

2010

Disclosures About Disclosure

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Recommended Citation

Lloyd H. Mayer, *Disclosures About Disclosure*, 44 *Ind. L. Rev.* 255 (2010-2011).

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DISCLOSURES ABOUT DISCLOSURE

LLOYD HITOSHI MAYER*

INTRODUCTION

In the wake of the Supreme Court's foundation-shifting decision in *Citizens United v. FEC*,¹ the media and other commentators could be forgiven for mostly overlooking a second, less controversial holding in that case. By a vote of 8-1, the Court upheld the disclosure and related disclaimer provisions that apply to independent election-related spending even as the Court removed the longstanding bar on corporations (and most likely unions) engaging in such spending.² In the relevant portion of the majority opinion, Justice Kennedy, writing for the Court, explained that the government's interest in providing information to voters was sufficient to justify the required public disclosure of not only Citizens United's funding of the communications at issue, but also disclosure of who provided significant financial support to that organization.³ Only Justice Thomas disagreed, arguing that the risk of retaliation against those whose support is revealed by such disclosure is sufficiently real to render legally required disclosure of their identities unconstitutional.⁴

These two contrasting narratives are important because they form the factual basis not only for arguments relating to the constitutionality of the existing campaign finance disclosure rules, but also for legislative debates relating to the advisability of adopting and expanding such rules in the future.⁵ Especially given the Court's decision, supporters of campaign finance regulation are turning more and more to disclosure rules to police campaign fundraising and spending. For example, Congress is considering significantly expanded disclosure and disclaimer requirements for political communications paid for by corporations, unions, and other organizations in the wake of *Citizens United*.⁶ Many state

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1. 130 S. Ct. 876 (2010).

2. See *id.* at 914, 931 (Stevens, J., concurring in part and dissenting in part).

3. *Id.* at 914-16.

4. *Id.* at 980-82 (Thomas, J., concurring in part and dissenting in part).

5. For a discussion of the constitutional issues raised by campaign finance disclosure laws, see BRADLEY A. SMITH, UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM 221-23 (2001); Richard L. Hasen, *The Surprisingly Complex Case for Disclosure of Contributions and Expenditures Funding Sham Issue Advocacy*, 48 UCLA L. REV. 265 (2000).

6. See, e.g., Democracy Is Strengthened by Casting Light on Spending in Elections (DISCLOSE) Act, H.R. 5175, 111th Cong. §§ 201-21, 301 (2010) [hereinafter House DISCLOSE Act]; Democracy Is Strengthened by Casting Light on Spending in Elections (DISCLOSE) Act, S.

legislatures are also considering similar expansions of disclosure and disclaimer rules,⁷ and several have already enacted such laws.⁸ The constitutional debates also continue, most recently in the ongoing case of *Doe v. Reed*, which involves the disclosure of the names and addresses of individuals who signed a referendum petition in Washington State.⁹

Yet neither the majority nor Justice Thomas provided a firm factual foundation for their respective narratives. The former simply asserted that knowing who supports or opposes a particular candidate “enables the electorate to make informed decisions and give proper weight to different speakers and messages” and provides both “shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters.”¹⁰ The latter relied heavily on anecdotal evidence of retaliation—specifically, the retaliation against supporters of California’s controversial Proposition 8 relating to same-sex marriage and various attempts to use information disclosed under campaign finance rules to publicly identify supporters of candidates and causes.¹¹ Justice Thomas markedly failed, however, to cite more broad-based evidence regarding either the actual risk of retaliation (particularly outside of the Proposition 8 context) or the chilling effect, if any,

3295, 111th Cong. §§ 101-04, 201-31 (2010) [hereinafter Senate DISCLOSE Act]; R. SAM GARRETT, CONG. RESEARCH SERV., R41054, CAMPAIGN FINANCE POLICY AFTER *CITIZENS UNITED V. FEDERAL ELECTION COMMISSION*: ISSUES AND OPTIONS FOR CONGRESS 6-7 (Feb. 1, 2010), available at http://assets.opencrs.com/rpts/R41054_20100201.pdf; see also SUNLIGHT FOUND., A COMPREHENSIVE DISCLOSURE REGIME IN THE WAKE OF THE SUPREME COURT’S DECISION IN *CITIZENS UNITED V. FEDERAL ELECTION COMMISSION* (2010), http://assets.sunlightfoundation.com/pdf/policy/sunlightfoundation_policy_citizens_united.pdf (arguing for a robust transparency regime in the wake of the *Citizens United* decision); L. PAIGE WHITAKER ET AL., CONG. RESEARCH SERV., R41096, LEGISLATIVE OPTIONS AFTER *CITIZENS UNITED V. FEC*: CONSTITUTIONAL AND LEGAL ISSUES 3-8 (Mar. 8, 2010), available at <http://www.fas.org/sgp/crs/misc/R41096.pdf>.

7. See Fredreka Schouten, *10 States Add Campaign Finance Laws*, ABC NEWS (July 24, 2010), <http://abcnews.go.com/Politics/campaign-finance-laws-emerge-states-disclose-act-stalled/story?id=11234998>.

8. See, e.g., H.R. 2788, 49th Leg., 2d Reg. Sess. (Ariz. 2010) (expanding disclosure requirements for independent expenditures); S. 10-203, 67th Gen. Assemb., 2d Reg. Sess. (Colo. 2010) (same); S. 2354, 83d Gen. Assemb., 1st Sess. (Iowa 2010) (same); H.R. 4647, 79th Leg., 2d Reg. Sess. (W. Va. 2010) (same).

9. See *Doe v. Reed*, 130 S. Ct. 2811 (2010) (concluding that a state law requiring disclosure of referendum petitions was constitutional on its face; remanding for a determination whether that law is unconstitutional as applied to a particular petition); see also *Canyon Ferry Rd. Baptist Church v. Unsworth*, 556 F.3d 1021, 1031-35 (9th Cir. 2009) (concluding that Montana’s “zero dollar” threshold for disclosure of de minimis in-kind contributions was unconstitutional even given the state’s important interest in providing citizens with information about the constituencies supporting and opposing ballot issues).

10. *Citizens United v. FEC*, 130 S. Ct. 876, 916 (2010).

11. *Id.* at 980-81 (Thomas, J., concurring in part and dissenting in part).

caused by the fear of retaliation.¹² The precedents cited by the majority and Justice Thomas also do not provide a more solid factual footing for their respective stories.¹³

The purpose of this Article is to consider what we in fact know about the truth of these two narratives. Part I addresses whether the existing disclosure and disclaimer rules result in more informed voters and if they do not, whether any disclosure and disclaimer regime would be more likely to accomplish this goal. This Article looks for the answer to this question in the political psychology literature regarding voter decisionmaking, and particularly the use by voters of “heuristic cues”—mental shortcuts—to reach, arguably, the same decision the voters would reach if they had unlimited time and interest to gather information about their election choices.

Part II addresses the extent to which the existing disclosure and disclaimer rules result in either actual retaliation or sufficient fear of retaliation—whether justified or not—that financial support of candidates is chilled. The answer to this question is less clear, unfortunately, because while anecdotal evidence of actual and possible retaliation exists, little if any empirical research has been done on the actual extent of retaliation and the effect of the fear of retaliation on potential contributors’ behavior. Nevertheless, the existing evidence of retaliation, combined with the more extensive research regarding informing voters, does suggest several changes to existing and proposed disclosure and disclaimer regimes. Such changes could both further the voters’ interest and reduce actual and perceived risk of retaliation.

Part III describes these recommended changes, which include both a reduction in the disclosure of information about “rank-and-file” contributors, whose specific identities have little or no informational value for voters, and an increase in the disclosure of information about substantial contributors, particularly through an expanded use of disclaimers on communications paid for by such contributors or the groups they support.

I. REWARD: INFORMING VOTERS

The oft-cited trilogy of government interests in disclosure of who financially supports (or opposes) candidates is informing voters, deterring corruption and the

12. See *id.* at 980-82.

13. *Id.* at 914 (quoting *Buckley v. Valeo*, 424 U.S. 1, 66 (1976) (asserting without citation that disclosure “provid[es] the electorate with information about the sources of election-related spending”)); *id.* (citing *McConnell v. FEC*, 540 U.S. 93, 196-97 (2003) (noting the use of misleading names by some organizations but otherwise simply accepting the assertion in *Buckley* that disclosure serves to more fully inform voters), *overruled by Citizens United*, 130 S. Ct. 876 (2010)); *id.* at 915 (citing *Buckley*, 424 U.S. at 76 (stating that disclosure serves “to insure that the voters are fully informed”)); *id.* (citing *McConnell*, 540 U.S. at 196) (arguing same); *id.* at 980-82 (Thomas, J., concurring in part and dissenting in part) (citing no precedents that provide additional factual support for the retaliation narrative).

appearance of corruption, and aiding enforcement of campaign spending limits.¹⁴ While there are other possible rationales for disclosure, including determining whether candidates and political parties receive adequate funding, determining the extent of individual (financial) participation in politics, and generally facilitating the study and knowledge of political behavior, it is only these three that have been cited as having constitutional significance.¹⁵

The focus here will be on the first interest—informing voters—for several reasons. First, the third interest—aiding enforcement of campaign spending limits—only applies when such limits exist (and possibly not even then as to disclosure to the public as opposed to a regulatory body), yet both the existing and proposed federal (and many state) disclosure regimes go well beyond disclosure of financial supporters who are subject to such limits, particularly in the wake of *Citizens United*.¹⁶ Second, there is significant skepticism regarding the extent to which disclosure alone in fact deters hard-to-prove corruption or the appearance of corruption, Justice Brandeis’s oft-quoted “[s]unlight is said to be the best of disinfectants; electric light the most efficient policeman”¹⁷ notwithstanding.¹⁸ Third, the Court in *Citizens United* chose to rely solely on the

14. See, e.g., *McConnell*, 540 U.S. at 196; *Buckley*, 424 U.S. at 66-68, 80-81; Robert F. Bauer, *Not Just a Private Matter: The Purposes of Disclosure in an Expanded Regulatory System*, 6 ELECTION L.J. 38, 38 (2007); Elizabeth Garrett, *McConnell v. FEC and Disclosure*, 3 ELECTION L.J. 237, 239 (2004); Hasen, *supra* note 5, at 270.

15. See K.D. Ewing & N.S. Ghaleigh, *The Cost of Giving and Receiving: Donations to Political Parties in the United Kingdom*, 6 ELECTION L.J. 56, 59 (2007) (listing rationales); David Schultz, *Disclosure is Not Enough: Empirical Lessons from State Experiences*, 4 ELECTION L.J. 349, 355-56 (2005) (same); Clyde Wilcox, *Designing Campaign Finance Disclosure in the States: Tracing the Tributaries of Campaign Finance*, 4 ELECTION L.J. 371, 371, 374-75 (2005) (noting how disclosure has facilitated the study of political behavior).

