

ARTICLE

MRS. MCINTYRE'S CHECKBOOK: PRIVACY COSTS OF POLITICAL CONTRIBUTION DISCLOSURE

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INTRODUCTION

The Web site of the Federal Election Commission (“FEC”) offers a wealth of information to the curious visitor.¹ The site catalogues every federal political contribution over \$200 made by individual persons, all cross-indexed and searchable by name, city, zip code, employer, and occupation.² In just an hour in front of my home computer, I used this resource to learn about the political beliefs of friends, neighbors, professors at my college and law school alma maters, and employees of companies and law firms where I have worked. To round out my exploration, I ran a search on the political donations of dentists in Peoria, Illinois, and found two Republican contributors.

A largely unexamined consensus supports publicizing this information about personal political contributions. As one pair of scholars put it, disclosure is “fast becoming a Motherhood issue.”³ Even in the intensely bitter debate over campaign finance regulation, both

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¹ See <http://www.fec.gov> (last visited Aug. 24, 2003).

² The “advanced search” function providing this information can be reached by linking from the FEC’s home page, *supra* note 1, or by going directly to <http://herndon1.sdrdc.com/fecimg/advindsea.html> (last visited Aug. 24, 2003). For more on the rules surrounding disclosure, including the \$200 threshold, see *infra* Part I.A.

³ BRUCE ACKERMAN & IAN AYRES, VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE 5 (2002); see also Elizabeth Garrett, *A New Paradigm for Campaign Finance Reform: Voting with Cues*, 37 U. RICH. L. REV. 1011, 1011 (2003) (observing the “gut reaction shared by most commentators and voters” in favor of disclosure).

sides support extensive disclosure of contributions.⁴ Libertarians who wish to repeal limitations on the size of contributions would largely replace these caps with even stronger disclosure rules.⁵ Reformers, meanwhile, see disclosure as an important complement to other regulations, praise existing disclosure rules, and seek to extend them.⁶ It seems everyone subscribes to the famous aphorism from Justice Brandeis that describes “sunlight” as “the best of disinfectants.”⁷

This consensus persists despite two countervailing legal trends. First, there is rising concern in nearly every other area of the law about information privacy.⁸ Scholars engage in lively discussion about its possible social, legal, and constitutional dimensions.⁹ Congress has enacted new protection for the confidentiality of records about an individual’s health care,¹⁰ finances,¹¹ and even video rent-

⁴ See Editorial, *Campaign Reform Farce*, N.Y. TIMES, Apr. 9, 2002, at A24 (“Full and complete disclosure of who gives how much to political campaigns is a concept embraced by everyone from President Bush and Senator John McCain to many legislative enemies of campaign finance reform.”).

⁵ See, e.g., Bradley A. Smith, *Money Talks: Speech, Corruption, Equality, and Campaign Finance*, 86 GEO. L.J. 45, 61-62 (1997) (calling fuller disclosure more appropriate and more narrowly tailored campaign finance regulation than contribution limits). As one pair of proponents describes it:

In this scenario, disclosure laws would be broadened and strengthened, and penalties for failure to disclose would be ratcheted up, while rules on other aspects—such as sources of funds and sizes of contributions—could be greatly loosened or even abandoned altogether [A] new disclosure regime might just prove to be *the* solution in itself.

LARRY J. SABATO & GLENN R. SIMPSON, *DIRTY LITTLE SECRETS: THE PERSISTENCE OF CORRUPTION IN AMERICAN POLITICS* 330 (1996) (proposing a “Deregulation Plus” model of “free market for campaign finance”).

⁶ See, e.g., COMMISSION ON CAMPAIGN FINANCE REFORM, *DOLLARS AND DEMOCRACY*, THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK: A BLUEPRINT FOR CAMPAIGN FINANCE REFORM 97-98 (2000) [hereinafter *DOLLARS AND DEMOCRACY*] (mentioning disclosure as an important tool and seeking an increase in disclosure of issue advocacy expenditures); Brooks Jackson, *Fixing the FEC: Suggestions for Change: Fulfilling the Promise*, in *CAMPAIGN FINANCE REFORM: A SOURCEBOOK* 315, 321 (Anthony Corrado et al. eds., 1997) (“Nearly everyone agrees that the most important campaign finance reform was accomplished . . . when Congress enacted the first serious requirement that candidates, parties, and political committees at the federal level disclose their incomes and expenses.”). The McCain-Feingold Act, enacted in 2002, included provisions to further expand the disclosure of individual campaign contributions. See *infra* note 40 and accompanying text.

⁷ LOUIS D. BRANDEIS, *OTHER PEOPLE’S MONEY: AND HOW THE BANKERS USE IT* 92 (1932), quoted in *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (per curiam).

⁸ References to “privacy” in this Article refer specifically to “data privacy” or “information privacy”—people’s ability to control the dissemination of personal information about themselves. See *infra* note 66 and accompanying text.

⁹ See, e.g., Symposium, *Cyberspace and Privacy: A New Legal Paradigm?*, 52 STAN. L. REV. 987 (2000) (discussing interactions between technology and privacy); Symposium, *Modern Studies in Privacy Law*, 86 MINN. L. REV. 1097 (2002) (discussing privacy rights and laws generally); Symposium, *Privacy*, 68 SOC. RES. 3 (2001) (presenting interdisciplinary analyses of privacy).

¹⁰ Health Insurance Portability and Accountability Act of 1996 (“HIPAA”), 42 U.S.C. § 1320d (2000) (authorizing regulations to protect the privacy of medical records).

als.¹² Some of these initiatives encountered difficulties in implementation,¹³ but the trajectory of policy concern points consistently toward privacy. Information about campaign contributions is more easily available to the public than any of these other types of data, and perhaps more sensitive, yet there is little sign of commensurate concern about its privacy.

The second countervailing trend emerges in recent Supreme Court decisions about anonymous political activity. *McIntyre v. Ohio Elections Commission* invalidated a state law requiring that election-related communications include the sponsor's name and address.¹⁴ When Mrs. Margaret McIntyre distributed unsigned leaflets opposing a local school tax referendum, she was charged and fined.¹⁵ Because

¹¹ Gramm-Leach-Bliley Act, 15 U.S.C. §§ 6801-6809 (2000) (requiring financial institutions to announce certain uses of personal financial data and offer customers an opportunity to prevent such uses).

¹² Video Privacy Protection Act, 18 U.S.C. § 2710(b)(1) (2000) (prohibiting video rental businesses from disclosing customers' records). For other examples of legislation passed in the last decade to protect data privacy, see Children's Online Privacy Protection Act, 15 U.S.C. §§ 6502-6505 (2000) (requiring parental consent for the collection of personal information about minor children on the Web); Drivers' Privacy Protection Act of 1994, 18 U.S.C. § 2721 (2000), *upheld in* *Reno v. Condon*, 528 U.S. 541 (2000) (requiring state motor vehicle departments to obtain affirmative consent from drivers before releasing personal data from records to marketers); Telephone Consumer Protection Act, 47 U.S.C. §§ 227, 609 (2000) (limiting telephone company use of customers' personal data); *see also* 1 RAYMOND T. NIMMER, *INFORMATION LAW* ch. 8 (2d ed. 2002) (discussing privacy and data protection law in the "digital age"); PAUL M. SCHWARTZ & JOEL R. REIDENBERG, *DATA PRIVACY LAW: A STUDY OF UNITED STATES DATA PROTECTION* (1996) (surveying federal and state data protection law); Jeff Sovern, *Protecting Privacy with Deceptive Trade Practices Legislation*, 69 *FORDHAM L. REV.* 1305, 1315-17 (2001) (surveying state laws). Information privacy has also been the subject of at least one statewide referendum. *See infra* note 242.

¹³ The original regulations for medical privacy were scaled back in response to negative reactions from some doctors and insurers. *Compare* Standards for Privacy of Individually Identifiable Health Information, Final Rule, 67 Fed. Reg. 53,182 (Aug. 14, 2002) (to be codified at 45 C.F.R. pts. 160, 164), *with* Final Rule, 65 Fed. Reg. 82,462 (Dec. 28, 2000) (codified at 45 C.F.R. 160, 164). *See also* Anne Barnard, *Doctors Brace for Changes on Patient Privacy*, *BOSTON GLOBE*, Jan. 11, 2003, at A1 (discussing doctors' reactions to Department of Health and Human Services rules requiring healthcare workers to disclose minimal amounts of patient information to each other and to describe privacy protections to patients); HEALTH PRIVACY PROJECT, SUMMARY OF HIPAA PRIVACY RULE 1, Sept. 13, 2002, at http://www.healthprivacy.org/usr_doc/RegSummary2002.pdf (noting that Congress failed to pass comprehensive health privacy regulation, which forced the Department of Health and Human Services to issue health privacy regulations). The Gramm-Leach-Bliley financial privacy requirements, *see supra* note 11, have been criticized for ineffectiveness. *See* Edward J. Janger & Paul M. Schwartz, *The Gramm-Leach-Bliley Act, Information Privacy, and the Limits of Default Rules*, 86 *MINN. L. REV.* 1219, 1230-32 (2002) (noting industry leaders and private advocates' disappointment with the Act); John Schwartz, *Privacy Notices are Called Too Common and Too Confusing*, *N.Y. TIMES*, May 7, 2001, at A1 (reporting on the ineffectiveness and inefficiency of the Act's requirements for privacy protection).

¹⁴ *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 338 & n.3 (1995) (describing the Ohio statute in question).

¹⁵ *Id.* at 337-38.

of Mrs. McIntyre's interest in retaining privacy while engaging in "the essence of First Amendment expression"¹⁶—pamphleteering—the Court held that she had a "right to remain anonymous."¹⁷ In 2002, the Court strongly reaffirmed the right to anonymity in *Watchtower Bible and Tract Society, Inc. v. Village of Stratton*, which overturned a town ordinance requiring door-to-door canvassers to register with the town and obtain a permit.¹⁸ The majority opinion relied heavily on *McIntyre* and found that the right to anonymity outweighed the asserted government interests in preventing fraud and crime and protecting residents from intrusion.¹⁹ The Supreme Court has also conferred a right of anonymity on politically-oriented expression in a number of other cases.²⁰ Lower courts have applied *McIntyre* to anonymous speech in a variety of contexts.²¹ As with the first trend, however, the trend of increasing solicitude toward anonymity has not extended to campaign contributions—indeed, so far the Supreme Court has studiously stopped short of that result.²²

¹⁶ *Id.* at 347.

¹⁷ *Id.* at 357.

¹⁸ 536 U.S. 150 (2002).

¹⁹ *Id.* at 166-69.

²⁰ *See, e.g.*, *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 197-200 (1999) (invalidating a law requiring that persons who circulate petitions for placing referendum questions on a ballot must wear identification badges revealing their names); *Talley v. California*, 362 U.S. 60, 65 (1960) (invalidating a law requiring all leaflets distributed in the city to contain the name and address of the author or sponsor); *Bates v. City of Little Rock*, 361 U.S. 516, 527 (1960) (invalidating a local ordinance requiring reporting of "dues, assessments, and contributions" paid to organizations); *NAACP v. Alabama*, 357 U.S. 449, 462-67 (1958) (ruling against compelled reporting of NAACP membership lists); *see also* *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 101-02 (1982) (protecting contributions to and expenditures by a socialist political party from disclosure and reporting); *infra* note 78 and accompanying text (discussing *Socialist Workers*).

²¹ *See, e.g.*, *Vt. Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 387 (2d Cir. 2000) (invalidating a state issue advocacy disclosure requirement); *Church of the Am. Knights of the KKK v. Kerik*, 232 F. Supp. 2d 205, 211-15 (S.D.N.Y. 2002) (overturning a state law that prohibited wearing masks at public gatherings); *ACLU v. Miller*, 977 F. Supp. 1228, 1232 (N.D. Ga. 1997) (granting a preliminary injunction against a state law interpreted as a ban on anonymous and pseudonymous Internet communication); *Doe v. Texas*, 2003 Tex. Crim. App. LEXIS 88, at *3 (Tex. Crim. App. May 14, 2003) (invalidating state issue advocacy disclosure requirements). *But see, e.g.*, *FEC v. Pub. Citizen*, 268 F.3d 1283, 1287-91 (11th Cir. 2001) (per curiam) (rejecting the argument that *McIntyre* renders the express advocacy disclosure requirements of 2 U.S.C. § 441d(a) unconstitutional); *cf.* *Frank v. City of Akron*, 303 F.3d 752, 753 (6th Cir. 2002) (Boggs, J., dissenting from denial of rehearing en banc) (arguing that a city ordinance requiring disclosure of contributors' home addresses was inconsistent with *McIntyre's* protection of anonymous political expression).

²² The Brennan Center for Justice filed an amicus brief in *Watchtower* asking that the Justices use the case to "clarify" that campaign finance disclosure rules "do not violate the First Amendment as long as pamphleteers and other advocates engaged in face-to-face communications are exempt." Brief of Amicus Curiae Brennan Center for Justice at 18, *Watchtower Bible & Tract Soc'y, Inc. v. Vill. of Stratton*, 536 U.S. 150 (2002) (No. 00-1737). At the *Watchtower* oral argument, Justice Breyer asked whether overruling the town ordinance would cast doubt on

This Article explores the tension between the consensus and these legal trends that point in the opposite direction. Why do we fret about the exposure of sensitive personal information, but require the government to announce individuals' political affiliations throughout cyberspace? Why do we grant Mrs. McIntyre complete anonymity in her modest pamphlets, but require complete disclosure should she write a modest check instead? I conclude that the tension, now thoughtlessly resolved in favor of disclosure, is actually more complex. As a result, parts of the current disclosure regime, especially with respect to smaller contributions made by individuals, face constitutional and policy objections.

Because of the focus on personal privacy, this Article concerns only those contributions made by individuals to candidates, political parties, or political action committees ("PACs").²³ Existing scholarship and case law largely ignore the privacy problems inherent in disclosure of individual contributions, although there has been some recent attention to disclosure rules that apply chiefly to expenditures by groups. The Bipartisan Campaign Reform Act of 2002 ("McCain-Feingold Act") requires disclosure of the sponsorship of advertise-

campaign contribution disclosure. Oral Argument Transcript at 15, *Watchtower*, 536 U.S. 150 (No. 00-1737), available at http://www.supremecourt.us/oral_arguments/argument_transcripts.html (last visited Aug. 24, 2003). See also Francis X. Clines, *Ohio Village Pleads its Case for a No-Pitch Zone*, N.Y. TIMES, Mar. 19, 2002, at A16 ("The justices' questions suggested that their ultimate concern involved how to uphold the free-speech right to anonymous door-to-door canvassing without limiting the government's right to require disclosure of campaign contributors' identities."). The *Watchtower* opinion ultimately sidestepped the issue, except for one line asserting that the facts in that case did not concern "any special interest in protecting the electoral process." 536 U.S. at 167. Justice Breyer's separate concurrence ignored the question. See *id.* at 169-71 (Breyer, J., concurring). In *McIntyre*, too, some of the Justices seemed uneasy about the possible extension of anonymity to campaign contributions. The majority opinion attempted to distinguish campaign contributions, see *McIntyre v. Ohio Election Comm'n*, 514 U.S. 334, 354-56 (1995), although I will argue later that the effort failed, see *infra* notes 125-37 and accompanying text. Justice Ginsburg went further in *McIntyre*, filing a short concurrence to emphasize that the anonymity precedent might not apply in "other, larger circumstances," perhaps including contribution disclosure. 514 U.S. at 358 (Ginsburg, J., concurring); see *infra* notes 211-14 and accompanying text (discussing Ginsburg's concurrence).

²³ Disclosure of a contribution made by a group (such as a PAC, political party, or tax-exempt organization) to a candidate does not itself implicate the kinds of personal interest described in Parts I.B-C—provided, of course, that the people who gave money to the group remain anonymous. See *NAACP v. Alabama*, 357 U.S. 449 (1958) (holding that the NAACP did not have to disclose membership lists); see also *FEC v. Beaumont*, 123 S. Ct. 2200, 2210 n.8 (2003) (finding restrictions on corporate contributions less troublesome under the First Amendment than restrictions on individual contributions because restrictions on corporations leave their individual members free to contribute on their own). Supreme Court anonymity cases have been particularly concerned about individuals and vulnerable groups. See *Watchtower*, 536 U.S. at 162-63 (emphasizing marginalization of plaintiff Jehovah's Witnesses); *Trevor Potter, Buckley v. Valeo*, *Political Disclosure and the First Amendment*, 33 AKRON L. REV. 71, 104 (1999) (noting "sympathetic" and small-scale plaintiffs who prevailed in *McIntyre*, *American Constitutional Law Foundation*, and *Socialist Workers*).

ments defined as “electioneering communications.”²⁴ This provision aims at “issue advocacy”—advertisements that avoid expressly advocating the election or defeat of a candidate and were thus exempt from prior federal campaign finance laws.²⁵ The problem has been analyzed by both courts²⁶ and scholars.²⁷ There has also been discussion of a less prominent statute, which amended the tax code to require greater disclosure of political speech by tax-exempt groups.²⁸ For the most part, however, both of these debates center on disclosure of political activity by groups, so they do not implicate any of the personal privacy interests that would be of concern to an individual like Mrs. McIntyre. In addition, they consider expenditures rather than con-

²⁴ Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 201, 116 Stat. 81, 88-89.

²⁵ The loophole originated in the famous “magic words” footnote of *Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976) (per curiam) (“restrict[ing] the application of [part of the Federal Election Campaign Act of 1971] to communications containing express words of advocacy of election or defeat”). See CRAIG B. HOLMAN & LUKE MCLOUGHLIN, BRENNAN CTR. FOR JUSTICE, BUYING TIME: TELEVISION ADVERTISING IN THE 2000 FEDERAL ELECTIONS 22-27, <http://www.brennancenter.org> (2001) (tracing the history of the issue advocacy loophole).

²⁶ See *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C.) (three-judge court), *prob. juris. noted*, 123 S. Ct. 2268 (2003) (mem.) (considering provisions in McCain-Feingold Act). The effect of the badly fragmented *McConnell* decision, which would alter the McCain-Feingold Act in bizarre ways, has been stayed pending Supreme Court review. See *McConnell v. FEC*, 253 F. Supp. 2d 18, 20 (D.D.C. 2003). Courts have also considered numerous state law issue advocacy disclosure requirements. See, e.g., *Cal. Pro-Life Council v. Getman*, 328 F.3d 1088, 1107 (9th Cir. 2003) (upholding the narrow construction of a state issue advocacy disclosure law); *Vt. Right to Life Comm. v. Sorrell*, 221 F.3d 376, 387 (2d Cir. 2000) (invalidating a state issue advocacy disclosure requirement); *Doe v. State*, 2003 Tex. Crim. App. LEXIS 88; at *3-*4 (Tex. Crim. App. May 14, 2003) (invalidating a similar statute).

²⁷ See Lillian R. BeVier, *Mandatory Disclosure, “Sham Issue Advocacy,” and Buckley v. Valeo: A Response to Professor Hasen*, 48 UCLA L. REV. 285, 288-92 (2000); Richard Briffault, *Issue Advocacy: Redrawing the Elections/Politics Line*, 77 TEX. L. REV. 1751 (1999); Richard L. Hasen, *Measuring Overbreadth: Using Empirical Evidence to Determine the Constitutionality of Campaign Finance Laws Targeting Sham Issue Advocacy*, 85 MINN. L. REV. 1773 (2001) [hereinafter Hasen, *Measuring Overbreadth*]; Richard L. Hasen, *The Surprisingly Complex Case for Disclosure of Contributions and Expenditures Funding Sham Issue Advocacy*, 48 UCLA L. REV. 265 (2000) [hereinafter Hasen, *Complex Case*]; Potter, *supra* note 23; Andrew Pratt, Comment, *The End of Sham Issue Advocacy: The Case to Uphold Electioneering Communications in the Bipartisan Campaign Reform Act of 2002*, 87 MINN. L. REV. 1663 (2003).

