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Through a Glass, Darkly: The Rhetoric and Reality of Campaign Finance Disclosure

JENNIFER A. HEERWIG* & KATHERINE SHAW**

In Citizens United v. FEC, the Supreme Court swept away long-standing limits on corporate spending in federal elections, but it also strongly affirmed the constitutionality of robust disclosure and disclaimer requirements. In the wake of that decision, many proponents of campaign finance regulation have turned their attention to disclosure as the best remaining mechanism by which to regulate money in elections. At the same time, opponents of campaign finance regulation—including the legal team behind Citizens United—have trained their sights on disclosure, filing new challenges to existing disclosure requirements in a number of state or federal courts, although so far with only limited success.

Relying on the Longitudinal Elite Contributor Database (LECD)—an original database developed by one of the authors to track the population of unique individual campaign contributors from 1980 through 2008—this Article tests the Supreme Court's rhetoric about disclosure, and some of the premises of our current policy debates about money in politics, against the realities of the FEC's existing disclosure regime. In particular, we find that compliance with existing disclosure regulations is inconsistent and that the current regime fails to identify the most potentially influential players in the campaign finance system. In so doing, the current system fails to provide basic facts about how candidates (and committees) finance their campaigns. We suggest that much of what the Court and reformers assume about disclosure is wrong—that their views are premised on an effective and well-functioning disclosure regime that in fact bears scant resemblance to the system of disclosure maintained by the FEC. Correcting these misunderstandings will be critical to crafting better reform proposals. And the stakes could not be higher: disclosure may well be the only constitutionally viable and politically feasible method of regulating money in elections in a post-Citizens United world.

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INTRODUCTION

Disclosure is the next front in the battle over money in politics. In *Citizens United v. FEC*, the Supreme Court swept away long-standing limits on corporate spending in federal elections, but it also strongly affirmed the constitutionality of robust disclosure and disclaimer requirements.¹ Four years later, in *McCutcheon v. FEC*, the same Court invalidated the aggregate contribution limits for individual contributors in federal elections, but again appeared to endorse the constitutionality of disclosure.² In the aftermath of those decisions, many proponents of campaign finance regulation have turned their attention to disclosure as the best remaining constitutionally viable and politically feasible mechanism by which to regulate money in elections.³ At the same time, opponents of campaign finance regulation—including the legal team behind *Citizens United*—have trained their sights on disclosure, filing new challenges to existing disclosure requirements in at least twenty-eight state or federal courts,⁴ although so far with only limited success.⁵

1. 558 U.S. 310, 319 (2010).

2. 134 S. Ct. 1434, 1442, 1459–60 (2014).

3. See, e.g., Richard Briffault, *Updating Disclosure for the New Era of Independent Spending*, 27 J.L. & POL. 683, 718 (2012) (“Our laws are reasonably effective at obtaining and publicizing the identities of those who contribute directly to candidates; it is now critical that the laws be updated to make them effective at disclosing the donors to independent committees.”); Richard L. Hasen, *Chill Out: A Qualified Defense of Campaign Finance Disclosure Laws in the Internet Age*, 27 J.L. & POL. 557, 572 (2012) (“In the post-*Citizens United* era, when the country will be increasingly awash in money flowing through various organizations in order to hide its true sources, mandated disclosure can serve the important interest in deterring corruption and providing valuable information to voters.”); Ciara Torres-Spelliscy, *Has the Tide Turned in Favor of Disclosure? Revealing Money in Politics After Citizens United and Doe v. Reed*, 27 GA. ST. U. L. REV. 1057, 1102–03 (2011) (“[D]isclosure is the primary means left for regulating independent spending within the campaign finance context.”; see also, e.g., Heather K. Gerken et al., *Rerouting the Flow of ‘Dark Money’ into Political Campaigns*, WASH. POST. (Apr. 3, 2014), http://www.washingtonpost.com/opinions/rerouting-the-flow-of-dark-money-into-political-campaigns/2014/04/03/1517acbe-b906-11e3-9a05-c739f29ccb08_story.html (“Given how much of the campaign-finance system the court has eviscerated in recent years, disclosures are becoming the only game in town.”).

4. See CAMPAIGN LEGAL CTR., *LEGAL CHALLENGES TO STATE & FEDERAL DISCLOSURE LAWS POST-CITIZENS UNITED* (2013), available at <http://www.democracy21.org/wp-content/uploads/2013/05/CLC-DISCLOSURE-CHART-4-26-13-2.pdf>; see also Stephanie Mencimer, *The Man Behind Citizens United Is Just Getting Started*, MOTHER JONES, May/June 2011, available at <http://www.motherjones.com/politics/2011/03/james-bopp-citizens-united>.

5. See CAMPAIGN LEGAL CTR., *supra* note 4; see also Mencimer, *supra* note 4; *infra* section I.B.3.

In this transformed campaign finance landscape, an intense debate continues to rage, in both reform and scholarly circles, about how to address the presence within the electoral arena of so-called dark money organizations, which typically do not disclose their donors.⁶ Although they differ in their particulars, proposals frequently focus on increasing disclosure, either by expanding the reach of existing disclosure laws to clearly require disclosure to the Federal Election Commission (FEC) by entities that at present do not disclose,⁷ or by empowering new entities, primarily the Securities Exchange Commission (SEC) or the Internal Revenue Service (IRS), to require disclosure through new mechanisms or under new frameworks.⁸

Expanding disclosure is unquestionably critical if disclosure is to achieve the lofty goals we have assigned to it. But more disclosure is not enough; rather, the existing disclosure regime is deeply flawed in ways that neither the Supreme Court nor many reformers have acknowledged. And genuine reform of our

6. These organizations poured unprecedented sums of outside money into the 2012 presidential and congressional elections: over \$300 million in total and, by some estimates, a remarkable 31% of all outside spending in the 2012 cycle. See BLAIR BOWIE & ADAM LIOZ, *BILLION-DOLLAR DEMOCRACY: THE UNPRECEDENTED ROLE OF MONEY IN THE 2012 ELECTIONS* 7 (2013), available at <http://www.demos.org/publication/billion-dollar-democracy-unprecedented-role-money-2012-elections>. Outside spending nearly tripled from 2010 to 2012, *id.* at 4, and shows no signs of abating in the 2014 midterm elections. See Andy Kroll, *Follow the Dark Money*, MOTHER JONES, July/August 2012, available at <http://www.motherjones.com/politics/2012/06/history-money-american-elections>; see also Richard Briffault, *Two Challenges for Campaign Finance Disclosure After Citizens United and Doe v. Reed*, 19 WM. & MARY BILL RTS. J. 983, 1005–10 (2011) (overview of the legal and regulatory context of the post-*Citizens United* rise of “dark money”).

7. See, e.g., Briffault, *Updating Disclosure*, *supra* note 3; Ciara Torres-Spelliscy, *Hiding Behind the Tax Code, the Dark Election of 2010 and Why Tax-Exempt Entities Should Be Subject to Robust Federal Campaign Finance Disclosure Laws*, 16 NEXUS 59, 92–93 (2011). This has been true of each iteration of the Democracy is Strengthened by Casting Light on Spending in Elections (DISCLOSE) Act, a post-*Citizens United* legislative measure that has now been introduced in Congress unsuccessfully three times. The most recent version of the DISCLOSE Act would have, among other things, mandated disclosure to the FEC of the identities (names, addresses, and total contributions during the political cycle) of any donor who contributed over \$10,000 to an organization involved in political spending, unless that donor expressly prohibited the organization from spending the contribution on electioneering activity. See S. 3369, 112th Cong. § 324(a)(2) (2012); *Campaign Finance Disclosure Rules: Hearing on S. 2219 Before the S. Comm. on Rules & Admin.*, 112th Cong. (2012) (statement of Richard L. Hasen, Chancellor’s Professor of Law and Political Science, University of California, Irvine School of Law).

8. See, e.g., Lucian A. Bebchuk & Robert J. Jackson, Jr., *Shining Light on Corporate Political Spending*, 101 GEO L.J. 923, 925 (2013) (arguing that “the SEC should develop rules requiring public companies to disclose political spending to shareholders”); Donald B. Tobin, *Campaign Disclosure and Tax-Exempt Entities: A Quick Repair to the Regulatory Plumbing*, 10 ELECTION L.J. 427, 440 (2011) (recommending that the Treasury “promulgate regulations requiring tax-exempt organizations . . . to disclose contributions and non-employee expenditures in excess of \$25,000”); see also Lili Levi, *Plan B for Campaign-Finance Reform: Can the FCC Help Save American Politics After Citizens United?*, 61 CATH. U. L. REV. 97, 101 (2011) (arguing that the FCC can use existing authority “to require third-party purchasers of airtime for political and advocacy advertising to disclose their major direct and indirect funding sources and principal directors, officers, or operators”); cf. Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities, 78 Fed. Reg. 71,535 (proposed Nov. 29, 2013) (to be codified at 26 C.F.R. pt. 1) (proposing new framework for determining eligibility for tax-exempt status under § 501(c)(4)).

disclosure rules will require not just expanding their reach, but also changing the mechanisms by which data on spending in elections are collected, maintained, and disseminated. These reforms are especially pressing in light of the Supreme Court's decision in *McCutcheon v. FEC*,⁹ which was handed down as this Article went to press. *McCutcheon*'s invalidation of the overall contribution limits—that is, the limits on the amount any individual could contribute in a single election cycle to all federal candidates and political committees combined—is likely to result in significantly greater sums of money pouring into the regulated coffers of federal candidates and committees. That additional money will all be subject to the FEC's existing disclosure requirements, but, as we show below, those requirements are unlikely to “offer[] a particularly effective means of arming the voting public with information,”¹⁰ as the *McCutcheon* Court reasoned.

In this Article, we focus on the well-established disclosure regime of the FEC, the regulatory body charged with maintaining disclosure records for the bulk of political money that flows through American federal elections. In particular, we concentrate our analysis of the current disclosure regime on individual contributors in federal elections. These individual contributors, not political action committees (PACs), are the source of the lion's share of funding to congressional candidates, and in recent elections, to political parties as well.¹¹ And given the Court's holding in *McCutcheon*, these donors are poised to play an even larger role in how American elections are financed.

Relying on the Longitudinal Elite Contributor Database (LECD)—an original database developed by one of the authors to track the population of unique individual campaign contributors from 1980 through 2008—this Article assesses the Supreme Court's rhetoric about disclosure and some of the premises of our current policy debates about money in politics in light of the reality of the FEC's existing disclosure regime. By investigating the contours of the disclosure regime vis-à-vis the most significant source of political money to congressional candidates—individual contributions—we suggest that much of what the Court and reformers assume about the reality of disclosure is wrong. In particular, contributor compliance with providing required information—such as address and occupation—is often both inconsistent and partial. Further, the lack of an infrastructure to track individual contributors over time impedes the identification of the most potentially influential players in the campaign finance

9. 134 S. Ct. 1434 (2014).

10. *Id.* at 1460.

11. See Robert Biersack & Melanie Haskell, *Spitting on the Umpire: Political Parties, the Federal Election Campaign Act, and the 1996 Campaigns*, in *FINANCING THE 1996 ELECTION* 155–59 (John C. Green ed., 1999); David B. Magleby, *Adaptation and Innovation in the Financing of the 2008 Elections*, in *FINANCING THE 2008 ELECTION* 1, 30 (David B. Magleby & Anthony Corrado eds., 2011); Norman J. Ornstein et al., *Vital Statistics on Congress*, BROOKINGS INST. ch. 3 (Mar. 14, 2013), <http://www.brookings.edu/media/Research/Files/Reports/2013/07/vital%20statistics%20congress%20mann%20ornstein/Vital%20Statistics%20Chapter%203%20%20Campaign%20Finance%20in%20Congressional%20Elections.pdf>.

system and, before the Court's decision in *McCutcheon v. FEC*, led to routine violations of the aggregate election cycle limits. Given these deficiencies, we argue that the Court's (and many reformers') views of disclosure are premised on an effective and well-functioning regime that in fact bears very little resemblance to the system of disclosure maintained by the FEC. Correcting these misunderstandings will be critical to crafting better reform proposals.

The first Part of this Article defines disclosure in the context of campaign finance reform and surveys the legal landscape surrounding disclosure, both in the courts and in the context of FEC interpretation. The next Part describes the interests the Supreme Court has identified in disclosure—an informational interest, an anticorruption interest, and an enforcement interest—then turns to an assessment of the empirical literature on the effects of disclosure on voters. Having examined both the basic premises of our disclosure debates and the existing empirical literature on disclosure, the Article then draws on original research to identify a number of systemic flaws in the FEC's mechanisms for collecting, maintaining, and disseminating information. Finally, the Article provides a number of recommendations for improving FEC practices in ways that will better align the reality of disclosure with both the Supreme Court's rhetoric about disclosure and the findings in the empirical literature regarding the ways to maximize the impact of disclosure.

I. THE LAW OF DISCLOSURE

A. DISCLOSURE DEFINED

At its most basic, disclosure is a regulatory technique that requires “‘the discloser’ to give ‘the disclosee’ information which the disclosee may use to make better decisions.”¹²

The authors of the seminal text *Full Disclosure* describe a type of disclosure they term “targeted transparency”—a category that includes campaign finance disclosure—as a regulatory method that rests on the “mobilization of individual choice, market forces, and participatory democracy through relatively light-handed government action.”¹³ All targeted transparency schemes, they explain, include the following characteristics: (1) “mandated public disclosure,” (2) “by corporations or other private or public organizations,” (3) “of standardized, comparable, and disaggregated information,” (4) “regarding specific products or practices,” (5) “to further a defined public purpose.”¹⁴ And although such schemes involve less extensive governmental action than more traditional regulatory techniques, “targeted transparency policies are characterized by a distinc-

12. Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 649 (2011).

13. ARCHON FUNG, MARY GRAHAM & DAVID WEIL, *FULL DISCLOSURE: THE PERILS AND PROMISE OF TRANSPARENCY* 5 (2007).

14. *Id.* at 6.

tive and demanding architecture.”¹⁵

In the campaign finance context, the term “disclosure” is actually used, in both case law and scholarship, to refer to at least three distinct activities, all broadly designed to promote transparency in political campaigns: the *reporting*,¹⁶ primarily to the FEC in the federal system,¹⁷ of campaign expenditures, contributions above a certain amount, and certain other entity-specific information; the public *dissemination* of various categories of information about campaign activities, particularly in the form of large-scale databases containing contribution and expenditure records; and the provision of *disclaimers*, which supply the public with immediate access to identifying information about the proponents of particular political messages. Nested within each of these categories is “a host of specific questions”¹⁸ regarding the timing, frequency, and actual content of reporting; the timing and form of public dissemination; the content of disclaimers; and, with respect to all of these activities, issues of enforcement.

In the following sections, we examine the substantive law of disclosure, in both the courts and the FEC. We then unpack disclosure from two different perspectives: first, what the Supreme Court and post-*Citizens United* lower courts have *said* about the interests disclosure serves; and second, what the social science literature *shows* about how disclosure advances those interests. We then address some of the systemic flaws in the federal disclosure system as currently constituted. Finally, we turn to a series of recommendations for better aligning the reality of disclosure with its identified goals.

B. THE SUPREME COURT AND THE RHETORIC OF DISCLOSURE

1. Disclosure Jurisprudence Before *Citizens United*

Federal law has long mandated certain types of campaign-related disclosures.¹⁹ The Supreme Court first approved the constitutionality of a campaign

15. *Id.* at 39. This architecture, the authors continue, typically includes a “specific policy purpose,” “specified discloser targets,” “a defined scope of information,” “a defined information structure and vehicle,” and “an enforcement mechanism.” *Id.*

16. Ciara Torres-Spelliscy further divides this sort of disclosure into two types: “(1) *entity-wide* disclosure that is applied to candidate campaign committees, political action committees, and political parties and (2) *event-triggered* disclosure that is initiated by purchasing a political advertisement that applies to any purchaser.” Torres-Spelliscy, *supra* note 3, at 1058 (emphasis added).

17. There are exceptions to this, however; Senate candidate reports, for example, are filed with the Secretary of the Senate. See 2 U.S.C. § 432(g)(1) (2012). In addition, “[a]ll states require some level of disclosure from candidates, committees, and political parties of the amount and source of contributions and expenditures,” with various state agencies charged with overseeing such disclosures. *Campaign Finance Reform: An Overview*, NAT’L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/legislatures-elections/elections/campaign-finance-an-overview.aspx#Disclosure> (last updated Oct. 3, 2011).

18. Richard Briffault, *Campaign Finance Disclosure 2.0*, 9 ELECTION L.J. 273, 277 (2010).

19. See *Buckley v. Valeo*, 424 U.S. 1, 61 (1976) (per curiam); see also Trevor Potter & Bryson B. Morgan, *The History of Undisclosed Spending in U.S. Elections & How 2012 Became the “Dark Money” Election*, 27 NOTRE DAME J.L. ETHICS & PUB. POL’Y 383, 385 (2013) (“Disclosure of the

finance disclosure law in 1934,²⁰ but the Court's first extended discussion of disclosure came forty years later in *Buckley v. Valeo*,²¹ the Court's foundational consideration of the constitutionality of the Federal Election Campaign Act (FECA).²²

In addition to its well-known holdings affirming the constitutionality of FECA's contribution limits²³ and striking down its expenditure limits,²⁴ the *Buckley* Court upheld FECA's reporting and disclosure requirements in full.²⁵ The relevant provisions of the law required political committees²⁶ to register with the newly created FEC, and to keep detailed records of both expenditures and contributions over ten dollars (just names and addresses for contributors over \$10, occupations and places of business for contributors over \$100).²⁷ FECA also required both candidates and political committees to provide quarterly reports to the FEC, detailing both contributions and expenditures,²⁸ which the FEC would then make available "for public inspection and copying."²⁹ Finally, the law required *all* individuals or groups that made independent expenditures of over \$100 per year³⁰ "'for the purpose of . . . influencing' the . . . election of any person to federal office" to file a statement with the Commission.³¹

The *Buckley* Court began its discussion of disclosure by noting that mandated

sources of funds spent to influence federal elections has been a core tenet of federal campaign finance law in the United States for more than a century.").

20. See *Burroughs v. United States*, 290 U.S. 534 (1934) (sustaining an indictment under the Federal Corrupt Practices Act for conspiracy to violate the Act's requirement that any presidential campaign committee designate a treasurer and provide the House of Representatives with information regarding donors to the committee). For a comprehensive overview of the Supreme Court's pre-*Buckley* treatment of disclosure, see generally Briffault, *Campaign Finance Disclosure*, *supra* note 18; Briffault, *Two Challenges*, *supra* note 6.

21. 424 U.S. 1 (1976).

22. Federal Election Campaign Act (FECA) of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972), amended by Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified as amended at 2 U.S.C. § 431 (1974)).

23. See *Buckley*, 424 U.S. at 26 (upholding FECA's contribution limits as justified by the Act's "primary purpose to limit the actuality and appearance of corruption resulting from large individual financial contributions"); see also *id.* at 38 (upholding FECA's aggregate contribution limit).

24. See *id.* at 39-59 (finding FECA's independent expenditure limit, limit on candidates' personal expenditures, and limit on overall campaign expenditures unconstitutional under the First Amendment). The *Buckley* Court also found that congressional appointment of members of the FEC was an unconstitutional infringement of the separation of powers. See *id.* at 143.

25. See *id.* at 83-84. The Court did, however, limit political committee disclosure to organizations whose "major purpose . . . is the nomination or election of a candidate." *Id.* at 79.

26. When *Buckley* was decided, FECA defined a political committee as "a group of persons that receives 'contributions' or makes 'expenditures' of over \$1,000 in a calendar year. . . 'for the purpose of . . . influencing' the nomination or election of any person to federal office." *Id.* at 62-63 (quoting 2 U.S.C. § 431 (Supp. IV 1970)).

