DISCLOSURE IN A POST-*CITIZENS UNITED* REAL WORLD

By

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Introduction

That wealthy individuals, corporations and unions, or well-funded associations of people should make large contributions to parties and candidates, and that expenses in political races are not legally restricted, is unpopular with a significant majority of Americans.[1] At the same time, most legal thinkers acknowledge that campaign finance laws raise serious questions about free speech that must be analyzed under First Amendment doctrine.[2] Because it takes money to widely propagate almost any political point of view and to reach substantial numbers of voters, or to organize and maintain the infrastructure of a campaign for office, restrictions on contributions to candidates, parties, and political committees, and limitations on expenditures for political purposes, seriously threaten rights to speech and association.[3] Indeed, while substantial majorities favor limiting contributions and expenditures, there is also broad public support for political spending as a form of free speech.[4]

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[1] *See* Nathaniel Persily and Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. PA. L. REV. 119, 133, 139-141 (2004); Lydia Saad, *Public Agrees With Court: Campaign Money is "Free Speech"*, GALLUP (Jan. 22, 2010), http://www.gallup.com/poll/125333/public-agrees-court-campaign-money-free-speech.aspx.

[2] Since Buckley v. Valeo, 424 U.S. 1 (1976) *,* twenty justices have sat on the Supreme Court, and all save Justices Stevens and White have agreed that the issue is one that should be analyzed as a First Amendment question.

[3] *See Buckley*, 424 U.S. at 64 ("significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest.").

[4] Saad, *supra* note 1.

Former House Minority Leader Richard Gephardt may have captured the perceived dilemma when he stated, "What we have is two important values in direct conflict: freedom of speech and our desire for healthy campaigns in a healthy democracy."[5] The intensity of this conflict is underscored by the length of the Court's campaign finance opinions—*Buckley v. Valeo*[6] and *McConnell v. Federal Election Commission*[7] are two of the longest reported cases in the Court's history.

Citizens United v. Federal Election Commission,[8] which struck down laws prohibiting corporations (and by implication unions) from making independent expenditures in political races, is not one of the longer campaign finance cases, even with Justice Stevens' rambling, ninety-plus page dissent. Arguably, it is far from the most important in its practical ramifications.[9] But *Citizens United* is almost certainly the most hotly debated of the Court's campaign finance decisions. More than in *Buckley*, *Bellotti*,[10] *Austin*,[11] *McConnell,* or any of the

[5] George Will, Editorial, *Fending off the Speech Police,* WASH. POST, March 11, 2001 (quoting Richard Gephardt). Gephardt has been criticized for this statement, including by this author, *see* Bradley A. Smith, *Campaign Finance Reform's War on Political Freedom,* CITY J. (July 1, 2007), *available at* http://www.city-journal.org/html/ws2007-07-01bs.html), but the statement is reflective of much thinking on the subject and perhaps, on further reflection, not so far off the mark.

[6] 424 U.S. 1 (1976).

[7] 540 U.S. 93 (2003).

[8] 558 U.S. 310 (2010).

[9] *See* Richard Briffault, *Corporations, Corruption, and Complexity: Campaign Finance After* Citizens United, 20 CORNELL J. L. & PUB. POL'Y 643, 646 (2011) ("*Citizens United* is unlikely to 'unleash' corporate campaign spending"); Keith E. Hamm et al., The Impact of *Citizens United* in the States: Independent Spending in State Elections, 2006–2010 (Oct. 22, 2012) (unpublished manuscript) (*available at* http://www.cfinst.org/pdf/state/State-Indep-Spdg_2006-10_Working-Paper-as-Released-22October2012.pdf.

Certainly *Buckley* outranks *Citizens United* in the hierarchy of campaign finance decisions, but even several Court of Appeals decisions, such as SpeechNow.org v. Fed. Election Comm'n, 599 F.3d 686 (D.C. Cir. 2010) (allowing pooling of unlimited contributions for independent expenditures, thus creating "Super PACS") and Fed. Election Comm'n v. Central Long Island Tax Reform Immediately Committee, 616 F.2d 45 (2d Cir. 1980) (reinforcing *Buckley's* narrow definition of political communications covered by the Federal Election Campaign Act) have had greater practical effect than *Citizens United,* even though the legal theories of *Citizens United* can be viewed as far more reaching.

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

[11] Austin v. Mich. State Chamber of Commerce, 494 U.S. 652 (1990).

Court's prior decisions, there is little room for compromise in *Citizens United.* The Court majority has been criticized for "reaching out" to address an issue not squarely presented in the lower court or in the petition for certiorari.[12] The opinion is absolutist in tone, stating that, at least for purposes of constitutional review, independent expenditures can never create the type of corruption sufficient to justify government intrusions on the rights of speakers. For its part, the dissent is equally or even more absolutist. Rather than concur in the judgment on any of the grounds suggested in the majority opinion, the dissenters stake out as radical a position in favor of government regulation as one can imagine. In essence, the dissent argues that the government can censor, even ban, the distribution of a documentary movie about an issue of vital public importance solely because the movie is—like virtually all films—produced or distributed by a corporation.[13]

Lillian Bevier, in an article written before *Citizens United,* neatly summarized the gulf separating the two sides:

> [O]ne finds the justices talking past one another. They share neither empirical assumptions nor theoretical premises. For the majority . . . freedom to spend money on political speech—including freedom of corporations to spend money on political speech about issues—is *the answer* . . . The dissenters take an utterly opposing view. From their perspective, corporate and union freedom to spend money on political speech is *the problem*. (emphasis in original).[14]

Yet as the two sides have gazed at each other across this divide, there has been one area of reasonably broad agreement–disclosure of campaign contributions and spending. In *Citizens United,* eight justices voted to uphold the disclosure requirements of the law.[15]

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[12] *See* Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance by the Roberts Court*, 2009 Sup. Ct. Rev. 181, 206–213 (2009).
[13] *Citizens United,* 130 S. Ct. at 929 (Stevens, J. dissenting).
[14] Lillian R. BeVier, *First Amendment Basics Redux*: Buckley v. Valeo *to* FEC v. Wisconsin Right to Life*, 2006-07*, Cato Sup. Ct. Rev. 77, 106–07 (2007).
[15] 130 S. Ct. at 913–916. Justice Thomas dissented on this point. 130 S. Ct. at 980–982 (Thomas, J. concurring in part and dissenting in part).

Not surprisingly the primary political reaction to *Citizens United* has been a demand for new laws and regulations governing the disclosure of political spending and contributions.[16] In this paper, I am going to suggest that proposed new regulations have tended to overlook some serious practical problems of increased compulsory disclosure; that the effort to mandate increased disclosure is, at least in substantial measure, based on illegitimate intent and an incorrect understanding of the extent of compulsory disclosure laws both before and after *Citizens United*; and that the new disclosure sought threatens hard won constitutional rights that we ought not surrender easily. I conclude that compulsory disclosure cannot bear the weight some now seek to place upon it, and that in trying we may endanger other important values. These portions constitute Parts III and IV, respectively, of this paper. I start in Parts I and II, however, with a review of campaign finance disclosure laws pre- and post-*Citizens United.*[17]

I. The State of Campaign Finance Disclosure Pre-*Citizen's United*

Disclosure, or "publicity" as it was once called, has been at the core of campaign finance law since the practice of regulating political campaigns began in the early twentieth century.[18]

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[16] Beyond disclosure, *Citizens United* has been used as a rallying cry to try to raise support for tax-funded political campaigns, *see, e.g.,* Adam Skaggs & Fred Wertheimer*, Empowering Small Donors in Federal Elections*, BRENNAN CENTER FOR JUSTICE (Aug. 22, 2012), http://brennan.3cdn.net/b71b1ef6391b3a4813_5jm6bwz6j.pdf, and has sparked efforts to create various constitutional amendments to overturn the Court's campaign finance jurisprudence, *see* Ramsey Cox, *Sanders Applauds Obama's Support for* Citizens United *Amendment,* THE HILL (Aug. 31, 2012), http://thehill.com/blogs/floor-action/senate/246979-sanders-applauds-obamas-support-for-an-amendment-to-the-citizen-united-decision, or even to debate the two-century old doctrine of "corporate personhood." *See* Susana Kim Ripken, Citizens United, *Corporate Personhood, and Corporate Power: The Tension Between Constitutional Law and Corporate Law*, ST. THOMAS J. L. & PUB. POL'Y (forthcoming 2013).

[17] Although *Citizens United* is the decisive case in the public mind, the U.S. Court of Appeals decision in SpeechNow.org v. Federal Election Commission, 599 F.3d 686 (D.C. Cir. 2010), decided just a few weeks later, is perhaps equally important to the discussion. I will continue to use *"Citizens United"* as convenient shorthand for the break that occurred in the late winter of 2010.

[18] *See e.g.* PAULA BAKER, CURBING CAMPAIGN CASH: HENRY FORD, TRUMAN NEWBERRY, AND THE POLITICS OF PROGRESSIVE REFORM 59–61 (2012).

