

# Manapori Dollars

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Revolutionising political finance in New Zealand

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# Introduction

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In New Zealand, we care about money's influence on politics. To minimise this influence, the legislature has traditionally focused on implementing strong demand side controls. These regulate how much money parties and candidates can *spend* on an election campaign in a bid to prevent a wealthy party from buying an election. With our attentions so focused, we have neglected to adequately deal with the supply side of the equation; how parties and candidates *raise* that money to campaign in the first place.<sup>1</sup> This laissez faire approach to the supply side has led to recent scandals and a loss of faith in the New Zealand political system.

In Chapter I, I discuss the problem with uncapped donations. Uncapped donations allow wealthy individuals and organisations to give generous donations to parties and candidates which can be leveraged for political influence. This leveraging can occur in one of two ways. Firstly, large donations can be used to solicit political favours from incumbent politicians, resulting in corruption. Even if the donation fails to secure the desired political outcome, the *appearance* of corruption created by large donations is enough to warrant concern. Secondly, large donations can influence elections. Generous funding from a few wealthy individuals or organisations can mask a party's lack of grassroots support and allow the party to viably compete in the electoral race (and perhaps win) despite what should be a democratically debilitating handicap. Even if the party fails to get into Parliament, the party's amplified voice can influence the pre-election debate and political agenda.

Using Michael Walzer's *Spheres of Justice*, I argue that it is unjust to use dominance in one sphere (the economic sphere) to gain advantages in another sphere (the political sphere).<sup>2</sup> When wealthy individuals and organisations are able to use political donations to leverage political power an injustice is done and democracy is undermined. This point was reiterated in the 1986 New Zealand Royal Commission on the Electoral System, which stated that "if elections are to be fair and our democracy is to prosper, it is important that the effects of [economic] inequalities are minimised."<sup>3</sup>

Chapter II assesses the common suggestions for supply side reform that aim to prevent economic inequalities from becoming political inequalities. Within a privately funded system, donation

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<sup>1</sup> For an excellent discussion of demand and supply side controls, see Andrew Geddis "Rethinking the Funding of New Zealand's Election Campaigns" (2007) 3(1) Policy Quarterly 3.

<sup>2</sup> Michael Walzer *Spheres of Justice* (Basic Books, New York, 1983).

<sup>3</sup> Royal Commission on the Electoral System *Towards a Better Democracy* (December 1986) at 190.

caps and increased transparency are popular options. If private funding is the problem, why not get rid of it altogether? Public funding of election campaigns is another way to deal with the undue influence of the economic sphere on the political sphere.

In 2002, Yale law professors Bruce Ackerman and Ian Ayres proposed a new and exciting way of getting money *into* the political system through a kind of voucher system.<sup>4</sup> They suggest funnelling public funds through citizens by distributing fifty Patriot dollars to every enrolled voter to then donate to the party or candidate of their choice. In Chapter III, I investigate whether Patriot dollars could be adapted to New Zealand as Manapori dollars and provide the answer to New Zealand's supply side woes. Chapter IV looks into what level of demand side controls would best compliment a Manapori supply side reform.

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<sup>4</sup> Bruce Ackerman and Ian Ayres *Voting with Dollars* (Yale University Press, New Haven, 2002).

# Chapter I: Supply Side Problem

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Money is inseparable from politics in our modern age, where an effective election campaign involves parties and candidates spending vast sums of money promoting themselves through mass media. Although political broadcasting is purely publicly funded, parties and candidates must raise private funds to finance expenditures such as billboards, pamphlets, newspaper advertisements, websites and campaign strategists. Attracting donations to fund these expenses can be crucial to a party's success or failure. David Cunliffe partially attributed the Labour Party's defeat in the 2014 General Election to troubles attracting private funds, stating that: "We can't fight and win a modern [twenty-first] century general election without a higher level of financial backing."<sup>5</sup>

This reliance on private funding opens up an opportunity for wealthy individuals and organisations who donate large amounts of money to leverage their economic power for political power. These advantages accrued by the wealthy undermine political equality, which lies at the heart of a thriving democracy.

## A: The Ideal of Political Equality

Although we may tolerate inequalities in some spheres (for example in the economic sphere), as a democracy New Zealand aims to uphold the ideal of political equality in the political sphere. Political equality (and equality in general) is open to many different interpretations.<sup>6</sup> While strict equality of influence is appropriate for voting with the one-person one-vote rule, it is less appropriate for wider forms of political participation. It would be undesirable to deprive a citizen who writes a compelling letter to their local MP of political influence simply because other citizens are less active and less persuasive. The best definition of political equality therefore is the equal opportunity to influence collective decisions.<sup>7</sup>

There are a number of reasons to value political equality. It creates legitimacy, giving people a reason to follow laws even if they do not agree with the specific content as they had an equal

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<sup>5</sup> Claire Trevett "Election 2014: Dotcom's action's 'reprehensible' – Cunliffe" (21 September 2014) New Zealand Herald <[www.nzherald.co.nz](http://www.nzherald.co.nz)>.

<sup>6</sup> For an interesting interpretation of equality, see Ronald Dworkin *Sovereign Virtue: the theory and practice of equality* (Harvard University Press, Cambridge (Mass), 2000).

<sup>7</sup> Jacob Rowbottom *Democracy Distorted* (Cambridge University Press, Cambridge, 2010) at 7-9.

opportunity to influence the overall process.<sup>8</sup> This legitimacy is of particular importance if one believes that economic inequalities generated by the market require democratic approval.<sup>9</sup> If economic inequalities are the result not of a societal choice but rather the capture of the regulatory process by certain wealthy groups, there is no reason to respect laws which protect the property of these groups.<sup>10</sup>

Political equality shows respect for every individual as a worthy and valued participant in the political community. It acknowledges that every individual has their own conception of the good, and that they deserve to have equal opportunities to mould the society they live in and agitate for their interests.<sup>11</sup> Those who engage politically are more likely to influence the law in their favour. Making sure that everybody has the chance to speak out and have their voice heard will ensure that democracy looks after the interests of all, rather than a select few. As Sidney Verba makes clear:<sup>12</sup>

Equal activity is crucial for equal consideration since political activity is the means by which citizens inform governing elites of their needs and preferences and induce them to be responsive. Citizen participation is, thus, at the heart of political equality.

Political equality is one of the foundations of democracy in New Zealand. It is reflected in the rule of one-person one-vote set out in s 12 of the New Zealand Bill of Rights Act 1990 (NZBORA), the ban on buying votes<sup>13</sup> and also in the principle of equal protection before the law. To gain political power over others, one is obliged to use argument and argument alone to persuade one's fellow citizens. In the political sphere, "All non-political goods have to be deposited outside: weapons and wallets, titles and degrees."<sup>14</sup>

In reality, wallets are not deposited outside. Money (in the form of political donations) is used to short-circuit argument and gain political advantages. Using Michael Walzer's distributive principle that "No social good  $x$  should be distributed to men and women who possess some other good  $y$  merely because they possess  $y$  and without regard to the meaning of  $x$ ,"<sup>15</sup> political

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<sup>8</sup> Jürgen Habermas *Between Facts and Norms: contributions to a discourse theory of law and democracy* (MIT Press, Cambridge (Mass), 1996).

<sup>9</sup> Dworkin, above n 6.

<sup>10</sup> Ackerman and Ayres, above n 4, at 13.

<sup>11</sup> Sidney Verba "Constructing Political Equality" (paper presented at the Inequality Summer Institute, Harvard University, June 2001) at 19.

<sup>12</sup> At 2.

<sup>13</sup> Electoral Act 1993, s 216(2)(a).

<sup>14</sup> Walzer, above n 2, at 304.

<sup>15</sup> At 20.



power should not be distributed to those with economic power solely on the basis of their economic power.

Through large donations to political parties and candidates, economic power is transformed illegitimately into political power in two different ways. A wealthy individual or organisation and an incumbent politician may exchange a large political donation for some use of public power that benefits the wealthy party (for example by granting a lucrative public contract or getting Ministerial approval for a relative's residency application). Political donations can also be used to influence elections themselves, as wealth has the potential to influence which box voters tick on Election Day.

## B: Political Donations and Corruption

Corruption results when a politician is influenced in their use of public power by a political donation. Allegations of corruption have been hot topic in 2014. Regarding the recent Oravida scandal, where a milk exporting company received special treatment from Minister Judith Collins, Duncan Garner writes:<sup>16</sup>

They want to get their products into China to make millions of dollars. So they forged a very close relationship with National at all levels. They're mates with President Peter Goodfellow. They donate to the National Party. They pay to play golf with John Key. It's prized access. The stuff only money can buy. But not only that. They have appointed the husband of senior Minister Judith Collins to their board. That's really strategic you see – it buys constant access to decision makers. So they're close right? You get it eh?

The Donghua Liu saga this year led to both National and Labour being tainted by donations from the Chinese businessman. The most damaging revelation was Minister Maurice Williamson's call to the police on behalf of Mr Liu (who had donated \$22,000 to the National party) to enquire about a domestic assault complaint against Mr Liu.<sup>17</sup> In 2012, it was alleged that SkyCity's \$60,000 donation to the National Party in 2005 secured them favourable treatment in the tendering process for the Auckland international convention centre.<sup>18</sup>

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<sup>16</sup> Duncan Garner "How Much Longer Can Collins be a Minister?" (16 April 2014) Radiolive <[www.radiolive.co.nz](http://www.radiolive.co.nz)>.

<sup>17</sup> Stacey Kirk "Maurice Williamson resigns over police call" (1 May 2014) Stuff News <[www.stuff.co.nz](http://www.stuff.co.nz)>.

<sup>18</sup> Adam Bennett "PM grilled on SkyCity connections" (18 April 2012) New Zealand Herald <[www.nzherald.co.nz](http://www.nzherald.co.nz)>.

Political donations can be used to corrupt the policy direction of a party. Once a large donation has been made, the party may either slash policies that the donor disagrees with or emphasise particular hobbyhorses of the donor. As an example, after Laurence and Katrina Day's \$675,000 donation to the Conservative Party, the Conservatives made support of binding referenda (which the Days feel particularly passionate about) a key election promise.<sup>19</sup> This system could also operate prior to any donation being made – the mere possibility of soliciting a large donation may bring about the same result.

In principle, the existing demand side controls on political expenditure should reduce the amount of money that a party needs to contest an election, freeing parties and candidates from reliance on large donors and the corrupt practices that go with them. However, in practice this is not the case. The spending cap only applies to “election expenses”<sup>20</sup> which is defined as the cost of producing and publishing election advertisements.<sup>21</sup> There is still demand for unlimited amounts of money for expenditures that fall *outside* of this definition, for example opinion polling, campaign travel, maintaining party headquarters and hiring campaign staff.

Even if the demand side controls managed to completely suppress the demand for funds above the level of the spending cap, this could have the perverse effect of increasing the influence of a few wealthy donors. If a party could only spend \$2 million on its entire campaign, this full amount could be gathered from only one or two donors, saving politicians the time and effort of soliciting a larger number of small donations. This handful of donors would have *more* influence than if there were no spending caps as they had each donated a larger percentage of the total amount needed.<sup>22</sup>

In New Zealand, exchanging donations for political favours is illegal. Under s 102 and s 103 of the Crimes Act 1961, any Minister or MP is liable for up to 14 or 7 years imprisonment respectively for corruptly accepting, obtaining or attempting to obtain a bribe for any act or omission done, or to be done by them in their official role. It is also an offence to bribe or attempt to bribe a Minister or MP with the intent to influence them. Bribe is defined in s 99 as “money, valuable consideration, office, or employment, or any benefit, whether direct or indirect” and thus covers political donations.

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<sup>19</sup> Adam Bennet “Millionaires give Craig \$675,000” (9 July 2014) New Zealand Herald <[www.nzherald.co.nz](http://www.nzherald.co.nz)>.

<sup>20</sup> Electoral Act 1993, s 206C.

<sup>21</sup> Section 3E.

<sup>22</sup> Rowbottom, above n 7, at 122.