27. See *id.* at 63 (citing 2 U.S.C. § 432 (Supp. IV 1970)).

28. See *id.*

29. *Id.* (internal quotation marks omitted).

30. See 2 U.S.C. § 431(e) (Supp. IV 1970).

31. *Buckley*, 424 U.S. at 63-64 (quoting 2 U.S.C. § 431(e)(1), (f)(1) (Supp. IV 1970)).

disclosure “can seriously infringe on privacy of association and belief guaranteed by the First Amendment.”³² This meant, the Court explained, that disclosure requirements could not be justified “by a mere showing of some legitimate governmental interest.”³³ Rather, such requirements “must survive exacting scrutiny,”³⁴ which requires both a sufficiently important government interest and a “‘relevant correlation’ or ‘substantial relation’ between the governmental interest and the information required to be disclosed.”³⁵ The Court then found that the governmental interests advanced in support of the statute’s disclosure requirements *did* satisfy the “exacting scrutiny” the Constitution required.³⁶ Those interests, the Court explained, were three. The first has come to be known as the “informational” interest:

[D]isclosure provides the electorate with information “as to where political campaign money comes from and how it is spent by the candidate” in order to aid the voters in evaluating those who seek federal office. It allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate’s financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.³⁷

Second, the Court found that disclosure furthered the governmental interest in preventing both corruption and the appearance of corruption. The Court concluded that “exposing large contributions and expenditures to the light of publicity” was likely to “discourage those who would use money for improper purposes either before or after the election.”³⁸ Similarly, disclosure equipped the public to monitor any special treatment that might flow from substantial financial support.³⁹

Finally, the Court concluded that disclosure was key to what has come to be known as the “enforcement interest” in policing compliance with other parts of the law—that is, that the law’s “recordkeeping, reporting, and disclosure requirements” functioned as an “essential means of gathering the data necessary” to police compliance with FECA’s other provisions, in particular its contribution

32. *Id.* at 64. To underscore the significance of this interest, the Court pointed to cases like *NAACP v. Alabama*, 357 U.S. 449, 466 (1958) (holding that Alabama could not compel the state chapter of the NAACP to disclose the names of its staff and members), and *Bates v. Little Rock*, 361 U.S. 516, 527 (1960) (holding that the City of Little Rock could not demand lists of NAACP members and staff).

33. *Buckley*, 424 U.S. at 64.

34. *Id.*

35. *Id.* (footnotes omitted) (citing *Pollard v. Roberts*, 283 F. Supp. 248, 257 (E.D. Ark.), *aff’d*, 393 U.S. 14 (1968)).

36. *Id.* at 64–66.

37. *Id.* at 66–67 (footnote omitted).

38. *Id.* at 67.

39. *See id.*

limits.⁴⁰

While affirming the weightiness—both individually and cumulatively—of these interests, the Court also considered the interests on the other side of the balance—the potential threats disclosure requirements posed to First Amendment rights, particularly the rights of association and associational privacy.⁴¹ Though it acknowledged the importance of those interests, the Court found that the governmental interests in disclosure were “sufficiently important to outweigh the possibility of infringement [of First Amendment rights], particularly when the ‘free functioning of our national institutions’ is involved.”⁴² The Court credited the argument that harassment and reprisal could sometimes result from governmentally compelled disclosure, but found that the plaintiffs had offered no evidence of such harassment or intimidation as a result of FECA’s disclosure requirements.⁴³ It made clear, however, that minor parties and candidates might qualify for exemptions from disclosure requirements by demonstrating a “reasonable probability” that disclosure would result in “threats, harassment, or reprisals.”⁴⁴

After its general discussion of disclosure, the Court then separately addressed the requirement that even independent organizations and individuals disclose contributions or expenditures over \$100 made for the purpose of influencing federal elections.⁴⁵ Perceiving a potentially problematic vagueness in the requirement, the Court read the provision narrowly, as applying only to “contributions earmarked for political purposes or authorized or requested by a candidate or his agent, to some person other than a candidate or political committee” and “expenditures for communications that expressly advocate the election or defeat of a clearly identified candidate.”⁴⁶ As narrowed, the Court concluded that the independent contribution and expenditure disclosure provisions did advance a substantial governmental interest by “shed[ding] the light of publicity on spending that is unambiguously campaign related but would not otherwise be reported.”⁴⁷ The Court found that such disclosure requirements were “responsive to the legitimate fear that efforts would be made . . . to avoid the disclosure requirements by routing financial support of candidates through avenues not

40. *Id.* at 67–68.

41. This discussion occurred primarily in the context of the Court’s evaluation of the argument that a blanket exemption to the disclosure requirements was warranted for independent and third-party candidates, but its general interest-balancing analysis was not by its terms limited to that context. *See id.* at 72–74.

42. *Id.* at 66 (quoting *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 97 (1961)).

43. *See id.* at 72.

44. *Id.* at 74. In *Brown v. Socialist Workers ’74 Campaign Comm. (Ohio)*, 459 U.S. 87, 102 (1982), the Court found that the Socialist Workers Party was entitled to such an exemption from Ohio’s campaign finance disclosure law.

45. *See Buckley*, 424 U.S. at 74–82.

46. *Id.* at 80. In a footnote, the Court elaborated on “express advocacy” as involving “express words of advocacy of election or defeat, such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ ‘reject.’” *Id.* at 44 n.52.

47. *Id.* at 81.

explicitly covered by the general provisions of the Act.”⁴⁸

Buckley, in sum, broadly upheld disclosure requirements for candidates and campaigns, as well as third parties, and further found that such requirements “in most applications appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist.”⁴⁹

Following *Buckley*, the Court cited disclosure requirements with apparent approval in a number of cases.⁵⁰ But its next extended discussion of disclosure did not come until the 2003 case *McConnell v. FEC*,⁵¹ in which the Court considered a broad challenge to the 2002 Bipartisan Campaign Reform Act (BCRA),⁵² the most important piece of campaign finance legislation since FECA. The *McConnell* Court divided sharply on the constitutionality of the law’s substantive provisions, with a narrow majority upholding the law’s extension of the prohibition on corporate “express advocacy” in the immediate pre-election period to include “electioneering communications,” a broader category of communications that swept in many so-called issue ads that had previously escaped regulation.⁵³

48. *Id.* at 76. The statute at issue in *Buckley* did not require independent spenders to disclose their donors, but the 1979 amendments to the FECA unambiguously introduced such a requirement. *See* 2 U.S.C. § 434(b)(3)(A) (2012); Potter & Morgan, *supra* note 19, at 420–21.

49. *Buckley*, 424 U.S. at 68.

50. *See, e.g.*, *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 223 (1999) (O’Connor, J., concurring in part and dissenting in part) (“[T]otal disclosure has been recognized as the essential cornerstone to effective campaign finance reform and fundamental to the political system.” (alteration in original) (citations omitted) (internal quotation marks omitted)); *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 262, 265 (1986) (invalidating FECA’s independent corporate expenditure limitations as applied to a nonprofit ideological corporation, but also citing with approval the disclosure provisions that continued to apply to the plaintiff group, and noting that “[t]hese reporting obligations provide precisely the information necessary to monitor MCFL’s independent spending activity and its receipt of contributions”); *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 791–92 & n.32, 795 (1978) (invalidating Massachusetts’s limitations on corporate spending on ballot initiatives, and remarking that “the people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments”; that “[t]hey may consider, in making their judgment, the source and credibility of the advocate”; and that “[i]dentification 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”). And, although the Court in *Austin v. Michigan Chamber of Commerce* did not consider disclosure in its opinion upholding Michigan’s prohibition on corporate expenditures in state elections, Justice Kennedy invoked disclosure in his dissent, arguing that the ban was unnecessary in part because “[t]he more narrow alternative of recordkeeping and funding disclosure is available.” 494 U.S. 652, 707 (1990) (Kennedy, J., dissenting); *see also* Briffault, *Campaign Finance Disclosure*, *supra* note 18, at 283 (“*Buckley* set the tone for jurisprudence of disclosure over the next three and a half decades.”).

51. 540 U.S. 93 (2003).

52. Bipartisan Campaign Reform Act (BCRA) of 2002, Pub. L. No. 107–155, 116 Stat. 81 (codified at 2 U.S.C. § 431 (2002)), *invalidated in part* by *Citizens United v. FEC*, 558 U.S. 310 (2010).

53. *McConnell*, 540 U.S. at 196. 2 U.S.C. § 434(f)(3) (2006) defined an electioneering communication as an ad that “refers to a clearly identified candidate for Federal office,” is broadcast within sixty days of a general or thirty days of a primary election, and, except in the case of presidential or vice presidential candidates, is targeted to the “relevant electorate.” This meant that the category was expanded to include corporate ads that did not contain the *Buckley* “magic words,” *see supra* note 46, but that did mention candidates by name in the immediate pre-election period.

But the Justices were nearly unanimous in upholding the parallel expansion of FECA's disclosure requirements. The new provisions required disclosure by individuals or entities that spent more than \$10,000 per year funding "electioneering communications," including the names and addresses of contributors over \$1,000.⁵⁴ The Court saw no constitutional infirmity with the extension of FECA's disclosure requirements beyond what the Court had approved in *Buckley*, explaining that *Buckley*'s express advocacy test was "an endpoint of statutory interpretation, not a first principle of constitutional law."⁵⁵ The Court found that "the important state interests that prompted the *Buckley* Court to uphold FECA's disclosure requirements—providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions—apply in full to [the disclosure requirements created by] BCRA."⁵⁶

In 2007, the Court, with new members Chief Justice Roberts and Justice Alito, considered afresh the constitutionality of BCRA's restriction on the use of corporate general-treasury funds for "electioneering communication[s]"⁵⁷ in the immediate pre-election period. The case, *FEC v. Wisconsin Right to Life, Inc. (WRTL II)*, cast *McConnell* as only having upheld the restriction on corporate electioneering activity as facially constitutional, while leaving the door wide open to future as-applied challenges.⁵⁸ As to the as-applied challenge before it, the Court held that the ads Wisconsin Right to Life wished to broadcast, which exhorted viewers to contact Senators Herb Kohl and Russ Feingold and urge them to oppose the filibuster of judicial nominees, could not constitutionally be restricted. And the Court set forth a rule that an ad could be subject to BCRA's restriction "only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."⁵⁹

Although *WRTL II* did not address the expanded disclosure requirements the Court had upheld in *McConnell*, many feared that *WRTL*'s retreat from *McConnell*'s strong endorsement of the constitutionality of BCRA spelled

54. BCRA § 201; *McConnell*, 540 U.S. at 195–96.

55. *McConnell*, 540 U.S. at 190.

56. *Id.* at 196. This part of the opinion was jointly authored by Justices Stevens and O'Connor and joined by Justices Souter, Ginsburg, and Breyer. Justice Kennedy, joined by Chief Justice Rehnquist and Justice Scalia, joined the disclosure portion of this opinion (making it an opinion for eight Justices) with the comparatively minor exception of the provision requiring disclosure *in advance* of the actual expenditure of funds. *See id.* at 322 (Kennedy, J., concurring in the judgment in part and dissenting in part). And Justice Scalia, who disagreed vehemently with the Stevens/O'Connor majority opinion, actually predicated much of his argument against the law's substantive restrictions on the notion that disclosure was sufficient to vindicate the important interests the law's defenders identified: "Evil corporate (and private affluent) influences are well enough checked (so long as adequate campaign-expenditure disclosure rules exist) by the politician's fear of being portrayed as 'in the pocket' of so-called moneyed interests." *Id.* at 259 (Scalia, J., concurring in the judgment in part and dissenting in part).

57. 2 U.S.C. § 441b(b)(2) (2006).

58. 551 U.S. 449, 456 (2007).

59. *Id.* at 451.

trouble for disclosure requirements.⁶⁰ Against that backdrop, *Citizens United* appeared.

2. *Citizens United* and Disclosure

Citizens United v. FEC began as a case largely about disclosure.⁶¹ The organization behind *Hillary: The Movie* initiated the lawsuit that became *Citizens United* with the purpose of securing a judgment that BCRA's disclosure and disclaimer requirements were unconstitutional as applied to its film, a feature-length critique of Hillary Clinton,⁶² as well as to three short advertisements for the film.⁶³ It also argued that BCRA's prohibition on the use of corporate general-treasury funds for electioneering activity was unconstitutional both on its face and as applied to the film.⁶⁴ A three-judge panel denied *Citizens United*'s motion for a preliminary injunction and granted the FEC's motion for summary judgment on all counts.⁶⁵

The lower court first concluded that under *McConnell*, even as modified by *WRTL II*, the film was plainly electioneering, as it was susceptible to no other interpretation but that it was an appeal to vote against Hillary Clinton.⁶⁶ Accordingly, the court found that the film fell squarely within BCRA's corporate expenditure prohibition,⁶⁷ and there was thus no live question about the applicability of the law's disclosure and disclaimer requirements to the film.

There was, however, a question as to whether the law's disclosure and disclaimer provisions were applicable to the short ads for the film. The disclosure provisions to which *Citizens United* objected, set forth in BCRA's § 201, required any corporation that spent more than \$10,000 on "electioneering communications"⁶⁸ to file a report with the FEC detailing, among other things, the names and addresses of donors over \$1,000.⁶⁹ The disclaimer requirements in BCRA's § 311 also required any ad paid for by an entity other than a candidate or political committee to contain a simple disclaimer ("____ is

60. See Torres-Spelliscy, *supra* note 3 (demonstrating that in the years immediately following *WRTL II*, a number of lower courts read the logic of the decision as throwing into question or even invalidating state disclosure laws that resembled those contained in BCRA).

61. 558 U.S. 310 (2010).

62. See Amended Verified Complaint for Declaratory and Injunctive Relief, *Citizens United v. FEC*, 530 F. Supp. 2d 274 (D.D.C. 2008) (per curiam) (No. 07-2240) 2007 WL 4774516.

63. See *id.* at 16.

64. See *id.* The FEC conceded that the advertisements were not subject to the prohibition, as they were not themselves electioneering activity, but merely proposed a commercial transaction. See *Citizens United v. FEC*, 530 F. Supp. 2d 274, 277 n.9 (D.D.C. 2008) (per curiam).

65. See *Citizens United*, 530 F. Supp. 2d at 282.

66. See *id.* at 279–80.

67. See *id.* at 280.

68. Defined, once again, as an ad that "refers to a clearly identified candidate for Federal office," is broadcast within sixty days of a general or thirty days of a primary election, and, except in the case of presidential or vice presidential candidates, is targeted to the "relevant electorate." 2 U.S.C. § 434(f)(3) (2006).

69. *Id.* § 434(f)(2).

responsible for the content of this advertising”), both spoken and displayed on the screen for at least four seconds.⁷⁰ In addition, § 311 required the sponsors of ads to include in the disclaimers “the name, address, and phone number or web address of the organization behind the advertisement.”⁷¹

Citizens United argued that because the ads themselves were not electioneering communications, Congress had no more power to require disclosure than it had to ban them outright.⁷² Put differently, Citizens United claimed that after *WRTL II*, only express advocacy, or its functional equivalent, could constitutionally be subject to *any* sort of regulation, including disclosure or disclaimer requirements.

The three-judge court soundly rejected that argument, explaining that *WRTL II* had been limited to the question of the constitutionality of the outright ban on corporate electioneering activity. And the court noted, citing *FEC v. Massachusetts Citizens for Life, Inc.*,⁷³ and several other decisions, that “in the past the Supreme Court has written approvingly of disclosure provisions triggered by political speech even though the speech itself was constitutionally protected under the First Amendment.”⁷⁴

Citizens United appealed to the Supreme Court,⁷⁵ challenging the lower court’s rulings, first on the disclosure and disclaimer requirements, and second on the corporate electioneering ban.⁷⁶ In its merits briefing, Citizens United relegated the disclosure and disclaimer arguments to decidedly secondary status,⁷⁷ and the oral arguments similarly focused on the corporate electioneering prohibition.⁷⁸

On June 29, 2009, rather than issuing an opinion in the case, the Court set the case for re-argument, asking the parties to brief the question whether *Austin v. Michigan Chamber of Commerce*⁷⁹ and the portion of *McConnell* upholding the

70. 2 U.S.C. § 441d(d)(1)(B) (2002).

71. *Citizens United*, 530 F. Supp. 2d at 280 (citing 2 U.S.C. § 441d(a)(3) (2002)).

72. *See id.*

73. 479 U.S. 238, 259–62 (1986).

74. *Citizens United*, 530 F. Supp. 2d at 281.

75. The direct appeal was taken pursuant to BCRA, Pub. L. No. 107–155, 116 Stat. 114 (2002) (codified at 2 U.S.C. § 437h (2002)) (requiring that “[a] final decision [on a constitutional challenge] shall be reviewable only by appeal directly to the Supreme Court of the United States”).

76. Jurisdictional Statement, *Citizens United v. FEC*, 558 U.S. 310 (2010) (No. 08–205). Questions one and two challenged the lower court’s ruling on the applicability of BCRA’s disclosure requirements, while questions three and four focused on the corporate-electioneering prohibition. *Id.*

77. *See* Brief for Appellant at 42–57, *Citizens United v. FEC*, 558 U.S. 310 (2010) (No. 08–205).

78. *See generally* Transcript of Oral Argument, *Citizens United*, 558 U.S. 310 (No. 08–205). The Chief Justice did raise the question of disclosure near the end of Malcolm Stewart’s argument for the government, but their colloquy focused entirely on the likelihood that disclosure would subject donors to reprisal. *See id.* at 49–52.

79. 494 U.S. 652, 660 (1990) (upholding a Michigan statute that prohibited corporations from making independent expenditures in any state political campaigns, based on the state’s interest in minimizing “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas”).

corporate electioneering prohibition should be overruled.⁸⁰ This reframing meant that the question of disclosure largely dropped out of the case; the supplemental merits briefs engaged in no discussion of the question of disclosure, and the issue was similarly absent from nearly all of the amicus briefs.

As is now well-known, after re-argument, the Court, in a broad and sweeping opinion by Justice Kennedy, struck down BCRA's ban on corporate electioneering and express advocacy in the pre-election period.⁸¹ But in a critical and far less appreciated portion of the majority opinion, eight Justices—every member of the Court but Justice Thomas—also resoundingly upheld the constitutionality of BCRA's expanded disclosure and disclaimer requirements, in many ways giving a stronger seal of approval to disclosure than any of the Court's previous opinions.

The Court began by affirming that under *Buckley*, disclosure requirements were subject to "exacting scrutiny," which required a "'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest."⁸² The Court explained that the *Buckley* Court deemed the government's interest in providing voters with information "about the sources of election-related spending" sufficiently compelling to justify any First Amendment encroachments represented by FECA's disclosure requirements.⁸³ And, the *Citizens United* Court explained, *McConnell* affirmed the facial constitutionality of BCRA's disclosure and disclaimer requirements by reasoning that "they would help citizens 'make informed choices in the political marketplace.'"⁸⁴

The *Citizens United* Court found that the same rationale justified subjecting *Citizens United*'s film and ads to the law's disclosure requirements.⁸⁵ And,

80. See *Citizens United v. FEC*, 557 U.S. 932 (2009) (mem.) (directing the parties to address the following question: "For the proper disposition of this case, should the Court overrule either or both *Austin v. Michigan Chamber of Commerce*, and the part of *McConnell v. Federal Election Comm'n*, which addresses the facial validity of Section 203 of the Bipartisan Campaign Reform Act of 2002?" (citations omitted)).

81. See *Citizens United v. FEC*, 558 U.S. 310, 356, 361 (2010). In the same portion of the opinion, the Court dismissed the argument that the restriction on corporate speech should be upheld because corporations retained the ability to form PACs through which they could engage in electioneering activity, writing:

[T]he option to form PACs does not alleviate the First Amendment problems with § 441b. PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations. For example, every PAC must appoint a treasurer, forward donations to the treasurer promptly, keep detailed records of the identities of the persons making donations, preserve receipts for three years, and file an organization statement and report changes to this information within 10 days.