The first federal publicity law was the Federal Corrupt Practices Act of 1910,[19] and by the time *Citizens United* was decided in 2010, forty-nine states and the federal government required some degree of disclosure of campaign contributions and spending.[20]

Citizens United neither made nor required changes to campaign disclosure laws. Nor have disclosure provisions been upended in any of the Roberts' Court's other decisions.[21] Similarly, in *SpeechNow.org v. Federal Election Commission*, the D.C. Court of Appeals decision that gave the green light to so-called Super PACs, the Court upheld the challenged disclosure provisions and the Supreme Court denied certiorari.[22]

In light of this, the casual observer could be excused for wondering about all the rhetoric regarding disclosure of campaign spending and contributions that has followed *Citizens United.* On July 22, 2012, this author entered "citizens united secret money" into the Google search engine, and returned "about 5,710,000 results." The first three hits, in the small teasers to the entries, noted (1) "Secret corporate money continues to swamp the American political process… wake of the 2010 U.S. Supreme Court ruling in Citizens United" (2) "Credit the Supreme Court's grotesque decision in Citizens United vs. the Federal…a record amount of secret money flooding our democracy," and (3) "'This flood of secret money unleashed by Citizens United is drowning out the voices of middle-class Americans,' [Sen.] Whitehouse added."[23] Such entries go on for page after page.

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[19] Federal Corrupt Practices Act, ch. 392, 36 Stat. 822 (1910).
[20] The lone holdout was North Dakota, a state not generally known for its political corruption. THE CAL. VOTER FOUND., THE CENTER FOR GOVERNMENTAL STUDIES, & UCLA SCHOOL OF LAW, *Grading State Disclosure 2008* (2008), http://campaigndisclosure.org/gradingstate/GSD08.pdf.
[21] Fed. Election Comm'n v. Wis. Right To Life, 551 U.S. 449 (2007). *See* 72 Fed. Reg. 72899, 72910–12 (Dec. 26, 2007) (Federal Election Commission Revisions to 11 C.F.R. § 114 after *Wisconsin Right to Life* decision).
[22] SpeechNow.org v. Fed. Election Comm'n, 599 F.3d 686, 698 (D.C. Cir. 2010).
[23] These synopses come from links to, respectively: (1) Michael Kirkland, *Under the U.S. Supreme Court: Citizens United – My how the money rolls in*, UPI (July 15, 2012),

To understand the apparent disconnect between the sudden concern about "secret money" in politics and its relation to a series of cases that did not change the laws governing campaign disclosure, during a time in which neither Congress nor the Federal Election Commission made changes in the rules governing disclosure, we will take a brief tour through the realm of disclosure as it existed at the time of *Citizens United*. We will start that discussion by briefly reviewing the legal framework in place at the start of January 2010, when *Citizens United* was decided.

Though battles over limitations and prohibitions on contributions and expenditures have tended to dominate political and legal debate (at least until *Citizens United),* disclosure of campaign contributions and spending has never been an easy issue for the Supreme Court. As is so common in the world of campaign finance, our discussion begins with the seminal case of *Buckley v. Valeo*.[24] In *Buckley*, the Court for the first time faced a First Amendment challenge to campaign disclosure laws. The Court began by recognizing compulsory disclosure as a First Amendment issue that "in itself, can seriously infringe on privacy of association and belief" and

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http://www.upi.com/Top_News/US/2012/07/15/Under-the-US-Supreme-Court-Citizens-United-My-how-the-money-rolls-in/UPI-35041342337400/; (2) Robert Reich, *The Secret Big-Money Takeover of America,* HUFFINGTON POST (Oct. 7, 2010), http://www.huffingtonpost.com/robert-reich/the-secret-bigmoney-takeo_b_754938.html; and (3) Eric W. Dolan, *Sen. Whitehouse: Secret money drowning out voices of the middle-class*, THE RAW STORY (July 15, 2012), http://www.rawstory.com/rs/2012/07/15/sen-whitehouse-secret-money-drowning-out-voices-of-the-middle-class/. In each case, the text reflects the synopses as they appeared on my Google screen on that date, including the ellipses in the first two quotes. A July 23, 2012 search of the Lexis news database for the two years from July 23, 2010 through July 22, 2012 yielded 490 stories using the terms "Citizens United" and "secret money." A search using just the term "secret money" for the two years immediately preceding *Citizens United* yielded only 269 hits, of which only 14 used the term in connection with U.S. politics, and five of those 14 did so only because the byline went to reporters for National Public Radio's "Secret Money Project."

[24] 424 U.S. 1 (1976). For a brief overview of the early disclosure laws, *see Buckley,* 424 U.S. at 61–62. More detail appears in Allison R. Hayward, *Revisiting the Fable of Reform,* 45 HARV. J. ON LEGIS. 421, 428–441 (2008); *see generally* ROBERT MUTCH, CAMPAIGNS, CONGRESSES AND COURTS: THE MAKING OF FEDERAL CAMPAIGN FINANCE LAW (1988).

holding that government mandated disclosure must be subject to "exacting scrutiny," requiring more than "some legitimate governmental interest."[25]

The Court recognized three governmental interests of sufficient "magnitude" for disclosure of contributions and expenditures to survive such "exacting scrutiny." "First, disclosure provides the electorate with information" that assists voters in "plac[ing] each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches [and]… alert[ing] the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office."[26] Second, disclosure can deter "corruption" or the "appearance of corruption" by allowing the public to "detect any post-election special favors that may be given in return."[27] And third, disclosure would provide information useful to the government in enforcing the restrictions on contributions that the Court upheld.[28]

But the Court nonetheless substantially trimmed back the Federal Election Campaign Act's ("FECA") disclosure provisions on First Amendment grounds. The Court recognized that compulsory disclosure could have a chilling effect on political speech.[29] The original language of the FECA required registration and reporting as a political committee by any group that made expenditures or contributions "for the purpose of influencing" a candidate election.[30] The Court was concerned that this would reach groups involved "purely in issue discussion," where the government's interest was less compelling.[31] Compulsory disclosure of funding for issue speech

[25] *Buckley*, 424 U.S.. at 64 (citations omitted).
[26] *Id.* at 66–67.
[27] *Id.* at 67.
[28] *Id.* at 67–68.
[29] *Id.* at 64.
[30] *Id.* at 145.
[31] *Buckley*, 424 U.S. 1, 79.

would not address any of the three government concerns the Court had identified as being of a sufficient magnitude to overcome the First Amendment hurdles.[32]

Thus, to avoid problems of vagueness and overbreadth, the Court clearly rejected the idea that disclosure is always constitutional, and narrowly construed what would count as candidate or election-related speech that could trigger political committee status and reporting of all contributions and expenditures. It construed the compulsory disclosure of donors and members to reach "only…organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate," or "funds used for communications that expressly advocate the election or defeat of a clearly identified candidate."[33] The definition of "expressly advocate," in turn, was related back to footnote 52 of the opinion, which narrowly construed the phrase to "communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'"[34]

Within the *Buckley* framework, groups could be forced to disclose members and donors only to the extent they qualified as "political committees," which meant that they had a primary purpose of electing candidates,[35] or that they spent money to finance communications within the narrow framework of *Buckley*'s footnote 52. To put it in an affirmative format, at the federal

[32] *Id.* at 79–80.
[33] *Id.* at 79–80.
[34] *Id.* at 44 n. 52, 80 n. 108.
[35] Political party committees, candidate committees, and registered political action committees were assumed to meet this criterion, and thus were required to disclose all donors; whether other groups were determined to be political committees would in turn depend on their spending for express advocacy political communications. What constitutes a "primary purpose" has never been fully determined. It is more than identifying candidates as aligned to specific issues, *see* Fed. Election Comm'n v. Mass. Citizens for Life, 479 U.S. 238, 262 (1986), and has often been tied in with spending a threshold percentage of an organization's total budget, although not definitively, *see* Akins v. Fed. Election Comm'n, 101 F.3d 731, 743-44 (D.C. Cir. 1996), *vacated and remanded on other grounds*, 524 U.S. 11 (1998).

level, all political action committees ("PACs"), campaign committees, and political parties were required to disclose all of their donors over the federal aggregate threshold of $200, and other groups would do so to the extent that they accepted contributions and made expenditures for communications including "express advocacy."[36] Not disclosed, however, were all of the funders of what came to be known as "issue ads," political advertisements that discussed candidates and issues but stopped short of express advocacy. Initially, this seemed to matter relatively little. Through the 1980s and early 1990s the Federal Election Commission ("FEC") and various political speakers waged a running fire fight in the federal courts over what constituted "express advocacy," with the FEC getting the worst of it, but the stakes seemed to be less about disclosure and much more about whether the spenders could accept contributions outside the limits and source prohibitions of FECA to run those ads.[37] Because groups which did not have a major purpose of candidate advocacy rarely accepted money for the purpose of making "express advocacy" independent expenditures—most, in fact, were barred from doing so because they were organized as non-profit corporations and thus precluded from "express advocacy" by the corporate spending ban of 2 U.S.C. 441b—they rarely had to disclose information on donors and members.

