and Anderson, *at* http://www.opensecrets.org/news/enron/index.asp (last visited Apr. 30, 2002).

70. *See id.*

71. *See* Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § 441(i) (2003).

Bellotti[72] should be overruled, and Professor Smith should use his analytical gifts to focus on the question of whether corporations have a constitutional right to give money contributions to candidate campaigns and engage in "express advocacy" on behalf of candidates. If not, why not? And, if they do not, why should corporations have a right to spend money on political issue ads to influence the opinions of civil society or to give massive soft-money donations to specific political parties jockeying against others? Where do these political rights come from? Smith's equivocation on corporate political rights reflects a lack of serious reflection about what a corporation is and whether it makes sense to talk about corporations enjoying the political rights of citizens.

Smith seems to think that the rest of society must resign itself to corporate interference in democratic politics because the benefits to corporations of winning political power and the risks to them of allowing natural citizens to govern are just too great:

> It is simply absurd to think that private actors will ignore rents made available to them by government action, and even more absurd to think that individuals or interests will allow the government to tax or regulate them, sometimes to the point of economic extinction, without attempting to influence who holds the reigns of power. (p. 194)

On this view, campaign spending is not some unquantifiably ethereal shouting in the wind, as Smith often invites us to believe, but a crucial strategic investment in the political environment.

Must we assume, with Smith, that society is powerless to prevent political intervention and domination by rent-seeking corporate "private actors" and "interests"? Is it, in fact, absurd to try to control the political power of business corporations? Surely corporate employees, shareholders, and managers may exercise their individual free-speech rights and spend personal money to promote what they see as the society's best interests, even if their vision is congruent with larger corporate political priorities. But it is illogical and perverse that the officers of publicly chartered corporations should be empowered to spend corporate-treasury money to tell the larger democratic society how to govern itself. The progress and integrity of democracy require a wall of separation between public elections and private corporations that will be as towering and impenetrable as the "wall of separation between church and state" advocated by Thomas Jefferson in his famous 1802 letter to the Baptists of Danbury, Connecticut.[73]

Indeed, if Professor Smith delved deeper into law-and-economics, he might even end up with a strong free-market argument on behalf of public campaign financing. For, as Smith understands, the system of

72. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

73. THOMAS JEFFERSON, WRITINGS 510 (Merrill D. Peterson ed., 1984).

private and corporate fundraising invites massive rent-seeking by private interests that figure out that well-invested millions in the campaign cycle can produce hundreds of millions or billions of dollars in return public policy benefits, either in the form of tax breaks or direct state subsidies. Thus, the true champion of an undistorted market economy should seek to oust rent-seeking strategic players in the campaign-finance game and liberate public officials from that kind of irrational influence and power. Conservatives like to say, with Smith, that corporate rent-seeking is the product of a large government as if corporations themselves were not directly involved in the expansion of the size and scope of government. This contradicts everything we know about the central role of corporations in driving the growth of the American state.

The wall of separation between corporations and public elections is something we already insist upon when it comes to *municipal* corporations. In a revealing case called *Anderson v. City of Boston*,[74] the Supreme Judicial Court of Massachusetts in 1978 stopped the city of Boston from spending money to support a campaign for a progressive taxation "classification" proposal that was on a statewide referendum-election ballot. Significantly, the municipal corporation of Boston was spending this money in direct opposition to *private* corporations which, in exercise of their *Bellotti* rights, were spending money to oppose the measure. The *Anderson* court speculated that "the First Amendment has nothing to do with this intra-state question of the rights of a political subdivision."[75] Yet, even assuming that this kind of municipal-corporate political speech was presumptively protected, the court found that Boston, Massachusetts had shown a "compelling interest in assuring the fairness of elections and the appearance of fairness in the electoral process," which justified its implicit ban on municipal expenditures in a referendum campaign.[76] The court emphasized how fairness was advanced by keeping the city from "using public tax revenues to advocate a position which certain taxpayers oppose,"[77] precisely the interest that the *Bellotti* Court dismissed when it came to private shareholders.[78] The *Anderson* court characterized Boston's view as suggesting that "the Commonwealth is apparently powerless against political entities of its own creation," precisely the terms in which Justice White castigated the argument made by private corporations and banks in *Bellotti*.[79]

74. 380 N.E.2d 628 (1978).

75. *Anderson*, 380 N.E.2d at 637.

76. *Id.* at 638.

77. *Id.* at 639.

78. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

79. *Anderson*, 380 N.E.2d at 639; *see also Bellotti*, 435 U.S. at 804-10 (White, J., dissenting).

