

Shade from the Glare: The Case for Semi-Disclosure

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Disclosure, normally the most widely embraced element of election regulation, became highly controversial in 2010. On the eve of the mid-term elections, [a Washington Post editorial](#) ^[1] declared that while money might not determine the outcome, they did not think that nonprofits spending "heavily" and "keeping their donors secret is a healthy development for democracy." When Republicans questioned the nondisclosure of many small anonymous contributions to Democratic candidate Barack Obama in 2008, their complaints were largely ignored by the press and reform community. By contrast, the rise of the so-called nonprofit super-PACs has set off a firestorm of good government indignation.

Quicker to realize the tactical potential of recent Supreme Court decisions (i.e. that corporations and trade unions were now free to transfer large sums of undisclosed money from their treasuries into nonprofit organizations to spend on newly redefined electioneering ads), conservatives funneled funds through nonprofit organizations like the Chamber of Commerce (approximately \$34 million) and the American Action Network (approximately \$21 million) to fund "electioneering communications" against Democratic opponents in targeted Congressional races. To put this development in perspective, electioneering communications (ads that avoid express advocacy but can discuss issues and candidates close to an election) will likely be only a third or less of all non-party independent spending and will still be dwarfed by the nearly \$4 billion in total spending when the final tallies are completed.

While Democrats raised a comparable level of total money and ran just as many negative ads, the Republicans utilized the nonprofit tactic more frequently. The same option was open to the Democrats, of course, but they relied more heavily on fully disclosed PAC and individual contributions to candidates and party committees, and on disclosed contributions for independent expenditures rather than using nondisclosed electioneering communications. The reform community fully understood the potential political opportunity created by recent Court decisions at the time they were decided, but their attempts to close that hole (in particular the DISCLOSE Act) faltered in the Senate, leaving a clear path for the super-PAC to emerge.

At the same time, recent developments have caused others to question whether protections for individual contributors are strong enough. The web's capacity to widely and instantaneously publicize personal information and the willingness of groups to deploy this information as a political weapon raises serious questions about whether a citizen's right to make choices free from harassment and threat will be compromised in the future, unless steps are taken to enhance protections. In particular, the Prop 8 trial in California and the *Doe v Reed* case in Washington brought allegations that citizens who signed petitions or who have money in support of preventing gay marriage were subjected to intimidation and threats by opponents making use of disclosed information. Curiously, we make voting anonymous in order to protect the autonomy of individual choice, but donations above very minimal levels, and acts of normal citizenship such as signing petitions, are often publicly disclosed, even though both are clearly protected First Amendment political actions. What is the principle that gives anonymity to one fundamental political right but not another? And if there was a rational basis to this distinction in the past, has it been undermined by radical changes in the information environment?

In the end, it seems clear that we need to be more careful about protecting individual choice in the exercise of all First Amendment rights, not just voting. This requires a closer examination of the goals we are pursuing, and in the true spirit of First Amendment jurisprudence, adopting a narrower tailoring of disclosure practices in order to protect individual autonomy. In particular, we should consider the option of semi-disclosure: that is, the full reporting but only partial disclosure of campaign donor information. Full reporting would serve the purposes of preventing corruption and promoting enforcement, while partial disclosure gives voters the information they need to make choices while protecting individual identities. It may also be a mistake to use disclosure and disclaimer requirements to discourage activity that cannot be prohibited under the Supreme Court's interpretation of the First Amendment.

The New Disclosure Problem

Disclosure requirements for Congressional candidates and committees have been in place and gradually extended in scope and enforcement rigor since 1910. The current law requires candidates and committees to report contributions and expenditures to the Federal Election Commission, and for information about donors to be made publicly available if donations surpass a minimal level. Individuals and groups that engage in independent expenditures expressly advocating for or against candidates are not subject to contribution or expenditure limits, but are required to report and allow the disclosure of contributors.

The upshot is a significant amount of reporting for candidates, committees, and citizens who wish to participate in elections. Moreover, there are potential financial and legal consequences for both unintentional and intentional reporting violations. At the federal level, these tasks are usually delegated by the candidates to experienced treasurers, professional accountants, and other staff, because mistakes can be costly. But this professionalization of course contributes to the growth of election costs. The Court in reviewing this process has acknowledged that reporting is a burden on time and privacy, but has generally supported reporting and disclosure because the benefits seemed to outweigh the costs. With the rise of electronic reporting, the burden has been eased somewhat. Act Blue, for instance, make it possible for donors to report their required information online (e.g. address, occupation, date of contribution) and transfer funds at the same time. The FEC and their state equivalents also provide helpful websites, FAQs and interactive assistance for those who are in doubt about what they need to do. The contribution and expenditure information is disclosed both in the FEC website but also increasingly by nonprofit groups such as Opensecrets.org [2].

When the Supreme Court took up disclosure in *Buckley v. Valeo*, its primary concern was small, fringe groups espousing potentially unpopular non-mainstream views. The new disclosure problem reflects both the greater openness of the Internet and the more polarized politics in America. To put it in more concrete terms, the names of people who make perfectly legal and limited contributions to candidates of choice can be posted on the Internet, exposing them to organized or random acts of harassment, economic punishment, or even violence.

But what does the state get in return? As long as direct contributions are limited (e.g. to less the \$2,400), there is no serious threat of quid pro quo corruption. One might have a stronger case with unlimited independent contributions or expenditures, but even so, if the information is reported in a complete and timely fashion, the government has what it needs to move forward with a corruption charge. Nor does exposing the identity of donors really assist enforcement. It is true that the FEC and their state counterparts rely heavily on reports of likely infractions from opposition parties, committees and candidates, but crowdsourcing often leads to exaggeration and unsubstantiated charges that are mainly used as campaign fodder. It would be better to rely more heavily on auditing by professional staff and to enhance agency resources. In any event, enforcement would be far more effective if we assigned individuals unique donor numbers for reporting purposes (just like a Social Security number or taxpayer ID) that would apply to all contributions and expenditures at any level rather than continuing to rely on the current system of releasing names and letting opposition researchers sift through the files for anomalies.