As campaign costs rose faster than inflation, however, contribution limits remained unadjusted for inflation, such that the maximum legal contributions shrank to a fraction of their original amount in actual purchasing power.[38] As a result, political candidates, fundraisers,

[36] Since almost every state passed comprehensive disclosure laws within a few years of *Buckley,* state regimes were essentially similar except for the dollar amount that triggered registration and disclosure.
[37] *See* Fed. Election Comm'n v. Christian Action Network, 110 F.3d 1049, 1055 (1997) and cases cited therein.
[38] I used the Bureau of Labor Statistics *CPI Inflation Calculator* (last visited Feb. 20, 2013)http://www.bls.gov/data/inflation_calculator.htm/ . By 1996, the maximum legal contribution to a national political party, $20,000, had a purchasing power barely one-third of what it had when enacted in

consultants, and donors all looked for additional sources of funds to adequately finance campaigns.[39] Issue ads run by groups that were not political committees were a logical solution, because, per *Buckley,* they could be run with money raised outside the limits and prohibitions of FECA. That donors to organizations running such ads could remain anonymous was mere sprinkles on the donut.

Thus, by the 2000 campaign, issue ads were growing rapidly as a percentage of total campaign spending. When carefully constructed, their effect on voters was little different from that of a traditional political ad. For example, in 2000, the NAACP Voter Action Fund, a nonprofit social welfare group organized under Section 501(c)(4) of the tax code, ran the following ad:

> *Renee Mullins (voice over*): I'm Renee Mullins, James Byrd's daughter. On June 7, 1998 in Texas my father was killed. He was beaten, chained, and then dragged 3 miles to his death, all because he was black. So when Governor George W. Bush refused to support hate-crime legislation, it was like my father was killed all over again. Call Governor George W. Bush and tell him to support hate-crime legislation. We won't be dragged away from our future.[40]

This thirty-second TV spot, featuring graphic reenactment footage, began running on October 25, 2000, just a few days before the 2000 presidential election.[41]

These types of issue ads were generally run by three types of groups: (1) nonprofit welfare organizations and trade associations organized under Section 501(c)(4) and (c)(6)

1974—it was the equivalent of $7253 in 1974. Similarly, by 1996 the value of a maximum individual contribution to a campaign committee, $1000, would have been just $363 in 1976.

[39] *See* Frances R. Hill, *Probing the Limits of Section 527 To Design a New Campaign Finance Vehicle,* 86 TAX NOTES 387 (2000).

[40] *Byrd Vote-TV* , (Oct. 25, 2000)http://www.gwu.edu/~action/ads2/adnaacp.html.).

[41] *Id*. For numerous other examples, see generally Taylor Lincoln et al., *The New Stealth PACs: Tracking 501(c) Non-Profit Groups Active in Elections,* PUBLIC CITIZEN (2004) *available at* http://www.stealthpacs.org/notebook/, *and* David B. Magleby, *Interest-Group Election Ads*, OUTSIDE MONEY: SOFT MONEY AND ISSUE ADVOCACY IN THE 1998 CONGRESSIONAL ELECTIONS 41–62 (David B. Magleby ed., 2000).

of the Internal Revenue Code, (2) unions; and (3) political organizations under Section 527 of the Code that, because they did not make contributions to candidates or parties, or finance express advocacy communications, did not qualify as "political committees" under the FECA.[42]

While this activity was often described as a "loophole" in the law,[43] it should be noted that the use of issue ads in this manner was predicted by the *Buckley* Court. In fact, one reason that the Court struck down FECA's limitations on independent expenditures was that:

> [s]o long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views. The exacting interpretation of the statutory language necessary to avoid unconstitutional vagueness thus undermines the limitation's effectiveness as a loophole-closing provision by facilitating circumvention by those seeking to exert improper influence upon a candidate or officeholder. It would naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence to believe that they would have much difficulty devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefited the candidate's campaign.[44]

In 2000, Congress passed legislation requiring groups organized under Section 527 to disclose the names of general donors to the Internal Revenue Service, unless they were already required to report to the FEC or to state officials.[45] In other words, because the *Buckley* Court had held that express advocacy was the trigger for compulsory disclosure under FECA, Congress used the tax code to attempt to achieve greater disclosure of issue ads. Groups organized under Section 527 but not subject to state or FEC disclosure as

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[42] *Compare* 2 U.S.C. § 431(4)(2002) (defining political committee), *with* 2 U.S.C. § 431(9)(B)(2002) (defining expenditure).
[43] *E.g.*, Wilson Huhn, *Citizens United v. F.E.C. (Part 2): The History of the Constitutionality of Campaign Finance Laws*, AKRON LAW CAFÉ (Feb. 8, 2010), *available at* http://www.ohioverticals.com/blogs/akron_law_cafe/2010/02/citizens-united-v-f-e-c-part-2-the-history-of-the-constitutionality-of-campaign-finance-laws/.
[44] *Buckley*, 424 U.S. at 45.
[45] 26 U.S.C. § 6104 (2006).

political committees were required to either report donors to the IRS, where they would be made public, or to pay a tax on income not so reported.[46] The disclosure regime was considerably less thorough than that required of political committees under FECA, but the core disclosure of donors was achieved. However, groups operating under Section 501(c)(4) of the Code remained free of reporting obligations with respect to their issue ads.

In the Bipartisan Campaign Reform Act of 2002[47] (commonly known as "BCRA" or "McCain-Feingold" for its lead Senate sponsors), Congress sought to bring more issue ads into the orbit of campaign finance law. Section 201 of BCRA defined "electioneering communications" as broadcast ads costing at least $10,000 and mentioning a candidate within thirty days of a primary election or sixty days of a general election. Corporate or union funding for such ads was prohibited, and the law imposed added reporting requirements on organizations paying for such ads, including donor information on persons who contributed to the special accounts that the law required be established to pay for these "electioneering communications." Both the prohibitions on funding and the disclosure provisions of Section 201 of BCRA were distinguished from the FECA provisions at issue in *Buckley* and upheld in *McConnell.*[48]

Thus, on the eve of *Citizens United* and *SpeechNow.org,* the federal disclosure regime looked like this:

[46] The Court has given more leeway to the IRS than to the FEC to define political activity broadly, given that tax status is not a constitutional right. *See* Regan v. Taxation With Representation of Washington, 461 U.S. 540 (1983).

[47] Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155 (2002) (codified at 2 U.S.C. § 434 (2007)).

[48] McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003). In Fed. Election Comm'n v. Wis. Right to Life, 551 U.S. 449 (2007) (*"WRTL II")* the Supreme Court substantially narrowed the scope of the provisions limiting funding for issue ads, but it did not restrict or constrain the disclosure provisions in any way. *See* 72 Fed. Regis. 72899, 72910-12, Dec. 26, 2007 (Federal Election Commission Revisions to 11 C.F.R. § 114).

- All federal candidate committees were required to disclose all donors and expenditures over $200 to the FEC;[49]
- National political parties and state and local parties engaging in $1000 or more of federal activity were required to disclose all donors and expenditures in excess of $200 to the FEC.[50]
- All federal PACs were required to disclose donors and expenditures in excess of $200 to the FEC.[51]
- 527s that avoided political committee status by avoiding express advocacy were required to disclose donors over $ 200 to the IRS;[52]
- Any group running "electioneering communications" was required to disclose data on those expenses, including information on any person who contributed in excess of $10,000 for those ads, to the FEC.[53]
- Any person making independent expenditures (that is, ads including "express advocacy") in excess of $250 was required to report to the FEC.[54]

Exempt from compulsory reporting and disclosure of donors was spending by organizations organized under Section 501(c) of the Internal Revenue Code for issue ads that did not constitute "electioneering communications" because they were run outside the thirty and sixty day pre-election windows of BCRA.[55] However, even these ads–like all of

[49] 2 U.S.C.S. § 434(b) (LexisNexis 2009).
[50] *Id*.
[51] *Id.*
[52] 26 U.S.C.S. § 527(j)(3)(B) (LexisNexis 2009).
[53] 2 U.S.C.S. § 434(f)(1) (LexisNexis 2009).
[54] 2 U.S.C.S. § 434(c)(1) (LexisNexis 2009).
[55] Prior to *Citizens United*, most 501(c) organizations could not run "independent expenditures"—that is, express advocacy ads—because they were incorporated and therefore barred from doing so. A few nonprofits were able to make independent expenditures under a judicially created exemption for ideological nonprofits that relied on individual donations, *see* Fed. Election Comm'n v. Mass. Citizens for

the political ads–were required to include within the framework of the ad the name of the group that was paying for the ad (though not the name of donors to the organization).[56]

II. The Effect of *Citizens United* and *SpeechNow.org* on Disclosure

Citizens United and *SpeechNow.org* substantially altered the campaign finance landscape. In *Citizens United,* the Supreme Court ruled that corporations, and by implication unions, could make independent expenditures in political races. In *SpeechNow.org,* the Court of the Appeals for the D.C. Circuit, in a unanimous en banc decision that was not appealed by the FEC, ruled that PACs that only made independent expenditures—that is, that did not make contributions to candidates or parties or work in coordination with candidates or parties–could accept contributions without limit and were not subject to the source prohibitions of the FECA. Although SpeechNow.org was itself an unincorporated entity and did not intend to accept corporate funds, when combined with *Citizens United* the *SpeechNow.org* decision made clear that corporations, unions, and individuals could pool unlimited sums for independent expenditures, creating what became known colloquially as "Super PACs."[57]

While neither *Citizens United* nor *SpeechNow.org* altered the statutory disclosure system, they altered the rules against which disclosure took place by allowing corporate

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Life, 479 U.S. 238 (1986). These incorporated nonprofits were required to file reports with the FEC listing their independent expenditures and the names of donors who contributed for the purpose of making those expenditures.