²⁸ Act of July 1, 2000, Pub. L. No. 106-230, 114 Stat. 477 (2000) (codified in scattered sections of I.R.C.). Several commentators have discussed the statute’s disclosure requirement. See Donald B. Tobin, *Anonymous Speech and Section 527 of the Internal Revenue Code*, 37 GA. L. REV. 611 (2003) (arguing that Congress may condition a political organization’s tax-exempt status on the organization’s willingness to comply with Section 527’s disclosure provisions); David S. Karp, Note, *Taxing Issues: Reexamining the Regulation of Issue Advocacy by Tax-Exempt Organizations Through the Internal Revenue Code*, 77 N.Y.U. L. REV. 1805 (2002) (arguing that Section 527 should be limited to groups engaged in express advocacy); see also Susan Crabtree, *Congress Tweaks 527 Law*, ROLL CALL, Oct. 21, 2002, at 1 (describing technical revisions in a law enacted with bipartisan support). One commentator has proposed a more dramatic change in the tax code, requiring disclosure of contributors, including individuals, who give money to “think tanks” organized under § 501(c)(3). See Note, *The Political Activity of Think Tanks: The Case for Mandatory Contributor Disclosure*, 115 HARV. L. REV. 1502 (2002) [hereinafter Harvard Note].

tributions, changing the constitutional analysis in important ways.²⁹ A recent proposal by Bruce Ackerman and Ian Ayres to replace mandatory disclosure of contributions with mandatory anonymity has also generated debate, but neither the authors nor their critics focus on privacy in particular.³⁰ If unthinking support for disclosure is widespread, silence about its privacy costs is nearly universal.³¹

Buckley v. Valeo upheld the disclosure of individual campaign contributions on the theory that its benefits outweigh its costs.³² But the characterization of these benefits and costs must now be reconsidered in light of new technology, increased concern for privacy, and the realities of modern campaigns. Part I of this Article, after a brief description of current disclosure rules, examines the privacy-related costs of disclosure and finds them more significant than the consensus recognizes. Part II moves to the other side of the scale and concludes that the purported benefits of disclosure have been overestimated, especially in the case of comparatively small contributions.

This reassessment of costs and benefits calls into question the conventional wisdom favoring disclosure. Part III considers the constitutional ramifications of this adjusted balance between costs and benefits. A vague standard of review and an inclination to defer to the legislature might allow courts to avoid striking down the current disclosure regime. But they should find the dissonance between that result and the new jurisprudence on anonymous political activity to be uncomfortable.

Part IV moves from the constitutional question to the policy issue. Whether or not courts strike down disclosure rules as unconstitutional, an improved understanding of privacy costs suggests that excessive disclosure is an unwise policy. None of this analysis requires the end of all contribution disclosure. Far from it, the Article con-

²⁹ See *infra* note 160 and accompanying text (discussing the crucial distinction between expenditures and contributions under *Buckley v. Valeo*).

³⁰ ACKERMAN & AYRES, *supra* note 3; see also Ian Ayres & Jeremy Bulow, *The Donation Booth: Mandating Donor Anonymity to Disrupt the Market for Political Influence*, 50 STAN. L. REV. 837 (1998) (offering an earlier version of the "secret donation booth" proposal). For a broad overview of the response to Ackerman and Ayres, see *The Brennan Center Jorde Symposium on Constitutional Law*, 91 CAL. L. REV. 641 (2003); Symposium, *Commentaries on Bruce Ackerman and Ian Ayres's Voting with Dollars: A New Paradigm for Campaign Finance Reform*, 37 U. RICH. L. REV. 35 (2003). See also Daniel H. Lowenstein, *Voting with Votes*, 116 HARV. L. REV. 1971 (2003) (book review). The Ackerman and Ayres proposal is discussed further in notes 250-53 and accompanying text.

³¹ I have only found three commentaries that devote more than superficial attention to individual privacy concerns. See Richard Briffault, *Reforming Campaign Finance Reform: A Review of Voting with Dollars*, 91 CAL. L. REV. 643, 655 (2003) (reviewing ACKERMAN & AYRES, *supra* note 3); Garrett, *supra* note 3, at 1043-44; Harvard Note, *supra* note, at 1523.

³² *Buckley v. Valeo*, 424 U.S. 1, 66-68 (1976) (per curiam) (finding that three state interests supporting disclosure outweigh donors' First Amendment interests in keeping contributions private).

cludes by suggesting some possible regimes for disclosure that retain its important virtues while better respecting privacy. I urge merely a recalibration of the cost-benefit scale to give greater weight to an individual's interest in keeping personal political convictions private.

At a minimum, the disclosure of smaller contributions deserves more careful consideration than it now receives. When one remembers that many individual contributors are idealistic "Mrs. McIntyres" who donate modest sums of money to support their favorite causes, disclosure takes on a different appearance than the conventional consensus recognizes. The current failure even to acknowledge privacy costs conceals the trade off required by disclosure and leads to an unreflective assumption that privacy invasions are easily justified by the civic virtue of "sunlight."³³

I. PRIVACY COSTS

In order to evaluate the privacy costs exacted by campaign contribution disclosure laws, we must first know what they require, so Part I.A reviews them in brief. The remainder of this Part explores the privacy costs that result.

A. *The Current Disclosure Regime*

Just a small percentage of American adults—not more than one in ten—makes political contributions.³⁴ Contrary to widespread perception, most of these contributions are modest donations of a few hundred dollars.³⁵ Other types of highly visible political spending may in-

³³ See Garrett, *supra* note 3, at 1011 ("As is often the case with gut reactions, this one needs to be critically assessed. Disclosure is not costless.")

³⁴ See National Election Studies, Center For Political Studies, University of Michigan, *The NES Guide to Public Opinion and Electoral Behavior*, at http://www.umich.edu/~nes/nesguide/toptable/tab6b_5.htm (last visited Aug. 24, 2003) [hereinafter *NES Studies*]. The NES survey has asked slightly different versions of essentially the same question concerning political contributions for many years. Since 1980, between 6 and 10 percent of respondents say they have made such a contribution; 7 percent did so in 1998 and 9 percent in 2000. *Id.* The NES Studies also breaks out results by race, gender, income group, education level, and other socioeconomic indicators, as well as by partisan and ideological affiliation. *Id.* See also John Green et al., *Individual Congressional Campaign Contributors: Wealthy, Conservative, and Reform-Minded*, at <http://www.opensecrets.org/pubs/donors/donors.asp> (June 9, 1998) (reporting the results of a 1997 survey concentrating on contributors' reasons for giving and opinions on the campaign finance system).

³⁵ In fact, extrapolating from FEC data, it appears that the number of contributions to candidates of under \$200 is over twice the number of those over \$750. In the 1999-2000 election cycle, individual contributions of less than \$200 to congressional candidates totaled \$169,289,822. See Fed. Election Comm'n, *FEC Reports Congressional Financial Activity for 2000*, at <http://www.fec.gov/press/051501congfinact/051501congfinact.html> (May 15, 2001). Using an unrealistically conservative assumption that all contributions in this category were \$199 each, that still would mean that there were at least 850,703 contributions of this size. In contrast, in-

volve larger amounts, such as money provided by corporations, unions, and interest groups³⁶ or unlimited independent expenditures by millionaires.³⁷ But these do not implicate quite the same privacy concerns as modest checks written by individual donors to campaigns or causes they personally support.

Disclosure has been a cornerstone of campaign finance regulation for almost a century, dating at least to the federal Publicity of Political Contributions Act of 1910.³⁸ More recently, reformers turned to a disclosure strategy when enacting the issue advocacy and tax code provisions mentioned earlier,³⁹ as well as certain small expansions of disclosure rules for individual contributions in the McCain-Feingold Act.⁴⁰ The principal federal provisions requiring disclosure of individual contributions were enacted as part of the 1974 amendments to the Federal Election Campaign Act ("FECA").⁴¹

dividual contributions of \$750 or more totaled \$250,825,446. *Id.* Using an equally unrealistic assumption that all these contributions were at the very bottom of the range, \$750, then no more than 334,433 contributions were at this level. This somewhat crude extrapolation is necessary because contributions under \$200 are not reported to the FEC individually.

³⁶ This is mostly the infamous soft money that the McCain-Feingold Act aims to curb. Of course, most of this money originally came from individuals. See Stephen Ansolabehere et al., *Why Is There So Little Money in U.S. Politics?*, 17 J. ECON. PERSP. 105, 108 (2003) (estimating that, in the 2000 elections, individuals gave \$1.1 billion to candidates, \$700 million to parties, and \$600 million to PACs, for a total of \$2.4 billion in individual contributions; only \$380 million originated directly from the treasuries of unions, corporations, and trade associations; \$235 million came from public funding). Corporations and unions have long been barred from contributing to candidates directly. See Taft-Hartley Act of 1947, 61 Stat. 136, § 304 (1947) (banning direct contributions to candidates by labor unions); Act of Jan. 26, 1907, ch. 420, 34 Stat. 864 (1907) (imposing similar restrictions on corporations and national banks).

³⁷ One such expenditure, which received a great deal of attention, was a television advertisement attacking John McCain's environmental record in the 2000 presidential primaries, funded by over two million dollars from Sam and Charles Wyly, Texas financiers who supported the candidacy of George W. Bush. Edward Walsh & Terry M. Neal, *McCain Hits TV Ad Blitz from Texas, Voters Are Urged to Condemn Bush Backers' "Dirty Money,"* WASH. POST, Mar. 5, 2000, at A20.

³⁸ 36 Stat. 822 (1910). This statute, the first federal campaign finance disclosure law, required post-election disclosure of national parties' contributions and expenditures. *Id.* The campaign for its passage began in 1904. See David Adamany, *The Unaccountability of Political Money*, in MONEY, ELECTIONS, AND DEMOCRACY: REFORMING CONGRESSIONAL CAMPAIGN FINANCE 95, 96-97 (Margaret Latus Nugent & John R. Johannes eds., 1990) (noting that the National Publicity Bill Organization was formed in 1904 to encourage disclosure of campaign contributions); see also *Buckley v. Valeo*, 424 U.S. 1, 61-63 (1976) (per curiam) (describing the history of campaign finance disclosure laws). Disclosure laws enacted before 1974 were ineffective and therefore largely "symbolic." Briffault, *supra* note 31, at 651-52.

³⁹ See *supra* notes 24-28 and accompanying text.

⁴⁰ See Pub. L. No. 107-155, §§ 306, 501-503, 116 Stat. 81, 102, 114-15 (2002) (establishing standards for software to allow more rapid disclosure of contributions on the Internet, expanding access to records on the Internet, and requiring additional disclosure reports by campaigns and national political parties); Bipartisan Campaign Reform Act of 2002 Reporting, 68 Fed. Reg. 404 (Jan. 3, 2003) (promulgating final rules to implement these provisions).

⁴¹ Pub. L. No. 93-443, 88 Stat. 1263 (1974) (codified at 2 U.S.C. §§ 431-455 (2000)).

Under FECA, candidates for federal office, and PACs that donate to such candidates, must submit regular reports about the contributions they have received and the expenditures they have made. Candidates must list individual contributors who give them over \$200 in one election cycle, along with their address, occupation, and employer. PACs must provide the same information about individuals who contribute over \$200 in any calendar year.⁴² The \$200 threshold has not changed since 1980, when it was raised from the \$100 level originally set in 1974.⁴³

Most states impose even stricter disclosure provisions for nonfederal elections.⁴⁴ Almost all require campaigns to itemize contributions below the federal threshold of \$200.⁴⁵ Eight states set thresholds as low as \$20 or \$25, and several others require reporting of all contributions, no matter what their size.⁴⁶

Before the rise of the Internet, data on these disclosed contributions was available to the public in theory, but difficult to obtain in practice. A curious journalist or voter needed to travel in person to an election agency office and rummage through piles of paper reports arranged in filing cabinets.⁴⁷ One could not search, sort, aggre-

⁴² 2 U.S.C. § 434(b)(3)(A) (2000); 11 C.F.R. 104.3(a)(4)(i) (2002). The requirement to identify individuals by their name, address, occupation, and employer is found in 2 U.S.C. § 431(13)(A) (2000).

⁴³ See Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, § 104, 93 Stat. 1339, 1348 (1980) (codified at 2 U.S.C. §§ 431-455) (amending § 304(b)(3)(A) of FECA). The law revised aspects of FECA which, after the experience of a few election cycles, were considered administratively burdensome. Privacy was not a motivating factor for the increase in the threshold. An earlier version of the bill left the \$100 level in place. See H.R. REP. NO. 96-422, at 18 (1979), reprinted in 1979 U.S.C.C.A.N. 2860, 2878.

⁴⁴ The FEC publishes a summary of state campaign finance laws, which is assembled by outside contractors. See EDWARD D. FEIGENBAUM & JAMES A. PALMER, FED. ELECTION COMM'N, CAMPAIGN FINANCE LAW 2000: A SUMMARY OF STATE CAMPAIGN FINANCE LAWS WITH QUICK REFERENCE CHARTS (2000). Another good source of information about state laws is the Campaign Finance Information Center's Web site, which includes summaries of campaign finance disclosure rules in every state. State Campaign Finance Search, at <http://www.campaignfinance.org/states/index.html> (last visited Aug. 24, 2003).

⁴⁵ See generally FEIGENBAUM & PALMER, *supra* note 44, at chart 1. The only exceptions, according to this compilation, are Mississippi (\$200), North Dakota (\$200), Nebraska (\$250), and New Jersey (\$300). *Id.*

⁴⁶ The eight states are Arizona (\$25), Colorado (\$25), Michigan (\$20), New Hampshire (\$25), Ohio (\$25, but higher for in-kind contributions), Washington (\$25), Wisconsin (\$20), and Wyoming (\$25); the District of Columbia requires disclosure at the \$10 level. *Id.* The states that have no threshold (although the fine print of the law sometimes limits disclosure in other ways) are Alabama, Louisiana, Maryland, and West Virginia. *Id.* New Mexico allows contributors to give up to \$100 to a candidate anonymously—that is, without even the candidate knowing their identity. *Id.* at NM-1 (citing N.M. Stat. Ann. §§ 1-19-26(Q), 1-19-34(B), 1-19-34(D)). A handful of other states allow small anonymous contributions, but since the permissible amounts are below the disclosure thresholds in those states, they make no difference for the privacy of the contributor. See *id.* at chart 2-B.

⁴⁷ See CAMPAIGN FIN. INST. TASK FORCE ON DISCLOSURE, WEBSITE WOES: THE FEDERAL NON-SYSTEM FOR CAMPAIGN FINANCE DISCLOSURE 5, <http://www.cfinst.org/disclosure/>

gate, or analyze these documents in the ways we take for granted when using a computerized database.⁴⁸ While my search for Peoria dentists yielded immediate results on the FEC Web site, it would be almost impossible to conduct in a huge file room arranged by candidate or contributor name rather than by profession or geography. Even when election officials first began computerizing their files, often the general public still needed to visit an election agency office and search the resulting database using a terminal there.⁴⁹

Because of combined cultural and technological forces, we now live in an age when everyone from prospective employers to prospective dates conducts do-it-yourself background checks with Internet search engines.⁵⁰ Dramatically increased computerization has created digitized archives of personal data that are larger, more publicly accessible, and more easily searched and analyzed than ever before.⁵¹ In the last five years, campaign contribution disclosure suddenly joined the trend of online compilation and availability.⁵² This change in technology qualitatively transformed the nature of disclosure laws. No longer can a contributor assume that disclosed information is

pdf/websiteswoes.pdf (Oct. 2002) ("As late as 1996, the major source of public information on money in federal elections was the small FEC Public Records office in Washington, DC. A visitor could laboriously examine and, for a fee, copy microfilmed campaign finance reports . . .").

⁴⁸ See CRAIG B. HOLMAN & ROBERT M. STERN, CENTER FOR GOVERNMENTAL STUDIES, ACCESS DELAYED IS ACCESS DENIED: ELECTRONIC REPORTING OF CAMPAIGN FINANCE ACTIVITY 14-15, http://www.cgs.org/publications/docs/Public_Disclosure.pdf (Dec. 2001) (detailing electronic filing procedures). The authors describe the process of drawing useful information from such paper reports as "slow, mathematically consuming, and tending towards inaccuracies." *Id.* at 20.

⁴⁹ *Id.* at 17. Alternately, some states allowed members of the public to obtain the database on a computer disk. *Id.* at 17-18.

⁵⁰ See Kathryn Balint, *I Surf, Therefore I Am: Finding Yourself—Literally—on the Pages of the Web*, SAN DIEGO UNION-TRIB., Dec. 5, 2000, Computer Link Section, at 6 (describing the danger that employers will find adverse information about a job applicant—or someone with an identical name—by surfing the Web); Kris Maher, *The Jungle*, WALL ST. J., July 16, 2002, at B10 (quoting a job searching expert, referring to popular search engine, "I can just about promise you that an employer will Google you"); Deborah Schoeneman, *Don't Be Shy Ladies—Google Him!*, N.Y. OBSERVER, Jan. 15, 2001, at 1 (chronicling a trend among Manhattan singles of investigating the background of their dates using a search engine); Neil Swidey, *A Nation of Voyeurs*, BOSTON GLOBE MAG., Feb. 2, 2003, at 11 (profiling Google and its cultural impact).

⁵¹ See Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 STAN. L. REV. 1193, 1198-99 (1998) (noting the increased access to information placed on the Web, because "data generated in cyberspace are detailed, computer-processable, indexed to the individual, and permanent"); Neil Weinstock Netanel, *Cyberspace Self-Governance: A Skeptical View from Liberal Democratic Theory*, 88 CAL. L. REV. 395, 473-74 (2000) (discussing the "virtually limitless possibilities for compiling, analyzing, and systematizing" digitized personal data).

⁵² See HOLMAN & STERN, *supra* note 48, at 17-18 (describing the sudden surge in the availability of campaign finance disclosures on the Internet starting in 1998).

unlikely to be seen by anyone.⁵³ The law may remain the same, but its effect is entirely different.⁵⁴

Many government election agencies pursue their disclosure mission with vigor. The FEC has called providing information about campaign contributions “perhaps the most important of the FEC’s duties.”⁵⁵ It publishes a large directory of federal and state agencies that disclose information about “money in politics,” including data on campaign contributions.⁵⁶ As noted earlier, the FEC’s Web site includes a fairly elaborate search engine, where a visitor can look up any person’s reported federal contributions by searching for name, city, state, zip code, employer, or occupation.⁵⁷ According to one comprehensive survey conducted in 2002, forty-six states and four major cities also provide online public access to campaign finance materials.⁵⁸

After the government makes this information conveniently available, private entities and the news media disseminate it further. Various independent advocacy groups use disclosure data to create sophisticated online databases of individual contributors.⁵⁹ These or-

⁵³ The FEC’s Web site had 146,113 visits in April 2002; the disclosure Web site maintained by the Center for Responsive Politics, see *infra* note 59, had 188,278 visitors in the same month. CAMPAIGN FIN. INST. TASK FORCE ON DISCLOSURE, *supra* note 46, at 6.

⁵⁴ One example of the use of contribution data may be particularly noteworthy to readers of this Article: one study analyzed the contribution patterns of law school faculty to reach conclusions about their ideological makeup, by school and subject matter. See John O. McGinnis and Matthew Schwartz, Commentary, *Conservatives Need Not Apply*, WALL ST. J., April 1, 2003, at A14.

⁵⁵ Fed. Election Comm’n, *Administering and Enforcing the FECA*, in CAMPAIGN FINANCE REFORM: A SOURCEBOOK 293, 294 (Anthony Corrado et al. eds., 1997), available at <http://www.fec.gov/pages/20year.htm> [hereinafter *FEC Twenty-Year Report*].

⁵⁶ Fed. Election Comm’n, *Combined Federal/State Disclosure and Election Directory 2003*, <http://www.fec.gov/pubrec/cfsdd/cfsdd.htm> (last visited Aug. 24, 2003).

⁵⁷ See <http://www.fec.gov> (last visited Aug. 24, 2003); *supra* notes 1-2 and accompanying text. For a critique of this site, see generally CAMPAIGN FIN. INST. TASK FORCE ON DISCLOSURE, *supra* note 47, at 8-25.