The current state of the law leaves us with an indefensible asymmetry: private-corporate managers can spend to the heavens in pursuit of their political objectives while municipal corporations can spend nothing even if, as in the *Anderson* case, the elected representatives of the people on the city council overwhelmingly authorize and approve it. This imbalance swells the power of private corporations, leaving municipal corporations at their mercy. It probably makes sense to view municipal corporations as without free-speech rights since they are artificial entities that should effectuate the public will rather than try to shape it. On the other hand, in a statewide election, if private corporations are going to campaign for or against ballot issues and spend other people's money (almost always without their knowledge or consent) on such a campaign, then surely cities or towns with specific regional and political commitments should be able to make the parallel choice. In fact, the argument in support of municipal corporations is even more compelling, since democratic accountability is much stronger in localities and their participation is badly needed to counteract the political power of private corporations. But the cleanest solution would be for the Court to recognize that no corporation, public or private, has a constitutionally protected right to spend or contribute money in electoral politics.

To be sure, the BCRA's ban on union and individual soft-money contributions to political parties is probably unconstitutional. Unions are just democratically governed groups of citizens who put their own money into the union treasury for common political purposes. When they want to spend money to promote political party-building activities, political education or get-out-the-vote drives, they are not converting anyone else's money into their own political power nor are they exploiting a socially created capital-accumulation vehicle for illegitimate political purposes. The ubiquitous but intellectually lazy linkage of unions with corporations, both in law and in scholarship like Smith's (p. 28), reflects a cheap moral and political equivalency that has prevailed at least since the time of the Taft-Hartley Act.[80] Unions are membership organizations whose members associate for the purpose of exercising their First Amendment political rights. Corporations are ownership structures that do not have members but shareholders, employees, and Boards of Directors, all organized into a closely regulated legal hierarchy for economic purposes.

Smith's apparent lack of appreciation for the historical and social meaning of corporate power undermines the utility of his healthy

80. Labor Management Relations (Taft-Hartley) Act, Pub. L. No. 80-101, ch. 120, § 304, 61 Stat. 136 (1947), *amended by* 18 U.S.C. § 610 (1948) (repealed 1976). Current prohibitions on union contributions to political campaign electioneering are contained in the Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § 441(b) (2003); *see also* p. 28 (discussing limitations on union political contributions in the Smith-Connally Act).

libertarian instincts. If he at least wrestled conceptually with the corporation, he could return to assure us that corporations are indeed functional citizens protected by the First Amendment and deserving of all of the constitutional political rights that human citizens enjoy. On this view, the Tillman Act would have to be tossed out along with the BCRA. Corporations would then become the unquestioned masters of our politics and government, just as they are now the unquestioned masters of our economy. This would not be any democrat's utopian fantasy, but there would be a clean logic to it.

Alternatively, Smith might report back that political liberty belongs to persons, not to state-chartered vehicles of wealth accumulation, and that the substantial constitutional protection already extended to corporate political power has been a costly conceptual error that has serviced not political freedom but inequality and aristocratic privilege. At that point, we could have a serious discussion about how to secure the people maximum political liberty while taming the state's own ravenous creature, in Justice White's clarifying terms.[81]

Perhaps the best way to do that, given the high costs of media campaigning, would be to develop a public finance regime based on reclaiming the public airwaves (at least partially) during election season for the purpose of providing free air time to federal candidates. Right now candidates spend more than a billion dollars in a federal election year buying television- and radio-broadcast time on airwaves that "we, the people" actually own but stupidly give away to mega-corporations, who charge us for the privilege of engaging in campaign discourse. But change here has proven terribly difficult because the broadcast industry is itself extremely powerful. It awards millions of dollars in campaign contributions to friendly legislators and intimidates politicians through its control over the media. Thus, one obvious cure for corporate domination of our politics — having the people reclaim our airwaves for political free speech — is being frustrated by the disease of corporate political power itself.

Yet, Smith sees nothing wrong with the way that our broadcast industry is organized other than the distant threat that political candidates will one day get to appear on the air without paying a large corporation for the privilege (p. 141). "The network has a right to operate its property," he insists, apparently perfectly oblivious to the political origins of this property (p. 141). "To paraphrase the Declaration of Independence, government is instituted to preserve such rights," Smith solemnly declares (p. 141). In fact, these corporate "rights" in the public airwaves only exist because the government created and currently regulates them. So why should we elevate these delegated property rights of the broadcast licensee over the political rights of the

81. *See Bellotti*, 435 U.S. at 809 (White, J., dissenting) ("The State need not permit its own creation to consume it.").

candidates and voters to have a campaign process with televised free speech? In a political democracy, it is a matter of unfulfilled commonsense to pass legislation conditioning broadcast licenses on surrender of substantial time for debates and candidate appearances during the election season. Smith allows that, as "a philosophical matter, such a statute may be well and good." But, as "a constitutional matter, it is exactly what the First Amendment prohibits when free speech is at stake" (p. 142).