[56] The FCC requires a sponsorship identification on broadcast television at 47 C.F.R. § 73.1212 (2012) and on cable television at 47 C.F.R. § 76.1615 (2006). For FEC rules mandating reporting and disclosure, *see* 2 U.S.C. §§ 431 (2002), 432 (2004), 434 (2007), 438 (1995), 439 (2002), 441(repealed); *see also* 36 U.S.C. § 510 (2002); *and* 11 C.F.R. §§ 104.1 to 104.22 (2006). Because most states have adopted similar rules to those of the FECA and BCRA, state disclosure rules are not substantially different, except that the thresholds for reporting are often lower and occasionally higher.

[57] This name appears to have originated with the pro-"reform" journalist Eliza Newlin Carney. *See* Eliza Newlin Carney, *Labor's Uphill Climb This Year,* NATIONAL JOURNAL (June 25, 2010), *available at* http://go.galegroup.com.ezproxy.stthomas.edu/ps/i.do?id=GALE%7CA229907911&v=2.1&u=clic_stthomas&it=r&p=ITOF&sw=w.

contributions to organizations that made independent expenditures and electioneering communications. Some have argued that this new background allows "secret money" into elections.

The argument that *Citizens United* (and *SpeechNow.org*) have enabled "secret money" to enter campaigns goes like this: incorporated 501(c)(4) and 501(c)(6) organizations can now make independent expenditures and electioneering communications about candidates. While the nonprofits will have to file the appropriate reports about their expenditures with the FEC, unless money is given specifically to run the ads in question, the donors to these non-profits will not be disclosed. Further, while so-called Super PACs are treated just as traditional PACs, and are required to register and report all donors over $200 to the FEC, those donors can include non-profit corporations. Thus, while the Super PAC will file with the FEC and will report that XYZ Nonprofit Corporation contributed to the Super PAC, donors to XYZ will not be disclosed.

Let us begin by noting that terms such as "secret" and "undisclosed" are somewhat out of place in discussing these donations to 501(c)(4) and (c)(6) organizations. Through the independent expenditure and electioneering communication reports filed with the FEC, the names of the sponsoring organizations that appear on the ads themselves, and the political files that must be maintained by broadcasters,[58] observers do know who has paid, at least nominally, for all these ads.

Of course, we do not necessarily know all that some observers would like to know—most importantly, who is supporting the advertiser with general contributions. But then

[58] 47 U.S.C. § 315(e) (2002), 47 C.F.R. § 73.1943 (2012). In 2012, the Federal Communications Commission required these files to be available on the internet for most network affiliates. *See* Second Report & Order*, In the Matter of Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations, etc.,* MM Dkt. Nos. 00-168 & 00-44, FCC No. 12-44 (rel. Apr. 27, 2012), 77 Fed. Reg. 27631 (May 11, 2012).

again, that was true before *Citizens United*. When non-profits ran ads such as the NAACP Voter Education Fund James Byrd ad,[59] observers did not necessarily know who was contributing to the non-profit.

Moreover, even donors to traditional PACs, parties, and candidate committees are not required to reveal their sources of income. Yes, the law does require such committees to ask about employers, but it does not require donors to disclose those employers to the committees, nor to reveal other sources of income that may have financed the contribution.[60] But this has always been true. It may be that this is legitimately a greater concern when discussing unlimited contributions to the newly created independent expenditure PACs than when discussing statutorily limited donations to candidates (a $2,500 limit in 2012) or traditional PACs ($5,000 limit). On the other hand, the so-called DISCLOSE Act ("Democracy Is Served by Casting Light on Spending on Elections"), as introduced in 2012, would have required donors to nonprofits making electioneering communications or independent expenditures of just $10,000 or more to be disclosed.[61] This is considerably less than the $30,800 that could be given legally by an individual to a political party without disclosing the original, underlying source of the income. That income might come from a lobbying contract for an industry or Indian tribe, from a foreign government for services or materials rendered, from a casino, or from government grants, yet its disclosure has not only never been required, it has never been considered a problem that has attracted the attention of the "reform" community. It may also be easier to learn

[59] *Byrd Vote-TV*, *supra* note 40.
[60] 2 U.S.C. § 431(13)(A) (2002); *but see* Republican Nat'l Comm. v. Fed. Election Comm'n, 76 F. 3d 400, 406 (D.C. Cir. 1996) ("The statute does *not* require political committees to report the information for 'each' donor. It only requires committees to use their *best efforts* to gather the information and then report to the Commission whatever information donors choose to provide.") (emphasis in original).
[61] *DISCLOSE: The Rise of Secret Money in Campaigns and Elections*, Public Citizen (July 24, 2012), *at* http://www.citizen.org/documents/rise-of-secret-money-disclosure-needed.pdf.

about individual donors from other sources than it is to learn about corporate donors—at least corporations that are not publicly traded. Given that one reason that the Supreme Court has upheld compulsory disclosure is to provide the public with voting cues, however, we should recognize that even if all the voter sees is that the Chamber of Commerce, the National Resources Defense Council, the National Rifle Association, or Public Campaign pays for an ad, voters have a pretty solid cue.

A second reason that the Court has upheld such laws is to assist in enforcement. But since the FEC has the power to audit or investigate spenders for violations of the law, including subpoena power, a public "piercing of the veil" is probably not terribly important for enforcement purposes. For example, the internal revenue code does not make tax returns public merely so that curious or vindictive persons, or those who merely want to make sure that the law is followed, can assist in reporting possible violations.

It is also doubtful that the law, even after *Citizens United* and *SpeechNow.org,* allows many of the examples that are being attributed to it. For example, in the spring of 2011, a corporation called W. Spann LLC, incorporated just six weeks earlier in March 2011, made a $1 million contribution to Restore Our Future, a Super PAC supporting Republican presidential candidate Mitt Romney. The company then dissolved in July 2011, apparently without having conducted any other business.[62] Leaving aside that within days of Restore Our Future reporting the donation to the FEC the name of the lawyer who incorporated the firm and the name of the donor were widely known thanks to a mere modicum of

[62] *See* Michael Isikoff, *Firm Gives $1 million to Pro-Romney Group, then Dissolves,* MSNBC (Aug. 4, 2011), http://www.msnbc.msn.com/id/44011308/ns/politics-decision_2012/t/firm-gives-million-pro-romney-group-then-dissolves/#.UBgxz2glZlI.

investigative reporting,[63] it should be noted that the contribution was almost certainly an illegal contribution given in the name of another.[64]

Similarly, a popular skit by the cable comedian Stephen Colbert suggested that one could hide his identity by incorporating a company for the purpose of contributing to Colbert's joke Super PAC, Citizens for a Better Tomorrow, Tomorrow.[65] The skit made for good comedy. But during the Question and Answer period of a speech at the American Law Institute, Colbert's lawyer, former FEC Chairman Trevor Potter, admitted the scenario he and Colbert had played out on the Comedy Central channel would in fact violate the requirement that a non-profit have a primary purpose other than political activity and could be subject to fines by the IRS.[66]

In fact, *Citizens United* did not change the *de jure* disclosure regime, and had little effect on *de facto* disclosure. Prior to passage of BCRA, 501(c) non-profits and trade associations could accept unlimited funds from any source, and pay for issue ads run at any

[63] Daniel Politi, *Edward Conrad: Mystery Romney Donor Behind W. Spann LLC Comes Forward,* SLATE (Aug. 6, 2011), http://slatest.slate.com/posts/2011/08/06/edward_conard_mystery_romney_donor_behind_w_spann_ llc_comes_forw.html.

[64] *See* 2 U.S.C.S § 441(f) (LexisNexis 2012).

[65] *See The Colbert Report*, COMEDY CENTRAL (television broadcast Sept. 29, 2011), http://www.colbertnation.com/the-colbert-report-videos/398531/september-29-2011/colbert-super-pac---trevor-potter---stephen-s-shell-corporation.