⁵⁸ Ctr. for Governmental Studies, *Electronic Filing and Disclosure Survey: 2002 Update 9*, <http://www.cgs.org/publications/docs/2002SurveyResults.pdf> (last visited July 27, 2003); see HOLMAN & STERN, *supra* note 48, at 5, 31 n.4 (providing results of 1996 and 2000 surveys). The cities are Los Angeles, New York, San Francisco, and Seattle; Austin, Texas and Madison, Wisconsin also post scanned disclosure forms online. The only states that do not post significant data online are Montana, Oklahoma, Tennessee, and Wyoming. Ctr. for Governmental Studies, *supra* at 9.

⁵⁹ Organizations that place large privately created contributor databases on the Internet include the Campaign Finance Information Center, sponsored by the University of Missouri School of Journalism, which allows registered users to conduct a “power search” of contributions in most states, at <http://www.campaignfinance.org> (last visited July 27, 2003); the Center for Responsive Politics, which offers data on individuals’ federal contributions, including search functions by zip code, at <http://www.opensecrets.org> (last visited July 27, 2003); Common Cause, which provides data on the unrestricted “soft money” contributions to political parties now targeted by the McCain-Feingold Act, Soft Money Laundromat, at <http://www.commoncause.org/laundromat> (last visited July 27, 2003); and the National Institute on Money in State Politics, a foundation-funded entity in Helena, Montana that provides

ganizations often add their own research to the information they obtain through government-mandated disclosure. Many of them use coding systems to convey more information, such as one developed by the Center for Responsive Politics to classify contributors' occupations; this coding process is known as "fingerprinting" contributors.⁶⁰ The National Institute of Money in State Politics augments public disclosure records by identifying the occupations, employers, and economic interests of individual contributors.⁶¹

This combination of campaign finance disclosure law, government administrative practices, and new technology makes information about individual political contributions much more widely and easily available than, say, medical or financial data.⁶² Contribution information is also more readily available than it was in 1976 when the regime was upheld in *Buckley v. Valeo*.⁶³ As one author has commented, giving a political donation now requires "broadcasting my beliefs to anyone who has a modem."⁶⁴

B. How Disclosure Impinges on Privacy

In his separate opinion in *Buckley*, Chief Justice Burger protested that the Court's analysis of disclosure rules paid too little attention to the privacy of individual contributors who made modest donations: "The public right to know ought not to be absolute when its exercise reveals private political convictions."⁶⁵ His instinct about the trade off between disclosure and privacy was correct. Recent technological developments make disclosed data far more accessible and only inten-

databases of contributions to many state campaigns, at <http://www.followthemoney.org> (last visited July 27, 2003). State-based advocacy organizations also offer databases about contributions in some individual states. See, e.g., Virginia Public Access Project, at <http://www.vpap.org> (last visited July 27, 2003).

⁶⁰ See LARRY MAKINSON, excerpts from THE FOLLOW THE MONEY HANDBOOK (1994), <http://www.opensecrets.org/pubs> (last visited July 27, 2003) (explaining a technique for using an occupational classification system).

⁶¹ The National Institute on Money in State Politics, *About the Database: How the Data are Compiled*, at <http://www.followthemoney.org> (last visited July 27, 2003).

⁶² See *supra* notes 10-12 and accompanying text (canvassing the legal protection for medical, financial, and other personal data).

⁶³ *Buckley v. Valeo*, 424 U.S. 1, 66-68 (1976) (per curiam).

⁶⁴ Fred Bernstein, Op-Ed, *An Online Peek at Your Politics*, N.Y. TIMES, Oct. 4, 2000, at A35.

⁶⁵ 424 U.S. at 237 (Burger, C.J., concurring in part and dissenting in part). Ironically, Burger held precisely the opposite view when the *Buckley* Court began its consideration of the case. See Richard L. Hasen, *The Untold Drafting History of Buckley v. Valeo*, 2 ELECTION L.J. 241, 244 & n.11 (2003) (reporting that internal memos show Burger's early support for FECA's disclosure provisions); *id.* at 246 (quoting Chief Justice Burger as writing in a memo that "[n]othing could be more wholesome and consistent with our tradition as an open society" than FECA's disclosure rules).

sify this concern. But current doctrine and conventional views continue to place too little value on the privacy costs of disclosure.

“Information privacy” (or “data privacy”) can be defined broadly as one’s ability to control the dissemination of personal information.⁶⁶ This basic definition leaves several specific issues open, such as the meaning of the term “personal information,” the nature and degree of control an individual should have, and the duration of that control.⁶⁷ But it is adequate for this Article, because the disclosure rules analyzed here give an individual contributor no control at all over information about the clearly personal and sensitive topic of political convictions. Under any definition, these rules curtail information privacy. The question is how much, and at what cost.

While this issue arose in *Buckley*, it was hardly the core of the case. Contribution disclosure consumes only about twenty-five of the per curiam opinion’s 144 pages in the *United States Reports*.⁶⁸ The Supreme Court was much more concerned with other questions, such as the legitimacy of FECA’s caps on campaign expenditures. The appellants also stipulated that disclosure was less restrictive than the other provisions of FECA, and the Court accepted this determination, focusing the inquiry elsewhere.⁶⁹ Finally, *Buckley* was considered on an accelerated schedule and drafted by multiple Justices, making careful attention to a subsidiary issue even less realistic.⁷⁰

⁶⁶ See ALAN F. WESTIN, *PRIVACY AND FREEDOM* 7 (1967) (defining privacy as “the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others”); Stephen Breyer, *Our Democratic Constitution*, James Madison Lecture On Constitutional Law (Oct. 22, 2001), in 77 N.Y.U. L. REV. 245, 261 (2002) (defining privacy as “the power to ‘control information about oneself’”) (quoting M. ETHAN KATSH, *LAW IN A DIGITAL WORLD* 228 (1995)); Kang, *supra* note 51, at 1205 (defining “information privacy” as “an individual’s claim to control the terms under which personal information . . . [is] used”); William McGeeveran, Note, *Programmed Privacy Promises: P3P and Web Privacy Law*, 76 N.Y.U. L. REV. 1812, 1816 n.19 (2001) (adopting and defending this definition); see also *United States Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 763 (1989) (opening a discussion of privacy under the Freedom of Information Act by noting “both the common law and the literal understandings of privacy encompass the individual’s control of information concerning his or her person”).

⁶⁷ A number of scholars question the usefulness of control-based definitions because of various constraints on choice, including the inability to recognize the full implications of sacrificing privacy. See, e.g., Yochai Benkler, *Siren Songs and Amish Children: Autonomy, Information, and Law*, 76 N.Y.U. L. REV. 23, 32-41 (2001); Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at “Copyright Management” in Cyberspace*, 28 CONN. L. REV. 981, 1003-38 (1996); Paul M. Schwartz, *Internet Privacy and the State*, 32 CONN. L. REV. 815, 821-34 (2000). That debate is beyond the scope of this Article; in the context of campaign contributions, as I note in the text, the lack of information privacy is manifest under any definition, including even the “control” paradigm that these scholars view as too lenient in other contexts.

⁶⁸ 424 U.S. at 60-84.

⁶⁹ *Id.* at 60, 68 & n.81. The Court speaks of corruption as the government interest at this point of the opinion, but later expands to the three interests described in Part II: information, corruption, and enforcement.

⁷⁰ See Hasen, *supra* note 65, at 249-51 (detailing the *Buckley* opinion’s drafting history).

Operating within this context, the *Buckley* Court construed information privacy narrowly indeed. It recognized only one individual privacy interest that might outweigh the government's interests in disclosure—the risk of outright harassment of a contributor as retaliation for the views expressed by a contribution.⁷¹ The Court interpreted this danger in the shadow of cases where it had protected the anonymity of NAACP members in the segregated south.⁷² The cost of disclosure in these cases included such consequences as “economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility.”⁷³ As in other instances where the Supreme Court responded to bigotry in the Civil Rights era, however, the relevance of these decisions may be confined to the extraordinary circumstances that gave rise to them.⁷⁴ Certainly, contributors to a typical present-day political campaign do not suffer the same costs from disclosure that southern desegregationists did in the 1950s and 1960s. *Buckley* contemplated that costs would outweigh benefits only when they were truly enormous.

The decision limited its recognition of privacy costs in other ways as well. It placed the burden on the contributor to prove this high level of injury in order to avoid disclosure requirements.⁷⁵ Furthermore, the Court indicated that even such serious injury needed to be paired with diminished government interests on the other side of the scale, which could be shown only by contributors to “a minor party with little chance of winning an election.”⁷⁶ Solely in the case of such fringe candidates would “the state interest furthered by disclosure

⁷¹ *Buckley*, 424 U.S. at 68-74.

⁷² *E.g.*, *Bates v. City of Little Rock*, 361 U.S. 516 (1960); *NAACP v. Alabama*, 357 U.S. 449 (1958).

⁷³ *Buckley*, 424 U.S. at 69 (quoting *NAACP v. Alabama*, 357 U.S. at 462). Justice Scalia's dissent in *McIntyre*, which relied principally on arguments about original constitutional intent, also cited this case law concerning “peculiar circumstances” and protested that, in contrast, there was “not even a hint that Mrs. McIntyre feared ‘threats, harassment, or reprisals.’” *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 379-80 (1995) (Scalia, J., dissenting) (emphasis removed).

⁷⁴ *Cf.* *Terry v. Adams*, 345 U.S. 461 (1953) (allowing state intervention to prevent a private all-white group from exercising de facto control over Democratic nominations for offices in then heavily Democratic Texas). This case has by no means created broad precedent for other interventions into the internal workings of political parties. *See, e.g.*, *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000) (invalidating a California blanket primary law); *Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214 (1989) (invalidating a statute that prohibited political parties from expressing support for specific candidates prior to primaries); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208 (1986) (invalidating a closed primary law).

⁷⁵ *Buckley*, 424 U.S. at 71-72 (“But no appellant in this case has tendered record evidence of the sort proffered in *NAACP v. Alabama*.”); *id.* at 74 (“Where it exists the type of chill and harassment identified in *NAACP v. Alabama* can be shown.”). In addition to its stringency, this requirement ignores the inherent contradiction of engaging in public litigation in order to maintain privacy—presumably after the harm of disclosure is already done.

⁷⁶ *Id.* at 70.

[be] so insubstantial that the Act's requirements [could not] be constitutionally applied."⁷⁷ The Supreme Court found these preconditions met in one later case concerning the Socialist Party,⁷⁸ but it is a rare situation in which this extreme standard would put any weight at all on the privacy side of the scale.

There are, however, many other legitimate reasons for people to make political statements anonymously. As the Court explained in *McIntyre*, "The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible."⁷⁹ All of these penalties could apply to contributions.

There are two intertwined types of privacy costs, one consequential but concrete, the other more direct but more abstract. The concrete costs occur when disclosure leads to specific negative results for the contributor. The NAACP members and socialists who are protected explicitly in current doctrine are extreme examples, but contributors can suffer significant harm from disclosure in a variety of other contexts. Individuals also have a direct but abstract interest in shaping their identity in the world, rooted in rights of dignity and autonomy.⁸⁰ Control over personal information maximizes their autonomy by increasing their ability to be the authors of their own lives, at least as perceived by others. Loss of that control injures personal dignity because others learn information that is "none of their business." I will arrange this discussion roughly from the most concrete costs to the more inchoate—but still important—autonomy and dignity costs.

In his *Buckley* opinion, Chief Justice Burger noted perhaps the most obvious direct penalty of disclosure—contributors to the losing candidate may get a cold shoulder from the winner.⁸¹ He also ex-

⁷⁷ *Id.* at 71.

⁷⁸ *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 101 (1982) (finding unanimously that the party demonstrated "reasonable probability of threats, harassment, or reprisals" against contributors). This protection of privacy in a socialist political campaign was itself an improvement over the Court's earlier precedents when, around the same time it was protecting civil rights protestors, it approved of disclosure to root out "subversive" activity. See *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 97 (1961), cited with approval in *Buckley*, 424 U.S. at 66.

⁷⁹ *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-42 (1995); see *Watchtower Bible & Tract Soc'y, Inc. v. Vill. of Stratton*, 536 U.S. 150, 166 (2002) (quoting this language from *McIntyre* with approval).

⁸⁰ For examples of classic past efforts to define the dignity and autonomy interests protected by data privacy, see generally WESTIN, *supra* note 66; Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962 (1964); Charles Fried, *Privacy*, 77 YALE L.J. 475 (1968); William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960); Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

⁸¹ *Buckley*, 424 U.S. at 237 (Burger, C.J., concurring in part and dissenting in part) ("Similarly, potential contributors may well decline to take the obvious risks entailed in making a re-

pressed concern about “[r]ank-and-file union members or rising junior executives” unwilling to defy their superiors’ political preferences with “even modest contributions.”⁸² These situations present the possibility of very concrete penalties for those who contribute to the “wrong” candidate or cause.

Disclosure of political contributions could also bear negative consequences on many professions. Those who rely on trust and identification with others to do their work—such as ministers, psychotherapists, or schoolteachers—may find their roles undermined if congregants, patients, or parents know and judge their personal political activity. Many media outlets impose a code of conduct on journalists that requires them to avoid public political activity.⁸³ When one radio journalist found her \$35 contribution to a gubernatorial candidate reported in the local newspaper, she responded, “I had asked [the candidate] to make it more anonymous I didn’t view it as a public endorsement.”⁸⁴ The Model Code of Judicial Ethics also bans political contributions by judges, but allows private political activity.⁸⁵ Both sets of rules aim to avoid the *appearance* of bias; they do not actually suggest that journalists or judges lack private political

portable contribution to the opponent of a well-entrenched incumbent.”). Republican lobbyists and conservative activists in Washington have worked together on the so-called “K Street Project” to assemble a “bulky dossier” listing the past political contributions of lobbyists and employees at trade associations and advocacy groups. Jim VandeHei, *GOP Monitoring Lobbyists’ Politics*, WASH. POST, June 10, 2002, at A1 (noting the hope of the project’s participants that Republican officeholders will provide greater “access” to Republican contributors and shut out Democratic contributors). As the congressman then in charge of Republican House campaigns noted, “People often don’t remember who gave them contributions. But they remember who gave to their opponents.” *Id.* (quoting Rep. Thomas M. Davis III (R-VA)).

⁸² *Buckley*, 424 U.S. at 237 (Burger, C.J., concurring in part and dissenting in part).

⁸³ See *Nelson v. McClatchy Newspapers*, 936 P.2d 1123 (Wash. 1997) (upholding a newspaper’s ability to penalize a reporter for participation in protests and other activism in violation of the newspaper ethics code).

⁸⁴ Bill Dedman, *Journalists’ Donations Raise Question of Conflict*, BOSTON GLOBE, July 18, 2002, at B1 (reporting contributions made by nineteen journalists in a Massachusetts gubernatorial campaign which were publicized under state’s expansive campaign disclosure law). The radio journalist quoted above, a producer for the public radio program “Marketplace,” reportedly violated a station policy against “partisan activity by anyone who contributes editorial content.” *Id.*

⁸⁵ Compare MODEL CODE OF JUDICIAL CONDUCT Canon 5 (A)(1)(e) (1990) (banning judges from making political contributions) with *id.* at Canon 5 (A) cmt. 4 (clarifying that the ban on public endorsements by judges “does not prohibit a judge . . . from privately expressing his or her views on judicial candidates or other candidates for public office”); cf. 28 U.S.C. § 455(a) (2003) (calling for disqualification when a judge’s “impartiality might reasonably be questioned”). The Canon barring contributions is different from the “announce clause” contained in an earlier version of the Model Code and recently held unconstitutional by the Supreme Court. See *Republican Party of Minn. v. White*, 536 U.S. 765, 768, 773 n.5 (2002). Nonetheless, it might be possible to read *White* broadly enough to call this Canon into question. Cf. *Spargo v. N.Y. State Comm’n on Judicial Conduct*, 244 F. Supp. 2d 72, 87-89 (N.D.N.Y. 2003) (relying partly on *White* to invalidate a state law, based on the Model Code, restricting “inappropriate political activity”).

convictions.⁸⁶ Were it possible, an anonymous political contribution might be acceptable under such ethics codes. Similarly, if a gay donor to the Log Cabin Republicans serves in the military, publication of his contribution on the Internet could violate the “Don’t Ask, Don’t Tell” policy and might well result in the end of his career.⁸⁷ Yet by its own terms the military’s rules would not ban the same contribution if it could be made in private. These professional penalties are a significant deterrent against contributing for persons with few other options for political expression.

Another negative consequence is the conversion of political information to unwanted commercial purposes. Those enjoying access to contribution disclosure include data-mining companies that assiduously gather personal information and aggregate it into a detailed profile of each American consumer.⁸⁸ Federal regulations supposedly ban the use of disclosed contribution information for commercial purposes or for solicitation of contributions by others.⁸⁹ Data on political giving nevertheless works its way into such permanent profiles.⁹⁰ Indeed, campaigns routinely “salt” their FEC reports with phony donors, linked to the addresses of staff members, so that they can track the misuse of the data by others.⁹¹ This appropriation of personal information for unwanted uses also implicates the dignitary interest in control. When medical information was diverted for marketing, it stimulated a legislative and regulatory response that recognized this dignitary interest.⁹²

⁸⁶ Cf. *White*, 536 U.S. at 777-78 (“[I]t is virtually impossible to find a judge who does not have preconceptions about the law.”).

⁸⁷ See *McVeigh v. Cohen*, 983 F. Supp. 215 (D.D.C. 1998) (considering the case of a gay sailor who discussed his sexual orientation in a seemingly anonymous online profile, only to have it revealed to his military superiors, who pursued discharge against him); Edward Stein, *Queers Anonymous: Lesbians, Gay Men, Free Speech, and Cyberspace*, 38 HARV. C.R.-C.L. L. REV. 159, 199-202 (2003) (arguing that “closetspeech” is protected by the First Amendment because “gay men and lesbians cannot enjoy free speech unless, when they speak as gay men or lesbians, they are allowed to speak anonymously”).

⁸⁸ See SIMSON GARFINKEL, *DATABASE NATION: THE DEATH OF PRIVACY IN THE 21ST CENTURY* 164-68 (2000) (describing the data collection industry).

⁸⁹ See 11 C.F.R. § 104.15 (2003) (prohibiting the sale or use for soliciting contributions of any contribution information); FED. ELECTION COMM’N, *CAMPAIGN GUIDE FOR CONGRESSIONAL CANDIDATES AND COMMITTEES* 39 (1999) (reproducing itemized receipt forms for campaign contributions which state that “[a]ny information copied from such Reports and Statements may not be used or sold . . . for commercial purposes”) [hereinafter *FEC CAMPAIGN GUIDE*].

⁹⁰ See, e.g., Leslie Wayne, *Voter Profiles Selling Briskly as Privacy Issues are Raised*, N.Y. TIMES, Sept. 9, 2000, at A1 (describing a company that provides detailed profiles of voters, including information on their past political contributions). The campaigns use these profiles as well, for such purposes as targeted Web advertising. *Id.*

⁹¹ See 11 C.F.R. § 104.3(e) (2003) (permitting a political committee to include up to ten pseudonyms in its reports to the FEC); *FEC CAMPAIGN GUIDE*, *supra* note 89, at 39 (reproducing itemized receipt forms).

⁹² See *supra* note 10 and accompanying text.

As *McIntyre* noted, there are also dangers of “social ostracism.”⁹³ Charles Fried has argued that the formation of relationships, an essential aspect of autonomy, requires that an individual control the selective revelation of personal information to others.⁹⁴ One can imagine that people with opinions different from those prevalent among their friends, family, or neighbors might choose not to reveal their own ideology—or at least might want to control the timing and content of that revelation. Instead, a gay or lesbian person who wishes to contribute to the Log Cabin Republicans risks being outed by FEC reports. Likewise, anyone “googled” by nosy neighbors may have their political convictions exposed.⁹⁵ Political contributions label us, and disclosure displays that label to others without our consent. Forced revelations are intrusions into a sphere of personal liberty.