Id. at 337–38.

82. *Id.* at 366–67 (quoting *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (per curiam)).

83. *Id.* at 367.

84. *Id.* (quoting *McConnell v. FEC*, 540 U.S. 93, 197 (2003)).

85. *Citizens United* argued that the disclosure requirements, like the ban, should be limited to speech that was the functional equivalent of express advocacy—which would have excluded the ads, which were not themselves exhortations to vote for or against a particular candidate, but rather exhortations to purchase the film—and the Court rejected that argument. It found that the "public has an interest in

finding this “informational interest” plainly sufficient to justify the requirements, the Court concluded that it was unnecessary even “to consider the Government’s other asserted interests”—limiting corruption and the appearance of corruption and enforcing the law’s substantive limitations.⁸⁶

As to the disclaimer requirement,⁸⁷ the Court found that both the film and the ads in question fell within BCRA’s definition of “electioneering communication.”⁸⁸ The Court found that the disclaimers provided viewers with useful information—that a candidate or party, for example, did not fund the ads—and also information about the entities that *were* responsible for the speech.⁸⁹

But the Court did more than merely reject *Citizen United*’s challenge to disclosure and disclaimer requirements. It opined much more broadly on the question of whether Congress’s power to prohibit certain types of speech, and its power to compel disclosure of information regarding that same sort of speech, were coterminous, finding that they were not:

[D]isclosure is a less restrictive alternative to more comprehensive regulations of speech. In *Buckley*, the Court upheld a disclosure requirement for independent expenditures even though it invalidated a provision that imposed a ceiling on those expenditures. In *McConnell*, three Justices who would have found § 441b to be unconstitutional nonetheless voted to uphold BCRA’s disclosure and disclaimer requirements. And the Court has upheld registration and disclosure requirements on lobbyists, even though Congress has no power to ban lobbying itself.⁹⁰

Finally, the Court addressed the possibility of shareholder participation, through corporate democracy mechanisms, in monitoring and checking corporate political activity:

A campaign finance system that pairs corporate independent expenditures with effective disclosure has not existed before today. . . . With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation’s political speech advances the corporation’s interest in making profits, and citizens can see whether elected officials are “in the pocket of so-called moneyed interests.” The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the

knowing who is speaking about a candidate shortly before an election,” even if such speech is not tantamount to express advocacy. *Id.* at 369.

86. *Id.* at 369.

87. See 2 U.S.C. § 441d(d)(2) (2006).

88. *Citizens United*, 558 U.S. at 368.

89. See *id.*

90. *Id.* at 369 (citations omitted). The Court did acknowledge, however, that compelled disclosure could in theory give rise to threats or harassment, and made clear that if the genuine probability of such events were established, the Court would be likely to sustain an as-applied challenge. *Id.* at 370.

speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.⁹¹

Although made in the context of shareholder participation, the Court's statements about the promise and function of disclosure are not by their logic limited to the shareholder context; they appear to reveal, rather, the Court's broad conception of the functioning of campaign finance disclosure.⁹²

Moreover, there is arguably a significant connection between the Court's two holdings, one that commentators have largely neglected: not only did the Court conclude that BCRA's disclosure requirements passed constitutional muster, but the existence and content of those requirements was arguably a critical component of the Court's conclusion that the substantive limitation violated the First Amendment. That is, when assessing the expenditure limitation, the Court did not dispute the legitimacy of the government's interest in preventing corruption or the appearance of corruption in campaigns for federal office; it simply appeared to conclude, in at least one portion of the opinion, that this interest was sufficiently advanced by mandated disclosure.⁹³

3. Disclosure in the Lower Courts in the Wake of *Citizens United*

In the wake of their victory in *Citizens United*—and undeterred by the Court's apparent embrace of disclosure—opponents of campaign finance regulation brought a slew of challenges to both federal and state disclosure requirements.⁹⁴ To date, the vast majority of those challenges have been unsuccessful, with most lower courts reading *Citizens United* as blessing the constitutionality of broad disclosure requirements.⁹⁵

One of the most important post-*Citizens United* cases, *SpeechNow.org v. FEC*, is best known for striking down BCRA's contribution limits as applied to political committees that engage solely in independent expenditures (thereby giving rise to the "super-PAC").⁹⁶ But the D.C. Circuit in *SpeechNow.org* also upheld the disclosure provisions that attached to contributions to, and expenditures by, these newly empowered political committees. The court found that PAC disclosure requirements advanced both informational and enforcement

91. *Id.* at 370 (citations omitted) (quoting *McConnell v. FEC*, 540 U.S. 93, 259 (2003)).

92. It is perhaps possible to read the Court's remarks about disclosure as simply explaining that the Constitution poses no obstacle to expansive disclosure requirements—as commentary on some hypothetical legal regime, rather than the one before it. But the Court's invocation of the "effective disclosure" *in effect* "today" strongly suggests that its discussion of disclosure was not an abstract one, but rather one grounded in its understanding of the current state of legally mandated disclosure.

93. *Citizens United*, 558 U.S. at 369 ("[D]isclosure is a less restrictive alternative to more comprehensive regulations of speech."). And in *McCutcheon v. FEC*, the Court reiterated that "disclosure often represents a less restrictive alternative to flat bans on certain types or quantities of speech." 134 S. Ct. 1434, 1460 (2014).

94. See Michael Kang, *Campaign Disclosure in Direct Democracy*, 97 MINN. L. REV. 1700, 1700 (2013) ("[C]ampaign disclosure laws now are under legal and political attack as never before.").

95. See CAMPAIGN LEGAL CTR., *supra* note 4; see also Ciara Torres-Spelliscy, *supra* note 3, at 1084.

96. 599 F.3d 686, 689 (D.C. Cir. 2010).

interests: “[T]he public has an interest in knowing who is speaking about a candidate and who is funding that speech Further, requiring disclosure of such information deters and helps expose violations of other campaign finance restrictions, such as those barring contributions from foreign corporations or individuals.”⁹⁷

Other federal courts quickly followed suit, rejecting challenges to additional aspects of BCRA’s disclosure requirements or the FEC’s regulations implementing those requirements. In June 2012, the Fourth Circuit rejected a 527 organization’s⁹⁸ challenge to FEC regulations defining “expressly advocating”⁹⁹ for purposes of disclosure requirements.¹⁰⁰ And in March 2013, a Wyoming district court dismissed a similar challenge, finding that “disclaimer and disclosure requirements become even more essential and necessary to enable informed choice in the political marketplace following *Citizens United*’s change to the political campaign landscape with the removal of the limit on corporate expenditures.”¹⁰¹

Challenges to state disclosure requirements, in the context of both candidate elections and ballot initiatives and referenda, have for the most part fared similarly, with courts relying heavily, as did the *Citizens United* Court, on the informational interest in disclosure. For example, in 2011, the First Circuit rejected a broad challenge to provisions of Maine law requiring political committee registration and “disclosure and reporting of information about expenditures made for election-related advocacy”¹⁰² by non-PAC entities, and general attribution and disclaimer requirements for all “political advertisements and certain other political messages.”¹⁰³ The court found those requirements justified by the state’s interest in providing the electorate with information about the sources of political speech:

In an age characterized by the rapid multiplication of media outlets and the rise of internet reporting, the “marketplace of ideas” has become flooded with a profusion of information and political messages. Citizens rely ever more on a message’s source as a proxy for reliability and a barometer of political spin.¹⁰⁴

97. *Id.* at 698.

98. “527” refers to a tax-exempt political organization under 26 U.S.C. § 527 (2006).

99. 11 C.F.R. § 100.22 (2011).

100. *See Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 558 (4th Cir. 2012).

101. *Free Speech v. FEC*, No. 12-CV-127-S, at 14 (D. Wyo. Mar. 19, 2013), *aff’d*, 720 F.3d 788 (10th Cir. 2013). *But see* *Hispanic Leadership Fund, Inc. v. FEC*, 897 F. Supp. 2d 407, 429–30 (E.D. Va. 2012) (concluding that proposed ads that included only audio clips of the President’s voice or general references to “the White House” or “the government” were not electioneering communications and thus not subject to disclosure).

102. *Nat’l Org. for Marriage v. McKee*, 649 F.3d 34, 40 (1st Cir. 2011), *cert. denied*, 132 S. Ct. 1635 (Feb. 27, 2012); *accord* *Nat’l Org. for Marriage v. Daluz*, 654 F.3d 115, 116 (1st Cir. 2011) (upholding Rhode Island’s similar disclosure requirements in a companion case to *McKee*).

103. *McKee*, 649 F.3d at 43.

104. *Id.* at 57.

In late 2012, the Seventh Circuit rejected a challenge to Illinois's disclosure requirements, which required both groups and individuals "that accept contributions, make expenditures, or sponsor electioneering communications in excess of \$3,000 to make regular financial disclosures to the State Board of Elections."¹⁰⁵ The court found that "[a]midst [a] cacophony of political voices—super PACs, corporations, unions, advocacy groups, and individuals, not to mention the parties and candidates themselves—campaign finance data can help busy voters sift through the information and make informed political judgments."¹⁰⁶ Also in 2012, a district court rebuffed a challenge to Vermont's disclosure laws, which applied to both PACs and to a lesser extent any other entity that engaged in electioneering communications. The court found that the laws bore "a substantial relation to Vermont's sufficiently important interest in permitting citizens to gauge the sources of candidate support."¹⁰⁷ In early 2013, the Fourth Circuit upheld a provision of West Virginia's campaign finance law requiring disclosure of expenditures over \$5,000 on electioneering communications (and \$1,000 during the immediate pre-election period).¹⁰⁸ And in mid-2013, the Eleventh Circuit rejected a challenge to Florida's disclosure and disclaimer scheme that required registration as a political committee, with attendant disclosure and disclaimer requirements, by any group that wished to "accept contributions of—or spend—more than \$500 in a year to expressly advocate the election or defeat of a candidate or the passage or defeat of a ballot issue."¹⁰⁹

105. *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 470 (7th Cir. 2012) (internal quotation marks omitted). Those disclosure reports included

the total sums of contributions received and expenditures made in the covered period; accountings of the committee's funds on-hand and investment assets held; and the name and address of each contributor who gave more than \$150 that quarter. . . . [in addition to] any contribution of \$1,000 or more (along with the name and address of the contributor) within five days of its receipt, or within two days if received 30 or fewer days before an election.

Id. at 472.

106. *Id.* at 490.

107. *Vt. Right to Life Comm., Inc. v. Sorrell*, 875 F. Supp. 2d 376, 400 (D. Vt. 2012).

108. *See Ctr. for Individual Freedom, Inc. v. Tennant*, 706 F.3d 270, 290–92 (4th Cir. 2013).

109. *Worley v. Fla. Sec'y of State*, 717 F.3d 1238, 1240 (11th Cir. 2013) (citing *FLA. STAT.* § 106.011(1)(a) (2012)). Courts have also upheld laws requiring disclosure in the ballot-initiative context, also primarily relying on the informational interest. The Ninth Circuit, for example, has rejected several challenges to Washington's disclosure rules by groups that spend money supporting or opposing ballot measures. *See Family PAC v. McKenna*, 685 F.3d 800, 803, 808 (9th Cir. 2011) (upholding Washington provisions requiring disclosure of "the name and address of contributors giving more than \$25 [as well as] the employer and occupation of contributors giving more than \$100," to political committees formed to support or oppose ballot measures, and explaining that "[d]isclosure . . . gives voters insight into the actual policy ramifications of a ballot measure," and that "by knowing who backs or opposes a given initiative, voters will have a pretty good idea of who stands to benefit from the legislation" (internal quotation mark omitted)); *Human Life of Wash. Inc. v. Brum-sickle*, 624 F.3d 990, 1008 (9th Cir. 2010) (rejecting a broad challenge to Washington's disclosure requirements, both facially and as applied to a group's ballot-measure efforts, and explaining that disclosure can "provid[e] the voting public with the information with which to assess the various messages vying for their attention in the marketplace of ideas").

Not all state disclosure laws have survived post-*Citizens United* scrutiny. In 2012, the Eighth Circuit concluded that a Minnesota state-law requirement that corporations and other associations making independent expenditures over \$100 do so through a PAC-like entity termed a “political fund”—with ongoing reporting requirements even in periods of inactivity—likely exceeded the bounds of what the Supreme Court had approved in *Citizens United*.¹¹⁰ In 2013, that same court invalidated several aspects of a similar Iowa law imposing disclosure and ongoing reporting requirements on independent spenders.¹¹¹ Similarly, the Tenth Circuit has invalidated two state-law disclosure requirements as applied to small nonprofit or neighborhood groups.¹¹² Still, even with these narrow victories for opponents of disclosure, as a general matter, both state and federal disclosure laws appear at the moment to be on firm legal footing.¹¹³

C. THE FEC AND DISCLOSURE IN 2014

The preceding sections examined the basic jurisprudence of disclosure. But the practice of disclosure in 2014 is informed, to a perhaps even greater degree, by the interpretation and enforcement of the law of disclosure by the FEC. This is particularly true over the last decade, as the FEC has attempted to respond, through enforcement and rulemaking, to the Court’s shifting interpretation of

110. *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 877 (8th Cir. 2012) (en banc).

111. *See Iowa Right to Life Comm., Inc. v. Tooker*, 717 F.3d 576, 596–601 (8th Cir. 2013).

112. *See Sampson v. Buescher*, 625 F.3d 1247, 1249 (10th Cir. 2010) (invalidating Colorado campaign finance disclosure requirements as applied to a neighborhood group that had raised less than \$1,000); *N.M. Youth Organized v. Herrera*, 611 F.3d 669, 671 (10th Cir. 2010) (invalidating New Mexico disclosure requirements as applied to two nonprofit organizations “formed for the purpose of educating young New Mexicans about issues such as healthcare, clean elections, the economy and the environment”).

113. Indeed, the Supreme Court itself rejected a challenge to state-mandated disclosure in a related context just a few months after its decision in *Citizens United* (albeit in a case that differs in some significant respects from the state-disclosure cases detailed above). *See Doe v. Reed*, 561 U.S. 186, 130 S. Ct. 2811, 2821 (2010). *Reed* involved a First Amendment challenge to a state open-records law that granted requesters access, among other things, to submitted referendum petitions, which included the names and addresses of petition signatories. *See id.* at 2815. The Court rejected the challenge, finding the state’s interest in “preserving the integrity of the electoral process” sufficiently compelling to defeat the petitioners’ constitutional challenge, so that it did not even need to address the state’s proffered “informational interest”—that is, its interest in “providing information to the electorate about who supports the petition.” *Id.* at 2819. And the Court reiterated its approval of disclosure requirements in *McCutcheon v. FEC*, 134 S. Ct. 1434, 1459–60 (2014) (“[D]isclosure of contributions minimizes the potential for abuse of the campaign finance system. . . . [D]isclosure . . . offers a particularly effective means of arming the voting public with information.”).

Despite the Court’s endorsements of the constitutionality of disclosure in *Citizens United*, *Doe*, and most recently *McCutcheon*, a spate of recent scholarship suggests that certain types of mandatory disclosure may pose a serious threat to contributor privacy interests. *See* Rebecca Green, *Petitions, Privacy, and Political Obscurity*, 85 TEMP. L. REV. 367, 367 (2013); William McGeveran, *Mrs. McIntyre’s Persona: Bringing Privacy Theory to Election Law*, 19 WM. & MARY BILL RTS. J. 859, 861 (2011); Bruce Cain, *Shade from the Glare: The Case for Semi-Disclosure*, in FOLLOWING THE MONEY: THE LAW AND ETHICS OF CAMPAIGN FINANCE DISCLOSURE (Nov. 8, 2010), <http://www.cato-unbound.org/print-issue/457>. *But see* Hasen, *supra* note 3, at 572–73 (2012) (critiquing privacy concerns about disclosure).

BCRA's provisions.

As discussed above, in 2002 BCRA expanded FECA's disclosure requirements so that they were triggered not just by express advocacy, but also by any "electioneering communications," a broader category of campaign-related speech.¹¹⁴ BCRA's expanded disclosure provisions applied to *any* individual or entity that spent more than \$10,000 per year on electioneering communications—not just political committees—and the statute required the identification of all contributors over \$1,000 since the start of the preceding calendar year.¹¹⁵ In 2007, after the Supreme Court held in *WRTL II* that BCRA's prohibition on corporate electioneering activity only applied to activity that was the "functional equivalent" of express advocacy,¹¹⁶ the FEC relied on rulemaking to implement the Court's new definition of electioneering. Although the *WRTL II* Court had taken no position on BCRA's disclosure requirements, the FEC opted nonetheless to address disclosure in its rulemaking. BCRA's text required disclosure statements to contain the "names and addresses of all contributors who contributed an aggregate amount of \$1,000,"¹¹⁷ but the regulation ultimately promulgated by the FEC required the disclosure of the identities of contributors over \$1,000 *only* if such contributions were made "for the purpose of furthering electioneering communications."¹¹⁸

A key test of that regulation came in 2010 and involved Freedom's Watch, a group that had spent \$126,000 on electioneering ads in the 2008 election cycle. The group filed reports with the FEC documenting its spending, but did not provide the identities of contributors to the organization, claiming that "all the donations had been given to support the organization's general purposes, and *none* were earmarked for specific electioneering ads," so that "they were not subject to the statutory disclosure requirement."¹¹⁹ An outside group filed a complaint with the FEC, alleging that Freedom's Watch had failed to make the disclosures required by the FEC regulation.¹²⁰ The FEC divided over the issue 3–2 and accordingly dismissed the complaint, an action technically without precedential value.¹²¹ But the effect of the episode has been that groups en-

114. See *supra* note 53 and accompanying text.

115. See 2 U.S.C. § 434(f)(2) (2002).

116. *FEC v. Wis. Right to Life, Inc. (WRTL II)*, 551 U.S. 449, 451 (2007).

117. 2 U.S.C. § 434(f)(2)(E), (F) (2002).

118. 11 C.F.R. § 104.20(c)(9) (2012). As the FEC explained in its rulemaking, the new standard would require disclosure only of "the identities of those persons who made a donation aggregating \$1,000 or more specifically for the purpose of furthering [electioneering communications]." Electioneering Communications, 72 Fed. Reg. 72,899, 72,911 (Dec. 26, 2007); see also 11 C.F.R. § 109.20 (2012); Potter & Morgan, *supra* note 19, at 425–28 (discussing history of regulation).

119. Briffault, *Updating Disclosure*, *supra* note 3, at 697.

120. The complaint alleged that Freedom's Watch "Failed to Disclose Donations Made for the Purpose of Furthering Electioneering Communications." Complaint against Freedom's Watch Inc., Freedom's Watch, Inc. (FEC Apr. 23, 2008) (matter under review), available at <http://eqs.fec.gov/eqsdocsMUR/10044272034.pdf>.

121. See Statement of Reasons of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn, Freedom's Watch, Inc. (FEC Aug. 13, 2010) (complaint dismissed and

gaging in outside spending in its wake have invariably opted not to make any contributor disclosure, “except in the unlikely event that a donor earmarks his contribution for a specific election campaign.”¹²²

After *Citizens United* cleared the way for unlimited spending by corporations, but also approved the law’s broad disclosure requirements, Representative Chris Van Hollen challenged this FEC regulation, arguing that the FEC’s limitation of disclosure to contributions “made for the purpose of furthering electioneering communications” was unduly narrow in light of BCRA’s clear intent to extend disclosure requirements to “all contributors.”¹²³ The district court agreed with Van Hollen,¹²⁴ and the FEC declined to appeal to the D.C. Circuit.¹²⁵ But several interveners did appeal, and the D.C. Circuit reversed.¹²⁶ The case is again pending before the district court.¹²⁷

II. EXAMINING DISCLOSURE: GOVERNMENT INTERESTS AND EMPIRICAL FINDINGS

As detailed above,¹²⁸ the Supreme Court has identified three primary justifications for campaign finance disclosure requirements: supplying voters with sufficient information to enable them to appropriately evaluate campaign speech (the “informational interest”); preventing corruption and the appearance of corruption (the “anticorruption interest”); and aiding in the enforcement of other campaign finance regulations (the “enforcement interest”). The *Citizens United* Court concluded that BCRA’s disclosure and disclaimer requirements were justified by the informational interest alone, so it declined even to consider the

file closed), available at <http://www.fec.gov/press/press2010/20100608MUR.shtml>; Statement of Reasons of Vice Chair Cynthia L. Bauerly and Commissioner Ellen L. Weintraub, Freedom’s Watch, Inc., (FEC Sept. 16, 2010) (dissenting commissioners), available at <http://www.fec.gov/members/weintraub/murs/mur6002sor.pdf>.