[66] *See Webcast: Annual Meeting Minutes*, THE AMERICAN LAW INSTITUTE (May 23, 2012), http://2012am.ali.org/videos.cfm?video_id=1. This contrasted with Potter's statement during his set comments that the Colbert skit was "accurate." The "accurate" comment is at approximately 12:30, and the Q & A begins at approximately 41:50. See 26 C.F.R. § 1.501(c)(3) (2008) and 26 C.F.R. § 1.501(c)(4)-1(a)(2) (1990) regarding rules governing 501(c) organizations and primary purpose. In another sketch, Colbert and *The Daily Show* host John Stewart (now operating *Citizens for a Better Tomorrow, Tomorrow*) coordinated their activity over the phone through nods and other non-verbal cues, though Colbert claimed to be a candidate. Attorney Potter, via telephone and in an act of borderline legal malpractice, informed them that their activities were legal, though this required Potter to ignore the non-verbal cues between the parties. In my opinion, such action constituted illegal coordination. *See The Daily Show*, COMEDY CENTRAL (television broadcast Jan. 17, 2012), http://www.thedailyshow.com/watch/tue-january-17-2012/colbert-super-pac---not-coordinating-with-stephen-colbert. Perhaps the conflicting views of two former FEC Commissioners, the pro-"reform" Potter and the pro-speech author, demonstrates the inherent confusion in the law, in which case modest adjustment to the statutory language, rather than a major expansion of mandatory disclosure, would probably solve the problem.

time. Beginning with the 2004 election, when McCain-Feingold took effect, they could accept unlimited funds from any source, and run such issue ads at any time more than thirty days before a primary or sixty days before a general election without disclosing their general donors. Since *Citizens United*, they are able to accept unlimited funds from any source, and run express advocacy ads at any time, without disclosing their general donors. Essentially, on the disclosure front, *Citizens United* re-establishes the status quo in existence prior to the election cycle of 2004, with two differences. First, (c)(4) and (c)(6) non-profits may make expenditures for both issue ads and express advocacy ads, rather than being limited to issue ads. Given that the FEC had argued that the difference between such ads was ephemeral–even that issue ads were a more effective means of campaigning than express advocacy ads–this probably represents a relatively insignificant change.[67] Second, there actually remains some greater disclosure of these issue ads than there was prior to the 2004 election cycle, since *Citizens United* did not repeal BCRA's disclosure requirements for those ads.

It certainly may be that all 501(c) organizations should have greater disclosure obligations, and it appears that more money is being spent through 501(c) organizations in 2010 and 2012 than in past elections, which might increase the desirability of greater compulsory disclosure. But the issue is one of degree, not a revolution in disclosure rules suddenly allowing "secret" money where it did not exist before. This recognition might make us a bit more skeptical of alarmist cries for new rules. Such skepticism is useful, because there are many problems with increased disclosure, both in drafting an effective statute, and in the constitutionality of the effort.

[67] *See* Fed. Election Comm'n v. Wis. Right to Life, 551 U.S. 449, 471 (2007) (citing McConnell v. Fed. Election Comm'n, 540 U.S. 93, 127 (2003)).

III. Some Practical Problems of Enhanced Compulsory Disclosure

The argument for added compulsory disclosure is generally framed in terms of the public's "right to know,"[68] or sometimes as a desire to find out who is "really behind"[69] various ads. Finding out, and then alerting the public as to who is "really behind" advertisements, however, is one of those things that is easier said than done.

Let us start with proposals to include additional information on the face of the ad itself. The FECA includes a requirement that all political ads include the name of the sponsor and state whether that sponsor is an authorized committee of a candidate; if it is not, it must also include the name and permanent street address, telephone number or web address of the advertiser, and state that it is not an authorized message of any candidate.[70] Additionally, the BCRA added a requirement that candidates seeking to qualify for preferred advertising rates must include a provision sometimes dubbed, "stand by your ad,"

[68] *See* Lisa Rosenberg, *FCC Poised to Take the Lead on Political Advertising Transparency,* SUNLIGHT FOUNDATION (Oct. 27, 2011, 1:16PM), http://sunlightfoundation.com/blog/2011/10/27/fcc-poised-to-take-the-lead-on-political-advertising-transparency/ ("[T]he public, . . . has a right to know who is paying for the avalanche of political ads that will blast from their televisions in the months ahead.")..

[69] *See* The White House: Office of the Press Secretary, *Weekly Address: President Obama Castigates GOP Leadership for Blocking Fixes for the Citizens United Decision* (Sep. 18, 2010*) available at* http://www.whitehouse.gov/the-press-office/2010/09/18/weekly-address-president-obama-castigates-gop-leadership-blocking-fixes- ("I warned of the danger posed by a Supreme Court ruling called Citizens United. . . . It gave the special interests the power to spend without limit – and without public disclosure – to run ads in order to influence elections. Now, as an election approaches, it's not just a theory. We can see for ourselves how destructive to our democracy this can become. We see it in the flood of deceptive attack ads sponsored by special interests using front groups with misleading names. We don't know who's behind these ads or who's paying for them.")

[70] 2 U.S.C.S § 441(d) (LexisNexis 2012). Most every state's disclosure rules are similar or identical. Additionally, the Federal Communications Commission requires television and radio ads to include the sponsor's name. The rules are relatively lax–a commercial can typically qualify simply by featuring the product advertised in the ads. It is difficult to envision too many commercial ads, or political ads, that would not want to include such information. *See* 47 C.F.R. § 73.1212 (2012).

in which the candidate personally appears in the ad and states that he "approves this message."[71]

Recent proposals have sought to include more information on the face of the ad. A model has been California's "top two" rule, which provides that in initiative and referenda, an ad must include on its face the names of the two largest financial contributors of $50,000 or more.[72] The requirements do not apply to candidate ads because, presumably, candidates must already disclose all their donors to the authorities. However, in light of the ability of nonprofit membership corporations to make express advocacy communications in a post-*Citizens United* world, some have argued for the adoption of such laws in candidate races. Connecticut, in fact, has passed a statute requiring the top five donors to be listed on the ad.[73]

However, leaving aside the questions of privacy that we will come to shortly, there are limits on how far this can go. Even the simple disclaimer required by the FECA takes up roughly ten to fifteen percent of a thirty-second radio ad, not including a "stand by your ad" disclaimer required of candidates. It may be suggested that this three to five second commandeering of speaker airtime is trivial, and at times it may be. But one can say bold and important things in three to five seconds: "Give me liberty or give me death;" "My only regret is that I have but one life to give for my country;" "We have nothing to fear but fear itself;" or, more mundanely, "The Washington Post's Fact Checker rates these claims 'untrue;'" or "I will never, ever vote to raise your taxes." It is not clear that it is more useful to candidates or to voters to have the three to five second FECA disclaimer read instead,

[71] 2 U.S.C.S § 441(d) (LexisNexis 2012). The statute also provides that a "clearly identifiable" photo may be used as a substitute for a personal appearance.
[72] Cal. Gov't § 84503 (West's Ann. Cal. Gov. Code 2012).
[73] 2010 Conn. Legis. Serv. P.A. 10-187, codified as amended at C.G.S.A. § 9-601c (West 2010).

and since incumbents tend to benefit from low information races, there is no reason to think that the rule is benign or even neatly reflects popular sentiment. In any event, efforts to identify major funders increasingly eat into campaign time.

For example, in March 2012 the U.S. Senate Committee on Rules and Administration held hearings on Senate Bill 2219, the "Democracy Is Served by Casting Light On Spending in Elections Act," a clumsy name that nevertheless yielded the propagandistic acronym of the "DISCLOSE Act." The bill included a provision that would have required a radio ad to include the following spoken disclaimer:[74]

> Paid for by American Action for the Environment
> www dot American Action for the Environment dot org
> Not authorized by any candidate or candidate's committee
> American Action for the Environment is responsible for the content of this advertising.
> I am John Smith, chief executive officer of American Action for the Environment, and American Action for the Environment approves this message.
> Major funders are Ronald B. Coppersmith and Donald Wasserman Schultz.[75]

Speaking this disclaimer would provide listeners with more information about funding, but could easily take twenty to twenty-five seconds. Whether this is the best use of political debate time is certainly an open question. The disclosure obtained from this lengthy statement is of dubious value. In terms of helping the viewer know who is "really behind" the ad, he learns the names of a pair of funders he has likely never heard of or seen before, and sees the image of a CEO he has probably never heard of assuring him that the group already identified as paying for the ad in fact approves of the ad for which it is

[74] It remains a curiosity of election law that these types of notices are routinely referred to as "disclaimers," since they are, if anything, "claimers," that state who paid for the advertisement. Perhaps it is indicative of the relatively low value of such disclosure that people lump these notices in with the true disclaimers of commercial advertising—the caveats, conditions and limitations that are spoken quickly at the end of the typical commercial ad.

[75] *Democracy Is Strengthened by Casting Light on Spending in Elections Act of 2012: Hearing on S. 2219 Before the S. Comm. on Rules & Admin.,* 112th Cong. 3 (2012) (statement of David B. Keating, President, Center for Competitive Politics).

paying. Of course, there are other circumstances where the name of the top funders might mean more to the viewer, and the viewer may be motivated to try to learn more about the major funders identified in the ad. But these are uncertain benefits, and they come with potential costs. For example, beyond crowding out a more substantive message, forcing the CEO of the organization paying for the message to appear may lead viewers to make judgments on the basis of race, sex, disability, or other characteristics that might best be left off the table.