Significantly, the fragmentary information derived from disclosure reports could be quite misleading: perhaps you donated to a conservative religious group with which you have some disagreements in order to support one of its agenda items, or gave to a liberal Democrat because your brother went to school with him.⁹⁶ Being subjected to such decontextualized judgments (or misjudgments) by others is a further affront to personal dignity.⁹⁷ Not only are you exposed to others without consent, but the impressions they glean do not reflect “the real you.”

Finally, many Americans desire privacy even though they do not face any concrete consequences of disclosure.⁹⁸ For them, it is nothing more than a legitimate preference to be left alone and to maintain control over, and distance from, their interactions with the world. Such comparative hermits may sacrifice the ability to engage in certain political activities, such as marching down Main Street in a protest, because the physical fact of exposure in those situations removes anonymity regardless of any legal rules. In two recent cases, however, the Supreme Court has held that those who physically reveal themselves in the course of political expression are protected

⁹³ *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-42 (1995).

⁹⁴ Fried, *supra* note 80.

⁹⁵ See *supra* note 50 and accompanying text.

⁹⁶ Cf. Richard L. Berke, *A Senate Candidate's Refrain: Could You Stretch It to \$500?*, June 8, 2002, N.Y. TIMES, at A1 (quoting a contributor to a Senate campaign who said “one of the primary reasons I contributed, frankly, was that I went to law school with [the candidate's] wife”). See generally Green et al., *supra* note 34 (discussing contributors' varied motives).

⁹⁷ See JEFFREY ROSEN, *THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA* 8-11 (2000) (discussing how people jump to conclusions about others based on personal data that is incomplete or out of context).

⁹⁸ As *McIntyre* put it, one might simply have “a desire to preserve as much of one's privacy as possible.” 514 U.S. at 342.

from legal requirements that erode their anonymity any further.⁹⁹ The legal rules of contribution disclosure can be seen as even more invasive because they mandate exposure where none would otherwise occur.

Many political contributors do not object to the current legal regime. Contributors are often politically active citizens who proudly announce their ideological convictions in many other contexts already, from individual conversations to bumper stickers to volunteering for campaigns. But information privacy, as I have defined it here, protects choice—and the opportunity to choose whether and how to communicate one's political convictions is an important exercise of autonomy. The elimination of anonymity in campaign contributions results entirely from an intentional state action to govern conduct in a particular way, rather than from any inevitable physical exposure; with different rules, making contributions could be a means to participate in politics for those who value their anonymity.¹⁰⁰

C. *The Chilling Effect of Privacy Costs*

The costs documented thus far are serious in their own right: campaign finance disclosure may cause concrete harms when others learn about an individual's political convictions, and, in any case, unwanted exposure infringes on personal autonomy and dignity. These negative results of disclosure deserve more consideration in policy debates. When the analysis turns to constitutional standards, however, these costs might have limited significance standing alone.

The Supreme Court has never clearly articulated an independent constitutional right to information privacy. Even in 1977, at the exact moment when the Court read substantive due process privacy rights more expansively,¹⁰¹ it unanimously rejected a claim in *Whalen v. Roe*

⁹⁹ See *Watchtower Bible & Tract Soc'y, Inc. v. Vill. of Stratton*, 536 U.S. 150, 166-67 (2002) (finding that door-to-door canvassers retain an anonymity interest despite revealing themselves on doorsteps); *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182 (1999) (finding that a person gathering petition signatures retains an anonymity interest).

¹⁰⁰ In a not-so-different context, when First Amendment scholar Geoffrey Stone was provost of the University of Chicago, he ensured that its laptop connections were configured so that the school allowed users to plug in and remain anonymous, while other universities required registration that removed anonymity. Like the structure of computer systems, the rules of a campaign finance system entail conscious choices that either allow or prohibit anonymity. See LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* 25-29 (1999) (comparing the University of Chicago's "complete, anonymous, and free" Internet access to Harvard's highly controlled access).

¹⁰¹ See, e.g., *Zablocki v. Redhail*, 434 U.S. 374 (1978) (recognizing a fundamental right to marry); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 688 (1977) (invalidating a ban on the distribution of contraceptives to minors for interfering with the "constitutionally protected right of decision in matters of childbearing"); *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977) (strik-

that governmental accumulation of computerized personal data, in itself, violated an autonomy-based constitutional privacy interest.¹⁰² Perhaps this will change. There are persuasive arguments that the autonomy interests in data privacy have strong constitutional moorings of their own that courts should recognize, whether through due process or other reasoning.¹⁰³ *Whalen* itself may prove to be a less formidable negative precedent than it first appears: there were specific safeguards against any public release of the information in that case (prescriptions for certain pharmaceuticals with narcotic qualities) and the Court suggested in dicta that a data privacy right “arguably has its roots in the Constitution.”¹⁰⁴

But even if courts remain skeptical of a freestanding constitutional right to information privacy, they frequently invoke a more instrumental constitutional concern, the specter of a chilling effect. When disclosure deters expression (and perhaps association) that is protected by the First Amendment, it may violate the Constitution. Earlier this year, the Court of Appeals for the District of Columbia relied on this constitutional difficulty when it prohibited the FEC from releasing internal documents gathered during an investigation of the Democratic Party and a labor union, accepting the claim that “releasing the names of hundreds of volunteers, members, and employees will make it more difficult for the organizations to recruit future personnel.”¹⁰⁵

There is very little empirical evidence to determine how often or how much the prospect of disclosure discourages would-be campaign contributors.¹⁰⁶ But the Supreme Court’s anonymity cases require virtually no empirical showing. In *Watchtower*, the Jehovah’s Witnesses who brought the case did not even object themselves to the surrender

ing down a zoning law for interference with extended family relationships); *Roe v. Wade*, 410 U.S. 113 (1973) (deriving the right to access to abortion from due process privacy rights).

¹⁰² *Whalen v. Roe*, 429 U.S. 589 (1977).

¹⁰³ See, e.g., Cohen, *supra* note 67, at 1003-38 (1996) (arguing that data privacy rights are inherent in the First Amendment); Paul M. Schwartz, *Privacy and Democracy in Cyberspace*, 52 VAND. L. REV. 1609, 1647-66 (1999) (arguing that data privacy, because it is necessary for political discourse and exercise of constitutionally protected rights, should receive constitutional protection as a fundamental right); Francis S. Chlapowski, Note, *The Constitutional Protection of Informational Privacy*, 71 B.U. L. REV. 133, 150-59 (1991) (arguing that data privacy is protected under the Due Process Clause). Cohen and Schwartz also employ a more expansive understanding of the scope of information privacy than the definition used in this Article. See *supra* note 67.

¹⁰⁴ 429 U.S. at 605. The safeguards mean that, while the government collected personal information, *Whalen* is not a true case of disclosure. For more on the distinction between reporting and disclosure requirements, see *infra* notes 153-56 and accompanying text.

¹⁰⁵ *AFL-CIO v. FEC*, 333 F.3d 168, 176 (D.C. Cir. 2003).

¹⁰⁶ See Clyde Wilcox, *Transparency and Disclosure in Political Finance: Lessons from the United States 11-14* (June 2001) (unpublished presentation paper, on file with author) (citing “anecdotal evidence” of a chilling effect on contributions); e-mail message from Clyde Wilcox to author (Jan. 22, 2003) (on file with author).

of anonymity required by the town; the Court essentially took judicial notice of the risk that other canvassers might object to it.¹⁰⁷ Similarly, it appears that Mrs. McIntyre omitted her name from her pamphlets mistakenly, rather than as some principled decision to remain anonymous.¹⁰⁸ Again the Court recognized the possible chilling effect, rather than the particular deterrence of Mrs. McIntyre, and proceeded with an analysis based on that danger. Courts have, on their own, found the denial of information privacy to cause a chilling effect on political activity.¹⁰⁹ This judgment should extend easily to the intuitively strong claim that the privacy costs outlined in Part I.B would deter many contributors.¹¹⁰

The chilling effect of privacy costs is likely to be uneven, and is therefore more troubling than a government policy that deterred or curtailed political speech of all types equally. One would predict that the contributors who were chilled would fall into certain likely categories. First, aversion to public exposure particularly deters persons from associating themselves with causes that are unpopular or unconventional.¹¹¹ This lopsided impact, favoring plain-vanilla candidates and causes over others, distorts the marketplace of ideas and further threatens First Amendment values. Second, it is not unreasonable to suppose that marginalized persons with the most to lose will be especially vulnerable to having their private ideology exposed to public view.¹¹²

¹⁰⁷ *Watchtower Bible & Tract Soc'y, Inc. v. Vill. of Stratton*, 536 U.S. 150, 166 n.14 (2002).

¹⁰⁸ *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 380 (1995) (Scalia, J., dissenting) (stating that Mrs. McIntyre "placed her name on some of her fliers and meant to place it on all of them").

¹⁰⁹ See also *AFL-CIO*, 333 F.3d at 176 (accepting the claim in affidavits by AFL-CIO and Democratic Party that disclosure of personal information about their volunteers, members, and employees would discourage such recruits).

¹¹⁰ However, as discussed below, see *infra* notes 168-70 and accompanying text, the Supreme Court may require less empirical evidence where campaign contributions are concerned. See generally *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 391-97 (2000) (holding that a state limit on campaign contributions did not violate the First Amendment).

¹¹¹ See Cohen, *supra* note 67, at 1003-38 (arguing that knowledge of being monitored or exposed chills an individual's exploration of controversial content); Stein, *supra* note 87, at 191-92 (suggesting that because chilling effect is uneven, "it is possible to understand the failure to protect anonymous speech as an implicitly content-based restriction on speech"); Neil Weinstock Netanel, *Cyberspace 2.0*, 79 TEX. L. REV. 447, 466-67 (2000) (book review) (stating that lack of privacy causes individuals to be cautious about anything controversial, "thus moving towards the bleak conformism that [John Stuart] Mill saw as the greatest threat to 'personal liberty' . . . in a modern democracy").

¹¹² See C. Edwin Baker, *Campaign Expenditures and Free Speech*, 33 HARV. C.R.-C.L. L. REV. 1, 28 n.111 (1998) ("For many people and groups on the margins of power, the people most in need of First Amendment support and the people most likely to be excluded from the political process, the opportunity to participate anonymously can be crucial."); Stein, *supra* note 87, at 199-211 (applying this principle to gay men and lesbians). Of course, an impoverished person probably cannot afford to donate to a political campaign, but those marginalized for other reasons, such as race, gender, sexual orientation, or ideology, may well have the resources to con-

In addition to its constitutional significance, the chilling effect presents a major practical problem. Robust public debate costs money. A single thirty-second prime-time television commercial on a New York City network affiliate costs about \$30,000.¹¹³ Congressional campaigns spent just over \$772 million on the 2002 elections.¹¹⁴ This amount may seem hefty, but it is dwarfed by consumer-products advertising that seeks to convey much simpler messages than the political content of a campaign.¹¹⁵ Absent either a serious national commitment to public financing or free media access for campaigns, we will depend on private contributions to fund the political speech that informs voters.¹¹⁶ I noted earlier how few Americans contribute money to campaigns and how little they give.¹¹⁷ Contribution limits establish sensible safeguards to avoid corruption, but only at the price of further reducing the funds available for candidates and causes to promote their message. As a policy matter, the electoral system cannot afford to discourage contributors needlessly by stripping them of their privacy. At the very least this additional cost of disclosure should be recognized.

Of course, disclosure is intended to deter at least some contributors, those who are seeking to “corrupt” a candidate and will presumably be scared off their scheme by public notice.¹¹⁸ As the next Part will explain, however, this narrow goal is ill-served by disclosure requirements so broad that they deter every donor—large or small,

tribute. In fact, some persons with quite low incomes do donate. See *NES Studies*, *supra* note 34 (indicating that 7 percent of respondents with an income in the seventeenth through thirty-third percentiles gave political contributions in the 2000 elections, compared to 9 percent overall).

¹¹³ John Harwood, *Control of Congress Lies in a Few Races in Smaller Locales*, WALL ST. J., Oct. 14, 2002, at A1.

¹¹⁴ Press Release, Fed. Election Comm'n, Congressional Campaign Expenditures Total \$772 Million at http://www.fec.gov/press/20030103can_exp.html (Jan. 2, 2003).

¹¹⁵ Advertising spending in the United States in 2002 was estimated to be \$237 billion. See David Kaplan & Andrew McMains, *A Slow Climb Upward in 2003*, ADWEEK, Dec. 16, 2002 (citing projections by Robert Coen of McCann-Erickson); see also Baker, *supra* note 112, at 35 (noting that total expenditures on all federal elections in the 1995-96 cycle, including presidential campaign, were less than that year's marketing budget for Philip Morris); Kathleen Sampey & Jack Feuer, *Deutsch Gets Special Order*, ADWEEK, May 6, 2002 (stating that the annual United States advertising budget for Burger King is \$300 million).

¹¹⁶ I will put to one side the objection that the dominance of television and other expensive media in campaigns is normatively undesirable. Critics of this view have rightly questioned it as misplaced, and perhaps counterproductive, wishful thinking. See Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1713 & n.41 (1999) (arguing that curbing political influence gained through campaign contributions will lead to spending in other, possibly less beneficial, places). The analysis in this Article will assume that campaigns continue to rely on mass media.

¹¹⁷ See *supra* notes 34-35 and accompanying text.

¹¹⁸ See Baker, *supra* note 112, at 46 n.165 (noting the paradox of desirable deterrence).

“corrupt” or not—who is unwilling to display his or her political beliefs to the general public.¹¹⁹

Overall, concrete penalties, incursions on autonomy and dignity interests, and the resulting deterrence of expression combine to impose serious privacy costs. When courts and commentators evaluate contribution disclosure rules, they consistently underestimate these costs. I will now turn to the other side of the balance and consider the benefits of disclosure requirements.

II. THE BENEFITS OF DISCLOSURE

Not only does current doctrine understate the importance of privacy, it also overstates the benefits of disclosure. This Part reassesses the three government interests held in *Buckley v. Valeo* to outweigh privacy costs and justify disclosure: (1) providing information to the public about a candidate’s likely positions on issues; (2) deterring corruption of a candidate by donors; and (3) enforcing limits on contributions.¹²⁰ I conclude that all three are less significant than *Buckley* held, especially when applied to smaller contributions.¹²¹

A. Information

Buckley relied heavily on the idea that information about campaign contributions “allows the voters to place each candidate in the political spectrum more precisely.”¹²² This view emphasizes that the allegiances of individual financial backers can give cues about a candidate’s likely political positions, just as the announced endorsements of advocacy groups, labor unions, or other elected officials do. While

¹¹⁹ See *infra* Part II.B (critiquing the *Buckley* analysis of corruption).

¹²⁰ 424 U.S. 1, 66-68 (1976) (per curiam); see Hasen, *Complex Case*, *supra* note 27, at 270 (summarizing the three state interests named in *Buckley*); Potter, *supra* note 23, at 74 (also summarizing the *Buckley* interests). *McIntyre* accepts the *Buckley* list implicitly, while distinguishing it in application to the facts there. *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 354 (1995).

¹²¹ Other cases sometimes state that *Buckley* recognizes only the corruption interest. See, e.g., *FEC v. Nat’l Conservative PAC*, 470 U.S. 480, 496-97 (1985) (calling corruption and its appearance “the only legitimate and compelling government interests thus far identified for restricting campaign finances”). This proposition may be true of regulations on expenditures, but *Buckley* gives weight to all three interests when evaluating contribution disclosure. For more on the *Buckley* distinction between expenditures and contributions, see *infra* Part III.A, especially notes 160-64 and accompanying text.

¹²² 424 U.S. at 67 (“[S]ources of a candidate’s financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.”); see BRADLEY A. SMITH, UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM 224 (2001) (“Knowing the sources of a candidate’s campaign funds provides us with a shorthand method for estimating a candidate’s probable stand on a variety of issues.”).

this argument may occasionally hold true for very large contributions, it does not make much sense when applied to individual contributions of a few hundred dollars.

Although it might seem difficult to quarrel with the government's interest in informing the electorate about candidates' possible stands on public issues, the *McIntyre* Court did just that when Ohio offered a parallel interest to defend its ban on anonymous electioneering. "The simple interest in providing voters with additional relevant information," the Court said, "does not justify a state requirement that a writer make statements or disclosures she would otherwise omit."¹²³ The *McIntyre* Court acknowledged that the disclosure Ohio required might be useful to voters, but judged this benefit insufficient to overcome the right to anonymity.¹²⁴

McIntyre took pains to distinguish the leaflet disclosure requirement from campaign finance disclosure rules.¹²⁵ The decisive difference, according to *McIntyre*, was the fact that a leaflet revealed more private information than disclosure of an expenditure (or, presumably, a contribution):

True, in another portion of the *Buckley* opinion we expressed approval of a requirement that even 'independent expenditures' in excess of a threshold level be reported to the Federal Election Commission. But that requirement entailed nothing more than an identification to the Commission of the amount and use of money expended in support of a candidate A written election-related document—particularly a leaflet—is often a personally crafted statement of a political viewpoint As such, identification of the author against her will is particularly intrusive; it reveals unmistakably the content of [Mrs. McIntyre's] thoughts on a controversial issue. Disclosure of an expenditure and its use, without more, reveals far less information.¹²⁶

At most, the Court was half right here. The exposure of Mrs. McIntyre's "personally crafted" pamphlet might indeed exact steeper privacy costs than disclosure of a modest contribution she makes to Senator Doe's campaign. As Part I documented, the privacy costs of

¹²³ *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 348 (1995); see Potter, *supra* note 23, at 103-04 (suggesting that *McIntyre* dismissed and thus undermined informational interest from *Buckley*).

¹²⁴ *McIntyre*, 514 U.S. at 348. *McIntyre* suggested that a voter could instead take the anonymous nature of the pamphlet into account when assessing it. 514 U.S. at 348 & n.11 (quoting *New York v. Duryea*, 351 N.Y.S.2d 978, 996 (N.Y. Sup. Ct. 1974)) ("Do not underestimate the common man. People are intelligent enough to evaluate the source of an anonymous writing They can evaluate its anonymity along with its message").

¹²⁵ 514 U.S. at 353-57; see also *infra* notes 209-14 and accompanying text (discussing other efforts in *McIntyre* to distinguish elections). The Court also noted that Mrs. McIntyre's expenditure was independent, while contributions to a candidate implicated corruption interests, see *infra* Part II.B, which were not present in her case. 514 U.S. at 354.

¹²⁶ *Id.* at 355 (citations omitted).

contribution disclosure can be very high, even if the typical costs of pamphlet disclosure are still higher.¹²⁷

But the Court forgot that the distinction cuts both ways. For the same reason that disclosure required by Ohio's unconstitutional law was arguably "especially intrusive," it was also especially informative. If the intrusiveness of contribution disclosure is reduced precisely because it provides less information, then the information argument in favor of disclosure must weaken commensurately. The *McIntyre* Court's attempt to distinguish the two situations ignored the other side of the cost-benefit scale.

Contribution disclosure actually provides much less information than was required by the Ohio law—and *McIntyre* struck down that law as insufficiently informative to overcome the right to anonymity. Elizabeth Garrett recently noted that, in order for the support of a contributor to provide an informative cue for a voter, at a minimum the voter must correctly associate the contributor's ideology with the recipient's, and must be able to learn of the contribution conveniently.¹²⁸ If we hypothetically compare mandatory disclosure of Mrs. McIntyre's name on her pamphlets with the mandatory disclosure of her contribution to Senator Doe, the Ohio law fulfills these conditions better than does contribution disclosure. Indeed, contribution disclosure fails both tests.

First of all, disclosure of a contribution only helps a voter who correctly associates the contributor's identity with some ideological position and then correctly connects that position with that of the candidate. This is not so simple. To begin with, the information argument for contribution disclosure assumes that the individual names and addresses in a list of modest-sized contributions will mean something to voters.¹²⁹ Even if this dubious proposition were true, those voters

¹²⁷ It is notable that, after its sweeping comments on information privacy and speech in other arenas, *McIntyre* retreated to a "reprisal" measure of privacy costs. *Id.* ("[W]hen money supports an unpopular viewpoint it is less likely [than a pamphlet] to precipitate retaliation."); see *supra* notes 71-74 and accompanying text (discussing the "retaliation" view of privacy costs).