But surely the government is not prevented by the First Amendment from saving a certain number of airwave hours for political debate when it awards broadcast licenses. Yet, to justify precisely this paradoxical position, Smith invokes a series of judicial decisions upholding the exclusion of third party and independent candidates from candidate debates sponsored by public television networks (p. 142 n.13). No self-respecting champion of free speech should have any word of praise for judicial decisions upholding a government practice that taxes citizens of all views to promote exclusionary television debates between candidates representing two points of view. This selective and one-sided conscription of public support for particular political ideas cuts against our deepest understandings of democratic liberty. As Thomas Jefferson argued on behalf of his 1779 statute for religious freedom, "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical."[82] Smith essentially invites us to believe that if a broadcast entity sponsors a debate between a Democratic and Republican congressional candidate and freezes out an Independent, our free-speech sympathies should lie not with the excluded candidate but with the broadcaster, who logically has the right to have the Independent arrested if he or she dares to show up.[83] Some libertarianism, some democrat.

Smith also misplaces his libertarian instincts when trying to refute several arguments that I have made in the past about our state-

82. THOMAS JEFFERSON, JEFFERSON'S LITERARY COMMONPLACE BOOK 41 (Douglas L. Wilson ed., Princeton Univ. Press 1989) (1928).

83. In the leading case, *Arkansas Education Television Commission v. Forbes*, 523 U.S. 666 (1998), a state-run cable channel excluded an Independent candidate for Congress from a televised debate between his Democratic and Republican rivals. When Forbes showed up at the station, he was turned away and told the station would rather show reruns of St. Elsewhere than conduct the debate with him in it. This is now a fairly common scenario, and one that achieved national attention in 2000 when the Commission on Presidential Debates, a private corporation, called out Massachusetts State Troopers to threaten Green Party presidential candidate Ralph Nader with arrest for showing up at its first George Bush-Al Gore debate at the University of Massachusetts. *See, e.g.*, *Nader Tossed Off Grounds at Debate Site: Thousands Protest Variety of Issues* (CNN television broadcast, Oct. 3, 2003) (reporting Nader's expulsion from the 2000 Presidential Debate in Boston, where state officers threatened him with arrest). For a complete analysis of the lawfulness of debate exclusion by both state and corporate actors, see Jamin B. Raskin, *The Debate Gerrymander*, 77 TEXAS L. REV. 1943 (1999).

engineered "wealth primary." In an article I wrote with John Bonifaz, we argued that Equal Protection compels the government, at a minimum, to provide subsidies to challengers equal to the most obviously political self-subsidies engineered by incumbent members of Congress, such as the franking privilege, which allows congressional members to use their official budget for mailings to their constituents,[84] taxpayer-funded press secretaries, schedulers, and speechwriters.[85] Smith takes lengthy issue with the suggestion that these extensive government-conferred subsidies and political advantages translate into state action. He argues: "Finding state action in the mere fact that some people are officeholders seems a dubious proposition, for it would place state action at the center of all aspects of public discourse" (p. 156). But, of course, there *is* state action at the center of public discourse when incumbent government leaders selectively substitute public resources for private campaign funds to reach the electorate on behalf of their own ambitions. As in *Terry v. Adams*,[86] we find in today's wealth primary "an infusion of conduct by officials, panoplied with state power... [in an] effort to... subvert what is formally the law,"[87] which here is supposed to be a private competition for funds *without* state subsidies. Smith, further, dislikes the argument that proincumbent state action can be found in the enactment of special-interest legislation profiting particular donors, which in turn spurs further contributions to the same incumbents. "This theory raises more questions than it answers," Smith writes (p. 156), and this certainly is true. The argument forces us to recognize that we have a mature political and social system and the only sensible and just way to organize fair and open campaigns is through a public system.

In the final analysis, Smith leaves us with an effective diatribe against muddled reformers who think that there is something intrinsically progressive about capping any kind of political campaign giving and spending we can lay our hands on. But, having gone for this easy target, Smith does not ask himself the hard questions about the structural place of private corporations in American democracy or the lawfulness of official contrivances favoring incumbents, much less how we might rearrange things for greater public participation or a more effective exercise of political liberty by citizens. His book reduces to an eloquent plea for doing nothing but opposing reform.