16. See FEC Adv. Op. 2010-11, at 2-3 (July 22, 2010), available at <http://saos.nictusa.com/aodocs/AO%202010-11.pdf> (opining that a federally registered, independent-expenditure-only political committee can solicit and accept unlimited contributions from a variety of sources); FEC Adv. Op. 2010-09, at 3-5 (July 22, 2010), available at http://saos.nictusa.com/saos/searchao?SUBMIT=continue&PAGE_NO=-1 (opining that a federally registered, independent-expenditure-only political committee may solicit and accept unlimited contributions from individuals in the general public).

17. LOUIS D. BRANDEIS, OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT 92 (Martino Publ’g 2009) (1913).

18. See, e.g., *McConnell v. FEC*, 540 U.S. 93, 321 (2003) (Kennedy, J., concurring in part and dissenting in part) (rejecting the combating corruption rationale with respect to the disclosure rules at issue); BRUCE ACKERMAN & IAN AYRES, VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE 27 (2002) (“[M]andated disclosure may make us feel good about ourselves but it does little to insulate the political sphere from the corrupting influence of unequal wealth.”); BROOKS JACKSON, HONEST GRAFT: BIG MONEY AND THE AMERICAN POLITICAL PROCESS 296-302 (rev. ed. 1990) (arguing that disclosure of interest group campaign contributions had the effect of legitimizing and increasing those contributions); Bauer, *supra* note 14, at 40 (arguing that “the rational of ‘deterrence’ . . . holds but cannot prove that disclosure will discourage illegal or corrupt

informing-voters interest in upholding the existing federal disclosure rules at issue in that case.¹⁹

There fortunately has been significant political-psychology research regarding how voters obtain information relevant to their election decisions, as well as broader research regarding public use of information when making decisions.²⁰ The story that emerges from this research is much more complicated and nuanced than the Court's statements in *Citizens United* would indicate. It is not simply enough to disclose contributor information. While existing research indicates that such information *may* help inform voters, whether it has a reasonable chance of doing so depends both on *what specific information* is disclosed and *how* that information is disseminated.²¹ As political scientist Arthur Lupia puts it with respect to informing citizens generally:

Scholars, legislators, and foundations both public and private advocate various means to enhance competence, including civic education campaigns and the development of informative [websites] . . .

However, something is wrong with many of these attempts. The

financial relationships between special interests and political actors"); Richard Briffault, *Reforming Campaign Finance Reform: A Review of Voting with Dollars*, 91 CAL. L. REV. 643, 652-53 (2003) (expressing skepticism that campaign finance disclosure rules discourage large donations that have the greatest potential for corruption and the appearance of corruption); Ewing & Ghaleigh, *supra* note 15, at 69; Elizabeth Garrett, *The William J. Brennan Lecture in Constitutional Law: The Future of Campaign Finance Reform Laws in the Courts and in Congress*, 27 OKLA. CITY U. L. REV. 665, 669-75 (2002); William McGeeveran, *Mrs. McIntyre's Checkbook: Privacy Costs of Political Contribution Disclosure*, 6 U. PA. J. CONST. L. 1, 30-32 (2003); Wilcox, *supra* note 15, at 373 ("Even with disclosure, it is exceeding difficult to *prove* that corruption has occurred, and many observers doubt that corruption is common."). *But see, e.g.*, Hasen, *supra* note 5, at 281, 283 n.78 (appearing to accept the *Buckley* Court's position that at least some communications done independently of candidates raise corruption or appearance of corruption concerns sufficient to justify disclosure of who financially supports those communications); Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1395 (1994) ("Candidates often know who spends money on their behalf, and for this reason, an expenditure may in some contexts give rise to the same reality and appearance of corruption." (internal citation omitted)).

19. *Citizens United v. FEC*, 130 S. Ct. 876, 915-16 (2010).

20. *See generally* Cheryl Boudreau, *Making Citizens Smart: When Do Institutions Improve Unsophisticated Citizens' Decisions?*, 31 POL. BEHAV. 287, 287-90 (2009) (compiling and explaining this research); Michael S. Kang, *Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and "Disclosure Plus,"* 50 UCLA L. REV. 1141, 1149-51 (2003) (same).

21. *See generally* ARCHON FUNG ET AL., *FULL DISCLOSURE: THE PERILS AND PROMISE OF TRANSPARENCY* 11 (2007) (concluding that for a targeted transparency policy to be successful, it must be both user-centered and sustainable); *id.* at 55 (arguing that the extent to which available information is used by decisionmakers depends on how much they value the information, the degree to which the information is compatible with their decision-making routines, and how comprehensible it is to them).

problem is that they are based on flawed assumptions about how citizens seek and process information. One manifestation of the problem is that many advocates of competence-generating proposals proceed as if merely providing new information is sufficient to improve competence. However, the transmission of socially relevant information is no “Field of Dreams.” It is not true that “if you build it, they will come.” Nor is it true that if they come, the effect will be as advocates anticipate.²²

Furthermore, there is still significant uncertainty regarding what information and which means of dissemination are most useful to voters.²³

Applying this research to the voter information narrative requires starting with two important but generally uncontroversial assumptions (at least in the United States). First, it is desirable for voters to be well-informed about their electoral choices—whether candidates or ballot initiatives—such that voters can accurately determine and apply their personal preferences when making such choices.²⁴ Well-informed in this context means voters not only having all relevant information, but also understanding that information.²⁵ Second, many,

22. Arthur Lupia, *Deliberation Disconnected: What It Takes to Improve Civic Competence*, 65 LAW & CONTEMP. PROBS. 133, 134 (2002) (internal citation omitted); see also Briffault, *supra* note 18, at 653-55 (expressing skepticism that campaign finance disclosure rules have a significant effect on voter information or voter behavior).

23. See generally James H. Kuklinski & Paul J. Quirk, *Conceptual Foundations of Citizen Competence*, 23 POL. BEHAV. 285 (2001) (identifying a host of problems with the research into, among other topics, how voters use the information they receive).

24. See, e.g., MICHAEL X. DELLI CARPINI & SCOTT KEETER, WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS 5-7, 59-61, 272 (1996) (concluding that “informed citizens are demonstrably better citizens” because, among other reasons, they are “better able to link their interests with their attitudes” and “more likely to choose candidates who are consistent with their own attitudes”); Richard R. Lau & David P. Redlawsk, *Voting Correctly*, 91 AM. POL. SCI. REV. 585, 586 (1997) (defining a “‘correct’ vote decision as one that is the same as the choice which would have been made under conditions of full information”); Daniel R. Ortiz, *The Engaged and the Inert: Theorizing Political Personality Under the First Amendment*, 81 VA. L. REV. 1, 45 (1995) (concluding that the right question to ask with respect to campaign finance regulation is “whether it would increase the amount and quality of deliberate, cognitive decisionmaking rather than just the amount of speech”); Ilya Somin, *Voter Ignorance and the Democratic Ideal*, 12 CRITICAL REV. 413, 415 (1998) (“Ideally, then, voters should be able to choose between opposing candidates and their platforms on the basis of ‘the preferences that people would have if their information were perfect.’” (internal citation omitted)). But see Craig M. Burnett et al., *The Dilemma of Direct Democracy* 4 (Univ. of So. Cal. Legal Studies, Working Paper No. 57), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1561926 (concluding in an empirical study of voting relating to a ballot initiative that most voters, regardless of their level of information, voted in a manner consistent with their policy preferences, although not extending this result to voting in candidate elections).

25. See Kuklinski & Quirk, *supra* note 23, at 301-03 (questioning what it means for an ordinary citizen to be well-informed when making political decisions and whether any significant

and probably most, voters are not well-informed, both because relevant information is often not available or comprehensible and because gathering and processing such information has costs that voters often choose not to incur given other demands.²⁶ This ignorance extends to basic information about candidates for elected office,²⁷ although there is an ongoing debate whether recall of such information accurately reflects the information that voters use to make decisions.²⁸ Given these assumptions, the question that existing and proposed campaign finance disclosure rules raise is whether they in fact help voters become more informed. This discussion will focus on disclosures of contributors who finance efforts to support or oppose candidates, both because *Citizens United* focused on spending relating to candidate elections and because others have already comprehensively considered this issue in the context of ballot initiatives.²⁹

The existing disclosure and disclaimer regimes generally collect and make public information in two ways. First, they require candidates, political parties, political committees, and other organizations engaged in certain election-related activities to file public reports identifying financial contributors who have given above certain thresholds.³⁰ For example, federal election law requires such entities to identify all contributors who provide more than \$200 within a designated period (either a calendar year or a federal election cycle), except that the threshold is \$1000 for non-candidate, non-party organizations, which have to disclose their contributors only because the organization makes “electioneering

proportion of citizens can truly be said to be well-informed, as opposed to merely relatively informed, compared to their fellows).

26. See, e.g., DELLICARPINI & KEETER, *supra* note 24, at 269-72 (highlighting the first reason while acknowledging other influences); ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 236-37 (1957) (focusing on the second reason); Edward G. Carmines & James H. Kuklinski, *Incentives, Opportunities, and the Logic of Public Opinion in American Political Representation*, in *INFORMATION AND DEMOCRATIC PROCESSES* 240, 244-45 (John A. Ferejohn & James H. Kuklinski eds., 1990) (noting both reasons); Philip E. Converse, *The Nature of Belief Systems in Mass Publics*, in *IDEOLOGY AND DISCONTENT* 206, 219-23 (David E. Apter ed., 1964) (detailing a general lack of public knowledge with respect to the liberal-conservative political distinction or how that distinction applied to the two major political parties); Ilya Somin, *Political Ignorance and the Counter-majoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 *IOWA L. REV.* 1287, 1304-15 (2004) (summarizing research demonstrating a general lack of political knowledge and providing further data supporting this finding).

27. See, e.g., Somin, *supra* note 26, at 1308 (summarizing the lack of knowledge about candidates, among other information, in 2000).

28. See James N. Druckman, *Does Political Information Matter?*, 22 *POL. COMM.* 515, 516 (2005) (describing this debate).

29. See, e.g., Elizabeth Garrett & Daniel A. Smith, *Veiled Political Actors and Campaign Disclosure Laws in Direct Democracy*, 4 *ELECTION L.J.* 295 (2005).