122. Briffault, *Updating Disclosure*, *supra* note 3, at 697. A recent article explains that the rise of undisclosed outside spending of precisely this sort

is best understood as primarily a failure of the Federal Election Commission (FEC) . . . This is because the plain statutory language of the Federal Election Campaign Act of 1971 (FECA), and subsequent amendments to FECA, including McCain-Feingold, is sufficiently broad to provide for full disclosure of the sources of the vast majority of funds used to influence federal elections. . . . But . . . the FEC has implemented and applied the disclosure provisions . . . in an extraordinarily narrow and illogical manner that effectively renders the statutory disclosure requirements meaningless.

Potter & Morgan, *supra* note 19, at 387.

123. Van Hollen v. FEC, 851 F. Supp. 2d 69, 75–76 (D.D.C. 2012) (internal quotation marks omitted).

124. *See id.* at 89.

125. *See* Notice of Defendant Federal Election Commission, Van Hollen v. FEC, 851 F. Supp. 2d 69 (2012) (No. 11-0766) (“The Federal Election Commission hereby advises that it will not appeal the Court’s order of March 30, 2012 (Doc. No. 49).”).

126. *See* Ctr. for Individual Freedom v. Van Hollen, 694 F.3d 108, 112 (D.C. Cir. 2012).

127. A motion hearing was held on October 29, 2013. *See* Docket, Van Hollen v. FEC, 11-766 (D.D.C. Oct. 29, 2013).

128. *See supra* notes 36–40 and accompanying text.

other interests the Court has identified.¹²⁹ For that reason, while we discuss each of the interests in turn below, we focus in the next section on empirical investigations of the informational interest.

A. THE SUPREME COURT'S ARTICULATED INTERESTS

1. The Informational Interest

Beginning in *Buckley*, the Supreme Court has recognized an important informational interest in disclosure.¹³⁰ According to the Court, the content of disclosure may aid the electorate by informing an analysis of candidate positions that goes beyond explicit party labels and campaign speeches.¹³¹ This analysis may be aided by disclosure in two ways. For one, disclosure may serve as a public endorsement—especially disclosure in the form of disclaimers that accompany political advertisements—of the groups or individuals supporting a candidate. For another, disclosure—especially disclosure in the form of large-scale databases that we investigate here—may “reveal whose interests a candidate will be inclined to serve once elected—whatever the candidate’s own substantive views.”¹³² The second of these two may be broadly conceived of as an accountability interest—by providing information about the interests to whom elected officials may in theory be beholden, disclosure empowers the electorate to monitor the conduct of elected officials to discern whether their behavior while in office reflects the interests of their donors, rather than the interests of their constituents.¹³³

Yet another strain of the informational interest, closely related to the accountability interest, has been described by commentators as a sort of general public interest in disclosure. Disclosure “permits the study of the influence of money on policymaking, and may thereby lead to a greater understanding of the workings of a political system.”¹³⁴ As Richard Briffault frames it, “[e]ven if campaign finance disclosure has a limited direct effect on voters’ decisions, it can still play an important salutary role in informing the public generally about the powerful economic forces that shape our elections, our politics, and ultimately, our public policy.”¹³⁵

129. *Citizens United v. FEC*, 558 U.S. 310, 369–70 (2010). *But see* *McCutcheon v. FEC*, 134 S. Ct. 1434, 1460 (2014) (“Today, given the Internet, disclosure offers . . . robust protections against corruption.”).

130. *See Buckley v. Valeo*, 424 U.S. 1, 67 (1976).

131. As the Court explained in *Buckley*, disclosure “allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches.” *Id.*

132. Daniel R. Ortiz, *The Informational Interest*, 27 J.L. & Pol. 663, 676 (2012).

133. *See Citizens United*, 558 U.S. at 370–71 (noting that through disclosure, “citizens can see whether elected officials are in the pocket of so-called moneyed interests” and can “make informed decisions” based on such information (internal quotation marks omitted)).

134. Clyde Wilcox, *Designing Campaign Finance Disclosure in the States: Tracing the Tributaries of Campaign Finance*, 4 ELECTION L.J. 371, 374 (2005).

135. Briffault, *Updating Disclosure*, *supra* note 3, at 718.

2. The Anticorruption Interest

Since even before *Buckley*, the Supreme Court has consistently held that the government's interest in preventing corruption or the appearance of corruption justifies campaign finance disclosure requirements.¹³⁶ The precise meaning of this anticorruption interest, however, has shifted over time.¹³⁷ The Court's early cases slide between different conceptions of "corruption," at times focusing on more traditional "quid pro quo" corruption,¹³⁸ at other times expanding that notion to include the very appearance of corruption,¹³⁹ and at still other times taking a much more expansive view of corruption as "a distortion of political outcomes as a result of the undue influence of wealth."¹⁴⁰

Of these competing visions of corruption, it is clear that the only one that

136. See *Burroughs v. United States*, 290 U.S. 534, 548 (1934) ("[P]ublic disclosure of political contributions, together with the names of contributors and other details, would tend to prevent the corrupt use of money to affect elections."). Indeed, the anticorruption interest was once the key justification the Court identified for such requirements. See Briffault, *Campaign Finance Disclosure*, *supra* note 18, at 281 (noting that it was not until *Buckley* that "the crucial argument for disclosure shifted [from the anticorruption interest to] . . . voter information"). For a detailed originalist argument that the Framers' concern with corruption was so great that they enshrined within the Constitution a free-standing anticorruption principle, see Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 342 (2009) (arguing that *Buckley* "gave corruption a relatively weak role in the constitutional scheme" so that the "concept of corruption has been unbound from the text and history of the document itself").

137. See Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. PA. L. REV. 119, 122 (2004) (noting, in the Court's campaign finance cases, the "alternating tendencies of the word 'corruption' to mean everything and nothing").

138. Much of the language in *Buckley* seems to take this narrow view of corruption. *Buckley v. Valeo*, 424 U.S. 1, 26–27 (1976) ("To the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined."); see also *McCutcheon v. FEC*, 134 S. Ct. 1434, 1466 (2014) ("Congress may target only a specific type of corruption—quid pro quo corruption." (internal quotation marks omitted)).

139. *Buckley*, 424 U.S. at 27 ("Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions."); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 395 (2000) ("[T]here is little reason to doubt that sometimes large contributions will work actual corruption of our political system, and no reason to question the existence of a corresponding suspicion among voters.").

140. Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118, 121–22 (2010) (arguing that until *Citizens United*, the Court "struggled between two competing views of the sources of potential corruption as a result of campaign finance": actual quid pro quo arrangements, on the one hand, and the distorting effects of money on the political process, on the other). Political scientist Thomas Burke discerns three different strains, rather than two, in the Court's cases: "quid pro quo, monetary influence, and distortion." Thomas F. Burke, *The Concept of Corruption in Campaign Finance Law*, 14 CONST. COMMENT. 127, 131 (1997). *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990), involves the most explicit articulation of the distortion/monetary influence vision of corruption, when it describes the "corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form," but it can be found in other cases as well. See, e.g., *Nixon*, 528 U.S. at 389 (articulating, in addition to the appearance of corruption rationale, "a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors"); *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985) ("Corruption is a subversion of the political process. Elected officials

survives *Citizens United* as to substantive campaign finance limitations is quid pro quo corruption. As Justice Kennedy wrote in his discussion of the corporate electioneering ban, “[w]hen *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest *was limited to quid pro quo corruption*.”¹⁴¹ *Citizens United* went on to hold that independent expenditures were categorically incapable of giving rise to quid pro quo corruption.¹⁴²

So post-*Citizens United*, it is clear that the additional variants of corruption the Court has identified can no longer justify campaign finance regulations like expenditure restrictions. But it does not necessarily follow that the Court’s narrowing of the idea of corruption in the context of substantive limitations applies with full force to disclosure requirements.¹⁴³ On the one hand, it may be that the Court’s newly limited conception of the anticorruption interest similarly drains the interest of much or all of its force when it comes to disclosure requirements (for it is difficult to conceive of a disclosure requirement that could withstand scrutiny if justified merely by an interest in preventing quid pro quo corruption, at least in the context of independent expenditures).¹⁴⁴ On the other hand, justifications for disclosure requirements have always been somewhat distinct from justifications for substantive limitations. There is accordingly a strong argument that the “antidistortion” or “monetary influence” strains of the anticorruption interest may have some continued applicability to disclosure.

Indeed, *Citizen United*’s insistence that government may require disclosure even of speech it could not proscribe outright implies some additional justifications for disclosure beyond those that are applicable in the context of other substantive campaign finance limitations. There is, of course, the informational interest described above, but there may also remain an anticorruption residuum beyond just quid pro quo corruption in the context of disclosure.

In a post-*Citizens United* article, Samuel Issacharoff tackles the question of

are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns.”).

141. *Citizens United v. FEC*, 558 U.S. 310, 359 (2010) (emphasis added). Justice Kennedy also referred to *Austin*’s antidistortion rationale as an “aberration.” *Id.* at 355.

142. *Id.* at 360 (stating that “independent expenditures do not lead to, or create the appearance of, quid pro quo corruption”).

143. *But cf.* Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1, 4 (2012) (“This narrowing of what counts as corruption for purposes of campaign finance law constrains not only the regulation of corporate spending but all types of campaign finance spending.”).

144. At least one circuit court has so concluded:

The second interest—preventing corruption and the appearance of corruption—does not apply to the case at hand because “electioneering communication” does not include activity by candidates or their committees. . . . [A]nd the Supreme Court has held that third-party expenditures “do not give rise to corruption or the appearance of corruption.”

Ctr. for Individual Freedom, Inc. v. Tennant, 706 F.3d 270, 282 (4th Cir. 2013) (quoting *Citizens United*, 558 U.S. at 314).

what exactly we mean by corruption in the context of campaign finance.¹⁴⁵ He agrees that the Court's cases have traditionally framed corruption as either traditional "quid pro quo" corruption or its appearance (the majority position), or distortion/monetary-influence corruption (generally embraced by the dissenters in the Court's campaign finance cases).¹⁴⁶ But Issacharoff proposes an alternative understanding of corruption, one that involves a temporal shift—away from campaigns and elections, and towards the governing activities in which those who emerge victorious from campaigns engage—and a shift in focus from inputs to policy outputs. He writes:

[T]he underlying problem is not so much what happens in the electoral arena but what incentives are offered to elected officials while in office. . . . [T]he inquiry on officeholding asks whether the electoral system leads the political class to offer private gain from public action to distinct, tightly organized constituencies, which in turn may be mobilized to keep compliant public officials in office.¹⁴⁷

Michael Kang argues for a similar reorientation in our conception of the anticorruption interest when he suggests that "[c]ampaign finance reform must shift to ex post measures to limit the influence of campaign money once it is already in the system, as opposed to ex ante regulation."¹⁴⁸ In making this argument, Kang relies heavily on the Court's decision in *Caperton v. A.T. Massey Coal Co.*,¹⁴⁹ decided the year before *Citizens United*.¹⁵⁰ The *Caperton* Court concluded that the Constitution required a West Virginia Supreme Court justice to recuse himself from a case involving a supporter who had made \$3 million in independent expenditures on the justice's election campaign.¹⁵¹ The *Citizens United* Court attempted to reconcile its holding with *Caperton* by explaining that "*Caperton*'s holding was limited to the rule that the judge must be recused, not that the litigant's political speech could be banned."¹⁵² But Kang reads the interaction of the two cases as signaling "that the Court actually may be sympathetic to concerns about campaign finance corruption, even from

145. See generally Issacharoff, *supra* note 140.

146. *Id.* at 122.

147. *Id.* at 126. Dennis Thompson makes essentially the opposite argument. He divides "corruption" into two categories: "governmental corruption," "in which an official provides a governmental benefit or service in return for a payment or favor from a private citizen," and "electoral corruption," which "refers to the integrity of the elections and the campaigns that lead up to them." Dennis F. Thompson, *Two Concepts of Corruption: Making Campaigns Safe for Democracy*, 73 GEO. WASH. L. REV. 1036, 1036–37 (2005). Thompson argues for renewed attention to electoral integrity, in part by shifting our attention from the impact of money and other sorts of political currencies on politicians to their impact on voters. See *id.* at 1037–38.

148. Kang, *supra* note 143, at 52–53.

149. 556 U.S. 868 (2009).

150. See Kang, *supra* note 143, at 52–53.

151. *Caperton*, 556 U.S. at 886–87.

152. *Citizens United v. FEC*, 558 U.S. 310, 360 (2010).

independent expenditures, but only when the responsive regulation is structured to cabin the effects of campaign money ex post, rather than restrict the entry of campaign money ex ante.”¹⁵³

Although neither Issacharoff nor Kang focuses on the interaction of their conceptions of corruption with disclosure,¹⁵⁴ robust disclosure must be a critical component of their reconceptualized anticorruption interests.¹⁵⁵ For disclosure is the only mechanism by which it might be possible to track, over time, whether campaign contributors are in fact able to exact from politicians private gains (rather than public goods) through the sorts of clientelist relationships that Issacharoff identifies¹⁵⁶—a variant on what Lawrence Lessig terms “dependence corruption.”¹⁵⁷ In fact, the conceptions of corruption Issacharoff and Kang identify as surviving *Citizens United* must be predicated on robust and effective disclosure mechanisms; those mechanisms, in one form or another, are the only way ex post accountability can be achieved.

3. The Enforcement Interest

The Court has also identified disclosure as a mechanism by which the government can police compliance with other campaign finance laws, although there is a degree of imprecision in the Court’s description of this interest. Richard Briffault argues that the Court has largely conflated *reporting* and *disclosure* in its identification of this interest.¹⁵⁸ Briffault points out that with good reporting, the FEC (or any similar body) could police compliance with other campaign finance laws. Accordingly, he contends, public scrutiny is not in fact necessary to advance this interest.¹⁵⁹

This argument is correct in theory but flawed in practice because of the way the FEC actually enforces the substantive laws within its jurisdiction—through public complaints (but not anonymous ones),¹⁶⁰ and by internally generated review only in cases where an initial review has revealed cause for further

153. Kang, *supra* note 143, at 57.

154. Kang has elsewhere suggested that the governmental interest in disclosure can more productively be conceived of as an interest in promoting “voter competence,” rather than in preventing corruption (at least in the context of direct democracy). See generally Michael S. Kang, *Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and “Disclosure Plus,”* 50 UCLA L. REV. 1141 (2003).

155. Although Issacharoff does not discuss disclosure as such in the piece cited above, in an earlier essay with Pam Karlan, he makes clear that he favors requiring “immediate internet disclosure of all campaign contributions to individuals, parties, or political action committees.” Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1736 (1999).

156. See Issacharoff, *supra* note 140, at 138–42.

157. LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* 15–20 (2011).

158. See Briffault, *Campaign Finance Disclosure*, *supra* note 18, at 280–81.

159. See *id.*

160. In the 1976 amendments to FECA, Congress “denied the Commission authority to investigate anonymous complaints.” Lauren Eber, Note, *Waiting for Watergate: The Long Road to FEC Reform*, 79 S. CAL. L. REV. 1155, 1167 (2006); BROOKS JACKSON, *BROKEN PROMISE: WHY THE FEDERAL ELECTION COMMISSION FAILED* 29–30 (1990).

investigation.¹⁶¹ Although the FEC was originally empowered to conduct random audits, Congress revoked that authority in 1979.¹⁶² The FEC's "goal" is now to conduct forty to fifty "audits for cause" each election cycle.¹⁶³ In the absence of FEC authority to conduct meaningful, in-depth audits to ensure compliance absent public complaint or other preexisting noncompliance, public dissemination of campaign finance information remains central to the enforcement of other campaign finance laws.

There is no question that as the Court invalidates substantive components of the campaign finance regime, the enforcement interest in disclosure is consequently weakened.¹⁶⁴ But as long as federal law continues to impose some limits on money in elections, at least on the contributions side,¹⁶⁵ the enforcement interest will remain a viable government purpose under current doctrine. Indeed, post-*Citizens United* lower courts have continued to credit the enforcement interest as a significant justification for disclosure requirements.¹⁶⁶

B. ASSESSING DISCLOSURE

1. Estimating the Effects of Disclosure

In *Citizens United*, the Court made broad and largely unsupported assumptions about the effects of disclosure on voters, reasoning that it "enable[d] the electorate to make informed decisions and give proper weight to different speakers and messages."¹⁶⁷ But whether disclosure does, in fact, aid voters' decision-making processes—or has other salutary effects on society more broadly—is an empirical question, and one that a number of studies have attempted to test. Taken together, those studies show that disclosure *can* assist voters in reaching informed decisions—but only under certain conditions and in certain forms.

Social scientists have long known that the electorate is not particularly well informed, and may even be considerably misinformed.¹⁶⁸ Indeed, "four decades

161. See GREG SCOTT & GARY MULLEN, FEC, THIRTY YEAR REPORT 12 (2005), <http://www.fec.gov/info/publications/30year.pdf>.

162. See JACKSON, *supra* note 160, at 30.

163. FEC, OFFICE OF COMPLIANCE OVERVIEW—ENFORCEMENT HEARING 7 (2009), available at <http://www.fec.gov/em/enfpro/complistsfy05-08.pdf>.

164. See, e.g., Davis v. FEC, 554 U.S. 724, 744 (2008) (invalidating BCRA's "millionaire's amendment" and further holding that the amendment's heightened disclosure requirements, which were "designed to implement the asymmetrical contribution limits," must similarly fall).

165. See, e.g., 2 U.S.C. § 441e (banning contributions by foreign nationals and foreign corporations); *id.* § 441b (banning corporate contributions).

166. See, e.g., SpeechNow.org v. FEC, 599 F.3d 686, 698 (D.C. Cir. 2010) (stating that "requiring disclosure . . . deters and helps expose violations of other campaign finance restrictions").

167. *Citizens United v. FEC*, 558 U.S. 310, 371 (2010). The Court reiterated these basic ideas in *McCutcheon v. FEC*, when it wrote that "[w]ith modern technology, disclosure now offers a particularly effective means of arming the voting public with information." 134 S. Ct. 1434, 1460 (2014).