84. *See* U.S. House of Representatives, Franking Commission: What is the Frank?, *at* http://www.house.gov/cha/franking/what_is_the_frank_/body_what_is_the_frank_.html (last visited May 30, 2002) (explaining the historical development of the franking privilege since its introduction to the American Continental Congress in 1775).

85. Jamin Raskin & John Bonifaz, *Equal Protection and the Wealth Primary*, 11 YALE L. & POL'Y REV. 273 (1993).

86. 345 U.S. 461 (1953).

87. *Terry*, 345 U.S. at 473-74.

II.

In their intriguing and spirited little manifesto for a massive voucher solution to the agonies of campaign-finance reform, Bruce Ackerman and Ian Ayres provide us with what is, at the very least, a provocative thought experiment about how we might broaden the circle of political participation to overcome the plutocratic dynamics of the current regime. Their meticulously detailed multibillion dollar plan for "patriot dollars" is sweepingly ambitious, gimmicky in parts, and also sometimes infected with the same ideologically saturated pre-legal-realist romance with "markets" that permeates Smith's work. But both the book's great virtues and its serious flaws point us in the direction of a real alternative to the depressing cycle of money domination and command-and-control regulation that infuses many recent reform dynamics. For the truly viable alternative today originates — what do you know? — not from conservative or liberal law professors but from voters in several states who have overcome the opposition of incumbent politicians to pass by initiative impressively effective "clean-money" voluntary public finance programs.

Yet, Ackerman and Ayres are not much interested in the clean-money movement that has triumphed in Arizona, Massachusetts, Maine, and Vermont.[88] In these states, legislative candidates who choose to participate can qualify for a set amount of public funding (usually pegged to the costs of victory in the last election) by first raising a certain threshold number of $5 contributions. This system allows large numbers of people, without regard to their wealth or poverty, to participate in the seeding of campaigns; it allows candidates, once they have qualified for the public funding, to spend time on campaigning rather than simply fundraising by granting them equal state subsidies; and it reduces overall the power of big private money in politics and government. As dictated by *Buckley*, candidates who choose to run outside of the public system can continue to raise and spend private money (under different state contribution limits).[89]

To Ackerman and Ayres, the clean-money regime smacks of "a centralized process — replete with heavy-handed requirements that favor incumbents, entrench existing parties, and alienate citizens from funding decisions" (p. 3). This unsubstantiated characterization is deeply at odds with all of the early evidence we have about the fairly

88. *See generally* Representative Harold E. Ford, Jr. & Jason M. Levien, *A New Horizon for Campaign Finance Reform*, 37 HARV. J. ON LEGIS. 307 (2000) (highlighting the triumph of clean-money ballot initiatives in Maine, Massachusetts, and Arizona); Miles Rapoport & Jason Tarricone, *Election Reform's Next Phase: A Broad Democracy Agenda and the Need for a Movement*, 9 GEO. J. ON POVERTY L. & POL'Y 379, 398-401 (2002) (showing that successful clean-money initiatives in Arizona, Maine, Vermont, and Massachusetts are promising models for broad democratic reform of our nation's money politics).

89. *See* Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam).

remarkable success of the clean-money reforms, which have substantially increased the number of new and outsider candidates, precipitated the ouster of large numbers of incumbents, and generally increased the openness of the political process.[90] These successes have come without the creation of any big, coercive bureaucracy, a driving fear of the authors. Indeed, the government effort implied by clean money pales next to their own vision of a renovated and expanded Federal Election Commission made up of five "retired federal judges" (p. 129) who name and oversee the heads of three new bureaucratic divisions assigned with fetchingly complex responsibilities (p. 132).

In any event, the state-based clean-money option is not the federal plan that the authors promote. Their plan certainly has its own great virtues — simplicity, unfortunately, not being one of them. The authors (along with a third collaborator, Danton Berube) experiment with different numbers, provisions, and requirements along the way, so perhaps it is best to follow the model statute that they provide at the end of the book (pp. 181-85).

The central feature of their "$5 billion plus program" (p. 42) is the introduction of "patriot dollars," a guaranteed $50 subsidy that every American citizen will receive from the government in order to make federal campaign contributions either to candidates, political action committees, or political advocacy groups. Once a voter has registered for a "patriot card" by mail, Internet, at the voting booth, or at the voter registrar's office, he or she will receive on his or her card four "subaccounts," including $10 for House elections, $15 for senatorial elections; and $25 for presidential elections. If, however, there is an incumbent president seeking reelection, the $25 subaccount is divided between $10 for the presidential primary and $15 for the general election (p. 182). All Patriot contributions by citizens must be made "anonymously" to candidates or political organizations through a "Blind Trust" set up by the Federal Election Commission (p. 183).