Per *Field v R*, if a Minister or MP accepts some private benefit (for example, a political donation) and *knows or believes* that such private benefit was given to either reward the Minister or MP for any act or omission done by them in their official role in the past or to influence them to act in a particular way in their official capacity in the future, they will be caught by s 102 or s 103.<sup>23</sup> No antecedent bargain or promise is necessary.<sup>24</sup> However, there is a *de minimis* exception for small tokens of thanks that are part of the “usual courtesies of life”– for example an MP accepting chocolates or a tie for opening an official function.<sup>25</sup>

In New Zealand, a politician would likely be horrified if someone explicitly tried to bribe them. Our political culture is robust enough that such an attempt would be rebuked. Although there is no exchange economy in political influence, it is likely that a *gift* economy is at play. The concept of gift economies was originally used by anthropologists to explain certain indigenous economies that operated through delayed reciprocity rather than direct exchange.<sup>26</sup> Lawrence Lessig applies this concept to politics, and argues that both donor and politician will pretend that the gift given (the donation or legislative favour) is not at all dependent on the previous gift received. However, the truth is that reciprocity is very important in their exchanges.<sup>27</sup> No further donations would be given unless political payoffs are received and vice versa.

The gift economy does not fit well within the Crimes Act as this dance of denial by both donor and politician make evidence that the politician *knew* or *believed* that the donation was made to influence or reward them hard to come by. This is confounded by the time lag between the initial gift and reciprocation and the fact that reciprocation is likely but not *guaranteed*.<sup>28</sup> The appearance of propriety makes the gift economy particularly insidious.

To further cloud the issue, politicians themselves may not be consciously aware of any obligation to reciprocate donations with political favours. New psychological research using brain scan technology suggests that intent to reciprocate gifts happens on a subconscious rather than a conscious level.<sup>29</sup> If this is the case, the criminal law is unable to stop the corrupting effect of donations. The only option would be to ban private donations or at least impose caps on them.

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<sup>23</sup> *Field v R* [2011] NZSC 129, [2012] 3 NZLR 1.

<sup>24</sup> At [61].

<sup>25</sup> At [65].

<sup>26</sup> See Marshall Sahlins *Stone Age Economics* (Routledge, London, 2004).

<sup>27</sup> Lawrence Lessig *Republic, Lost: How Money Corrupts Congress – and a Plan to Stop It* (Twelve, New York, 2011) at 107-108.

<sup>28</sup> At 110-111.

<sup>29</sup> Association of American Medical Colleges *The Scientific Basis of Influence and Reciprocity: A Symposium* (Washington D.C., June 12, 2007) at 10-12.

An opposing school of thought argues that donations do not affect the actions of politicians at all. The politician's policy objectives may overlap with those of the donor simply because the donor would only donate to someone who was *already* advocating for what they wanted.<sup>30</sup> One thing that scholars of campaign finance agree upon, in a field marred by disagreement, is that the available empirical evidence is inconclusive as to whether money does influence the behaviour of those in power.<sup>31</sup>

One way to gauge whether donations were made as some kind a bribe would be to look at whether MPs received more candidate donations when they were in government or in ministerial roles. A sudden increase in power will attract donors who are seeking some preferential treatment. Before the 2008 election, the MPs listed below were in opposition and thus relatively powerless. Before the 2011 election, they all had ministerial roles and it was likely that National would win thus they had a high chance of retaining their seats. As Ministers, they would be prime targets for *instrumental* donations designed to extract a political benefit.

	2008 declared donations <sup>32</sup>	2011 declared donations <sup>33</sup>
Judith Collins	\$0	\$30,532
Gerry Brownlee	\$5,500	\$17,979
Tony Ryall	\$0	\$9,200
Anne Tolley	\$5,000	\$19,859
Christopher Finlayson	\$3,000	\$15,161
Murray McCully	\$7,867	\$12,998
Tim Groser	\$3,000	\$10,075
Jonathan Coleman	\$36,323	\$36,500
Bill English (Deputy PM)	\$0	\$42,723

The above table provides some evidence to support the conclusion that political donations are made to leverage particular outcomes from those in power. Unfortunately the Electoral

<sup>30</sup> Janet Grenzke "PACs and the Congressional Supermarket: The Currency is Complex" (1989) 33(1) Am J Polit Sci 1.

<sup>31</sup> Frank Baumgartner and others *Lobbying and Policy Change: Who Wins, Who Loses, and Why* (University of Chicago Press, Chicago, 2009); Justin Fox and Lawrence Rothenberg "Influence without Bribes: A Noncontracting Model of Campaign Giving and Policymaking" (2011) 19(3) Political Analysis 325.

<sup>32</sup> Electoral Commission *Candidate Returns of Expenses and Donations 2008 by Electorate* (2009) <www.elections.org.nz>.

<sup>33</sup> Electoral Commission "Candidate Returns 2011 General Election" (2012) <www.elections.org.nz>.

Commission only has documents disclosing donations contributed to individual candidates from 2008 onwards, so a similar comparison cannot be made for the Labour Party.

Another advantage that large donors have is access to more face-to-face time with an important decision maker. Cash-for-access schemes can operate implicitly, with politicians reciprocating a large donation with preferential access as part of the political gift economy. The first randomised field experiment in campaign finance was carried out in 2014 in the United States. It found that access to high-level politicians was granted three to four times more often when the intermediary *knew* that the person requesting access was a donor.<sup>34</sup> As legislative attention and time is a scarce commodity, access to it is of paramount importance. If similar pressures are at play in New Zealand, it puts the average New Zealander at a disadvantage when they wish to express their policy concerns. As Jane Clifton astutely notes:<sup>35</sup>

What people who donate big sums to parties think they're getting is a fair question. Chiefly, it's visibility and access. Simple manners mean if a politician knows or suspects someone has been generous to the party, they will be more likely to give them a hearing. Is that corrupt? A Minister's diary is always going to be prime real estate.

Cash-for-access schemes can also operate explicitly, where an agreement is reached for a donation to be exchanged for a personal interaction with a politician. Although such schemes are legal,<sup>36</sup> they operate in an ethical grey area. Explicit cash-for-access schemes were brought to light in New Zealand with the revelation that John Key was the star attraction at a Maori Party fundraiser, where guests paid \$5000 for one-on-one contact with the Prime Minister.<sup>37</sup> The debate gained momentum with allegations of a "Cabinet Club", where Ministers attend functions where people had paid to spend time with them.<sup>38</sup>

Whether one labels preferential access as corrupt depends on whether one defines access to politician as a form of public power. Access to politicians is important because it is a necessary but not sufficient condition for swaying decision-makers and influencing policy. In the case of access to Ministers who can make highly discretionary snap decisions that benefit certain players, the case for access being power is stronger. Even if preferential access does not lead to

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<sup>34</sup> Joshua Kalla and David Broockman "Congressional Officials Grant Access to Individuals Because They Have Contributed to Campaigns: A Randomized Field Experiment" (University of California, Berkeley, 2014).

<sup>35</sup> Jane Clifton "Another balls-up" *New Zealand Listener* (New Zealand, 13 March 2014).

<sup>36</sup> In fact, the Cabinet Manual specifically allows Ministers to go to fundraisers for their own electorate or another MP.

<sup>37</sup> Patrick Gower "Key firm on fundraising methods" (28 May 2014) 3 News <[www.3news.co.nz](http://www.3news.co.nz)>.

<sup>38</sup> Andrea Vance "'Cash for access' claims fly" (7 May 2014) Stuff News <[www.stuff.co.nz](http://www.stuff.co.nz)>.

favourable outcomes, it can still undermine political equality as it provides those with access greater opportunities to influence collective decisions than those without.<sup>39</sup>

Cash-for-access schemes also erode the public trust in a politician's door being open to everyone. The question a citizen may ask is: If donor x is *paying* for access, then access must not be free, therefore I should not bother to schedule a meeting with the Minister for Immigration to address my concerns about policy x's effects on my family. This strengthens the popular belief that politicians are in the pockets of big business or wealthy individuals and further deters people from engaging politically.

Regardless of whether or not private donations secure political advantages, cash moving from private hands into the pockets of politicians *looks* bad. Donations from companies have a particularly toxic feel to them as a company would only donate if some financial benefit was to be gained. As Lessig points out in his book *Republic, Lost*, the real cost of the influx of private money into politics is not the dodgy deals but rather the public's resulting lack of faith in the system.<sup>40</sup> Although people cannot be sure that an advantage was in fact secured by a donation, the very presence of cash makes them question whether the politician has acted in the public interest or in the interest of the donor. David Ipp, the past head of the Independent Commission Against Corruption in Australia, stated that:<sup>41</sup>

Once citizens believe that government is corrupt, and that government decisions are corruptly made or influenced, the belief in the rule of law will diminish, and our way of life will ineradicably alter. This has proven to be the case in other jurisdictions.

Although politicians are ultimately accountable to citizens through the electoral process, this occurs only once every three years in contrast to the daily ebb and flow of donations.<sup>42</sup>

## C: Political Donations and Elections

Large political donations do not merely raise corruption concerns. They also raise questions about how political resources are distributed and how these resources can be used to influence voters and distort elections. The amount of funds a party can raise will decide not only whether they can viably compete in an election but also the volume of their voice in the pre-election

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<sup>39</sup> Rowbottom, above n 7, at 11.

<sup>40</sup> Lessig, above n 27, at 9.

<sup>41</sup> Independent Commission Against Corruption *Investigation Into Corruption Risks Involved In Lobbying* (ICAC Report November 2010, 2010) at 14.

<sup>42</sup> Lessig, above n 27, at 158.

period and thus how much attention they command. These factors can influence whether the party gets into Parliament. Even if the party fails to get a seat, visibility and voice can still allow them to shape the pre-election agenda. Looking to the ideal distribution of funds, there are a number of somewhat contradictory goals to keep in mind, being: responsiveness to citizen's choices, diversity of choice of political parties and creating a system that encourages rigorous debate of policy proposals in the pre-election period.<sup>43</sup>

It may be argued that existing demand side controls capping election expenses will ensure that the party that gathers the most donations is not able to outspend its competitors, and therefore we need not worry about the distribution of funds between parties. However, these expenditure caps do not prevent large disparities in resources and thus expenditure between different political parties.<sup>44</sup> For example, in the 2011 election the New Zealand First Party spent \$144,570 on "election expenses" whereas ACT spent \$617,035.<sup>45</sup> The fact that there are disparities is not inherently problematic – for example a large party like National should be able to outraise and outspend a smaller party like the Greens. However, the disparities do need to be justified by reference to some democratic criteria.

As Jacob Rowbottom makes clear, "leaving political donations largely unregulated does not guarantee that the inequalities between the parties will be fair."<sup>46</sup> Unfairness is particularly evident when two parties – one with many supporters who have given small donations, the other with one or two wealthy supporters who have given large donations - find themselves on equal footing in the pre-election period in terms of their ability to compete and have their voice heard. Even though these two parties will face the same spending caps, the problem is not fairness between parties but rather fairness between individuals. The current system of uncapped donations undermines the equal status of individuals in the political sphere, as support from a wealthy donor simply counts for more.<sup>47</sup> Thus wealth is used to *distort* the electoral playing field in favour of the few rather than the many.

Sometimes these distortions can alter the election result. Bob Jones (a wealthy property investor) founded and funded the New Zealand Party in the 1980's as a vehicle to promote his own libertarian agenda. This party acted as a spoiler party, drawing votes away from National who at the time believed in large-scale state intervention towards Labour who advocated a more laissez-

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<sup>43</sup> Rowbottom, above n 7, at 124.

<sup>44</sup> At 124.

<sup>45</sup> Electoral Commission *Summary Table of 2011 Party Expenses returns* (2011) <[www.elections.org.nz](http://www.elections.org.nz)>..

<sup>46</sup> Rowbottom, above n 7, at 125.

<sup>47</sup> At 125.

faire approach. Some credit Bob Jones and his large campaign with the defeat of Muldoon and the success of the Lange/Douglas government in the 1984 election, despite the New Zealand Party failing to secure any seats in Parliament. The Lange/Douglas government went on to implement many of Bob Jones' free market policies.