Most of the proposals for new mandatory disclosure requirements, however, deal not with added disclosure on the face of the ad, but with added reporting of information to government agencies. The goal is to get behind the name of the nonprofit (c)(4) or (c)(6) group to learn who are the donors to the organization. It is believed that this will help voters better judge the ads they are seeing or hearing, and "hold speakers accountable." Let us leave aside for a moment what it might mean to hold a speaker "accountable" for lawful, non-defamatory speech, and whether the government has a compelling–or even non-compelling–interest in forcing persons to disclose their political activity so that private citizens – or perhaps merely the government's allies in the mob - may "hold them accountable." We must consider whether such compulsory disclosure serves that goal.

Disclosure of general financial donors to groups sounds easier in theory than it is in practice. Consider this scenario: Acme Industries makes a $100,000 dues payment to the National Business Chamber ("NBC") in December of an election year, say 2014, and then again in 2015. NBC, in order to encourage political activity by local and state chambers of commerce, agrees to match what the State Chamber of Commerce raises for election activity in the 2016 elections. State Chamber raises $350,000 specifically for political

activity over several months, and the National Chamber matches it by sending a check to State Chamber in March 2016. In June of 2016, State Chamber transfers $1 million – the $350,000 it raised specifically for political activity, the $350,000 from the NBC, and another $300,000 from general dues - to the Committee for a Better State ("CBS"), a 501(c)(4) organization that the State Chamber uses for its political activity. CBS reserves $200,000 for its own direct spending, and then transfers $800,000 to the State Jobs Alliance, a coalition formed to promote pro-business issues and candidates, which raises and spends $3 million in the state, about two-thirds for advertising on a ballot initiative. When NBC, the State Chamber, CBS, and the State Jobs Alliance file their spending reports, what donors are to be disclosed, and for how much?

What should be immediately obvious to any observer is that the question of "disclosure" is not so easy. Is Acme Industries responsible for spending by NBC, CBS, or the State Chamber? Is there some point at which Acme becomes cut off from political spending made by entities to which it neither directly gave money nor directed money, over which it has no control, and which is made eighteen months or more after Acme's initial payment to NBC?

This problem, which we might call the Russian Nesting Doll problem, after the little Russian dolls of decreasing size, placed one inside the other,[76] is a serious one. If we only disclose that the State Jobs Alliance received money from CBS, we haven't solved the problem of "who is really behind" the expenditures, at least if, as seems to be essential to the entire "disclosure" argument, one is unwilling to accept that the State Jobs Alliance or CBS really is the party behind the expenditures. Going one level deeper only reveals the State Chamber, still not revealing the original source of funding. Further on, we find NBC–

[76] I thank Joe Birkenstock for the label.

but where does NBC get its money? By the time we reach Acme Industries, is the information useful–or even truthful? Would it be truthful to say that Acme Industries is "responsible" or "endorses" messages on a state ballot initiative made by the State Jobs Alliance far down the road?

In the hypothetical above–one based on my real world experience as a campaign finance lawyer and one which other practicing attorneys will quickly recognize–there is no particular effort to conceal funding; groups are simply engaged in political activity in the interest of their members. The problem, of course, gets more complicated if a donor actually wants to conceal its identity. One could, for example, require only the disclosure of donations made within the past year, but the effect would be merely to push donations back to thirteen months out. One might require that donors be revealed for some set number of transactions back, but this seems arbitrary and in any case would be easily skirted by simply creating and inserting more intermediary organizations into the process.

A law might include a basic accounting norm, for example, Last-In/First-Out (LIFO) or First-In/First-Out (FIFO). Under LIFO, the last contributors to an organization not previously "disclosed" for another ad would be listed as paying for the most recent ad. Under FIFO, the most recent ad would be attributed to the earliest contributors not previously disclosed. But if the goal is to inform viewers who is really behind an ad, this seems thoroughly unhelpful, particularly if the group doing the spending is involved in various causes and races. Acme Industries might be generally supportive of NBC, but wholly opposed to the particulars or even the cause and candidates of the ads eventually run by the State Jobs Alliance. Suppose, for example, that Bob Perry, a Texas home builder well known for his support of the Republican Party and conservative groups such as Swift

Boat Veterans for Truth,[77] were to decide that an effective way to support conservative causes and Republican candidates was to give to the National Rifle Association ("NRA"). The NRA routinely endorses incumbents of any party with pro-gun records. Thus, if the NRA endorsed a pro-gun rights Democratic incumbent in a gubernatorial race,[78] would it help or harm voters' knowledge to have Bob Perry identified with NRA spending in the race?

Few of us identify or endorse everything that a group of which we are a member or financial supporter chooses to do. Rather, people contribute to organizations because they believe that, on balance, those oganizations do some good. But at some point, and sooner rather than later, the effort to track money back to its source will provide voters with as much disinformation as information, and will be unfair to speakers and donors as well.

Efforts at original source reporting are also likely to actually harm public knowledge of the overall operation of the campaign finance system. For example, in the above hypothetical, should NBC, CBS, the State Chamber, and the State Jobs Alliance each report Acme Industries as a donor? For how much? If each must report upriver donors such as Acme as donors to their own groups, for the entire amount of Acme's original dues to NBC, the total reported will vastly overstate both Acme's role, and, as other donors are treated in the same fashion, total spending in the election cycle. Allison Hayward has

[77] Ben Smith, *Meet Bob Perry*, POLITICO (Oct. 20, 2010), http://www.politico.com/blogs/bensmith/1010/Meet_Bob_Perry.html. This example is purely hypothetical, the author having no knowledge of Mr. Perry's plans or intentions.

[78] *See* Philip Klein, *NRA Endorses Democratic Gov. Strickland over Kasich*, THE SPECTACLE BLOG, THE AMERICAN SPECTATOR (Jun. 14, 2010, 10:54 AM), http://spectator.org/blog/2010/06/14/nra-endorses-democratic-gov-st.

dubbed this type of misleading information "junk disclosure."[79] There is evidence that over-reporting by the press already leads Americans to grossly overestimate spending in elections.[80]

Perhaps these problems could be skirted by demanding detailed accounting throughout the system. It might start with Acme, which might be required to earmark all permissible uses of its donation. But this is unlikely to solve any problem. Surely Acme must be able to mark funds for "general operations," and once it does that, the entire question is back on the table. Requiring Acme to explicitly authorize the use of its dues for political activity doesn't solve the problem either—we would still have the allocation problem downstream.

Furthermore, at some point the allocation and accounting that reformers seek would be so burdensome as to become clearly suppressive of speech. Imagine if a business were required to keep track of how businesses from whom it purchases, or businesses to whom it sells, spent the money paid or used the goods received. The accounting burden, if not impossible to meet, would be near overwhelming.

In short, the enforcement problems of "original source" reporting are probably insurmountable. It may be that a law might initially disclose some donor sources that would not have been disclosed before the law took effect; but once the law is known and understood, it will not be difficult to work around through the creation or use of other intermediaries. The solution would appear to give voters bad information–hardly a government interest and hardly a way to combat corruption or help voters judge a message.

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[79] Allison Hayward, *Junk Disclosure: A Series on Stupid Disclaimers*, CENTER FOR COMPETITIVE POLITICS (Feb. 11, 2011), http://www.campaignfreedom.org/2011/02/11/junk-disclosure-a-series-on-stupid-disclaimers.

[80] Stephen Ansolabehere, Erik C. Snowberg, & James M. Snyder, *Unrepresentative Information: The Case of Newspaper Reporting on Campaign Finance,* 69 Pub. Op. Q. 213 (2005).

Simply put, there are limits to the ability of any disclosure regime to accurately account for the original source of all politically oriented expenditures. Calling disclosed expenditures "secret money" or "dark money" is no help in confronting these issues or analyzing the problem.

IV. Some Constitutional Problems with Enhanced Compulsory Disclosure

Anonymous political speech is not an abnormality in American politics, but has a long, celebrated pedigree. The Federalist Papers, of course, were published anonymously, but they are hardly the only example of prominent, anonymous speech from the nation's early history. Indeed, much of the commentary on adoption of the Constitution was conducted anonymously, including influential tracts by such anti-federalist writers as Richard Henry Lee and Robert Yates, writing under pseudonyms such as "Brutus," "The Federal Farmer," and "Candidus."[81] Many prominent Americans have used anonymous speech or financing of anonymous speech to advance their political goals, including James Madison and Thomas Jefferson,[82] Chief Justice John Marshall,[83] Abraham Lincoln,[84] and John Hay[85] to name just a few.

[81] *See generally* HERBERT J. STORING WITH THE ASSISTANCE OF MURRAY DRY, THE COMPLETE ANTI-FEDERALIST (1981).
[82] Beyond Madison's anonymous contributions to the Federalist Papers, Madison and Jefferson arranged behind-the-scenes financing, and, at least in Madison's case, periodically wrote anonymous columns for Philip Freneau's National Gazette. *See* KEVIN R.C. GUTZMAN, JAMES MADISON AND THE MAKING OF AMERICA 262–63 (2012).
[83] Martin S. Flaherty, *John Marshall,* McCulloch v. Maryland, *and "We the People": Revisions in Need of Revising*, 43 WM. & MARY L. REV. 1339, 1370 (2002).
[84] *See* Michael Burlingame, *Author Interview, Abraham Lincoln: A Life*, ABRAHAM LINCOLN ONLINE (Dec. 2008), http://showcase.netins.net/web/creative/lincoln/books/burlingame.htm.
[85] MICHAEL BURLINGAME, LINCOLN'S JOURNALIST: JOHN HAY'S ANONYMOUS WRITINGS FOR THE PRESS, 1860–1864 (1998).