30. See generally 2 U.S.C. § 434 (2006 & Supp. 2009) (specifying federal disclosure requirements); *Campaign Disclosure Law Database*, CAMPAIGN DISCLOSURE PROJECT (Dec. 31, 2006), <http://disclosure.law.ucla.edu> (cataloguing state campaign disclosure requirements).

communications.”³¹ For individuals, the information that must be provided is the person’s name, mailing address, occupation, and employer.³² All of this information is then made available in an Internet-accessible, searchable database.³³ A search of the Campaign Disclosure Law Database maintained by the Campaign Disclosure Project reveals that every state has similar disclosure laws, although reporting thresholds vary and are usually significantly lower than \$200.³⁴

Second, these regimes require the same organizations, when they pay for certain types of communications, to include disclaimers in those communications identifying the organization.³⁵ For example, federal election law requires covered communications not authorized by a candidate to state the name and permanent street address, telephone number, or web address of the organization (or individual) who paid for the communication, as well as a statement that the communication is not authorized by any candidate or candidate’s committee.³⁶ Federal election law also requires that radio or television communications by any person or organization other than the candidate or authorized by the candidate include an audio statement that “_____ is responsible for the content of this advertising.”³⁷ A search of the Campaign Disclosure Law Database maintained by the Campaign Disclosure Project revealed that most, although not all, states have similar disclaimer laws.³⁸

The disclosure of financial contributors will rarely, if ever, directly inform voters about the qualifications or policy positions of candidates. Rather, such disclosures may indirectly provide such information to voters depending on what the voters know (or believe they know) about the contributors—their judgment, values, and policy positions.³⁹ Such indirect knowledge is commonly referred to

31. 2 U.S.C. §§ 434(b)(3)(A), (c)(2)(C), (f)(2)(E). An “electioneering communication” is defined as a certain communication that refers to a clearly identified candidate, reaches a certain number of electorate for that candidate, and is aired within a certain time window before the relevant election. *Id.* § 434(f)(3)(A)(i).

32. *Id.* § 431(13)(A).

33. See FED. ELECTION COMM’N, CAMPAIGN FINANCE DISCLOSURE DATA SEARCH, http://www.fec.gov/finance/disclosure/disclosure_data_search.shtml (last visited Oct. 15, 2010).

34. See *Campaign Disclosure Law Database*, *supra* note 30 (under “Compare,” scroll down to “F. Contributor Information” and select “7. Is there a threshold amount for reporting individual contributions?,” click “select all” to search all jurisdictions, and click “Next”).

35. See generally 2 U.S.C. § 441d; *The Campaign Disclosure Law Database*, *supra* note 30.

36. 2 U.S.C. § 441d(a).

37. *Id.* § 441d(d)(2).

38. See *Campaign Disclosure Law Database*, *supra* note 30 (under “Compare,” scroll down to “T. Advertisement disclosure” and select “2. Are committees required to disclose their identity on broadcast (TV or radio) advertisements?,” click “select all” to search all jurisdictions, and click “Next”).

39. See Arthur Lupia, *Who Can Persuade Whom?: Implications from the Nexus of Psychology and Rational Choice Theory*, in THINKING ABOUT POLITICAL PSYCHOLOGY 51, 56 (James H. Kuklinski ed., 2002) (concluding that “cue-giver attributes . . . affect a cue’s

as heuristic cues.⁴⁰ These mental shortcuts permit, in this situation, the voter who learns the identity of a financial contributor to jump to a conclusion regarding the supported (or opposed) candidate's qualifications for office or policy positions based on that contributor's information. Commonly identified heuristic cues include party affiliation, endorsements by interest groups, newspapers, celebrities, politicians, and other opinion leaders, and a candidate's personal characteristics and character.⁴¹

This brief description of heuristic cues suggests their limitations both generally and specifically with respect to contributor information. Perhaps most importantly, not all scholars who have studied this issue are convinced that all or most identified heuristic cues in fact tend to lead voters to act as they would if they were better informed.⁴² These skeptics argue that cues may lead to

persuasiveness only if they are necessary to inform a cue-seeker's perceptions of a cue-giver's actual knowledge or interests").

40. See ARTHUR LUPA & MATHEW D. MCCUBBINS, *THE DEMOCRATIC DILEMMA: CAN CITIZENS LEARN WHAT THEY NEED TO KNOW?* 37 (1998) (listing and agreeing with studies showing that voters use simple shortcuts when making complex decisions); SAMUEL L. POPKIN, *THE REASONING VOTER: COMMUNICATION AND PERSUASION IN PRESIDENTIAL CAMPAIGNS* 44 (1991) (describing the use of "information shortcuts" by voters); PAUL M. SNIDERMAN ET AL., *REASONING AND CHOICE: EXPLORATIONS IN POLITICAL PSYCHOLOGY* 19 (1991) (describing heuristics generally); Boudreau, *supra* note 20, at 289 (summarizing research about such cues); see generally Daniel Kahneman, *Maps of Bounded Rationality: Psychology for Behavioral Economics*, 93 AM. ECON. REV. 1449 (2003) (discussing the state of research into intuitive, as opposed to reasoning, decisionmaking).

41. See, e.g., LUPA & MCCUBBINS, *supra* note 40, at 7-8 (listing possible heuristic cues identified by scholars); Kuklinski & Quirk, *supra* note 23, at 295 (same); Richard R. Lau & David P. Redlawsk, *Advantages and Disadvantages of Cognitive Heuristics in Political Decision Making*, 45 AM. J. POL. SCI. 951, 953-54 (2001) (dividing commonly considered candidate heuristic cues into five categories: party affiliation, ideology, endorsements, "viability" information from polls, and visual appearance); Victor C. Ottati & Robert S. Wyer, Jr., *The Cognitive Mediators of Political Choice: Toward a Comprehensive Model of Political Information Processing*, in *INFORMATION AND DEMOCRATIC PROCESSES*, *supra* note 26, at 186, 211-14 (reviewing commonly identified heuristic cues for candidates, including party affiliation and image).

42. See, e.g., DELLI CARPINI & KEETER, *supra* note 24, at 53-55 (arguing that while commonly cited heuristic cues, such as political party affiliation, are valuable, they alone are not sufficient to permit voters to act if they were well-informed); James H. Kuklinski & Norman L. Hurley, *On Hearing and Interpreting Political Messages: A Cautionary Tale of Citizen Cue-Taking*, 56 J. POL. 729, 732-33 (1994) (noting the limited effectiveness of the views of political elites as heuristic cues); James H. Kuklinski & Paul J. Quirk, *Reconsidering the Rational Public: Cognition, Heuristics, and Mass Opinion*, in *ELEMENTS OF REASON: COGNITION, CHOICE, AND THE BOUNDS OF RATIONALITY* 153, 155-59, 165-67 (Arthur Lupia et al. eds., 2000) (questioning whether some of the claimed benefits of political heuristic cues actually exist, although not denying that they may be helpful to voters); Lau & Redlawsk, *supra* note 41, at 966-67 (concluding that political heuristic cues may tend to mislead less politically sophisticated voters generally and even relatively politically sophisticated voters in certain situations); Somin, *supra* note 24, at 421-23

incorrect conclusions about a candidate; for example, given the breadth of positions held by candidates identified with each of the major parties, the label “Democrat” or “Republican” does not necessarily accurately convey whether the candidate is pro-choice or pro-life, pro-gun control or pro-gun rights, and so on.⁴³ Some cues apparently used by voters—a candidate’s looks, eloquence, height, or the place of the candidate’s name on the ballot, for example—are particularly vulnerable in this respect.⁴⁴ Furthermore, voters who have already formed an impression of a candidate—including an inaccurate one—may be relatively immune to the influence of such cues.⁴⁵ Finally, savvy politicians, campaign managers, and political consultants are aware of these cues and thus may be able to manipulate their use to their advantage.⁴⁶

Despite these doubts, there is significant evidence that certain heuristic cues do help voters to act as if they were well-, or at least better-, informed—i.e., to vote as they would if they had and understood more of the relevant information, particularly with respect to candidate voting, than the voters actually have.⁴⁷ Of course, such evidence does not demonstrate that voters are in fact well-informed—whether through heuristic cues or otherwise. This evidence

(discussing the limits of political party affiliation as a helpful cue); *id.* at 424-26 (same with respect to opinion leaders).

43. See, e.g., James M. Snyder, Jr. & Michael M. Ting, *An Informational Rationale for Political Parties*, 46 AM. J. POL. SCI. 90 (2002) (modeling how party platforms may converge or diverge depending on various factors); Somin, *supra* note 24, at 422 (noting that “where party discipline is relatively lax, as it is in the United States, the positions of the party as a whole may be a poor predictor of the [positions] of key individual candidates for office”).

44. See, e.g., Garrett, *supra* note 18, at 678 n.38 (citing sources relating to ballot order).

45. See, e.g., James H. Kuklinski et al., *Misinformation and the Currency of Democratic Citizenship*, 62 J. POL. 790, 793 (2000) (finding that people who are misinformed on a specific issue tend to resist correct information, although the strength of that resistance is unclear); see generally Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 646-54 (1999) (summarizing how existing views of a candidate can lead to disregarding or misinterpreting new information).

46. See, e.g., Shanto Iyengar et al., *The Stealth Campaign: Experimental Studies of Slate Mail in California*, 17 J.L. & POL. 295, 300-02 (2001) (describing the use of carefully designed and targeted “slate mailers” to influence voters); Somin, *supra* note 26, at 1322 (noting that ill-informed voters are probably the most vulnerable to such manipulation).

47. See, e.g., Larry M. Bartels, *Uninformed Votes: Information Effects in Presidential Elections*, 40 AM. J. POL. SCI. 194, 217 (1996) (concluding that in the context of presidential elections, voters are more likely to vote in a manner consistent with their personal preferences apparently through the use of heuristic cues, although they do not fully match how they would vote if they had complete information); Arthur Lupia, *Shortcuts Versus Encyclopedias: Information and Voting Behavior in California Insurance Reform Elections*, 88 AM. POL. SCI. REV. 63, 63-64 (1994) (concluding that in the limited context of certain ballot initiatives, knowing whether a particular industry supported or opposed the initiative provided a useful heuristic cue). *But see* Burnett et al., *supra* note 24, at 4 (concluding that in the direct democracy context, uninformed and informed voters tend to have equal success in applying their preferences).

demonstrates just that heuristic cues help the voters act more *as if* they are well-, or at least better-, informed. It would be more desirable if voters were actually well-informed, particularly since being well-informed would presumably have broader positive effects. Heuristic cues that are not misleading, however, are at least an improvement for the relatively uninformed.

There are several reasons, however, to be skeptical of the proposition that contributor information, at least in its current form, is a helpful heuristic cue. First, it is not clear what cues such information provides that is not already provided by other existing and readily accessible heuristic cues such as party affiliation and endorsements.⁴⁸ These cues, like contributor information, also arguably have value because of what voters know about the third parties involved.⁴⁹ Studies that have shown the greatest positive effect from contributor or other supporter information has been in the context of ballot initiatives, where party affiliation and other candidate-related heuristic cues are often lacking. Here, contributor information may be one of the few, if not the only, heuristic cues available to voters.⁵⁰

Second, it appears that the vast majority of contributors will not be known to the vast majority of voters, and so the fact of their financial support will not provide *any* useful information about a candidate to most voters.⁵¹ That is, while a voter might be able to use the fact that, for example, Jane Fonda or Rush Limbaugh contributed to a particular candidate's campaign or to an organization that opposed a particular candidate to intuit correctly something about the relevant candidate's qualifications for office or policy positions, the vast majority

48. See generally Cheryl Boudreau, *Are Two Cues Better Than One? An Analysis of When Multiple Cues Improve Decisions* (Mar. 25, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1368562 (noting that little research has been done on the effect of multiple cues and concluding—based on controlled experiments focusing on cues relating to the trustworthiness of a knowledgeable speaker—that in this context, two cues may increase the likelihood of a correct decision).