168. See, e.g., James H. Kuklinski et al., *The Political Environment and Citizen Competence*, 45 AM. J. POL. SCI. 410, 410 (2001); Jeremy N. Sheff, *The Myth of the Level Playing Field: Knowledge, Affect, and Repetition in Public Debate*, 75 MO. L. REV. 143, 151 (2010).

of survey research show that citizens cannot recall basic political facts . . . , do not have a consistent understanding of ideological abstractions . . . , and fail to recall or recognize the names of their elected representatives."¹⁶⁹ For instance, a recent Pew Research survey found that just 40% of voters knew which political party controlled the House of Representatives, and only 39% could correctly identify the Chief Justice of the Supreme Court.¹⁷⁰

However, "there are specific conditions under which people who have limited information can make reasoned choices."¹⁷¹ Political psychologists have theorized that voters' decisions often hinge on cognitive shortcuts, or "heuristics," which act as proxies for underlying policy positions or preferences. Heuristics enable citizens to make decisions with limited information, and indeed to make decisions more efficiently, given competing demands for time and attention.¹⁷² For voters, one well-known heuristic that routinely aids candidate choice is political party—voters frequently select candidates based purely on their partisan affiliation without a deep understanding of a candidate's particular issue stances, voting history, or relevant political experience.¹⁷³ These dynamics also "justify voter decisions to attend to a candidate's . . . work experience, involvement in scandals (if any), sound bites (e.g., tough on crime, tax cutter), interest group ratings, endorsements (e.g., supported by labor), or personal appearance instead of learning a candidate's complete legislative voting history, policy

169. Arthur Lupia & Mathew D. McCubbins, *The Institutional Foundations of Political Competence: How Citizens Learn What They Need to Know*, in *ELEMENTS OF REASON: COGNITION, CHOICE, AND THE BOUNDS OF RATIONALITY* 47, 50 (Arthur Lupia, Mathew D. McCubbins & Samuel L. Popkin eds., 2000); accord Paul Freedman, Michael Franz & Kenneth Goldstein, *Campaign Advertising and Democratic Citizenship*, 48 AM J. POL. SCI. 723, 724 (2004) (summarizing a "half century" of research and concluding that "when it comes to politics and political information, most Americans are severely malnourished," that they "are inattentive to most things political; [they] care little, know less, and participate in politics only when absolutely necessary," and that their "political views are peripatetic, hastily assembled, unconstrained by ideology, and unencumbered by data").

170. PEW RESEARCH CTR., WHAT VOTERS KNOW ABOUT CAMPAIGN 2012, <http://www.people-press.org/files/2012/08/8-10-12-Knowledge-release.pdf>.

171. ARTHUR LUPIA & MATHEW MCCUBBINS, *THE DEMOCRATIC DILEMMA: CAN CITIZENS LEARN WHAT THEY NEED TO KNOW?* 5 (1998).

172. See Delia Baldassarri & Hans Schadee, *Voter Heuristics and Political Cognition in Italy: An Empirical Typology*, 25 ELECTORAL STUD. 448, 450 (2006) (noting that when confronted with complex, risky and uncertain situations, decision makers use heuristics to make satisfactory decisions); Elizabeth Garrett & Daniel A. Smith, *Veiled Political Actors and Campaign Disclosure Laws in Direct Democracy*, 4 ELECTION L.J. 295, 296 (2005) ("No voter needs to acquire all available information to competently make a reasoned decision. Instead, she can rely on particular pieces of information, connected non-accidentally to accurate conclusions about the consequences of her vote, and still vote competently."); Gerd Gigerenzer & Wolfgang Gaissmaier, *Heuristic Decision Making*, 62 ANN. REV. PSYCHOL. 451, 473 (2011) ("[H]euristics can often be more accurate than complex 'rational' strategies."); Arthur Lupia & John G. Matsusaka, *Direct Democracy: New Approaches to Old Questions*, 7 ANN. REV. POL. SCI. 463, 468 (2004) (reporting that human nature demands that decisions be based on heuristics because one cannot know detailed information or conduct rigorous research on every choice, even complex and important ones).

173. See generally ANGUS CAMPBELL ET AL., *THE AMERICAN VOTER* (1960); SAMUEL L. POPKIN, *THE REASONING VOTER: COMMUNICATION AND PERSUASION IN PRESIDENTIAL CAMPAIGNS* (1991); James H. Kuklinski & Paul J. Quirk, *Conceptual Foundations of Citizen Competence*, 23 POL. BEHAV. 285 (2001).

portfolio, or name.”¹⁷⁴ Although these simplified cues are imperfect, the use of heuristics may help close informational deficits for less informed voters, resulting in a mass electorate that, on average, approximates one where decision makers are well, or at least better, informed.¹⁷⁵

In a convincing empirical demonstration of the power of heuristics in voter decision making, Arthur Lupia compares the voting behavior of poorly informed and well-informed voters on an auto-insurance ballot initiative in California.¹⁷⁶ The ballot initiative pitted three interest groups—the insurance industry, trial lawyers, and consumer groups—against each other and spawned five distinct propositions regarding auto-insurance forms.¹⁷⁷ Despite small sample sizes, the results demonstrate that voters’ ability to identify the interest group backing a particular proposal enabled poorly informed voters to mirror the decision-making processes of their more well-informed peers.¹⁷⁸ Lupia concludes that these signals may effectively substitute for more fine-grained, “encyclopedic” forms of knowledge about policy proposals and should inform proposals to “educate” the public on matters of politics.¹⁷⁹

A recent experimental study by political scientist Michael Sances gives strong support to the hypothesis that disclosures about political money “serve[] as . . . useful signal[s] to voters regarding candidates’ ideology.”¹⁸⁰ Participants in Sances’s study were shown an edited political advertisement supporting a Senate candidate during the 2010 campaign cycle; the advertisement did not identify the candidate’s party and merely “emphasized the non-partisan issue of ‘job creation.’”¹⁸¹ Some participants were then shown a disclaimer indicating that a fictional organization, “Americans for Change,” was responsible for the

174. LUPIA & MCCUBBINS, *supra* note 171, at 30.

175. The theory that heuristics significantly aid the decision-making processes of voters has not been without critics. See Larry M. Bartels, *Uninformed Votes: Information Effects in Presidential Elections*, 40 AM. J. POL. SCI. 194, 217 (1996) (describing the difference in the vote choices of hypothetical “fully informed” voters and uninformed voters, and finding that, with cues and shortcuts, the uninformed “do significantly better than they would by chance, but significantly less well than they would with complete information”); Richard R. Lau & David P. Redlawsk, *Advantages and Disadvantages of Cognitive Heuristics in Political Decision Making*, 45 AM. J. POL. SCI. 951, 964 (2001) (demonstrating that sophisticated voters are the most likely to benefit from informational shortcuts—including interest group endorsements—while heavy heuristic use may actually disadvantage less informed voters); David M. Primo, *Information at the Margin: Campaign Finance Disclosure Laws, Ballot Issues, and Voter Knowledge*, 12 ELECTION L.J. 114, 126–27 (2013) (finding that campaign finance information embedded in mock newspaper articles has no statistically significant effect on voters’ ability to identify interest groups’ positions on a ballot issue at the margin, that is after controlling for other types of information available to voters).

176. See Arthur Lupia, *Shortcuts Versus Encyclopedias: Information and Voting Behavior in California Insurance Reform Elections*, 88 AM. POL. SCI. REV. 63 (1994).

177. See *id.* at 64.

178. See *id.* at 72.

179. *Id.*

180. Michael W. Sances, *Is Money in Politics Harming Trust in Government? Evidence from Two Survey Experiments*, 12 ELECTION L.J. 53, 54 (2013).

181. *Id.* at 56.

advertisement.¹⁸² Two groups were also shown text that purported to list the top contributors to “Americans for Change”: the “Labor Disclosure” group was shown a list of five labor unions, and the “Business Disclosure” group was shown a list of five corporations (chosen from the contributors to the American Crossroads PAC).¹⁸³ Participants, who had supplied their partisan identification at the outset of the study, were then asked how likely they were to vote for the candidate depicted in the advertisement. Compared to subjects who were not provided disclosures listing the top contributors to the fictional organization, Republican subjects were significantly less likely to register support for the candidate when shown the labor contributors; conversely, Democratic participants were less likely to indicate support for the candidate when informed that the top contributors were corporations.¹⁸⁴

Similarly, Sances finds in a follow-up study that “simply providing voters with information about the ideological background of campaign funders has a marked impact on their ability to place the candidate” along the ideological spectrum.¹⁸⁵ This result holds for all voters; in other words, it is not just partisan voters who benefit from enhanced disclosures vis-à-vis the ideological background of contributors. Taken together, Sances’s findings lend powerful support to the idea that disclosure aids voters by enabling them to identify candidate ideology, and in turn, to select candidates they believe best reflect their own views.

In addition to the above, other research suggests that disclosure laws may confer even broader public benefits beyond improving voter decision making. For example, a 2006 study tests whether state-level campaign finance laws have an effect on levels of trust in government and “efficacy,” which the authors define as “the belief that one can have an influence on the political process.”¹⁸⁶ The authors find that the existence of state campaign finance disclosure laws is positively, and statistically significantly, associated with affirmative answers to the questions “Do people have a say [in government]?” and “Do officials care [what people like them think]?”¹⁸⁷

In sum, past social scientific research demonstrates that disclosure can serve as a useful heuristic in the identification of a candidate’s ideological leanings and ultimately, in voter decision making, as the Supreme Court envisions.¹⁸⁸

182. *Id.* (internal quotation marks omitted).

183. *Id.* at 56–57.

184. *See id.* at 57–59.

185. *Id.* at 62.

186. David M. Primo & Jeffrey Milyo, *Campaign Finance Laws and Political Efficacy: Evidence from the States*, 5 ELECTION L.J. 23, 26 (2006).

187. *Id.* at 33–34 (internal quotation marks omitted).

188. To be sure, disclosure has many detractors. And some empirical work, primarily in the consumer and patient contexts, suggests that disclosure not only fails to aid decision making, but in many cases actually results in worse decisions. A recent piece in the *Journal of Public Policy and Marketing*, for example, examines a number of experimental studies and finds that in the vast majority of those studies, “[m]andated messages increased confusion for consumers and were ineffective or

Moreover, it may have still other positive effects on the public's trust in government and sense of efficacy. But not all disclosure is created equal. Rather, scholars have identified a number of conditions under which disclosure is most efficacious for information users—in this case, the electorate—and when it may even serve to alter the behavior of disclosers. In the next section, we draw on studies of disclosure more broadly—including research about disclosure in other areas of concern—to distill lessons for designing the most effective disclosure regimes.

2. Theorizing Effective Disclosure Regimes

In addition to the social-scientific studies of campaign finance disclosure cited above, others have addressed the question of disclosure more broadly and have formulated theoretical frameworks for predicting the efficacy of disparate disclosure regimes. One such framework can be found in the work of Michael Malbin and Thomas Gais, who identify the elements of a successful disclosure regime in the campaign finance context. First, they argue, candidates and other entities must accurately report on their activities; second, those reports must actually describe the “activities and relationships of importance to voters”; third, the reports must be both usable and accessible; fourth, interested and knowledgeable intermediaries must synthesize the information and make it available to voters; and fifth, voters must be “able and willing to use the information as a basis for making an election decision.”¹⁸⁹ As the authors explain, disclosure can only achieve its goals if *each* of the foregoing conditions

harmful.” Kesten C. Green & J. Scott Armstrong, *Evidence on the Effects of Mandatory Disclaimers in Advertising*, 31 J. PUB. POL’Y & MARKETING 293, 293 (2012). It should be noted, however, that the authors reviewed a heterogeneous set of studies and neglected to consider the statistical significance of the underlying studies or of their meta-analysis.

Another recent piece surveys the existing empirical literature on disclosure in the consumer and patient context, and concludes that mandated disclosure “chronically fails to accomplish its purpose.” Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 651 (2011). The authors cite numerous studies highlighting the shortcomings of various disclosure schemes. Truth-in-lending legislation, for example, requires lenders to disclose basic loan features, but borrowers end up “overloaded by the number of disclosures, and do not understand the basic disclosed features of the loan.” *Id.* at 666. In the sphere of informed consent, the authors describe research showing that even when doctors provide patients with all of the information “they would need to make educated decisions,” patients “neither understand nor remember it.” *Id.* at 668.

Critically, however, none of the studies reviewed by Ben-Shahar and Schneider (or Green and Armstrong) examines disclosure in the context of campaign finance information. And there are significant differences between the settings discussed above and the campaign finance context. For one, voters in the context of campaigns are often flooded with information in the form of campaign and independent advertising but lack credible metrics for assessing that information. By contrast, consumers (*vis-à-vis* truth-in-lending disclosure) and patients (*vis-à-vis* informed consent) frequently lack access to information *with the exception* of the disclosed material. Given its technical content, this type of disclosed information frequently overwhelms and confuses more than it empowers and illuminates. Indeed, much of the “failed” disclosure cited by the authors refers to detailed, technical information given to one party to a complex transaction.

189. MICHAEL J. MALBIN & THOMAS L. GAIS, *THE DAY AFTER REFORM: SOBERING CAMPAIGN FINANCE LESSONS FROM THE AMERICAN STATES* 36 (1998).

is satisfied.¹⁹⁰

Echoing the insights of Malbin and Gais, the book *Full Disclosure* examines and evaluates eighteen disclosure regimes—ranging from hygiene grades for restaurants to mortgage-lending disclosure—to discern when disclosure is most effective in both assisting information users and altering the behavior of disclosers. It concludes that disclosure policies succeed “when they are *user-centered*,” stating in particular:

Successful policies focus first on the needs and interests of information users, as well as their abilities to comprehend the information provided by the system. Such policies also focus on the needs, interests, and capacities of disclosing organizations. They seek to embed new facts in the decision-making routines of information users and to embed user responses into the decision making of disclosers. Successful transparency policies thus place the individuals and groups who will use information at center stage.¹⁹¹

The paradigmatic example of such disclosure is restaurant-hygiene disclosure, which takes the form of letter grades (“A,” “B,” etc.) posted in restaurant windows. As the authors explain, such grades “have become highly embedded in customers’ and restaurant managers’ existing decision processes. A restaurant’s grade is available *when* users need it . . . *where* they need it . . . and in a *format* that makes complex information quickly comprehensible.”¹⁹² And in addition to changing the decision calculus of diners, restaurant grades have also become embedded in *disclosers’* decision-making processes. Restaurant managers “have both market and regulatory incentives to discern customers’ perceptions of food safety,” and those incentives have resulted, in one locality examined by the authors, in a “measurable increase[] in hygiene quality and a consequent significant drop in hospitalizations from food-related illnesses.”¹⁹³

To take another example, corporate financial disclosure—a disclosure regime that mandates publicly traded companies report financial information to the SEC¹⁹⁴—has become highly embedded in the decision-making processes of corporate managers through its effects, or anticipated effects, on the reactions of investors. As “[i]nstitutional and individual investors use key indicators from

190. *See id.*

191. FUNG, GRAHAM & WEIL, *supra* note 13, at 11.

192. *Id.* at 82–83. As the authors elaborate:

Transparency systems alter decisions only when they provide pertinent information that enables people to substantially improve their choices without imposing significant additional costs. That is one reason diners are more likely to use the window-front grades . . . than Internet databases with similar information: the added cost of obtaining new information (in time, energy, and planning) is very low.

Id. at 55.

193. *Id.* at 83.

194. *See id.* at 82; *see also* 15 U.S.C. § 781 (setting forth registration requirements); *id.* § 78m (disclosure requirements).

quarterly and annual reports to inform stock purchases and sales. . . . [c]ompany managers, in turn, track investor responses to their financial disclosures as a routine practice and respond to perceived investor concerns."¹⁹⁵ Thus, effective disclosure regimes work by offering well-timed, actionable, and easily comprehensible information—or information that can be rendered comprehensible by skilled intermediaries¹⁹⁶—that becomes embedded in both users' and disclosers' decision-making processes.

In this formulation, we suggest that one further criterion is implicit—that disclosure information be *credible*. In this context, Lupia and McCubbins postulate that political institutions may play a crucial role in signaling the credibility of disclosure information. In a political environment saturated with conflicting messages of often-dubious quality, political institutions (like the FEC) may aid voters by helping them assess speakers and their messages. Political institutions may "clarify a speaker's trustworthiness to citizens; provide effective substitutes for a speaker's character; allow people to make more effective decisions about whom to believe; allow citizens to learn what they need to know; and allow people who lack information to make reasoned choices."¹⁹⁷ Disclosure, in an idealized form, conveys credible signals about candidates and members of Congress. It exposes the relationships between donors and recipients, and it creates formal (and informal) sanctions for noncompliance. In so doing, mandatory disclosure can help ensure that the content of disclosure information is credible—in other words, a well-functioning disclosure regime provides reliable, accurate, and trustworthy information to the electorate. In this way, the informational interest and the enforcement interest in disclosure may, in fact, be inextricably linked.

To summarize, theories of disclosure suggest that effective disclosure regimes must offer information users easily accessible, easily comprehensible, actionable, and credible information. But despite these documented ingredients of efficacy, the next Part highlights several significant limitations of the current disclosure regime. These limitations pose a serious obstacle to the ability of both voters and intermediaries to translate potentially valuable campaign finance disclosure information into credible signals, or shortcuts, to guide voter choice. Accordingly, we suggest that the recommendations detailed in this Part should be considered in the context of campaign finance disclosure, given its salience to current jurisprudence and reform debates.

195. FUNG, GRAHAM & WEIL, *supra* note 13, at 82.

196. For certain types of information, comprehensibility will nearly always require reliance on intermediaries. For example, because the data contained in corporate financial disclosures may be complex and require highly specialized vocabulary, "users often rely on intermediaries . . . to aid in embedding information in their investment choices." *Id.* at 65.

197. Lupia & McCubbins, *supra* note 169, at 49.

III. THE REALITY OF DISCLOSURE

A. THE ORGANIZATIONAL CONTEXT OF DISCLOSURE

Before turning to our original analysis of the LECD, we briefly describe the organizational context for disclosure in the federal system¹⁹⁸—namely, the structure and authority granted to the FEC, the sole organization charged with enforcing the FECA and its amendments. Since its creation, the FEC has been subject to relentless criticism,¹⁹⁹ with agency critics often citing structural deficiencies as the primary source of the FEC's impotence. Critics have charged, in effect, that the very form of the Commission prevents its public servants from carrying out their duties in a rapidly changing campaign finance environment. Below we detail a few of the most common criticisms that have been leveled at the FEC.

Unlike other regulatory bodies, such as the SEC, the FEC is headed by an even number of commissioners.²⁰⁰ Under the FECA, the FEC may have no more than three Commissioners from a single political party, which in practice has generally meant exactly three Democrats and three Republicans.²⁰¹ This bipartisan structure has frequently led to gridlock in the enforcement and rulemaking processes, especially more recently as deep ideological differences have riven the two political parties.²⁰²

Congressional leaders have also often played a large de facto role in the selection of the FEC's members.²⁰³ Historically, the Commissioners have been strong partisans with careers in politics, and often with ties to the very organizations—like PACs—they are charged with monitoring.²⁰⁴ The confirmation of FEC appointees has become a politically fraught process, with nominees often languishing in review for many months. In late spring 2013, for instance, the Commission was short one Commissioner after the resignation of Cynthia

198. For a discussion of campaign finance disclosure in the states, see MALBIN & GAIS, *supra* note 189; Wilcox, *supra* note 134.

199. See, e.g., Todd Lochner & Bruce E. Cain, *Equity and Efficacy in the Enforcement of Campaign Finance Laws*, 77 TEX. L. REV. 1891, 1893 (1999) (describing the broad consensus that "the FEC at present does not adequately enforce the law, does not adequately deter potential malfasants, and requires fundamental restructuring").

200. See 2 U.S.C. § 437c(a)(1) (2012).

201. See Lauren Eber, Note, *Waiting for Watergate: The Long Road to FEC Reform*, 79 S. CAL. L. REV. 1155, 1165 (2006).

202. See Dave Levinthal, *How Washington Starves Its Election Watchdog*, CENTER FOR PUB. INTEGRITY (Dec. 17, 2013, 5:40 AM), <http://www.publicintegrity.org/2013/12/17/13996/how-washington-starves-its-election-watchdog>. See generally NOLAN McCARTY, KEITH T. POOLE & HOWARD ROSENTHAL, *POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES* (2008 ed. 2006).