It is suggested that these examples are inapposite because they do not go to the question of speech in candidate elections, and do not always include a financing element.[86] But the point here is simply to note that Americans have long valued anonymity in public life.

To say that the public has "a right to know" is to beg the question: what does it have a right to know? And, correspondingly, what do individuals have a right to keep from the public, or at least not to be forced to disclose to their neighbors and strangers under the threat of legal sanction? The Supreme Court has long recognized that anonymity in funding and in person can be vital to maintaining the speech, associative, and other rights of citizens. In some cases, the desire for anonymity is based on more immediate, less abstract considerations. For example, speakers may be alarmed at having their private addresses and employment information made available to the public for fear of personal safety or harassment unrelated to their speech.[87] They may be concerned about retaliation for their speech from private individuals[88] or government actors.[89]

Over the years, the Supreme Court has recognized many of these concerns as not only valid, but of a constitutional dimension. In *Thomas v. Collins*,[90] a case concerning a requirement for prior registration of speakers, the Court made clear that there was a presumption of liberty with regard to the right to speak. The state would have to justify incursions on the right, not the other way around.[91] In the 1950s and 1960s, the Court made a series of rulings upholding the

[86] For example, while the authors of the Federalist Papers were long unknown, the identity of the publisher was well known.
[87] *See* Gigi Brienza, Editorial, *I Got Inspired. I Gave. I Got Scared*, WASH. POST, July 1, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/06/29/AR2007062902264.html.
[88] *See* Bradley A. Smith, *In Defense of Political Anonymity*, 20 CITY J. 74, 77 (2010).
[89] *See* Kimberly A. Strassel, Editorial, *The President Has a List*, WALL ST. J., Apr. 26, 2012, http://online.wsj.com/article/SB10001424052702304723304577368280604524916.html.
[90] 323 U.S. 516 (1945).
[91] *Id.* at 538–39 ("How far the State can require previous identification by one who undertakes to exercise the rights secured by the First Amendment has been largely undetermined … [A] requirement of

rights of civil rights organizations to maintain the confidentiality of their members' and donors' identities, even after the fact.[92] For example, in *NAACP v. Alabama,* Alabama sought to use the NAACP's failure to comply with the state's corporation laws to obtain (and implicitly, to publicize) information on the organization's donors and members.[93] Said the Court, "[i]t is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] effective restraint on freedom of association," likening such disclosure to a "requirement that adherents of particular religious faiths or political parties wear identifying armbands."[94]

Through the "red scare" of the 1950s and the civil rights movement of the 1950s and 1960s, laws and other government actions aimed at chilling thought and speech through compelled disclosure were a regular part of the Court's docket, including *United States v. Rumely,* prohibiting a congressional committee from demanding information on customers who bought political books,[95] and *Talley v. California,* striking down a statute requiring that handbills urging a business boycott include the identity of the publisher of the names of those "causing" the handbill to be published.[96] These cases did not only involve civil rights organizations. The Court was even faced with partisan efforts to silence, through the private intimidation that could

registration in order to make a public speech would seem generally incompatible with an exercise of the rights of free speech and free assembly.").

[92] *See* NAACP v. Alabama, 357 U.S. 449 (1958); Bates v. Little Rock, 361 U.S. 516 (1960); NAACP v. Button, 371 U.S. 415 (1963); Gibson v. Florida Legislative Investigation Comm'n, 372 U.S. 539 (1963).

[93] 357 U.S. 449 (1958).

[94] *Id.* at 462.

[95] 345 U.S. 41 (1953).

[96] 362 U.S. 60 (1960). The handbill in question was aimed at an employer allegedly engaging in racially discriminatory hiring practices.

be created by compulsory disclosure, the Republican Party in areas where it was a distinct minority.[97]

During the same period, the Court rejected the idea that anonymous speech and association were absolute rights.[98] But it had clearly placed the burden on government to demonstrate that the information sought was necessary to a "sufficiently important" governmental interest.[99] These were hard-won victories for the principles of free speech and association, but victories they were.

By the time *Buckley* was decided in 1976, the Court noted that:

> compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment … significant encroachments on First Amendment rights or the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest.[100]

Buckley went on to hold that not merely government retaliation, but private action that was "an unintended but inevitable result of the government's conduct," was sufficient to demand "exacting scrutiny" of compulsory disclosure laws.[101]

As a result, we have seen *Buckley* substantially restrict the reach of the disclosure provisions of the FECA. Later cases provided still more protection to anonymous political speech. *Brown v. Socialist Workers '74 Campaign Committee*[102] upheld the rights of an unpopular minority party to keep the names of its members, donors, and vendees private in order to avoid both "governmental and private hostility."[103] In *McIntyre v. Ohio Elections*

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[97] Pollard v. Roberts, 283 F. Supp. 248 (E. D. Ark. 1968), *aff'd* 393 U.S. 14 (1968) (per curiam) (State prosecutor sought to subpoena bank records in order to reveal amounts given by and names of Republican Party donors.).
[98] Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1961).
[99] *Buckley*, 424 U.S. at 66.
[100] *Id*. at 64.
[101] *Id*. at 65
[102] 459 U.S. 87 (1982).
[103] *Id*. at 98–99.

Commission,[104] the Court struck down an Ohio statute requiring political handbills advocating the passage or defeat of a school tax to disclose on the handbill the names of those "responsible therefor."

Over a lengthy, fifty-year battle, from *Thomas v. Collins* through *McIntyre,* the Supreme Court established a broad right to privacy in speaking out on and otherwise holding or supporting one's political views. This presumptive right of privacy might be overcome where the governmental interest was particularly strong—as when the "free functioning of our national institutions" is involved[105]—but even that obviously compelling interest was interpreted narrowly, applied in a strict fashion requiring an actual rather than a conjectural threat,[106] or where a donor directly gave a large sum to a candidate or candidate committee or specifically to support the election or defeat of a candidate.

There are many legitimate reasons why persons might seek to retain some degree of anonymity while supporting political candidates. For some, it is an abstract commitment to personal privacy, or a simple desire to shun the limelight. Others want to avoid being solicited by other worthy (and unworthy) candidates and causes, a perfectly legitimate desire. Some may want to avoid awkward personal disclosures.[107] Anonymous political speech can also be

[104] 514. U.S. 334 (1995).
[105] *Buckley*, 424 U.S. at 66.
[106] Consider that under *Brown,* a political party whose mission statement called for the overthrow of the U.S. government was specifically exempted from compulsory disclosure requirements.
[107] Consider, for example, an individual who contributes to a well-known gay rights advocacy group such as the Human Rights League or the Log Cabin Republicans. Such an individual may not want these contributions, and the conclusions that others will (rightly or wrongly) draw from them to be made public. *Cf.* Geoffrey Fowler, *When the Most Personal Secrets Get Outed on Facebook,* WALL ST. J., Oct. 12, 2012, http://online.wsj.com/article/SB10000872396390444165804578008740578200224.html.

important for domestic, social, or business peace. Others will be concerned about the effects that publicizing their political beliefs might have on career advancement.[108]

Still others will seek anonymity because they wish their arguments to stand on their own merits, rather than be accepted or rejected based on their identity, or they may seek to promote ideas that are otherwise unpopular within their political party or community. In some cases, individuals or organizations will feel that their message is more effective if it is not associated with a particular speaker.

The push for additional disclosure now jeopardizes many of these hard-won freedoms. For instance, in *Doe v. Reed,*[109] the Supreme Court rejected efforts to keep private the names of signatories to a petition to place a referendum on same-sex marriage on the Washington state ballot, dismissing a facial challenge to the law requiring publication but allowing for an as-applied challenge. The next year, however, the Court rejected that as-applied challenge.[110] In the as-applied challenge, the petitioners produced testimony and evidence that opponents of same-sex marriage were "'mooned,' 'flipped off,' received angry phone calls, were confronted by individuals in public places, had pictures taken of them 'post[ed] to Facebook,' received vulgar notes, were pushed and yelled at with explicatives in public, had garbage thrown on them, had

[108] *See* Shelton v. Tucker, 364 U.S. 479 (1960). School district could not require all public school teachers to reveal their membership in groups and associations as a condition of employment. "[T]o compel a teacher to disclose his every associational tie is to impair that teacher's right of free association, a right closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society.… The pressure upon a teacher to avoid any ties which might displease those who control his professional destiny would be constant and heavy. Public exposure, bringing with it the possibility of public pressures upon school boards to discharge teachers who belong to unpopular or minority organizations, would simply operate to widen and aggregate the impairment of constitutional liberty." *Id.* at 485–87. *See also* Sweezy v. New Hampshire, 354 U.S. 234 (1957) (College professor could not be forced to discuss his knowledge of Communist or Progressive parties as part of state investigation into "subversive persons" in the state.).