49. This assumes, of course, that they know something about such third parties, but the same limitation applies to contributor information. See SHAUN BOWLER & TODD DONOVAN, *DEMANDING CHOICES: OPINION, VOTING, AND DIRECT DEMOCRACY* 62 (1998) (noting that endorsements are only a useful cue if a voter is able to recognize the cue); Somin, *supra* note 26, at 1320-21 (noting that many heuristic cues require a foundation of basic knowledge to be useful).

50. See, e.g., BOWLER & DONOVAN, *supra* note 49, at 168-70; Garrett & Smith, *supra* note 29, at 297; Kang, *supra* note 20, at 1151-53.

51. See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 348-49 (1995) (noting that “in the case of a handbill written by a private citizen who is not known to the recipient, the name and address of the author add little, if anything, to the reader’s ability to evaluate the document’s message”); *Cal. Pro-Life Council, Inc. v. Randolph*, 507 F.3d 1172, 1179 n.8 (9th Cir. 2007) (citing a survey that found even in the ballot measure context that it is endorsements by relatively well-known individuals and groups, such as interest groups, politicians, and celebrities, that voters find helpful); McGeveran, *supra* note 18, at 26-27 (finding that even if a voter correctly identifies a well-known person’s or group’s views, that voter cannot tell why that person or group donated to the campaign).

of reported contributors are not household names within their local communities, much less for most of the relevant electorate.⁵² After all, even candidates for positions such as state representative in a relatively small state usually have dozens, if not hundreds, of contributors above the reporting thresholds, most of whom are relatively unknown to the public. Some commentators have argued that the large volume of contributor information may have a *negative* effect on informing voters.⁵³

Third and finally, it is not clear that most voters even know contributor information before they enter the voting booth.⁵⁴ While party affiliation is usually listed on the ballot, and interest group, newspaper, and celebrity endorsements are often circulated widely, voters generally gain access to contributor information only by proactively searching for such information, which few voters probably do even with Internet-accessible databases.⁵⁵ There are a number of private groups that take the available contributor information and attempt to render it more accessible to voters by, for example, providing maps that show the locations of contributors⁵⁶ or reporting only contributor information for supporters of particular types of candidates.⁵⁷ There is little evidence, however, that such attempts have been particularly successful in educating voters, especially before election day. Even intermediaries such as the media, which might be viewed as in the business of educating voters before election day,

52. See Samuel L. Popkin & Michael A. Dimock, *Political Knowledge and Citizen Competence*, in CITIZEN COMPETENCE AND DEMOCRATIC INSTITUTIONS 117, 143 (Stephen L. Elkin & Karol Edward Soltan eds., 1999) (noting that for individuals with relatively low political knowledge, “party identification and well-known political figures” serve as useful cues).

53. See, e.g., Bauer, *supra* note 14, at 52; Elizabeth Garrett, *Voting with Cues*, 37 U. RICH. L. REV. 1011, 1045-47 (2003) (noting the potential for harmful “information cascades” but arguing that disclosure of group support for candidates is unlikely to lead to such harmful effects). This potential for negative effects may be increased by the fact that disclosures generally also require disclosure of information relating to expenditures as well as contributions.

54. See MICHAEL J. MALBIN & THOMAS L. GAIS, *THE DAY AFTER REFORM: SOBERING CAMPAIGN FINANCE LESSONS FROM THE AMERICAN STATES* 46-48 (1998) (noting the difficulties faced in ensuring that usable contributor information reaches voters, particularly before Election Day).

55. See ACKERMAN & AYRES, *supra* note 18, at 27 (“[I]f most voters pay scant attention to politics, they won’t take the time to go through the lengthy lists of donors published in the name of ‘full information.’”); see generally RICHARD DAVIS, *THE WEB OF POLITICS: THE INTERNET’S IMPACT ON THE AMERICAN POLITICAL SYSTEM* 23 (1999) (noting that most citizens, on most political issues, will not take the time to seek out information regardless of how inexpensive or convenient it may be to do so).

56. See, e.g., *Campaign Donors: Fundrace 2008*, HUFFINGTON POST, <http://fundrace.huffingtonpost.com> (last visited Aug. 10, 2010) (allowing the identification of federal election contributors by geographic location).

57. See, e.g., PROP 8 MAPS, <http://www.eightmaps.com> (last visited Aug. 10, 2010) (providing maps showing the locations of supporters of California’s Proposition 8, which changed California’s constitution to prohibit same-sex marriage).

have a variety of incentives—the need to attract readership and to demonstrate autonomy and objectivity, for example—that shape and limit their use of political contributor data.⁵⁸ There are also significant reasons to believe that the most effective location for providing useful information is on the ballot itself, which never includes contributor information.⁵⁹

Indeed, at least some of the efforts by institutions that have the capacity to review and reformat contributor data appear to be designed primarily to inform neighbors, customers, co-workers, employers, and others with relationships to the contributors about the character or positions *of the contributors*, not to inform voters about the character or positions *of the candidates*. For example, Fundrace 2008, a database of federal election-related contributors maintained by the Huffington Post website, is in prominent part designed to help locate contributors on a map and to ease learning about which candidates or political groups one's neighbors support.⁶⁰ Similarly, MSNBC sifted through federal contributor data to identify journalists who had made federal political contributions, often in apparent violation of their employers' stated policies.⁶¹ While it is possible that such use of this information may have other positive effects—such as reinforcing journalistic neutrality in the case of the MSNBC example—it does not further the voter-informing interest relied upon by the Supreme Court in *Citizens United*.⁶²

There are, however, intermediary institutions that process the raw contributor data and highlight aspects of the data that relate to the candidates, as opposed to the contributors. For example, the media often publicly identifies controversial or high-profile contributors, which in turn may lead to candidates and political groups eschewing contributors from such sources. Similarly, the media and other groups may identify certain candidates or political groups as being heavily supported by employees of a particular industry or from a particular geographic region.⁶³ Candidates and political parties, as well as the government agencies

58. See Raymond J. La Raja, *Sunshine Laws and the Press: The Effect of Campaign Disclosure on News Reporting in the American States*, 6 ELECTION L.J. 236, 238-39 (2007) (discussing such concerns with respect to newspaper use of campaign finance data).

59. E.g., Burnett et al., *supra* note 24, at 38-42.

60. See *Campaign Donors: Fundrace 2008*, *supra* note 56.

61. See Bill Dedman, *The List: Journalists Who Wrote Political Checks*, MSNBC.COM, <http://www.msnbc.msn.com/id/19113455/ns/politics> (last updated July 15, 2007).

62. See generally Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L.J. 967, 1044-47 (2003) (discussing the possible value of "gossip" to society, or the lack thereof).

63. See, e.g., *Cal. Pro-Life Council, Inc. v. Randolph*, 507 F.3d 1172, 1179 n.8 (9th Cir. 2007) (quoting a journalist crediting campaign finance disclosure laws with allowing her to inform readers that support for a particular ballot measure did not come primarily from small businesses, as had been publicly represented by its supporters, but instead from "giant tobacco [c]ompanies"); *ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197, 1224 n.11 (E.D. Cal. 2009) (concluding that it is "very probable" that the California electorate would be interested in knowing the extent to which financial support for a ballot initiative comes from outside the state); see also Patrick M. Garry et al., *Raising the Question of Whether Out-of-State Political Contributions May Affect a*

that receive the initial reports, may also review this information so as to highlight information of particular salience to voters before the relevant election.⁶⁴ Of course, if the receiving government agencies served in this filtering role instead, they could disclose certain patterns of information (e.g., industry or geographic distribution) *without* disclosing individual identification data. Choosing what patterns should be disclosed might not be a simple task; therefore, private parties should experiment with what the public finds useful to know.⁶⁵

What is less clear is the extent and effect of these filtering efforts. Especially in an age of shrinking media budgets, there is reason to believe that such filtering by intermediaries is relatively limited.⁶⁶ Even if intermediaries serve in this role, at least three possible effects could be imagined. First, and most positively, the filtered information may be significantly more likely to reach and be used by voters than the unfiltered, individual contributor information.⁶⁷ There is, however, some skepticism that this is the case.⁶⁸ For example, research indicates that newspapers provide very limited coverage of campaign finance issues, especially absent a significant scandal involving contributions.⁶⁹

Second, candidates and political groups may avoid certain contributors or certain concentrations of contributors because they perceive a potential for an adverse inference from voters, whether in fact such an adverse inference is likely to occur.⁷⁰ For example, voters likely view candidates and ballot initiatives that receive support from certain disfavored industries, such as tobacco companies, less favorably. Again, the existence, much less the strength, of such an effect is unknown.

Third, and less positively, the intermediary organizations may selectively publish or emphasize certain contributor information to further their particular

Small State's Political Autonomy: A Case Study of the South Dakota Voter Referendum on Abortion, 55 S.D. L. REV. 35, 36 (2010) (raising concerns that out-of-state contributions to voter referendum campaigns may undermine a state's independence from other states, a risk that could only be known if the states where such contributions originate are known).

64. See Garrett, *supra* note 53, at 1022 (noting that many voters rely on intermediaries to bring information to their attention).

65. See, e.g., *Investigate Money in State Politics*, FOLLOW THE MONEY, <http://www.followthemoney.org> (last visited Aug. 10, 2010) (providing a variety of filters for federal and state political campaign contributors). *But see* McGeeveran, *supra* note 18, at 27-28 (questioning whether either government or private actors have the capacity to engage in meaningful filtering).

66. See, e.g., MALBIN & GAIS, *supra* note 54, at 46-47.

67. See Wilcox, *supra* note 15, at 377.

68. See, e.g., MALBIN & GAIS, *supra* note 54, at 48.

69. See La Raja, *supra* note 58, at 246-47.

70. See ACKERMAN & AYRES, *supra* note 18, at 27, 27 nn.2-3 (noting that candidates will consider the potential costs of accepting money from notorious groups, although expressing skepticism that such costs will be considered high enough to refuse significant contributions in most cases); La Raja, *supra* note 58, at 248 (arguing that a lack of increased scandal stories when better disclosure regimes are in place may indicate that politicians are more careful about who they accept contributions from when there is greater public disclosure of contributors).

agendas or narratives, thereby actually distorting the information reaching voters and encouraging intuitive leaps to false conclusions about candidates.⁷¹ Even intermediaries that are relatively unbiased, such as journalists, may be subject to such distortions if they rely on others to filter this information for them.⁷²

There are data indicating, however, that the less prominent second aspect of most disclosure regimes may actually be more effective when it comes to informing voters. Required disclaimers on political communications are similar to interest group endorsements in that they demonstrate the financial commitment of groups or relatively wealthy individuals. Unlike the vast majority of contributors, such well-financed organizations (or wealthy individuals) are more likely to be known to voters, at least if they commonly take public positions on candidates as well as policy issues.⁷³ The fact that the disclaimer represents a usually substantial financial commitment reduces the chance that this cue could be manipulated.⁷⁴ Perhaps most importantly, because the disclaimer information is communicated directly to voters when they receive the organization or individual's message, there is evidence that it does help voters evaluate both the message received and the identified candidate.⁷⁵ As a constitutional matter, however, current law would prohibit disclaimer requirements for certain communications such as personally written leaflets distributed by an individual, as was the case in *McIntyre v. Ohio Elections Commission*.⁷⁶

The existing mass media disclaimer regimes are not without their flaws. While some organizations that pay for political communications are well-known to voters, others are "front" organizations given innocuous-sounding or otherwise

71. See, e.g., Bauer, *supra* note 14, at 39 n.4, 45-46 (arguing that some intermediaries use disclosed information to advance their own agendas, including to generate support for more expansive campaign finance regulation).