A more recent example is the emergence of ACT out of the post-MMP landscape. This is likely due to their ability to solicit a few large donations (such as from Alan Gibbs) and therefore spend a huge amount of money on each campaign. Their very high dollar per vote ratio (\$25.83 per vote in 2011 compared with Greens \$3.15 per vote and Labours \$2.91 per vote)<sup>48</sup> may make it *seem* like they are wasting their money launching large campaigns. However, it may be that such a large campaign (and thus having wealthy donors) is necessary to keep them in Parliament at all.

The influence of large donors in the political sphere is magnified when they also found or lead their own party. Founder-funders do not have to compromise with anyone else and are therefore able to control the message and goals of their political party completely. 2014 was the year of the founder-funder party. German internet mogul Kim Dotcom founded the Internet Party, and donated at least \$3,500,000 to the Internet Party between the party's launch in March 2014 and the General Election in September 2014.<sup>49</sup> Dotcom was the "party visionary" under the Internet Party Rules and therefore was a permanent member of the executive committee and policy committee and could not be removed by members of the party.<sup>50</sup> Likewise, the New Zealand multi-millionaire Colin Craig founded the Conservative Party in August 2011 and as of October 2014 had donated at least \$2,994,500 to it.<sup>51</sup> Although both parties failed to get into Parliament, they still managed to dominate the media discussion around the election and shape the political agenda.

## D: Declining Civic Participation

When political donations are used to provide the wealthy with greater opportunities to influence collective decisions, political equality is undermined. The most tangible effect of this is a

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<sup>48</sup> David Farrar "Party Spending in 2011" (22 March 2012) Kiwiblog <[www.kiwiblog.co.nz](http://www.kiwiblog.co.nz)>.

<sup>49</sup> Electoral Commission "Returns of Party Donations Exceeding \$30,000" (25 September 2014) <[www.elections.org.nz](http://www.elections.org.nz)>.

<sup>50</sup> Internet Party "Internet Party Rules" <[internet.org.nz](http://internet.org.nz)>.

<sup>51</sup> Electoral Commission "Returns of Party Donations Exceeding \$30,000", above n 48.



decrease in civic participation. People become disenchanted with politicians and believe that if their voice is going to be ignored, there is no point engaging in the first place. As Lessig notes:<sup>52</sup>

When democracy seems a charade, we lose faith in its process. That doesn't matter to some of us – we will vote and participate regardless. But to more rational souls, the charade is a signal: spend your time elsewhere, because this game is not for real.

Civic participation can be measured through enrolled voter turnout at elections. There has been a steady decline in voter turnout since it hovered around 90% in the 1980s. Voter turnout in 2011 was 74%, the lowest since 1887.<sup>53</sup> In the recent 2014 General Election, turnout increased slightly to 77%.<sup>54</sup> However, the number of non-voters almost equalled the number of people who voted for the big election winner, National.

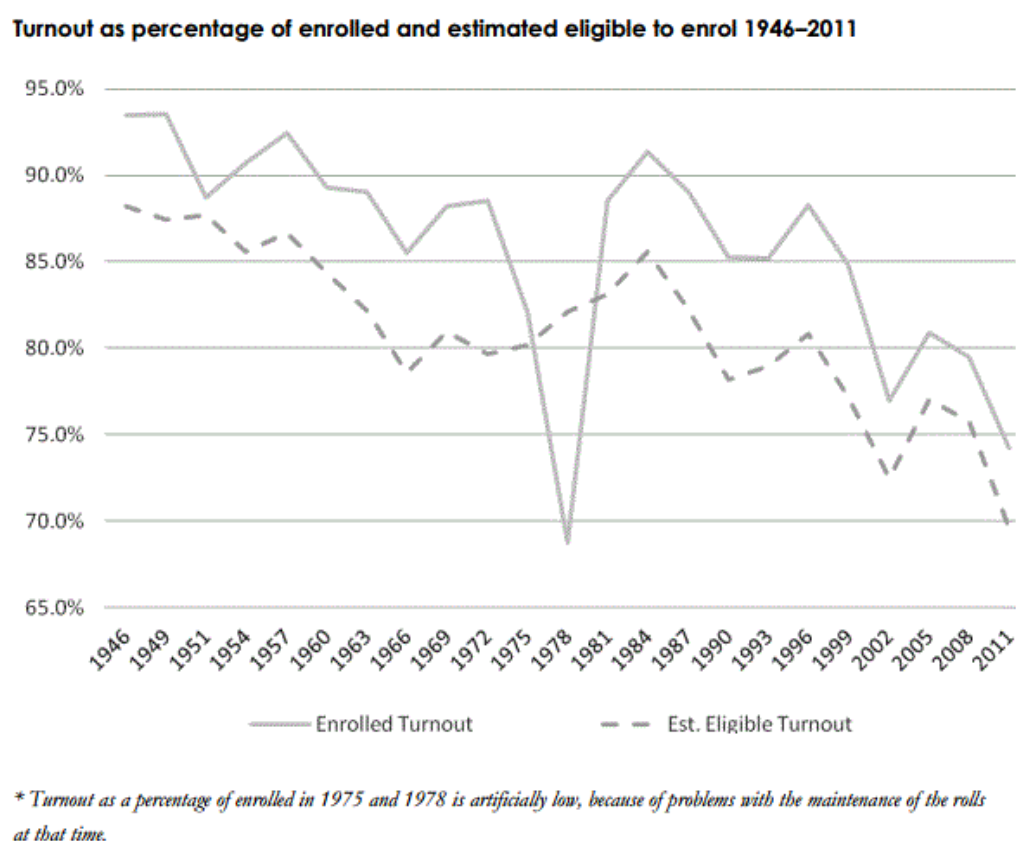


Figure 1: Justice and Electoral Committee *Inquiry into the 2011 General Election* (April 2013).

<sup>52</sup> Lessig, above n 27, at 9.

<sup>53</sup> Electoral Commission “General Elections 1853-2011 – Dates and Turnout” (9 September 2013) <[www.elections.org.nz](http://www.elections.org.nz)>.

<sup>54</sup> Patrice Dougan “Election 2014: Rise in voter turnout” (21 September 2014) New Zealand Herald <[www.nzherald.co.nz](http://www.nzherald.co.nz)>.

In the 2011 election, 43.2% of people gave reasons that Statistics New Zealand classified as “disengaged” to explain why they did not vote.<sup>55</sup> Disengagement is caused by multiple factors, of which disgust at the role of money in politics is just one. Other facts include a lack of competitiveness in the election (if one party is obviously going to win) and a lack of policy differences between the main parties.<sup>56</sup> However, it is notable that, when asked to rate reasons for not voting in an Electoral Commission Survey, the factor that had the highest proportion of 4 out of 5 or 5 on the impact scale was “I don’t trust politicians” (33%).<sup>57</sup>

## E: Summary

Economic power can be leveraged into political power through wealthy individuals and organisations granting large political donations. Money (the currency of the economic sphere) is used as an illegitimate replacement for argument (the currency of the political sphere) to gain influence. When private money passes into political pockets, it can corruptly influence not only the behaviour of incumbent politicians but also the election itself in favour of the wealthy donor. Political equality is therefore undermined. The role of money in politics provides citizens with good reason to disengage from politics, negatively affecting voter turnout and derailing the legitimacy of democracy itself.

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<sup>55</sup> Statistics New Zealand *Non-voters in 2008 and 2011 general elections: Findings from New Zealand General Social Survey* (January 2014) at 7.

<sup>56</sup> Electoral Commission *Report of the Electoral Commission on the 2011 General Election and Referendum* (April 2012) <[www.elections.org.nz](http://www.elections.org.nz)> at 24.

<sup>57</sup> At 24.

## Chapter II: Standard Suggestions for Supply Side Reform

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A lot of literature has been published proposing various ways to reform the supply side of campaign finance with the aim of removing the corrupting and distorting effects of large political donations and enhancing political equality.<sup>58</sup> Common suggestions for reform include donation caps, increased transparency and public funding.

### A: Donation Caps

The traditional response to eliminating the influence of large donations is to implement donation caps which in effect prevent large donations from being given. On a practical level, this solves the problem of large donations being used to corruptly levy political favours. It also stops politicians from courting future large donations by tilting their policies to be wealth friendly. Cash-for-access schemes would dry up as donors could not donate enough money (due to the cap) to be able to expect a personal audience with a politician. Parties founded by wealthy individuals like Colin Craig's Conservative Party and Kim Dotcom's Internet Party would not exist because donation caps prevent entirely self-funded parties. Parties like ACT who are chiefly funded by a few large donors would struggle too.

On a principled level, donation caps are appealing because they recognise the equal status of all the electors in the political system.<sup>59</sup> A party would not be able to command attention or compete in an election simply because they had a small number of wealthy donors. In order to raise sufficient funds to run an effective campaign with donation caps in place, the politician would have to do roughly the same thing that they do to court votes; appeal to a wide range of people.

Some may argue that having to appeal to a broader range of people to secure sufficient funds will turn the politician into a populist. However, this is only undesirable if one is opposed to politicians being responsive to citizens, which is another can of worms best opened at a later date. Regardless, a system where political funding is more in line with political equality is better than one that favours a few wealthy donors.<sup>60</sup>

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<sup>58</sup> This literature tends to come out of the United States. For a New Zealand slant, see Andrew Geddis "Regulating the Funding of Election Campaigns in New Zealand" (2004) 10(4) Otago Law Review 575.

<sup>59</sup> Rowbottom, above n 7, at 125.

<sup>60</sup> At 126.

The real question is where the cap should be. In *Buckley v Valeo*, \$1000 was held to be an acceptable amount to encourage political engagement but get rid of corruption.<sup>61</sup> The individual cap on donations is currently \$2,600 to candidates and \$32,400 to parties in the United States.<sup>62</sup> In Canada, individuals are only able to donate \$1,200.<sup>63</sup> Although a lower cap would be more effective at eliminating the corrupting and distorting influence of donations, it also increases the risk of underfunded campaigns, incumbency advantage and provides a greater threat to freedom of expression.

### *1: Freedom of expression*

Section 14 of the NZBORA states that “Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.” Political donations are a form of expression - they “impart information” about the donor’s heart-felt support of the party or candidate. For the purposes of the following discussion, a donation cap of \$2,000 per party and \$200 per candidate shall be discussed.

In *Brooker v Police*,<sup>64</sup> McGrath J emphasised the importance of freedom of expression, and quoted the Supreme Court of Canada:<sup>65</sup>

The core democratic values which free expression promotes include self-fulfilment, participation in social and political decision making, and the communal exchange of ideas. Free speech protects human dignity and the right to think and reflect freely on one’s circumstances and condition. It allows a person to speak not only for the sake of expression itself, but also to advocate change, attempting to persuade others in hope of improving one’s life and perhaps the wider social, political and economic environment.

A \$50,000 donation undoubtedly expresses a greater level of support than the same person donating \$2,000. Donation caps therefore act to limit freedom of expression by limiting the *intensity* of support a person can express through their donation.<sup>66</sup> However, as the United States Supreme Court noted in *Buckley v Valeo*, donations “serve as a general expression of support for the candidate and his views, but [do] not communicate the underlying basis for the support.”<sup>67</sup>

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<sup>61</sup> *Buckley v Valeo* 424 US 1 (1976).

<sup>62</sup> Federal Election Committee “Contribution Limits 2013-2014” <[www.fec.gov](http://www.fec.gov)>.

<sup>63</sup> Elections Canada “Limits on Contributions” (3 April 2014) <[www.elections.ca](http://www.elections.ca)>.

<sup>64</sup> *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91 at [114].

<sup>65</sup> *RWDSU, Local 558 v Pepsi-Cola Canada Beverages (West) Ltd* [2002] 1 SCR 156 at [32].

<sup>66</sup> Lessig, above n 27, at 228.

<sup>67</sup> *Buckley v Valeo*, above n 61, at 21.

Because political donations communicate very limited information, they may not be deserving of a large amount of protection.