203. See JACKSON, *supra* note 160, at 29.

204. See *id.* at 29–33.

Bauerly, and the other five standing Commissioners were each serving beyond the official ends of their terms.²⁰⁵

Although FEC statistics show that only a minority of cases are dismissed without substantive action due to a deadlock among the Commissioners, the cases that are dismissed tend to be “difficult, controversial issues affecting party entities or other players in the political process”—in other words, the most pressing campaign finance matters of the day.²⁰⁶ And a recent report by Public Citizen showed a significant increase in the number of split votes on enforcing existing regulations and issuing advisory opinions, while the number of enforcement actions has rapidly declined since 2008.²⁰⁷ These developments, taken together, have rendered the Commission increasingly ineffective in responding to changes in the way American elections are financed.²⁰⁸

As we describe below, the FEC also currently lacks the authority to undertake random audits of committee disclosure filings to ensure compliance with existing regulations. Instead, the FEC must rely on investigations that are initiated “for cause.”²⁰⁹ In the case of an alleged campaign finance violation, the FEC may initiate a lengthy, multistage civil-enforcement process beginning with a “matter under review,” which prompts an investigation.²¹⁰ Each of the four stages of this process requires four affirmative votes from the Commissioners to proceed to the next phase.²¹¹ At the end of the often time-consuming process (and assuming a majority of the Commissioners has voted in the affirmative), the FEC may either persuade a respondent to enter into a conciliation agreement or file a civil suit on a *de novo* basis.²¹²

The number of stages in the civil-enforcement process—and the requirement of four affirmative votes at each—has significantly hindered the FEC’s ability to pursue violations of the law in a timely manner. The average time for a case to close with substantive action taken exceeded 600 days for cases opened in 1995,

205. See Jonathan D. Salant, *Will the Federal Election Commission Ever Work Again?*, BLOOMBERG BUSINESSWEEK (May 2, 2013), <http://www.businessweek.com/articles/2013-05-02/will-the-federal-election-commission-ever-work-again>.

206. PROJECT FEC, NO BARK, NO BITE, NO POINT: THE CASE FOR CLOSING THE FEDERAL ELECTION COMMISSION AND ESTABLISHING A NEW SYSTEM FOR ENFORCING THE NATION’S CAMPAIGN FINANCE LAWS 56 (2002), (internal quotation marks omitted), available at <http://www.democracy21.org/uploads/%7BB4BE5C24-65EA-4910-974C-759644EC0901%7D.pdf>.

207. See Press Release, Public Citizen, *Roiled in Partisan Deadlock, Federal Election Commission Is Failing* (2012), available at <http://www.citizen.org/documents/fec-deadlock-press-statement.pdf>.

208. See *id.*; Christopher Rowland, *Deadlock by Design Hobbles Election Agency*, BOS. GLOBE (July 7, 2013), <http://www.bostonglobe.com/news/nation/2013/07/06/america-campaign-finance-watchdog-rendered-nearly-toothless-its-own-appointed-commissioners/44zZoJwnzEHyzxTByNL2QP/story.html>.

209. See SCOTT & MULLEN, *supra* note 161, at 12–13; Lochner & Cain, *supra* note 199, at 1929.

210. Thomas E. Mann, *The FEC: Administering and Enforcing Campaign Finance Law*, in THE NEW CAMPAIGN FINANCE SOURCEBOOK 232, 236 (Anthony Corrado et al. eds., 2005); Trevor Potter, *Campaign Finance Disclosure Laws*, in THE NEW CAMPAIGN FINANCE SOURCEBOOK, *supra*, at 123, 134.

211. See Mann, *supra* note 210.

212. See Eber, *supra* note 201, at 1170; Kenneth A. Gross, *The Enforcement of Campaign Finance Rules: A System in Search of Reform*, 9 YALE L. & POL’Y REV. 279, 284–85 (1991).

1997, and 2000, and averaged well over a year for 1996, 1998, and 1999.²¹³ Between fiscal years 1995 and 2000, the FEC dismissed 54% of cases without taking substantive action.²¹⁴ The median penalty was less than \$5,000 between 1985 and 1993, and near \$10,000 between 1994 and 2001.²¹⁵ Given that fines are normally not levied in the same election cycle as an alleged violation and the relatively low amount of the average fine, some have speculated that the FEC's main enforcement protocol may simply be viewed as a "cost of doing business" by candidates and donors.²¹⁶

B. THE FEC'S DISCLOSURE DATA: FLAWS AND LIMITATIONS

Despite problems with the rulemaking and enforcement procedures at the FEC, the current disclosure regime has generally been touted as a success, and indeed, an antidote to the potentially corrupting influence of political money.²¹⁷ Yet a close examination of the current reality of disclosure both highlights the limitations of the disclosure regime and exposes areas where the FEC's authority might be legitimately modified or expanded to better achieve the goals of disclosure. In the research detailed below, one of the authors has capitalized on the availability of disclosure data on individual contributions to map the contours of elite political alignments over time and to identify the nation's largest and most consistent donors.²¹⁸ One of the most challenging aspects of this work has been the quality of the information contained in the FEC records, despite the seeming surfeit of data available to the public. Below we describe a few of the issues encountered in analyzing the FEC data.

Each year the FEC receives hundreds of thousands—and in recent elections, millions—of pages of disclosure documents from candidates and political committees itemizing contributions made by individual donors.²¹⁹ Despite the volume of filings—and the sustained growth in the absolute number of itemized contributions in recent election cycles—candidates and political committees are currently not required to use a standardized disclosure form to collect basic

213. FEC, ENFORCEMENT PROFILE 8 (2005), available at <http://www.fec.gov/em/enfpro/enfpro2005.pdf>.

214. SCOTT & MULLEN, *supra* note 161, at 14.

215. *Id.*

216. PROJECT FEC, *supra* note 206, at 6 (internal quotation marks omitted).

217. *See id.* at 7; *see also* *McCutcheon v. FEC*, 134 S. Ct. 1434, 1460 (2014) ("[D]isclosure now offers a particularly effective means of arming the voting public with information. . . . Reports and databases are available on the FEC's Web site almost immediately after they are filed. . . . [M]assive quantities of information can be accessed at the click of a mouse . . .").

218. The donations of unique contributors were linked using a probabilistic record-matching algorithm. In contrast to deterministic matching procedures, probabilistic record linkage quantifies the likelihood that any pair of observations represents a true match by assigning weights to a number of independent match identifiers (here contributor surname, first name, middle initial, occupation, ZIP Code, and gender). The weights take into account the identifying power and the degree of error in each match variable. As we note *infra*, we err on the side of caution in all of the estimates presented below by excluding all false positives. Thus, the estimates we describe in this section are conservative by design.

219. *See* SCOTT & MULLEN, *supra* note 161, at 11.

information on individual donors. Instead, the FEC's candidate guide advises candidates to obtain the name, mailing address, occupation, and employer for all individual contributors whose donations aggregate to over \$200 in an election cycle.²²⁰ In the event that contributors do not disclose this information with their initial donation, campaigns are asked to send a follow-up solicitation within thirty days. After the follow-up solicitation, candidate campaigns may indicate in their disclosure reports to the FEC that they made a "best efforts" attempt.²²¹ Not surprisingly then, the full LECD includes nearly 20,000 instances of "Best Effort" or "Info Requested" in place of contributor information.²²²

Even when disclosure fields are not blank, contributor compliance with disclosure requirements is often minimal. Broadly, four reporting problems pervade the FEC records—selective compliance, valid nonresponse, low response consistency, and dissimulation.²²³ *Selective compliance* refers to the many instances of incomplete donor information. For example, donors typically

220. See FEC, CONGRESSIONAL CANDIDATES AND COMMITTEES 73 (2011), available at <http://www.fec.gov/pdf/candgui.pdf>.

221. *Id.* at 76.

222. Since its inception, FECA has prescribed particular identifying information to be collected from certain contributors. 2 U.S.C. § 431(13)(A) (2012) (defining "identification," for individual contributors, as including "the name, the mailing address, and the occupation of such individual, as well as the name of his or her employer"); 2 U.S.C. § 434 (2012) (describing reporting requirements); 11 CFR § 100.12 (2011) (elaborating on definition of "identification"). But an early amendment to the FECA added a proviso that "best efforts" to gather such information were sufficient. Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475, 480. And an FEC regulation first enacted in 1981 elaborates on this statutory "best efforts" standard, providing, at least in the case of PACs, that "[w]hen the treasurer of a political committee shows that best efforts have been used to obtain, maintain and submit the information required by the Act for the political committee, any report of such committee shall be considered in compliance with the Act." 11 C.F.R. § 104.7(a) (2012). The regulation goes on to explain that "[f]or each contribution . . . which lacks required contributor information, such as the contributor's full name, mailing address, occupation or name of employer," compliance with the "best efforts" standard merely requires the treasurer to make "at least one effort after the receipt of the contribution to obtain the missing information" and "[s]uch effort shall consist of either a written request sent to the contributor or an oral request to the contributor documented in writing." *Id.* § 104.7(a)(2); accord *Republican Nat'l Comm. v. FEC*, 76 F.3d 400, 406 (D.C. Cir. 1996) (upholding the FEC's requirement that political committees make one follow-up attempt to gather missing contributor information, but invalidating a separate regulatory provision requiring committees to include in such follow-up requests a statement indicating that federal law *required* them to report contributor-identifying information).

Current FEC enforcement guidelines, however, suggest that compliance with the "best efforts" standard will not insulate committees from scrutiny. As an enforcement manual explains, "if a committee that established best efforts are being made still has a large percentage of the individual contributions lacking the adequate contributor information at the end of the election cycle," that committee will be assessed "audit points." FEC, REPORTS ANALYSIS DIVISION REVIEW AND REFERRAL PROCEDURES FOR THE 2011-2012 ELECTION CYCLE 83 (2011), available at http://www.fec.gov/pdf/RAD_Procedures.pdf. A certain threshold of audit points may result in referral for an audit. See *id.* at 16.

223. Because donations were linked using a probabilistic algorithm, pairwise combinations of contributions did not need to have identical values on all of the match variables to be brought together into a group. Instead, contributions had to agree on a subset of variables with sufficiently high match weights.

disclose a first and last name, but, as we detail below, often neglect or decline to include their employer and occupation. *Valid nonresponse* refers to noninformative disclosure information. For example, many contributors are listed as “self-employed,” which counts as a valid response for the purposes of disclosure requirements, but conveys little information about the interests a donor may represent. *Low response consistency* refers to within-contributor variation in responses over time unrelated to underlying changes in a donor’s characteristics or status. Lastly, *dissimulation* refers to the practice of purposeful misrepresentation of a contributor’s identity or interests. Figure 1 presents individual disclosure filings for a number of unique contributors, with each contributor grouping illustrating one or more of the types of noncompliance defined above. Each row in the table represents one discrete, itemized contribution that was made to a candidate or political party.

All individual contributors to federal elections are required to disclose their full names. However, the FEC does not mandate—and reporting candidates and committees, in turn, do not request—that contributors provide their full *legal* names. Not surprisingly, contributors are apt to provide nicknames, initials, and other variations of their full legal names on disclosure forms. The first contributor in Figure 1, James, contributed more than forty times in twenty-six years.²²⁴ Over these twenty-six years, James is variously listed as James, Jay, and “J.” Similarly, Contributor 2 in Figure 1 sometimes lists his full name, Raymond, and at other times appears under a nickname, Randy.

The next required piece of donor information, occupation, could aid in the identification of socially significant patterns of political influence across industries, or help voters discern which industries have “endorsed” a candidate. For those who do report an occupation, the disclosure filings lack a standardized reporting system for occupation, resulting in a hodgepodge of self-reported occupations (for example, school teacher), positions (for example, chief executive officer), sectors (for example, finance), and specific employers (for example, Goldman Sachs). The honor system governing disclosure also produces a high degree of valid nonresponses. Although donors disclose an occupation, many of the most frequent occupations listed in the FEC files are noninformative. “Retired,” “lawyer,” and “homemaker” dominate the files, as well as contributors who are “self-employed” or “not employed.” Figure 2 plots the fifteen most frequent “occupations” found in the LECD, which include “student” and “self-employed writer.”

A degree of creativity also informs the occupations that donors do report. To illustrate, the third contributor in Figure 1 lists his employer as “Dunder Mifflin”—the fictional office supply company featured on the popular television

224. Last names of contributors, names of specific employers, and ZIP codes have been removed to protect the identities of donors. Our objective is not to highlight specific individuals, but to expose a widespread practice through several illustrative examples.

Figure 1.

Disclosure Entries including Year of Contribution, First Name, Occupation, and State for Five Unique Individual Contributors in the LECD

#	Year	First	Occupation	State
1	1980	James	Law Firm	WA
	1984	J	Lawyer	WA
	1994	James	Law Firm	WA
	2000	Jay	Lawyer	WA
2	2002	Randy	Self Employed Oil Gas	OK
	2004	Raymond	Go Petroleum	OK
	2006	Randy	Self Employed Oil Gas	OK
3	2008	Barry	Dunder Mifflin Assistant to Region A	IL
4	1980	Charles	Home	TX
	1980	Charles	Investments	TX
	1980	Charles	Investor	TX
	1980	Charles	Oil Gas Investments	TX
	1986	Charles	Self	TX
	1988	Charles	Businessman	KY
	1988	Charles	Geologist	TX
	1988	Charles	Horse Breeder	KY
	1990	Charles	Breeding Racing	KY
	1994	Charles	Horseman	KY
	1996	Charles	Investment Relations	KY
	1996	Charles	Self	KY
	1996	Charles	Tbred Breeding Racg	KY
	1998	Charles	Farmer	KY
	1998	Charles	Horse Owner Breeder	KY
	2000	Charles	Race Horse Farm	KY
	2004	Charles	Self Employed Owner Farm	KY
	2004	Charles	Company Executive	KY
	2008	Charles	Self Employed Thoroughbreds	KY
5	2002	Philip	Vice President	VA
	2002	Philip	Vice President	VA
	2002	Philip	Executive	VA
	2002	Philip	Vice President	FL
	2002	Philip	Vice President	VA
	2006	Philip	N A Retired	FL
	2006	Philip	None Retired	FL
	2006	Philip	Apollo Technologies	VA
	2006	Philip	N A Retired	FL
	2006	Philip	Retired	VA

Figure 2.
Frequencies (in millions) of the Fifteen Most Common Self-Reported Occupations in the LECD

show *The Office*.²²⁵ The fourth contributor in Figure 1, Charles, has donated for nearly thirty years and has made more than a hundred distinct contributions. Charles variously appears as “businessman,” “horse breeder,” “farmer,” “oil and gas investor,” “investor,” and “self-employed,” among others. Charles is, in a way, all of these things. The grandson of an oil tycoon, Charles is also a co-owner and board member of numerous energy and investment companies, as well as the owner of a thoroughbred horse farm. Later in his career, Charles served as a high-ranking State Department official, but during that time he continued to report his occupation as a racehorse-farm owner (his modal self-reported occupation). That Charles selectively identifies as a “farmer” and a “horseman” impedes identification of Charles as a distinct individual donor, but it may also suggest a degree of selective reporting—or possibly disingenuousness—among contributors. As we note later, many of these discrepancies—whether intentional or not—could be remedied by improving the FEC’s system for soliciting donor information.

The current disclosure regime also requires contributors to report a mailing address along with an itemized contribution. Again, “mailing address” means different things to different contributors. Contributors may report a home address or a primary residence, but they also routinely provide mailing addresses for businesses or employers. For some, mailing address may even be reported at a second or vacation house. Charles, described above, appears in two cities in two different states within the 1988 election cycle—one corresponding

225. This contribution predates the launch of the Dunder Mifflin copy paper now sold at the office supply store Staples. See Suzanne Vranica, *Great Scott! Dunder Mifflin Morphs into Real-Life Brand of Copy Paper*, WALL ST. J. (Nov. 28, 2011), <http://online.wsj.com/news/articles/SB10001424052970203764804577060463594279098>.

to a residential address and the other to a horse farm in another state. Contributor 5, Philip, appears at two different residential addresses within an election cycle—one near the headquarters of his most recently listed employer and one in an exclusive residential neighborhood in North Palm Beach, Florida.

A more complex issue vis-à-vis the FEC's disclosure records stems from the structure of the disclosure data. A common misconception is that the FEC aggregates data on individual contributors. In fact, the FEC merely catalogs contributions. In other words, there is no mechanism for identifying unique donors or to whom those donors have contributed, and the task is made more difficult given the forms of nonresponsiveness and evasion detailed above. This has at least two implications. For one, the lack of a unique donor number prevents identification of the biggest or most consistent donors—perhaps the donors of most concern to voters. The apparent surfeit of disclosure thus gives the illusion of transparency, but functions instead to obscure the most pertinent financial constituencies in a sea of data.²²⁶ As the system exists now, "the more we look, the less we understand."²²⁷

Second, the lack of a formal mechanism for aggregating contributions originating from unique individuals has had profound implications for the enforcement of the federal aggregate-contribution limits. Although the aggregate limits were invalidated by the Court in *McCutcheon v. FEC*,²²⁸ the FEC's enforcement track record with respect to those limits continues to offer an important lesson on the shortcomings of the current disclosure system.

Because the FEC does not itemize contributors, the mechanism by which violations of the aggregate-contribution limits might have been identified and sanctioned has always been unclear. In the research described above, one of the authors has linked all contributions beginning in 1980 by contributor. In so doing, she found that exceeding the legal contribution limits was not uncommon and indeed was fairly prevalent among contributors who made donations at or near the legal aggregate maximum. Figure 3 gives the frequency distribution of the estimated number of donors who exceeded the maximum aggregate-contribution limit between 1980 and 2008.²²⁹ The figure indicates that over the twenty-eight years from 1980 through 2008, approximately 1,700 individual contributors violated federal maximums. The high point for such violations of existing law occurred in the contentious 2000 presidential election, when 310 individual contributors made donations exceeding the \$50,000 ceiling in effect for that cycle.²³⁰

226. See Lloyd Hitoshi Mayer, *Disclosures About Disclosure*, 44 IND. L. REV. 255, 265–66 (2010).

227. LESSIG, *supra* note 157, at 257.

228. 134 S. Ct. 1434, 1442 (2014).

229. We exclude all potential false positives before calculating the number of total contributors who violated the limit in each election cycle. Thus, the estimates presented here are conservative by design and represent lower-bound estimates of the actual number of over-limit contributors.

230. For alternative estimates, see also Adam Bonica & Jenny Shen, *Breaching the Biennial Limit: Why the FEC Has Failed to Enforce Aggregate Hard-Money Limits and How Record Linkage Tech-*

Figure 3.

Number of Individual Contributors that Exceeded the Aggregate Election Year Maximum Limit, 1980–2008

The statistics in Figure 3 are especially striking if we consider the small number of donors at or near the legal maximum in the LECD. For instance, during the 2007–2008 election cycle, the LECD shows that 263 individual contributors donated an amount exceeding 90% of the \$108,200 aggregate limit (that is, these contributors donated an amount above \$97,380). Of these 263, Figure 3 shows that 137 violated the aggregate limit. Thus, using this smaller denominator from the LECD, 48% of donors who contributed above \$97,380 exceeded the federal aggregate limit in 2008. As a percentage of donors above 90% of the election cycle aggregate limit, we calculated that contributors who have violated the legal aggregate limit ranged from 48% in 2008 to 68% in 1984.

Each of these deficiencies in the existing regime urges additional reflection on what, in theory, we might hope to gain from disclosure vis-à-vis each of the potential audiences of disclosure. In the section below, we enumerate the three most important audiences for such data—voters, informational intermediaries, and regulators—and describe how the current reality of disclosure falls far short for each constituency.

nology Can Help, 49 WILLAMETTE L. REV. 563, 578 (2013). Bonica and Shen utilize “a customized linkage algorithm written in R and MySQL designed specifically for linking contributions records across state and federal reporting agencies.” *Id.* at 576. Details of the linkage algorithm have not, as of this writing, been made publicly available. Their estimates cover the 2003–2004 through 2011–2012 election cycles. For the three election cycles that overlap with our analysis (2003–2004, 2005–2006, 2007–2008), the estimates presented here are more conservative. This discrepancy likely reflects both the differences in linkage procedures and the ultimate treatment of potential false positives. While we opt to exclude groups of contributor observations that may have been erroneously joined into a group, Bonica and Shen include these observations and note that “two individuals with similar personal information may be erroneously grouped together” in their counts. *Id.* at 579.