72. See La Raja, *supra* note 58, at 248 (identifying this concern).

73. See Garrett, *supra* note 18, at 680-81 (using well-known groups such as the NRA and the Sierra Club as examples of contributors who provide useful heuristic cues).

74. See Boudreau, *supra* note 20, at 288 (concluding that information is generally more helpful and reliable if the speaker shares a common interest with the decisionmaker, faces a penalty for lying, or is verified by a third party).

75. See, e.g., Kang, *supra* note 20, at 1180 n.151; see also *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 354 n.18 (1995) (quoting *Bellotti* with approval but distinguishing the individually written and funded leaflet in that case); *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 792 n.32 (1978) (stating that in the ballot initiative context, "[c]orporate advertising, unlike some methods of participation in political campaigns, is likely to be highly visible. Identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected."); Elisabeth R. Gerber & Arthur Lupia, *Voter Competence in Direct Legislation Elections*, in *CITIZEN COMPETENCE AND DEMOCRATIC INSTITUTIONS*, *supra* note 52, at 147, 157 (suggesting that contributor information may enhance voter competence if it were made more accessible to voters by, for example, "requiring candidates or election officials to purchase access to the print or broadcast media and disseminate the names of large contributors").

76. 514 U.S. 334 (1995).

misleading names that hide the true motivations and views of those who created and fund them.⁷⁷ Perhaps the most famous example of such a group was the creation of “Republicans for Clean Air” by a small group of George W. Bush supporters to oppose Senator McCain in the 2000 Republican primary elections.⁷⁸ Individuals can also pay for such communications, and even wealthy individuals who solely fund such communications may not be known to most voters. Thus, disclosure of the names of wealthy individuals by themselves may not provide a useful cue.

The bottom line is that the Supreme Court’s simple assertion that the existing disclosure and disclaimer regime “enables the electorate to make informed decisions and give proper weight to different speakers and messages”⁷⁹ is deeply flawed. As noted previously, while existing research indicates that such information *may* help inform voters, whether it has a reasonable chance of doing so depends both on *what specific information* is disclosed and *how* that information is disseminated. More research is needed, but it appears that the most likely way to help voters make decisions as if they were fully informed is to limit disclosures to contributors who are likely to be known to voters and to expand disclosures through disclaimers in the political communications that the largest—and likely most well-known—contributors support. Databases of numerous \$200 contributors (or less, in the case of most states) may serve other purposes—for example, enhancing enforcement of contribution limits or identifying contributors who are barred from making contributions such as foreign citizens, journalists, and charitable organizations. Yet there is little, if any, evidence that this information even reaches voters before election day, much less is useful to the voters when they decide how to vote.⁸⁰ Maintaining and ensuring the accuracy of such databases may also draw limited enforcement resources away from other aspects of campaign finance laws.⁸¹

77. See, e.g., *McConnell v. FEC*, 540 U.S. 93, 128, 197 (2003) (providing examples of such organizations); *Cal. Pro-Life Council, Inc. v. Randolph*, 507 F.3d 1172, 1179 n.8 (9th Cir. 2007) (listing quotes from both a political science professor and a public relations firm executive regarding the common use of such organizations); Mike McIntire, *Hidden Under Tax-Exempt Cloak, Political Dollars Flow*, N.Y. TIMES, Sept. 24, 2010, at A1, available at <http://www.nytimes.com/2010/09/24/us/politics/24donate.html>; see also Garrett & Smith, *supra* note 29, at 296 (discussing the use of “veiled political actors” in the ballot initiative context).

78. See Mark Sherman & Jena Heath, *Bush Denies Ad Attacking McCain on Environment*, ATLANTA J.-CONST., Mar. 4, 2000, at A4; Richard W. Stevenson & Richard Perez-Pena, *Wealthy Texan Says He Bought Anti-McCain Ads*, N.Y. TIMES, Mar. 4, 2000, at A1.

79. *Citizens United v. FEC*, 130 S. Ct. 876, 916 (2010).

80. Higher thresholds for disclosure requirements also are less vulnerable to constitutional challenge. See Hasen, *supra* note 5, at 280; McGeveran, *supra* note 18, at 42.

81. See Todd Lochner & Bruce E. Cain, *Equity and Efficacy in the Enforcement of Campaign Finance Laws*, 77 TEX. L. REV. 1891, 1913-15 (1999) (concluding, based on a study of early 1990s FEC enforcement actions, that the vast majority of claims of disclosure violations considered by the FEC are brought by third parties, and many such claims are trivial). *But see* Todd Lochner & Bruce E. Cain, *The Enforcement Blues: Formal and Informal Sanctions for Campaign Finance*

Of course, if there were only a potential upside to such disclosures and no downside, then keeping and expanding the existing disclosure and disclaimer regime, however imperfect, could be justified both constitutionally and as a policy matter. There is a commonly asserted downside, however—the risk of retaliation against those identified through required disclosures, and the related fear of retaliation that may chill political contributions by others. It is to this other narrative that we now turn.

II. RISK: RETALIATION

There are several potential harms cited by critics of the current disclosure and disclaimer rules, including privacy costs and administrative burdens on the organizations that must provide the required information as well as actual or potential retaliation and the related chilling effect on potential contributors. The focus of this Part is on the retaliation-related harms for three reasons. First, the retaliation-related harms are included in the privacy costs and represent the most verifiable part of those costs.⁸² Second, while increased computer capacity may enhance the potential for retaliation, as detailed below, at the same time, it is significantly reducing the administrative costs of disclosure given the ease of maintaining databases and electronically filing required reports. Whether such administrative burdens are constitutionally significant is also unclear.⁸³ Third, it was the costs of retaliation that Justice Thomas relied on in his opinion objecting to the conclusion of the other eight Justices that the disclosure and disclaimer provisions at issue in *Citizens United* were constitutional.⁸⁴

The retaliation narrative, like the informing-voters narrative, is deceptively simple. Public disclosure of the contributors to candidates, political groups, and groups that engage in certain types of political communications exposes those

Violations, 52 ADMIN. L. REV. 629, 648-50 (2000) (concluding that the California Fair Political Practices Commission appears to be more efficient in enforcing its disclosure-only state campaign finance laws than the FEC is with respect to enforcing the broader federal campaign finance laws).

82. See, e.g., McGeveran, *supra* note 18, at 16-20 (discussing the privacy costs of political contribution disclosure—including, but not limited to, the risk of retaliation); Wilcox, *supra* note 15, at 375.

83. Compare *Citizens United*, 130 S. Ct. at 897-98 (finding the disclosure, recordkeeping, and similar administrative requirements related to forming and maintaining a political committee or PAC to be unconstitutionally burdensome, without mentioning the limits on contribution sources and amounts applicable to PACs), with *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 252-56 (1986) (Brennan, J., plurality op.) (finding the PAC alternative unconstitutionally burdensome because of the administrative burdens on PACs, including limits on whom can be solicited for contributions); *id.* at 265-66 (O'Connor, J., concurring in part and concurring in judgment) (concluding that the PAC alternative was unconstitutionally burdensome only because it both requires “a more formalized organizational form and significantly reduces or eliminates the sources of funding for groups” with few or no “members”).

84. *Citizens United*, 130 S. Ct. at 980-82 (Thomas, J., concurring in part and dissenting in part).

contributors to a significant risk of retaliatory actions by those who disagree with the supported candidates or groups.⁸⁵ Such retaliation harms the contributors for exercising their constitutional right to make such contributions and may chill the exercise of that right by others sufficiently to raise constitutional concerns.⁸⁶ An important coda to this narrative is that the existing legal avenue of obtaining an exemption from the disclosure requirements on a case-by-case basis is insufficient to address this risk.⁸⁷

The strength of this narrative depends on the extent to which such retaliation in fact occurs or is perceived to occur. As those who argued in favor of this narrative in *Citizens United* undoubtedly discovered, there is very little research on this point. It is likely for this reason that neither they, nor those who sought to discount or minimize this risk, could point to more than anecdotal evidence of retaliation against contributors to political causes. It is with that anecdotal evidence that we start.

The available anecdotal information generally falls into five categories. First, government agencies in various states during the civil rights era attempted to obtain the member and donor rolls of local NAACP chapters in order to expose such members and donors to intimidation. These efforts eventually led to Supreme Court decisions barring such attempts and, as a result, limiting the ability of governments to require such disclosure absent a sufficiently important governmental interest.⁸⁸ Second, there are the documented instances of retaliation against publicly disclosed contributors to political parties self-identified as “communist” or “socialist.” In these situations, the courts, and on occasion, the relevant government agencies, have granted exemptions on a case-by-case basis to the generally applicable campaign finance disclosure requirements. However, this was done only after the parties at issue provided evidence that there was a reasonable probability of retaliation against their financial supporters if their identities became publicly known.⁸⁹ Third, there are the flurry of stories about retaliation against publicly disclosed supporters following the passage of California’s Proposition 8.⁹⁰ Fourth, there are stories

85. See, e.g., McGeveran, *supra* note 18, at 16-20.

86. See *Buckley v. Valeo*, 424 U.S. 1, 71 (1976); *DeGregory v. Att’y Gen.*, 383 U.S. 825, 829 (1966); *NAACP v. Alabama*, 357 U.S. 449, 462-63 (1958).

87. See *Buckley*, 424 U.S. at 74 (stating that such an exemption is constitutionally required when there is a reasonable probability that disclosure will lead to threats, harassment, or reprisals).

88. See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984); *Buckley*, 424 U.S. at 15; *Kusper v. Pontikes*, 414 U.S. 51, 58-59 (1973); *Gibson v. Fla. Legis. Investig. Comm.*, 372 U.S. 539, 546 (1963); *Bates v. City of Little Rock*, 361 U.S. 516, 525-27 (1960); *NAACP*, 357 U.S. at 464-66.

89. E.g., *Brown v. Socialist Workers ’74 Campaign Comm.*, 459 U.S. 87, 102 (1982); *FEC v. Hall-Tyner Election Campaign Comm.*, 678 F.2d 416, 423 (2d Cir. 1982) (involving a group that supported communist candidates); *McArthur v. Smith*, 716 F. Supp. 592, 593-94 (S.D. Fla. 1989) (involving a Socialist Workers Party candidate and his supporters); *Socialist Workers Party, FEC Adv. Op. 2009-01*, at 1, 10-11 (Mar. 20, 2009) (renewing the partial exemption from the federal disclosure rules for several socialist political parties and their candidates).