With tens of millions of newly empowered donors, there would be a huge and salutary influx of new cash for political expression and millions of new participants in political campaigns, spreading out and opening up a fundraising system that has grown elitist and self-referential. The authors estimate that, whereas "$3 billion flowed into the campaign coffers of all aspirants for federal office" in the 2000 elections, "in contrast, $5 billion or so would be coming into the campaign through the patriotic system" (p. 7).

Yet, the authors do not wish to use the tidal wave of new patriotic money to completely oust the system of elite-dominated private contributions that constitute our "wealth primary."[91] On the contrary,

90. *See* Public Campaign, Clean Money Campaign Reform, *at* http://www.publicampaign.org/clean_main.html (last visited Jan. 24, 2003).

91. *See* Raskin & Bonifaz, *supra* note 85.

they would not only continue the right to give money contributions to candidates but also would deliberately raise the hard-money private contribution limits from what they are today under McCain-Feingold, to what they cheerfully concede is "a stratospheric height that will be practically insignificant to all but the very richest Americans" (p. 48). They propose a $100,000 limit for gifts to presidential candidates, $100,000 for gifts to national political parties during presidential political cycles, $15,000 for gifts to Senate candidates, and $5,000 for gifts to House candidates (p. 184). Furthermore, before patriot dollars even kick in, the authors would allow federal candidates to raise money for exploratory funds, including up to $50,000 for House candidates, $250,000 for Senate candidates, and $1 million for presidential candidates. Individual donors would be allowed to contribute up to $2,000, $10,000, and $20,000 to each of these kinds of funds.

Now, the authors are convinced that dramatic increases in private giving will not translate into more plutocracy. They keep this faith for several reasons. The first is the innovation of which they seem most proud: the "secret donation booth," which emphatically challenges the standard reform dogma that full contribution disclosure is critical to democracy (p. 25). Just as voters cast their ballots in secret, Ackerman and Ayres argue, voters-as-donors should make their contributions secretly to the FEC's Blind Trust, which will then deposit the contributions into designated registered candidate accounts according to various intricate camouflaging formulae.[92] As a matter of course, the Commission will keep secret the information of who gave how much to whom. But if "a contributor requests, the Blind Trust will publicly disclose the amount the contributor has given up to $200" (p. 183). But the records of large donations are not published — that is, until they are all made public ten years after the fact (an interval that perhaps shows a naïve lack of faith in the longevity of grudges harbored by American politicians).

Furthermore, the authors have devised an intricate "secrecy algorithm," found in Appendix B (pp. 227-31), to disguise all contributions through manipulation of the timing and amounts of the FEC's release of donated money into the blind trusts. Even if a donor literally shows a candidate a cancelled check he wrote to the Blind Trust earmarked to the candidate's campaign for $5,000, this too is to no avail, according to the authors. For they have cleverly provided

92. For example, if

> the Blind Trust receives an unusually large amount of contributions from an unusually concentrated number of donors, it will report only a randomized amount of contributions (ranging from one standard deviation below to two standard deviations above the mean daily receipts) and will attribute excess amounts over a ten-day period.

P. 183.

that any contributor may rescind any contribution "within five days" of making it or may "instruct the Blind Trust in advance to send a refund check" even if the check is cashed (p. 183). Since sneaky faux-donors will trick politicians, there will be "a regime of cheap talk" (p. 28) and no candidate can ever be absolutely sure that any person actually made a contribution over $200.

What are we to make of this delightful proposal? Its virtues are plain. Patriot dollars will "invite millions to take a small but active role throughout the election campaign" (p. 15). Patriot donors "will be giving renewed social meaning to their self-understanding as free and equal citizens, engaging in democratic deliberation" (p. 15). This "citizenship effect" will engender an "agenda effect" as "candidates and political organizations will soon learn that they need not rely on the small elite of private-money donors but can finance themselves through broad-based appeals to the patriotic citizenry" (p. 15). It could actually make possible the development of new political formations, networks, and perhaps even parties.

Furthermore, through various complex-trigger mechanisms, the plan guarantees that patriot dollars will always represent two-thirds of total campaign giving, even with the proposed lifting of limits on private giving, so that the impact of private contributions is contained (p. 51). Since private wealth in politics has recently dominated the public agenda and national budgetary priorities, reducing private fundraising to a minority portion of total campaign funds can begin to emancipate the public to choose new policy directions.