C. AUDIENCES FOR DISCLOSURE

1. Voters

The most important audience for disclosure is, of course, voters. As the empirical literature shows, disclosure can assist voters in reaching informed decisions, but only under certain conditions. The current conditions of the FEC disclosure regime, however, are far from optimal for this crucial information constituency.

The FEC posts contribution records on its website as they become available from candidate and political committees. Visitors to the website may search for disclosure filings—for instance, a contribution made by an individual to a presidential candidate—through the FEC’s campaign finance data-disclosure portal.²³¹ Unfortunately, the large majority of usable disclosure information—including the details of aggregate donations from particular donor constituencies—is not readily accessible on the website, nor is converting the raw FEC files to a usable format an easy task. To gain an understanding of such patterns, voters must rely on so-called informational intermediaries, detailed below.

The bulk of existing disclosure data, including information about the sources from which a candidate has received money over time, is also available for download on the FEC website in the form of “detailed files” listing each contribution a particular candidate or committee received in an election cycle.²³² The files are formatted as raw text files—to the untrained eye, they appear as long rows of jumbled letters and numbers.²³³ Using the files involves downloading thousands or possibly millions of records, having access to a software program capable of reading a large amount of data (generally beyond the capacity of Microsoft Excel), and then creating a corresponding “data dictionary” for the disclosure information to be properly formatted.²³⁴ After this tedious process, the user must then analyze the data—a task that potentially requires not only technological know-how, but also some understanding of statistics. As a result, most voters are dependent on informational intermediaries to clean, code, and analyze the FEC data. Voters thus have no unmediated understanding of the disclosure data. Instead, what voters learn of patterns of influence in the campaign finance system is filtered through the interpretive lens of informational intermediaries.

231. See *Campaign Finance Reports and Data*, FED. ELECTION COMMISSION, <http://www.fec.gov/disclosure.shtml> (last visited Feb. 14, 2014).

232. See *Detailed Files About Candidates, Parties, and Other Committees*, FED. ELECTION COMMISSION, <http://www.fec.gov/finance/disclosure/ftpdet.shtml> (last visited Feb. 3, 2014).

233. For an example of a downloadable data set, see *Contributions by Individuals 2000*, FED. ELECTION COMMISSION, <ftp://ftp.fec.gov/FEC/2000/indiv00.zip> (last visited Feb. 16, 2014).

234. See, e.g., *Data Dictionary—Contributions by Individuals*, FED. ELECTION COMMISSION, <http://www.fec.gov/finance/disclosure/metadata/DataDictionaryContributionsbyIndividuals.shtml> (last visited Feb. 16, 2014) (describing different variables in one type of data dictionary). These variable designations would then need to be manually entered before analyzing the data.

As this brief description establishes, the disclosure data the FEC provides to voters directly do not, as presently constituted, meaningfully facilitate voters' use of FEC data to, as the Supreme Court imagines, "make informed decisions and give proper weight to different speakers and messages."²³⁵

2. Informational Intermediaries

Although *Citizens United* identified voters as the primary audience for disclosure, in practice it has been "informational intermediaries" that first "select, analyze, and disseminate a more manageable version of disclosed information."²³⁶ These informational intermediaries include journalists, who analyze the files in the aftermath of a political corruption scandal or to discern patterns of political influence, and academic researchers, who have used the FEC files to examine the political alignments of wealthy and corporate elites.²³⁷ Nonprofit research organizations and watchdogs like the Center for Responsive Politics (CRP),²³⁸ the Campaign Finance Institute (CFI),²³⁹ and the Sunlight Foundation²⁴⁰ have done the work of providing detailed analyses of trends in campaign financing and distributing more manageable versions of the FEC disclosure files. The CRP has also developed an infrastructure for users to undertake their own analyses of the raw FEC records, including a dedicated website for tutorials on using the FEC files and a community discussion board that acts as a support group for data users.²⁴¹

As a result of these efforts to make the FEC disclosure data more manageable, nonprofits like the CRP have, in fact, become the data outlet of choice for much of the political news media. In a 2002 survey of political journalists, the CRP was rated the top website used by political journalists, with the FEC's own

235. *Citizens United v. FEC*, 558 U.S. 310, 371 (2010).

236. Paula J. Dalley, *The Use and Misuse of Disclosure as a Regulatory System*, 34 FLA. ST. U. L. REV. 1089, 1102 (2007).

237. See generally DAN CLAWSON, ALAN NEUSTADTL & MARK WELLER, *DOLLARS AND VOTES: HOW BUSINESS CAMPAIGN CONTRIBUTIONS SUBVERT DEMOCRACY* (1998); MCCARTY ET AL., *supra* note 202; Val Burris, *The Political Partisanship of American Business: A Study of Corporate Political Action Committees*, 52 AM. SOC. REV. 732 (1987); Val Burris, *The Two Faces of Capital: Corporations and Individual Capitalists as Political Actors*, 66 AM. SOC. REV. 361 (2001); Dan Clawson et al., *The Logic of Business Unity: Corporate Contributions to the 1980 Congressional Elections*, 51 AM. SOC. REV. 797 (1986).

238. See, e.g., *Politicians and Elections*, CENTER FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/elections/> (last visited Feb. 3, 2014).

239. See, e.g., *Federal*, CAMPAIGN FIN. INST., <http://www.cfinst.org/federal.aspx> (last visited Feb. 3, 2014).

240. See, e.g., *Realtime Federal Campaign Finance*, SUNLIGHT FOUND., <http://reporting.sunlightfoundation.com/outside-spenders/2014/super-pacs/> (last visited Feb. 3, 2014).

241. See Google Group for OpenSecrets Open Data, <https://groups.google.com/forum/?fromgroups#!forum/opensecrets-open-data>; *OpenData Documentation*, CENTER FOR RESPONSIVE POLITICS, http://www.opensecrets.org/resources/create/data_doc.php (last visited Feb. 3, 2014).

website falling into a distant third place.²⁴² The dependence of political journalists on the disclosure data of informational intermediaries like the CRP has raised concerns about journalists' awareness and understanding of how these outlets clean and categorize the contributions catalogued in the FEC data. The CRP—in an effort to make the FEC data both accessible and useful—“categor[izes] the money and mak[es] some assumptions about the motives of donors.”²⁴³ Because many journalists do not analyze the FEC data directly, “it’s unclear if many journalists who use these data know much about the coding debate” surrounding, for instance, classifying self-reported donor occupations into standard, consistent entries for individual donors.²⁴⁴

Nonprofit organizations have played a central role in disseminating disclosure data and in making this data accessible to the public. But as we suggested above in our discussion of cognitive heuristics, we propose that the efficacy of disclosure data may, in part, hinge on the credibility of the discloser. Given that many current nonprofits also advocate reform goals, the task of aggregating, cleaning, disseminating, and analyzing disclosure data might best be kept the primary responsibility of the FEC.²⁴⁵

3. Regulators

Finally, the current disclosure regime fails to meet the needs of another crucial audience—regulators. Even the FEC describes the current system as being partially self-governing, and its institutional mission as one of encouraging “voluntary compliance” with existing law.²⁴⁶ But as the high number of violations of individual aggregate limits shown in Figure 3 makes clear, the system has often failed to check abuses of existing law.

In Part IV, we outline several policy recommendations that would considerably enhance the FEC’s ability to effectively further the interests disclosure is designed to serve.

242. See Albert L. May, *The Virtual Trail: Political Journalism on the Internet*, INST. FOR POLITICS DEMOCRACY & THE INTERNET 22 (2002), http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/The_practice_of_journalism/pp_online_journalist.pdf.

243. *Id.* at 26.

244. *Id.* at 27.

245. For an alternative perspective on the government’s appropriate role in disseminating data, see David Robinson et al., *Government Data and the Invisible Hand*, 11 YALE J.L. & TECH. 160 (2009). The authors agree that “[g]overnment must provide data,” but they argue that “Web sites that provide interactive access for the public can best be built by private parties” rather than the government itself. *Id.* at 161. Although we, too, see virtue in open data infrastructures that make data easily “reusable” for informational intermediaries, we disagree with the suggestion that “[a]s long as there is vigorous competition between third party sites . . . most citizens will be able to find a site provider they trust,” such that government entities should be cut out of the process of data analysis and dissemination entirely. *Id.* at 174.

246. FEC, PERFORMANCE AND ACCOUNTABILITY REPORT 1 (2012), available at http://www.fec.gov/pages/budget/fy2012/FEC_PAR_FY_2012-Final.pdf.

IV. IMPROVING DISCLOSURE

As we have seen, the Supreme Court's cases have tended to assume that the extant disclosure regime is capable of creating (or at least assisting in the creation of) an informed and competent electorate able to critically evaluate campaign-related speech in order to choose among candidates and hold elected officials accountable if they are excessively responsive to the desires of large donors at the expense of their constituents. This assumption has significant consequences: the Court often appears emboldened to strike down laws that place various substantive limits on the use of money in elections precisely *because* it believes disclosure is capable of advancing the compelling interests it has credited in the campaign finance sphere.

Like Supreme Court decisions, legislative-reform proposals are often premised upon a relatively well-functioning (if insufficiently far-reaching) disclosure regime, with expansion of the existing regime as the guiding reform principle. Too often, scholarship on disclosure and campaign finance has been predicated on a similarly idealized conception of a regime of disclosure. Few published works have grappled with the on-the-ground reality of disclosure or put theoretical insights into conversation with what social scientists have learned about voters' decision-making processes.

We believe that "policymakers can improve the competence of ordinary voters by structuring the information environment to provide citizens with cues or heuristics that will help them vote competently with limited data. Appropriately tailored disclosure statutes are vital to this endeavor."²⁴⁷ Below we detail a set of policy recommendations for modifying and improving the existing system of disclosure. We assume here that the FEC will continue to be charged with this function, contrary to the calls of some reformers,²⁴⁸ and we do not here address the IRS or its standards for granting tax-exempt status to organizations that may engage in political activity.²⁴⁹

A. DISCLOSURE DATA: COLLECTION, PROCESSING, AND DISSEMINATION

First, the current categories of information sought by the FEC do not adequately capture, or allow the FEC in turn to accurately report, relevant information about donors to campaigns. To slightly update an example offered by Elizabeth Garrett, "it may substantially improve the electoral decisions of ordinary citizens if they know that [George Soros] supports one candidate and [Sheldon Adelson] another, or that the NRA supports one candidate and the

247. Garrett & Smith, *supra* note 172, at 297.

248. For a proposal that calls for dismantling the FEC, see generally PROJECT FEC, *supra* note 206.

249. For useful discussions of related questions in the context of 501(c)(4), see Ellen P. Aprill, *Regulating the Political Speech of Noncharitable Exempt Organizations After Citizens United*, 10 ELECTION L.J. 363, 402–05 (2011); Terence Dougherty, *Section 501(c)(4) Advocacy Organizations: Political Candidate-Related and Other Partisan Activities in Furtherance of the Social Welfare*, 36 SEATTLE U. L. REV. 1337, 1391–1400 (2013); Donald B. Tobin, *Campaign Disclosure and Tax-Exempt Entities: A Quick Repair to the Regulatory Plumbing*, 10 ELECTION L.J. 427, 439–47 (2011).

Sierra Club another.”²⁵⁰ But only a small set of donors will be immediately familiar to many voters, the way George Soros and Sheldon Adelson are. For most other donors, accurate and complete information about occupation, industry, residence, and aggregate contributions is critical, so that, at a minimum, informational intermediaries can review and synthesize large-scale data. But at present, there is insufficient accuracy and completeness for social scientists, engaged citizens, or informational intermediaries to confidently infer broader patterns of political influence.

1. Data Collection

In response, mandating completion of all fields as a precondition of a campaign or third party's ability to accept a contribution is one way to ensure that nonresponses do not dominate the self reports of donors. In light of the enshrinement in the law of the “best efforts” standard,²⁵¹ this change would require congressional action to effectuate.

Increasing accuracy in the reporting of “employment” is another important improvement that could be made to the FEC's data collection. Occupation is an important metric for tracking political influence; in the aggregate, the positions and preferences of various sectors of industry could provide easily interpretable cues to voters about the interests a candidate is likely to serve once in office. One possible fix is to make the FEC reporting forms more like the Census Bureau's 2000 “long” form questionnaire,²⁵² a survey designed to supplement the basic population characteristics compiled by the census. The long form asks respondents three discrete questions with embedded subprompts that probe for both occupation and industry. The first question in the series asks about the respondent's industry or employer, and then follows up with questions about occupation:

Industry or Employer—*Describe clearly this person's chief job activity or business last week. If this person had more than one job, describe the one at which this person worked the most hours. If this person had no job or business last week, give the information for his/her last job or business since 1995.*

a. For whom did this person work? . . . Name of company, business, or other employer

250. 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, 681 (2002) (using Jane Fonda and Ross Perot in the original text).

251. See *supra* note 222.

252. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, UNITED STATES CENSUS 2000 (2000), available at <http://www.census.gov/dmd/www/pdf/d-61b.pdf>.

b. What kind of business or industry was this? *Describe the activity at location where employed. (For example: hospital, newspaper publishing, mail order house, auto repair shop, bank)*

c. Is this mainly—Mark ☒ **ONE** box.

☐ Manufacturing?

☐ Wholesale trade?

☐ Retail trade?

☐ Other (*agriculture, construction, service, government, etc.*)?

Occupation

a. What kind of work was this person doing? *(For example: registered nurse, personnel manager, supervisor of order department, auto mechanic, accountant)*

b. What were this person's most important activities or duties? *(For example: patient care, directing hiring policies, supervising order clerks, repairing automobiles, reconciling financial records)*²⁵³

The nested structure of the questions guides respondents to supply information that will aid in the classification of respondents into universal categories. For ease of interpretation, each question offers examples to respondents and then allows respondents to fill in a free-form response.

The FEC might adopt a similar standardized question format for contributors making in-person or online contributions. In a paper format, contributors might be asked to answer a simple and short series of nested questions to ensure accuracy of responses and to facilitate the classification of donors into universal categories. For contributions made online, contributors could be provided with a series of drop-down menus from which to select a category, followed by short, free-form fields. As survey researchers have long known, the form of the response is often in the form of the question, and coaxing information from respondents requires careful survey design.²⁵⁴

There are several other simple amendments to the FEC's current disclosure regime that could greatly enhance the quality of data it collects from donors. In particular, the FEC could adopt a standardized disclosure form for both political

253. *Id.* at 7.

254. See Dennis Chong & James N. Druckman, *Framing Theory*, 10 ANN. REV. POL. SCI. 103, 104 (2007) (describing framing effects in opinion surveys that "occur when (often small) changes in the presentation of an issue or an event produce (sometimes large) changes of opinion"); Tom W. Smith, *That Which We Call Welfare by Any Other Name Would Smell Sweeter: An Analysis of the Impact of Question Wording on Response Patterns*, 51 PUB. OPINION Q. 75, 76 (1987) ("Since the same word can conjure significantly different meanings to different respondents, it is not surprising that different words designed to tap the same object or feeling state can actually serve as significantly different stimuli and trigger different response patterns.").

committees and third-party spenders²⁵⁵ to provide to donors, both online and on paper. The form could collect the same basic pieces of donor information but more closely resemble a brief survey. For instance, the disclosure form could supply the donor with a short explanation of the form itself (for example: "Full disclosure of donors' information is federally mandated and legally required. The information will be used for statistical analyses."). Then, instead of simply asking donors to supply "last name" and "first name," for instance, the form could ask that donors supply *full legal given name and surname*. The same revision could be made for other required pieces of donor information. In other words, the form of each question should compel donors to disclose complete, valid, and reliable information.

2. Data Sources

Second, as a number of others have argued,²⁵⁶ the range of entities from which the FEC requires data about campaign expenditures and underlying donations must be expanded to clearly encompass outside entities, in addition to campaigns and political committees.

One possible solution, proposed by Richard Briffault, is to expand the definition of political committee "either by broadening the definition of what constitutes an electoral expenditure, or by treating an organization as a political committee for campaign finance reporting purposes if it engages in a threshold level of electoral activity even though most of its expenditures are not for electoral purposes."²⁵⁷ But in light of the Supreme Court's concerns, expressed in *Citizens United*, about the burdens involved in political-committee status,²⁵⁸ a far safer solution—advocated by Briffault as a preferable alternative—would simply be to "require the disclosure of donations to organizations that engage in a threshold level of independent expenditures, whether or not they are political committees."²⁵⁹

The text of BCRA actually already requires such disclosure—any person or entity that spends more than \$10,000 on "electioneering communications" must file a report within twenty-four hours with the FEC.²⁶⁰ The statute mandates

255. As we argue *infra*, either legislative or regulatory action should be taken to clarify that third-party spenders are also subject to disclosure requirements.

256. See Briffault, *Two Challenges*, *supra* note 6, at 1010; Briffault, *Updating Disclosure*, *supra* note 3, at 693; Potter & Morgan, *supra* note 19, at 425.

257. Briffault, *Updating Disclosure*, *supra* note 3, at 693.

258. See *Citizens United v. FEC*, 558 U.S. 310, 337 (2010) ("[T]he option to form PACs does not alleviate the First Amendment problems with §441b. PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations. For example, every PAC must appoint a treasurer, forward donations to the treasurer promptly, keep detailed records of the identities of the persons making donations, preserve receipts for three years, and file an organization statement and report changes to this information within 10 days."); see also Richard Briffault, *Corporations, Corruption, and Complexity: Campaign Finance After Citizens United*, 20 CORNELL J.L. & PUB. POL'Y 643, 663–70 (2011).

259. Briffault, *Updating Disclosure*, *supra* note 3, at 693.

260. 2 U.S.C. § 434(f) (2012); see *supra* section I.C.

that the disclosure form contain the name and address of anyone who “contributed an aggregate amount of \$1,000 or more to the person making the disbursement” within the preceding year.²⁶¹ But, as discussed above, the FEC has decided to require disclosure of the sources of only those contributions “made for the purpose of furthering electioneering communications.”²⁶²

The FEC could simply promulgate a new regulation that would reverse its interpretation of existing statutory law and clearly require disclosure of all contributors to organizations that engage in election-related spending. Alternatively, Congress could reverse by legislation the FEC’s narrow interpretation of existing disclosure requirements. Of course, entities that engage in non-electoral as well as electoral activity would likely resist such broad disclosure. To account for this, Briffault proposes permitting organizations that wish to engage in both sorts of activities to set up nonelectoral accounts, with contributions to such accounts not subject to disclosure.²⁶³

3. Data Processing

Providing every donor with a unique donor-identification number would allow researchers and informational intermediaries to track individual contributors with a degree of confidence and without significant data cleaning.²⁶⁴ Another, more practical possibility would be to require additional identifying information (for example, date of birth and last four digits of one’s social security number) with each contribution that could be combined after a donation to produce a synthetic identifier. For instance, a synthetic identifier could combine the legal surname, date of birth, partial social security number, and gender of the contributor.²⁶⁵ Such an identifier would allow regulators and informational intermediaries to track donors over time without requiring that contributors provide their identification number with each contribution.

The patterns in a unique donor’s contribution history—such as what types of

261. 2 U.S.C. § 434(f) (2012).

262. 11 C.F.R. § 104.20(c)(9) (2012).