The strongest explicit, court-condoned argument for revealing donor identity is that it provides valuable voter information. Academic studies have shown that many voters rely on cues such as the source and amount of contributions from given sectors of the economy, political committees, regions, and the like to make inferences about the value and motives of competing candidates or initiative measures. While one could imagine the value in knowing that candidate Jones gets most of his money from oil companies, doctors, or the SEIU, there is little or no informational gain from knowing the specific names and home addresses of the company executives, doctors, or union members who make the contribution.

Perhaps because our disclosure rules were developed in less polarized and transparent times, we have never sufficiently distinguished between full reporting and semi-disclosure. But given the potential dangers of exposing the identities of people exercising fundamental political rights, it is a distinction we need to take more seriously. We already apply semi-disclosure in the release of census data, taking care to ensure that the income level or other sensitive personal information is aggregated at a level (tract, block, or block group) that protects individual privacy. It is odd and unacceptable that we do less for core political actions such as making contributions.

At the same time, with the loosened definition of electioneering communications, the ability to spend without reporting and semi-disclosing through exempt nonprofits has to end. No doubt some have chosen to invest in this route because it better protects privacy, but privacy could be preserved with semi-disclosure. Others are quite possibly purposely trying to keep relevant cue information from the voters whom they are trying to persuade, but that cannot be an acceptable reason to maintain the

status quo with respect to nonprofit disclosure exemptions.

In any event, anonymity is neither the most valuable feature of the super-PACs nor the most important reason for their growth. Like the party soft money in the 90s, super-PACs offer a flexible way to raise and transfer large amounts of money to key areas and states within an election cycle. Just as presidential elections have come to focus primarily on a small number of swing states, midterm Congressional strategies focus increasingly on the toss-up seats, with money ebbing and flowing in a targeted way as the prospects for winning in particular seats changes during the campaign. Candidates generally prefer to control their own campaign spending and message development themselves, and their consultants want to reap the fees associated with campaign spending (especially media buys). However, the "hard money" system of candidate contributions that they prefer is woefully inefficient by comparison with soft money despite the capacity for transfers between candidates, because too much money inevitably ends up in safe or uncontested seats. Independent spending will continue to thrive for efficiency reasons even without offering anonymity.

While some reform is needed in the form of semi-disclosure to assist voters make decisions, other aspects of the new disclosure agenda as revealed by the DISCLOSE Act are more problematic. Disclosure requirements linked to threshold independent spending levels and disclaimer provisions have an implicit motive that reaches beyond enforcement, voter education, and preventing corruption, namely discouraging large contributions and expenditures. Public disclosure and disclaimer, in other words, is tied to an equity goal that the Supreme Court has ruled out as a legitimate reason for limiting contributions. The implicit agenda works as follows: by identifying the names of big donors who spend independently, or by forcing big donors or the executives of companies that pay for electioneering communications to put disclaimers on the ads that they fund, public disapproval will be focused on them, and this will discourage them from undertaking expensive independent actions.

This might indeed work in some cases, but it raises two problems. First, it unleashes a form of "public pressure" on these individuals who are exercising legal fundamental rights. In other words, it diminishes individual autonomy. Secondly, it does so for a purpose that the Supreme Court has not approved of — equality of speech. Since *Buckley*, the Court has been very explicit in opposing the goal of equalizing voices through contribution or expenditure limits. Attempting to discourage large independent expenditures and electioneering through total disclosure and disclaimers is effect a "soft" limitation (i.e. relying on informal constraints like public pressure or shame) as opposed to a hard or legal limitation. It might not be as effective, but it is likely to have some impact. But if hard limits for the sake of equality of voice are not permissible, why would soft limits be acceptable?

The reform community's rationale is clear. The cases *Federal Election Commission v. Wisconsin Right to Life* and *Citizens United v. Federal Election Commission* blew a substantial hole in the McCain-Feingold approach to soft money, allowing a broader category of electioneering communications to be paid for out of corporate and trade union treasuries. The almost exponential growth of both super-PAC and conventional independent spending in 2010 as compared to the mid-term in 2006 looks eerily like the rapid growth of party soft money in the nineties — the very problem McCain-Feingold was meant to patch. Because the Republicans were the quickest to exploit this and had the more favorable political winds behind them in 2010, the Democrats have been and will continue to be the most vocal critics of this development.

Critics of McCain-Feingold predicted that this would happen when the bill was being considered, but the reform proponents turned a deaf ear, reasoning that they would address one problem at a time. But now the inevitable has happened — more flexible, efficient, independent soft money spending has found another avenue that will be almost impossible to shut off. In the wake of the Court decisions that have further enabled this process, it is only natural that reformers would want to find a way to gain back what has been lost in the battle against soft money. But using transparency as a weapon to combat inequality of voice is a dangerous game to play. It promotes forms of disclosure that are not narrowly tailored and invites closer Court scrutiny of disclosure laws. It is wiser to give voters the information they really need to make informed choices rather than extend disclosure's reach into realms that have been clearly rejected by the Court.

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[1] a *Washington Post* editorial: <http://www.washingtonpost.com/wp-dyn/content/article/2010/10/30/AR2010103003268.html>

[2] Opensecrets.org: <http://www.opensecrets.org/>

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