A limitation on freedom of expression is legitimate if it is demonstrably justified in a free and democratic society (NZBORA, s 5). In *Hansen v R*, the Supreme Court gave guidance on how to apply the s 5 balancing test.<sup>68</sup> This can be summarised as:

- (a) Does the objective serve a purpose sufficiently important to justify some limitation of the right or freedom?
- (b) If so, then:
  - a. Is the limit rationally connected with the objective?
  - b. Does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?
  - c. Is the limit in due proportion to the importance of the objective?

Applying the s 5 balancing test to a \$2,000 donation cap, the objective of the cap is to enhance political equality through removing the influence of large donations over the actions of politicians and the result of elections. This objective is sufficiently important to justify some limit on the right to freedom of expression. A donation cap is rationally connected with the objective of enhancing political equality. A \$2,000 cap limits freedom of expression no more than is reasonably necessary for sufficient achievement of the objective.

Political equality lies at the heart of democracy, therefore the limit is in proportion to the importance of the objective. As the Canadian Supreme Court noted in *Harper v Canada*, wealth must be “prevented from controlling the electoral process to the detriment of others with less economic power.”<sup>69</sup> Equality and fairness in the electoral realm are important to ensure that the public retains faith in the system.<sup>70</sup> As a \$2,000 donation cap passes the s 5 test, freedom of expression is justifiably limited by donation caps.

## 2: Underfunded campaigns

Money is not just a frill that can be discarded without consequence. Donation caps would likely mean that there would be less money to finance election campaigns and therefore less political activity. Parties would still try to reach out to as many of the over three million enrolled voters as

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<sup>68</sup> *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 at [123], where the court drew on the test set out in *R v Oakes* [1986] 1 SCR 103 developed by the Canadian Supreme Court.

<sup>69</sup> *Harper v Canada* [2004] 1 SCR 827 at [62].

<sup>70</sup> At [63].

they could to inform them of their policies and try to secure their vote. However, they would be constrained in their ability to put political advertisements in newspapers, print and distribute fliers, conduct opinion polls, put up political billboards and posters, hire out public meeting places, employ campaign strategists and other campaign personnel, hire campaign buses, maintain the party headquarters and so on.

In 2013, the National Party declared \$1,037,537.39 in donations.<sup>71</sup> Parties do not have to declare donations under \$1,500, so this amount would be the *minimum* that they would have received. Around 16% of their declared donations were over \$15,000 and around 67% were above \$5,000. If donation caps were to sit at \$5,000, the party bank account would drop by up to two-thirds.

For the Greens, the situation is even more dire. In 2013, they declared \$386,711.09 in donations.<sup>72</sup> Around 68% of their declared donations were above \$15,000 and around 75% were over \$5,000. If a cap was set at \$5,000, their funding would drop by up to three quarters. It would be naïve to expect that politicians could make up the difference by soliciting a large number of smaller donations – given the high percentage of large donations, it would be an uphill battle.

With less money and thus less political activity, voters may miss out on crucial political information or otherwise feel like they had not been drawn in to the election. Underfunding of campaigns was the chief reason that the Electoral Commission in the United Kingdom rejected a cap on donations as a desirable reform.<sup>73</sup>

Several empirical studies have shown that more electioneering leads to a better informed citizenry.<sup>74</sup> In the United States Report of the Task Force on Campaign Reform, fourteen experts on campaign finance found that the problem was too little spending, rather than too much.<sup>75</sup> For relatively uneducated people who may not be interested in politics, electioneering makes a large difference to their level of political education.<sup>76</sup> Donation caps act as a barrier to running an effective campaign, and the ultimate cost of this may fall on voters' heads.

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<sup>71</sup> Electoral Commission 2013 *Party Donation Returns* (2014) <[www.elections.org.nz](http://www.elections.org.nz)>.

<sup>72</sup> Electoral Commission 2013 *Party Donation Returns*, above n 71.

<sup>73</sup> Electoral Commission (UK) *The Funding of Political Parties: Report and Recommendations* (2004).

<sup>74</sup> Filip Palda *How much is your vote worth? The unfairness of campaign spending limits* (ICS Press, San Francisco, 1994).

<sup>75</sup> Report of the Task Force on Campaign Reform, in Larry Bartels and Lynn Vavrek (ed) *Campaign Reform: Insights and Evidence* (University of Michigan Press, Ann Arbor, 2000) 226.

<sup>76</sup> Christopher Kenny and Michael McBurnett "An Individual-Level Multiequation Model of Expenditure Effects in Contested House Elections" (1994) 88 *Am Polit Sci Rev* 699.

### *3: Incumbency advantage*

Donation caps are particularly harmful to challengers. Incumbents are better able to activate a large network of supporters to make smaller donations to attempt to make up for a funding shortfall. Challengers simply do not have those networks in place, thus any donation cap will disadvantage challengers more than incumbents. This problem is confounded by the fact that challengers may need to spend (and thus raise) more money than incumbents to run a successful campaign. This is because incumbents have high “informational capital”: they are already well known to the public and receive free media coverage through press reports on the daily goings on of Parliament.<sup>77</sup> Most of the exposure that challengers receive however will have to be paid for. They also need relatively *more* exposure in order to get their names and faces into the minds of voters.<sup>78</sup>

The United States literature on incumbency advantage focuses on the advantages that individual candidates have once in Congress and how these can be used to keep candidates launching a successful challenge from outside of Congress. However, in New Zealand it is important to note that incumbency advantage works primarily to benefit parties rather than candidates who are already in Parliament. The importance of the party vote in determining roughly the number of Parliamentary seats per party under MMP is the reason why power in New Zealand is located so firmly in the party structure.

### *4: Hydraulic theory of money*

Karlan and Issacharoff claim that money will always find a way to influence politics.<sup>79</sup> When donation caps block one channel of influence, another one will be utilised (for example by an increase in lobbying). Although regulating more effective forms of influence buying would result in diminishing returns per dollars for the influence-seeker, the overall problem of the hydraulic nature of money remains.

Ackerman and Ayres discuss the “dismal cycle” of reform around political donations.<sup>80</sup> The first phase is when legislators respond to popular anger at the role of wealth in politics and pass various laws limiting the use of money in the political process. The second phase is where large donors find the loopholes in these laws to enable them to continue to give large donations. Phase

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<sup>77</sup> Ackerman and Ayres, above n 4, at 38.

<sup>78</sup> At 38.

<sup>79</sup> Samuel Issacharoff and Pamela Karlan “The Hydraulics of Campaign Finance Reform” (1999) 77(7) Texas L Rev 1705.

<sup>80</sup> Ackerman and Ayres, above n 4, at 8.

three commences when legislators once again respond to the wave of anger from the public and create more regulations. Thus the dismal cycle is complete.

The classic pseudo-solution to the hydraulic nature of money is to throw in the towel and insist simply on strict disclosure laws. As long as people know where the money is coming from and where it is going, such transparency would ideally stop corrupt dealings and tit-for-tat politics. However, as shown below, transparency alone is not strong enough to combat the advantages that wealth brings to the political process.

If private money will always flow to its most politically influential location, trying to plug one route will simply lead it to being diverted through another. If the flow of private money cannot be controlled, at least its influence can be diluted. This could be achieved through flooding the system with public dollars, which is an option explored in Chapter IV with the idea of state-funded Manapori dollars.

### *5: Summary*

Donation caps should be explored as a tool to minimise the influence of money on politics. Although a cap would place a limit on freedom of expression, that limit is justified. However, before donation caps can be advocated as a solution to our campaign financing woes, problems with underfunded campaigns, incumbency advantage and the hydraulic nature of money circumventing any caps need to be addressed.

## **B: Increasing Transparency**

Increasing transparency around political donations is another popular demand when the public becomes suspicious of the role of wealth in politics. Currently, public identity disclosure requirements only apply to people who donate above \$15,000 to a party<sup>81</sup> and above \$1,500 to a candidate in aggregate over a calendar year.<sup>82</sup>

The rationale behind disclosure regimes is to give the public information necessary to assess whether a politician or party has been putting the interests of certain donors above the public interest.<sup>83</sup> It allows politicians and parties that are behaving corruptly to be punished at the ballot

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<sup>81</sup> Electoral Act 1993, s 210(1)(a).

<sup>82</sup> Section 209(1)(a).

<sup>83</sup> Geddis “Rethinking the Funding of New Zealand’s Election Campaigns”, above n 1, at 5.



box. This operates as both a tool to get rid of the duds and also as a disincentive for other politicians to grant political favours in exchange for donations.

Utilising Justice Brandeis' mantra that sunlight is the best disinfectant; calls have been made for increased transparency to prevent corruption. This could be achieved through lowering the threshold that triggers the public identity disclosure rules to an amount, say \$300, to catch a greater number of donations.<sup>84</sup> In August 2014, the *Sunday Star Times* launched a transparency campaign, calling for the identities of *all* donors to be lodged with the Electoral Commission.<sup>85</sup> Ideally donors would also be unable to hide behind an organisation (such as a trust) through which they funnel donations.

Unfortunately transparency is too weak a tool to prevent corruption or the appearance thereof. Most people are relatively uninformed about politics; they have bills to pay, kids to play with and jobs to do. It is unlikely that the average Kiwi is up to date with who is donating to whom, let alone carries out the complex task of assessing whether some donation secured a later political advantage. Even though a journalist may be slightly better able to identify suspicious donations, they too struggle at the task.

Although a possible connection between a donation and later favourable treatment may be pointed out, the politician can deny a *causal* link and claim that any action taken was meritorious and independent of the donation received. Simply put, transparency schemes dishearten the public in that they unveil the monetary machinations of political parties, but do not provide voters with the information they actually desire: proof of whether money bought a particular outcome. Because of this, the punishment mechanism behind transparency regimes fails.

As Lessig argues, transparency “simply normalizes dependence rather than enabling independence. There’s no shame in the dance. There’s no embarrassment from being on the list.”<sup>86</sup> Witnessing money flowing in to the political machine is likely to prompt despair, but not necessarily enable action. Indeed, transparency regulations without parallel legislative action to prevent corruption may cause the public to lose faith in the political system as the full extent of influence buying is made clear.<sup>87</sup>

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<sup>84</sup> Geddis “Rethinking the Funding of New Zealand’s Election Campaigns”, above n 1, at 6.

<sup>85</sup> Tony Wall, Hamish Rutherford and Steve Kilgallon “Secret donations: Buck stops here” (17 August 2014) *Sunday Star Times* <[www.stuff.co.nz](http://www.stuff.co.nz)>.

<sup>86</sup> Lessig, above n 27, at 258.

<sup>87</sup> At 270.

In the end, transparency measures may be little more than a self-congratulatory pat on the back.<sup>88</sup> Although increasing disclosure requirements will certainly increase the amount of information available, it is not sort the information that can disinfect the gift economy. The matrix between a donation given and favourable treatment received is simply too complex.

## C: Public Funding

Another option for reform is to increase the current partial public funding of election campaigns (which happens officially through the broadcasting allocation and unofficially through the Vote Parliamentary Service) to full public funding, covering every aspect of the campaign. This would provide politicians with a clean source of funds while ensuring that their campaigns were adequately resourced.

Ackerman and Ayres succinctly lay out the well-established arguments against public funding: it is used to “favour incumbents, entrench existing parties, and alienate citizens from funding decisions.”<sup>89</sup> Public funding reduces incentives for MPs to engage with their constituents as they no longer need their money. There are also inherent conflicts of interest in a system where MPs control the state funding and are also the chief beneficiaries. This could lead to political parties banding together to keep newcomers out.<sup>90</sup>

### *1: Incumbency advantage*

When the state controls the campaign finance purse-strings, the most obvious candidates for a hand-out are incumbent politicians. Incumbents have shown themselves to be popular through winning a sufficient number of votes at the previous election and are obviously serious about politics. However, when dealing with challengers, the state must establish some criteria to assess who qualifies for state funds. If the threshold is too low, joke parties may qualify for public money – something that the public would be unhappy about. A robust criterion would attempt to separate the serious contenders from the trivial pretenders. However, separating out these two groups is almost impossible. The balance is usually struck at a relatively high level, favouring incumbents and a few select others, justified by reference to being responsible with the public

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<sup>88</sup> Ackerman and Ayres, above n 4, at 27.