¹²⁸ Garrett, *supra* note 3, at 1027. Garrett also points to another condition, that the information be credible, rather than sending a strategic false signal. *Id.*

¹²⁹ *Cf. McIntyre*, 514 U.S. at 348-49 ("Moreover, in the case of a handbill written by a private citizen, . . . the name and address of the author add little, if anything, to the reader's ability to evaluate the document's message."). One possible exception is the rare contribution by a person whom an opponent tries to revile as a campaign issue. In the 2000 Senate race, for example, Hillary Rodham Clinton was attacked for receiving contributions from several allegedly pro-Palestinian figures, a potential liability in a state with a large Jewish vote. See Clifford J. Levy & David M. Halbfinger, *Torrent of Campaign Cash Both Helped and Backfired*, N.Y. TIMES, Nov. 9, 2000, at B20. These exceptions are so minor and unusual, however, that they seem to prove the rule that modest individual donations are rarely newsworthy. Besides, in this case, the accusations did not have the desired impact with the public, see *id.*, further underscoring the minimal information interest in spotlighting such individual contributions. *Cf. Garrett, supra* note 3, at 1034-35 (discussing potential cues provided by contributions from "notorious" groups).

also must know what Mrs. McIntyre believes in order to draw any inference at all about her contribution. It is unlikely that even famous individual contributors can easily be connected with ideological positions.¹³⁰ If a voter both knows who Mrs. McIntyre is and identifies her views correctly on issues, her contribution to Senator Doe expresses her support, but says nothing about the underlying motives for that support. A voter still can only guess whether Mrs. McIntyre and Senator Doe actually agree on any *particular* issue, and whether ideology really motivated the contribution at all.¹³¹

Compare this tenuous chain of inferences to the information provided by the Ohio pamphleteering law. Mrs. McIntyre exercised absolute control over the content and tone of her pamphlet; a reader who knows her identity can safely assume that the ideas in the pamphlet are hers and evaluate them accordingly. Loosely equating the information provided by her contribution and by a Sierra Club contribution simply glides past the fact that voters know what the Sierra Club believes, and so glean a fairly accurate cue from its support of a candidate.¹³²

The disclosure required by Ohio law in *McIntyre* also informed voters more effectively than campaign contribution disclosure because it was targeted to exactly the relevant audience. Ohio could argue that every reader of Mrs. McIntyre's pamphlet would find information about its source useful, and that Ohio structured its law to ensure that this information would reach every voter who was potentially influenced by her arguments, but almost no one else. In contrast, even the atypical voter—one who might find it useful to know, when assessing Senator Doe's candidacy, that Mrs. McIntyre gave a contribution—can learn that information only by taking the initiative to seek it out. Meanwhile, this personal information is equally available to a contributor's employers and neighbors. In other words, campaign contribution disclosure, unlike disclosure under the Ohio law, is not made directly and solely to those voters who might find it useful.

A pattern of individual contributors with particular interests might be somewhat informative, but discerning such a pattern amidst the vast quantities of disclosed information requires a great deal of ef-

¹³⁰ See Garrett, *supra* note 3, at 1043 ("For example, what information is conveyed by substantial financial support from Bill Gates?").

¹³¹ *Id.* (stating that mixed motives for individuals' contributions make them less informative than groups' contributions). As noted earlier, Mrs. McIntyre's support may have nothing to do with Senator Doe's views. See *supra* notes 96-97 and accompanying text.

¹³² See SMITH, *supra* note 122, at 224 (suggesting that contributions by ideologically-affiliated groups, like their endorsements, serve as proxies for voters assessing a candidate). While Smith refers to contributions by groups when he states the premise, he extends the argument to those made by individuals.

fort.¹³³ Even if an enterprising journalist could show that an array of persons known to support issue X had contributed to Senator Doe, it would at best provide weak evidence of Doe's position on the issue, compared to Doe's own statements, past voting record, or endorsements from newspapers, other officials, or interest groups who state their clear preferences on issue X.¹³⁴ And the disclosure needed to squeeze this small information out of contributions imposes privacy costs on all donors, including those who have nothing to do with such marginally informative patterns.

It is particularly difficult to imagine anything very remarkable emerging from disclosure of smaller individual contributions. The donors' reasons for contributing are so varied and their influence on the candidate so minimal that identification of any meaningful pattern becomes troublesome. Thus, even those who support disclosure of political spending by groups must acknowledge that the case for it is weak where individual contributions are concerned.¹³⁵

This is not to deny that some voters in some circumstances might gather some useful information from contribution disclosure. It is arguably more likely in the choice between candidates, who present complex bundles of issue preferences, personal attributes, and "character," compared to the straightforward up-or-down question in a referendum (such as the one at issue in *McIntyre*). Decisions about candidates are based on predictions about their likely positions on future issues, and the identity of their contributors may provide evidence for that evaluation. But a voter can get better evidence by examining

¹³³ See DAVID W. ADAMANY & GEORGE E. AGREE, *POLITICAL MONEY: A STRATEGY FOR CAMPAIGN FINANCING IN AMERICA* 103-12 (1975) (arguing that the "tidal wave" of disclosed campaign finance information overwhelms both journalists and voters); Garrett, *supra* note 3, at 1025 ("[T]oo much information can overwhelm the ability of average Americans to process and understand information and may result in their tuning out data that could provide helpful cues."). There are, of course, journalists and nonprofit organizations that undertake this project. See *supra* notes 59-61 and accompanying text. As I shall suggest later, if these types of patterns are really the goal, then perhaps we should design disclosure systems that concentrate on aggregate data while sacrificing less information privacy. See *infra* notes 262-66 and accompanying text.

¹³⁴ If the pattern went against Senator Doe's public positions or other evidence of his views, the most likely explanation would be that the contributors gave his campaign modest sums of money for some other reason. Cf. *supra* notes 96-97 and accompanying text. It is just possible, if Doe had taken no position (or a vague or unclear position) on issue X, that a pattern of financial support from those with clear positions on issue X might allow a plausible inference about his likely position. Given the amount of labor required to assemble the facts and the extreme weakness of this inference, it does not amount to a very compelling government interest. It certainly does not compare with the value of the information that a reader of Mrs. McIntyre's pamphlet receives.

¹³⁵ See Briffault, *supra* note 27, at 1790 (considering it unlikely, in the context of issue advocacy, that "voter decision-making would be enhanced if the sources of a few hundred dollars [were] required to be disclosed"); Garrett, *supra* note 3, at 1043-44 (acknowledging that the disclosure of individual contributions, unlike the disclosure of group contributions, is unlikely to provide much useful information to voters).

other readily available sources of information rather than by guessing the policy motivation of small contributors.

Because it went no deeper than a simple assertion about the value of ideological cues from contributors, *Buckley* overstated the value of this information. The Court was closer to the truth in *McIntyre*, when it recognized that the information interest in identity disclosure, while real, was small.¹³⁶ When *McIntyre* weighed this information interest against the true privacy costs of disclosure, it began to look even smaller.

B. Corruption

By exposing campaign contributions to public scrutiny, *Buckley* states, the government advances its efforts to “deter actual corruption and avoid the appearance of corruption.”¹³⁷ This is different from the information rationale, which posits that contributions enable predictions about candidates’ stands on the issues. However, it has problems similar to the information rationale that make it weaker than commonly assumed.

In standard campaign finance jurisprudence, preventing corruption is the most favored justification for regulation, but “corruption” usually takes on the specific meaning of a direct trade between candidate and contributor—a “quid pro quo: dollars for political favors.”¹³⁸ A broader and less precise formulation of the corruption interest extends from worries about “quid pro quo” swaps to a more general concern that elected officials will be too beholden to contributors, and to a belief that candidates are sullied by certain types of campaign financing.¹³⁹ Perhaps a better label for this broader understanding of corruption is “excessive influence.”

However broadly the evil is defined, many see disclosure as the cure for it. They assume that properly informed voters will punish a

¹³⁶ Cf. Briffault, *supra* note 27, at 1773 n.124 (“Still, it is fair to say that *McIntyre* placed far greater weight on the anti-corruption function of disclosure and less on its informational value than did *Buckley*.”); Potter, *supra* note 23, at 106 (“[T]he overall trend in disclosure cases has been skepticism toward the pro-disclosure framework enunciated in *Buckley*.”).

¹³⁷ 424 U.S. at 67.

¹³⁸ *FEC v. Nat’l Conservative PAC*, 470 U.S. 480, 497 (1985); see *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 790-92 (1978) (using a quid pro quo understanding of corruption); *Buckley*, 424 U.S. at 26-27 (using the same view of corruption).

¹³⁹ The Supreme Court has applied this more expansive view to an analysis of limits on the size of contributions. See *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 389-90 (2000) (recognizing a state interest in stopping corruption “extending to the broader threat from politicians too compliant with the wishes of large contributors”). The Court most recently discussed the corruption rationale in *FEC v. Beaumont*, 123 S. Ct. 2200 (2003), where the majority opinion seemed to revivify a moribund interpretation of *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), as including the use of the corporate form to amass “war chests” for political spending as a form of corruption. *Beaumont*, 123 S. Ct. at 2209-10.

candidate who collects what they see as “dirty” money.¹⁴⁰ This rationale for disclosure displays two major flaws when examined in light of current law and technology.¹⁴¹

First, the corruption interest, like the information interest, fails to justify disclosure of modest-sized contributions. Most donors are small fry.¹⁴² Their negligible influence poses little danger of corruption, however defined. As one of the lawyers for the *Buckley* plaintiffs wrote a few years before the decision, “it is flatly unbelievable that a contribution of [\$100] could have an undesirable impact.”¹⁴³ *Buckley* itself acknowledged that many small contributions “are too low even to attract the attention of the candidate, much less have a corrupting influence.”¹⁴⁴ Rather than serving as one side of a corrupt trade or influencing the candidate excessively, the typical small contribution earns only a thank-you card and subsequent appeals for more money.

Second, even when somewhat larger sums are contributed, very few voters actually give much consideration to the nature of candidates’ donors when choosing whether to support them.¹⁴⁵ The utility of disclosure as a technique to deter corruption collapses if its supposed enforcers, an outraged public, do not play their assigned role.¹⁴⁶

There are several commonsense reasons that disclosed contributions sway so few voters. The most obvious one resembles the problems just discussed in connection with the information interest. Raw data about contributors, while very easy to obtain, is difficult to digest

¹⁴⁰ See, e.g., *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 222 (1999) (O’Connor, J., concurring in part and dissenting in part) (“[F]inancial disclosure requirements tend to discourage those who are subject to them from engaging in improper conduct”); SABATO & SIMPSON, *supra* note 5, at 333-34 (arguing that improved disclosure would expose special-interest “favor-seekers” whose contributions will be seen as “dirty” in “the court of public opinion”).

¹⁴¹ *McIntyre* found this justification inapplicable to the situation before it, because it was a referendum campaign rather than a candidate campaign. *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 356 (1995); see *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 298 (1981) (differentiating between candidate campaigns and ballot initiatives); Hasen, *Complex Case*, *supra* note 27, at 273 (discussing this aspect of *McIntyre*).

¹⁴² See *supra* notes 34-35 and accompanying text (discussing how few persons contribute, and that most contribute relatively small amounts).

¹⁴³ RALPH K. WINTER, JR., *CAMPAIGN FINANCING AND POLITICAL FREEDOM* 21 (1973). Under the original FECA amendments then being debated, contributions above \$100 were disclosed; the threshold is now \$200. See *supra* note 43.

¹⁴⁴ 424 U.S. at 82-84; see Garrett, *supra* note 3, at 1015-16 (“Indeed, sums substantially higher than \$200 probably do not buy political favors”); Bernstein, *supra* note 64 (“A corruption-watcher worried about such small amounts would be missing the forest for the twigs.”).

¹⁴⁵ See ACKERMAN & AYRES, *supra* note 3, at 27 & 250 nn.2-3 (“Researchers have yet to find an election between candidates in which information about funding actually made a difference in the outcome.”).

¹⁴⁶ See Ayres & Bulow, *supra* note 30, at 844 (“[T]oday’s jaded citizenry imposes hardly any electoral punishment on candidates known to have sold political access.”).

and interpret. The implications of any single allegedly “dirty” contribution can be understood only in the context of a candidate’s entire campaign finance profile. “Excessive” influence is also in the eye of the beholder. Different candidates may be equally indebted to their donors, so that voters will often find it difficult to distinguish between candidates on this basis.¹⁴⁷

More fundamentally, conscientious voters trying to decide which candidate to support must balance corruption concerns against factors which will often be more important to them. As David Adamany and George Agree summarized this problem a quarter century ago:

The theory of disclosure insists that voters will reject candidates at the polls when disclosure shows too much spending, misdirected spending, unsavory or disfavored financial sources, or excessive contributions. In elections, however, a citizen cannot express himself [or herself] solely on campaign finance practices; his [or her] vote for a candidate is a decision about many other issues as well [V]oters do not and should not give campaign finance practices heavy weight in making ballot choices, and therefore candidates rarely need fear that disclosure of such practices will result in political penalties at the polls.¹⁴⁸

This is not necessarily regrettable public apathy. Rather, it may represent rational prioritization by the electorate. If a voter favors one candidate’s substantive issue positions, discomfort with his or her campaign finance practices alone may not (and perhaps should not) alter that preference.¹⁴⁹ Once again, disclosure makes sense only if we assume that sunlight leads voters to respond in some fashion we

¹⁴⁷ See ADAMANY & AGREE, *supra* note 133, at 114 (“In the present political financing system, both parties and virtually all candidates receive and use funds from big givers and interest groups. Voters usually do not have a choice between clean money candidates and dirty money candidates; all are soiled.”).

¹⁴⁸ *Id.* at 112, 114 (arguing that disclosing campaign finance information does not affect voting decisions because, among other things, voters choose “leaders . . . whose general outlook coincides with their own . . . [and] selectively perceive facts that confirm their choices”).

¹⁴⁹ See *id.* at 113-114. Ackerman and Ayres note that the public has been found to pay more attention to campaign financing in referendum campaigns—exactly those situations in which votes turn on only one issue, rather than complex bundles of policy preferences, leaving more room for consideration of funding. ACKERMAN & AYRES, *supra* note 3, at 27 & 250 n.2 (citing ELISABETH R. GERBER, *THE POPULIST PARADOX: INTEREST GROUP INFLUENCE AND THE PROMISE OF DIRECT LEGISLATION* (1999)); but see Garrett, *supra* note 3, at 1034 & n. 86 (questioning this contention by Ackerman and Ayres). The election of Senator Jon S. Corzine in New Jersey might further illustrate voters’ disinterest in a candidate’s means of financing the campaign. Corzine spent a record \$60 million on the race, drawn largely from his personal wealth, and gave charitable contributions to groups whose leaders then endorsed him. See David M. Halbfinger, *Corzine Wins Costly Bid for Senate in New Jersey*, N.Y. TIMES, Nov. 8, 2000, at A1. While his opponent attempted to draw attention to these practices and criticize them, much of the campaign focused on topics such as gun control and health care, and Corzine’s positions on these issues resonated far more with New Jersey’s increasingly Democratic voters. See *id.*; Marjorie Connelly, *Vote in U.S. Senate Race Followed 12-Year Trend*, N.Y. TIMES, Nov. 12, 2000, § 1, at 44.

deem appropriate. But there are several subsidiary assumptions embedded in this one: voters must be able to learn something useful, and they must choose to act on it.

C. Enforcement

The third interest *Buckley* found in disclosure, “gathering the data necessary to detect violations of the contribution limitations,”¹⁵⁰ can be dispensed with completely. First, the Court has rejected disclosure requirements aimed at preventing related illegal activity, such as libel or deception, because of their overbroad application.¹⁵¹ Even if they could be tailored more narrowly, the notion that a campaign would break the rules but then dutifully report the infraction is “silly.”¹⁵²

Most significantly, enforcement may require reporting, but not true public disclosure. Although the two are often conflated,¹⁵³ it is important to distinguish between them. Disclosure can be defined as the government’s release of information about political contributions to the general public. It is conceptually separate from reporting, when the law requires donors or recipients to tell the government about contributions so that the government—without necessarily releasing the information—can monitor compliance with the law.¹⁵⁴ We could require reporting of campaign contributions but not disclosure.¹⁵⁵ Other personal information is reported to the government,

¹⁵⁰ *Buckley v. Valeo*, 424 U.S. 1, 68 (1976) (per curiam).

¹⁵¹ See *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 343-44 (1995) (rejecting the argument that disclosure is “a means to prevent the dissemination of untruths” because “the ordinance plainly applies even when there is no hint of falsity or libel”); *Talley v. California*, 362 U.S. 60, 64 (1960) (rejecting the justification of leaflet disclosure law as a means to enforce fraud, false advertising, and libel laws because of overbreadth in application).

¹⁵² DAVID ADAMANY, *FINANCING POLITICS: RECENT WISCONSIN ELECTIONS* 250 (1969) (“As a practical matter, the only enforcement benefit that disclosure laws have is the occasional reporting of a minor infraction which occurs because the law’s provisions are obscure.”).

¹⁵³ The FEC itself fell into this trap when extolling the virtues of disclosure: “In fact, it would be virtually impossible for the Commission to effectively fulfill any of its other responsibilities without disclosure. The Commission could not, for example, enforce the law without knowledge of each committee’s receipts and disbursements.” *FEC Twenty-Year Report*, *supra* note 55, at 294. One pair of experts recognized the distinction between reporting and disclosure, but used the term “reporting” as an umbrella to refer to both candidates’ “filing” data with the government and the government’s “disclosure” of that data to the public. See *HOLMAN & STERN*, *supra* note 48, at 2; see also *Vt. Right to Life Comm. v. Sorrell*, 221 F.3d 376, 386 (2d Cir. 2000) (recognizing a distinction in state issue advocacy disclosure law).

¹⁵⁴ See *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 198 (1999) (holding that the government interest in apprehending “petition circulators who engage in misconduct” can be fulfilled just as well by collecting information about circulators with petitions—reporting—rather than mandating that petition circulators wear identification badges—disclosure).

¹⁵⁵ Federal campaign finance law requires campaigns to keep records about all contributors who give over \$50, even though only those over \$200 need to be reported to the FEC. See 2 U.S.C. § 432(c) (2003).

but not disclosed to the public, in income tax returns¹⁵⁶ and census forms.¹⁵⁷ Citing the government's interest in enforcement adds no weight to the pro-disclosure side of the scale.

III. CONSTITUTIONAL RAMIFICATIONS

So, a reevaluation finds that disclosure imposes more privacy costs than widely acknowledged, and that the troika of government interests is less substantial than *Buckley* suggested. This result casts serious doubt on the advisability of our current disclosure regime and especially its application to modest contributions. I will return to this doubt in Part IV. This Part considers what the new assessment of costs and benefits might mean for a renewed constitutional challenge, based on the privacy costs that disclosure requirements impose on individuals and the resulting chilling effect on contributors' political activity.

By necessity, much of this consideration is somewhat speculative. For one thing, the Supreme Court's impending decision in *McConnell v. FEC*, the challenge to the McCain-Feingold Act, makes this the most uncertain moment for campaign finance jurisprudence since *Buckley*.¹⁵⁸ Furthermore, courts have not focused on the unique problems of privacy and contribution disclosure—indeed they have strained to avoid the question.¹⁵⁹ Finally, the most significant factor making the analysis tentative is the lack of clarity about what type and degree of protection the First Amendment provides to political contributions.

As a result of these limitations, I do not reach a clear answer to the question of how contribution disclosure laws might fare against a constitutional challenge. Yet even that result is a step forward. As we have seen, most observers today think the answer is clear, and fail to recognize the problem of privacy costs. They thus ignore a credible argument that mandatory disclosure of contributions, especially those of modest size, violates the First Amendment.