90. See Scott M. Noveck, *Campaign Finance Disclosure and the Legislative Process*, 47

about retaliation, or fear of retaliation, by elected officials against those that supported their opponents.⁹¹ The most infamous of these instances was the “K Street Project,” where Republican members of Congress threatened lobbying organizations with a loss of access to Republican lawmakers if they did not hire Republicans for their lobbying positions.⁹² Additionally, there are other stories about such retaliation or apparent fear of such retaliation.⁹³ Finally, there has been at least one instance where disclosures led not to retaliation based on the candidate, group, or ballot initiative at issue, but based on other information disclosed about a contributor, such as the contributor’s employer.⁹⁴

The veracity of the retaliation stories is generally not at issue. The history of the civil rights movement is well known; the communist and socialist political parties have had to produce sufficient evidence of retaliation to qualify for exemption; the Proposition 8 retaliation stories were relatively widespread; the K Street Project undoubtedly existed; and even the apparently rare case of retaliation unrelated to the candidate or group at issue has been documented. The questions raised include: What is the extent of actual retaliation and perception of retaliation? and What is the extent to which the possibility of retaliation leads potential contributors not to contribute, or to contribute less (i.e., below the reporting thresholds)?

With respect to the first question, there is surprisingly little information. Given the public availability of contributor information, it would appear to be a relatively simple task to survey a statistical valid sample of contributors to determine if they have experienced any form of retaliation as a result of the disclosure of their financial support. Yet for whatever reason, no one appears to have done such a survey, much less a series of surveys, focusing on contributors to different types of groups (e.g., candidates, political parties, other political

HARV. J. ON LEGIS. 75, 98-99 (2010) (gathering accounts of such retaliation); Thomas Messner, *The Price of Prop 8*, HERITAGE FOUND. (Oct. 22, 2009), <http://www.heritage.org/Research/Reports/2009/10/The-Price-of-Prop-8> (same).

91. See, e.g., JACKSON, *supra* note 18, at 69-70, 77-81 (detailing how officials in both major parties pressured donors to change their giving patterns on threat of losing access to policymakers).

92. See Nicholas Confessore, *Welcome to the Machine: How the GOP Disciplined K Street and Made Bush Supreme*, WASH. MONTHLY 29, 30 (Aug. 2003); Peter Perl, *Absolute Truth*, WASH. POST, May 13, 2001, at W12; Jim VandeHei, *GOP Monitoring Lobbyists' Politics: White House, Hill Access May Be Affected*, WASH. POST, June 10, 2002, at A1.

93. See, e.g., Mary Ann Akers, *Kerry Puts GOP Donor on Defensive*, WASH. POST, Feb. 28, 2007, at A17 (reporting that Senator John Kerry questioned ambassadorial nominee Sam Fox regarding his donations to Swift Board Veterans for Truth); Kimberly A. Strassel, *Challenging Spitzerism at the Polls*, WALL ST. J., Aug. 1, 2008, at A11 (reporting that a candidate challenging an incumbent state attorney general stated that many potential contributors did not donate for fear of retaliation by the incumbent if their names appeared in the challenger’s records).

94. See Gigi Brienza, *I Got Inspired. I Gave. Then I Got Scared.*, WASH. POST, July 1, 2007, at B3 (recounting how the author’s donations to two presidential campaigns led to her being publicly targeted by a radical and violent animal rights group because it learned, through public campaign contribution information, that she worked for Bristol-Myers Squibb).

groups, or ballot initiative committees relating to various topics).

Even generalizing the anecdotal information beyond the specific contexts in which undoubted retaliation occurred is problematic without further information. The civil rights movement was arguably a unique event in our nation's history for which there is no current parallel with respect to the heated emotions and entrenched opposition that arose. Retaliation against supporters of communist or socialist parties does not necessarily indicate that supporters of other parties, even other third parties such as the Libertarians or the Greens, are at risk. This was the conclusion that the Supreme Court reached in *Buckley v. Valeo* when it held that the First Amendment did not require a blanket exemption for minor parties from the requirement that they publicly disclose their financial supporters.⁹⁵ The circumstances that led to the retaliation against Proposition 8 supporters—including the strong lesbian-gay-bisexual-transgender (LGBT) community in California and the perhaps surprising passage of Proposition 8—may not even apply to same-sex marriage ballot initiatives in other states, much less to candidate elections.⁹⁶ Also, the use of disclosed information for unrelated retaliation purposes appears to be very rare, with apparently only one situation identified recently.⁹⁷

Perhaps the most troubling set of retaliation anecdotes are those relating to the K Street Project and stories about less well-organized state and local equivalents. The reason for this is if anyone actually pours through campaign contribution databases, it is probably elected officials and their staffs. Such stories are essentially the reverse of rent-seeking by elected officials, where an official threatens lobbyists and interest groups with action, or inaction, that will hurt a particular group's interests unless the lobbyist or interest group provides a certain level of financial support to the official's re-election campaign.⁹⁸ The K Street Project and similar stories suggest that elected officials may also use the threat of negative action or inaction to reduce employment of, or contributions by, lobbyists and others to individuals and groups who are likely to challenge these officials.⁹⁹ That said, such stories tend to be limited to lobbyists and others

95. *Buckley v. Valeo*, 424 U.S. 1, 74 (1976).

96. *See, e.g., Nat'l Org. for Marriage v. McKee*, 666 F. Supp. 2d 193, 206 n.74 (D. Me. 2009) (stating "nor is there a record here indicating a pattern of threats or specific manifestations of public hostility towards [the plaintiffs] or showing that individuals or organizations holding similar views have been threatened or harmed" in litigation by anti-same sex marriage groups challenging Maine's campaign finance disclosure laws). *But see* Eliza Newlin Carney, *New Spending Rules Mean New Backlash*, NAT'L J., Aug. 30, 2010 (reporting retaliation against Target Corp. and Best Buy Co. for contributions to a Minnesota political group backing an anti-gay gubernatorial candidate), http://www.nationaljournal.com/njonline/po_20100830_3944.php.

97. *See* Brienza, *supra* note 94.

98. *See, e.g.,* Bruce E. Cain, *Moralism and Realism in Campaign Finance Reform*, 1995 U. CHI. LEGAL F. 111, 124-25.

99. *See* Garrett & Smith, *supra* note 29, at 303 (noting that disclosure of groups and individuals that support ballot initiatives may attract retaliation by government officials in particular because these initiatives are often an attempt to bypass such officials).

involved directly in seeking to influence public policy—groups serving an important role in our political process but representing only a small subset of the general public. The longevity of such efforts also appears to be limited due to the shifting winds of political fortune.

It is also sometimes difficult to sort out retaliation against supporters whose political views were known for reasons other than the public disclosure of their financial contributions. For example, many of the Proposition 8 retaliation stories involved supporters who advertised their support through signs and bumper stickers.¹⁰⁰ While such stories provide evidence of the potential for retaliation against supporters whose support is publicly known only because of the contributor disclosure system, they do not conclusively demonstrate that there is a reasonable probability that such retaliation will occur.

Finally, the degree of harm caused by the retaliation is uncertain and may be relatively low. Setting aside the arguably unique situation of the civil rights movement and the limited situation of communist and socialist political parties, there had been a number of alleged incidences of individuals losing their livelihood or being physically threatened. Much of the alleged retaliation, however, appears to result in nothing more than social stigma or embarrassment.¹⁰¹ The federal district court hearing a challenge to California's disclosure laws by Proposition 8 supporters refused to preliminarily enjoin those laws in part because it found that "[p]laintiffs' claim would have little chance of success in light of the relatively minimal occurrences of threats, harassment, and reprisals."¹⁰² It should be noted, however, that after the court issued its opinion, the plaintiffs submitted forty-nine declarations of individuals (in addition to the nine originally submitted along with press reports of retaliation) alleging various

100. See Plaintiffs' Statement of Undisputed Facts in Support of Motion for Summary Judgment, Appendices A & B, *ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197 (E.D. Cal. 2009) (No. 2:09-CV-00058-MCE-DAD) [hereinafter Plaintiffs' Statement of Undisputed Facts] (providing summaries of statements by fifty-eight "John Does" regarding retaliation for their support of Proposition 8, which included displaying yard signs and bumper stickers, making other public pronouncements, and contributing financially, of which at most ten appear to have had their support revealed solely by the required public disclosure of their financial contributions).

101. See, e.g., *id.* (providing summaries of statements by fifty-eight "John Does" regarding retaliation for their support of Proposition 8, most of whom experienced relatively minor negative consequences); Declaration of Sarah E. Troupis in Support of Plaintiffs' Motion for Preliminary Injunction at 2-4, *ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197 (E.D. Cal. 2009) (No. 2:09-CV-00058-MCE-DAD) [hereinafter Troupis Declaration] (listing news stories reporting retaliation against Proposition 8 supporters, including death threats, physical violence, threats of physical violence, vandalism, and job losses, but also less serious forms of retaliation such as peaceful protests and negative comments); Brienza, *supra* note 94 (explaining how disclosure led to being listed as a "target" by a radical animal rights group, but no more specific threats or actions resulted); see also *supra* notes 89-91 and accompanying text (relating to government official retaliation).

102. See *ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197, 1216 (E.D. Cal. 2009); see also Plaintiffs' Statement of Undisputed Facts, *supra* note 100.

forms of retaliation.¹⁰³ A related issue is the fact that many of the retaliatory actions are in the form of legal forms of political protests—boycotts, pickets, angry emails and telephone calls, and so on—that are themselves constitutionally protected and even celebrated as demonstrating political engagement and a healthy democracy, arguably providing an offsetting benefit.¹⁰⁴ In the recent *Doe v. Reed* oral argument relating to disclosure of ballot initiative petition signers, Justice Scalia went so far as to say, “[T]he fact is that running a democracy takes a certain amount of civic courage. And the First Amendment does not protect you from criticism or even nasty phone calls when you exercise your political rights to legislate, or to take part in the legislative process.”¹⁰⁵

There is, however, at least one significant factor that suggests that retaliation, including criminal forms of retaliation, may be an increasing risk outside of the contexts and forms in which it has previously occurred. That factor is the growing availability of contributor information over the Internet.¹⁰⁶ For example, retaliation against Proposition 8 supporters may have largely been fueled by the creation of websites dedicated to identifying those supporters. The most well-known such site is www.eightmaps.com, which uses a combination of the state government’s contributor database and Google Maps to create an easily searchable system for locating and identifying Proposition 8 supporters.¹⁰⁷ While that website does not overtly encourage any particular use of this information or characterize the persons identified in any particular way, another website called “Californians Against Hate” lists particular Proposition 8 supporters in its “Dishonor Roll,” including all donors who gave \$5000 or more.¹⁰⁸ Such sites also may encourage individual, as opposed to organized, retaliation attempts that are more likely to veer into particularly harmful or illegal areas.