<sup>89</sup> At 3.

<sup>90</sup> Rowbottom, above n 7, at 130.

purse. This systematic advantage to incumbents leads to a stale political system. The incumbents themselves are very happy with this bias, and make no moves to destabilise it.<sup>91</sup>

The existing partial public funding of campaigns officially through the broadcast allocation and unofficially through Parliamentary funding has *already* led to incumbency advantage. The state provides parties with funding to purchase time on air through the broadcast allocation. The total allocation for 2014 was \$3,283,250<sup>92</sup> and additional air time cannot be purchased with private funds.<sup>93</sup> The allocation for each party is determined by the Electoral Commission on the basis of six factors.<sup>94</sup> The formula, and thus the resulting allocation, is disadvantageous to challengers because three of the six factors focus on previous electoral success. The formula also ignores the fact that established parties get a lot of free media coverage.

Parliamentary funding through the Vote Parliamentary Service is meant to be used to help MPs and parties in their legislative roles and also to support MPs serving their constituencies. It is *not* meant for electioneering.<sup>95</sup> However, in practice Parliamentary funds *are* used to exactly these ends. Free flights are used to spread party political messages around the country, websites become electioneering vehicles, Parliamentary staff are conscripted to help out with the campaign and research units become involved in party propaganda.<sup>96</sup> Even the Royal Commission on the Electoral System noted that, “While these entitlements are provided to the MPs themselves as aids to the fulfilment of their parliamentary functions, they are available throughout the year and are of considerable value to the political parties for campaigning and other purposes.”<sup>97</sup>

Access to parliamentary funding suggests that incumbents do enjoy a significant advantage over those outside the house.<sup>98</sup> Bryce Edwards notes that since the introduction of MMP in 1994, only

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<sup>91</sup> Ackerman and Ayres, above n 4, at 19.

<sup>92</sup> Electoral Commission *Decision of the Electoral Commission on the allocation of time and money to eligible political parties for the broadcasting of election programmes for the 2014 General Election* (June 2014) <[www.elections.org.nz](http://www.elections.org.nz)>.

<sup>93</sup> Broadcasting Act 1989, s 70.

<sup>94</sup> Section 75(2). The six factors are the number of votes gained at the previous election; votes gained at any by-election since the last election; number of MPs that the party has pre-election; whether the party has a component party (for example Internet Mana); other indications of public support (for example opinion polls and the size of party membership) and fairness in allowing each party to communicate its policies to the public.

<sup>95</sup> Parliamentary Service Act 2000, s 3B(2). Incumbent MPs and parties are never allowed to use parliamentary funds to explicitly solicit votes, membership or funding, or try to discourage people from voting, funding or becoming a member of another party. Within the “regulated period” three months prior to an election, parliamentary funds cannot be used to pay for “election advertisements” as defined in the Electoral Act 1993.

<sup>96</sup> Bryce Edwards “Myth 11: Parliamentary resources are not routinely used for party political purposes” (18 April 2007) Liberation <[www.liberation.typepad.com](http://www.liberation.typepad.com)>.

<sup>97</sup> Royal Commission on the Electoral System, above n 3, at 210.

<sup>98</sup> Andrew Geddis *Electoral Law in New Zealand: Practice & Policy* (2nd ed, LexisNexis, Wellington, 2014) at 193.

one party (ACT) has come into Parliament with no incumbent politicians in it.<sup>99</sup> It is notable that it is ACT in particular that has managed to launch a successful challenge initially *without* access to Parliamentary funds, most likely because they had access to large amount of private funds donated by a few wealthy individuals. This suggests that parties that are currently *not* in Parliament and that *do not* have wealthy donors would struggle to get into Parliament. This puts marginalised and unrepresented groups in a difficult position – either they accept their lack of voice within Parliament or they are forced to cosy up to wealthy individuals (like Kim Dotcom) to mount a feasible challenge.

When dealing with campaign finance, it is important to be aware that entrenched politicians are just as dangerous as entrenched wealth. Ackerman and Ayres warn us against “exchanging one master for another.”<sup>100</sup> Incumbency advantage is so dangerous because it undermines the very essence of democratic elections – a fair race between all contenders. The fact that our current partial public funding of election campaigns has already led to a degree of incumbency advantage suggests that it would be unwise to extend public funding out further.

## *2: Alienation*

Although the dark side to private funding are its potentially corrupting and distorting effects, the light side is that it forces politicians out into the community to engage with citizens and convince them of the politician’s vision. Public funding deprives politicians of this incentive to engage. Parties no longer need to cultivate their traditional support bases (for example unions or business organisations) as they do not have to appeal for financial resources or for volunteer labour to run an effective campaign.<sup>101</sup> Freed from their traditional support bases, parties move towards the centre in the race to capture the median voter. This creates “ideological convergence”, where parties are no longer truly distinguishable on ideological grounds.<sup>102</sup> The resulting lack of differentiation between the parties and their policies leads to voter disaffection with the political process.

The interests ultimately served by a public funding system are that of the incumbent politician. They can sit back and relax while the funds roll in. It is citizens and their communities that miss out as politicians no longer need to engage and inspire passionate support to get a donation *on top of* a vote.

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<sup>99</sup> Bryce Edwards “Political finance and inequality in New Zealand” (2008) 23(2) New Zealand Sociology 4 at 10.

<sup>100</sup> Ackerman and Ayres, above n 4, at 157.

<sup>101</sup> Edwards “Political finance and inequality in New Zealand”, above n 99, at 10.

<sup>102</sup> At 11.

The Cartel Party Thesis was developed by Richard Katz and Peter Mair.<sup>103</sup> This thesis states that a cartel type party will emerge in advanced democracies where the state has a large role in governing and funding political actors. The cartel party will collude with its political competition, leading to an apolitical environment where parties and politicians are not distinguished by their policies but by their public personas. The political arena becomes technocratic and increasingly professionalised. State funding allows these cartel parties to survive despite growing detachment from their traditional support base and society as a whole. We can see the Cartel Party Thesis at play in New Zealand, with partial public funding leading to the narrowing of the ideological differences between the different parties, a rise in bland and professional campaigning and a focus on the leadership style and personalities of party leaders (also called the “presidentialisation” of politics).<sup>104</sup>

The concern about the separation of the political party from their supporters has led to the German Constitutional Court setting (and the legislature subsequently codifying) both absolute limits (*absolute Obergrenze*) and relative limits (*relative Obergrenze*) to public funding. The absolute limit caps the amount of public funds available to parties so that they do not constantly seek increases in the amount.<sup>105</sup> The relative limits hold that public funding cannot account for more than 50% of a party’s budget.<sup>106</sup> Both of these limits are intended to anchor political parties to support from citizens.

## D: Summary

In order to minimise the influence that wealthy individuals and organisations can leverage through political donations, we need to move away from the laissez-faire regulatory environment and introduce some substantial reforms. The standard options for tightening controls on the supply side of the campaign finance equation include donation caps, increased transparency and public funding. However, this dissertation has argued that increased transparency is too weak a tool to reign in corruption or the appearance thereof. Donation caps are one method of eliminating the problems with the private funding of political parties and candidates. Although the resulting limitation on freedom of expression is justified based on the importance of minimising political inequality, the issues of underfunded campaigns, incumbency advantage

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<sup>103</sup> Richard Katz and Peter Mair “Changing Models of Party Organization and Party Democracy: The Emergence of the Cartel Party” (1995) 1(1) *Party Politics* 5.

<sup>104</sup> Chris Rudd, Janine Hayward and Geoffrey Craig *Informing voters? Politics, Media and the New Zealand Election 2008* (Pearson, North Shore (Auckland), 2009) at 6.

<sup>105</sup> Parteiengesetz 1967 (Germany) §18, 2 (translation: Political Parties Act)

<sup>106</sup> §18, 5

and the hydraulic nature of money need to be addressed before donation caps can be advocated as a viable solution.

The desire to provide politicians with a clean source of funds and avoid problems with underfunding generally leads to calls for public funding of election campaigns. However, this cure may be just as harmful as the disease. Public funding leads to incumbency advantage and alienates politicians from their support base.

A way forward is to investigate alternative models of public funding that can avoid some of the pitfalls of the above reforms. Patriot dollars, as proposed by Ackerman and Ayres, is public funding with a twist – public funds are funnelled through citizens rather than going directly from the state to politicians.<sup>107</sup> This voucher-style system uses the best and avoids the worst of both private and public funding systems.

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<sup>107</sup> Ackerman and Ayres, above n 4.

# Chapter III: Revolutionising Political Finance

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The public benefits from political parties running engaging and effective campaigns. Well-run campaigns are crucial for informing voters and connecting them with their future parliamentary representatives. However, in a bid to fund election campaigns we engage in a dance with the devil. The status quo is in dire need of reform to remove the advantages accrued by wealthy donors, yet the obvious reforms of donation caps, increased transparency and public funding seem unsatisfactory. We must look further afield for fresh ideas that can bring something new to the campaign finance table.

My proposal for reform is that New Zealand adopts a mixed public-private funding model, combining donation caps on private donations with publicly funded Manapori dollars. Manapori dollars are heavily inspired by Patriot dollars, first developed by Ackerman and Ayres in their 2002 book *Voting with Dollars*.<sup>108</sup> Manapori dollars route public funding *through* citizens by giving every citizen enrolled to vote twenty Manapori dollars to distribute to the political party or candidate of their choice. This allows parties and candidates to be properly funded in their campaigning efforts while ensuring that the distribution of funds is responsive to the citizenry as a whole.

## A: Manapori Dollars

### *1: The mechanism*

Under the Manapori scheme, the state would distribute twenty Manapori dollars to every person enrolled to vote at the start of every three year electoral cycle. These Manapori dollars could then be donated to the party or candidate of the individual's choice. Individuals could either donate all twenty Manapori dollars in one go or break it into a number of separate smaller donations. Manapori dollars would be inalienable and expire after every General Election.<sup>109</sup>

Why twenty dollars? Why not five? Why not a hundred?<sup>110</sup> In the 2011-2014 New Zealand election cycle, *roughly* twenty million was given in political donations to parties and

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<sup>108</sup> Ackerman and Ayres, above n 4.

<sup>109</sup> At 16-17.

<sup>110</sup> Ackerman and Ayres' distribute fifty Patriot dollars to every enrolled voter to achieve a roughly two to one Patriot to private ratio. To achieve a similar ratio in New Zealand, only twenty dollars is needed.

candidates.<sup>111</sup> With the goal of overwhelming private donations at roughly a two to one ratio, the state would only need to distribute twenty dollars to every enrolled voter. If all those who voted in the 2014 election (2.4 million people<sup>112</sup>) also donated their twenty Manapori dollars, this would inject around \$48 million into the political system. Although not *all* voters would use their Manapori dollars, the Manapori to private funding ratio would likely remain around two to one as the level of private funds in the system would drop with a donation cap in place.

Although Manapori dollars *could* be progressive – the poor would get 100 dollars and the rich ten – this is not recommended. To ensure that the system is not repealed with a change of government and picked apart on partisan grounds, Manapori dollars must aim to be a-political rather than politicized.<sup>113</sup> Maintaining a simple scheme that has a standard amount distributed to all is also easier to administer. Doling out Manapori dollars would happen with ease, with no need to register or update income or other details.<sup>114</sup>

Ackerman and Ayres recommend piggy-backing on the voting enrolment system to distribute Manapori dollars.<sup>115</sup> All that would be required is for the enrollee to list one bank account on their voter enrolment form, allowing Manapori dollars to be linked to their bank account and able to be dispensed from ATMs or through online banking. Alongside “Withdraw twenty dollars” and “View your account”, it would say: “Donate your Manapori dollars”. Once the donation option was selected, there would be a list of registered political parties and candidates that the individual could donate to as well as how many Manapori dollars remain. Connecting Manapori dollars to an individual’s bank account and the ATM/online banking system allows donating to be hassle free and encourages individuals to make it a part of their everyday lives.

