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The Costs of Mandating Disclosure

Posted By [John Samples](#) On November 10, 2010 @ 11:00 am In [Reaction Essay](#) | [Comments Disabled](#)

The composer Benjamin Britten once said that there “are a few composers, a very few, when I hear a work I do not like, I am convinced that it is my own fault. Verdi is one of those composers.” I feel the same about the political scientist Bruce Cain, *mutatis mutandis*.^[1] Were I to disagree much with a Cain article on campaign finance, I would think I was in error. His essay here urges us to revisit our assumptions about disclosure. In that spirit, let me pose some questions about the hitherto unquestioned value of mandating disclosure.

Let me begin by suggesting how libertarians — or others who accord substantial weight to freedom from coercion — might think about disclosure. A person wishes to give money to support a candidate for office (or a party). The candidate (or party) accepts the contribution. For those who do not voluntarily disclose the action, what could justify government mandating disclosure?

Professor Cain mentions two rationales for such coercion: preventing corruption and informing voters. Cain argues that current contribution limits are enough to prevent corruption. Until now many libertarians argued such limits should be loosened or eliminated. Disclosure would then bear the full weight of preventing corruption. Such limits might then still be liberalized, but eliminating them now seems less relevant.

The *Citizens United* decision invalidated a ban on electoral speech paid for by groups taking the corporate form. The recent decision in [SpeechNow.org vs. Federal Election Commission](#)^[1] indicates that individuals in association may spend as much as they wish advocating the election or defeat of a candidate. Consider an example that follows from these two decisions. A donor gives money to (say) Karl Rove, who then gives it to a broadcaster. Candidates and their parties are not involved and cannot be corrupted. If Rove is to be forced to disclose these activities, it cannot be to prevent corruption.

Mandated disclosure will be the regulation of choice for these new ways of funding speech. This regulation will be constitutionally justified as a way of informing voters. The courts have generally concluded that the benefits of such information outweigh the costs of disclosure. Do they?

Americans know little about government and public policy. How then can voters cast a ballot that reflects their interests and ideals? It is thought that disclosed information about donations helps voters with this task. For example, a voter on the left might learn from a disclosure that unions supported a candidate; that information provides a shortcut for the voter to support that candidate.

The voter education rationale seems paternalistic: the government is trying to prevent you from hurting yourself by voting for a candidate who opposes your interests. To achieve that, the government forces others to reveal information about their political activities. In short, government mandates disclosure to provide benefits to voters who refuse to fulfill the responsibilities of citizenship. Partisans of disclosure see it as an unalloyed good. The truth is less pleasing. Mandated disclosure both reflects and fosters the decline of self-government in the United States. The American framers thought a republic demanded much from citizens. We seem happy to demand very little.

For much of the past four decades — roughly the era of modern campaign finance regulation — most people assumed the information provided to voters by mandated disclosure came at little or no cost to First Amendment rights. The continual demonization of money in politics, and its contributors, nourished that assumption. The cant phrase “it’s only disclosure” suggested such mandates were both costless and a minimal starting point for the regulation of money in politics. Disclosure was the least we could do given that those who engaged in private financing of campaigns were involved in a shady practice.

Professor Cain’s essay suggests why people assume mandated disclosure has few consequences for free speech and association. These days people passionately engaged in political struggle recognize fewer restraints in pursuit of victory than in the past. Disclosure enables partisans to raise the cost of political participation through political abuse and economic harms; a higher price, of course, leads to a lower quantity in the familiar downward sloping demand curve. (Justice Thomas’ opinion in *Citizens United* provides details about the threats and harassment facilitated by disclosure in ballot

initiatives).

The costs of mandated disclosure are probably higher than we know. After all, the costs of non-participation do not manifest themselves; disclosure leads citizens to decide not to do something. Thus the effects of disclosure often will not leave data behind to be measured and analyzed. We are left with reports like George Soros' comment that a few contributors stayed on the sidelines in 2004 because of disclosure. Such stories should give us pause. Donors solicited by Soros in 2004 would be fostering a challenge to a sitting president. If that president were re-elected, he would know who funded his opposition. Most presidents, recalling the fate of Richard Nixon, would probably refrain from going after their enemies. But who knows? The same could be said of senators and representatives. Yes, those who can stand the heat stay in the kitchen, to paraphrase Harry Truman. But how many people stayed out of, or left the kitchen because mandated disclosure raised the temperature by several degrees?

Mandated disclosure imposes another, more subtle cost on American politics. It directs public attention toward the sources of funding for speech and away from the content of speech, apart from its conclusion to "vote for" or "vote against" a candidate. The voter is asked to endorse or reject the putative interests of the funder rather than assess the content of the relevant political speech. This tendency sits uneasily in a nation whose constitutional doctrines all but automatically invalidate content-based restrictions on speech. Why do we care so much about the content of speech? It is essential to persuading others and thus to a government based on argument and consent. By depreciating the content of speech in favor of the putative interests of funders, mandated disclosure moves us away from that ideal of popular government. That change, subtle and "realistic" as it is, should also count as a cost of disclosure.

Professor Cain proposes to sustain the benefits of disclosure while lowering its costs. Voters would learn which interests, but not which individuals, supported a particular instance of political speech. Who would decide how to present contribution and independent expenditure information to voters? The relevant authority would have to decide, for example, whether some contributions were "labor union backed" or "supported by the friends of working families." Many such decisions would be necessary. Perhaps neutral categories would be used, but there is reason to be skeptical. Votes and hence power would be in the balance. Moreover, public opinion research tells us that small changes in wording can affect responses from citizens.

Professor Cain also proposes that the government would collect detailed information about spending but not disclose it. Auditors would oversee adherence to contribution limits in the relevant cases and presumably refer accusations of corruption to the Department of Justice. Would such information be used for political retribution? Or would it be like tax data, occasionally abused as in the Nixon administration, but generally not a weapon in political battles? If these questions can be answered, Professor Cain's proposal offers an improvement over the status quo.

That said, I wonder if Professor Cain's proposal might lack friends in Congress. Last year the majority in the House of Representatives proposed a DISCLOSE Act that manifestly sought to discourage electoral spending by putative allies of the minority. For Professor Cain, discouraging speech is bug in a bill; for partisan majorities it may be a feature. It is possible, however, that the difficulty of discouraging speech through disclosure may open the door for a proposal like Cain's, one that attends to the costs as well as the modest and questionable benefits of disclosure.

[1] Cain may well be the Verdi of American political science. I am not its Britten.

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[1] *SpeechNow.org vs. Federal Election Commission*: <http://www.fec.gov/law/litigation/spechnow.shtml>