Websites of this nature are not necessarily limited to Proposition 8 supporters. Accountable America, an organization dedicated to opposing right-wing and special interest policies, has an ongoing “Conservative Group Project” to educate the public about right-wing donors.¹⁰⁹ Press reports state that this

103. *ProtectMarriage.com*, 599 F. Supp. 2d at 1216-17; see also Plaintiffs’ Statement of Undisputed Facts, *supra* note 100.

104. See *ProtectMarriage.com*, 599 F. Supp. 2d at 1218 (noting that some of the actions complained of by plaintiffs are historic and lawful means of voicing dissent, including boycotts); Plaintiffs’ Statement of Undisputed Facts, *supra* note 100 (providing summaries of statements by fifty-eight “John Does” regarding retaliation for their support of Proposition 8, including picketing, boycotts, and angry emails, letters, and telephone calls); Troupis Declaration, *supra* note 101 (listing news stories reporting retaliation against Proposition 8 supporters, including reports of public protests, picketing, and boycotts).

105. Transcript of Oral Argument at 12, *Doe v. Reed*, 130 S. Ct. 2811 (2010) (No. 09-559).

106. See, e.g., McGeveran, *supra* note 18, at 10-13 (describing the use of the Internet to increase the dissemination of political contributor data).

107. See PROP 8 MAPS, *supra* note 57.

108. See *The Californians Against Hate Dishonor Roll*, CALIFORNIANS AGAINST HATE, <http://www.californiansagainsthate.com/dishonor-roll> (last visited Aug. 10, 2010).

109. See ACCOUNTABLE AMERICA, <http://www.accountableamerica.com/about> (last visited

organization has also sent letters to such donors, threatening to publicize their financial support of right-wing causes and implying that doing so will lead to boycotts and similar adverse reactions (although conservative activists quoted in those stories appeared unconcerned).¹¹⁰ While the organization has not made a public database of such contributors available, at least so far, it would not be difficult for it to do so using existing, publicly available contributor information.

The ease of creating such a database is evidenced not only by the Proposition 8 databases, but also by other private party established Internet databases of political contributors, such as the previously mentioned Fundrace 2008¹¹¹ and the newly established TransparencyData.com that combines federal and state campaign contribution information.¹¹² Other examples of such websites include the previously mentioned MSNBC website that discloses journalists who made federal political contributions and another website that collects data from state databases of political contributions.¹¹³ Data like this could also potentially find its way to websites with broader foci, such as the “Unvarnished” website for posting anonymous reviews of professional reputations.¹¹⁴ The growth of social networking sites also makes it easy to quickly communicate the positions of individuals to their friends, family, and co-workers. While recent events had led to a focus on retaliation against supporters of anti-same-sex marriage initiatives, the Internet has been used to encourage harassment outside of the political contribution context.¹¹⁵ What remains unexplored, however, is the extent to which the growth of access to information through the Internet will in fact lead to greater incidences of retaliation.

Research on the second question—whether the fear of retaliation changes the behavior of potential contributors—is almost nonexistent.¹¹⁶ One survey prepared by Dr. Dick M. Carpenter II for the Institute for Justice found that a significant percentage of respondents would “think twice before donating money” if their name and other information, such as their address or employer, were released to the public as a result.¹¹⁷ The survey does not reveal, however,

Aug. 10, 2010).

110. Michael Luo, *Group Plans Campaign Against G.O.P. Donors*, N.Y. TIMES, Aug. 8, 2008, at A15.

111. *Campaign Donors: Fundrace 2008*, *supra* note 56.

112. TRANSPARENCY DATA, <http://www.transparencydata.com> (last visited Aug. 10, 2010).

113. See Dedman, *supra* note 61; *Investigate Money in State Politics*, *supra* note 65.

114. *About Unvarnished*, UNVARNISHED, http://www.getunvarnished.com/page/about_unvarnished (last visited Aug. 10, 2010).

115. See, e.g., *Planned Parenthood of the Columbia/Williamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1062-63 (9th Cir. 2002) (en banc) (upholding an injunction against the distribution, including over the Internet, of materials and personal information relating to abortion providers with a specific intent to threaten).

116. See McGeveran, *supra* note 18, at 21 (noting the lack of empirical evidence regarding whether the prospect of disclosure deters would-be contributors).

117. DICK M. CARPENTER II, INST. FOR JUSTICE, DISCLOSURE COSTS: UNINTENDED CONSEQUENCES OF CAMPAIGN FINANCE REFORM 7-8 (Mar. 2007), *available at*

what portion of the respondents would affirmatively state that they would choose not to donate, or donate as much, given these disclosures; nor did that study test whether the respondents would change their giving patterns in the face of such disclosures (as opposed to saying that they might). The study also did not determine to what extent individuals knew about the existing disclosure rules and made contributions despite that knowledge. Similarly, summaries of sworn statements by Proposition 8 supporters who faced retaliation, provided in the context of litigation challenging California's contributor disclosure rules, often failed to mention whether the supporters would curtail future financial support for similar measures. If the summaries did address this issue, they mostly said the supporters would be "unlikely," "reluctant," "hesitant," or otherwise uncertain about providing such support without flatly ruling out doing so.¹¹⁸

One reason to take this possible "chilling" effect seriously, however, is the fact that people tend to be bad at estimating risk.¹¹⁹ In particular, when presented with a small sample, people tend to view that sample as highly representative of the population from which it is drawn, and similarly, when an instance or occurrence can readily be brought to mind, it leads to overestimation of the frequency of that instance or occurrence.¹²⁰ For example, say that retaliation, even in the most heated situations, consists of "relatively minimal occurrences of threats, harassments, and reprisals," as a federal district court found with respect to Proposition 8 supporters.¹²¹ If the sample of Proposition 8 supporters of which the public is aware consists mostly of supporters who faced retaliation, and the retaliation is memorable in that it threatened their livelihood or physical safety,¹²² then the public *perception* may tend to be that many, if not most, Proposition 8 supporters faced retaliation and threats to their livelihood or physical safety. Such a perception, even though inaccurate, could lead to many potential contributors choosing to reduce or stop their contributions. The fact that even with disclosure, there are many (disclosed) contributors does not fully answer this concern¹²³ because such contributors represent a small portion of the

http://www.ij.org/images/pdf_folder/other_pubs/DisclosureCosts.pdf; see also Dick M. Carpenter II, *Mandatory Disclosure for Ballot-Initiative Campaigns*, 13 INDEP. REV. 567, 574-78 (2009) (discussing same survey).

118. See Plaintiffs' Statement of Undisputed Facts, *supra* note 100. See especially the summaries of declarations of John Doe numbers 1, 2, 8-9, 12-13, 19, 23, 27, 30, 43, 51, 53, who all mention a possible effect of the retaliation they experienced on their future financial support for similar causes. *Id.*

119. See McGeeveran, *supra* note 18, at 21-23 (discussing the possible chilling effect on expression).

120. See, e.g., Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124, 1125-27 (1974).

121. *ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197, 1216 (E.D. Cal. 2009).

122. See Troupis Declaration, *supra* note 101, at 2-4 (listing news stories reporting retaliation against Proposition 8 supporters, including death threats, physical violence, threats of physical violence, vandalism, and job losses).

123. See Hasen, *supra* note 5, at 280-81 (arguing that the number of disclosed soft money

possible contributors. For example, the most successful political fundraising campaign in the United States—that of President Obama—received contributions from upwards of three million donors, but under one-sixth of those donors were at the relatively modest over \$200 disclosure threshold.¹²⁴ While that level of donor participation is impressive, those numbers alone—representing less than 1.5% of the 212 million individuals eligible to vote in the 2008 presidential election¹²⁵—do not necessarily mean that there is no chilling effect caused by public disclosure of support for even a highly popular candidate. What the actual perception is with respect to the various potential types of contributions, much less the effect of that perception, is simply not known at this time. This potential chilling effect was sufficiently real, however, for the Supreme Court in *Buckley v. Valeo* to assert that “[i]t is undoubtedly true that public disclosure of contributions to candidates and political parties will deter some individuals who otherwise might contribute.”¹²⁶

It is true that a few jurisdictions have laws prohibiting the use of contributor data for retaliatory purposes.¹²⁷ More widespread promulgation of such laws might serve to limit both the actual and perceived risk of retaliation to contributors.¹²⁸ The track record of the existing laws is not encouraging in this respect, however, both because there appears to be little evidence of enforcement and because at least one state supreme court has struck down such a law as an unconstitutional restriction on free speech.¹²⁹ Similarly, the more common laws

contributors to political parties demonstrates a lack of a chilling effect from disclosure).

124. See ANTHONY J. CORRADO ET AL., REFORM IN AN AGE OF NETWORKED CAMPAIGNS: HOW TO FOSTER CITIZEN PARTICIPATION THROUGH SMALL DONORS AND VOLUNTEERS 13-14 (2010), available at http://www.cfinst.org/books_reports/Reform-in-an-Age-of-Networked-Campaigns.pdf (observing President Obama’s fundraising campaign, in which only 405,000 of over three million donors donated above an aggregate amount of \$200).

125. See Michael McDonald, 2008 General Election Turnout Rates, U.S. ELECTIONS PROJECT, http://elections.gmu.edu/Turnout_2008G.html (last updated Oct. 6, 2010).

126. *Buckley v. Valeo*, 424 U.S. 1, 68 (1976); see also *Perry v. Schwarzenegger*, 591 F.3d 1147, 1163-64 (9th Cir.) (concluding that if individuals would alter their communications and reconsider their political involvement if subject to disclosure, it would be sufficient to make a prima facie showing of chilling), *cert. dismissed*, 130 S. Ct. 2432 (2010).

127. See, e.g., WASH. REV. CODE § 42.17.010 (West, Westlaw through 2010 legislation) (providing that campaign finance and lobbying disclosure provisions “shall be enforced so as to insure that the information disclosed will not be misused for arbitrary and capricious purposes and to insure that all persons reporting under this chapter will be protected from harassment and unfounded allegations based on information they have freely disclosed”).

128. On the possible ability of such laws to reduce the perceived risk of retaliation even if they failed to reduce the actual incidence of retaliation, see generally Amitai Aviram, *The Placebo Effect of Law: Law’s Role in Manipulating Perceptions*, 75 GEO. WASH. L. REV. 54 (2006).

129. See *Fowler v. Neb. Accountability & Disclosure Comm’n*, 330 N.W.2d 136, 141 (Neb. 1983) (finding state laws that prohibited the use of campaign statements filed by political committees for “other political activity” and for “harassment” to be unconstitutional when addressing a case where the campaign statements included information about contributions made

that bar the use of contributor data for commercial use may effectively foreclose the mass use of such data by background-checking companies; however, both types of laws are unlikely to foreclose a potential employer or consumer from checking such data and do not extend to non-commercial and First Amendment protected political activity, such as boycotts and picketing.¹³⁰ Finally, while it is possible for individuals and groups to seek as-applied exceptions from the disclosure rules based on actual or likely harassment, it may be difficult to anticipate such retaliation. Additionally, the very act of applying for an exception may expose at least some individuals to retaliation.¹³¹

The strength of the retaliation narrative is therefore uncertain. There is no doubt that in some contexts private actors and, perhaps more troubling, government actors have used disclosed contributor information to engage in retaliatory actions against contributors—ranging from legal activities such as boycotts or employment termination to criminal activities, including destruction of property or threats of physical harm. There is no reliable information, however, on the extent of such retaliation, which demonstrates whether it extends beyond the contexts identified above and whether the increased access to contributor information through the Internet is—or will translate into—a significantly greater level of retaliatory acts. Similarly, although there are anecdotal data (and a single survey) indicating that the perceived risk of retaliation from disclosure *may* change potential contributor behavior, neither the extent of that perceived risk nor the strength of its effect on behavior is known.