## *2: Benefits of Manapori dollars*

The Manapori scheme has the potential to awaken and enliven our democracy. Although voters currently have an equal say over the election result with equal suffrage protected by s 12 of the

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<sup>111</sup> Unfortunately the 2014 party donation returns are not yet available, nor are the 2014 candidate returns. This figure was calculated by summing the 2012 and 2013 party donation returns (\$3.2 million and 2.3 million respectively) with the party donations received in 2014 that were over \$30,000 which are declared within 10 days of receiving the donation (\$8.4 million). Candidate returns operate in 3 year electoral cycles rather than in calendar years like the party donations, so estimating that roughly the same amount was gathered in this election cycle we can add \$1.9 million to the sum above to include donations to candidates as well as to parties. This amounts to \$15.8 million in total, and this is rounded up to \$20 million to reflect the fact that donations *under* \$30,000 will have been received but will not be declared until 2015 and the fact that donations under \$1,500 are not declared.

<sup>112</sup> Dougan, above n 54.

<sup>113</sup> Ackerman and Ayres, above n 4, at 41.

<sup>114</sup> At 42.

<sup>115</sup> At 67.



NZBORA, the right to vote can be undermined if the pre-election competition is unfair and favours parties with wealthy donors. Under the Manapori scheme, the distribution of funds between political parties would no longer be hijacked by the wealthy few but determined by the entire voting population. This would be a huge boon to political equality. The parties that have the loudest voice in the political debate and the parties that have the ability to seriously compete in elections would thus be aligned with the choices of the citizenry as a whole.<sup>116</sup>

There are certain parallels between donating Manapori dollars and casting a vote at the ballot box. Both votes and Manapori dollars are distributed equally, are inalienable and act to ensure that politics remain responsive to citizens. An individual would ‘vote’ with their Manapori dollars to have their say over who they want to hear from in the run up to the election and then would vote a second time to have their say over who is to lead the country.

However, Manapori dollars could be so much *more* than a preliminary vote. Voting is usually a one-off activity that takes place once every couple of years. The public’s interest and involvement in politics is thus strongly centred on this one day that they can directly exercise their democratic power. In contrast to this, Manapori dollars offer the public the opportunity to directly exercise democratic power at *any* time. This would extend the length of time in which the public is interested and directly involved in politics. It would also provide incentives to stay up to date with the policy developments of various parties on a more constant basis. While a vote on Election Day can be useless if the party falls below the 5% threshold and is verging on useless if the party voted for ends up in the opposition, a Manapori donation will always make a difference (even if it is small) as it will help facilitate a campaign that has the potential to inspire others.

After having donated their Manapori dollars, citizens would no longer be able to relate to political campaigns as passive consumers. Instead they would have actively contributed to (or showed a lack of support for) various communications. Their thoughts would turn to whether they spent their Manapori dollars well, whether the message communicated by the advertisement aligns with their values and ideals or whether they should rather give their remaining Manapori dollars to another party or candidate instead.

The question of which party or candidate to donate to would at the very least spur political discussions. Others who are drawn into the discussion would turn their mind to their own

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<sup>116</sup> Rowbottom, above n 7, at 126.

Manapori dollars, creating a domino effect of political debate and engagement.<sup>117</sup> Making a donation of Manapori dollars would also make the donor more attached to the political party they donated to, creating political rather than indifferent citizens. Ackerman and Ayres name this increase in political engagement the “citizen effect”.<sup>118</sup>

Manapori dollars would also democratise the expressive capacity of money.<sup>119</sup> Expressing support for a party or candidate does more than just enrich the political culture and ongoing debate; it is also a means of self-fulfilment. The capacity for self-fulfilment is a good that as many people should have access to as possible.

Unlike other campaign finance reforms, Manapori dollars do not ignore the hydraulic nature of money.<sup>120</sup> The hydraulic nature of money means that when one channel is blocked through regulation, another channel will be found to achieve political influence and power. Rather than trying in vain to plug the leaks, the flood of Manapori dollars would act to dilute the influence of the private money in the system.

### *3: Potential problems*

Although Manapori dollars offer great opportunities for engaging and politicising the public, there awaits the minefield of potential problems faced by all ambitious reforms. The chief issues are whether people would actually use their Manapori dollars and how to stop the formation of a black market. It would also be prudent to have an adjustment mechanism should twenty Manapori dollars per person be too high or too low.

Lillian BeVier argues that people are unlikely to use their Manapori dollars and thus the reform would fail.<sup>121</sup> The problems that plague voter turn-out would also plague Manapori dollars, but more severely. One of the main reasons that voter turnout is low is because it is *rational* not to vote. Voting takes time and effort, and the chance that your vote would swing an election is next to zero. The negative expected value of donating Manapori dollars would be higher than voting as even more time and effort is required. The voter’s paradox would become the Manapori paradox.

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<sup>117</sup> Ackerman and Ayres, above n 4, at 34-35.

<sup>118</sup> At 15.

<sup>119</sup> At 159.

<sup>120</sup> Issacharoff and Karlan, above n 79.

<sup>121</sup> Lillian BeVier “What Ails Us? Voting with Dollars: A New Paradigm for Campaign Finance by Bruce Ackerman: Ian Ayres” (2003) 112 (5) Yale LJ 1135 at 1160.

Ackerman and Ayres state in response that “Patriot may empower citizens, but it cannot create them.”<sup>122</sup> If the majority were so unresponsive to Manapori dollars, democracy would be dead anyway. However, we have not come to such a point yet.<sup>123</sup> There is every reason to be optimistic rather than pessimistic about people using them. Because Manapori dollars are so easy to dispense, it would not require the same effort and time that going to a voting booth does. The novelty could pique people’s interest for the first few elections, allowing the citizen effect to kick in which would keep them coming back.

A big concern with doling out Manapori dollars is that a black market would emerge. For example, a politician (or more likely their employees or supporters) could offer ten real dollars to anyone who donated their twenty Manapori dollars to them or their party. The biggest deterrent to a market in Manapori dollars would be heavy fraud-based penalties for anyone caught trading or attempting to trade in Manapori dollars. Any large-scale fraud attempt would greatly increase the chance of getting caught.

To further weaken a black market there should be an information-deprived environment. Just as there is no list of who voted for whom, there should be no publicly available record of who donated their Manapori dollars to whom. Donors should also be unable to access records of who they donated to.<sup>124</sup> If the donor cannot prove that they did donate to the particular party or candidate, no one would be willing to pay them real money to do so.<sup>125</sup> Manapori dollars should be funnelled through the Electoral Commission on their way to the chosen party or candidate to ensure that any identifying clues are erased. This is similar to how qualifying donations can be anonymously sent to parties under Part 4 of the Electoral Act 1993. The Electoral Commission bundles all of the anonymous donations together and passes them on to the intended recipients.

What is to stop a donor from allowing a Manapori buyer to look over their shoulder at the ATM or as they use internet banking to prove that they have indeed made the donation? Unlike voting, there is no secret booth which one physically enters to cast a donation in private. Although a secret donation booth could also be set up, having to go to a special facility to donate Manapori dollars would deter some people from using them. It is best to incorporate donating facilities into facilities that people use every day.

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<sup>122</sup> Ackerman and Ayres, above n 4, at 33.

<sup>123</sup> At 17.

<sup>124</sup> This may require the Official Information Act 1982 and the Privacy Act 1993 to be amended. Another option is to utilise the current procedures for Anonymous Donations under Part 4 of the Electoral Act 1993.

<sup>125</sup> Ackerman and Ayres, above n 4, at 6.

The ability to rescind donations is one mechanism to prevent a black market.<sup>126</sup> It would mean that looking over someone's shoulder while they make the donation is no guarantee the Manapori dollars would actually flow on to the desired party or candidate as the donor could rescind them afterwards. The potential for the donor to scam the buyer by keeping the real dollars *and* the Manapori dollars would act as a deterrent to buying Manapori dollars in the first place.

Even if there are still some donors that do not rescind their fraudulently-made donations, the likelihood of fraud being widespread is low. As voter fraud is not a problem in New Zealand (despite that there are no ID requirements to vote), it is unlikely that donation fraud would be a large problem either.

Ackerman and Ayres discuss a number of mechanisms to fix teething problems when Manapori dollars are first implemented. If parties are failing to receive enough funding from private and Manapori sources combined, they recommend increasing the value of Manapori dollars at the following election.<sup>127</sup> If private dollars overwhelm Manapori dollars, they also recommend increasing the amount of Manapori dollars at the next election to maintain a minimum two to one Manapori to private funding ratio.<sup>128</sup>

When Manapori dollars are first introduced, the Electoral Commission would have to undertake an educational campaign explaining Manapori dollars to the public and encouraging people to use them. Any unused Manapori dollars could flow back to the Electoral Commission to fund further such civic education campaigns.

## B: Private Funds

The Manapori scheme is a mixed private-public funding system. Why not go the whole hog and ban private donations? If parties and candidates could *only* accept Manapori dollars, there would be a sharp division between the economic and political sphere. There is a principled argument to be made that if we strive for political equality, this should be reflected in equal financial input into the political process. Parties and candidates should accept twenty Manapori dollars from

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<sup>126</sup> Ackerman and Ayres, above n 4, at 101.

<sup>127</sup> At 88.

<sup>128</sup> At 89.

each citizen and not a dollar more.<sup>129</sup> By abolishing private donations, the corrupting and distorting effect of private money would be banished from the political sphere.

However, there is a stronger case for adopting a mixed system, where private funds (subject to caps) are accepted by candidates and parties as well as Manapori dollars. Abolishing private donations could be used by incumbents to keep out challengers. Incumbents are well known by the public and would find it easy to attract Patriot dollars. However, challengers face a Catch-22. In order to launch an effective campaign they need to gather Manapori dollars, but to gather Manapori dollars they need an effective campaign. If a challenger can inspire the passionate support of a small crowd of people who give their Manapori dollars as well a small private donation, it will be easier for the challenger to get the ball rolling.

Private funds also keep incumbent politicians honest. Incumbents would be greatly advantaged if they could ban private donations and then underfund the Manapori system (from twenty dollars down to say five dollars) so that even if the challenger attracted a reasonable number of donations, it would not be enough to provide an “in” to media coverage and the public consciousness.<sup>130</sup> This could be justified to the public on the basis of cutting needless public expenditure, but would in reality act to further entrench incumbents. Private donations mean that even if the Manapori scheme was deliberately underfunded, challengers would not be completely shut out.

Lessig also supports a mixed funding system for his “democracy dollars” because of the importance of “allowing citizens to have skin in the game.”<sup>131</sup> The Obama campaign is a prime example of people feeling empowered through giving small private donations. Once someone has donated their Manapori dollars, they may be inspired to help their chosen party or candidate even further.

### *1: Donation caps*

Although there are many good reasons to keep private funds in the system, they should be subject to a cap. This recognises that while private funds do empower challengers, keep incumbents honest and allows citizens to have skin in the game, they can also lead to corruption and distort elections in favour of wealthy individuals and organisations. A limit of \$2,000 per party per year strikes a good balance between these competing interests. A cap on donations to

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<sup>129</sup> Ackerman and Ayres, above n 4, at 44.

<sup>130</sup> At 39.

<sup>131</sup> Lessig, above n 27, at 267.

candidates should be \$200 per candidate per year, reflecting the fact that candidates need less money than parties do to run a successful campaign.

Who should the donation cap apply to? Obviously it would apply to individuals wanting to donate money. The issue is how it applies to a diverse range of organisations from advocacy groups to companies to unions. Organisations play an important role in our democracy, acting as vehicles for individuals to combine their voices to lobby for action. To apply the individual donation cap on a collection of individuals seems unfair. However, applying a higher cap on organisations creates potential loopholes for individual donors to exploit. Individuals could funnel donations through sham organisations to benefit from the higher donation cap.<sup>132</sup> The United States provides an excellent example of individuals getting around donation caps through the Political Action Committee, as Political Action Committees face less regulation overall and higher limits.<sup>133</sup> Allowing individuals to give money to political parties *and* to give money to organisations to pass on to political parties could also lead to a duplication of representation which would undermine political equality.<sup>134</sup> Therefore the same cap needs to apply to both organisations and individuals.