263. See Briffault, *Updating Disclosure*, *supra* note 3, at 698.

264. The FEC already, in fact, assigns unique identification numbers to candidates for office and PACs. *Detailed Files About Candidates, Parties and Other Committees*, FED. ELECTION COMMISSION, <http://www.fec.gov/finance/disclosure/ftpdet.shtml> (last visited Feb 3, 2014). Similarly, the SEC assigns corporations and individuals Central Index Keys (CIKs) for inclusion in publicly available disclosure filings. 1 SEC. & EXCH. COMM’N, EDGAR FILER MANUAL § 4.1 (2013), available at <http://www.sec.gov/info/edgar/edgarfm-vol1-v15.pdf>.

265. Studies have shown that a large majority of Americans can be identified by a combination of simple identifiers. For instance, one study using 1990 Census data found that “87% (216 million of 248 million) of the population in the United States had reported characteristics that likely made them unique based only on {5-digit ZIP, gender, [and] date of birth}.” *Simple Demographics Often Identify People Uniquely 2* (Carnegie Mellon Univ., Data Privacy Working Paper No. 3, 2000). An updated study of 2000 Census data estimated that 63% of the population could be identified given ZIP code, gender, and birth date. Philippe Golle, *Revisiting the Uniqueness of Simple Demographics in the US Population*, in *PROC. 5TH ACM WORK. ON PRIV. ELEC. SOC.* 77, 77 (2006). For another treatment, see generally Michael P. McDonald & Justin Levitt, *Seeing Double Voting: An Extension of the Birthday Problem*, 7 *ELECTION L.J.* 111 (2008).

races or candidates a donor supports over time—might allow voters to better assess the meaning of a donor's support for a particular candidate. Ideally, this would apply to campaigns, PACs, and outside entities engaged in political activity. Such a requirement would genuinely enable researchers and informational intermediaries to track the overall activity of individual contributors, and especially the contributors who make the most contributions.²⁶⁶

The introduction of a donor-identification infrastructure may also be crucial to both setting the campaign finance reform agenda and implementing proposed reform legislation. For instance, the absence of a central donor-identification scheme has prevented the calculation and dissemination of basic “social facts” about the contours of political influence in American elections, like the amount or overall percentage of contributions candidates for office receive from donors who have “maxed out” to a particular candidate. And recent reform efforts that seek to magnify the impact of donations from average Americans through voucher programs would, in fact, necessitate an infrastructure for centrally tracking individual donors. The Grassroots Democracy Act of 2013 proposed by Representative John Sarbanes (D-MD), for instance, would provide Americans twenty-five dollars in “grassroots democracy dollars” (via a refundable tax credit) to be distributed to candidates for congressional office. The legislation, however, would disqualify any donor who has already made an aggregate contribution of \$200 or more to “any single Federal congressional candidate” or “any political committee established and maintained by a national political party.”²⁶⁷ Such a voucher scheme would necessitate tracking each donor within an election cycle and linking eligibility criteria to IRS tax records. Without a donor-identification infrastructure administered by the FEC, it is difficult to see how such a proposal could be implemented.

The implementation of a donor-identification scheme could, however, raise a number of privacy concerns, especially for contributors who contribute only small sums. A potential solution to these concerns is to collect donor information but only disseminate a partially de-identified, “semi-disclosure” database to the public, with names of small contributors stripped from the final data release.²⁶⁸ Proposals for semi-disclosure regimes, in fact, presuppose an infrastructure for tracking individual contributors. Under a semi-disclosure regime,

266. And after *McCutcheon*, tracking the largest and most consistent individual contributors will be more important than ever. *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014).

267. Grassroots Democracy Act of 2013, H.R. 268, 113th Cong. § 36C(b)(2)(A) (2013).

268. For an argument in favor of “semi-disclosure,” see Bruce Cain, *Shade from the Glare: The Case for Semi-Disclosure*, CATO UNBOUND (Nov. 2010), <http://www.cato-unbound.org/print-issue/457>. Another proposal, by Bruce Ackerman and Ian Ayres, would go still further, completely anonymizing donations to both the public and to the candidates who receive them. Ackerman and Ayres argue that making the source of donations completely anonymous would “deter political corruption” by “mak[ing] it more difficult for politicians to reward their contributors.” Ian Ayres, *Should Campaign Donors Be Identified?*, 24 REG. 12, 12, 14 (2001). See generally BRUCE ACKERMAN & IAN AYRES, *VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE* (2002). For a trenchant critique of this proposal, see LESSIG, *supra* note 157, at 260–63.

only “large” donors would be subject to full disclosure of the sort the current regime now requires for all donors over \$200.

If the FEC were to implement such a disclosure regime, donors might also be asked to provide additional, more fine-grained sociodemographic information with their contributions. For instance, donors could be required to report basic information—routinely collected by the Census Bureau—such as race, gender, and highest level of education completed. A semi-disclosure regime could simultaneously address privacy concerns and provide voters with a more robust portrait of the composition of a candidate’s financial constituency—that is, it might better serve the informational interest.

4. Data Dissemination

Finally, we propose that the FEC’s disclosure regime might be expanded to disseminate information of the sort Justin Levitt has termed “Democracy Facts” about individual candidates and elected representatives.²⁶⁹ Although Levitt envisions “Democracy Facts” as disclaimers for political advertisements, we suggest that a modified version of “Democracy Facts” could also be used to distill basic information about candidate financing from the FEC’s large-scale disclosure database itself. Voters might be able to look up the name of a particular candidate for office or elected representative to retrieve a candidate fact sheet including the total amount and percentage of receipts the candidate received from donors of various sizes, the total amount and percentage of receipts the candidate received from donors who have contributed in past election cycles, and the corresponding occupational and industry breakdowns of these donor groups. Such “Democracy Facts” might also include baseline comparisons to other candidates running for the same office, as well as the candidate’s vote records, if available. For instance, voters might want to know if their congressional representative receives more or less money from donations in sums over a particular threshold or from a particular industry, compared to other representatives in Congress. And they might also want to compare patterns in funding to patterns in a member’s roll call vote history. The dissemination of “Democracy Facts” by the FEC would thus satisfy the goals of providing voters with readily interpretable and credible information by which to judge candidates and elected representatives.

B. DISCLAIMER REQUIREMENTS

Many of the above suggestions for disclosure reform apply with equal weight to recommendations for disclaimers. Again, disclaimers generally appear alongside an advertisement sponsored by a group or an individual. Since voters are made immediately aware of who is responsible for an ad, disclaimers, in theory at least, allow voters to instantly evaluate the content of a message based on the

269. Justin Levitt, *Confronting the Impact of Citizens United*, 29 YALE L. & POL’Y REV. 217, 228 (2010).

speaker's identity.²⁷⁰ And as social science has shown, the comprehensibility and credibility of such information sets important limits on its efficacy.²⁷¹

But at present, nearly all third-party funders of campaign advertisements conceal their identities—or the interests they represent²⁷²—by adopting noninformative, benign, or patriotic-sounding names for their organizations.²⁷³ To name just a few, American Crossroads,²⁷⁴ Local Voices,²⁷⁵ America's Next Generation,²⁷⁶ and America Shining²⁷⁷ all made independent expenditures in the 2012 cycle to enact highly ideological agendas despite rather innocuous names.²⁷⁸ These entities did comply with BCRA's disclaimer requirements, but to no genuine advantage for voters.

More meaningful disclosure on political ads themselves, in the form of better and fuller disclaimer requirements, is another important step toward achieving the purposes disclosure serves. As the authors of *Full Disclosure* explain, "Policies are most effective when they match information content and formats to users' levels of attention and comprehension."²⁷⁹

Beyond simply disclosing the name and address of the group sponsoring the ad, groups might be required to craft a mission or policy statement, much like organizations submitting amicus curiae briefs in the Supreme Court customarily provide in the description of the "interest of amicus curiae" required by Supreme Court rules. Citizens United, for example, described itself in its filings in the Supreme Court (albeit as a party) this way: "Through a combination of education, advocacy, and grass-roots programs, Citizens United seeks to promote the traditional American values of limited government, free enterprise,

270. See Hasen, *supra* note 3, at 560 ("[C]ampaign finance data, especially when included on the face of campaign advertising, provides an important heuristic cue helping busy voters decide how to vote.").

271. Cf. FUNG, GRAHAM & WEIL, *supra* note 13, at 59.

272. These groups have been referred to as "veiled political actors" or "VPAs." Garrett & Smith, *supra* note 172, at 296.

273. The degree to which such groups seem to choose deliberately noninformative names strongly suggests that such entities believe that the public might derive some benefit—perhaps to the detriment of such campaign spenders—from more informative or descriptively accurate names.

274. See *American Crossroads Outside Spending Summary 2012*, CENTER FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/outsidespending/detail.php?cmte=C00487363&cycle=2012> (last visited Feb. 14, 2014) (American Crossroads spent against Democratic candidates).

275. See *Local Voices Outside Spending Summary 2012*, CENTER FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/outsidespending/detail.php?cmte=C00531624&cycle=2012> (last visited Feb. 14, 2014) (Local Voices spent to support incumbent President Barack Obama).

276. See *America's Next Generation Outside Spending Summary 2012*, CENTER FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/outsidespending/detail.php?cmte=C00491373&cycle=2012> (last visited Feb. 14, 2014) (America's Next Generation opposed incumbent President Barack Obama).

277. See *America Shining Outside Spending Summary 2012*, CENTER FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/outsidespending/detail.php?cmte=C00525618&cycle=2012> (last visited Feb. 14, 2014) (America Shining spent in favor of Democratic candidates and against Republican candidates).

278. See *2012 Outside Spending, by Super PAC*, CENTER FOR RESPONSIVE POLITICS <http://www.opensecrets.org/outsidespending/summ.php?cycle=2012&chrt=V&type=S> (last visited Feb. 14, 2014).

279. FUNG, GRAHAM & WEIL, *supra* note 13, at 178.

strong families, and national sovereignty and security.”²⁸⁰ Such information could help familiarize voters, at least to some degree, with the ideological objectives of funders of campaign ads. These short “mission statements” could appear alongside the groups’ standard disclaimers and help familiarize voters with sponsoring entities. Disclaimers might also include the names of the top five donors and the percentage of the sponsoring organization’s funds from these donors, as Levitt recommends.²⁸¹

Writing in the context of ballot initiatives—but quite applicable in the candidate context—Elizabeth Garrett and Daniel Smith explain the following:

For group-support to serve as a heuristic . . . three conditions must be met. First, voters must correctly associate the group with a particular ideology or policy position that allows them to draw accurate inferences about the consequences of a vote for or against [the candidate in question]. Second, the information conveyed by the group’s support must be credible. Third, voters must be able to learn of the group’s support at a time when it can affect their decisions.²⁸²

Improved disclaimer requirements must take all of these conditions seriously.

C. ENFORCEMENT

The viability and credibility of the disclosure system, and the extensions or revisions to it detailed here, are contingent on effective enforcement of campaign finance disclosure laws. At present, donors self report information of dubious accuracy and authenticity and often fail to report mandatory information at all. As detailed above, political committees and independent spenders might be compelled to provide greater disclosure from their donors if complete donor information were a precondition of accepting a contribution.

But an effective disclosure regime would likely also mean enhancing the FEC’s enforcement authority, including the expansion of all enforcement programs beyond just political candidates, committees, and their contributors. In 2000, the FEC implemented a new enforcement program—designed to supplement the civil-enforcement process outlined in section III.A.—called the Administrative Fine Program.²⁸³ The Administrative Fine Program creates a streamlined

280. Brief for Appellant at 5, *Citizens United v. FEC*, 588 U.S. 310 (2010) (No. 08-205).

281. See Levitt, *supra* note 269, at 227 (proposing the creation of a “Democracy Facts” label “emphasizing simple proxies for the quantity and fervor of local support for a particular communication,” including the number of supporters in a given jurisdiction, as well as the percentage of support given by top donors). For a visual demonstration of Levitt’s proposal, see <http://electionlawblog.org/archives/DemocracyFacts.html>.

282. Garrett & Smith, *supra* note 172, at 297.

283. See *Administrative Fine Program*, FED. ELECTION COMMISSION, <http://www.fec.gov/af/af.shtml> (last visited Jan. 23, 2014); see also Bradley A. Smith & Stephen M. Hoersting, *A Toothless Anaconda: Innovation, Impotence and Overenforcement at the Federal Election Commission*, 1 ELECTION L.J. 145, 147 & n.17 (2002).

process by which the FEC can levy fines on political committees that file late disclosure reports or fail to file disclosure reports at all.²⁸⁴ The FEC could extend such a program to also fine political committees *and* independent spenders that fail to supply complete information for a specified threshold of reported contributions.

Analyses of the LECD also indicate that individual contributors in federal elections have routinely exceeded the aggregate contribution limits set forth in FECA and amended by BCRA. According to FEC materials, the Commission's Reports Analysis Division (RAD) reviews incoming "statements and financial reports filed by political committees participating in Federal elections."²⁸⁵ When "an error, omission, need for additional clarification, or prohibited activity . . . is discovered in the course of reviewing a report, the [RAD] sends the committee a letter which requests that the committee amend its report, take corrective action, or provide further information concerning a particular problem."²⁸⁶ In addition, alleged violations may also be reported *sua sponte* or made by outside complainants.²⁸⁷

Despite these various avenues to enforcement, violations of aggregate contribution limits remained pervasive when such limits were in effect. For instance, the LECD indicates that 537 individual contributors donated in excess of the election-cycle maximum between the 2003–2004 and 2007–2008 cycles. Over the same period, the FEC reports that only 158 potential violations of the aggregate limits were adjudicated through the FEC's formal enforcement process²⁸⁸ and less than twenty additional violations were settled through the FEC's Alternative Dispute Resolution program, which facilitates negotiated settlements without a formal enforcement review.²⁸⁹ Thus, we estimate that only a third of the aggregate-limit violations depicted in Figure 3 resulted in any type of enforcement action, with the vast majority of such violations undetected and unreported.

Restoring the FEC's ability to conduct random audits might significantly

284. As the FEC explained in its final rule creating the program, "[a]llowing the FEC to impose administrative fines for reporting violations without the lengthy procedural steps required in a normal enforcement case will free critical FEC resources for more important disclosure and enforcement efforts." Administrative Fines, 65 Fed. Reg. 31,788 (May 19, 2000) (to be codified at 11 C.F.R. pts. 104, 111).

285. FEC, OFFICE OF COMPLIANCE OVERVIEW—ENFORCEMENT HEARING 1 (2009), available at <http://www.fec.gov/em/enfpro/complistsfy05-08.pdf>.

286. *Id.*

287. See FEC, GUIDEBOOK FOR COMPLAINANTS AND RESPONDENTS ON THE FEC ENFORCEMENT PROCESS 5 (2012), available at http://www.fec.gov/em/respondent_guide.pdf.

288. See FEC, OGC ENFORCEMENT STATISTICS 5 (2008), available at <http://www.fec.gov/em/enfpro/enforcstatsfy03-08.pdf>.

289. This statistic was calculated by searching the FEC's Enforcement Query System for violations of section 441(a) that were settled through Alternative Dispute Resolution. Each of the resulting cases in the search was manually reviewed for the subject of the violation, and only violations involving excessive contributions from individuals were counted toward the total. For access to the Query System, see FEC ENFORCEMENT QUERY SYSTEM, <http://eqs.nictusa.com/eqs/searcheqs>.

improve compliance with all campaign finance regulations, including disclosure requirements.²⁹⁰ As others have noted, “the prospect of candidates and contributors being audited more frequently and unpredictably would presumably encourage a higher level of compliance.”²⁹¹

Perhaps more importantly, adopting a more systematic approach to disclosure itself—by, as we note above, systematizing disclosure forms, instituting a unique donor identification number, or requiring additional pieces of identifying information with a contribution—would greatly enhance the quality of information available to the electorate *and* aid the enforcement process. At present, however, violations are only infrequently, and inconsistently, met with sanctions.²⁹² And as others have noted, “[a]ny disclosure system without real sanctions invites abuse.”²⁹³ More importantly, we suggest that this lack of enforcement may compromise the credibility of the disclosure regime, and, in so doing, diminish the efficacy of disclosure data in informing the electorate.

CONCLUSION

Legislative, popular, and even judicial calls for more disclosure in a post-*Citizens United* world are well-founded but incomplete. Standing alone, more disclosure will not work. Disclosure needs to be very different, and much better, if it is to achieve the goals the Supreme Court has articulated for it—chief among them “enabl[ing] the electorate to make informed decisions and give proper weight to different speakers and messages.”²⁹⁴

Although the reality of our current disclosure regime falls far short of the Supreme Court’s rhetoric, we suggest that the policy recommendations detailed above would considerably enhance the electorate’s access to quality information about the contours of political influence in our democracy.²⁹⁵ There remains

290. As noted above, at present, the FEC only conducts “for cause” audits of political committees if a committee’s disclosure reports fail to meet the “Commission’s thresholds for substantial compliance.” FEC, OFFICE OF COMPLIANCE OVERVIEW—ENFORCEMENT HEARING 7 (2009), available at <http://www.fec.gov/em/enfpro/complistsfy05-08.pdf>. Each election cycle the FEC aims to undertake forty to fifty of these audits; FEC documents show that in 2008, forty-eight “for cause” audits were completed. *Id.*

291. Lochner & Cain, *supra* note 199, at 1929.

292. We should note here that we do not consider the criminal enforcement of the campaign finance laws. Although most violations of the laws governing campaign finance are handled, if at all, by the FEC pursuant to its civil and administrative enforcement authority, BCRA significantly expanded the potential criminal liability for individuals who knowingly and willfully violate the campaign finance laws, including the laws governing disclosure where the violations involve more than \$2,000 in a calendar year. 2 U.S.C. § 437g(a), (d) (2012); See CRAIG C. DONSANTO ET AL., FEDERAL PROSECUTION OF ELECTION OFFENSES 4 (7th ed. 2007). In addition to BCRA’s internal criminal penalty provision, 2 U.S.C. § 437g(d), the intentional filing of false statements with the FEC may violate the general prohibition on making false statements to federal agencies contained in 18 U.S.C. § 1001 (2006). See *id.* at 5. And a 2007 guidance document from the Justice Department sets forth the “Department’s position that all knowing and willful FECA violations that exceed the applicable jurisdictional floor . . . should be considered for federal prosecution.” *Id.* at 199.

293. Wilcox, *supra* note 134, at 382.

294. *Citizens United v. FEC*, 558 U.S. 310, 371 (2010).

295. As Richard Hasen writes:

much work to be done on the electorate's likely relationship with, and interpretation of, disclosure data. And research must focus on ways that disclosed information may effectively become "'embedded' in the everyday decision-making routines of information users."²⁹⁶

Writing broadly about transparency policy, the authors of *Full Disclosure* note, "openness evolves through political struggle in continuous competition with values that favor secrecy, beset by practical difficulties in making information truly accessible, outpaced by disclosers' discoveries of new loopholes, and challenged by changing markets and public priorities."²⁹⁷

In the future, the conversation about disclosure, among reformers and legislators alike, should take seriously the on-the-ground reality of disclosure. Disclosure is a significant regulatory technique in and of itself and may well be a necessary antecedent to other campaign finance policy changes, such as the "democracy dollars" legislation currently under consideration in the House.²⁹⁸ Much work remains to be done if disclosure is to truly achieve the objectives the Court and reformers have envisioned for it.

[E]specially in the Internet era, campaign finance disclosure data can serve an important public function in helping voters make choices consistent with their interests. Voters looking for reliable campaign finance information are faced with information overload; a recent Google search for Mitt Romney returned 189 million results. Campaign finance data are especially reliable evidence as to who backs a candidate. If voters know who puts their money where their mouth is, they will be able to make more intelligent estimates about the policy positions of candidates.

Hasen, *supra* note 3, at 571.

296. David Weil et al., *The Effectiveness of Regulatory Disclosure Policies*, 25 J. POL'Y ANALYSIS & MGMT. 155, 155 (2006).

297. FUNG, GRAHAM & WEIL, *supra* note 13, at 16.

298. Grassroots Democracy Act of 2013, H.R. 268, 113th Cong. (2013).