¹⁵⁶ See 26 U.S.C. § 6103 (2003) (establishing the general rule that disclosure of information from tax returns is prohibited, with specified exceptions, including recent changes related to investigating terrorist activity).

¹⁵⁷ See 13 U.S.C. § 9 (2003) (establishing broad confidentiality rules for census information); 13 U.S.C. § 214 (2003) (making unlawful disclosure of census information a criminal offense punishable by fines, imprisonment, or both).

¹⁵⁸ The symposium on *McConnell* appearing in this issue, 6 U. PA. J. CONST. L. 56 (2003), canvasses many views concerning the significance and outcome of *McConnell*. As contribution disclosure is one of the only major issues that is *not* raised in that case, I will simply consider the question here on the basis of the *Buckley* framework and two nascent schools of thought concerning post-*Buckley* law.

¹⁵⁹ See *supra* note 22 and accompanying text (describing the Supreme Court's avoidance of contribution anonymity issues in *McIntyre* and *Watchtower*).

This Part should at least demonstrate that we cannot assume the constitutionality of contribution disclosure as automatically and routinely as we do—or, indeed, as automatically as the *Buckley* per curiam opinion assumed it. It first analyzes the question through the lens of the current *Buckley* doctrine, although that lens is clouded at best. It then comments on whether an answer might be different under either of the two emerging interpretations that are now competing to supplant the *Buckley* framework.

A. *The Buckley Standard for Scrutinizing Disclosure*

The black letter summary of “the central conceptual edifice inherited from *Buckley*” is easy to state: “By contrast to the permissive arena of regulation for contributions, the Court has extended, as a general matter, broad constitutional protection to all expenditures by candidates for office.”¹⁶⁰ Expenditures are those amounts spent directly on communication about politics by campaigns, outside groups, or individuals. Contributions are funds that are instead given to campaigns or groups, who in turn pool the contributions in order to make expenditures. The *Buckley* framework has many critics.¹⁶¹ But it was reaffirmed just a few months ago in *FEC v. Beaumont*, where the Court explicitly relied on the distinction between contributions and expenditures.¹⁶² This edifice may remain standing for some time to come.

Excessive focus on the distinction between contributions and expenditures, however, may conceal the fact that both receive constitutional protection; *Buckley* emphatically noted that “both implicate fundamental First Amendment interests.”¹⁶³ The difference is one of degree rather than kind. While perhaps less central than direct expenditures, contributions are also a form of political expression.¹⁶⁴

The exact level of constitutional protection for contributions proves more difficult to articulate than the simple rule that they are different from expenditures. This ambiguity impedes any effort to assess the constitutionality of contribution disclosure requirements. As one recent Supreme Court opinion noted, perhaps with a hint of dry humor, “Precision about the relative rigor of the standard to review contribution limits was not a pretense of the *Buckley* per curiam

¹⁶⁰ SAMUEL ISSACHAROFF, ET AL., *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 460 (2d ed. 2001).

¹⁶¹ See *infra* notes 194-201 and accompanying text.

¹⁶² *FEC v. Beaumont*, 123 S. Ct. 2200, 2207-2211 (2003).

¹⁶³ *Buckley v. Valeo*, 424 U.S. 1, 23 (1976) (per curiam).

¹⁶⁴ *Id.* at 14 (calling political campaign activities, including contributions, “the most fundamental First Amendment activities”); BeVier, *supra* note 27, at 288-92 (emphasizing this aspect of *Buckley*).

opinion."¹⁶⁵ The standard used in many cases involving direct expenditures is "exacting scrutiny"—really almost a form of strict scrutiny—which would require that the regulation be narrowly tailored to meet asserted state interests.¹⁶⁶ As a starting point, then, contributions might be thought to receive something less than this degree of scrutiny but more than nothing.¹⁶⁷

How much more? Two recent majority opinions written by Justice Souter provide some limited guidance. In *Nixon v. Shrink Missouri Government PAC*, the Supreme Court applied quite minimal scrutiny to a state law limiting the maximum amount of campaign contributions.¹⁶⁸ The Eighth Circuit had used strict scrutiny.¹⁶⁹ The *Shrink Missouri* Court explicitly rejected this standard and instead deferred to the state legislature in upholding contribution caps much smaller than those in federal law.¹⁷⁰ In *Beaumont*, the Supreme Court rejected a challenge to the federal ban on direct corporate contributions.¹⁷¹ The case was brought by an "advocacy" corporation, North Carolina Right to Life, Inc., which hoped the Court would extend an earlier decision striking down restrictions on expenditures by similar groups.¹⁷² The *Beaumont* Court refused, pointing to the difference between exacting scrutiny of restrictions on expenditures and the "relatively complaisant review" of contribution restrictions.¹⁷³ "[I]nstead of requiring contribution regulations to be narrowly tailored to serve a compelling governmental interest, a contribution limit involving significant interference with associational rights passes muster if it satisfies the lesser demand of being closely drawn to match a sufficiently important interest."¹⁷⁴

¹⁶⁵ *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 386 (2000).

¹⁶⁶ See, e.g., *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978); *Buckley*, 424 U.S. at 16.

¹⁶⁷ See *Lincoln Club v. City of Irvine*, 292 F.3d 934, 937 (9th Cir. 2001) ("[I]t is clear that expenditure limitations are subject to strict scrutiny and contribution limits are subject to less than strict scrutiny . . .").

¹⁶⁸ 528 U.S. at 391-97 (requiring little empirical evidence to justify contribution limits and concluding that limits would be held too low only if "so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless"); see Richard L. Hasen, *Shrink Missouri, Campaign Finance, and "The Thing That Wouldn't Leave"*, 17 CONST. COMMENT. 483, 490-91 (2000) (evaluating the low level of scrutiny applied in *Shrink Missouri*).

¹⁶⁹ 528 U.S. at 384.

¹⁷⁰ See *id.* at 386-89, 393. Missouri law limited individual contributions to candidates for statewide office, including governor, to \$1,075; the cap for state legislative campaigns was \$275. *Id.* at 382-83.

¹⁷¹ *FEC v. Beaumont*, 123 S. Ct. 2200 (2003). The ban on corporate contributions is found in 2 U.S.C. § 441b (2003).

¹⁷² See *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986).

¹⁷³ 123 S. Ct. at 2210.

¹⁷⁴ *Id.* (quotations and citations omitted).

Before *Beaumont*, it seemed that the very deferential standard of *Shrink Missouri* might apply only to review of contribution limits, and not necessarily to other regulations of contributions, such as disclosure. After all, the rationale for extending less First Amendment protection to contributions than to expenditures in the first place was the holding in *Buckley* that a donor's speech interest is tied up in the act of making a donation rather than in its amount.¹⁷⁵ In other words, when determining the First Amendment content of contributions, size doesn't matter. *Shrink Missouri* echoed this reasoning.¹⁷⁶ Its result followed almost automatically, because contribution caps affect the size of a contribution alone.

Buckley declared that the expressive portion of a contribution, on the other hand, is "the undifferentiated, symbolic act of contributing."¹⁷⁷ Perhaps the conceptual divide of *Buckley*, while described in convenient shorthand as a split between contributions and expenditures, should be expressed more precisely as a distinction between the size of contributions on one hand, and other forms of spending aimed at political expression (including the "fact" of contributions) on the other hand. Disclosure of a contribution's existence reveals that precise part of it that *Buckley* identified as highly protected speech and association.¹⁷⁸ The impingement is on the act of contributing, not the amount contributed. On *Buckley's* terms, then, this form of political expression should enjoy significantly more protection than the nearly toothless *Shrink Missouri* scrutiny provides for donation size.

Beaumont could be read to call this analysis into question. Even though the restriction at issue there was an outright ban, not a size limit, the Court rejected an argument by opponents of the ban that exacting scrutiny should therefore apply.¹⁷⁹ On the other hand, the reasoning in *Beaumont* depended heavily on several considerations that would be absent from a case concerning contribution disclosure.

¹⁷⁵ *Buckley v. Valeo*, 424 U.S. 1, 20-21, 30 (1976) (per curiam) ("The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing Such distinctions in degree become significant only when they can be said to amount to differences in kind.").

¹⁷⁶ *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 386-88 (2000). While the concurrence adopts a broader rationale, see *id.* at 400-02 (Breyer, J., concurring), it does not represent binding precedent (at least not yet) and its viewpoint is therefore deferred until Part III.B.2.

¹⁷⁷ 424 U.S. at 21.

¹⁷⁸ While *Buckley* glides over the distinction between the speech and associational interests inherent in political contributions, 424 U.S. at 24-25, the two recent cases appear to give priority to the associational interest. See *Beaumont*, 123 S. Ct. at 2210; *Shrink Mo. Gov't PAC*, 528 U.S. at 388. The difference is immaterial to the analysis here, and I will sometimes refer simply to "speech" interests.

¹⁷⁹ 123 S. Ct. at 2210-11.

First, it emphasized at length that the restrictions were aimed at corporations, which enjoy unique state-conferred advantages,¹⁸⁰ and that previous decisions had repeatedly upheld limits on contributions by corporations.¹⁸¹ Second, the opinion recognized throughout that laws restricting corporate political activity function “without jeopardizing the associational rights of advocacy organizations’ members.”¹⁸² Indeed, these restrictions may promote the associational rights of individuals by preventing corporations from contributing to causes that some of their individual stockholders might not support.¹⁸³ Third, the holding turned on the fact that a corporation has another obvious and often-used option to make federal political contributions: it can form a PAC.¹⁸⁴ As a result of this different avenue for contributing, the prohibition on direct corporate contributions did not function like a ban at all.¹⁸⁵ As we have seen, however, many individuals concerned about privacy lack clear alternative avenues for political expression and association.

Moreover, the *Beaumont* Court recognized that a ban and a limit present different constitutional issues. It commented, somewhat delphically, “It is not that the difference between a ban and a limit is to be ignored; it is just that the time to consider it is when applying scrutiny at the level selected, not in selecting the standard of review itself.”¹⁸⁶ This riddle seems to say that contribution regulations always receive less than strict scrutiny, but that the resemblance of a particular restriction to a ban would influence the crucial determination of whether it was “closely drawn” to serve government interests.

This articulation would provide more robust protection than the extreme deference of *Shrink Missouri*. It is also consistent with the

¹⁸⁰ *Id.* at 2205-07.

¹⁸¹ *Id.* at 2205-09; see *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 658-59 (1990); *FEC v. Nat’l Conservative PAC* 470 U.S. 480, 495, 500-01 (1985); *FEC v. Nat’l Right to Work Comm.*, 459 U.S. 197, 207-11 (1982); see generally Adam Winkler, *The Corporation in Election Law*, 32 *LOY. L.A. L. REV.* 1243 (1999) (discussing the regulation of corporate involvement in elections).

¹⁸² 123 S. Ct. at 2211 (citing *NAACP v. Alabama*, 357 U.S. 449, 462 (1958)); see *id.* at 2210 n.8 (recognizing that “corporate contributions are furthest from the core of political expression”); *supra* note 23 and accompanying text (distinguishing disclosure of group contributions from disclosure of individual contributions).

¹⁸³ 123 S. Ct. at 2206-07.

¹⁸⁴ *Id.* at 2211 (citing *Nat’l Right to Work Comm.*, 459 U.S. at 201-02).

¹⁸⁵ The opinion concluded, “[Respondents] cannot prevail, then, simply by arguing that a ban on an advocacy corporation’s direct contributions is bad tailoring. [Respondents] would have to demonstrate that the law violated the First Amendment in allowing contributions to be made only through its PAC and subject to a PAC’s administrative burdens.” *Id.* at 2211. *Beaumont* found that position flatly inconsistent with the unanimous holding in *National Right to Work* that administrative restrictions on PACs were constitutional. *Id.* (citing *Nat’l Right to Work Comm.*, 459 U.S. at 201-02).

¹⁸⁶ *Id.*

suggestion in *Shrink Missouri* that a contribution cap could eventually be unconstitutional if it were so stringent that it eradicated the entire worth of the contribution—that is, if it impinged on the “fact” of a contribution rather than solely its size.¹⁸⁷ Finally, it acknowledges that *Buckley* generated the distinction between contributions and expenditures in the context of reviewing FECA’s limits on the permissible dollar amounts of each, but that the concept may not function properly when moved to a different setting such as disclosure.

Disclosure requirements with thresholds (such as the \$200 cutoff in federal law or the lower ones in many states) may seem closer to limits, since they apply only to contributions of a certain size. For two reasons, they should be analyzed more like a ban when applying the *Beaumont* test. First, for contributions above the threshold, the result of disclosure is the announcement to the general public of a personal “symbolic” political act. This strikes close to the original purpose of the *Buckley* distinction, to protect politically expressive content. The disclosure of Mrs. McIntyre’s contribution affects her ability to engage in that political expression, not only the degree to which she does it. More significantly, contribution limits apply equally to all; every contributor may give up to a certain amount, and none may give any more. Size is a neutral and universal trigger. In contrast, we have seen that privacy costs are distributed unevenly: only some people care about the privacy of their contributions, and only some face penalizing consequences from disclosure. Even worse, disclosure is more likely to deter contributions aligned with certain ideological positions—more controversial ones—a correlation that threatens both the First Amendment protection of contributions and the open debate we strive for in elections.¹⁸⁸ Those with mainstream views who choose to sacrifice privacy may contribute an amount above the threshold while others, whose views are more likely to be unorthodox, are chilled from doing so.

It is also questionable whether disclosure is a remedy “closely drawn” to the asserted government interests discussed in Part II. To observers accustomed to a salutary view of disclosure, it may seem intuitive that a cap impinges on a donor’s rights far more than “mere” disclosure.¹⁸⁹ But this conclusion is at odds with the core holding that a contributor’s real First Amendment interest is the undifferentiated

¹⁸⁷ *Nixon v. Shrink Mo. Govt. PAC*, 528 U.S. 377, 397 (2000); see also *Buckley v. Valeo*, 424 U.S. 1, 21 (1976) (per curiam) (noting that “contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy.”).

¹⁸⁸ See *supra* notes 111-12 and accompanying text (discussing the unevenness of the chilling effect of campaign contribution disclosure).

¹⁸⁹ Recall that the litigants in *Buckley* stipulated that disclosure was a less restrictive response than their real concern, contribution caps. See *supra* note 69 and accompanying text.

ability to participate through a political contribution, rather than its size. Under the logic of *Buckley*, a more closely drawn restriction, which infringes on expression and association the least, is a contribution limit (which impinges on size alone), not disclosure (which impinges on the core of the contributor's First Amendment right).¹⁹⁰ This is especially true in light of the judiciary's openness to the first change under *Shrink Missouri*. Furthermore, a limit aims directly at large contributions, the real cause for corruption concern, while disclosure sweeps much more expansively, imposing privacy costs on contributions that, we have seen, present minimal corruption risk.¹⁹¹

The McCain-Feingold Act moved in the opposite direction. The Act doubles the contribution limit to \$2000 and indexes it to inflation so that it will continue to rise.¹⁹² Meanwhile, the unaltered disclosure rules apply to all contributors who give over \$200, an order of magnitude less than the contribution limit.¹⁹³ A system that broadcasts into cyberspace every contribution between \$200 and \$2000 exposes the "fact" of many contributions without targeting the remedy carefully to those that are related to the asserted problem.

Of course, differential treatment of contributions and expenditures means that disclosure need not be the most closely drawn alternative—such a requirement would be closer to the exacting scrutiny applied to expenditures. Whether they are closely drawn enough would depend on the gaze of the beholder. But federal rules after the McCain-Feingold Act, and state rules with even lower thresholds, do raise troublesome issues. They are especially troublesome in relation to modest contributions of a few hundred dollars. An honest and thorough constitutional evaluation of those laws would require careful consideration of the privacy costs discussed in Part I and the weakness in the government justifications outlined in Part II. And the result of that analysis might well be a conclusion that such sweeping contribution disclosure cannot pass muster under *Buckley* and its progeny, including *Beaumont*.

¹⁹⁰ Bradley Smith, who fervently opposes contribution limits but supports disclosure laws, accepts *Buckley*'s assumption, so he too gets this point backwards. See Smith, *supra* note 5, at 61-62 (asserting that *Buckley* wrongly upheld contribution limits by "departing from the requirement that the legislature choose the more narrowly tailored solution—in this case disclosure").

¹⁹¹ See *AFL-CIO v. FEC*, 333 F.3d 168, 178 (D.C. Cir. 2003) (finding a blanket disclosure rule requiring broad disclosure of politically-sensitive information to be constitutionally suspect).

¹⁹² See Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 307(a)(1), 116 Stat. 81, 102 (raising the individual contribution limit to \$2000).

¹⁹³ Reports by Political Committees, 11 C.F.R. § 104.3(a)(4)(i) (2003). Indeed, as noted earlier, the McCain-Feingold Act further expands disclosure. See *supra* note 40 and accompanying text.

B. Disclosure in a Post-Buckley World

Buckley is perhaps the most extensively criticized opinion of the Burger Court.¹⁹⁴ The awkward distinction between contributions and expenditures is one of the principal objections to its doctrine.¹⁹⁵ Others protest that the framework erroneously equates money and speech.¹⁹⁶ Antipathy to *Buckley* is also found within the Supreme Court itself, where a majority of the Justices appears willing to dismantle the framework dividing contributions and expenditures, but unable to agree on a replacement.¹⁹⁷ The dissatisfied Justices can be divided into two camps, although this rough grouping overlooks more subtle differences between them, and it involves interpretation of their sometimes cryptic comments. On one side, libertarians such as Justices Thomas and Scalia and possibly Justice Kennedy would in-

¹⁹⁴ See E. Joshua Rosenkranz, *Introduction to IF BUCKLEY FELL: A FIRST AMENDMENT BLUEPRINT FOR REGULATING MONEY IN POLITICS 1*, 1 (E. Joshua Rosenkranz ed., 1999) (quoting and citing numerous articles in law reviews and newspapers lambasting *Buckley*) [hereinafter *IF BUCKLEY FELL*]. Scorn for *Buckley* is widespread in legal academia. See Baker, *supra* note 112, at 1 n.3 (citing efforts by Ronald Dworkin, Bruce Ackerman, and John Rawls to have *Buckley* overturned); Ronald Dworkin, *Free Speech and the Dimensions of Democracy*, in *IF BUCKLEY FELL*, *supra* at 63, 65 (“Many constitutional scholars (though by no means all) believe that the *Buckley* ruling . . . was a mistake . . .”). One group of scholars and experts has even called for lawyers to form a “*Buckley* Brigade” that would pursue a coordinated litigation strategy aimed at overturning the decision. See E. JOSHUA ROSENKRANZ, TWENTIETH CENTURY FUND WORKING GROUP ON CAMPAIGN FIN. LITIG., *BUCKLEY STOPS HERE: LOOSENING THE JUDICIAL STRANGLEHOLD ON CAMPAIGN FINANCE REFORM 89-106* (1998) [hereinafter *BUCKLEY STOPS*].

¹⁹⁵ See Issacharoff & Karlan, *supra* note 116, at 1736 (“A generation has shown us that the expenditure/contribution distinction of *Buckley* not only is conceptually flawed, but has not worked.”) (collecting cases); see also *BUCKLEY STOPS*, *supra* note 194, at 43-45 (noting that the distinction is “[t]he single most criticized aspect of *Buckley*”); Hasen, *supra* note 168, at 483-84 (comparing *Buckley*, and especially its distinction between contributions and expenditures, to the boorish party guest overstaying his welcome, who was portrayed by John Belushi on *Saturday Night Live* as “The Thing That Wouldn’t Leave”).

¹⁹⁶ For prominent examples of the widespread critique, see, e.g., *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 398 (2000) (Stevens, J., concurring) (“I make one simple point. Money is property; it is not speech.”); *FEC v. Nat’l Conservative PAC*, 470 U.S. 480, 508-09 (1985) (White, J., dissenting) (“The First Amendment protects the right to speak, not the right to spend . . .”); J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609 (1982) (dubbing the *Buckley* decision “tragically misguided”); J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001 (1976) (examining the *Buckley* decision). Justice Breyer has noted that this “purely conceptual” argument about money and speech misses the central question: when does regulation of money effectively stifle speech? See Breyer, *supra* note 66, at 252.