[109] John Doe No. 1 v. Sam Reed, 130 S. Ct. 2811 (2010).

[110] Doe v. Reed, 132 S. Ct. 449 (2011).

their children threatened, were called 'fascists,' and some even received death threats,"[111] but this was deemed insufficient to merit relief.

Compare those allegations, however, to the evidence of harassment presented by the Socialist Workers Party ("SWP") in their 2003 and 2009 requests to extend their exemption from federal reporting standards in accordance with *Brown.*[112] In 2009, for example, the SWP evidence of harassment over a full six year period consisted almost entirely of vague, general statements of "fear" by SWP supporters, supported by thirteen acts of vandalism including paint poured over a vehicle, graffiti on campaign offices, eggs thrown at an office, and "generalized threats of harm to SWP campaigners."[113] The harassment included eleven allegations of "threatening or hostile statements made by mail or by phone," and four persons who were terminated from their jobs, though "in three of the examples, the official basis used by the company to fire the employee was alleged work-related misconduct and did not pertain to SWP-related activities."[114] Official harassment allegedly included police ordering members to remove literature tables blocking public rights of way, FBI agents questioning a party member who had returned from a trip to Cuba, and "the possible placement of an SWP activist on a no-fly list …. The individual was permitted to board his flight."[115] It seems doubtful that the exemption for the Socialist Workers or other minority parties or groups can be sustained on such a record in light of *Doe v. Reed.*

[111] Doe v. Reed, 2011 U.S. App. LEXIS 23327, at *8 (Smith, J., dissenting) (9th Cir. Nov. 16, 2011), *injunction denied* 132 S. Ct. 449 (2011).
[112] The Socialist Workers Party and the FEC have since operated under a settlement which requires the SWP to seek renewal of its exemption at periodic intervals. *See* Op. Fed. Election Comm'n, 2009–01 (Mar. 20, 2009).
[113] Op. Fed. Election Comm'n, 2009–01 (Mar. 20, 2009).
[114] *Id*. (In the fourth example, a member was dismissed from employment after taking an unexcused absence of three weeks to attend a socialist youth conference in Venezuela.).
[115] *Id*. Evidence from the 2003 request, which is similar or even less compelling, is found in Op. Fed. Election Comm'n. 2003-02 (Apr. 4, 2003) (the author, at the time Vice-Chairman of the Commission, voted in favor of the SWP's request).

Compelled political disclosure, has, in recent years, claimed a number of victims with employment losses. In particular, in the wake of California's Proposition 8, a measure to bar same-sex marriage in the state, there were numerous documented instances of vandalism and of persons losing their jobs after their employers were boycotted, or threatened with boycotts, because of the employee's financial support or speech for the measure.[116] If supporters of such measures can be forced to disclose their associations, in light of legitimate job fears and threats of vandalism, can we long expect the Court to respect precedents such as *Shelton v. Tucker,* holding that teachers cannot be forced to disclose their memberships,[117] or *United States v. Rumely,* holding that booksellers cannot be forced to reveal the names of persons buying books in bulk?[118] A person buying a political book in bulk, after all—say Barack Obama's *The Audacity of Hope*—might well be planning to distribute those copies in order to assist in the election or defeat of a candidate. "The public," some would say, "has a right to know." R.I.P. *Rumely.*

Similarly, in *Talley,* civil rights protestors were allowed to organize an economic boycott of employers allegedly engaging in discriminatory hiring practices, without disclosing their members and financial supporters. Under the disclosure regime as it appears to exist post-*Doe,* forced disclosure of an employee's political donations can lead to a boycott of the employer, but the boycotters may keep the names of their members and their sources of financial support anonymous. One doubts that this asymmetry is sustainable. If it gives, in light of the current

[116] *See* Thomas M. Messner, *The Price of Prop 8,* HERITAGE FOUNDATION Oct. 22, 2009, http://www.heritage.org/research/reports/2009/10/the-price-of-prop-8. *See also* Brad Stone*, Prop 8 Donor Web Site Shows Disclosure Law is 2-Edged Sword,* N.Y. TIMES, Feb. 7, 2009, http://www.nytimes.com/2009/02/08/business/08stream.html?_r=0; *Prop 8 Supporters Suffer Harassment, Assaults from Homosexual Activists*, CATHOLIC NEWS AGENCY, Nov. 10, 2008, http://www.catholicnewsagency.com/news/prop_8_supporters_suffer_harassment_assaults_from_homosexual_activists/.

[117] Shelton v. Tucker, 364 U.S. 479 (1960).

[118] U.S. v. Rumely, 345 U.S. 41 (1953).

passion for "disclosure," it is likely to be the privacy of the boycotters that is lost, not the privacy of the political donors on all sides that is sustained.

Concurring in *Doe v. Reed,* Justice Scalia concluded that "[r]equiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed."[119] But in a world in which the incentive to participate in political debate are already fragile, one has to question if Justice Scalia does not have the equation backwards.

Consider, for example, the case of Gigi Brienza and other employees of the pharmaceutical company Bristol Myers Squibb. In the summer of 2006, Brienza was notified by the company's security department that her name and home address appeared on a list of "targets" posted online by a radical animal-rights group called Stop Huntingdon Animal Cruelty ("SHAC"). SHAC's ultimate target was Huntingdon Life Sciences, a London-based lab that uses animals in drug safety tests. The FBI has identified SHAC as a domestic terrorist threat.[120] SHAC members had earlier assaulted a Huntingdon manager in the United Kingdom with a baseball bat outside his house, and damaged property and physically threatened scientists in the United States.[121] Brienza and others were targeted because their employer did business with Huntingdon. SHAC had learned that Brienza and others worked for Bristol Myers Squibb through the website of the Federal Election Commission, which, pursuant to law, publishes the names and addresses of donors to federal candidates online. Brienza had contributed $500 to presidential candidate John Edwards in 2004. Using FEC data, SHAC had published her name

[119] 130 U.S. 2811, 2837 (Scalia, J., concurring).
[120] Brienza, *supra* note 87.
[121] United States Senate, Committee on Environment and Public Works, Hearing on *Eco-Terrorism Specifically Examining Stop Huntingdon Animal Cruelty,* Oct. 26, 2005, p. 61–65, Opening Statement of Senator Inhofe.

and home address, and those of some 100 other Bristol Myers Squibb employees, on the internet under the heading "now you know where to find them."[122]

People such as Brienza will, of course, have no way of knowing in advance what crazy terrorist group may be interested in their employer. And if donors such as Brienza are expected to demonstrate "civic courage," one must consider why the same logic does not apply to donors to the NAACP and other organizations. The purpose and effect of measures such as the DISCLOSE Act (were it to pass) is, indeed, to overturn the *NAACP v. Alabama* line of cases, requiring disclosure of donors and members should the organization undertake exactly the type of ads it has in the past.[123] As one original sponsor of DISCLOSE stated when introducing the bill, "the deterrent effect should not be underestimated."[124]

There are many who believe that the NAACP no longer needs such protection, and that politics today is so different that references to this and other cases are misplaced. But as we have seen the NAACP has not been the sole beneficiary of anonymity. And is it so far-fetched that in the next few years we might see a series of bombings or drive-by shootings at the homes of donors to Planned Parenthood or the National Organization for Marriage? If so, we may regret it if we have too easily tossed away the protection of political anonymity provided by the *NAACP v. Alabama* line of cases.

Conclusion

[122] *Brienza*, *supra* note 87.
[123] *See supra* note 61.
[124] T.W. Farnam, *The Influence Industry: Disclose Act could deter involvement in elections*, WASH. POST, May 13, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/05/12/AR2010051205094.html (quoting Sen. Chuck Schumer).

In this essay, I have laid out some practical problems with efforts to get "full disclosure" of political spending, problems that have received far too little attention in the wake of *Citizens United v. Federal Election Commission.* It simply will not do–at least not for serious policy makers–to demand "full disclosure" of "secret money" without considering the practical realities of political participation and campaigning, and giving careful consideration to what, really, would be gained by added disclosure on top of the extensive compulsory disclosure regime that already exists. We already have, after all, more campaign finance disclosure than at any time in history prior to 2003.

Proposed laws such as DISCLOSE will neither provide the public with good information, nor solve the alleged problems of "secret money." Further, they will come at a price in political freedom and safety from government and private retaliation. Precedents protecting civil liberties, established over a half century of painstaking litigation, could be brushed aside in the sudden hysteria for "full disclosure." Liberty, once lost, may not be lost forever, but it certainly can be difficult to reclaim.[125]

Only by realizing and accepting the limits of disclosure can we develop a truly optimal policy that make the proper tradeoffs between individual liberty, the public's desire to monitor officeholders, public information on candidates and issues, and civic participation.

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[125] *See* John Adams & Abigail Adams, FAMILIAR LETTERS OF JOHN ADAMS TO HIS WIFE, ABIGAIL ADAMS 76 (Charles Francis Adams, ed. 1876) (Letter to Abigail Adams, July 17, 1775), available at http://books.google.com/books?id=fGZM4qiKHWkC&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false ("Liberty, once lost, is lost forever.").