Because organisations could still donate \$2,000 to each party (rather than being banned from making donations like in Canada), they are not prevented from expressing their support of parties and candidates through a financial contribution. A donation, although small, could act as a symbolic gesture from an organisation to show that their commitment to a party or candidate is more than just cheap talk. The organisation could also encourage its members to individually donate to a particular candidate or party.

How would the donation cap apply to people who had bundled together the donations of others? In America, bundlers (who are usually lobbyists) have gained immense power because donation caps do not apply on bundles of donations as long as the individual donations that make up the bundle are under the cap. To avoid this anomaly the same cap should apply to individuals, organisations and bundlers of donations.

## *2: Increases in third party campaigns*

With donation caps preventing large donations to political parties and candidates, the hydraulic theory of money suggests that individuals and organisations seeking political influence would

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<sup>132</sup> Rowbottom, above n 7, at 139.

<sup>133</sup> Cass Sunstein "Political Equality and Unintended Consequences" (1994) 94(4) Colum L Rev 1390 at 1403.

<sup>134</sup> Rowbottom, above n 7, at 138.

funnel their money into other less regulated areas, for example by launching or funding third party campaigns.<sup>135</sup> Third party campaigns are campaigns that are *not* run by political parties or candidates that encourage people to vote in a certain way (express advocacy), or adopt a certain stance on an issue (issue advocacy).

Third party campaigns can raise the same type of corruption concerns as political donations.<sup>136</sup> Parties and candidates often know who has launched a third party campaign that benefits them, which in turn may lead politicians to reciprocate this gift with political favours. Third party campaigns can also influence elections as certain issues favoured by wealthy interests receive a disproportionately loud voice in the debate.

Third party campaigns can do the dirty work that politicians applaud in private but distance themselves from in public. Nicky Hagar's book *Dirty Politics*, published several weeks before the September 2014 General Election, exposed the outsourcing of smear campaigns by the National government to various right-wing bloggers.<sup>137</sup> To make such third party campaigns more attractive to wealthy individuals and organisations seeking to make a political investment is undesirable.

Although in theory the cap on political donations could be extended to donations to third parties, this would be too burdensome on third party groups and would also be difficult to monitor.<sup>138</sup> Fears of a rise in third party campaigns should however be assuaged by the fact that the ability for third parties to engage in express advocacy and borderline express/issue advocacy is currently subject to strict regulation.

The current regulatory regime limiting third party election expenditure was inspired by anger at the role of the Exclusive Brethren in the 2005 election where they spent around \$1 million printing anti-Green and anti-Labour pamphlets.<sup>139</sup> Third parties now must register if they plan on spending over \$12,300<sup>140</sup> on advertising expenses and are limited to spending \$308,000 on "election expenses" during the "regulated period".<sup>141</sup>

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<sup>135</sup> Ackerman and Ayres, above n 4, at 119 .

<sup>136</sup> Sunstein, above 133, at 1395.

<sup>137</sup> Nicky Hagar *Dirty Politics: how attack politics is poisoning New Zealand's political environment* (Craig Potton Publishers, Nelson, 2014).

<sup>138</sup> Rowbottom, above n 7, at 28.

<sup>139</sup> Nicky Hagar *The Hollow Men: A Study in the Politics of Deception* (Craig Potton Publishers, Nelson, 2006), at 25-26.

<sup>140</sup> Electoral Act 1993, s 204B(1)(d).

<sup>141</sup> Section 206V – this amount changes annually to stay in line with the Consumer Price Index per s 266A.

“Election expenses” is defined in the Electoral Act 1993 as the advertising expenses incurred in relation to an “election advertisement”.<sup>142</sup> An “election advertisement” is an advertisement in any medium that may reasonably be regarded as encouraging or persuading voters to vote, or not vote for a type of party or candidate described or indicated by reference to views or positions that are, or are not, held or taken (whether or not the name of the party or candidate is stated).<sup>143</sup> Publishing is defined as “to bring to the notice of a person in any manner”, but excludes face-to-face contact.<sup>144</sup>

The “regulated period” is two years and nine months after the last election, or if the Prime Minister announces the election day before this date, 3 months before polling day.<sup>145</sup> The fact that caps only operate during this time recognises the relatively short duration of election campaigns in New Zealand<sup>146</sup> and that advertisements published during this period will have the greatest impact on the election result.<sup>147</sup>

If an advertisement attempts to persuade a voter to vote for a particular candidate or party, the third party first must obtain written authorisation from the candidate or party to publish it.<sup>148</sup> If permission is granted, the spending on that election advertisement also counts towards the party's or candidate's overall spending cap as well as that of the third party. This means in practice that parties are very hesitant to authorise any third party advertising that encourages people to vote for their party.<sup>149</sup> However, they are more than happy for smear campaigns or issue advocacy to go ahead as no authorisation from the party is needed and thus it does not count toward their spending limit. A further requirement for third party advertising is that they must always include their name and address on any election advertisement in the form of a “promoter statement”.<sup>150</sup>

Third parties also cannot broadcast an “election programme”,<sup>151</sup> defined as a programme that seeks to encourage or persuade voters to vote/not vote for a candidate or party, or advocates or opposes support for a particular candidate or party.<sup>152</sup> With third parties constrained in their ability to publish “election advertisements” and not able to broadcast “election programmes” at

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<sup>142</sup> Electoral Act 1993, s 206(1).

<sup>143</sup> Section 3A.

<sup>144</sup> Section s 3D.

<sup>145</sup> Section 3B(2).

<sup>146</sup> Geddis “Rethinking the Funding of New Zealand’s Election Campaigns”, above n 58, at 576.

<sup>147</sup> Rudd, Hayward and Craig, above n 104, at 3.

<sup>148</sup> Electoral Act 1993, ss 204G(1) and 204H(1).

<sup>149</sup> Geddis *Electoral Law in New Zealand: Practice & Policy*, above n 98, at 153.

<sup>150</sup> Electoral Act 1993, s 204F(1).

<sup>151</sup> Broadcasting Act 1989, s 70(1).

<sup>152</sup> Section 69(1).



all, a logical manoeuvre for a third party seeking political influence is to engage in issue advocacy.

Issue advocacy can be powerful. The mining industry spent over \$22 million in six weeks in order to bring down Australian Prime Minister Kevin Rudd because of an economically sound mining super tax that he supported.<sup>153</sup> Much of this money was spent on orchestrating public relations campaigns which proved immensely successful at turning the public against the tax. This led to Kevin Rudd being ousted by his own party. In New Zealand in the early 2000s, Federated Farmers launched a massive campaign against what it termed a “Fart Tax”, a tax on livestock which would be used to fund research into reducing the livestock’s methane emissions. This campaign was successful and so spelled the death of the tax.

However, expenditure on pure issue advocacy has little ability to secure preferential treatment. To stay out of the bounds of “election advertising” the advertisement cannot encourage or persuade people to vote/not vote for a specific party or candidate, support specific policy solutions that could be used as a “yardstick” by which to rank different parties or candidates<sup>154</sup> or rank or judge the different policies of the parties or candidates themselves.<sup>155</sup> “Free off-peak student transport is a fantastic policy” is as much an election advertisement as publishing “Vote Greens!”. Because of these limitations it is unlikely that a politician would be convinced that a third party had done the politician a large enough favour to warrant special treatment.

Although there might not be a large problem with corrupt dealings caused by money flowing into issue advocacy, there are still problems with issue advocacy distorting elections. Launching a huge public relations campaign can draw a lot of attention to an issue and may enhance the issues importance to voters, distorting the election in favour of groups who can pay for such campaigns. This however is an advantage we cannot do much about given the immense freedom of expression concerns that attach to regulating issue advocacy.

Short of abolishing private property, it is impossible to completely remove the influence of money.<sup>156</sup> However, the increase in campaigning by political parties and candidates who tap into the \$48 million Manapori dollars available will likely dilute the effect of any increase in third party campaigns.

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<sup>153</sup> Mark Davis “A snip at \$22m to get rid of PM” (2 February 2011) Sydney Morning Herald <www.smh.com.au>.

<sup>154</sup> *Greenpeace v Electoral Commission* [2014] NZHC 2135 at [91].

<sup>155</sup> At [92].

<sup>156</sup> Ackerman and Ayres, above n 4, at 120.

## C: Summary

Within a mixed funding scheme, publicly-funded Manapori dollars and capped private donations fit together like two pieces of a puzzle. While Manapori dollars do enhance political equality and promote political engagement, alone they are unable to deal with the corrupting and election-distorting effects of large donations. Donation caps minimise the possibility of corruption and distortions, while in turn Manapori dollars solve the underfunding concerns that plague donation caps. Because no one method of determining the distribution of funding for political parties and candidates is perfect, by combining two different methods the kinks in one will hopefully be ironed out by the other.

One must acknowledge what these reforms *do not* do. They do not ensure a diversity of choice at the ballot box - there is a risk that Manapori dollars will simply supply the leading parties with greater funds to then attract further support, making big parties bigger and small parties smaller. Nor do these reforms ensure that the pre-election debate is a rigorous and high-quality affair.<sup>157</sup> They do however make the electoral arena more responsive to citizen choice and deprive wealthy donors of a means of cashing in their money for political advantages, which is no small feat.

In the complex world of political finance, this reform is a genuinely new and exciting prospect for revolutionising not only the way that we fund campaigns but also the way we do politics. With civic participation in politics on a worrying downward trend, this could be just the jolt our democracy needs.

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<sup>157</sup> Rowbottom, above n 7, at 127.

# Chapter IV: Demand Side Consequences of the Revolution

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## A: Abolishing Expenditure Caps

In New Zealand there are heavy demand side regulations, chiefly in the form of spending caps on parties' and candidates' "election expenses" during the regulated period and on parties and candidates broadcasting "election programmes". For the 2014 General Election, the cap on election expenses (which cover the costs associated with publishing election advertising) was \$1,091,000 plus \$25,700 for each candidate contesting an electorate.<sup>158</sup> This created a *de facto* maximum of \$2,915,700 if a party put forward candidates in all 71 electorates.<sup>159</sup> The broadcast allocation for the 2014 election was capped at \$3,283,250.<sup>160</sup>

These spending caps aim to prevent the wealthiest party "buying" an election by outspending competitors in an advertising onslaught.<sup>161</sup> This assumes that it is actually *possible* to buy an election - a lot of academic research has investigated whether greater election expenditure *causes* more people to vote for a party, however the jury is still out.<sup>162</sup> Spending caps also aim to stop arms races, where politicians focus increasingly more of their time and effort on fundraising in order to *be* the party that outspends its competition and thus buys the election.<sup>163</sup> This incentive to raise more and more funds is not dependent on a causal link between increased campaign expenditure and winning votes – all that is needed is for politicians to *believe* that this is the case. Politicians do appear to believe in this link; otherwise they would not waste time and energy attending fundraising functions and soliciting donations.

These justifications for heavy demand side regulations do not stand when applied to the Manapori scheme. Under a Manapori scheme, the arms race is transformed from a dirty competition for the biggest guns (donors) into an incentive to reach out to as many people as possible to get their Manapori dollars. The most successful strategy for incumbents would be to show competence and ingenuity as a politician and then to communicate policy successes to

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<sup>158</sup> Electoral Commission "Media Handbook: Part 1 Election Advertising" (1 May 2014) <[www.elections.org.nz](http://www.elections.org.nz)>.

<sup>159</sup> Geddis *Electoral Law in New Zealand: Practice & Policy*, above n 98, at 171.

<sup>160</sup> Electoral Commission *Decision of the Electoral Commission on the allocation of time and money to eligible political parties for the broadcasting of election programmes for the 2014 General Election*, above n 92.

<sup>161</sup> Geddis "Rethinking the Funding of New Zealand's Election Campaigns", above n 1, at 4.