¹⁹⁷ ISSACHAROFF ET AL., *supra* note 160, at 485-86 (“Both of the anti-*Buckley* wings are united by rejecting the core insight of *Buckley* that different first amendment regimes govern the contributions and expenditures side[s] of electoral regulation. But they are divided by an inability to agree on the direction in which the *Buckley* edifice should fall.”). For interesting speculation about where the individual members of the Supreme Court stand on the future of *Buckley*, see Hasen, *supra* note 168, at 505-09. This Article does not take any position on the choice between the two alternatives; I am only analyzing the implications of each for privacy and contribution disclosure.

crease constitutional scrutiny over regulation of contributions.¹⁹⁸ Others, including Justices Breyer and Ginsburg and possibly Justice Stevens, would instead relax constitutional restrictions on campaign finance law across the board.¹⁹⁹ It remains to be seen if one side or the other might assert itself in *McConnell*.²⁰⁰

Both groups seem to view contribution disclosure rules of the type now in place as constitutional and desirable. While analyzing constitutional law “if *Buckley* fell”²⁰¹ involves even more speculation than the previous Section, this Section anticipates how each group might respond to my concerns about privacy costs. I conclude that it would be a mistake to see the problem of privacy costs as a feature unique to the widely reviled doctrinal approach of *Buckley*. Rather, the predictable tension between privacy and disclosure persists no matter how the larger doctrinal framework looks.

1. A Libertarian Framework

One camp, exemplified by Justice Thomas, would like to shift post-*Buckley* law toward stricter constitutional limits on regulation of campaign contributions. This move would eliminate the contribution-expenditure dichotomy by placing both under strict (or perhaps “exacting”)²⁰² scrutiny.

The usual version of this libertarian model would eliminate contribution limits and rely on full disclosure of contributions.²⁰³ Its proponents see this structure as analogous to a free market, where disclosure gives market actors the information they need to make

¹⁹⁸ *Shrink Mo. Gov't PAC*, 528 U.S. at 409-10 (Kennedy, J., dissenting) (“I would overrule *Buckley* and then free Congress or state legislatures to attempt some new reform, if, based upon their own considered view of the First Amendment, it is possible to do so.”); *id.* at 410 (Thomas, J., dissenting) (“[O]ur decision in *Buckley* was in error, and I would overrule it.”); *see also* *FEC v. Beaumont*, 123 S. Ct. 2200, 2212 (2003) (Thomas, J., dissenting) (reiterating his belief that contributions should receive strict scrutiny, in an opinion joined by Justice Scalia).

¹⁹⁹ *See Shrink Mo. Gov't PAC*, 528 U.S. at 404-05 (Breyer, J., concurring) (stating, in an opinion joined by Justice Ginsburg, the potential need to “reconsider” *Buckley*); *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 648-50 (1996) (Stevens, J., dissenting) (arguing, contrary to *Buckley*, that limits on direct campaign spending, at least by political parties, should be constitutional).

²⁰⁰ The reliance on the *Buckley* framework in *Beaumont* suggests perhaps not. *See* 123 S. Ct. at 2210-2211; *see supra* notes 179-86.

²⁰¹ *See generally* IF *BUCKLEY FELL*, *supra* note 194 (presenting essays by scholars considering replacements for the *Buckley* framework).

²⁰² *See Shrink Mo. Gov't PAC*, 528 U.S. at 410 (Thomas, J., dissenting).

²⁰³ *See* SABATO & SIMPSON, *supra* note 5, at 328-35 (arguing for deregulation of campaign financing); SMITH, *supra* note 122, at 215-20 (arguing against campaign finance regulation as it currently stands); Kathleen M. Sullivan, *Against Campaign Finance Reform*, 1998 UTAH L. REV. 311, 326-27 (arguing for full disclosure); *see also* DOLLARS AND DEMOCRACY, *supra* note 6, at 96-97 (dubbing such proposals “deregulate and disclose” and calling them “inadequate foundation for reform”).

decisions. By requiring disclosure, the government ensures that voters (buyers in the political marketplace) have accurate information about the campaign finances of candidates (the prices and ingredients of the products they buy in the political marketplace). As one Republican congressional leader described it from the floor of the House of Representatives, the libertarian model would “let the voters decide through instant disclosure,” allowing them to assess candidates “while [the candidates] are collecting their money and spending it”²⁰⁴

Unfortunately for its adherents, their plan contains a serious inconsistency. Applying strict scrutiny to everything means that disclosure, too, faces a tough constitutional test. The framework dispenses with the *Buckley* distinction between the fact of a contribution and its size, but only does so by bringing both up to a high level of constitutional protection. The resulting balance leads to greater concern about privacy costs than under *Buckley*. Extensive disclosure of modest donations would not survive the strict scrutiny these libertarians envision.²⁰⁵

The story does not quite end there, however, because the unlimited contributions that would be allowed under the libertarian framework add a wrinkle. If contribution limits were unconstitutional, a wealthy donor could write a million-dollar check to a candidate. Disclosure would fare better in the case of very large contributions, because the corruption and information interests would become much stronger.²⁰⁶ The potential for donors to extract a quid pro quo is obviously greater if they have poured huge quantities of money into a campaign’s coffers, intensifying the corruption interest. A short list of very big donors, compared to a long list of small donors, provides information that is both more digestible and more relevant for voters. Furthermore, because this framework is designed to make contribution caps much more difficult to impose, there would be no obvious and less intrusive alternative to disclosure.

In sum, while the strict scrutiny invoked by a libertarian framework adds to the privacy side of the scale, government interests are also weightier when huge contributions are allowed. In such cases, these state interests would eventually overcome even the strictest scrutiny. This opening for disclosure is limited, however, to large contributions that magnify the corruption and information interests.

²⁰⁴ The quotation is from Rep. Tom DeLay, then the House majority whip and now the majority leader. *Excerpts from House Debate on the Shays-Meehan Campaign Finance Bill*, N.Y. TIMES, Feb. 14, 2002, at A30.

²⁰⁵ See *supra* Part III.A (expressing doubt that disclosure would survive “exacting” scrutiny).

²⁰⁶ The enforcement interest, of course, disappears entirely, because there is no limit to enforcement.

The corruption potential of a \$200 contribution is not greater merely because the donor has the option to give \$20,000—indeed, the contrary is true, because \$200 becomes even less significant to a candidate who can gather funds efficiently from more generous contributors. Thus, at the lower end of the contribution scale, the government interests remain as diminished as they were in Part II, but the protection for contributions is greater, so the balance favors anonymity even more than under the *Buckley* framework. At the higher end, the balance tips.²⁰⁷

This peculiar, bifurcated result illustrates two points: first, the disclosure requirement at the libertarian framework's heart is inconsistent with its fundamental premise, the high First Amendment value of political contributions; second, disclosure must be evaluated in the context of an entire regulatory regime. Here, the elimination of contribution limits alters the *Buckley* analysis in several respects.

2. *A Regulatory Framework*

Several members of the Supreme Court appear poised to allow significantly more regulation of both contributions and expenditures than current doctrine permits.²⁰⁸ They have not unified around a single easily summarized plan like the libertarian model, but their general principles can be thought of as the regulatory framework for post-*Buckley* doctrine. As articulated by these Justices and by a distinguished group of scholars who share this perspective, the framework considers more government supervision of elections justified in order to achieve their democratic purposes.

McIntyre sends mixed signals about the extent of a regulatory framework. It acknowledges that government interests may receive more deference in cases involving “election code provisions governing the voting process itself.”²⁰⁹ But it distinguishes the disclosure requirement imposed on Mrs. McIntyre's pamphlets, because it “does not control the mechanics of the electoral process. It is a regulation

²⁰⁷ Courts would need to draw some line at which the size of a contribution inflated the corruption and information interests enough to overcome strict scrutiny and justify disclosure. It is impossible to fix a number in such a hypothetical situation, without either a factual record or a definitive statement of the libertarian framework; given the strict scrutiny applied under the libertarian framework, the burden would be on the government to justify whatever threshold the legislature had selected.

²⁰⁸ See, e.g., *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 399-405 (2000) (Breyer, J., concurring) (laying out, in an opinion joined by Justice Ginsburg, a more flexible approach to constitutional judgments about campaign finance, which may or may not be reconcilable with *Buckley*); *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 648-50 (1996) (Stevens, J., dissenting) (urging, in an opinion joined by Justice Ginsburg, that limits on direct campaign spending, at least by political parties, should be constitutional).

²⁰⁹ 514 U.S. 334, 344 (1995).

of pure speech.”²¹⁰ Contributions would appear to fall between mere electoral “mechanics” and “pure speech.” Justice Ginsburg filed a separate two-paragraph concurrence, where she hinted that her vision of a future regulatory framework might give greater latitude to electoral disclosure than this Article has found in the *Buckley* framework.²¹¹ Despite her support for Mrs. McIntyre’s anonymity in the circumstances of that case, she said, “In for a calf is not always in for a cow.”²¹² This statement, and her contrast of Mrs. McIntyre and other lone speakers with “other, larger circumstances,”²¹³ suggests that she had in mind disclosure of major activity, especially by groups, and not necessarily modest individual contributions. None of the six other Justices who supported the judgment joined the Ginsburg concurrence.²¹⁴

A broader-based Supreme Court opinion that suggests the Justices’ thinking about the regulatory framework—without focusing on disclosure—is Justice Breyer’s concurrence in *Shrink Missouri*, which Justice Ginsburg also signed.²¹⁵ He emphasized that limits on campaign contributions “seek to protect the integrity of the electoral process—the means through which a free society democratically translates political speech into concrete governmental action Under these circumstances, a presumption against constitutionality is out of place.”²¹⁶ In this view, the design of a fair and democratic election system is a constitutional task, and its importance may sometimes outweigh political contributors’ individual First Amendment interests.²¹⁷ While Justice Breyer indicated that his approach could be rec-

²¹⁰ *Id.* at 345. As noted earlier, the majority opinion also attempted to distinguish electoral disclosure on various other grounds. See *supra* notes 125-27 and accompanying text.

²¹¹ 514 U.S. at 358 (1995) (Ginsburg, J., concurring) (“We do not thereby hold that the State may not in other, larger circumstances require the speaker to disclose its interest by disclosing its identity.”).

²¹² *Id.*

²¹³ *Id.* at 358 & nn.1-2.

²¹⁴ *Id.* at 358. Justice Ginsburg signed the six-vote majority opinion. *Id.* at 335. The seventh vote came from Justice Thomas, who concurred separately on originalist grounds. *Id.* at 358-71 (Thomas, J., concurring in the judgment).

²¹⁵ *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 399 (2000) (Breyer, J., concurring).

²¹⁶ *Id.* at 401. For another statement of Justice Breyer’s views on the proper framework for campaign finance jurisprudence, see Breyer, *supra* note 66, at 250-56.

²¹⁷ See *Shrink Mo. Gov’t PAC*, 528 U.S. at 399-400 (Breyer, J., concurring) (“On the one hand, a decision to contribute money to a campaign is a matter of First Amendment concern [O]n the other hand, restrictions upon [contributions] seek to protect the integrity of the electoral process”); Breyer, *supra* note 66, at 253 (stating that First Amendment issues should be considered with regard to any “negative impact on the ability of some to engage in as much communication as they wish and the positive impact upon the public’s . . . ability to communicate through . . . the electoral process”); Hasen, *supra* note 168, at 498-99, 505-08 (discussing the implications of Breyer concurrence).

onciled with the *Buckley* framework, he also stated outright that if it could not, then the Court would need to “reconsider” *Buckley*.²¹⁸

These Justices are at an early stage of conceptualizing the boundaries of permissible regulation if *Buckley* were replaced. We can augment our understanding of the regulatory framework by turning to a diverse group of scholars who have worked to develop this theory further.²¹⁹ While there are important differences between the various judicial and academic articulations of this idea, the discussion here will concentrate on their common points.

The commentators echo Justice Breyer, but perhaps go somewhat further, by viewing an election as a bounded realm subject to different First Amendment rules.²²⁰ Because the electoral process has special purposes as a method of selecting leaders and setting policies in our democracy, this argument runs, the government may superintend it so that it can perform these functions fairly and openly. Such oversight lends legitimacy to the election’s outcomes and the resulting governmental decisions that bind the entire electorate.²²¹ As C. Edwin Baker put it, in language very close to Justice Breyer’s, elections are the “structured sluices through which public opinion flows when being converted into political power.”²²²

Proponents garner support from many Supreme Court decisions which allow the government to regulate election processes in ways that might otherwise infringe on First Amendment rights, from be-

²¹⁸ *Shrink Mo. Gov't PAC*, 528 U.S. at 404-05 (Breyer, J., concurring).

²¹⁹ See, e.g., Baker, *supra* note 112 (arguing that “electoral speech” should be considered part of the “electoral process” rather than “political speech”); Briffault, *supra* note 27 (proposing a new definition of “election-related” speech); Dworkin, *supra* note 194 (arguing against the *Buckley* opinion in light of “the defects of our democracy”); Burt Neuborne, *Soft Landings, in IF BUCKLEY FELL*, *supra* note 194, at 169 (discussing the effects of overturning *Buckley* on free speech); Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803 (1999) (discussing whether or not campaign contributions should be considered speech for First Amendment purposes).

²²⁰ Baker, for example, compares treatment of speech in the “institutionally bound” domain of an election campaign to regulation of unconstitutional conditions, forum doctrine, and time, place, and manner restrictions. Baker, *supra* note 112, at 16-21; see also Schauer & Pildes, *supra* note 219, at 1835 (“But if electoral speech can be seen as a relatively distinct domain, then it would be intellectually plausible to press for its regulation with less threat to the uniqueness of American free speech culture.”).

²²¹ See Briffault, *supra* note 27, at 1764-65 (“[E]lectoral outcomes govern the entire polity, the losers as well as the winners . . . [This] creates the need for rules that both protect the rights of individuals and ensure the fairness and integrity of the process as a whole, thus enhancing the democratic legitimacy of the government that results.”).

²²² Baker, *supra* note 112, at 34. Baker draws heavily on Jurgen Habermas’s concept of a broad “lifeworld” in which persons conduct most of their meaningful daily interactions, and a narrower institutionalized “systems realm” in which the experiences and opinions formed in the lifeworld are transformed into action, including law. *Id.* at 37-45 (citing JURGEN HABERMAS, *BETWEEN FACTS AND NORMS* (William Rehg trans., 1996)).

coming involved with the internal affairs of political parties,²²³ to banning campaign speech within one hundred feet of a polling place,²²⁴ to picking and choosing among candidates to speak in a government-sponsored election debate.²²⁵ The notion of a bounded realm will be tested again in *McConnell*, where plaintiffs challenge provisions of the McCain-Feingold Act that restrict issue advocacy advertisements immediately before elections.²²⁶

Accounts of a post-*Buckley* framework with greater latitude for government regulation of elections would not, by any means, ignore the speech interests of participants in the electoral process.²²⁷ At most, they would place comparatively more weight on the societal-interest side of the scale, and less on the individual-rights side. All of the scholars who pursue this rationale carefully draw lines to limit the incursion into nonelectoral expression and association.²²⁸ It is not clear whether a rule requiring disclosure of contributions, despite significant privacy costs, would lie within the government's enhanced power in this bounded realm. An examination of the deeper underlying purposes for greater government authority over elections suggests that much mandatory disclosure (although, again, not all) contradicts those purposes.

Perhaps the single greatest motivation for the regulatory framework is an enhanced conception of the interests in information during an election. The proponents of this view see the election as a temporary civic moment of transparency, during which maximizing information increases the legitimacy of the voting process, and thereby the choices that result. As Richard Briffault has framed it, voters "set the course of government for the next political term. There is a collective interest in increasing the amount of relevant information available to the voters in the hope of improving the quality

²²³ See, e.g., *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997) (permitting the prohibition of fusion candidacies); *Terry v. Adams*, 345 U.S. 461 (1953) (banning an informal "white primary" that effectively selected the Democratic nominee who was then assured of victory in one-party Texas).

²²⁴ *Burson v. Freeman*, 504 U.S. 191 (1992). Justice Breyer also cited *Freeman*. See *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 401 (2000) (Breyer, J., concurring).

²²⁵ See *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1998) (holding that a candidate debate required a different constitutional analysis than other programming on a government-controlled public television station because of the special election context).

²²⁶ See Pub. L. No. 107-155, § 201, 116 Stat. 81, 88-90 (2002); Briffault, *supra* note 27, at 1776-98 (discussing the constitutionality of such express advocacy limits with reference to bounded realm analysis).

²²⁷ See Baker, *supra* note 112, at 51 (arguing that the bounded realm conception does not "abandon constitutional protection for speech in the campaign context").

²²⁸ See, e.g., Briffault, *supra* note 27, at 1791-98 (tailoring rules to minimize the speech-restrictive impact of limits on "issue advocacy" advertising aimed at electioneering); Schauer & Pildes, *supra* note 219, at 1824-30 (exploring the acceptable placement of the line between the electoral realm and other political speech by analyzing the impact on freedom of speech).

of collective decision-making.²²⁹ For Briffault, this interest justifies judicial deference to legislatively-imposed disclosure requirements because they help voters make wise choices.

This souped-up information interest remains vulnerable to the same criticisms made earlier of the *Buckley* information interest: diffuse and hard-to-digest data, concerning modest-sized individual contributions made for various unknowable reasons, adds little “relevant information” to a voter’s decision-making process.²³⁰ Mrs. McIntyre’s identity was more informative to the reader of her pamphlet than to the voter surfing the Web and learning about her contributions to candidates. Yet the Court backed Mrs. McIntyre’s interest in anonymity over the voter’s interest in disclosure. This is so even though the Ohio law was itself specifically limited to the bounded realm of elections (in that case, a local referendum).²³¹ A supporter of the bounded realm might argue that *McIntyre* and the other anonymity cases were wrongly decided, but their assessment of the true benefit to voters of other speakers’ identities (and by extension individual contributors’ identities) remains compelling.

On the cost side, deterrence of contributions should be a particularly significant problem with disclosure rules under a bounded realm theory.²³² Baker, who has advanced one of the most interventionist versions of the regulatory framework, warned that in order to stay consistent with his rationale for government intervention, courts should “strike down regulations that restrict the democratic character—the openness, fairness, or effectiveness—of the electoral process.”²³³ The deterrent effect of contribution disclosure would restrict rather than expand access to the electoral process.²³⁴ Indeed, it may block the only avenue available for some individuals—those who wish to exercise control over their exposure to the world—to participate in this democratic electoral realm.²³⁵ Worst of all, the uneven nature of this chilling effect distorts the content of political discourse and de-

²²⁹ Briffault, *supra* note 27, at 1773.

²³⁰ See *supra* Part II.A.2.

²³¹ *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 337-38 (1995). A broader law requiring that all pamphlets be signed had already been overturned. *Talley v. California*, 362 U.S. 60 (1960). Thus the only hope for Ohio to preserve its law was a claim that disclosure in the limited realm of elections should be handled differently. See *McIntyre*, 514 U.S. at 344-45.

²³² On the deterrence of contributions caused by disclosure rules, see *supra* Part I.C.

²³³ Baker, *supra* note 112, at 51.

²³⁴ Baker addresses the point directly and seems to agree that, at least in some circumstances, government regulation of the electoral sphere should not extend to stripping the right of anonymity from protected speech. See *id.* at 28 n.111, 46 & n.165 (“[W]hen willingness to participate is reasonably and predictably dependent on anonymity, laws requiring the disclosure of identity are presumptively unconstitutional.”).

²³⁵ Cf. *supra* note 100 and accompanying text (discussing the constitutional difference between anonymity-stripping through law and through physical exposure).

tracts from the regulatory framework's central goal of reflecting authentic public opinion in the electoral process.²³⁶

In addition, under a regulatory framework the government would enjoy many other tools to promote the democratic purposes of elections. Flat limits on either contributions or expenditures still allow all individuals (and organizations) to engage in some amount of effective speech, on an equal footing, without penalties being imposed by the legal system. Perhaps most significantly, the law could restrict express advocacy more comprehensively than the traditional understanding of the *Buckley* framework would allow.²³⁷ Admittedly, the bounded realm rationale imposes no formal "least restrictive means" requirement when analyzing disclosure rules. But if the government had the authority to intervene more directly, with measures such as expenditure caps and express advocacy limits, the necessity of an indirect tool like disclosure becomes harder to defend.