But, as with Smith, there are significant unstated assumptions in the argument, and vexing unanswered questions. To begin with, it is not at all clear that the seemingly inspired secret "donation booth" addresses the real problem of corruption in the political process. The authors proceed on the premise that corruption follows mainly from politicians receiving large gifts from individual donors and knowing the identity of these donors. The painfully elaborate time-release-camouflage mechanism in their "donation booth" scheme is designed to sow doubt and confusion as to whether someone is really giving cash to a candidate. But their assumption is that most contributions come from arms-length relationships among strategic political investors. This is problematic, for many campaign investors are deeply and organically rooted as political allies, fundraisers, compatriots, and friends of the politicians they support. Thus, while there may be a sly trickster here and there who fools a politician into thinking he gave when he really did not, the vast majority of big donors will caucus with politicians, party with them, and strategize together for victory. They have no interest in tricking their endorsed politicians by secretly withholding their money since they want to see them win. Most donors share thick ideological, class, and professional connections to the politician. The contribution is not a kind of contract between them but the expression of a common world view and political project.

Thus, real corruption does not come from individual candidates knowing for certain who gave them money, but rather from organized money — a chief source of social inequality — operating outside of its proper sphere of market influence to dominate political life and distribute the opportunities of candidates and citizens to speak, persuade, and debate. The Supreme Court came much closer to understanding this sense of corruption in *Austin v. Michigan Chamber of Commerce* when it defined corruption not as quid pro quo arrangements but as "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form" and are spent on influencing political outcomes but that reflect the will of rich corporations, rather than the public's political ideas and choices.[93]

Thus, it is necessary to ask why the authors do not simply get rid of the private donation booth and completely socialize opportunities for candidacy with their Patriot plan. If we are going to spend $5 billion of public money on the exceedingly complex patriot dollar system — already quadrupling or quintupling the amount of money in the federal campaign process — why not strike a complete blow for democratic equality and abolish private campaign contributions? After all, the authors recognize that, in recent federal elections, one-tenth of one percent of the public gave one-half of the total campaign money raised (p. 31), and the vast majority of Americans give no private contributions at all. Does it not complete the democratic logic of equal public funding to give everyone, as much as possible, an *equal money stake* in politically funded campaigns in the same way we all have an equal vote? Why not structure the patriot system in such a way that candidates must either choose to go patriot or go private but have no intermediate option for a "mixed system"? (p. 33). Candidates and voters would be invited to identify with either public values and resources or private values and resources, a choice that would take on different meanings at different points in time.

The authors are not immune to the logical force of the "abolitionist argument," but seem to reject it, albeit reluctantly, for a hodgepodge of reasons. The first is the "realist caution" that, even "if the abolitionist proposal were adopted, there would be many other ways for the rich to project their influence" (p. 32). Of course, on this familiar, depressing theory, we should abandon the whole enterprise of campaign reform, as indeed Professor Smith urges us to do. Regardless of what we do, the rich will control their own newspapers, their own television stations, and various other bullhorns, so why not let them keep their own politicians and privately bankrolled

93. Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 659-60 (1990).

campaigns as well? Indeed, on this reasoning, it is not entirely clear why we should maintain laws against political bribery. After all, there will always be many other ways for the "rich to project their influence," so why not let them buy the will of politicians directly, which also has the virtue of being supremely efficient?

But surely the point of democratic progress against the tyranny of wealth is to radically separate what is properly a market commodity from what is not. The opportunities to run for office, to communicate as a candidate, or to influence legislation should not be market commodities bought and sold according to the whims and vicissitudes of those with financial capital. We can surely embrace a "mixed system" with respect to generalized background political discussion (what is now called "issue speech") such that we can have both publicly subsidized speech, like public-cable-television networks, as well as privately controlled speech, like newspapers. But the opportunity for the wealthy to own their own newspapers or television stations hardly justifies allowing them the further opportunity to project financial power into the public sphere of campaign speech. Let them allocate their $50 like everyone else. If it's good enough for the poor, it's good enough for the rich.