<sup>162</sup> See for example Steven Levitt "Using Repeat Challengers to Estimate the Effect of Campaign Spending on Election Outcomes in the U.S. House" (1994) 102(4) *The Journal of Political Economy* 777.

<sup>163</sup> Geddis "Rethinking the Funding of New Zealand's Election Campaigns", above n 1, at 4.

citizens. For challengers, the most successful strategy would be to inspire the passionate support of a group of people willing to privately fund (up to the donation cap) the initial campaign. If their initial campaign is convincing to a wider audience, the Manapori dollars would start to flow in and allow them to fund efforts to reach out to successively more and more people. If the winner of the financial arms race then goes on to “buy” the election, so be it. As the currency is political engagement, we can only applaud them.

The supply side reforms advocated by this dissertation do not necessarily require any change to existing demand side regulations. However, because the traditional justifications for heavy demand side regulations lose their footing when applied to a Manapori scheme, this creates the opportunity to assess exactly what level of demand side regulation would fit best with the proposed supply side reforms.

## B: Benefits of Unlimited Expenditure

Removing spending caps on “election advertising” and “election programmes” within a Manapori system would have many benefits. It would be a large carrot to motivate politicians to chase after Manapori dollars. If they could not spend the money they collected on these valuable forms of promotion but only on currently uncapped expenditures such as hiring campaign staff and paying for travel, their enthusiasm for collecting Manapori dollars would be tepid at best. It would also be quite bizarre to pump up to \$48 million Manapori dollars into the hands of parties and candidates to fund their campaigns and then not allow them to use it on the most effective campaigning methods.

Abolishing spending caps would lead to a greater volume of political speech. As addressed under “Underfunded campaigns” in Chapter II, an increase in electioneering does increase the political education of people who are uneducated or uninterested in politics. Removing caps would allow parties and candidates to pay for and distribute more fliers, put up more billboards, post more letters, buy more newspaper space, pay for more television and radio advertisements and in general educate a greater number of people about their policies. The link between expenditure and information was highlighted by the Canadian Supreme Court in *Harper v Canada*, where it was held that low spending caps are unconstitutional as they would impinge on the ability of

voters to be informed, which is protected under s 3 of the Canadian Charter of Rights and Freedoms.<sup>164</sup>

Although some may fear a barrage of irritating political advertising, there is already a mechanism to disincentivise this – that of the ballot box. If a party did run a campaign that infuriated rather than engaged voters, they would witness the consequences on Election Day. New Zealand society is bombarded by commercial advertising so completely; with up to twenty minutes per hour of advertisements on television and some magazines having more advertisements than articles, it may be a refreshing break from the bland consumerism to have a greater volume of advertisements with political content.

An increase in political speech would not mean politicians and candidates merely printing more of the same material. When spending is capped, parties and candidates prioritise getting their face and name out into the public and conveying simple messages over communicating complex policy ideas. However, with the caps eliminated, parties and candidates can have it both ways, publishing and broadcasting both simple and more complicated messages. Eliminating spending caps would also mean that novel ideas that emerged late in the campaign when the cap was either at its limit or nearly at its limit would get to see the light of day. The overall effect would be *more* political speech of a higher quality.

Eliminating spending caps may also empower challengers. Challengers need to be able to spend more money than incumbents in order to overcome, or at least equal, the incumbents “informational capital”.<sup>165</sup> Spending caps prevent them from doing this.

Although there are currently spending caps on politicians, candidates and third parties, the amount of column inches and air time spent praising or denigrating various parties and candidates by the media is unlimited.<sup>166</sup> This increases the amount of influence the media has in deciding elections. Eliminating spending caps would decrease this influence – however, is this a good thing? An optimistic view of the media is that they are the peoples’ advocates, asking hard questions and holding politicians to account. A more pessimistic view is that they are often the mouthpieces of their owners, advertisers and staff.<sup>167</sup> In fact, the power of the media itself can be used to secure a media baron’s (e.g. Rupert Murdoch) political influence, as the promise of good

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<sup>164</sup> *Harper v Canada*, above n 69, at [73-74].

<sup>165</sup> Ackerman and Ayres, above n 4, at 39.

<sup>166</sup> Broadcasting Act 1989, s 70(3); Electoral Act 1993, s 3A(2)(c).

<sup>167</sup> Rowbottom, n 7, at 171.

coverage and the threat of bad coverage act to cajole politicians into line.<sup>168</sup> Mason CJ discussed this issue in *Australian Capital Television Pty Ltd v Commonwealth* and noted that when a cap has been reached, politicians can only get media coverage “at the invitation of the powerful interests which control and conduct the electronic media.”<sup>169</sup> This is of particular relevance in societies (such as New Zealand) where media ownership is characterised by duopolies and monopolies.

Even if one takes the optimistic view of the media, the media themselves are vulnerable to exploitation from wealthy interests. Cost cutting measures and higher productivity requirements mean that journalists are expected to write more with less time. This leads journalists to lean more heavily on external sources to feed them new information. Journalists are therefore vulnerable to a kind of copy-paste approach where they publish ‘news’ given to them by powerful organisations without appropriate scrutiny.<sup>170</sup> What appears to readers as independent and balanced content is in fact framed in a way that is beneficial to the source (usually corporate interests). This suggests that decreasing the power of the media through eliminating expenditure caps would indeed be beneficial.

### C: Problems with Unlimited Expenditure

Although abolishing spending caps does come with benefits, it is a risky strategy. Describing the United States system of unlimited expenditure but capped donations, Karlan and Issacharoff state that:<sup>171</sup>

The effect is much like giving a starving man unlimited trips to the buffet table but only a thimble-sized spoon with which to eat: chances are great that the constricted means to satisfy his appetite will create a singular obsession with consumption.

Lessig claims that this system turns politicians into junkies,<sup>172</sup> or less dramatically, into full time fundraisers rather than full time legislators.

Eliminating spending caps does promote a focus on fundraising. In the United States, the arms race for donations has led to 17-18% of Congress peoples’ time being spent fundraising.<sup>173</sup> A

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<sup>168</sup> Rowbottom, above n 7, at 173.

<sup>169</sup> *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, [1992] HCA 45 at 146.

<sup>170</sup> Rudd, Hayward and Craig, above n 104, at 10.

<sup>171</sup> Issacharoff and Karlan, above n 79, at 1171.

<sup>172</sup> Lessig, above n 27, at 96.

<sup>173</sup> Congressional Management Foundation and the Society for Human Resource Management *Life in Congress: The Member Perspective* (Washington D.C., 2013) at 18.

politician's focus on fundraising is problematic for two reasons. First, it is *who* they are meeting. The people who politicians dedicate this fundraising time to are those with funds – wealthy individuals and businessmen. Secondly, it is *how long* they spend doing it, as this comes at a cost to time they could spend legislating. Ackerman and Ayres suggest that the reason that American politicians spend so much of their time fundraising is that in order to solicit large donations, the politician must demonstrate that they take the wealthy individual's concerns seriously through either a personal meeting or a telephone conversation. Outsourcing this task is not an option as the personal touch is crucial to get big donors on side.<sup>174</sup>

Under a Manapori system, fundraising would lose its negative connotations. Firstly, fundraising would not be directed at wooing a select few wealthy individuals or organisations but rather at reaching out to as many people as possible. Both donation caps and the high Manapori to private dollar ratio will ensure that the focus remains on the majority rather than on a wealthy minority. Reaching out to the masses could be achieved through forums like town hall meetings.

There is a risk that politicians would spend too much time fundraising and not enough time legislating. However, a smart incumbent politician would quickly realise that the most effective way to raise Manapori dollars is to show competence – and ideally success – at governing the country. If a party or candidate had been in government, the question that everybody would ask is: what have you achieved with your three year term in power? If the answer is 'not much', the opposition would pounce on that and use it to draw Manapori dollars away from the incumbent.

#### D: Caps on Third Party Expenditure

Removing spending caps on parties and candidates is mainly justified on the basis that they should be provided with incentives to chase Manapori dollars. However, this leaves open the question of what to do with caps on third party "election expenses" and the prohibition on third parties broadcasting "election programmes". Should they be removed as well? The short answer is no. As third parties would not be eligible to receive Manapori dollars, the justification that supports removing caps for parties and candidates does not apply to third parties. Unlike political parties and candidates, third parties can receive unlimited amounts of money from unknown sources, meaning that we should be wary about increasing their role in election campaigns.

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<sup>174</sup> Ackerman and Ayres, above n 4, at 95.

## E: Summary

To complement reforms on the supply side, demand side regulations should be loosened and expenditure caps abolished. With the ability to spend unlimited amounts of money, politicians would have a strong incentive to chase Manapori dollars. This would encourage them to engage with their communities and convince people of their vision. It would also increase the amount of political speech, empower challengers and decrease the power of the media in determining election outcomes.

The traditional arguments against unlimited expenditure lose their footing when applied to a Manapori system. Fears of wealthy candidates and parties entering into financial arms races and the victor then buying the election no longer stand. Instead, the Manapori system turns these fears into opportunities. The arms race is to be encouraged as it gives parties and candidates an incentive to reach out to more and more people. If the party with the most Manapori dollars manages to 'buy' the election, they have bought it using the currency of political engagement.



# Conclusion

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We have a problem in New Zealand with money being used to gain political leverage, with economic inequalities becoming political inequalities. This dissertation has focused on the supply side of campaign financing and how private donations influence public power. This is seen in the gift economy, where donations made to political parties are reciprocated with legislative favours. It is seen in the electoral race, where support of a few wealthy donors can be substituted for widespread grassroots support and empower those parties to viably contest an election and influence the pre-election agenda.

The common proposals wheeled out to address these issues are donation caps, increased transparency and public funding. Transparency requirements do not have the muscle necessary to engender any real change – in fact they may just further discourage the public when the extent of monetary influence is exposed. Donation caps can decrease corruption and the influence of large donors over elections but would likely lead to underfunded campaigns. When political campaigns are necessary to reach out and inform voters, the true cost of donation caps inevitably falls on their heads.

Public funding is usually called for when people are fed up with the influence of private money on public power. However, this clean source of funding has *already* lead to incumbents entrenched in Parliament. Public funding can also lead to politicians being alienated from their supporters and the cartelization of politics.

Money would not be such an influential political tool if the average New Zealander felt themselves to be an *activist*. The problem in New Zealand of a-politicization leaves a partial vacuum in which the influence of money grows. People are no longer excited, or even vaguely interested in politics. This is witnessed in the downward trend of voter turnout.

To enhance political engagement and political equality and to weaken the influence of large donors, I have proposed a mixed public-private campaign financing system where Manapori dollars are introduced alongside donation caps. By giving people dollars as well as a vote, we further empower them in their role as political actors. Politicians will no longer be able to rely on wealthy donors to finance their political campaigns – they will have to meet the newly-empowered citizens half-way, interacting and engaging with the political community in the battle

to persuade the public of their vision. Somewhat perversely, we can use a market-based mechanism to prevent economic inequalities becoming political inequalities.

It must be acknowledged that the reforms proposed are very ambitious; some would say extreme. Although they are unlikely to be implemented in the near future, thinking about novel and intriguing ways to improve the New Zealand political system is a crucial part of the wider enterprise of cultivating (and sometimes reviving) our democracy.

This dissertation has focused on political donations as an illegitimate tool to leverage political influence. However, there are many other ways that wealth can be used to gain advantages in the political sphere. The fact that we live in a capitalist economy means that big economic players will always hold political clout. When a growing GDP and declining unemployment rate are crucial statistics for re-election, politicians will always have an open ear to the demands of those who say that they can provide growth and jobs.<sup>175</sup> There are many more ways that dominance in the economic sphere can lead to unjust domination in the political sphere. However this does not mean that we should sit back and let it happen, rather we must fight it at every step. In the battle for a just distribution of political resources, Manapori dollars provide a fine weapon. There is a pleasing irony to a system which turns money – a source of political inequality – into its very solution.

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<sup>175</sup> Charles Lindblom *Politics and markets: the world's political economic systems* (Basic Books, New York, 1977).

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