This would especially be true of modest contributions. It seems odd to argue that, in order to preserve equal and fair access to the democratic forum of an election, Mrs. McIntyre must open her political convictions to public view as the price of admission. The privacy costs imposed on small contributors discussed in Part I would still exist, they would still deter—and they would be less justifiable as a trade off against other policy goals when they could be so easily avoided through a wide range of other available regulation.

Because it emphasizes flexibility and deference to legislatures in running elections, the regulatory framework would present the fewest formal constitutional obstacles to disclosure rules. Nonetheless, supporters of a framework grounded in concern for equal participation should also be concerned about rules that restrict and deter some contributors but not others. The information interest they espouse can be better served by forms of disclosure that do not impinge on information privacy. I begin the project of identifying these in the next Part.

IV. TOWARD A PRIVACY-SENSITIVE DISCLOSURE POLICY

Part I delineated serious privacy costs which call into question the policy wisdom of maintaining current campaign contribution disclosure requirements. Part III suggested that these rules may also be unconstitutional. That leaves the question of what could replace them. The purposes of informing voters and preventing corruption

²³⁶ See *supra* notes 111-12 and accompanying text (discussing how the chilling effect of disclosure favors those with orthodox views).

²³⁷ See Briffault, *supra* note 27, at 1776-98 (discussing the constitutionality of express advocacy limits with reference to bounded realm analysis).

remain—weaker than commonly assumed, as Part II explained, but real nonetheless. This final Part suggests alternatives for more privacy-sensitive disclosure regimes that still serve much of the purpose of disclosure. Having raised the privacy problems with broad mandatory disclosure, this Article will do no more than sketch some possible approaches, but it is important to demonstrate that alternatives exist.²³⁸

To overcome objections to privacy costs, it is not sufficient simply to point at the drawbacks of protecting contribution privacy. Data privacy frequently imposes burdens on other values.²³⁹ The availability of personal data reduces the transaction costs of cumbersome information-gathering and avoids externalizing costs based on any resulting gaps in information.²⁴⁰ Richard Posner has long argued that the ability of individuals to shield data about themselves from others leads to imbalances in all kinds of daily interactions with people who would respond differently if they had full information.²⁴¹

The law routinely balances these burdens against privacy costs, and reaches different conclusions in different situations. We allow lenders to demand extensive personal information from prospective borrowers, in part because we recognize that loans would become more expensive for everyone if lenders could not adjust their interest rates to account for individual credit risks. This may seem intuitive, yet we limit the ability of health insurers to use personal information of beneficiaries in the same way. These restrictions lead to the same predictable externalization—everyone's premiums go up to protect privacy—but we have made a normative policy choice based in part on the sensitivity of the data.

As technology and culture increase the availability of personal information, public willingness to make such sacrifices for information

²³⁸ See Garrett, *supra* note 3, at 1012 (“The choice . . . is not between no disclosure and full disclosure. Rather, policymakers need to determine what information should be disclosed and in what form.”).

²³⁹ See generally McGeeveran, *supra* note 66, at 1822-26 (discussing the burdens of data privacy in a variety of settings).

²⁴⁰ See FRED H. CATE, *PRIVACY IN THE INFORMATION AGE* 30-31 (1997) (“Instant credit, better targeted mass mailings, lower insurance rates, faster service when ordering merchandise by telephone, special recognition for frequent travelers, and countless other benefits come only at the expense of some degree of privacy.”).

²⁴¹ See, e.g., Richard A. Posner, *An Economic Theory of Privacy*, in *PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY* 333 (Ferdinand David Schoeman ed., 1984) (arguing that the value of “prying,” for both commercial and personal reasons, should be weighed against the value of privacy in economic analysis); Richard A. Posner, *The Right to Privacy*, 12 *GA. L. REV.* 393 (1978) (making the same argument); see also SOLVEIG SINGLETON, *CATO INST., PRIVACY AS CENSORSHIP: A SKEPTICAL VIEW OF PROPOSALS TO REGULATE PRIVACY IN THE PRIVATE SECTOR* 8-13, <http://www.cato.org/pubs/pas/pa-295es.html> (Jan. 22, 1998) (describing the economic function of personal data).

privacy has increased.²⁴² In response, the law has more frequently tilted the scales toward privacy, despite the burdens of doing so.²⁴³ These changes were not constitutionally required, because, unlike contribution disclosure, the privacy costs involved did not implicate the First Amendment under current doctrine.²⁴⁴ They were policy responses to a growing problem of the information age.

By thinking creatively, however, the sacrifices required to protect information privacy can be minimized. For instance, businesses faced with more stringent protection of privacy for commercial information in other parts of the world are learning to adjust to the burdens.²⁴⁵ Likewise with campaign contribution disclosure. Even if we are not constitutionally compelled to do so, a new awareness of privacy costs should spur us to think creatively about ways to minimize intrusion on information privacy but preserve the perceived benefits of disclosure.

Many of the goals of disclosure, such as deterring corruption and providing information, can be advanced through other regulatory techniques without any sacrifice of data privacy at all. Public financing might be the most comprehensive approach. There are also contribution limits, independent advocacy restrictions, ballot access laws, and many more. Furthermore, the disclosure of political activity by organizations does not implicate the problems documented in Part I because privacy is an individual interest.²⁴⁶ Thus there is no privacy-related objection to a requirement that the First National Bank or the NAACP reveal contributions and expenditures²⁴⁷ (unless they must

²⁴² A referendum last year in North Dakota illustrated public willingness to make such privacy-protecting trade offs. Seventy-two percent of those voting supported a measure to tighten financial privacy rules, despite a pervasive advertising campaign by opponents (who outspent supporters six to one) featuring ominous images of walls encircling the state's borders and warnings that banks would leave North Dakota if forced to adhere to tighter rules. See Adam Clymer, *North Dakota Tightens Law on Bank Data and Privacy*, N.Y. TIMES, June 13, 2002, at A28; Caroline Daniel, *North Dakota Guards Its Privacy Against Free Trade in Financial Data*, FIN. TIMES, June 27, 2002, at 2.

²⁴³ See *supra* notes 10-12 and accompanying text (citing numerous examples).

²⁴⁴ Recall that the Supreme Court refused to find an inherent constitutional right to data privacy in *Whalen v. Roe*, 429 U.S. 589 (1977), although there are persuasive arguments that such a right does exist. See *supra* notes 103-04 and accompanying text.

²⁴⁵ The European Union has stricter information privacy rules than any jurisdiction in the United States. See Council Directive 95/46/EC, 1995 O.J. (L 281) 31. Paired with creative thinking, technology can be an aid rather than an obstacle in this endeavor. See generally McGeeveran, *supra* note 66 (advocating a combination of legal, market, and technological approaches to protect privacy on the World Wide Web).

²⁴⁶ See *supra* note 23 and accompanying text.

²⁴⁷ See, e.g., *supra* note 28 and accompanying text (discussing Section 527 disclosure requirements); *supra* notes 180-84 and accompanying text (discussing the unique status of corporate contributions in election law).

also divulge the names of individuals who gave them money²⁴⁸). Under a regulatory framework, the number of non-disclosure options would grow even larger.²⁴⁹

A more radical approach, advanced by Ackerman and Ayres, would replace mandatory disclosure of campaign contributions with mandatory anonymity.²⁵⁰ Their provocative proposal is motivated by the elimination of the corrupting influence of contributions rather than by privacy concerns. Under their elaborate plan, contributions could be made only through intermediaries that conceal the donor's identity, even from the candidate. They reason that candidates cannot be beholden to donors whose identities they do not know.²⁵¹ Whatever its effectiveness in fighting corruption, this scheme would certainly protect privacy better than disclosure.²⁵² While the idea seems farfetched, that is largely because it contradicts our unthinking embrace of sunlight. After all, we take the privacy of the voting booth for granted today,²⁵³ but the secret ballot is a radical reform of very recent vintage; it swept the nation in a wave of progressive zeal in the late nineteenth century.²⁵⁴ That reform was also motivated by a desire to fight corruption, not to protect privacy.²⁵⁵ Perhaps someday we will feel the same about the privacy of contributions as we do about the secret ballot.

We can, however, make strides toward privacy-sensitive disclosure rules without such a dramatic paradigm shift. First, as noted repeatedly in this Article, relatively large contributions present a stronger case for the government's corruption and information interests. Disclosure policy that concentrated on these contributions would do

²⁴⁸ See *NAACP v. Alabama*, 357 U.S. 449 (1958) (finding that the NAACP did not have to disclose information about its members to the state of Alabama).

²⁴⁹ See *supra* note 237 and accompanying text.

²⁵⁰ ACKERMAN & AYRES, *supra* note 3; see *supra* note 30 and accompanying text (noting the proposal and critiques of it).

²⁵¹ The Ackerman and Ayres proposal has generated extensive commentary. See *supra* note 30. I only consider it from the vantage of data privacy.

²⁵² A scheme that prevented contributors from disclosing information about themselves might be objectionable, because it would limit choice over the selective revelation of political convictions. The detailed design of the model alleviates this concern. A contributor can claim to have contributed to a candidate, just as a voter can claim to have pulled the lever for a particular candidate. The intermediaries would be arranged, however, so that the donor could not prove the fact, rendering a claim of having supported a candidate financially—like a claim of having cast a vote for a candidate—nothing more than “cheap talk.” ACKERMAN & AYRES, *supra* note 3, at 6, 28-30; Ayres & Bulow, *supra* note 30, at 855.

²⁵³ See Ayres & Bulow, *supra* note 30, at 838-39 (noting that voting without secret ballots was commonplace until reforms were enacted).

²⁵⁴ See *Burson v. Freeman*, 504 U.S. 191, 200-02 (1992) (describing the history of the secret ballot).

²⁵⁵ For an intriguing and informative summary of the history of the secret ballot as a response to widespread corruption, and perhaps a means of entrenching certain established interests, see ISSACHAROFF ET AL., *supra* note 160, at 348-52.

more to advance those interests, while protecting the privacy of most individual contributors.²⁵⁶ Reformers who are serious about privacy should get to work producing the empirical evidence needed to determine at what level benefits outweigh costs.²⁵⁷ In lieu of such evidence, the current regime relies on unexamined assumptions about the value of sunlight, even for small contributions. These assumptions may turn out to be true, on further consideration, in the (relatively rare) case of large individual contributions.

Additional disclosure also might occur through informal norms rather than formal law. Of course, individuals are always free to disclose their own political contributions. Protection of expression, after all, is the whole purpose of anonymity, and information privacy protects an interest in choice rather than imposing secrecy.²⁵⁸ Scattered voluntary disclosures do not harm privacy, but they are unlikely to advance information or corruption interests. More significantly, if the government did not provide data on particular contributors, media outlets and good-government organizations might pressure candidates to release their full campaign finance reports, including details about their contributors. Candidates currently provide their personal tax returns to journalists so routinely that a refusal to do so is often newsworthy.²⁵⁹ Since the law would continue to require reporting to the government even without public disclosure,²⁶⁰ candidates and PACs would possess detailed reports that could be shared with reporters easily. This practice would erode privacy by imposing many of the same costs discussed in Part I. In some ways it would be worse, because contributors would not know in advance whether their data would remain private or not. Some rules might be neces-

²⁵⁶ See Garrett, *supra* note 3, at 1042 (“[S]mall contributions and expenditures are not generally informative to voters . . .”).

²⁵⁷ Reformers have risen to this challenge in the case of issue advocacy by producing empirical evidence of the problems of “sham” issue advocacy. See HOLMAN & MCLOUGHLIN, *supra* note 25; Hasen, *Measuring Overbreadth*, *supra* note 27.

²⁵⁸ See Steven Hetcher, *Climbing the Walls of Your Electronic Cage*, 98 MICH. L. REV. 1916, 1932-34 (2000) (reviewing LESSIG, *supra* note 100); Kang, *supra* note 51, at 1266 (“[C]ontrol is at the heart of information privacy If the individual wants to exercise that control by disclosing information [he should be able to.]”); McGeveran, *supra* note 66, at 1837-38 (“Respect for autonomy requires not only the freedom to keep personal data private, but also the freedom to disclose it”); cf. *supra* note 252 (discussing this issue in relation to the Ackerman and Ayres proposal).

²⁵⁹ See, e.g., Halbfinger, *supra* note 149 (recounting how Senator Jon S. Corzine’s opponent succeeded in pressuring him to release details of his tax returns and charitable contributions); Dean E. Murphy & Eric Lipton, *Bloomberg Discloses He’s Rich, But He’s Frugal with Details*, N.Y. TIMES, July 14, 2001, at A1 (recounting the pressure on New York Mayor Michael Bloomberg, a billionaire, to release more information about his personal finances than was legally required during his campaign); Editorial, *The Bloomberg Factor*, N.Y. TIMES, July 21, 2001, at A14 (criticizing Bloomberg for failure to release full personal tax returns).

²⁶⁰ See *supra* notes 153-56 and accompanying text (distinguishing reporting from disclosure).

sary to address this problem.²⁶¹ At least norms would involve no state action, however, and probably no central Web site of all contributions.

Regulations other than disclosure, perhaps coupled with disclosure of especially large contributions, would prove adequate to meet the goals of disclosure while protecting information privacy. If not, however, I would suggest an additional option—aggregate disclosure of more modest contributions. As we have seen, a single contribution of a few hundred dollars standing alone provides little meaningful information. The context of other contributions, however, may cause informative patterns to emerge.²⁶² Government agencies such as the FEC, rather than disseminating full raw data about individual named contributors, could instead reveal statistics such as the total amount of money and the total number of contributions that each candidate and PAC has received from certain categories of sources. An agency could report on categories such as zip code and occupational group—and if other information would be helpful, the law could require contributors to provide it.²⁶³ Personalized data would be unavailable to the general public, almost eliminating privacy costs.²⁶⁴ Paired with disclosure of individual large contributions, such a regime might actually provide more useful data than the current system, and do so without naming names.

The Census Bureau is a model for a government agency that discloses enormously informative aggregate data, while observing a strict

²⁶¹ Of course, adopting a rule that forbade candidates from releasing the names of contributors who gave modest amounts, or perhaps only those who affirmatively opted out of disclosure by requesting privacy, would prevent this problem. But partial or redacted lists might distort the overall pattern of contributions received, replacing information with misinformation. *See* Harvard Note, *supra* note 28, at 1522 (warning of the danger of selective disclosure). A better rule would simply prohibit candidates from divulging the information at all. Given the dominant rhetoric of sunlight, such a regime is admittedly far away. This discussion of informal disclosure norms highlights a common genie-out-of-the-bottle problem with privacy protection: once a set of data such as a list of contributors is generated, and someone is curious about its content, keeping it private becomes very difficult.

²⁶² The energy that private groups devote to categorizing contribution data, *see supra* notes 59-61 and accompanying text, suggests the importance of such value-added presentations of contribution data. *See generally supra* note 133 and accompanying text.

²⁶³ Federal law now defines the required “identification” of an individual contributor as including the “name, the mailing address, and the occupation of such individual, as well as the name of his or her employer.” 2 U.S.C. § 431(13)(A) (2003). This definition could be expanded to allow disclosure of other useful data that would be reported in the aggregate. With privacy assured, the data might even include potentially sensitive classifications, such as race or party registration, if aggregate data on them would help voters evaluate candidates.

²⁶⁴ Of course, there are privacy costs associated with government collection of information. In this context, however, the privacy costs of reporting are much lower than the costs associated with public disclosure, and justifiable as essential tools to enforce campaign contribution limits.

legal ban on revealing private information about individuals.²⁶⁵ There is reason to be optimistic that the FEC could handle this task, despite its other problems. Even harsh critics of the agency admit that it administers disclosure rules fairly effectively.²⁶⁶ This approach depends on an adequate level of funding for election agencies, although private groups could perhaps be enlisted to help if they were required to respect the privacy of individual names.²⁶⁷ None of these compromise approaches is perfect. They all sacrifice both some privacy and some ability to advance corruption and information interests. The current system, in contrast, virtually ignores privacy costs—and nonetheless does an imperfect job of advancing the other interests. Judges, legislators, regulators, and advocates should all be thinking more carefully and creatively about how to achieve the right balance between privacy and disclosure in our electoral system.

CONCLUSION

This Article has a modest goal. It identifies and explores the collective cognitive dissonance we indulge when we sing the praises of disclosure in some areas of our political discourse and warn of the dangers of exposure in other areas. Current contribution disclosure rules cannot be fully reconciled with cases such as *McIntyre* and *Watchtower*, try as one might to distinguish them. Instead, we should assess honestly the costs of ubiquitous Internet access to any federal political contribution over \$200 (and even smaller contributions to many state and local campaigns). Having done so, we may find ourselves freed to think more creatively about campaign finance rules that achieve their goals while respecting information privacy. There are few tasks in a democracy more important than ensuring that elections embody our highest ideals of fairness, openness, equality, and robust debate. Many proposed changes in campaign finance rules would bring our flawed electoral processes closer to this aspiration. Disclosing the modest political contributions of the nation's Mrs.

²⁶⁵ See 13 U.S.C. §§ 9, 214 (2003) (establishing the confidentiality requirement for census data and penalties for violations); *supra* note 157 and accompanying text (discussing census and tax forms).

²⁶⁶ See, e.g., Jackson, *supra* note 6, at 321 (“The FEC is generally praised for its handling of this public information, but even here improvements could be made.”). Like most proponents of disclosure, Jackson would improve disclosure at the FEC by increasing it. *Id.* But see CAMPAIGN FIN. INST. TASK FORCE ON DISCLOSURE, *supra* note 47, at 23-25 (suggesting remedies for shortcomings in FEC Web site, centered on the accuracy of raw data and increasing site’s user-friendliness).

²⁶⁷ In Virginia, for example, a nonprofit organization formed to put a database of state campaign contributions on the Web receives funding from state government, media organizations, and private donors, and works with state legislators and regulators. See Virginia Public Access Project, *History*, at <http://www.vpap.org/about/history.cfm> (last visited July 31, 2003).

McIntyres, however, advances these goals very little, and harms them a fair amount.

SYMPOSIUM

MCCONNELL V. FEC: UNDERSTANDING THE DECISION AND ITS IMPLICATIONS

FOREWORD

*Nathaniel Persily**

On May 2, 2003, the United States District Court for the District of Columbia released its decision in *McConnell v. FEC*,¹ adjudging the constitutionality of the Bipartisan Campaign Reform Act.² In four opinions stretching 1638 pages, the three judges considering the case created more legal questions than they answered. In a symposium that took place on May 15, 2003, legal scholars, political scientists, and other campaign finance experts convened at the University of Pennsylvania Law School to explain and critique the various opinions in the case. Selected remarks from that “live” symposium appear in the pages that follow.

The first panel of lawyers and law professors attempted to explain the court’s decision. Speaking on that panel were Professor Richard Briffault, Vice Dean and Joseph P. Chamberlain Professor of Legislation at Columbia Law School; Trevor Potter, former Commissioner and Chairman of the Federal Election Commission, Chair and General Counsel of the Campaign Legal Center, and Member of the law firm Caplin & Drysdale; and Robert F. Bauer, the Office Managing Partner and Chair of the Political Law Group in the Washington, D.C. office of Perkins Coie.

The second panel, which was chaired by Professor Roy A. Schotland of Georgetown University Law Center, critiqued the decision. The following law professors appeared on that panel: Burt Neuborne, John Norton Pomeroy Professor of Law and Legal Director of the Brennan Center for Justice at New York University School of Law; Daniel R. Ortiz, John Allan Love Professor of Law at the University of

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¹ 251 F. Supp. 2d 176 (D.D.C.) (three-judge court), *prob. juris. noted*, 123 S. Ct. 2268 (2003) (mem.).

² Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81.