III. RECOMMENDATIONS

Both the extent to which disclosure of political contributor information aids voters in their ballot-box decisions and the extent to which such disclosure exposes contributors to retaliation and chills potential contributors are still in many ways open questions. The existing information does suggest possible changes to the current disclosure and disclaimer regimes that would increase the likelihood of aiding voters—in some instances, also minimizing the actual and perceived risk of retaliation. One change would be to reduce the scope of disclosure by significantly raising the disclosure thresholds or making public only certain non-identifying information for smaller contributors. Another change would be to expand the scope of disclaimers to facilitate delivery of information about major financial supporters to the voting public.

by the committees to candidates).

130. See, e.g., 2 U.S.C. § 438(a)(4) (2006) (prohibiting the use of information from statements filed with the FEC “for the purpose of soliciting contributions or for commercial purposes”); ME. REV. STAT. tit. 21-A, § 1005 (West, Westlaw through 2009 legislation) (“Information concerning contributors contained in campaign finance reports . . . may not be used for any commercial purpose. . . .”); MINN. STAT. § 10A.35 (West, Westlaw through 2010 legislation) (“Information . . . from reports and statements filed with the [Minnesota Campaign Finance and Public Disclosure Board] may not be sold or used . . . for a commercial purposes. . . .”).

131. See Garrett, *supra* note 14, at 242.

The first change is based on the fact that the relatively low level of current dollar thresholds for disclosure of a contributor's identifying information does not appear to be justified by the government's interest in informing voters. The vast majority of such specific contributor information is unlikely to help voters because knowing the identities of those contributors does not provide any useful cues regarding the candidates supported, either directly or through communications by independent groups.¹³² At the same time, disclosure of such information exposes these contributors to possible retaliation, even if perhaps relatively rare and usually not particularly harmful.¹³³ There may, of course, be other reasons for collecting such information, including aiding enforcement of contribution limits, identifying geographic or industry concentrations of contributors, and facilitating limited disclosure to particularly interested parties such as shareholders, members, or donors for the group involved and facilitating academic research.¹³⁴ The first reason only applies when such limits exist. However, in the post-*Citizens United* world, that is not the case for expenditures by independent groups, which are the subject of the most recent disclosure proposals. In fact, the most prominent of the proposed federal legislative responses to *Citizens United* would significantly expand the scope of the expenditures reached by disclosure requirements.¹³⁵ While prohibitions on certain types of contributors—e.g., non-resident, foreign citizens, and charitable organizations—still exist in this context, such prohibited contributors appear to be both relatively rare, and if they are giving less than even the increased threshold, they are unlikely to have a material effect on elections. As for collecting information about concentrations of contributors, both for voter information and academic research purposes, such purposes do not require public disclosure of the names and complete addresses of individual contributors.

At least in part for these reasons, several commentators have suggested only having public disclosure of aggregate data of voters for all but the largest contributors.¹³⁶ Organizations subject to the disclosure requirements could still report individual information to the government to permit government verification of the accuracy of reporting, but the publicly released information could be limited to aggregate data. One way to impose this limit would be to have the relevant government agency aggregate the data for donors below a

132. See *supra* notes 48-72 and accompanying text.

133. See *supra* Part II.

134. See *supra* notes 14-15 and accompanying text.

135. See House DISCLOSE Act, *supra* note 6, § 202(a) (expanding the time period for electioneering communications); Senate DISCLOSE Act, *supra* note 6, § 202(a) (same); compare House DISCLOSE Act, *supra* note 6, § 201(a) (revising the definition of an independent expenditure) and Senate DISCLOSE Act, *supra* note 6, § 201(a) (same), with 2 U.S.C. § 431(17) (current definition of an independent expenditure).

136. See Briffault, *supra* note 18, at 655; McGeeveran, *supra* note 18, at 53-54; Noveck, *supra* note 90, at 107-10; Kathleen M. Sullivan, *Against Campaign Finance Reform*, 1998 UTAH L. REV. 311, 327; David Lourie, Note, *Rethinking Donor Disclosure After the Proposition 8 Campaign*, 83 S. CAL. L. REV. 133, 154-63 (2009).

certain threshold in various categories, such as by geographic locale or type of employer. If the relevant government agency lacked or was seen as lacking the willingness, resources, or ability to do such aggregation, another option would be to disclose only a portion of contributor data (e.g., city & state, zip code, occupation, and perhaps employer, but not name or street address) and leave it to private actors to then aggregate these data as they saw fit.

Implicit in this recommendation is at least the suggestion that contributing to a political effort is, for smaller contributions, more akin to voting as opposed to most forms of speech that necessarily involve identification of the speaker.¹³⁷ Voting is and has been for many years in the United States a private matter, with the secret ballot in place to prevent undue influence on the voter.¹³⁸ In contrast, many, although not all, forms of political speech are necessarily public, and any (legal) pushback the speaker receives is usually seen as simply the price one must pay to be politically involved.¹³⁹ This is not the case in every instance, as the *McIntyre* decision protecting anonymous leafleting demonstrates.¹⁴⁰

Space limitations prohibit an in-depth analysis of this issue, but there is at least one reason that suggests smaller contributions are more akin to voting than other forms of political expression for purposes of disclosure. Like voting, our political system depends on citizen participation through financing election campaigns in order to function. Other campaign financing systems, including public financing, could be implemented; under our current system, however, candidates, political parties, and independent groups rely primarily on the financial support of others to fund their political messages. If disclosure places such funding at risk—as it does, at least in theory and perhaps in some cases, in fact—it must be justified by another concern. In the case of smaller contributions, the most highlighted concern of informing voters is not usually salient for the reasons already discussed (nor is combating corruption or the appearance of corruption likely relevant).¹⁴¹

These considerations therefore suggest that current contributor disclosure thresholds should be significantly increased or that the information made publicly

137. See Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 672-73 (1997) (discussing whether political contributions and expenditures are more akin to voting or political speech). This point was noted by Heather Gerken during the symposium of which this Article is a part. See Heather K. Gerken, *Keynote Address: What Election Law Has to Say to Constitutional Law*, 44 IND. L. REV. 7 (2010).

138. See generally Allison R. Hayward, *Bentham & Ballots: Tradeoffs Between Secrecy and Accountability in How We Vote* 7-17 (George Mason Law & Economics Research Paper No. 09-42, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1462942 (discussing the debates in England and the United States surrounding the eventual adoption of the secret ballot).

139. See Transcript of Oral Argument, *supra* note 105, at 12.

140. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-42 (1995) (recognizing that the decision to speak anonymously is protected by the First Amendment regardless of its motivation, which may include “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”).

141. See *supra* note 18 and accompanying text.

available should be limited, at least in contexts where contribution limits do not apply. As for concerns relating to corruption or the perception of corruption, to the extent they are justified, it is the higher dollar amount contributors that raise such concerns, not the \$200 or even \$1000 contributors in most instances. In some circumstances, however, lower dollar threshold may be justified for lower-cost elections, such as school boards and town councils. As Elizabeth Garrett has said in her commentary on *McConnell*, retaliation concerns “oblige drafters to tailor disclosure statutes narrowly to reveal only the information that promotes voter competence and to provide greater protection for individuals than for groups.”¹⁴² For the reasons previously discussed, disclosing identifying information for smaller contributors not only does not promote voter competence, but it may also expose such contributors to retaliation.

Second, the existing disclaimer regimes do appear to be justified by the government’s interest in informing voters, but that interest would be better served if those regimes were expanded and enhanced.¹⁴³ The main flaw in the existing system is the ability to create misleadingly named organizations that hide the true financial supporters behind a particular communication.¹⁴⁴ One way to overcome this weakness would be to require the disclaimers to include the largest financial supporters of the organization paying for the communications.¹⁴⁵ The most prominent of the proposed federal legislative responses to *Citizens United* do in fact include a requirement to disclose the five largest financial supporters, along with additional “stand by your ad” requirements. These would require the highest ranking official of the organization paying for the communication to personally appear in the ad—as well as, in some cases, the largest funder of the ad.¹⁴⁶ Rules to prevent layers of organizations from hiding the ultimate financial supporters, such as those already in place under the disclosure regime, could be used to ensure that the actual top contributions are included in the disclaimer.¹⁴⁷

For individuals who pay for political communications, a modicum of more information, such as the individual’s employer and position with the employer, might enhance the usefulness of the disclaimer. For example, when Don Blankenship spent over \$500,000 supporting the election of Brent Benjamin to the West Virginia Supreme Court, it might have helped to inform voters in a disclaimer on those communications that Blankenship was the chairman, chief

142. Garrett, *supra* note 14, at 242.

143. See Kang, *supra* note 20, at 1171, 1179-81 (suggesting disclaimers in the context of direct democracy).

144. See *supra* notes 77-78 and accompanying text.

145. See Kang, *supra* note 20, at 1180-81.

146. See House DISCLOSE Act, *supra* note 6, § 214(b)(2); Senate DISCLOSE Act, *supra* note 6, § 214(b)(2); see also Ronald Dworkin, *The Decision That Threatens Democracy*, N.Y. REV. OF BOOKS, May 13, 2010, at § 4, available at <http://www.nybooks.com/articles/archives/2010/may/13/decision-threatens-democracy> (urging Congress to require identification of major corporate contributors of organizations that pay for election-related television advertisements in those advertisements).

147. See, e.g., 2 U.S.C. § 441d (2006); 47 C.F.R. § 73.1212(e) (2009).

executive officer, and president of the A.T. Massey Coal Company.¹⁴⁸ Similarly, it might have helped voters to know that Blankenship was one of the top contributors to “And For The Sake Of The Kids,” which also supported the candidate and opposed his opponent, at least if that information was communicated to them at the same time as this group’s political messages.¹⁴⁹ While such information was available in required state campaign finance filings, West Virginia law apparently did not require it to be included in disclaimers that were part of the communications themselves.

CONCLUSION

More research certainly needs to be done regarding informing voters and retaliation with respect to public disclosure of contributor information. What we do know does provide some initial guidance for shaping the disclosure rules for political contributors in the post-*Citizens United* world; however, guidance is needed that goes beyond the relatively simple voter information and retaliation narratives found in that decision’s opinions. Since helping voters make better ballot-box decisions and limiting retaliation to encourage greater political participation are both desirable, disclosure and disclaimer rules that appear likely to enhance both of these goals should become part of the existing and proposed disclosure regimes.

148. See *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2257 (2009).

149. See *id.*