But Ackerman and Ayres argue, much like the campaign-finance romantic Bradley Smith, that making campaign contributions is "one of many ways Americans show that they care about the fate of the country, and thereby encourage others to engage in the enterprise of active citizenship" (p. 34). Here, private giving is not seen as a threat to democratic values but as the very embodiment of them. "Flatly prohibiting private campaign contributions would be a real loss to the civic culture — especially when we consider how the social meaning of small gifts will change within the new regime of campaign finance" (p. 34). That is, some patriot donors will get so invested in the success of their favorite candidates that they will decide to throw personal dollars after patriot dollars. This should be seen as virtuous, not corrupting. More importantly, in the early stages of the campaign, when most citizens are not focused enough to donate their patriot dollars, the private "donation booth is a means for more active citizens to put their money where their mouth is" (p. 36) and launch candidacies with big money contributions. This function is especially important, say the authors, to enable minor parties and their candidates to get off the ground (pp. 36-37).

Many of these arguments indeed sound an echo of Professor Smith's elegiac defense of private giving. Smith, for example, praises campaign fundraising as the most open and democratic form of political participation for ordinary, busy people.[94] Yet, there are some hard

94. P. 82 ("For most Americans, the best way to convert their talents to influence is through cash contributions.").

questions we need to ask Ackerman and Ayres. If everyone has fifty patriot dollars to spend, why doesn't the use of this (public) private money already sufficiently show that these voters "care about the fate of their country" and "thereby encourage others to engage in the enterprise of active citizenship"? Is everything public to be automatically denigrated, even patriot dollars? Would it really represent a loss to the civic culture to ask candidates to choose between the patriot system and the wealth primary?

The argument that early private money will be crucial to propel candidacies suggests not a virtue but a problem with the design of the patriot plan. Recall that the authors would allow federal candidates to raise large private-money contributions for exploratory funds, including up to $50,000 for House candidates, $250,000 for Senate candidates, and $1 million for presidential candidates. Individual donors would be allowed to contribute up to $2,000, $10,000, and $20,000 to each of these kinds of funds. This regime allows candidates to raise private-money contributions to spend on soliciting patriot contributions. But this pattern reincarnates the problem the plan is trying to address. For candidates will raise big private contributions to invest in media to tell voters to send in their patriot — and private — dollars to their campaigns. There will thus be a private-money chase to spend on a patriot and private-dollar chase, making the campaign a kind of relay race for money. And the distribution of patriot dollars will come to mimic and echo, rather than replace, the distribution of private dollars. The idea that this will benefit minor political parties and candidates is unsubstantiated by the authors and seems farfetched given the way private fundraising clearly benefits incumbents and their parties today.

Indeed, we can go further at this point and ask the more fundamental question: Granted that the Patriot plan usefully gets more people involved in the campaign-giving process and would mark a major improvement over the status quo, why should the capacity of candidates to reach the electorate with their campaign message depend on their ability to raise money from the electorate in the first place, whether it is from patriot contributions or checkbooks? Consider a U.S. House race in which the incumbent "major party" candidate raises $1 million (two-thirds in patriot donations and one-third in private donations), the other "major party" challenger raises $500,000 (in the same ratio), and a "minor party" challenger raises $100,000 (in the same ratio). Now, assume that the amount of money raised will roughly translate into the candidates' capacity to purchase and engage in political communication (which is, in essence, the whole premise of the ruling in *Buckley v. Valeo* that expenditure caps are unlawful "quantity restrictions" on political speech).[95] The incumbent

95. *See* Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam).

will have double the exposure and opportunity to communicate as his or her major-party challenger and five times that of his or her minor-party challenger.

But why? To be sure, we have structured the mass-media market in a way that shampoomakers will obtain differential access to the public mind, but should the same market approach govern candidates for the same public office from different political parties? Surely a different norm should operate here: democratic equality. At its foundation, modern democracy insists upon the hard-won principle of one-person, one-vote. In the setting of legislative floor debates over particular issues, it calls for one party-one equal bloc of time, with floor leaders divvying up the minutes among the members waiting their turn to speak. In Supreme Court oral arguments, contending sides in a battle get precisely the same amount of time to plead their case regardless of their wealth or the popularity of their cause.

When it comes to the mass media that operate on the people's airwaves and the people's minds, surely the principle of democratic equality also calls for debates and forums in which candidates receive equal floor time regardless of how much money they have or have raised or which political party they represent. It similarly calls for the award of equal free television time to candidates to make their pitch. It is these standards, so familiar to the rest of the democratic world, that we lose sight of when we simply continue and accelerate the money chase with an otherwise attractive universal subsidy. It would obviously be much cheaper for us as a society to save the money on the expensive Patriot plan and simply force the television networks to give us some of *our time* back so we can award it equally among the candidates.

This approach would have a truly catalytic effect on third parties and Independents. Outsider candidates cannot presently compete with the money-drenched insider parties and are routinely closed out of both public and private debates that favor the exclusionary "two party system" whose candidates wear their major-party tags like a "title of nobility."[96] But this public airtime approach puts our (weak) commitment to multi-party democracy to the test. The self-perpetuating "two party system" presupposes that "major party" candidates should never have to debate candidates of lesser parties, who are presumed to be frivolous, nonviable, or even crazy.

Yet, we have seen how outsider candidates, once allowed to debate, can change the dynamics of a race — and win. In 1998, Jesse

96. My allusion, of course, is to the constitutional prohibition against congressional members awarding "titles of nobility" to themselves. *See* U.S. CONST. art. I, § 9, cl. 8. For a detailed examination of the problem of "debate gerrymandering" and the entrenchment of the extra-constitutional "two party system," see Jamin B. Raskin, *The Debate Gerrymander*, 77 TEXAS L. REV. 1943 (1999).

Ventura stunned the Minnesota establishment by winning the state's governorship after a maverick run in which he was allowed to participate in ten candidate debates with his Democratic and Republican opponents. Ross Perot captured an astonishing 19% of the popular vote in the 1992 presidential election after he was allowed to debate President George Bush and then-governor Bill Clinton. Congressman Bernie Sanders won election to the House of Representatives from Vermont in 1990 as an Independent after being trounced in four earlier statewide races. The exclusion of "minor party" candidates from debates is an article of faith for the self-entrenching "two party system" not because they are frivolous and destined to lose, but because they are serious and might win.

In sum, Ackerman and Ayres err in assuming that a candidate's current ability to raise money — even in a broad egalitarian pool — should determine his or her opportunity to speak to the public. This is a right, along with the right to debate one's opponents, that should be foundational. Now, certainly candidates should have the opportunity to pair off and square off with just one other candidate. "Major party" candidates could merge their individual time allotments to hold an exclusive "major party candidate" debate, a right that clearly seems implied by Supreme Court decisions like *Hurley*[97] and *Dale*.[98] But surely we should condition a candidate's general right to participate in a public finance regime on his or her acceptance of at least one debate challenge with all qualified candidates appearing together. Can democracy require any less than at least one formal public debate?

Like Smith, Ackerman and Ayres join conservative criticism of McCain-Feingold's ban on electioneering communications. "We reject this effort to expand the regulatory net," they declare (p. 54). But it is a mistake, as we have seen, to conflate corporations and unions and assume that they should have the same political free-speech rights. If we follow conservative Justices like Rehnquist and White, we can understand the corporation to be a legally created social vehicle for wealth accumulation without constitutionally rooted political rights. A union, on the other hand, is a membership organization whose money comes from the members' political commitments. Interference with its right to mention officeholders within a certain period of elections does indeed seem, as McCain-Feingold's critics tell us, to be a direct assault

97. Hurley v. Irish-American Gay, Lesbian & Bisexual Group, Inc., 515 U.S. 557 (1995) (holding that a public accommodations law requiring private citizens who organized a parade to include among the marchers a group whose message the organizers did not wish to convey violated the organizers' First Amendment rights); *see also* Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000). Both cases stand for the proposition that private persons may choose the participants of the forum in which they convey their message.

98. *Dale*, 530 U.S. 640 (holding that a public-accommodations law prohibiting the Boy Scouts' selective admissions policies violated the organization's First Amendment right of expressive association).

on speech. Treating corporations and unions as peas in a pod has political appeal but little logical coherence as First Amendment doctrine. In the face of massive corporate criminality and interference with our politics, we need much clearer thinking about the constitutional status of corporate power.

In the final analysis, Ackerman and Ayres have structured a helpful, detailed blueprint for substantially modifying, if not entirely transforming, our Wild West federal campaign-finance roundup. To many conservative readers, like Professor Smith perhaps, the blueprint will smack of an overgrown Hillary Clinton-style national campaign-finance bureaucracy, despite the authors' passionate protests that they want to remain market driven. To more radical democrats who have already cast their lot with the promising state-based clean-money reforms, this plan hatched at Yale Law School may look like a distraction from a popular movement that is forcing candidates on the ground to choose between public- and private-financing plans and in the process, liberating state elections from the tyranny of big money.

But Professors Ackerman and Ayres have developed a plan and laid a marker in the sand for campaign vouchers, just as Professor Smith has developed a plan — that of no plan at all — and hoisted the flag of libertarian deregulation. All are to be commended for their intellectual seriousness as our activist conservative Court takes up McCain-Feingold. Whatever happens, we will need new paradigms and new ideas to face the awesome dilemma of reconciling private money with public elections, and market economics with democratic politics.